THE SHERIFFS' ASSOCIATION

Consultation on "The Sheriff Court and Alternative Dispute Resolution."

The Council of the Sheriffs' Association welcomes the invitation from the Sheriff Court Rules Council to offer comments on the recommendations of the Mediation Committee and wishes to take up the opportunity to respond on behalf of the Association.

Council's response is as follows:

1. *Do consultees consider that such a rule (to encourage mediation and ADR) is necessary or desirable ?*

   No. It is considered that the selection of the forum for resolution of a given dispute is a matter for the litigants and their legal representatives. It is not considered appropriate, where parties have selected the Sheriff Court and paid court dues, that the sheriff should be required to encourage the parties to take their litigation elsewhere. Solicitors have always been involved in the process, in general terms, of resolving disputes. Especially in these days of increased specialisation, solicitors know or ought to know, better than sheriffs what alternative means of dispute resolution may exist and whether experience suggests that the process of that alternative form of resolution is more attractive or pertinent, as the case may be, to the particular dispute. It is felt strongly that if parties wish to have their dispute resolved by a sheriff, then they should be entitled to have their dispute resolved by a sheriff. This is not to say that we consider that sheriffs should be prevented from encouraging a settlement in the informal way that most sheriffs currently do, particularly in family law cases, but we are anxious about sheriffs being seen to be required to encourage the use of a forum other than the one chosen by the parties.

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

   As is evident from our response to question 1, we do not like the notion of being required to encourage litigants to consider ADR. The strong opinion of the members consulted was against any form of compulsion of parties forcing them to an alternative forum. While we have not considered the matter in any depth, there is a concern that a power to compel parties to an alternative forum may not be ECHR compliant and it will be appreciated that, as a public body, the Court cannot act in a manner which is incompatible with the Convention. The particular concern is, inevitably, the provisions of Art.6. Two complications appear to arise. The first is whether the particular alternative forum would be able to be regarded as an independent and impartial tribunal established by law prepared to pronounce judgment publicly in the absence of one of the recognised exceptions to public judgment. The second is that, by referring the

matter to an alternative forum, the court would potentially lose control of the timetable and therefore its responsibility to ensure a hearing within a reasonable time.

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

   For the reasons set out in the answers to Question 1 and 2, we do not consider that such a power is necessary or desirable.

4. *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 ?*

   No.

5. *Do consultees have any comments to make in relation to this part of the recommendation ?*

   We are unaware of any demand for the facility. On the contrary, the demand we see is for the speedier resolution by the sheriff of disputes brought to the Sheriff Court. It is a rare event for parties or one of them to ask for a case to be sisted for arbitration. Occasionally, a joint motion is made to sist a family case to allow mediation to take place and that would always be granted. So we do not see what useful function not presently carried out in the Sheriff Court the proposed rule would permit or encourage.

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

   No. We think it would be wrong to have any general rule about expenses because a party is disinclined to be re-directed to some other form of dispute resolution. Rather, we are comfortable with having a wide discretion in relation to expenses where, if it could be argued that expense could have been reduced by resort to another form of resolution, for example, a litigant's failure to do that might be reflected in some modification of the award of expenses which would otherwise be made.

7. *Is it appropriate to include a reference to ADR in each set of court rules ?*

   No. However, if despite our opposition such a rule is to be promulgated, logic suggests that it should apply across the board to all forms of litigation.

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

   We do not consider the all-encompassing rule should be introduced but were it to be it would patently render rule 33.22 redundant.

9. *Do consultees have any comments to make in relation to recommendation two (a requirement to include an article of condescendence averring the steps taken by*

parties prior to the raising of the action to resolve the dispute by other means) ?

Leaving aside the technical issue of why an article of condescendence, as opposed to averments, would be required, we consider that such a requirement would be wholly inappropriate. The inevitable inference to be drawn from such a requirement is that litigants should be required to try to resolve their dispute by some means other than litigation prior to litigation. We are at a loss to understand why people should not be entitled to engage in litigation if they want forthwith. Protective remedies, such as interim interdict, pending final determination of the dispute, are unlikely to be available elsewhere, unless provided contractually.

10. *Consultees are invited to provide comments on the terms of recommendation three (the provision of In Court Mediation Services).*

We understand that the pilot scheme is not up and running in Aberdeen and we have no information about the operation of the schemes in either Glasgow or Edinburgh. We are concerned about the use of the word "mediation" with its connotation of a deliberate deflection from the litigation process. We feel that if parties to a litigation wish to find themselves a mediator then they can find one themselves preferably not in the court building. On a practical note, most court buildings are already bursting at their seams. We would have less objection to an In Court Advice Service, provided it had access to legally qualified staff and its functions and limitations were agreed with representatives locally of solicitors. Such a scheme has been successfully piloted in Dundee where unrepresented litigants in small claims and summary cause actions are offered the opportunity to consult with the Service. The result is often a settlement. At worst, the issues come to be better focused and the In Court Service will conduct a proof if they consider it appropriate to do so.

11. *Please indicate, with reasons, whether a new paragraph, in the terms outlined above (permitting discussion in private rather than in open court in small claims and summary cause first callings where the sheriff is to ascertain the issues and try to promote settlement) should be incorporated into both Rule 8.3 of the Summary Cause Rules 2002 and Rule 9.2 of the Small Claims Rules 2002.*

We have no strong view one way or the other on this issue. Most sheriffs appear comfortable with the present rules.

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

Apart from repeating our opinion that it is neither necessary nor desirable, we consider that the rule as currently drafted is unnecessarily cumbersome. All that is required is that the sheriff should enquire whether ADR may be appropriate and for each side to respond. The multi-step process envisaged appears to us to create unnecessary expense and to involve the taking up of a lot of time during which parties ought to be adjusting their pleadings. It will also create additional work for sheriff clerks' staff. We are very much against Rule 9A.5 for the reasons hereinbefore explained.

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

Apart from considering this to be undesirable and to constitute an unnecessary part of the proposed process, we have no comment about the layout or content of the form.

Finally, Council would wish to make the general observation that the procedural proposals in this consultation document would seem to involve a policy question about access to the courts. Policy decisions on matters such as this would in our view be for the Scottish Executive and Parliament and we believe there is a question whether it is appropriate for the Rules Council to make proposals for such changes in the absence of a clear policy decision by the Executive.

We do not require these observations to be regarded as confidential.

4 September 2006

THE SHERIFFS' ASSOCIATION

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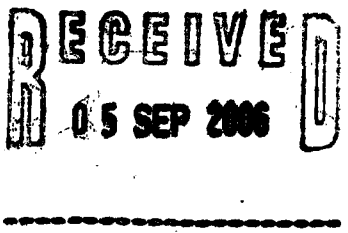
4 September 2006



Ms Ann Oxley
Assistant Secretary
Sheriff Court Rules Council
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Dear Ms Oxley

Consultation on "The Sheriff Court and Alternative Dispute Resolution"

I refer to your letter of 21 June 2006 and have pleasure in enclosing the response of the Council of the Sheriffs' Association, together with the relevant Respondent Information Form.

Yours sincerely

Andrew C. Normand

Sheriff Andrew Normand