

SHERIFF COURT RULES COUNCIL

CONSULTATION ON THE SHERIFF COURT AND ALTERNATIVE DISPUTE RESOLUTION

RESPONSE BY STIRLING COUNCIL LEGAL SERVICES

Summary of Consultation Questions

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

Yes.

Q1b Please provide comments to explain your reasons.

Such a rule would bring the consideration of ADR into the focus of the parties and their legal advisers.

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

Parties should be encouraged rather than compelled to adopt ADR procedures. While parties may be required to justify their reasons for whether or not they consent to ADR there seems little benefit in putting those reasons in writing. Nevertheless the court process should record the fact the issue of ADR has been considered and that one or other or both parties have declined to adopt ADR. Ultimately the Court's sanction for a party's unreasonable conduct in litigation comes in the assessment of expenses. See Q6b below.

Q2b Please provide comments to explain your reasons.

See Q2a above.

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

Yes. Parties should be required to consider ADR and to advise the Court of their respective positions on ADR. It seem to us that the appropriate time at which ADR is considered is the Options Hearing in Ordinary Cause actions and the Hearings under Rules 8.3 and 9.2 of the Summary Cause and Small Claims Rules respectively: these being the first reasonable opportunities at which a party could address the court on the issue of ADR. The relevant rules should be amended to reflect this requirement.

Q3b Please provide comments to explain your reasons.

See Q3a above.

Q4a Should the parties to the action be required to give notice in writing as to whether or not they consent to a referral to mediation?

No. They should however be under an obligation to consider ADR and advise the Court of their position on ADR as suggested at Q3a above.

Q4b Please provide comments to explain your reasons.

See Q4a and Q3a above.

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

We consider that the most appropriate time for the Court and the parties to address the issue of ADR is at the Options Hearing or Hearings under Summary Cause and Small Claims Rules 8.3 and 9.2 respectively. See also Q3a above.

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

No.

Q6b Please provide comments to explain your reasons.

This is probably unnecessary as the Sheriff is already able to consider the conduct of parties in assessing awards of expenses see MacPhail paras. 19.11-19.12.

Q7a Is it appropriate to include a reference to ADR in each set of court rules?

Yes. It would be inconsistent with the purpose of the proposals if certain types of action were automatically excluded from the potential benefits of ADR.

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

See Q7a above.

Q7c 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.

See Q7a above.

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

Family law actions should retain their own distinctive mediation rule.

Q8b Please provide comments to explain your reasons.

See Q8a above.

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

The trend in written pleadings is towards their simplification. Such an article of condescence is contrary to that trend and is therefore unnecessary. The pre-litigation conduct of the parties may be relevant in the question of expenses. That said, parties should be able at an Options Hearing to outline their pre-litigation conduct as this may be relevant to the consideration of ADR: the Options Hearing being the first and most suitable opportunity for consideration of ADR. The Sheriff Court Ordinary Cause rules that relate to Options Hearings should be amended to make it a requirement that at an Options Hearing parties provide such information to the sheriff if so required. A similar amendment should be made to the Summary Cause and Small Claims Rules in respect of the Hearings under 8.3 and 9.2 of the respective rules. See also Q3a above.

Q9b Please indicate, with reasons, whether this provision should be incorporated into all or some or any or none of the rules of court.

See Q9a above.

Q9c If you think that this provision should only be incorporated into some of the court rules please indicate, with reasons, which set of court rules.

See Q9a above.

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

This may be useful in summary cause and small claims where there are a more significant number of party litigants. See also Q11a below.

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 and Rule 9.2 of the Small Claim Rules 2002?

No particular view on holding such hearings in private. The in-court mediation service should have a role in such a private hearing.

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.

See Q11a above.

Q11c Do consultees have any views on the recommendation that rules 8.2 and 9.2 should otherwise remain for the time being unaltered?

See Q11a above.

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.

No particular comments on the content of the rule-other than those made above.

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 particular comments on the form or content of the notice.