Response to sheriff court rules council consultation on the sheriff court and alternative dispute resolution

September 2006

SCC Scottish Consumer Council
Making all consumers matter

About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

· carrying out research into consumer issues and concerns;

· informing key policy and decision-makers about consumer concerns and issues;

· influencing key policy and decision-making processes;

· informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC's Chairman and Council members are appointed by the Secretary of State for Trade and Industry, in consultation with the First Minister. Martyn Evans, the SCC's Director, leads the staff team.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS

Can consumers actually get the goods or services they need or want?

CHOICE

Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION

Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS

If something goes wrong, can it be put right?

SAFETY

Are standards as high as they can reasonably be?

FAIRNESS

Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION

If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

Published by the Scottish Consumer Council
September 2006

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Introduction

The Scottish Consumer Council welcomes the opportunity to respond to the Sheriff Court Rules Council consultation paper on the Sheriff Court and Alternative Dispute Resolution. We were among those who originally made representations to the Council on this matter, as mentioned at paragraph 1.6 of the consultation paper. We wrote to the Council in June 2003 to ask whether it had considered the introduction of new rules giving the court power to refer non-family cases, with the agreement of the parties, to mediation.

We are delighted that the Council has taken up this issue, and is now proposing the introduction of rules along these lines. While we see these proposals as an important step forward, however, we are not convinced that such rules alone will achieve the major shift in culture which is required to ensure that greater use is made of alternative dispute resolution (ADR), and that the courts are viewed as a last resort.

The purpose of the Scottish Consumer Council is to make consumers matter. We do this by putting forward the consumer interest, particularly that of disadvantaged groups in society, and by working with those people who can make a difference to achieve beneficial change. We have a longstanding interest in ensuring that consumers who become involved in disputes have access to appropriate and affordable means of resolving them.

We are particularly interested in the potential benefits to consumers of alternative dispute resolution, especially mediation, which is the most commonly used and most consensual ADR process. We believe that the increased availability of mediation as an option for resolving disputes of all kinds would be an important step towards achieving better access to justice for consumers in Scotland.

The value of mediation

While most people agree that the courts are an important way for people to enforce their rights, on the whole those involved in disputes are more interested in finding a resolution to their problem or obtaining compensation for harm or loss than necessarily enforcing their legal rights.[1] We also know that people would generally prefer to avoid becoming involved in legal and court processes. They are apprehensive about involvement with lawyers and also the potential costs, formality, delay and trauma they associate with legal processes.[2]

[1] *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, Oxford University Press, 2001.

[2] *Paths to Justice Scotland, ibid*; *Civil Disputes in Scotland: a report of consumers' experiences*, Scottish Consumer Council, 1997.

Those who actually end up in a court or tribunal tend to express high levels of dissatisfaction with the process, much more so than those in England and Wales. The *Paths to Justice Scotland* research found that fewer than half of those whose dispute was resolved by a court or tribunal thought the decision was fair, as opposed to 80% of those who reached an agreement. The evidence clearly suggests that, in general, people prefer processes where they have more direct control over the process and the outcome.[3]

It must be acknowledged that mediation will not be appropriate in every case. There will always be some cases where an authoritative court ruling is required, for example. We believe, however, that mediation is potentially suitable in most cases, and offers greater control to the parties than going to court. Mediation is flexible, and focuses on what the parties want to achieve, rather than their strict legal rights. The mediation process can introduce non-legal solutions to meet the needs and interests of the parties. Mediation is therefore capable of achieving a 'win/win' result, with both parties achieving the outcome they want, rather then the 'win/lose' result imposed by a court decision.

The powers of the courts are limited and inflexible, being largely geared towards awarding financial compensation. A court cannot, for example, order one party to apologise to the other. However, an apology could be agreed through mediation. The payment of money is not always the primary remedy sought by those involved in disputes, as demonstrated by Scottish Consumer Council research. When asked what they wanted to get out of their dispute, half of our respondents said they were seeking financial compensation or a refund. However, more than half also said they wanted to prevent it happening to someone else in the future. Moreover, 43% said they wanted an apology, while 41% wanted an explanation. [4]

Mediation also gives the parties a chance to be heard, and to put forward their case, in a less formal and more private environment than a court. Given that both parties have indicated willingness to try to resolve the dispute, there is likely to be more trust between them than there would be in a court. This should in turn make it easier for the parties to communicate with each other.

Mediation is also likely to lead to faster settlement of a dispute than going to court,[5] and where it is successful, should also be cheaper.[6] This latter point is an important consideration here. In addition to the benefits it can bring in terms of increased access to justice, use of mediation rather than the court process is likely to save money, not just for the parties, but also for the courts. There is some evidence from the mediation service at Edinburgh sheriff court that

[3] *Paths to Justice Scotland,* ibid at Chapter 6.
[4] *Civil Disputes in Scotland: A report of consumers' experiences*, Scottish Consumer Council, 1997.
[5] See eg. *The Central London County Court Pilot Mediation Scheme Evaluation Report*; Lord Chancellor's Department Research Series No 5/98; Professor Hazel Genn, 1998.
[6] *Court-based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal*, Professor Hazel Genn, published by the Department for Constitutional Affairs, March 2002.

mediation saves the court time and money: in 2004-5, it was estimated that use of the mediation service saved the court around five small claims full hearings or summary cause proofs per month.[7]

The available research indicates that those who have been through the mediation process are generally very satisfied with the process, even though they may not have achieved a successful outcome.[8] Scottish Consumer Council research has found that over half of those with a dispute said they would have preferred to have had their case handled by mediation, including a third of those who had already gone to a court or tribunal. Even among those who won their case, almost three in ten would have preferred an alternative way of resolving the dispute.[9] More recent research found that, once the process was explained to them, over half of respondents said they would consider using mediation if they had a dispute.[10]

However, while it is clear that most people would prefer to take a more consensual approach to resolving their disputes, the civil justice system in Scotland remains largely adversarial. The recent final report of the Civil Justice Advisory Group chaired by Lord Coulsfield noted clear agreement among stakeholders that the system should encourage the resolution of disputes at the earliest stage possible. The report acknowledged that the courts will always be central to the civil justice system, but concluded that they should be viewed as a last resort, should other less formal means of dispute resolution prove unsuccessful. [11]

The need for cultural change

If there is to be a change in the culture so that the courts are truly viewed as a last resort, there is a need to move away from the prevailing view that mediation is best conducted within the 'shadow of the court'. On this view, mediation works best when court proceedings are already underway. Yet at this stage, costs have already been incurred in raising a court action and preparing for a hearing, in addition to the stress and anxiety that may have been caused to the parties.

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[7] *Edinburgh Sheriff Court: Report on the Mediation Service*, September 2004 - August 2005.

[8] See for example *The Central London County Court Pilot Mediation Scheme Evaluation Report*; Lord Chancellor's Department Research Series No 5/98; Professor Hazel Genn, 1998; *Court-based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal*, Professor Hazel Genn, published by the Department for Constitutional Affairs, March 2002; *Edinburgh Sheriff Court: Report on the Mediation Service*, September 2004 -August 2005.

[9] *Civil Disputes in Scotland: A report of consumers' experiences*', Scottish Consumer Council, 1997.

[10] *Report of Omnibus Survey on Public Awareness and Perceptions of Mediation in Scotland*, Scottish Consumer Council, March 2005.

[11] *The Civil Justice System in Scotland - a case for review?: the final report of the Civil Justice Advisory Group*, published by the Scottish Consumer Council, November 2005.

Where mediation or another form of ADR is employed before the court stage and is successful, this avoids either party incurring court costs and enduring the stress involved in a court case. If ADR does not succeed, the parties still have the option of going to court. One of the major criticisms of recent civil justice reforms south of the border has been that, while successful mediation saves money, unsuccessful ADR can increase the costs for parties. It is important to note that such mediation usually takes place once court proceedings have already begun.

As the final report of the Civil Justice Advisory Group noted:

'Greater use of mediation at an earlier stage would potentially save cost, delay and stress for the parties involved, while freeing up court resources. The stumbling block, however, is persuading the parties, and more crucially their advisers, to go to mediation when there is no outside pressure on them to do so.'[12]

We see the introduction of court rules allowing the sheriff to order the parties to consider using alternative dispute resolution as a key means of delivering such outside pressure, where a case has reached the court stage. We strongly believe, however, that this should take place within the context of wider reform, encompassing some means of formally requiring the parties to attempt to resolve their case before raising court proceedings.

We think that there are important lessons to be learned from experience in England and Wales, where the Woolf review led to the introduction of major reforms within the civil justice system. This raft of reforms was designed to encourage settlement at the earliest stage through pre-action protocols, information and encouragement to use ADR processes and greater case management by the courts for those cases that do reach the court stage.

The evidence available to date suggests that in general the reforms are working well: fewer court actions are being taken and pre-action protocols are promoting early settlement. However, although there was an initial increase in mediations, the number of cases being resolved by mediation has levelled off, and remains fairly modest.[13] This is not in itself a cause for concern, as it may be that the overall impact of the changes, including the possibility of court-ordered mediation, is leading to earlier settlement in more cases prior to the court stage.

Recent amendments to the Civil Procedure Rules 1998, introduced in April 2006, seek to encourage this by clearly stating that both parties may be required by the court to provide evidence that alternative means of resolving their dispute were considered. The rules now make clear that litigation should be viewed as a last

[12] See footnote 11 - at paragraph 5.68.

[13] *Further Findings: A Continuing Evaluation of the Civil Justice Reforms, Lord Chancellor's Department,* August 2002.

resort, and claims should not be issued while the parties are still actively exploring a settlement.

Although the courts have a duty under the Civil Procedure Rules to encourage the parties to use alternative dispute resolution where appropriate, recent research on the impact of the reforms found that most judges had little experience of ADR being used. There was felt to be little enthusiasm for it, and even real resistance to its use. Judges did not think that mediation played a role in the court process, and were reluctant to order its use due to a lack of facilities and resources. The researchers concluded that *'it would not be possible to find support from these findings for court mandated ADR.'* [14]

Disappointingly, this suggests that despite some high profile cases, little use is currently being made of the court rules relating to ADR on a day-to-day basis in the English courts. While the reforms have increased the number of cases which are settled, it seems that once cases are in court, they are not being sent to ADR.

The research suggests that one reason why ADR is not being used is that judges are not using their powers under the rules. Where a dispute reaches the court stage, the judiciary has a crucial role in the promotion of mediation. However, members of the judiciary are lawyers, who have been trained in the adversarial court system. It is therefore likely that their views on mediation will be similar to those of the legal profession.

As we discussed in our 2001 report on how the use of mediation might be encouraged in non-family civil disputes,[15] the evidence available then suggested that, while some members of the profession had embraced the benefits of mediation, many remained sceptical about its usefulness. While we understand that the Scottish Executive is soon to carry out research on attitudes to mediation among the profession, there is currently little evidence that those attitudes have changed significantly during the intervening period.

While the evidence from the Edinburgh sheriff court mediation service is that sheriffs are becoming more comfortable with the idea of mediation, and are increasingly suggesting mediation to parties in small claims and summary cause cases, the proposed new rules may meet with resistance from some members of the judiciary. Certainly, research on family mediation has found considerable variation among sheriffs in referral to mediation. This variation in approach seemed to depend on the particular sheriff's views on the value of mediation. While some saw mediation as playing a valuable role, others were sceptical

[14] *The Management of Civil Cases: the courts and post-Woolf landscape,* DCA research series 9/05, Professor John Peysner and Professor Mary Seneviratne, published by the Department of Constitutional Affairs, November 2005.

[15] *Consensus Without Court: encouraging mediation in non-family civil disputes in Scotland*, Scottish Consumer Council, August 2001.

about its value.[16]

We agree with the conclusions of the Civil Justice Advisory Group that there is scope for greater case management by judges and sheriffs in Scotland, as one means of addressing problems of cost and delay in the civil justice system. We therefore welcome the proposed introduction of court rules allowing the court to order parties to consider mediation. If these rules are to be truly effective, however, we consider that they need to be introduced as part of a wider strategy aimed at changing the prevailing culture within the civil justice system.

Firstly, there is a need to introduce increased case management, encouraging all of those involved within the civil justice system to try to settle cases as early as possible. Secondly, an awareness raising and training strategy is required, in order to change attitudes among the judiciary, the legal profession and also members of the public. We believe that the current general lack of enthusiasm among some members of these groups is partly due to a lack of knowledge and experience of mediation and its potential benefits.[17]

Availability of mediation services

If the proposed court rules are to be introduced, it is vital that sufficient quality assured mediation services are made available to meet the increased demand that will be created. As mentioned earlier, a lack of mediation facilities has been cited by English judges as one reason why they are not making use of their powers to refer cases to mediation. [18] If sheriffs do not have sufficient confidence that the necessary services are available, and that those services are of a good quality, they may decline to use their new powers.

This raises the central question as to how such mediation services might be provided and funded. We have previously argued that greater public funding must be made available for mediation if it is to take off to any real extent outside the commercial, family and community fields.[19] While it may be economically viable for parties in ordinary cause cases to pay commercial mediation rates, we consider that public funding would have to be made available for mediation in small claims and summary cause cases, and possibly also ordinary cause cases where one or both parties may be unable to afford to pay. We consider that one important way of providing mediation services would be to build on the existing court-annexed schemes, and this is discussed in more detail in our answer to Question 10 below.

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[16] *The Role of Mediation in Family Disputes in Scotland*, Jane Lewis, Legal Studies Research Findings No. 23, Scottish Office Central Research Unit, 1999.
[17] See footnote 15.
[18] See footnote 14.
[19] See footnote 15.

There are also issues to be addressed in relation to the quality assurance of mediation services. Those who use such services are entitled to expect that the people providing those services are competent, have adequate training and expertise, and that the services will be of a good standard. Those who make referrals to such services will also wish to have such assurances. At present, there is no universally accepted set of quality standards for mediation, but we are aware that the Scottish Mediation Network is currently working towards establishing a quality assurance framework for mediation providers in Scotland.

Evaluation and review of the operation of the rules

If the proposed rules are introduced, it will be important to monitor and evaluate how they operate in practice, in order to assess whether they are achieving their intended purpose, and/or whether the require amendment or review. We would urge the Council to make a commitment to carry out an evaluation of how the rules have operated, once they have been in operation for a period of time, and to review and adjust them as necessary.

Answers to the consultation questions

Recommendation One

Q1a Do consultees consider that such a rule is necessary or desirable?

Q1b Please provide comments to explain your reasons.

Yes. As stated above, we consider that the civil justice system should be designed in such a way as to encourage the resolution of disputes before a court action is raised, so far as possible. However, we agree that where cases do reach the court stage, the system should encourage the parties to consider alternative means of resolving their disputes.

It must be considered, however, how this change might be encouraged most effectively. While there is some evidence of increased interest in mediation among some members of the legal profession, it is still little used in civil disputes outside of the family, commercial and community fields. The experience of the Edinburgh sheriff court mediation service suggests that, now that the service is well established, many sheriffs are suggesting mediation to parties, without the need for court rules. However, we believe that the introduction of such rules would be an important step in changing the prevailing culture throughout Scotland, helping to establish alternative dispute resolution as an integral part of the civil justice system.

Q2a Should the rule encourage rather than compel parties to seek resolution of matters in dispute by way of ADR before resorting to litigation?

Q2b Please provide comments to explain your reasons.

It is generally argued by mediators that the parties to a dispute should never be compelled to participate in mediation, and that it must be a voluntary process. On this view, forcing parties to mediate would be contrary to the philosophy of mediation, which is a consensual process. Moreover, if parties have no choice, the dispute is less likely to settle. If one or both parties do not wish to go to mediation, the dispute will continue to be adversarial.

A mandatory mediation programme has been running in Ontario, Canada since 1999. Under this model, most defended non-family civil cases are referred to mediation; cases may be exempted only by means of a court order. Any party failing to comply with the requirement to mediate may be subject to court-imposed sanctions. An evaluation of the scheme found that mediated cases were resolved more quickly and cheaply than those which went through the court process, and that a substantial majority of lawyers and litigants were satisfied

with the process, and would use it again if they had a choice in the matter. Overall, around 40% of cases were settled at mediation, although this proportion varied considerably depending on the type of case, and was over 50% in some categories.[20]

Following a number of cases relating to mediation and the Civil Procedure Rules, the English courts ruled in 2004 that, while the courts have jurisdiction to impose sanctions on successful parties who unreasonably refuse to mediate, they have no power to order parties to mediate.[21] This was reflected in recent amendments to the Civil Procedure Rules, which now say that *'it is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR*.' [22] The English courts have indicated that it is likely that compulsory mediation would be seen to be in breach of Article 6 of the European Convention on Human Rights.[23] While we are aware that some commentators do not accept this argument, we do not consider, on balance, that compelling parties to mediate would be an acceptable approach at this stage.

An alternative approach might be to introduce compulsory referral to mediation. A recent pilot scheme at Central London County Court, under which the parties in 100 randomly selected cases per month were automatically required to attend mediation with a chance to opt out, proved unsuccessful. Throughout the pilot, the parties chose to opt out in 80% of cases. It is worth noting, however, that in most cases it appears that the parties were advised by their lawyers not to go to mediation.[24] This again illustrates the central role of legal advisers in changing the culture, and the need to increase their awareness of the potential benefits of mediation.

Having considered the various options at some length, we would agree that, on balance, giving the court the power to compel parties to *consider* mediation, rather than forcing them to attend and/or participate in mediation, is the best route at this stage. We believe that it is important that the sheriff should have discretion in exercising this power, but that the introduction of the rules should be accompanied by awareness raising and training for sheriffs about mediation and its potential benefits. Experience in Edinburgh has shown that once sheriffs start to see the benefits of mediation, they will suggest to parties that they consider it.

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[20] *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report- the first 23 months*, published by the Ontario Ministry of the Attorney General, 2001.

[21] *Halsey v Milton Keynes General NHS Trust* (2004) EWCA Civ 576.

[22] Practice Direction- Protocols, paragraph 4.7, as amended in April 2006.

[23] See *obiter* judgement in the *Halsey case*, above, where the court expressed the view that it was likely that compulsion to mediate would constitute a violation of Article 6.

[24] See *Solving Civil Justice Problems: what might be best*?; Paper by Professor Hazel Genn, University College, London for Seminar 4 in the series. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council.

The parties are not compelled to mediate, and the success rate for those cases which do go to mediation is very high.[25]

As previously stated, we think that the new rules would be most effective within the context of wider case management reforms designed to encourage earlier resolution of disputes, and awareness raising for all of those involved within the civil justice system. In particular, we hope that such measures would result in parties or their solicitors lodging motions requesting that the sheriff makes an order under the rules. If, however, an evaluation of the operation of the rules were to show that in practice they were not achieving their aim, we would suggest that the discretionary approach adopted might require to be re-considered at a future date.

Q3a Should the court have the power to require parties to an action to consider ADR?

Q3b Please provide comments to explain your reasons.

Yes, for the reasons outlined above. It is important that the sheriff has discretion here, rather than being required to refer cases to mediation. However, where the court decides that a dispute would be suitable for mediation, either of its own volition or on the motion of either party, there should be some form of impetus on the parties to consider ADR seriously, so that they cannot dismiss any suggestion about its use out of hand. If this is not the case, the requirement to consider ADR may be viewed by some parties and/or their solicitors as simply a 'tick box' exercise, without giving it serious consideration.

Q4a 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?

Q4b Please provide comments to explain your reasons.

It is important that parties are required to provide good reasons as to why they do not consent to mediation. In this connection, we note that, while draft form 011 requires the parties to list their reasons, the draft rule itself does not explicitly refer to any requirement on the parties to provide reasons. We would suggest that it would be helpful for both the court and the parties if the rule specified examples, perhaps even a substantive list, of the reasons which may be acceptable, and if the parties were required to substantiate these.

In cases where parties are represented by solicitors, we consider that requiring them to lodge a formal notice would be a reasonable approach. Further consideration should be given, however, as to how this might be applied in cases

[25] *Edinburgh Sheriff Court: Report on the Mediation Service*, September 2004-August 2005.

involving unrepresented parties, particularly small claims cases. At the very least, there would be a need for guidance and pre-printed forms to be provided to those parties, possibly in conjunction with assistance from the sheriff clerk, and ideally advice from an in-court adviser, where one is available.

Q5 Do consultees have any comments to make in relation to this part of the recommendation?

We agree that consideration of settlement or referral to dispute resolution should take place within the relevant stage of the current court timetable. While settlement by negotiation or mediation should be faster than the court process, provision should be made for cases to be continued or sisted where necessary to allow for negotiation or mediation. This is currently the practice at Edinburgh sheriff court in relation to small claims and summary cause cases, and we note that the draft rule provides for cases to be sisted following a relevant order by the court.

Q6a Do consultees consider it appropriate to have an express reference in the rule relative to the awarding of expenses?

Q6b Please provide comments to explain your reasons.

Yes. While we are of the view that mediation should not be made compulsory, we think that parties should be encouraged to give very serious consideration to using ADR. We therefore support the reference made to the awarding of expenses in the draft rule, specifically linked as it is to unreasonable conduct by any party. While parties should not be compelled to go to mediation, it is important that the court has discretion to award expenses where one party unreasonably refuses to consider negotiation or mediation. This may be the case particularly in instances where there is an imbalance of power between the parties, such as a consumer case where the business involved unreasonably refuses to make attempts to settle the case.

Guidance for both the court and the parties as to what might constitute 'unreasonable conduct' would be helpful. While those parties who are legally represented will have the benefit of legal advice on their position, it is important that protections are built in for unrepresented parties. Such parties will not have the benefit of legal advice on the court rules, unless they are lucky enough to be appearing in a court which has an in-court adviser.

While we support the reference to expenses for the reasons above, it must be acknowledged that there is some limited evidence from England that pressure from the courts to mediate and the fear of court sanctions have in some cases led parties to go to mediation without being fully committed to it, leading to a reduction in the settlement rate for mediation.[26]

[26] See footnote 24.

Q7a 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?**

Q7b Please indicate, with reasons, whether the reference should be incorporated into all, some or none of the court rules.

Q7c If you think that reference should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.

In principle, we agree that reference should be made to ADR in relation to all categories of case. The system should encourage the early resolution of all suitable disputes, regardless of the amount of money involved. The final report of the Civil Justice Advisory Group expressed particular concern about the disproportionate costs involved in resolving disputes of lower financial value, and we share these concerns.

While we are well aware of the success of the Edinburgh sheriff court mediation service in dealing with small claims and summary cause cases, we agree with the conclusion of the Civil Justice Advisory Group that there is a need to review the way in which cases of lower financial value are dealt with. We are concerned that there are many problems with the way in which the current small claims procedure is operating, and we do not believe that rules changes alone will address these. We therefore believe that better ways of securing access to justice for those with lower value claims need to be found as a matter of urgency. In our view, any effective and appropriate form of dispute resolution for lower value claims should in itself be a form of ADR, rather than an adversarial process.

In relation to the present system, we are not convinced that there is any longer a case for retaining three separate procedures in the sheriff court. Summary cause procedure remains for historical reasons, having been left in place when the small claims procedure was introduced. We think that if the small claims limit were to be substantially increased – and we have argued that it should go up to £5000[27] - there would be a strong argument for abolishing summary cause procedure altogether.

[27] *Policy paper on increasing the financial limit in small claims procedure,* Scottish Consumer Council, November 2003

While the current structure remains in place, however, it is important that any rules are clear and unambiguous, and that they are accompanied by clear guidance for the benefit of unrepresented litigants. There is also a need to ensure that unrepresented court users within all of the existing procedures have access to advice, from an in-court adviser where one is available, about their legal position and the available dispute resolution options, allowing them to make an informed choice.

Q8a Do consultees consider that rule 33.22 should be deleted from the OCR in the event of the all-encompassing rule being introduced?

Q8b Please provide comments to explain your reasons.

Yes. We agree that there would be no place for rule 33.22 within the proposed new system. We can see no reason why the rule should be retained, differentiating family cases from other types of civil case. This rule does not fit with the proposals, as it provides for compulsory referral by the sheriff to mediation. If there is to be no compulsion to mediate in other categories of case, there should be none in relation to family cases.

Recommendation Two

Q9a Do consultees have any comments to make in relation to this recommendation?

Q9b Please indicate, with reasons, whether this reference provision should be incorporated into:

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

Q9c 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.

We agree that such a provision should be incorporated into the ordinary cause rules, as this will encourage parties and their solicitors to consider negotiation or settlement before they raise a court action, reinforcing the need to view court action as a last resort. It is likely, however, that there will be some ordinary cause pursuers who do not have legal representation, and this should be borne in mind when drafting the rules and any accompanying guidance.

We are not convinced that this provision would be appropriate in small claims or summary cause cases, where party litigants are likely to be involved. We think that it would be too onerous to expect unrepresented litigants to make such

averments. One potential way of dealing with this issue would be to add a new section to the small claims and summary cause summons relating to attempts at settlement, to be filled in by the pursuer. This would need to be accompanied by clear guidance for unrepresented litigants, and ideally by advice from an in-court or other suitable adviser.

Recommendation Three

Q10 Consultees are invited to provide comments on the terms of recommendation three.

As discussed in the introduction to this response, we are of the view that if the proposed court rules are to be successful in practice, there must be sufficient quality assured mediation services in place to meet the demand which will be created. We agree that one possible means of facilitating the use of mediation would be to provide court annexed mediation schemes.

It could be argued that moving a process which was intended to be less formal and legalistic into the court system may result in that process resembling the adversarial court process it was intended to supplement or replace.[28] However, we consider on balance that it may be more efficient and convenient to house such schemes within court buildings, where sufficient space is available. Experience also suggests that, in cases involving unrepresented parties, it is important to have close links between in-court advice services, where they exist, and mediation services.

Many court-annexed mediation schemes exist in the USA, where all federal courts are required to offer some form of ADR, and a number of such schemes have been established in England and Wales. Such a service has, of course, been in existence in Edinburgh sheriff court for some years, and the Scottish Executive has recently set up further pilot schemes based on different models in Glasgow and Aberdeen sheriff courts.

The Edinburgh service has been very successful, particularly since it became based within the sheriff court building. In 2004-2005, 80% of cases that proceeded to mediation were resolved. The overwhelming majority of those who used the service during that period said they would advise a relative or friend to use mediation, and that they would go to mediation again if necessary.[29] In

[28] See *Institutions of Civil Justice: a paper prepared for the Scottish Consumer Council Seminar on Civil Justice, December 15 2004*: Professor Carrie Menkel-Meadow, Georgetown University, Washington DC. Available on the Scottish Consumer Council website at www.scotconsumer.org.uk/civil. Hard copies may also be obtained on request from the Scottish Consumer Council.

[29] *Edinburgh Sheriff Court: Report on the Mediation Service*, September 2004 - August 2005. 90% of pursuers and 100% of defenders said they would advise a relative or friend to use mediation; 87% of pursuers and 100% of defenders said they would go to mediation again.

addition to increasing access to justice for the parties, there is some evidence from the Edinburgh service that mediation saves the court time and money, as discussed in the introduction to this response.

The consultation paper suggests that in-court mediation services should be made available for all levels of sheriff court procedure. This raises issues about the capacity of such services. The service at Edinburgh sheriff court has always dealt almost exclusively with small claims and summary cause cases, although the new pilots at Aberdeen and Glasgow will also deal with ordinary cause cases.

If court rules were to be introduced, the question of funding for such schemes would be a central one, particularly in relation to cases of lower financial value. To date, the Edinburgh service has been provided by volunteer mediators, supported by a part-time mediation co-ordinator. It cannot be expected, however, that either existing or future services can rely so heavily on the goodwill of volunteers in the longer term. Mediators are highly trained professional people, and while to date many have been happy to provide their services free of charge in exchange for the experience they gain, this situation cannot continue forever. Research also suggests that the provision of sufficient administrative support, such as a mediation co-ordinator, is central to the success of such schemes.[30]

There are various possible means of funding such schemes. Some court-annexed mediation schemes in England charge the parties relatively modest fixed fees based on the value of the dispute, while the newly launched Glasgow and Aberdeen pilot schemes will also charge the parties in ordinary cause cases. While charging may be economically viable for the parties in ordinary cause cases, we consider that public funding would have to be made available for mediation in small claims and summary cause cases, and possibly also ordinary cause cases where one or both parties may be unable to afford to pay.

One possibility might be for the state to employ full-time mediators, which may be more cost-effective than purchasing the services of private mediators. This would follow the approach taken by a number of local authorities, which employ mediators to deal with neighbourhood disputes within their area. While it is important that there is no suggestion of compulsion, one possibility might be that the Scottish Legal Aid Board, for example, could pay for the provision of public mediators. While funding for mediation is presently available through legal aid for those who are eligible, take up has to date been very low, particularly in non-family cases. An alternative option might be to retain experienced mediators to carry out a certain number of mediations per year for a fixed fee agreed in advance.

It is important to note, however, that despite high satisfaction rates among those who do make use of such voluntary court-annexed schemes, the experience in

[30] *Court-based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal*, Professor Hazel Genn, published by the Department for Constitutional Affairs, March 2002.

England and Wales has been that there is a very low take-up rate, even where the mediation is provided free or at very low cost.[31] Again, this is an issue that might be tackled as part of an awareness-raising campaign, ultimately requiring cultural change. The evidence from the Edinburgh scheme is that experience of mediation can change attitudes among legal advisers and the judiciary, and we believe that this could be replicated on a wider scale.

Recommendation Four

Q11a 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**
- **Rule 9.2 of the Small Claims Rules 2002?**

Q11b 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.

Q11c Do consultees have any views on the recommendation that rules 8.3 and 9.2 should otherwise remain for the time being unaltered?

We are aware that some sheriffs find it difficult to take on the role of negotiator, and we can understand that in some cases it may be easier to hear matters in private. We also know that many sheriffs do their best to ensure that any imbalance of power between the parties is redressed, insofar as s/he can do so within the limits of his/her role. We therefore have no difficulty with such an amendment being made to the small claims and summary cause rules.

3 Draft Rule

Q12 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.

As stated in our answer to Questions 4a and 4b above, we note that, while draft form 011 requires the parties to list their reasons, the draft rule itself does not explicitly refer to any requirement on the parties to provide reasons. We would suggest that it would be helpful for both the court and the parties if the rule

[31] *The Central London County Court Pilot Mediation Scheme Evaluation Report*; Lord Chancellor's Department Research Series No 5/98; Professor Hazel Genn, 1998; *Court-based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal*, Professor Hazel Genn, published by the Department for Constitutional Affairs, March 2002.

specified examples, or possibly a substantive list, of the reasons which may be acceptable, and if the parties were required to substantiate these.

4 Form of Notice

Q13 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.

We have no specific comments to make on the proposed form of notice.