CONSULTATION PAPER ON THE SHERIFF COURT AND ADR
ANNEX A
Summary of Consultation Questions
Recommendation Question

Recommendation 1

Q.1a	Do consultees consider that such a rule is necessary or desirable?	6
	No	
Q.1b	Please provide comments to explain your reasons.	6
	The court is concerned absolutely with "the rule of law". Mediation (ADR) is solely concerned with "non-law" – ie the absence of the rule of law.	
	Whilst I agree ADR may exist in a democratic society, I don't concur that it should be "encouraged" or that a party should be "compelled" to use ADR. I am of the firm view that this should be a "choice" provided to both parties only. As such, to have a rule of court encouraging or compelling parties to use ADR is "Unjust Law"[1]/[2] because a judge would "compromise" his/her position relating to the rule of law and thus go "outside" of the scope of his/her equitable discretion to do subjectivity.	
	Eg In Edinburgh there is a park and in the month of May a phenomena occurs. The cherry trees blossom. Most blossom pink but one blossoms white. In context this shows the question: were the cherry trees planted "objectively"?, such that it does not matter that they were pink or white, what mattered was that they were cherry trees. This is an example of law "applied" objectively. The second question is : were the cherry trees planted "subjectively"?, such that it mattered what colour the blossoms were. In law this is the judge's discretion to do "equity" and take into consideration race, colour, creed, disability etc which would be reflected by the different colours of cherry tree blossom. Thirdly, the alternative to law is non-law. In the park this would be seen as an "oak tree", a species outside the design of the park.	
	I am firmly of the view that there is a need for "competition" concerning law and non-law (litigation) and (mediation ADR) which revolves around choice of the parties. I am of the view the same number of disputes will still occur, the issue is market share.	
	Eg I see the situation as two little boys who have got biscuits. One (mediation) has an oat biscuit, the other (litigation) has a chocolate biscuit. The little boy with the oat biscuit eats all of his biscuit and then turns to the other and says I want a bit of your chocolate biscuit (and eats all or nearly all of it), thus preventing the process of justice from occurring in society.	
	I have proposed a "Competition Model" to the civil justice unit in Brussels and taken part in a Consultation Paper to take the issue out of the control of Member States and into the control of the European Community where I hope to achieve a higher intelligence than the Scottish Executive. Responses to the Consultation Paper on the Subsidiary Principle are published http://www.europarl.europa.eu/comparl/juri/consultations/default_en.htm	

[1] An Unjust Law is not Law, neither is a Non-legal Concept
[2] Table concerning Woolf Reforms to England & Wales

and analysis and report is still awaited. The Scottish Executive and the Civil Justice Unit refuse to process ADR along the lines of my competition model but along the lines of the Directive on Mediation and English & Welsh model which has a fundamental flaw in the model.

The flaw is that mediation is being promoted as "Access to Justice". In effect the consequences is "Access FROM Justice" and when processed in its true light the court should only process as a rule to deal with ADR at the "end" of the process, not at the beginning of it.

The beginning of the process should be left to promotion and advertising of litigation and mediation to enable choice.

Promotion of ADR should stipulate that a decision may be achieved quicker and in informal surroundings and atmosphere BUT that both parties may be subjected to psychological techniques, that a mediator is a "neutral" person and not a judge, and does not protect the parties who may experience inequality, unfairness, lack of impartiality and may not receive a just decision. They will also be gagged by a confidentiality clause, BUT may get access to a wider scope of remedies than otherwise provided by a court of law. A decision in ADR will not impact on "Justice" which can reiterate or change the rule of law wherein the parties are equal before the law, have fairness, impartiality and just conduct. In ADR both parties are in a win:win situation and therefore the rule of law is compromised. As such a party has no rights. A party may make a bad bargain which will be held to be valid in law.

A rule of court should therefore relate to the legality of the bargain (at its end). It should be asked to ascertain whether the bargain (agreement) is valid in law (ie contract/equity) and whether its terms fall within the boundaries of the Unfair Contract Terms Act 1977, if such an act exists in Scotland. It should also have to fall within the scope of criminal law and should not refer to dispute resolution by "'any' other means" as this gives legality to acts of harm or murder ie, fisticuffs or pistols at dawn scenarios where the intention is to settle a dispute and not to commit harm.

A second rule should be created concerning enforcement of an ADR agreement such that it will be held as valid in law. In the event of breach of the ADR agreement etc, contract/equity law.

I would therefore urge you to wait for the Consultation Paper on the Subsidiary Principle and to not follow the Scottish Executive on mediation which is following the English & Welsh model which has a flaw in it.

Not near enough research has been done, for instance:

- The concept of ADR is Japanese – how does it operate in Japan?
- The concept is occurring via America – how does it operate in American states?
- There is an English & Welsh model with knowledge of a flaw in it. The E&W model occurred utilizing insufficient research material. Has there been follow-up research?
- Why has Denmark abstained from the Directive on Mediation?

ADR is promulgated on the E&W model and has the ability to "knock over judicial systems" and "water down standards and rule of law" in a safe and just society. As such mediation should only be promoted on the basis of freedom of choice to the parties rather than encouraged or compelled via the courts.

It is fundamentally necessary to democracy that "Justice" occurs

because we must have freedom of speech, thought, expression and movement else we do not exist in a democracy. Also in a democracy equality is the highest form of social order. As such Justice is the only methodology which provides for and ensures equality. It is accepted that it is possible for both parties to a mediation to do 50:50 but this will be rare. The issue is traditional:contemporary (ADR) equality.

The good work that judges do to regulate society should not be unregulated by a concept which by its nature and design has the ability to usurp justice and undermine the rule of law.

Whilst mediation can provide a service to society it is "Alternative Dispute Resolution" for a reason. It is individualistic rather than uniform in application. It must be promulgated separately to the courts and the "competition model" promotes a mediation center in every town and city that currently has a court so as to compete with the courts, not for the courts to assimilate mediation into the courts at its commencement only at its conclusion when it becomes a rule of law again which is contract or equity based.

I am academic on the concept of ADR under the topic Jurisprudence and do not wish the Scots to follow the E&W model but to do something else and to promote the competition model in Scotland and Europe. It may be the case that the Competition model will be given credence by Europe and at least waiting for the result of the Consultation paper on the Subsidiarity Principle would be a good idea especially as the Scottish Executive and Civil Justice Unit in Brussels are aware of a fundamental flaw in the Directive on Mediation and E&W model.

The courts overriding obligation to society is to protect society through regulation using the rule of law to do so. Jurisprudence is the science and theory of human law. Judges must judge : Justice must be done and seen to be done. Mediation undermines the rule of law it must be processed outside of judicial establishments and separated from law.

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
	No, as 1b above.	
Q.2b	Please provide comments to explain your reasons.	7
	However, all courts should remove limiation periods from litigation so as to compete with mediation.	
Q.3a	Should the court have the power to require parties to an action to consider ADR?	7
	No.	
Q.3b	Please provide comments to explain your reasons.	7
	Parties should have freedom of choice. Suspension of all limitation periods inclusive of repeal of Limitation Act would mean a party having chosen ADR can still litigate if needs must. Also the Human Rights Act provides for a right to a fair trial, therefore limitation periods should be obsolete under this Act.	
	Litigation may prove necessary if breach of confidentiality agreement (Enforcement issue).	
Q.4a	Should the parties to the action be required to give notice with reasons	7

	in writing as to whether or not they consent to a referral to mediation? No.	
Q.4b	Please provide comments to explain your reasons. People should be free to litigate or mediate whenever they are able to do so.	7
Q.5	Do consultees have any comments to make in relation to this part of the recommendation? Not necessary under Competition Model. Parties to litigation are free to settle their dispute at any time prior to trial. ADR sometimes doesn't result in settlement. Litigation should be safe and just option upon that outcome whether a party is able to do so.	7
Q.6a	Do consultees consider it appropriate to have an expenses provision in the rule relative to the awarding of expenses? No	7
Q.6b	Please provide comments to explain your reasons. There is normally little or no difference between cost of litigating or mediating. It would act as a deterrent for mediationg then litigating as party could use ADR to delay litigation. No power to send party to ADR or some other service should be permitted. A judge must process parties according to "rule of law" not "non-law" as it is outwith scope of judges discretion or power lawfully.	7
Q.7a	Is it appropriate to include a reference to ADR in each set of court rules namely : Ordinary Cause Rules 1993 . SummaryApplications, Statutory Applications and Appeals etc. Rules 1999 . Summary Cause Rules 2002 . Small Claim Rules 2002? Yes.	8
Q.7b	Please indicate with reasons whether the reference should be incorporated into all, some or none of the court rules. Reference should be to : (a) legality of ADR Agreement (b) enforceability of ADR agreement (c) not to commencement of ADR unless litigation is underway (d) suspension of litigation to enable ADR at parties request only in all courts.	8
Q.7c	If you think that the reference should only be incorporated into some of	8

	the court rules please indicate, with reasons, which set(s) of court rules. All court rules, as 7c above	
Recommendation 2		
Q.8a	Do consultees consider rule 33.22 should be deleted from the OCR in event of the all-encompassing rule being introduced? Yes.	8
Q.8b	Please provide comments to explain your reasons ADR should be available as freedom of choice in all areas of law except criminal law – re competition model.	8
Q.9a	Do consultees have any comments to make in relation to this recommendation? Of no merit whatsoever.	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. C.	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. N/a	9
Recommendation 3		
Q.10	Consultees are invited to provide comments on the terms of recommendation three. No. Mediation should be a service which is “opposite” to the court service. The judiciary should be concerned with “rule of law”. Contrariwise, mediation should be “non-law”. Mediation within the judiciary has the effect of perverting the course of justice. It is fundamental that “Justice” occurs in a just and safe society as it is the only process which provides equality. It is also “Christian” in essence. Mediation has the impact of a “silent invasion” as it is not a western concept to a western democracy and is an eastern concept.	9
Recommendation 4		
Q.11a	Please indicate, with reasons, whether a new paragraph, in the terms outlined above, should be incorporated into both:	10

Rule 8.3 of the Summary Cause Rules

2002 and

Rule 9.2 of the Small Claim Rules 2002?

Judges should 'never' be able to act as a mediator. ADR by its very nature is 'private', it should never be within the scope of a 'public' institution designed to process the rule of law , albeit arbitration is excepted because it applies the rule of law. ADR must be processed as a separate institution along the lines of the law society with its own neutral mediators and mediation centers in every town and city – see competition model.

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

No.

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

No – dispensed with absolutely and completely.

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

None of rule 9A be applied to any court of law by reason it is "unjust law", ie outwith the scope of judicial discretion.

Proposed rule:

"Where the parties to litigation have decided to suspend proceedings to go to ADR or some other dispute resolution forum, the case be sisted until settlement and a check for (a) legality and (b) enforcement, or a period of 3 months.

Rule for legality

Rule for enforcement

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

Change Form 011

"The Pursuer and Defender wish to sist the case by reason of ADR or some other dispute resolution until settlement or a date 3 months hence."

Miss Lesley D McDade
17/07/06