



## **SHERIFF COURT RULES COUNCIL**

### **CONSULTATION**

**on**

**The Sheriff Court and Alternative Dispute Resolution**

## Consultation Arrangements

The Mediation Committee ("Committee") of the Sheriff Court Rules Council ("Council") has carried out a review as to what the function of the court should be in relation to the use by parties to an action of alternative resolution procedures and made a number of recommendations to the Council. The Committee's Report and the minutes of its various meetings can be viewed and downloaded at:

[http://www.scotcourts.gov.uk/sheriff/rules\\_council/index.asp](http://www.scotcourts.gov.uk/sheriff/rules_council/index.asp)

This paper sets out these recommendations together with a proposed draft rule and form of notice to be given by parties to an action. The Council is asking for your views and comments on the recommendations. The Council has not yet formed any views on the recommendations made to it by the Committee. Views and comments should be made before **27 September 2006**:

by e-mail to: [SCRCCMed@scotland.gsi.gov.uk](mailto:SCRCCMed@scotland.gsi.gov.uk)

in writing to: The Secretariat  
Sheriff Court Rules Council  
Scottish Executive Justice Department  
Civil Court Procedure & Sheriff Court Jurisdiction  
2 West  
St Andrew's House  
Edinburgh  
EH1 3DG

telephone: 0131 244 4844

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Please note comments by e-mail would be preferred as this aids in the analysis process. A full list of questions is contained at Annex A and each question is highlighted in the appropriate section in the text. It would be helpful if, in responding, comments could be cross referred to the question numbers in the paper although you do not need to respond to all the questions.

If you would like your responses to be treated as confidential please indicate this clearly. Responses from those who reply in confidence will only be included in numerical totals and names and text will not appear in the list of respondents.

All respondents should be aware that the Sheriff Court Rules Council is a statutory body and is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Further copies of this paper can be downloaded from:

[http://www.scotcourts.gov.uk/sheriff/rules\\_council/index.asp](http://www.scotcourts.gov.uk/sheriff/rules_council/index.asp)

Requests for the paper in different formats will be considered.

**INDIVIDUALS AND ORGANISATIONS ARE INVITED TO SUBMIT VIEWS AND COMMENTS BY 27 September 2006.**

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# 1 Introduction

1.1 This consultation follows a review by the Mediation Committee ("Committee") of the Sheriff Court Rules Council ("Council") as to what the function of the court should be in relation to the use by parties to an action of alternative dispute resolution procedures (ADR). It seeks views on the recommendations made by the Committee to the Council. The Committee's Report and the minutes of its various meetings can be viewed and downloaded at:

[http://www.scotcourts.gov.uk/sheriff/rules\\_council/index.asp](http://www.scotcourts.gov.uk/sheriff/rules_council/index.asp)

1.2 The phrase "alternative dispute resolution" or "ADR" is employed in this paper to cover both mediation and any other form of dispute resolution.

1.3 The Committee presented its Report to the Council in December 2005. The Council decided to continue its consideration of the recommendations contained in the Report until after consultation with court users had been carried out.

## Origins and Scope of Review

### The Sheriff Court Rules Council

1.4 The Sheriff Court Rules Council ("the Council") was set up by section 33 of the Sheriff Courts (Scotland) Act 1971 to keep under review the procedure and practice in civil proceedings in the sheriff court. It regularly prepares draft rules of procedure and submits them to the Court of Session for approval and enactment as an Act of Sederunt.

1.5 To assist it in the discharge of its functions, the Council may invite representations on any aspect of the procedure or practice in civil proceedings in the sheriff court. Representations may also be made by individual members of the Council or by any member of the public on any matter within the remit of the Council. The Council considers any representations received.

1.6 In June 2003 the Council was asked to consider representations concerning mediation that had been received by the secretariat. Given the far reaching implications of the issues raised it was decided by the Council that a Committee be formed to consider them and report its findings to the Council (then under the chairmanship of Sheriff Principal ID Macphail QC, as he then was).

### The Mediation Committee

#### Remit of the Committee

1.7 The remit given by the Council to the Mediation Committee and agreed by the Committee was:

- 1 To consider what the function of the court should be in relation to the use by the parties to an action of alternative dispute resolution procedures; and in particular to consider:

- (a) whether the court should be required to encourage the parties to use such a procedure in all or any of:
- ~ ordinary cause procedure;
  - ~ summary cause procedure;
  - ~ small claim procedure;
  - ~ summary application procedure;
- (b) if so, at what stage or stages of the cause the court should be required to do so;
- (c) whether the court should also be required to facilitate the use of such procedure:
- (d) if so, by what means the court should facilitate the use of such procedure.
- 2 To obtain such information as to the legal systems of other countries as appears to the Committee likely to assist their consideration of these matters.
- 3 To consider whether, in summary cause and small claim procedure, the sheriff should continue to be required to seek to negotiate and secure settlement of the action between the parties (Summary Cause Rules 2000, Rule 8.3(2) (b); Small Claim Rules 2000, Rule 9.2(2) (b)).
- 4 To report to the Council with recommendations.

#### Membership of the Committee

1.8 The Membership of the Committee is set out below.

#### Sheriff Court Rules Council Members:

Sheriff Principal B A Kerr QC (Chairman)  
Mr Ronnie Conway, Solicitor  
Mr Simon Di Rollo QC  
Mr Joseph d'Inverno, Solicitor-Advocate  
Mr Joseph Murphy, Sheriff Clerk  
Mr Paul Cackette, Scottish Executive Justice Department

#### Members Co-opted by the Council:

Sheriff N M P Morrison QC  
Professor John Sturrock QC  
Ms Lesley Napier, Scottish Executive Justice Department

#### Previous members of the Committee:

Mrs Caroline Flanagan, Solicitor  
Ms Barbara Brown, Scottish Executive Justice Department  
Mr Alan Adams, Consumer and Trading Standards, Glasgow City Council

The Scottish Executive Civil Justice Division provided secretariat services to the Committee.

Since its inception the Committee met on ten occasions to produce its report and, in accordance with its remit, it has considered information on mediation from other jurisdictions, attended conferences and invited speakers to address Committee Members.

## 2 Mediation Committee Recommendations

2.1 In accordance with its remit and following deliberations, the Committee made five recommendations to the Council along with a draft rule and draft form of notice. The fifth recommendation made was

**That a wide consultation process should be conducted among court users as a preliminary to drawing up an Act of Sederunt for the approval of the Lord President of the Court of Session.**

As stated at paragraph 1.3, the Council decided to continue its consideration of the recommendations made until after consultation with court users had been carried out.

2.2 In relation to point 2 of its remit, in order to aid its considerations and discussions, the Committee obtained from a variety of sources a large amount of information on ADR and the use that is made thereof by the legal systems of other countries. The Committee also invited speakers to address it, considered various papers and publications on the subject matter and members attended mediation conferences and seminars.

2.3 The remaining recommendations are set out below and explained. The draft rule and form of notice is set out in sections 3 and 4 below.

### Recommendation One

***That there be incorporated into each set of rules applicable to the conduct of civil business in the sheriff court a new rule concerning mediation in the terms set out in the draft rule below (section 3) or in terms similar thereto, adapted as necessary to the context of the set of rules in which it appears. Rule 33.22 of the Ordinary Cause Rules 1993 (OCR) would thereby be superseded.***

2.4 The Committee after long consideration came to the view that in Scotland some greater recognition is now required in the sheriff court rules of the rôle which mediation and other forms of ADR may play in resolving disputes. The court should encourage rather than compel parties to seek resolution of matters in dispute between them by ADR or by negotiation before committing themselves to litigation or during the course of proceedings. A resolution of their differences by judicial decision of the court usually produces a winner and a loser.

**Note: Even if you answer “no” to question 1a it would be very helpful to have your views on all remaining questions.**

**Q. 1a Do consultees consider that such a rule is necessary or desirable?**

**Q. 1b Please provide comments to explain your reasons.**

2.5 The Committee reached the view that a rule in mandatory terms would be inappropriate or even ineffective since ADR is a voluntary process. However, to leave matters as they currently stand with no rule in place concerning ADR would be unsatisfactory in the twenty-first century and the right note for the sheriff court in Scotland would be struck by giving the court power, on its own initiative if not at the request of a party

to the action, to require parties to consider resolving their differences by some means other than court proceedings. If none of the parties to the action seek leave to refer the matter to ADR the court would consider whether the particular dispute appeared suitable for resolution by some other means and if so it would require the parties to consider it.

**Q. 2a** Should the rule encourage rather than compel parties to seek resolution of matters in dispute by way of ADR before resorting to litigation?

**Q. 2b** Please provide comments to explain your reasons.

**Q. 3a** Should the court have the power to require parties to an action to consider ADR?

**Q. 3b** Please provide comments to explain your reasons.

**Q. 4a** Should the parties to the action be required to give notice with reasons in writing as to whether or not they consent to a referral to mediation?

**Q. 4b** Please provide comments to explain your reasons.

2.6 The Committee were of the opinion that consideration of settlement or referral to dispute resolution should take place within the constraints of the current court timetable i.e. the timetable which applies at the stage in the action when parties are considering the settlement of the dispute or referral to dispute resolution.

**Q. 5** Do consultees have any comments to make in relation to this part of the recommendation?

2.7 The Committee recommended that where the court considers that the dispute in question appears suitable for another means of resolution as opposed to litigation, and parties to such an action cannot agree that the disputed matter(s) or some of them should be referred to ADR, the basis on which one or more parties had elected to withhold agreement might in due course become a ground on which an award of expenses could be made. It therefore included a reference to the court's consideration of "any unreasonable conduct of any party" in dealing with a motion for expenses in the draft rule. The rationale for its suggested inclusion is that its presence would act as a "flag" to remind those considering whether matter(s) in dispute should be referred to mediation or some other form of dispute resolution that such a power exists in the court and might be exercised in appropriate circumstances. The arguments for its exclusion are that a "flagging up" of a power to award expenses carries with it, at least arguably, an undesirable implication that mediation is intended to be a procedural "default option" and that the court already has such an inherent power in any event (for which reason reference to such a power does not generally appear in other rules of court). Questions may also arise as to how "unreasonable conduct" falls to be interpreted.

**Q. 6a** Do consultees consider it appropriate to have an express reference in the rule relative to the awarding of expenses?

**Q. 6b** Please provide comments to explain your reasons.



**Q. 7a** Is it appropriate to include a reference to ADR in each set of court rules namely

- Ordinary Cause Rules 1993
- Summary Applications, Statutory Applications and Appeals etc. Rules 1999
- Summary Cause Rules 2002
- Small Claim Rules 2002?

**Q. 7b** Please indicate with reasons whether the reference should be incorporated into all, some or none of the court rules.

**Q. 7c** If you think that the reference should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.

2.8 During its deliberations the Committee noted that currently the only reference to mediation is contained in rule 33.22 of the Ordinary Cause Rules 1993 (OCR). This rule relates to referral to family mediation in a family action in which a court order in relation to parental responsibilities or parental rights is in issue and would appear to empower the sheriff to refer such an issue to mediation without the agreement of the parties. If the proposed all-encompassing rule in relation to mediation is accepted, this arguably would mean that OCR 33.22 should be superseded as involving an element of compulsion.

**Q. 8a** Do consultees consider that rule 33.22 should be deleted from the OCR in the event of the all-encompassing rule being introduced?

**Q. 8b** Please provide comments to explain your reasons.

#### Recommendation Two

*That a new para (5A) be inserted into OCR 3.1 in the following terms:-*

*“(5A) An article of condescence shall be included in the initial writ averring the steps taken by the parties prior to the raising of the action by other forms of dispute resolution (whether by way of mediation, negotiation or otherwise) with a view to avoiding the need for litigation.”.*

*A similar provision should be inserted into each of the other sets of rules applicable to the conduct of the civil business in the sheriff court, adapted as necessary to the context of the set of rules in which it appears.*

2.9 The Committee accepted that in some cases the parties to an action may already have considered and/or taken steps to resolve the dispute with a view to avoiding the need for an action. The Committee recommended that at the outset of an ordinary action the initial writ should indicate any steps taken in the articles of condescence. Similar terms would be placed in each of the other sets of civil court rules.

**Q. 9a** Do consultees have any comments to make in relation to this recommendation?

**Q. 9b** Please indicate, with reasons, whether this reference provision should be incorporated into:

- (a) All or
- (b) Some or
- (c) None of the court rules.

**Q. 9c** If you think that this provision should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.

#### Recommendation Three

*That, subject to questions of cost and practicability, the use of mediation or another form of dispute resolution should be facilitated in relation to disputes at all levels by the provision of an in-court mediation service in the manner piloted in the sheriff courthouses of Edinburgh, Glasgow and Aberdeen.*

2.10 Points 1(c) and (d) of the Committee's remit asked that it consider to what extent the court should facilitate mediation or other forms of dispute resolution and if so by what means the court should facilitate the use of such procedure. The view formed by the Committee was that where practicable and the costs of providing such procedure could be met, the use of such procedure should be facilitated in relation to disputes at all levels by the provision of an in-court mediation service such as is currently being piloted in Edinburgh, Glasgow and Aberdeen.

**Q. 10** Consultees are invited to provide comments on the terms of recommendation three.

#### Recommendation Four

**That rule 8.3 of the Summary Cause Rules 2002 and rule 9.2 of the Small Claim Rules 2002 should be amended by the incorporation into each of a new paragraph in the following terms:-**

**"8.3(2A)/9.2(2A): In carrying out the duties referred to in paragraph (2) (b), the sheriff may hold discussions in private and not in open court.";**

**and that otherwise the said rules 8.3 and 9.2 should remain for the time being unaltered.**

2.11 It appears from anecdotal evidence that many sheriffs feel uncomfortable about being expected to act as a negotiator and that difficulties can readily arise if a sheriff, having assumed that rôle without success, is then required to hear the case and adjudicate upon it. On the other hand there is anecdotal evidence that many sheriffs have no problem or difficulty with assuming the negotiator's rôle nor with thereafter adjudicating upon the case and in any event there exists in many courthouses the possibility of handing the case on to another sheriff for adjudication should that be required after an attempt to negotiate a settlement has been tried and failed. It was apparent also that one of the chief difficulties in

persuading parties to consider and then move to any settlement is the fact that the negotiation has hitherto had to be conducted in open court often before many onlookers where many litigants are unwilling or unable to contemplate open discussion of the strengths or weaknesses of their position with consequent loss of face. Against this background the Committee took the view that the impetus for the sheriff to seek to achieve a settlement should for the time being be preserved, as originally envisaged, but that there should in addition be provision to permit the sheriff to hold discussions with parties in private in order to meet the chief difficulty so far encountered in practice.

**Q. 11a Please indicate, with reasons, whether a new paragraph, in the terms outlined above, should be incorporated into both:**

- ♦ Rule 8.3 of the Summary Cause Rules 2002 and
- ♦ Rule 9.2 of the Small Claim Rules 2002?

**Q. 11b If you think that the reference should only be incorporated into one set of the court rules please indicate, with reasons, which set(s) of court rules.**

**Q. 11c Do consultees have any views on the recommendation that rules 8.3 and 9.2 should otherwise remain for the time being unaltered?**

[Please see pages 11 and 12 for questions 12 and 13.]

### 3 Draft Rule

#### Proposed Rule

#### CHAPTER 9A

##### ENCOURAGEMENT OF PARTIES BY COURT TO RESOLVE MATTERS IN DISPUTE

**9A.1** The sheriff and parties shall seek to secure the speedy and efficient resolution of all matters in dispute.

**9A.2 - (1)** In any defended action the court may, at any stage of the action where it considers it appropriate to do so or on the motion of any party, make an order requiring the parties within such period as may be specified in the order to consider together settlement of the dispute or referral to mediation or to another form of dispute resolution.

(2) An order made under paragraph (1) shall not affect any requirement for a party to comply with any other provision in these rules or any order of the court.

**9A.3 - (1)** Where an order has been made under rule 9A.2 for consideration of referral to mediation or to another form of dispute resolution, the parties shall after such consideration indicate to the court by lodging a notice in Form 011 whether or not they each consent to such a referral.

(2) Where all parties indicate their consent thereto, the court shall forthwith make an order referring some or all of the matters in dispute to mediation or to such other form of dispute resolution as has been agreed.

**9A.4 - (1)** Where an order is made under rule 9A.3 (2), the court may sist the action for the purpose of such referral for such period as may be specified.

(2) The court may, at any time where it considers it appropriate to do so after hearing parties or on the motion of any party, recall the sist and any referral made by order under rule 9A.3 (2).

**9A.5** In considering any motion for expenses, the sheriff may take account of any unreasonable conduct of any party in relation to the provisions of this rule.

**Q. 12 Do consultees have any comments about the proposed rule as drafted? It should be clear to which part (s) of the rule the comments relate.**

## 4 Form of Notice

### Proposed Form of Notice

FORM 011

Rule 9A.3(1)

Form of notice indicating response to  
order of court made under rule 9A.2(1)

NOTICE for Pursuer [*or* Defender]

in the cause

AB (*insert designation and address*)

Pursuer

against

CD (*insert designation and address*)

Defender

The pursuer [AB] (*or* defender [CD]) having considered the matters ordered by the court to be considered in terms of rule 9A.2(1) of the Ordinary Cause Rules 1993 states to the court that he [*or she*] consents/does not consent\* to the dispute(s) between the parties being referred to mediation or another form of dispute resolution for the reasons given below.

Reasons:-

Date (*insert date*)

(*Signed*)

[AB] Pursuer

*or*

[CD] Defender

*or*

Solicitor for pursuer (*or* defender)

\*(*delete as appropriate*)

**Q. 13 Do consultees have any comments to make on the proposed form of notice? It should be clear to which part (s) of the notice the comments relate.**

## ANNEX A

### Summary of Consultation Questions

Recommendation	Question	Questions	Page number
1	Q. 1a	Do consultees consider that such a rule is necessary or desirable?	6
	Q. 1b	Please provide comments to explain your reasons.	6
	Q. 2a	Should the rule encourage rather than compel parties to seek resolution of matters in dispute by way of ADR before resorting to litigation?	7
	Q. 2b	Please provide comments to explain your reasons.	7
	Q. 3a	Should the court have the power to require parties to an action to consider ADR?	7
	Q. 3b	Please provide comments to explain your reasons.	7
	Q. 4a	Should the parties to the action be required to give notice with reasons in writing as to whether or not they consent to a referral to mediation?	7
	Q. 4b	Please provide comments to explain your reasons.	7
	Q. 5	Do consultees have any comments to make in relation to this part of the recommendation?	7
	Q. 6a	Do consultees consider it appropriate to have an expenses provision in the rule relative to the awarding of expenses?	7
	Q. 6b	Please provide comments to explain your reasons.	7
	Q. 7a	Is it appropriate to include a reference to ADR in each set of court rules namely <ul style="list-style-type: none"><li>♦ Ordinary Cause Rules 1993</li><li>♦ Summary Applications, Statutory Applications and Appeals etc. Rules 1999</li><li>♦ Summary Cause Rules 2002</li><li>♦ Small Claim Rules 2002?</li></ul>	8
	Q. 7b	Please indicate with reasons whether the reference should be incorporated into all, some or none of the court rules.	8

Recommendation	Question	Questions	Page number
	Q. 7c	If you think that the reference should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.	8
2	Q. 8a	Do consultees consider rule 33.22 should be deleted from the OCR in event of the all-encompassing rule being introduced?	8
	Q. 8b	Please provide comments to explain your reasons	8
	Q. 9a	Do consultees have any comments to make in relation to this recommendation?	8
	Q. 9b	Please indicate, with reasons, whether this provision should be incorporated into:  (a) All or (b) Some or (c) None of the court rules.	8
	Q. 9c	If you think that this provision should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.	9
3	Q. 10	Consultees are invited to provide comments on the terms of recommendation three.	9
4	Q. 11a	Please indicate, with reasons, whether a new paragraph, in the terms outlined above, should be incorporated into both:  • Rule 8.3 of the Summary Cause Rules 2002 and • Rule 9.2 of the Small Claim Rules 2002?	10
4	Q. 11b	If you think that the reference should only be incorporated into one set of the court rules please indicate, with reasons, which set(s) of court rules.	10
	Q. 11c	Do consultees have any views on the recommendation that the said rules 8.3 and 9.2 should otherwise remain for the time being unaltered?	10
Proposed Rule	Q. 12	Do consultees have any comments about the proposed rule as drafted? It should be clear to which part (s) of the rule the comments relate.	11
Proposed Form of Notice	Q. 13	Do consultees have any comments to make on the proposed form of notice? It should be clear to which part (s) of the notice the comments relate.	12

## ANNEX B

### List of Consultees

Centre for Scottish Public Policy  
Citizens Advice Scotland  
Consumer Credit Counselling Services  
Money Advice Scotland  
Payplan  
Poverty Alliance  
Scottish Bankruptcy Advice  
Scottish Consumer Council  
Scottish Tenants Organisation  
Shelter Scotland  
Scottish Women's Aid  
Stepping Stones For Families  
Tenant Information Service  
Tenant Participation Advisory service  
Welfare Rights Service  
Which?  
Consumer Credit Association  
Credit Services Association Ltd  
Institute of Credit Management  
Property Managers Association Scotland  
Scottish Consumer Credit Association  
Scottish Trade Union Congress  
Association of British Insurers  
Community Business Scotland  
Confederation of British Industry (Scotland)  
Finance and Leasing Association  
Institute of Directors Scotland  
Scottish Chambers of Commerce  
Scottish Council of Development and industry  
Scottish Federation of Small Businesses  
Association of Chartered Certified Accountants  
Chartered Institute of Bankers in Scotland  
Building Societies Association  
Committee of Scottish Clearing Bankers  
Council of Mortgage Lenders  
Institute of Chartered Accountants of Scotland  
Bank of Scotland  
Clydesdale Bank plc  
Lloyds TSB  
Royal Bank of Scotland  
Society of Law Accountants in Scotland  
Royal Society of Edinburgh  
British Energy  
Scottish and Southern Energy plc  
Scottish Gas  
Scottish Power  
BT Scotland  
Scottish Water  
Scottish Trade Unions Congress  
Scottish Trade Unions Women's Committee  
SACRO  
Scottish Enterprise  
Highland and Islands Enterprise  
All Unitary Councils  
SOLAR  
CoSLA  
All Local Faculties of Solicitors  
Court of the Lord Lyon  
Court of Session Rules Council  
Judicial Studies Committee  
Lord President of the Court of Session  
Faculty of Advocates  
In-Court Advice Service  
Law Society of Scotland  
Legal Services Agency Ltd  
Scottish Association of Law Centres  
Scottish Law Agents Society  
Scottish Law Commission  
Scottish Legal Action Group  
Sheriff Court Users Group  
All Sheriffs in Scotland  
Part time Sheriffs' Association  
Sheriffs Principal  
Sheriffs' Association  
Society of Solicitors Advocates  
SSC Society  
WS Society  
Advisory Council for Messengers-at-Arms  
and Sheriffs Officers  
Society of Messengers-at-Arms and Sheriffs Officers  
Scottish Mediation Network  
Core Mediation  
Family Mediation Scotland  
National Family Mediation  
CALM  
Couple Counselling Scotland  
Centre for Research on Families and Relationships  
UK College of Family Mediators  
Scottish Parenting Forum  
Centre for Effective Dispute Resolution (CEDR)  
Catalyst Mediation Ltd  
Chartered Institute of Arbitrators  
Association of Personal Injury Lawyers  
Forum of Insurance Lawyers  
Forum of Scottish Claim Managers  
Employment Tribunals (Scotland)  
Professor Hazel Genn  
Professor Gwynn Davis  
Professor Carrie Menkel-Meadow  
Professor Elizabeth Thornburg  
Judge Paul Collins  
  
Clerks to the individual Committees of the Scottish  
Parliament  
All Members of the Scottish Parliament  
Scottish Parliament Information Centre  
  
Faculties of Law and Business, Universities  
  
Catholic Bishop's Parliamentary Office  
Scottish Churches Parliamentary Office  
Scottish Interfaith Council  
  
Relevant Scottish Executive and United Kingdom  
Government Departments and Agencies

**FOR REFERENCE PURPOSES**  
Advocates Library  
House of Commons Library  
House of Lords Library  
Mitchell Library  
National Library of Scotland