



Law Society  
of Scotland

# Consultation response

## Mediation in Planning

March 2021



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Planning Law Sub-committee welcomes the opportunity to respond to the Scottish Government's consultation on *Mediation in Planning*<sup>1</sup>.

## General comments

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We have previously supported promotion of the role for mediation and other forms of alternative dispute resolution (ADR) in the civil justice system in Scotland and consider that the use of mediation in the planning system can be of benefit to those involved. The Scottish Parliament's Justice Committee has previously noted that there is a "lack of information on the availability and benefits of ADR, inconsistency in the provision and funding of ADR and inconsistency in referrals to ADR from the courts."<sup>2</sup>

We therefore support clear guidance from Scottish Government around the use of mediation in the context of the planning system. However, there requires to be careful consideration as to how mediation works in practice in the context of the planning system including the associated resourcing requirements, which is likely to have an impact on the take-up by parties in the planning system, and potential for delays.

There is merit in the role that mediation may potentially perform in removing at least some of the adversarial elements of the planning system. Consensus building is to be encouraged but it is considered that mediation will only work in a limited number of cases. We would not wish to overestimate the number of planning disagreements that are capable of being resolved through mediation as parties may not be willing to negotiate towards a solution. It is often not the detail but the principle of development that is at stake and in such cases mediation may not be applicable. There are additional complexities where there are a significant number of parties in a mediation with different expectations.

That having been said the Scottish Government is proposing a limited scope for their mediation guidance and this is to be welcomed in order that the outcomes of this can be fully assessed in due course and provide an evidence base going forward.

<sup>1</sup> <https://consult.gov.scot/local-government-and-communities/mediation-in-planning/>

<sup>2</sup> <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/10/1/I-won-t-see-you-in-court--alternative-dispute-resolution-in-Scotland/JS052018R9.pdf>

There are a number of fundamental issues that must be resolved at an early stage and this includes advice on the scope of the mediator's appointment, his or her qualifications, methodology and response times as well as who is paying for the mediation. Guidance would need to be clear on these issues. Third parties may not be willing to fund mediation and a clear guidance on this is needed from Scottish Government on how this resource will be met and funded. While mediation may have a role in the 'gatecheck' or Development Plan Examination, consideration will be required as to how it is intended that the mediator will interact with the Reporter in relation to the outcomes of the mediation.

## Consultation response

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### **Q1. Have we got the range of areas to which the mediation guidance should cover right?**

We agree that the range of areas should for which mediation guidance cover should be limited to the following:

- Development Planning: Gatecheck and Development Plan Examinations
- Development Management
- Proposal of Application Notices and Pre-Application Consultation

We do not consider that mediation is needed for Development Plan Schemes. While we would not wish to rule out mediation for other areas, we consider it important that the outcomes of the implementation of guidance in these areas be carefully assessed before widening the scope.

### **Q2. Do you agree with the suggestion to maintain policy support for the use of mediation in National Planning Framework 4?**

Yes. We consider this is preferable in order to recognise its importance.

### **Q3. Please tell us about your experience of using mediation including any financial / non-financial costs incurred. Please set out also how any costs were shared between the parties.**

No comment.

### **Q4. Do you agree with the proposal that the Scottish Government's guidance on Development Plan Schemes should reference the use of mediation as one of a range of innovative techniques and activities for engaging stakeholders to be considered in the planning authority's participation statement?**

We question if mediation is necessary or would add measurable value for Development Plan Schemes.

While it could be one of a range of techniques and activities for engaging stakeholders, it is important to recognise that it will not be suitable for all situations.

In the event that mediation is to be referenced, it is important that the guidance clearly sets out at what point in the consultation process mediation might take place. We expect that this would be where an LDP policy has attracted opposition from an individual, community body, developer or similar group and mediation has been requested. The ability to request mediation should be clearly identified in the guidance on Development Plan Schemes but also the practical implications of such a mediation, including the cost and who pays for it.

While the voluntary nature of mediation may make it an attractive option for some, the respective costs will have an impact on whether parties wish to and are able to engage. The use of independent representatives or consultants to represent bodies at a mediation may also impact take-up, for example, a large developer may be able to afford a representative or consultant to represent them at a mediation, while a community body or individual may have limited funds to appoint similar representation.

As such, we suggest that a method of calculating and apportioning cost should be included in guidance, which could possibly be determined by individual local authorities in relation to specific LDPs.

#### **Q5. Do you agree with the proposal that planning authorities should consider the use of mediation when preparing the participation statement element of their Development Plan Schemes?**

We question if mediation is necessary for the participation statement element of Development Plan Schemes.

#### **Q6. Do you agree that the Scottish Government should further investigate the potential role of mediation at the gatecheck stage?**

We recognise the merit in further investigating the potential role that mediation could play at 'gatecheck' stage. It is not currently clear how mediation could be undertaken at this stage, particularly given the practicalities of the 'gatecheck' process itself are currently uncertain. We note that mediation at this stage could duplicate the process during the consultation on Development Plan Schemes.

#### **Q7. Do you agree with the proposal that the Scottish Government guidance should encourage the use of mediation between parties in advance of the development plan examination stage?**

We support this in principle, however, consider greater clarity on the practicalities is required. For example, how is mediation to be practically addressed in situations with multiple Schedule 4 comments where agreement cannot be reached? Does each body who has provided a Schedule 4 comment where there is no agreement have to raise an individual mediation? It is unclear from Annex B, the partial Business and Regulatory Impact Assessment, if a portion of this cost is to be borne by the local authority.

**Q8. Do you agree with the proposal that the Scottish Government guidance should amend its guidance on Proposal of Application Notices to encourage the use of mediation between parties in any additional consultation activity attached to PAC?**

Yes, the use of mediation should be referenced but this needs to be carefully managed.

We note that the emphasis in these sections seems to be with the applicant to encourage or introduce mediation, which would be included in their PAN. While we consider mediation can be appropriately encouraged, we suggest that more information should be published regarding costs and the practical application. For example, is it expected that a mediator be present at all community engagement events or is this proposed only to be introduced when a dispute has arisen?

**Q9. Do you agree with the proposal that the Scottish Government should provide guidance encouraging the use of mediation between parties in Pre-Application Consultation?**

Yes, the use of mediation should be encouraged but this needs to be carefully managed. Please see our comments above.

**Q10. Please give us any views you have on the content of these partial assessments.**

We welcome the recognition within the partial EQIA that there is a need to improve public engagement measures and that different groups in society currently have different levels of engagement with the planning system. It is important that disabled people, groups and organisations of disabled people, and groups and organisations representing them are able to effectively participate in the planning system generally and mediation in planning specifically.

We note that the partial EQIA highlights that Scottish Government will not be prescriptive about the use of either online or face to face mediation and will suggest that the method chosen is appropriate to the particular circumstances. We consider that it is important for the guidance to highlight the need to adopt different formats of mediation taking into account the requirements of people who wish to engage with the process. Different protected groups have different needs which should be accommodated – for example in relation to age older people may be less able to engage with on-line mediation, while conversely it may improve accessibility and engagement for people living in remote and rural areas as well as people with certain disabilities. In addition, the EQIA has identified potential barriers in relation to race when a person or group who wish to engage in a planning process do not speak English as their first language and would suggest that the Guidance include reference to their need for additional support such as translation services to enable full engagement. Guidance on the promotion and use of mediation in the Scottish planning system should highlight the importance of ensuring that engagement takes place in a way that is fully accessible and supports participation, from all groups taking into account their individual needs as well as recognising the full range and diversity of disabilities For disabled people, the Scottish Government should take steps to ensure that, where support is needed to facilitate participation in the same way as people without disabilities, that

support is provided in line with the Scottish Government's obligations under the UN Convention on the Rights of Persons with Disabilities.

**Q11. Do you have or can you direct us to any information that would assist in finalising these assessments?**

The Ministry of Justice report, *Evaluating the use of judicial mediation in Employment Tribunals*<sup>3</sup> provides some information on the impact of gender and age on interest in taking up mediation noting that in that study cases involving women claimants and people aged over 50 were more likely to be interested in pursuing mediation.

**Q12. Please give us your views on the Island Communities Impact, the Fairer Scotland Duty and Strategic Environmental Assessment screening documents and our conclusion that full assessments are not required.**

No comment.

**Q13. If you consider that full assessments are required, please suggest any information sources that could help inform these assessments?**

No comment.

**For further information, please contact:**

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<sup>3</sup> <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/evaluating-judicial-mediation-march10.pdf>