

**Scottish Association of Law Centres
response to Sheriff Court Rules Council Consultation on
The Sheriff Court and Alternative Dispute Resolution**

The Scottish Association of Law Centres (SALC) is the national membership organisation for Law Centres in Scotland. Law Centres in Scotland seek to provide legal services in areas of unmet legal need, and often do so where the individual would otherwise be unable to afford access to legal advice or representation.

SALC welcomes the increased use of mediation and ADR as an alternative to litigation. However, it notes that mediation is not appropriate in every case and that this is particularly so where there is an imbalance of power between the parties. It would be a matter of concern if mediation were made compulsory or encouraged to the extent where inappropriate cases were being referred to mediation, leading to a waste of resources or to outcomes which did not serve the interests of justice.

Conversely, SALC is also aware of much civil litigation which is brought by Pursuers unnecessarily and inappropriately and would welcome a reduction in the numbers of such cases being brought, where mediation could be used as an alternative.

As family law is not an area of law not widely practiced by the members of SALC, we have declined to answer Q.8.

1a SALC considers that the rule is desirable as a means to encourage the use of mediation and other forms of ADR.

1b Although mediation is available for parties engaged in litigation at present, the numbers of cases resolved in this way is very low. Allowing the courts to encourage the use of mediation would be a useful way of increasing its use in this context.

2a SALC considers that the rule should encourage rather than compel parties to use ADR.

2b There is little point in forcing people to enter into mediation or indeed any other form of ADR if they do not wish to participate. The prospects of an agreement being reached would be negligible and this would serve only to increase the cost of litigation for parties. It might also force more vulnerable litigants into a situation where they feel pressured into agreeing a settlement which may not be in their best interests.

3a SALC considers it would be beneficial for the court to have powers to require parties to consider ADR.

3b The power to require consideration of ADR would give parties an opportunity to afford the proposal sufficient time in contemplation to take an informed decision, based on the merits of ADR for that particular case. Time for reflection would be of particular benefit where parties might otherwise reject mediation based on an emotional response or a desire not to show any weakness in their position in open court.

4a The parties to an action should not be required to give notice with reasons in writing in response to a proposal for mediation.

4b The requirement to give reasons would place an additional and unwarranted obligation on parties who are, for whatever

reason, not willing to proceed with mediation. If ADR is to be a truly voluntary process, parties should not be placed under pressure (of whatever sort) to proceed when they do not wish to do so.

5 SALC considers that, where possible, any referral to dispute resolution should take place within the constraints of the court timetable. However, it should also be possible for court proceedings to be continued or sisted to enable mediation or other ADR to take place.

6a SALC does not consider it appropriate to have an express reference to the awarding of expenses.

6b In fact, SALC considers that it is inappropriate that the refusal to take part in mediation be considered in the award of expenses under any circumstances. In order that parties are not put under pressure or coerced into taking part in mediation or ADR, parties should be entitled to refuse participation in ADR without prejudice to the position on expenses. Mediation or ADR should not be allowed to become a *de facto* barrier to the courts.

7 The use of mediation should be encouraged, where appropriate, in all forms of litigation. Particular care should be taken to avoid additional financial burdens to small claims litigants, especially party litigants.

9 SALC do not consider it appropriate for Pursuers to be under an obligation to include an article on condescence averring the steps taken to avoid litigation by way of other forms of dispute

resolution. This would tend to promote an assumption of ADR in all cases, which is certainly not warranted. If a Pursuer has a valid claim against a Defender, then a requirement that other unenforceable remedies be explored first could be exploited by potential Defenders to delay litigation. Making mediation or ADR a *de facto* requirement increases the risk of it becoming a barrier to justice. Such a requirement should be inserted into none of the court rules.

10 SALC considers that an in-court mediation service should be made available. Making mediation available in this way would avoid a financial disincentive to individuals.

11 SALC considers that this proposed alteration may be of use in some circumstances.

12 As noted earlier, Rule 9A.5 should instead make it clear that a party's refusal to participate in mediation or ADR would be without prejudice to the position on any award of expenses.

13 As noted earlier, the form should not require the giving of reasons and should simply indicate the consent or lack of consent to the proposal.