

# **Angus Council Trading Standards Service response to the Sheriff Court Rules Council consultation on the Sheriff Court and Alternative Dispute Resolution**

## **Mediation Committee Recommendations**

### **Recommendation One**

*That there be incorporated into each set of rules applicable to the conduct of civil business in the sheriff court a new rule concerning mediation in the terms set out in the draft rule below (section 3) or in terms similar thereto, adapted as necessary to the context of the set of rules in which it appears. Rule 33.22 of the Ordinary Cause Rules 1993 (OCR) would thereby be superseded.*

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

It is desirable that ADR is encouraged in dispute resolution in general and mediation is encouraged in particular. Hugh Henry wrote to delegates at the Scottish Mediation Network Conference 5-6 September 2006 saying

" The Scottish Executive is a strong supporter of the increased use of mediation in dispute resolution"

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

There are many general reasons why mediation is beneficial not least its role is dealing with conflict resolution so that animosities developed during a dispute do not damage the future relations of parties. This is obviously critical where family law issues exist as well as where there are neighbour and anti-social behaviour disputes. It is however also relevant where there are B2B and particularly where B2C contracts often have a very human context with upset and offence involved.

#### **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?**

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

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

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

**Answer Q2 and Q3**

California (population 33.9million)

<http://www.mediationtools.com/rules/index.html>

Pennsylvania(pop 12.3 million)whose lawyers handle 16-17000 mediation cases per year

<http://www.pennsylvaniamediationlawyers.com/news.cfm/Article/68151/Metropolitan-Court-Mediation-Division.html>

Maryland (pop.5.3 million)

<http://www.marylandmacro.org/>

Massachusetts (pop.6.3 million)

<http://www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/ccadr0601large.pdf>

and Australia (pop.20.6million)

<http://www.fedcourt.gov.au/litigants/litigants.html>

all have well developed voluntary schemes which offer insights , if not models of mediation.

Further the hybrid law (part English type Common Law, part European Codified law) legal system of Canada ( one of the few similar in influences to Scotland) has produced a compulsory mediation system ( the Ontario Mandatory Mediation Program) with a 90% success rate in Ontario.

<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp>

It should be noted that Australia has progressed to ODR (online dispute resolution) through the likes of the Mediation room ("The Mediation Room for use by its 40,000 lawyer members throughout Australia"). This must be beneficial in a country with a widely dispersed population like Australia or Scotland.

<https://www.themediationroom.com/>

If compulsion is necessary then it should be used, if it is not used then lots of money will be spent advertising a voluntary system that can effectively deal with the majority of civil disputes. This would avoid unnecessary expenditure that can be used elsewhere more effectively. Economy, Effectiveness and Efficiency considerations may result in a mandatory system being considered . It would also certainly result in procedural clarity to the user.

**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?**

Yes if it is not compulsory.

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

It may be ignorance of the system that prevents the uptake of mediation. If this is the case then advice and education to the users could change their positions and allow ADR.

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

Encouragement in a voluntary system would be necessary especially at the introduction stage and this would require time and resources, rather than having a procedural requirement, where encouragement or persuasion are not required.

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

Yes, that would be persuasive. However it would be unnecessary if the scheme was compulsory.

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

Where people are unfamiliar with a system and they have choice (and their advisors are also new to a system) then ignorance/lack of

familiarity/fear will result in a lack of uptake when the cost , time and outcome benefits may be considerably more beneficial than the traditional system . It should be remembered that Mediation is a "tried and tested" method , which has been proved effective in several different legal systems.

**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 and Appeals etc. Rules 1999
- . Summary Cause Rules 2002
- . Small Claim Rules 2002?

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

Yes in ordinary, summary cause and small claims actions.  
Possibly not in Statutory applications as the intention can be punitive if undertaken by an enforcement body Trading Standards, Planning .

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

No Comment

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

No Comment

## **Recommendation Two**

*That a new para (5A) be inserted into OCR 3.1 in the following terms:-  
"(5A) An article of condescendence shall be included in the initial writ averring the steps taken by the parties prior to the raising of the action by other forms of dispute resolution (whether by way of mediation, negotiation or otherwise) with a view to avoiding the need for litigation. "*

*A similar provision should be inserted into each of the other sets of rules applicable to the conduct of the civil business in the sheriff court, adapted as necessary to the context of the set of rules in which it appears.*

**Q. 9a Do consultees have any comments to make in relation to this recommendation?**

It would seem reasonable.

**Q. 9b Please indicate, with reasons, whether this reference provision should be incorporated into:**

**(a) All or**

**(b) Some or**

**(c) None of the court rules.**

Where appropriate, all if necessary

**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 court rules.**

NO COMMENT

### **Recommendation Three**

*That, subject to questions of cost and practicability, the use of mediation or another form of dispute resolution should be facilitated in relation to disputes at all levels by the provision of an in-court mediation service in the manner piloted in the sheriff courthouses of Edinburgh, Glasgow and Aberdeen.*

**Q.10 Consultees are invited to provide comments on the terms of recommendation three.**

This sounds reasonable, depending on the findings of the pilot scheme. The concern is how many people will be deterred from accessing mediation by the necessity of having to put a claim into court before being directed /advised to seek mediation. It is likely that the vulnerable and less able will still be debarred from access to justice by ignorance, fear and illiteracy.

Angus Council has tried to address this with an independent adjudication scheme produced in partnership with the Federation of Small business, Tayside Police and the Chartered Institute of Arbitrators to help with consumer disputes. The Trading Standards service already operates as do most trading standards services a conciliation and advice service. Angus has further trained staff as

mediators. It is the belief that an early intervention at the pre court stage is the most effective strategy. This type of advice/conciliation is also given by CAB , community mediators , family mediators and some voluntary organisations.

Consumer Protection is a reserved function; and additionally ADR activity is a non statutory function and is not directly funded by Westminster. Giving financial support to those organisations that offer pre – court ADR should be considered. This would decrease the numbers reaching court and requiring either court based ADR or resulting in a hearing.

### **Recommendation Four**

That rule 8.3 of the Summary Cause Rules 2002 and rule 9.2 of the Small Claim Rules 2002 should be amended by the incorporation into each of a new paragraph in the following terms:-

"8.3(2A)/9.2(2A): In carrying out the duties referred to in paragraph (2) (b), the sheriff may hold discussions in private and not in open court."; and that otherwise the said rules 8.3 and 9.2 should remain for the time being unaltered.

**Q. 11a 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 and Rule 9.2 of the Small Claim Rules 2002?**

Transparency of a decision and hearing are paramount in establishing the credibility of a legal system. If, however, the intention was to encourage mediation/ADR then such a clause, more precisely worded, may be appropriate.

It is not reasonable to expect a Sheriff to be a negotiator , that is why mediation if made mandatory would remove the necessity. The adjudication by the Sheriff and his decision would not be potentially tainted.

Mediation allows negotiations to be in private, other jurisdictions seem to find this results in a very high level of positive outcomes.

**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(s) of court rules.**

**NO Comment**

**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?**

**NO Comment**

**Q.12 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.**

**Only that 9 A.5 is very valuable if a non mandatory mediation scheme is introduced as it will focus attention on the consequences of failing to positively participate in any pre-trial resolution scheme. This could be used by the participants professional advisors to help persuade litigants of the consequences of their actions.**

**Q. 13 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.**

**No Comment.**

## **General point**

**There is one aspect of ADR that should be considered that has not been addressed by this consultation. The introduction of an effective small claims procedure should have been, in itself, the equivalent of the introduction of a form of ADR (when compared to existing civil actions). It is the failure of the Small Claims Procedure financial limits to be updated to be relevant to the scale of disputes in the modern world that has forced organisations such as Trading Standards to look at ADR in the form of mediation and adjudication as effective alternatives to a moribund system. It results in the dreadful situation that consumers are advised to take claims against English companies under the English Small Claims Procedure (with current limits of £5000) as the most cost effective way of progressing a claim even though both locus and jurisdiction should reasonably be Scottish.**

**If the Small Claims Procedure was given realistic and regularly increasing limits, Pre-court ADR , in –Court ADR and ODR and where appropriate advocacy for the vulnerable were all introduced and adequately financially supported then accessibility to justice for all citizens may become a reality , rather than an aspiration.**