

NAF PAPER FOR SEPTEMBER 2019 MEETING

MEDIATION

Purpose

1. To seek views from NAF members on proposals from the sub-group on mediation.

Consultation Responses

2. Following the May meeting of NAF, this sub-group has met twice. On 26 June it agreed a consultation letter, which was sent to all NAF members, the Scottish Land Commission, LAFs and access authorities, seeking their views on the idea of preparing a NAF guidance paper on mediation. The summary of responses (Annex 1) shows that there was general support for this proposal, and respondents also offered helpful suggestions about the content of such a guidance paper. The sub-group considered these responses at its second meeting on 6 September (see below).

SG draft Guidance to Local Authorities

3. Meanwhile, on 16 August, the Scottish Government issued Draft Revised Guidance for Local Authorities and National Park Authorities regarding Part 1 of the Land Reform (Scotland) Acts of 2003 and 2016 (LRSA). Unlike the existing guidance, this draft revised guidance includes a number of explicit references to the use of mediation.

With reference to Section 13 (Duty of local authority to uphold access rights) it states that

“Before instituting legal proceedings, local authorities should consider whether mediation or arbitration proceedings may be appropriate. These can provide an alternative to court that can sometimes be quicker and less costly than taking court action. However, as such steps are not formally enshrined in the legislation, both parties would need to agree to such action. As with instituting legal proceedings, it is recommended that local authorities take legal advice on implications. Some local authorities may have mediation specialists as part of their organisation who would also be well placed to provide advice. General advice on alternatives to court is available at <https://www.mygov.scot/alternatives-to-court/>.”

With reference to Section 25 (role of local access forums) it states that:

“Where a conflict or dispute arises, the forum may offer to help towards a resolution, and if the parties accept the offer the forum may give assistance to the parties involved by providing advice, mediation, or suggesting other sources of assistance or support, etc.”

With reference to Section 28 (judicial determination of existence and extent of access rights and rights of way) it states that:

“Before taking such a matter to court, it would be expected that local authorities would have used mediation to try and resolve disputes, including through the local access forum.”

Sub-group meeting on 6 September

4. The sub-group meeting on 6 September was also attended by May Millward of Scottish Mediation (which is a professional body for mediators in Scotland). With her help the sub-group addressed the potential issues regarding mediation that had been raised in the responses to the consultation letter. Key points are summarised below:

- **Cost.** A mediator is likely to charge around £100 per hour for their services and so the cost of a case requiring 2-3 days works could be around £2000-£3000. This cost should be seen in the context of the (much higher) costs associated with legal action, as well as staff costs for access authorities and others dealing with long-running disputes.
- **Geographical spread of mediators.** The 70 professional mediators currently accredited by Scottish Mediation are fairly well distributed throughout Scotland, and are generally willing to travel if necessary.
- **Confidentiality and transparency.** Successful mediation requires confidentiality among the parties during the mediation process, and notes are shredded afterwards. However, in the context of access cases, there will usually be a need for transparency with regard to the outcome. Arrangements for publicising the outcome would need to be agreed by the parties.
- **Multi-stakeholder involvement.** Where there are more than two parties involved in a particular case mediation is likely to be more complex, but still feasible.
- **LRSA compliance.** While, in general, mediators do not always have (or need) expertise in the subject under consideration, the sub-group considered that, for access cases, mediators should have a good knowledge of the LRSA and Code. There are various ways of ensuring that specialist knowledge on access is made available to mediators. For example, briefing sessions could be organised for professional mediators interested in work relating to access rights. Another possibility is to encourage individuals with good knowledge of access rights to train as mediators – they could then serve as co-mediators in access cases until they gained sufficient experience to achieve full accreditation.
- **Other training opportunities.** Scottish Mediation run short (3 hour) conflict resolution workshops (for groups of 16 people, at a cost of around £300-

£500). These may be of interest to LAFs, and others, who are engaged in informal mediation.

During this meeting it was also noted that the NAF guidance should make clear that while professional mediation could be a useful tool, every effort should continue to be made to resolve matters through informal mediation (e.g. by access officers and LAFs) before resorting to professional mediation. The guidance note should include a flow-chart to explain this, and to show that litigation in the Courts would still be available when necessary.

Recommendations from sub-group

5. At its meeting on 6 September the sub-group agreed the following recommendations for NAF:

a. If NAF agrees, the sub-group should begin work on developing a guidance note on mediation. This should be no more than 10 pages, with web-links to other relevant guidance on mediation. A suggested outline for this guidance note is attached as Annex 2 and, if NAF agree to take this forward, a full draft will be prepared for the January NAF meeting.

b. There should be a presentation/discussion on the use of professional mediation at the 2020 NAF/LAF meeting. (May Millward has agreed to speak, if available.)

c. Promote training opportunities for access officers and others (such as NAF/LAF reps) who are engaged in informal mediation.

d. Encourage other networks (such as SOAN) to discuss the role of mediation in dealing with difficult access cases.

- **NAF members are invited to consider these recommendations.**

Mediation sub-group
September 2019

Annex 1. Summary of responses to consultation letter

The consultation letter was issued on 16 July and requested responses by the end August 2019. In total, there were ten responses from access authorities and seven responses from other bodies, including the Scottish Land Commission as well as NAF members. There were four questions, and the responses are summarised below:

Q1. Do you think it would be useful for NAF to prepare a guidance note on the potential use of professional mediation as a tool for helping to resolve difficult access cases? If so, what might such a guidance note include?

Nearly all the responses supported the idea of a guidance note. It was suggested that such a guidance note should:

- explain the role of professional mediation and its relationship with other dispute resolution mechanisms including informal mediation, arbitration and litigation;
- enable potential participants to understand the process and feel more confident about taking part;
- discuss the potential benefits of professional mediation, such as the fact that it is likely to be cheaper than litigation, and can help in narrowing-down issues in the event of subsequent litigation;
- give some indication of the likely costs of professional mediation, and the limitations of mediation;
- outline the general principles of mediation, such as voluntary nature of the process, the impartiality of the mediator, confidentiality rules and the non-legally binding nature of the outcome, and consider how these might apply in access cases (where, for example, there is likely to be a need for transparency with regard to the outcome);
- include a list of potential mediators;
- provide illustrative examples showing how mediation might be appropriate in particular types of access case, including cases where there are several different parties.

One access authority (Shetland) did not think that a guidance note would be relevant for them as the issues are infrequent and, when necessary, local councillors act as intermediaries. Other responses included cautionary comments about, for example, mediation being used as a device to procrastinate or evade more robust approaches to removing access obstructions. It was also noted that mediation requires parties to be willing to engage and look for solutions and so it is not possible where one or more parties choose to be intransigent.

Q2. Does your organization have any experience of using professional mediation to help address disputes relating to land use/land ownership issues, and if so would you be willing to share information about any lessons from this for helping to resolve access disputes?

There were a number of useful examples. These included the use of informal mediation to address rafting/fishing disputes; the use of facilitated mediation to try to address conflict between wildfowlers and access takers; community mediation, over for example boundary disputes and the use of parks; and the use of professional mediation in the tenant farming sector, in neighbour disputes, high hedge disputes and planning disputes.

Mediation had helped to resolve some seemingly intractable cases, by helping to improve relationships as well as identifying mutually agreed outcomes. However, it was also noted that disputes over land can generate very strong emotions. Some responses highlighted the challenges associated with multiple-party cases – and an example was given of a case where one party did not fully engage during the mediation process but intervened at a late stage to prevent agreement being reached.

Q3. What are the difficulties or barriers that could prevent successful use of professional mediation? (These may include, for example, the cost of paying the mediator.) How might these difficulties or barriers be overcome?

- Cost. Some respondents pointed out that this compares favourably with other forms of dispute resolution. Questions were asked about who should pay for the different elements of the cost (i.e. the services of the mediator, suitable meeting rooms, travel costs/accommodation etc), and about whether recreational and land management user groups would help public bodies to meet the costs. It was noted that parties who have no incentive to try to seek resolution are unlikely to contribute to costs.
- Encouraging people to take part in a voluntary process. It was noted that barriers could include a lack of understanding of mediation, and a lack of trust and confidence in the process.
- It was noted that problems may arise where parties hold polar opposite views, and it was suggested the guidance note should try to identify the types of case where mediation is likely to be successful.
- Several respondents referred to need for outcomes to be LRSA compliant. It was noted, for example, that otherwise there is a risk that a third party might challenge a compromise solution reached through mediation.
- Views varied about the desirability or otherwise of having a non-legally binding outcome. It was however suggested that the parties could, if they

wished, have the agreed outcome presented in a legal document which they would sign.

- The need for skilful and committed mediators with a knowledge of access rights was highlighted. It was also suggested that it would be useful to provide training for access officers and LAFs to improve skills in informal mediation.

Q4. Any other thoughts or suggestions on this matter. For example, do you agree that the sub-group is correct in not pursuing the arbitration option further at this stage?

While most respondents agreed that the focus should be on mediation, some said that arbitration may be appropriate in certain circumstances - this included the Scottish Land Commission, who referred to their guidance on alternative dispute mechanisms.

Annex 2 Draft outline of Guidance Note

Purpose of Guidance

- Explain, e.g., that the purpose of the note is to provide guidance on the potential use of professional mediation as a tool for helping to resolve difficult access cases, and that it is intended to help access authorities, land owners/managers and access takers.

Background

- Explain, e.g., that the creation of the statutory right of access in Scotland has been a success, but it has also inevitably given rise to local issues and disputes. Access authorities and LAFs have worked hard to address these issues and some cases have gone to Court. However, there are many cases that have stalled, partly because going to Court is time consuming and expensive. Professional mediation is a tool that may be useful in helping to resolve access cases without going to Court, or at least to narrow down the issues in advance of litigation. It is increasingly being encouraged in other land-related contexts (e.g. planning and agricultural landlord/tenant relationships) and features in the draft revised SG Guidance to access authorities on the LRSA.

What is professional mediation in the context of access legislation?

- Explain, e.g., that this is a process whereby the parties to a dispute agree to invite an independent professional mediator to help them reach a mutually acceptable outcome that complies with the LRSA and that all the parties can accept. Through this process the mediator will invite the different parties to explain their interests and concerns and encourage them to think creatively about ways forward. It is a voluntary process and parties can walk away at any stage. Details of discussions remain confidential although if there is an agreed outcome this will probably need to be publicised in the interests of transparency.

The place of professional mediation is resolving difficult access cases

- Use a flowchart to explain the relationship of professional mediation to other approaches, including informal mediation by access officers/LAFs (which would normally come first) and litigation in the Courts. Note that arbitration is also an option, but less likely to be appropriate.

Potential benefits of professional mediation

- Explain, e.g., that mediation is likely to be cheaper than litigation; that it can help resolve seemingly intractable cases or at least narrow-down the issues; and that it can help to improve relationships. There may also be savings for access authorities and other bodies whose staff spend a lot of time dealing with long-running disputes.

Potential costs and limitations of professional mediation

- Outline the order of magnitude of potential costs (e.g. a mediator is likely to charge around £100 per hour for their services and so the cost of a case requiring 2-3 days work would be around £2000-£3000.)
- Note that mediation may not always be appropriate, or successful, e.g, when key parties refuse to engage or have intransigent views.
- Discuss particular challenges associated with multiple-party cases.

Understanding the process of professional mediation

- Explain that it is for the mediator to agree with the parties the details of how to undertake the discussions and such matters as timing and venue. Include weblinks (e.g. Scottish Mediation¹, Scottish Land Commission Tenant Farming Commissioner's *A Guide to the use of Alternative Dispute Resolution in the Scottish agricultural holdings sector*² and in the Scottish Government's *A Guide to the Use of Mediation in the Planning System in Scotland*³).

Other issues

- Availability of professional mediators. Refer to the "search" facility on the Scottish Mediation website. Note opportunities to brief potential mediators on access rights, and to train those with expertise in access rights as mediators.
- Refer to opportunities to provide training for access officers/LAFs in informal mediation.

Illustrative examples

- Give short illustrative examples showing how mediation might help in different types of case (e.g. land excluded from access rights, conduct excluded from access rights, obstructions to access, signs etc.). Also give examples of cases where professional mediation may not be appropriate.

¹ <https://www.scottishmediation.org.uk/>

² https://landcommission.gov.scot/wp-content/uploads/2018/04/TFC-Guide-to-ADR_Final.pdf

³ <https://www.gov.scot/publications/guide-use-mediation-planning-system-scotland/>