

Thank you for the opportunity to comment on the consultation paper on Sheriff Court and ADR. As a law academic I have taught and researched on ADR for a number of years (including with colleagues from Australia, USA and Canada, and I am an accredited mediator as well as a qualified solicitor in Scotland with experience in civil litigation. I am delighted that the Rules Council has considered this matter in such detail and that changes are proposed.

My responses are as follow:-

1a Yes I do think this is necessary and desirable.

1b There is extensive evidence from other jurisdictions (and from the use of a court rule in family mediation) that the existence of a power to raise the issue of mediation with parties encourages them to think about the range of options open to them to resolve the dispute (which often involves underlying matters that are beyond the scope of the litigation).

The empowerment of the parties in this way does not at all encroach upon the responsibilities and duties of the court to deal with the matter by way of adjudication if mediation is unsuccessful or in appropriate.

2a I agree that at present the rule should merely encourage, but in fact I know of successful use of a compulsion rule in other jurisdictions.

2b Compulsion to consider mediation (including being informed of what it does and does not do by someone who is a trained mediator) does not impinge upon the consensual nature of the process because no party can be compelled to engage positively or to reach agreement. However there is good evidence internationally that the provision of information about the process is most effectively given by a person trained in it.

3a Yes

3b Same reasons as in 2b

4a yes, but this could be explored further by the sheriff during procedural hearings.

4b Parties direct or through their agents might be inclined to reject the issue and provide formulaic reasons for doing so, which might require to be interrogated to some extent in an oral hearing.

5 Yes the court timetable should be adhered to, but with the power, as proposed, to sist if mediation is to be arranged and further time is needed for this. However mediations can often be arranged speedily, and particularly if undertaken at a late stage of the case, facts and evidence should be readily to hand.

6a Yes

6b This encourages a consistency of approach and helps agents to set clients' expectations in this regard.

7a Yes in all.

7b It should become recognised as a standard matter to consider in all civil cases regardless of level of sum claimed.

8a No.

8b It is useful to keep this rule which is well known in family actions. It goes further than the proposed rule in allowing mediation referral against the parties wishes, and it is appropriate for that to be the case when the sheriff has to give paramount consideration to the interests of the child. It would also allow for comparative evaluation of the two rules.

9a This is a good idea. However it should not preclude the issue being discussed at a later stage in the case because the dynamics and parameters of the case change during its lifetime, and repeat consideration of whether mediation is appropriate should become the norm.

9b All the rules, although as now, the pleading expectations in small claims by individuals have to be realistic. There should be a tick box for this perhaps, but it could be explored in more detail at the preliminary hearing.

10 An in-court service is desirable, but in reality parties should try to find their own mediator with assistance from the court who keep a panel of accredited mediators. This is particularly so in higher value cases where the parties are best empowered in the process if they have taken steps to choose and cost the services of their own mediator.

11a I agree with the proposed change for privacy purposes. Ideally the same sheriff should not then deal with any adjudication in the case, but this may be difficult in courts with only one sheriff. This should be in both small claims and summary cause rules.

12 I am content with the rule as proposed. Its operation should be evaluated and its terms kept under review.

I am happy to add anything further should the Mediation Committee have further queries.

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