PART-TIME SHERIFFS' ASSOCIATION

**21 Ann Street, Edinburgh, EH4 1PL**
**Phone: 0131 332 5559**
***alastairthornton@btinternet.com***

President - John Newall
Vice President - John McCormick
Secretary/Treasurer - Alastair Thornton

# Response to Sheriff Court Rules Council consultation on the Sheriff Court and Alternative Dispute Resolution

This response has been considered by a committee of office bearers of the Association and has been approved by them for submission to the Rules Council as the Association's response to the consultation paper entitled "The Sheriff Court and Alternative Dispute Resolution". Its terms have not been considered by the wider membership of the Association, and therefore it should not be taken as indicating the views of all members.

## Responses to questions

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

**Response :** Yes. We consider that a rule such as this is both necessary and desirable.

### Q. 1b) Please provide comments to explain your reasons

**Response :** There are many cases before the courts which settle at a late stage of the proceedings – often "at the door of the court" just before the commencement of a proof. We understand the proportion to be statistically very high. This can result in a considerable waste of judicial time and resources allocated to the consideration of such cases. In addition it produces a substantial backlog of cases waiting to be heard. It seems to us likely that the imminence of proof dates may in many cases provide the catalyst which results

in the parties negotiating a settlement. We consider it desirable that parties and their lawyers should, if the court considers it appropriate, be required to address the matter of resolution of the dispute before such a late stage is reached.

Furthermore we are aware that referral to mediation by the courts is used widely and with considerable success in other jurisdictions, and has had a significant effect in reducing or even eliminating waiting lists in certain courts. Mediation in particular has a number of benefits over ordinary negotiation in that (a) it brings about greater involvement or empowerment of the parties themselves in the resolution of their dispute or difference, (b) it enables them to gain the skilled and active assistance of a independent and neutral person (the mediator) who will not make a judgment about them or the issues between them, and thus (c) it leaves them in ultimate control of the decision to settle and the terms of resolution.

However in Scotland, where mediation has not in the past been so widely used, we are aware that there may still be some ignorance or uncertainty on the part of parties or their lawyers about the process of mediation and its potential benefits. This may inhibit a voluntary referral to a mediation service. Accordingly we consider it desirable that sheriffs should gain the power to require parties to consider settlement or referral to mediation, preferably at a substantially earlier stage of the proceedings than the eve of the proof.

In passing we should comment that there are references in the title and body of the consultation paper to “alternative dispute resolution” and to “ADR”. We are unsure as to what these terms are intended to encompass. Mediation is well recognised both in Scotland and in other jurisdictions as a process in its own right which has a track record of success. “ADR” seems to be us to be a much more nebulous and undefined concept, and without greater clarity we would prefer that the rule refer simply to referral to mediation rather than to “another form of dispute resolution”.

**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?**

**Response :** Yes

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

**Response :** Mediation is a voluntary process. Accordingly it seems to us that it would not be consistent with the character of mediation to compel parties to use that process. That does not mean that the courts cannot or should not use

every means to encourage parties to refer their dispute to mediation where the court considers that to be appropriate.

We refer to our comments at 1b) above in relation to the use of the term “ADR” .

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

**Response :** Yes.

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

**Response :** We refer to our response to Q. 1b) above. In order to avoid ignorance or uncertainty about the mediation process and its benefits acting as an inhibition to parties or their lawyers from using a mediator to help them resolve their differences, we consider that a power to require parties to consider this is both necessary and desirable. The proposed rule stops well short of compelling parties to mediate, and as indicated in our response to Q. 2b) above, we do not favour such compulsion.

Again we refer to our comments at 1b) above in relation to the use of the term “ADR” .

**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?**

**Response :** Yes, but in the event of consent to mediation, it should not be necessary for reasons to be given.

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

**Response :** Where parties consent to a referral to mediation, it will be convenient if, as set out in the proposed rule, the court is able simply to make a suitable order referring matters in issue to mediation. This is most easily achieved if the parties notify the court in writing. In our view there is no need for parties to provide any reasons for consenting to a referral to mediation. However where a party does <u>not</u> consent to mediation, it seems to us that that party should be required to provide an explanation to the court, so that the validity and reasonableness of the explanation tendered may be properly tested at any subsequent calling of the case.

**Q. 5 Do consultees have any comments to make in relation to this part of the recommendation ? (i.e. the timing of consideration of settlement or referral to mediation)**

**Response :** The proposed rule provides for an order being made at any stage of the action requiring the parties to consider settlement or referral to mediation. This seems to us to be appropriate. The earlier in the life of the action that settlement or mediation is considered, the greater the benefits are likely to be in saving court time and expense to the parties. The use of such an order at more than one stage of the proceedings should not be ruled out. It may be that at different stages, there are different issues which might benefit from mediation. Alternatively failure to resolve matters by agreement or through mediation at one stage of an action does not preclude a successful resolution by these methods at a subsequent stage.

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

**Response :** On balance, yes

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

**Response :** If such a rule is to be properly effective in encouraging parties to consider resolution of their differences by agreement or mediation, and to do so at earlier stages in the proceedings than evidence suggests may happen at present, it requires a suitable sanction should one or more party unreasonably refuse consent. The possibility of a sanction in expenses is a reasonable one in our view. It would remain a matter within the discretion of the court, a power to be exercised in appropriate circumstances, but as the consultation paper suggests, a specific reference to expenses in the rule would flag up to parties and advisers the need to behave reasonably and responsibly when considering such matters. We recognise that the court already has such an inherent power in any event, but a specific reference may help to focus the minds of those considering the issue of resolution.

**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 & Appeals etc. Rules 1999**
- **Summary Cause Rules 2002**
- **Small Claims Rules 2002?**

**Response :** Yes. Reference is made to our comments in our response to Q. 1a) regarding the use of the term “ADR”.

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

**Response :** It seems to us that there is no good reason why the same approach should not be taken in all civil proceedings in the sheriff court, and so we consider that the reference should be made in each set of 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.**

**Response :** Not applicable

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

**Response :** Yes

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

**Response:** There seems to us to be no justification for taking a different approach in certain family cases (i.e. compelling parties to undertake mediation) as compared with all other cases.

**Q. 9a) Do consultees have any comments to make in relation to this recommendation (i.e. that pursuers should aver in the initial writ the pre-action steps taken to avoid litigation)?**

**Response :** While such a provision might have the effect of encouraging parties and their advisers to focus on resolution by negotiation or mediation at an earlier stage, it may also have the effect of increasing the length of written pleadings. At present we remain unconvinced of the efficacy of such a provision.

**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**

**Response :** None – see our answer to Q. 9a) above.

**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 rules.**

**Response :** None - see our response to Q. 9a) above.

**Q. 10 Consultees are invited to provide comments on the terms of recommendation three (i.e. that the use of mediation should be facilitated by the provision of in-court mediation services in Edinburgh, Glasgow and Aberdeen sheriff courts)?**

**Response :** This may be appropriate for low value disputes such as small claims or summary causes, but is likely to be ruled out entirely on the basis of cost in more significant actions. The skills of an effective mediator are considerable and are the product of a highly significant amount of (a) training, (b) development of expertise, (c) assessment and accreditation, followed by (d) a commitment to continuing professional development. These skills come at a not inconsiderable cost, and well and effectively utilised they are of very great value to parties. The most highly skilled mediators are most unlikely to be available to parties through in-court services operating under the sort of budget constraints applicable to a public service. It seems to us that parties should be able to choose the mediation service provider and the mediator they want. No doubt the cost of referral will be a factor for parties to consider when making that choice, along with a number of other factors including the reputation and expertise of the mediator. We consider that in claims above the small claim or summary cause level, market forces should be allowed to operate so that parties should be able to approach the mediation service provider and mediator of their choice. Indeed we can see no justification for the Rules Council to adopt a more restrictive approach.

**Q. 11a) Please indicate, with reasons, whether a new paragraph, in the terms outlined above (i.e. that in small claims and summary causes the sheriff may hold discussions with the parties in private) should be incorporated into both**

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

**Response :** For the reasons outlined by the Committee, we consider that such a provision should be incorporated into both sets of rules. It appears to us that the ability to discuss settlement with the parties in private would be a helpful one which may assist in encouraging parties to find a resolution to their differences.

**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 of rules.**

**Response :** Not applicable - see our response to Q. 11a) above.

**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?**

**Response :** We consider that this recommendation is well founded. The provisions of both rules have merit. The problem in our experience is that frequently the number of cases calling in a particular summary cause / small claims court is such that it is very difficult for a sheriff to give any individual case the necessary time to explore fully with parties the possibilities for negotiating a settlement.

**Q. 12 Do consultees have any comments about the proposed rule as drafted?**

**Response :** We are in general agreement with the terms of the proposed rule as drafted. Our only concerns relate to the use of the term “another form of dispute resolution”. Reference is made to our response to Q. 1a) above. We consider that this phrase is too vague in its scope and nature, and that it is sufficient simply to refer to mediation which is a well recognised process.

**Q. 13 Do consultees have any comments to make on the proposed form of notice?**

**Response :** As indicated in our response to Q. 4b) above, we consider that it should not be necessary for a party who consents to a referral to mediation to have to give reasons for so consenting. Otherwise the form appears to us to be in order.