RESPONSE TO CONSULTATION ON THE SHERIFF COURT AND ALTERNATIVE DISPUTE RESOLUTION

1(a) I do consider such a Rule to be both necessary and desirable.

1(b) Having been involved in the field of mediation, both as instructing solicitor and as mediator, my experience is that parties are often unwilling to suggest mediation or to consider this lest such a step be perceived as an indication of weakness on their behalf. Procedure which incorporates some form of official recognition of and encouragement to consider mediation would, in my view, remove this difficulty. Evidence from other jurisdictions would appear to support this view.

2(a) I consider the rule should encourage rather than compel.

2(b) Whilst there is some evidence from other jurisdictions to support the proposition that, even where there is compulsion, once mediation has commenced there is a reasonable prospect of something being achieved by way of settlement, my view is that parties are more likely to approach the process in a constructive way should there be encouragement rather than compulsion.

3(a) Yes

3(b) Whilst knowledge of the process has increased over the last few years there is still some misunderstanding of the process. In addition, some parties are reluctant to mention mediation lest this be perceived as a weakness on their behalf. This obstacle would be removed if there was a requirement by the Court that parties consider the suitability of the case for mediation. In such a situation, there would be an additional element of neutrality where an onus is placed on both parties to consider the suitability of the case for mediation.

4(a) Yes

4(b) The requirement to lodge such a notice would impose upon the parties to the action a requirement to give serious consideration to mediation rather than to pay lip-service to the question. The critical point here is not so much the lodging of the notice but rather the exposition of the reasons. Those reasons may be relevant in determining the question of expenses in such matters. There may, of course, be good reason as to why mediation is inappropriate such as the need to have the case judicially determined for reasons of precedent. However, it is suggested that there be some mechanism incorporated within the rules to allow the Sheriff to discuss the reasons with the parties.

5 I agree that consideration of settlement or referral to the dispute resolution should take place within the constraints of the current court timetable. It is, however, suggested that, from a point of view of economics, there may be merit in the question of the mediation being raised early in the stages of the court action.

6(a) Yes

6(b) It is suggested that it is far better that there is explicit mention of the question of expenses. The rationale for this is that explicit mention will reinforce that the consideration of mediation is a serious matter to be considered by the parties.

7(a) I am of the view that it is appropriate for it to be applied in an appropriately tailored format.

7(b) I consider that the rationale and underlying basis for the reference to be included should be equally applicable in all forms of Court actions. Whilst one can perceive of there being lesser use of the process in, for example, summary applications, there would appear to be no good reason why reference ought not to be included in the applicable rules. It is suggested that simpler versions may be required for summary cause and small claims rules which might entail a greater focus on oral responses rather than written notices.

7(c) No comment.

8(a) No.

8(b) With the interest of the child being paramount it is suggested that this is the sort of scenario where judicial referral with some form of compulsion may be beneficial.

9(a) I agree with the proposed approach that parties should be required to include within the Initial Writ some information relative to steps taken prior to raising the action by forms of other dispute resolution. I do, however, consider that there are some practical issues as to the level of information to be included in the notice. My concern is that there should not be an onus on the parties to narrate the detail of the steps taken. The phrase "averring the steps" may suggest that information relative to the content of negotiations may be required. This, in my view, would be unfortunate and it may be that there should be some consideration to phrasing the rule in a slightly more open way by requiring something along the lines of "setting out whether or not the parties, prior to the raising of the action, have endeavoured to resolve the matter by other forms of dispute resolution."

9(b) I consider this should be incorporated into all of the Court Rules. There would appear to be no good reason why the underlying rationale is different in any of the other court actions.

9(c) No comment.

10(a) I consider it is too early to comment upon the in-Court mediation service as piloted in Glasgow and Aberdeen and consider this matter should be further considered upon an analysis of the operation of those schemes. The Edinburgh scheme relates to lesser claims and tends to have a mediator appointed without the parties having any choice in the selection of the mediator. Whilst there may be no difficulty with that approach in lesser value cases, particularly where there may be no or minimal charges for the mediation services, in higher value cases the selection of the mediator may be a matter of greater import and it is unclear if this is something that would be possible in terms of Court facilitation. If there is to be a Court based scheme, it is suggested that there should be no compulsion to use the services provided by the Court, albeit it is

noted the recommendation simply relates to facilitation rather than provision of the services. In addition, it is critical is that there is a high quality mediation service provided if there is to be facilitation via the Court and some thought will be required as to how quality will be assured in this context.

11(a) I agree that the proposed new paragraph should be incorporated in both sets of rules and consider that the possibility of private discussions would allow for more open discussions, particularly in scenarios such as where one of the parties is legally represented and the other is a party litigant.

11(b) No comment.

11(c) I agree that Rules 8.3 and 9.2 should remain unaltered meantime.

12 In so far as reference is made to the question of expenses in 9(a).5, I am uncertain relative to the wording "unreasonable conduct of any party". The question of reasonableness could be the subject of much debate and it may be that the rule might be more neutrally expressed by referring to, for example, the "actings of any parties".

I also have some concerns relative to 9(a).3(2) where the "Courts … make an order referring some or all the parties in dispute to mediation". My experience is such that very often there are matters considered at mediation which transcend the bounds of matters which are referred to, or capable of being referred to, in the litigation but which are nonetheless critical as between the parties. My view in the circumstances is that it would be more appropriate simply to indicate that the subject matter in dispute is to be referred to mediation but that should not be a limiting factor so that any associated issues might be considered in the context of that mediation.

13(a)

I am content with the proposed form of the Notice.