Scottish Courts and Tribunals Service

Development and Innovation Directorate
Legislation Implementation Team
N1 Spur, Saughton House
Broomhouse Drive
Edinburgh
EH11 3XD
DX: ED 545309

22 August 2019

By email only

Margaret Mitchell MSP
M2.11
Scottish Parliament
Edinburgh
EH99 1SP

Our Ref:

Your Ref:

Dear Ms Mitchell,

Consultation – Mediation (Scotland) Bill

I refer to the above consultation to which I respond on behalf of the Scottish Courts and Tribunals Service ("the SCTS"). The response is submitted by the SCTS acting in its role to provide efficient and effective administration to the courts and tribunals and does not include the views of the Judiciary.

The SCTS is supportive of any measures that are designed to ensure that the most effective and efficient use is made of judicial resources; and which improve access to justice for those seeking to resolve disputes in Scotland.

The Scottish Civil Justice Council prepares draft rules of procedure for the civil courts and advises the Lord President on the development of the civil justice system in Scotland. One of its guiding principles is that "alternative methods of dispute resolution should be promoted, where appropriate". It has in recent years introduced rules which are designed to encourage the use of mediation, for example Rule 7.6 of the Simple Procedure Rules. Additionally, rules have been made which require parties, in certain types of action, to observe pre-action protocols for example in some personal injury cases. These encourage pre-action discussions and settlement negotiations. Further, the Court of Session Practice Note No.1 of 2017 (Commercial Actions) envisages pre-action communications between parties ensuring in particular that the action when raised can be said to be truly necessary.

The proposal suggests that the court initiates the mediation process by issuing parties with a questionnaire. However, it is unclear exactly how this would work in practice, particularly as it is unclear at what point the questionnaire will be issued.

If it is envisaged that questionnaires are issued at the point at which the claim is raised at the court, this would have a significant impact on the SCTS given the large volume of claims that are raised. To raise their claim, the party would have taken the time, and potentially incurred costs, to prepare their claim form and would have paid a court fee to submit the form. This would not appear to be consistent with the outcomes that the proposal aims to achieve.

It is also unclear what would happen if the respondent failed to complete the questionnaire or indeed simply refused to do so. For example, how would it be proved that they had received it?

We are also unsure what would happen to the claim itself during the period between its submission and the mediation information session. Would the claim still be served on the respondent and what would happen thereafter? Would the respondent be required to lodge a response to the claim or a notice of intention to defend? The status of the claim, both pending consideration of the appropriateness of mediation and while the mediation itself took place if parties agreed to mediate, would also have to be considered.

Ultimately this would seem excessive given the high percentage of claims that are undefended. 4 in 5 Sheriff Court actions are undefended and less than 2% of Sheriff Court civil actions go to proof[1].

Similar issues would also arise if it was envisaged that the questionnaire was issued at the point that the case becomes defended. For example, consideration would also have to be given to the status of the claim.

If the questionnaire is issued to parties prior to a claim being registered, some form of application would still need to be submitted to the court as the court would still require a number of key pieces of information relating to the claimant and respondent to enable questionnaires to be issued. The SCTS does not have a system for recording this information at present. Therefore there would be costs incurred to set up an appropriate register. However, at this stage the court fee would not be payable and therefore it is not clear how this would be funded.

The proposal set out in the Bill will therefore have an impact on the SCTS in terms of cost. This is as a result of the staff resources and administrative costs that would result from these additional stages being added to the process. There would also be costs incurred in making the IT system changes that we anticipate would be required. The extent of these costs will be dependent on how it is envisaged the proposal will work in practice.

Additionally, an appropriately funded mediation service would need to be in place, with sufficient mediators available to take up what may be a significant number of cases. It is likely that such a service would also require oversight by a separate body with mediators being required to undertake continuing professional development.

The SCTS would welcome the opportunity to be kept informed of any developments as work on any Bill progresses, including contributing towards any financial memorandum, if required.

If you require any further information please let me know.

Yours sincerely

Nicola Anderson

[1] SCTS Annual Report and Accounts 2017-18, page 74 http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/publications/scts-annual-report-accounts-2017-18---final.pdf?sfvrsn=2

Head of Legislation Implementation Team
nanderson@scotcourts.gov.uk
Tel: 0131 444 3471