National Access Forum Scotland

Guidance Note on the Use of Mediation for Access

Guidance Note **November 2020**

NATIONAL ACCESS FORUM GUIDANCE NOTE ON THE USE OF MEDIATION FOR ACCESS

1. Purpose of Guidance

The purpose of this note is to provide guidance on the potential use of professional mediation as a tool for helping to resolve difficult access cases. It has been developed by the National Access Forum (NAF) and is intended to help access authorities (i.e. local authorities and National Park Authorities), Local Access Forums (LAFs), land owners/managers and access takers.

The NAF will keep this guidance note under review and will revise it, for example by including more illustrative examples, in the light of experience.

2. Background

The right of access to most land and inland water in Scotland was created by Part 1 of the Land Reform (Scotland) Act 2003, as amended (the 2003 Act). The Scottish Outdoor Access Code (SOAC) sets out guidance on the responsibilities of both access takers and the owners/managers of land over which there is public access. While these access rights have brought significant public benefits and are generally working well on the ground, there have inevitably been some local disputes and points of tension. Most of these problems have been successfully addressed through discussion, which has often been facilitated by access professionals (employed by the access authorities) and/or by LAFs.

Access officers and LAFs should remain the 'first port of call' for dealing with difficult access cases. However, a number of cases have gone to Court – an expensive and time-consuming business for all concerned – and there are currently some unresolved or 'stalled' cases that may never be taken to Court because of the expense.

Increasingly, professional mediation is being used as an alternative means of dispute resolution in a wide range of settings, including family relationships, employment, community disputes and housing. It can be cheaper, quicker and less stressful than Court action. Such alternative forms of dispute resolution are also being encouraged in land-related contexts, such as planning[1] and agricultural landlord/tenant relationships[2].

[1] See *Scottish Government's A Guide to the Use of Mediation in the Planning System in Scotland* at https://www.gov.scot/publications/guide-use-mediation-planning-system-scotland/

[2] See *Scottish Land Commission Tenant Farming Commissioner's A Guide to the use of Alternative Dispute Resolution in the Scottish agricultural holdings sector* at: https://www.landcommission.gov.scot/downloads/5dd8099972db9_TFC-Guide-to-ADR_Final.pdf.

The Scottish Government's draft revised guidance to access authorities on the access legislation states that they should consider the use of mediation or arbitration before instituting legal proceedings under the 2003 Act.

3. What is professional mediation in the context of access legislation?

It is important to distinguish between 'professional mediation' and other - less formal - forms of mediation. Professional mediation is undertaken by a qualified mediator, registered on the Scottish Mediation Register - it has not yet been widely used in relation to access cases. On the other hand, access professionals employed by access authorities and LAF members have successfully been using less formal forms of mediation to resolve difficult cases – some examples of this are outlined in section 10 of this note. However, despite these successes, there are still cases where these less formal approaches have not resolved the situation and where professional mediation may be helpful.

Professional mediation 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 all the parties can accept. In the context of access legislation, such an outcome needs to comply with the 2003 Act and SOAC. Professional mediators are independent and have no vested interest in the case – their role is to help the parties to identify the issues (by explaining their interests and concerns), to explore options and to think creatively about ways forward.

Discussions that take place during the course of the mediation process are confidential (unless otherwise agreed by the parties) and any notes are destroyed afterwards.

The outcome from a successful mediation may take the form of an agreed document, or an exchange of letters or emails. The agreement is confidential between the parties, although it should contain an agreement on what information can be disclosed and to whom. As transparency is an important aspect of access legislation, the aim for access cases should be to encourage the parties to reach an agreement (or at least an outline of the key points) that they are content to place in the public domain.

The following box highlights further points about what mediation is, and what it isn't:

BOX "What mediation is … and what it isn't"

What mediation is -

- a voluntary process: neither participation nor decisions are imposed. Participation demonstrates a willingness to try to resolve the issue amicably. Since mediation is a voluntary process, parties can walk away at any stage.

- a flexible process: it can be used to settle disputes in a range of situations and to develop solutions not achievable in an adversarial system. As it is less adversarial, it encourages early resolution of disagreements.

- a process that focuses on "interests" rather than "rights" and "positions". It encourages parties to think differently in order to find an acceptable outcome that they can live with.

- a process that is controlled by the parties: they are all involved in negotiating the agreed outcome.

- a less formal process than arbitration or litigation, so it is likely to be less stressful, cheaper and quicker. If agreement cannot be reached the parties are free to follow other processes, such as arbitration or Court action. Even where it does not resolve the problem, mediation can provide a step forward, by establishing dialogue between parties and clarifying/narrowing down the issues under dispute.

- a confidential process (unless otherwise agreed by the parties). The confidentiality of the process means that discussions can take place "without prejudice" so that details are not referred to if the case subsequently goes to Court.

What mediation is not –

- it is not a form of court. Mediators do not take sides or make judgements - their role is to facilitate the process.

- it is not the same as arbitration – Section 4 of this Note explains the difference.

- it is not legally-binding. The aim is to identify an outcome that parties are willing to accept and implement on a voluntary basis. However, in some cases, parties may also wish subsequently to enter into legally-binding agreements relating to certain aspects of the outcome; such an agreement would be between the parties in dispute but would not be binding on third parties.

- it does not establish case law. However, where the outcome is in the public domain there is the potential for it to be used to inform discussions in other comparable cases.

- it is not a way around the legislation on access rights. It cannot over-ride the 2003 Act or the SOAC. The outcome should be compliant with the legislation and the Code.

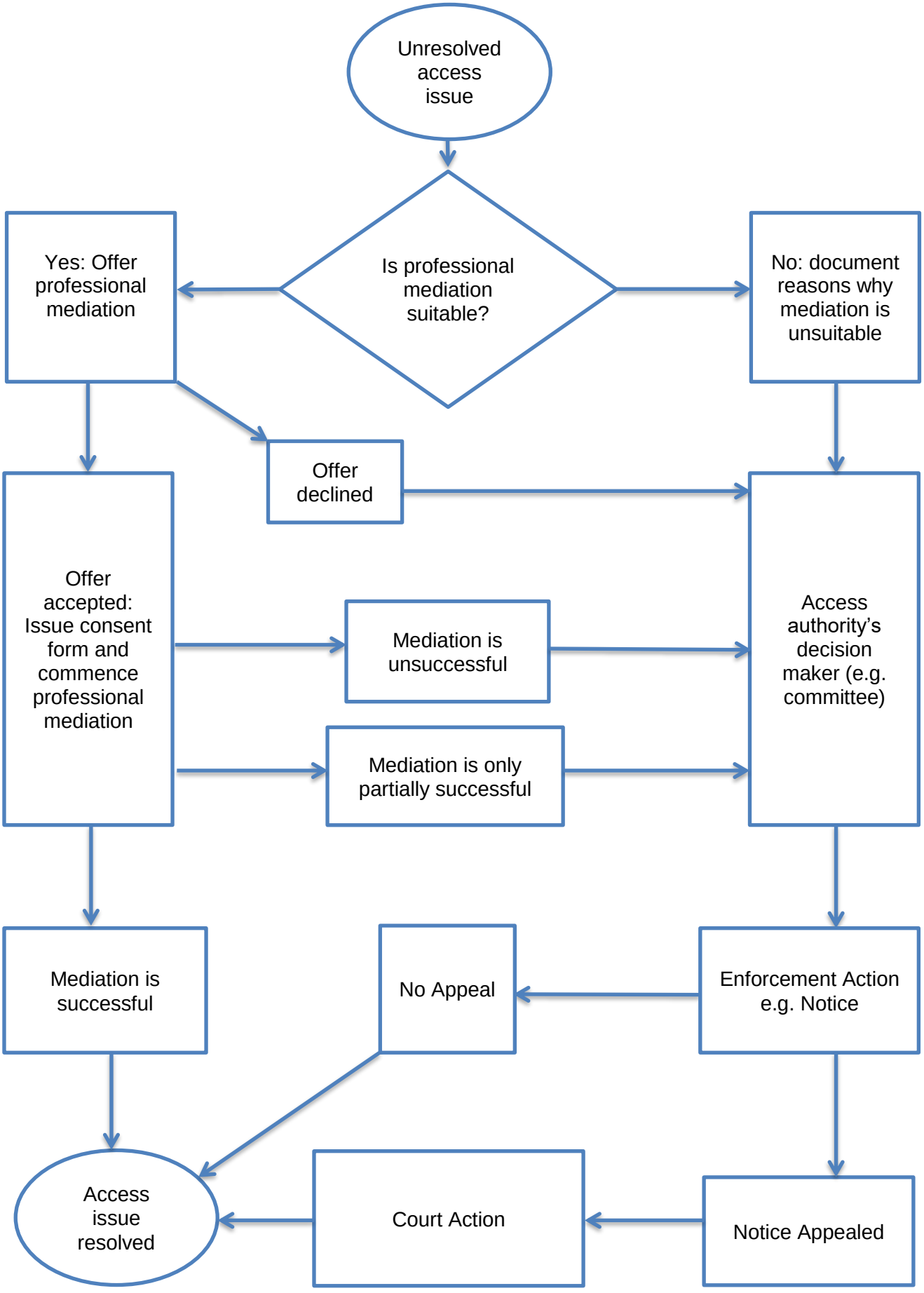
4. In what ways is arbitration different from mediation?

The process of arbitration is often referred to as a private version of going to Court where the judicial outcome of a dispute is determined by an individual third party – the arbitrator. The arbitrator will make a firm decision on a dispute based on the evidence provided by the parties, which the parties accept to be legally binding. This means that subsequent Court action on the merits of the decision cannot be taken, and there are limited options to appeal the decision on procedural grounds. Like mediation, arbitration is a non-court, voluntary process. The final decision by the arbitrator remains private and confidential, unless both parties agree for the decision to be made public.

The nature of arbitration means that the outcome is not normally in the public domain, and it is not necessarily suited to a multiplicity of parties. Given the desire for transparency and better understanding of access law in practice, as well as the reality that access cases may involve various interested parties, arbitration may therefore be less appropriate than mediation for access cases.

5. The place of professional mediation in resolving difficult access cases

Although internal procedures for handling access cases vary between access authorities, such cases are typically referred to the access officer in the first instance. The access officer can then decide what further investigations are needed and can refer it to the LAF for advice. The LAF may initiate informal discussions with a view to seeking a resolution of the matter. This is often successful; however, professional mediation may be a useful tool when the matter is not resolved by the access officer and/or the LAF. A suggested due process for handling these “unresolved” cases by access authorities is shown in the following flowchart:


Unresolved access issue
Is professional mediation suitable?
Yes: Offer professional mediation
No: document reasons why mediation is unsuitable
Offer declined
Offer accepted: Issue consent form and commence professional mediation
Mediation is unsuccessful
Mediation is only partially successful
Access authority's decision maker (e.g. committee)
Mediation is successful
No Appeal
Enforcement Action e.g. Notice
Access issue resolved
Court Action
Notice Appealed

6. Potential benefits of mediation

Although professional mediation may not always be possible or appropriate (for example where the parties are unwilling to participate constructively in the process), there is potential for professional mediation to assist in dealing with difficult access cases. For example, there is a potential role for professional mediation in tackling those issues which are seemingly intractable and which may have been rumbling on for a number of years, potentially causing a high level of work for the access authority and concern in the local community – or even further afield in a particular user community.

While there is a financial cost to undertaking a process of professional mediation (see Section 7), it is likely to be much cheaper than going to Court to resolve the issue. Professional mediation can also save access authorities the staff-time costs involved in handling long-running disputes, including time spent on correspondence and meetings, and it may save other costs such as the investigation of solutions through seeking Counsel's opinion.

Even if the mediation process is ultimately unsuccessful, for example if the parties refuse to engage properly or have intransigent or unreasonable views, then it is likely that the process will have narrowed down the key issues. Although the mediation process will have incurred costs, this narrowing down of key issues could enable any subsequent Court case to be more focussed in its scope and so potentially save money for the parties. If one party refuses to take part in the mediation, the fact that the other party has tried to resolve the issue this way may be an advantage for them if the case goes to Court as they will have demonstrated an attempt to take a reasonable approach to finding a solution - while refusal to mediate may not impact upon the substance of a court decision (which would be based on the merits of the case) a Court may take this into account e.g. for assigning the costs associated with a case.

Another potential benefit from professional mediation is that simply providing the opportunity for parties to give their side of the issue can help to get movement and improve relationships on all sides by building understanding of each other's interests.

7. Potential costs and limitations of professional mediation

Costs of professional mediation will of course vary according to such factors as the complexity of the case. However, estimated costs for a case requiring 2-3 days' work are likely to be in the order of £2,000 - £3,000, including venue costs etc., based on a mediator charging around £100 per hour for their services. This is a substantial amount of money, but in comparison with a legal case (which could cost perhaps £10,000 - £20,000 for the winning party and possibly around £100,000 - £200,000 for the losing

side) it is likely to be a much more acceptable cost. It could also be compared to the cost of seeking Counsel's opinion, which may be in the region of £2,000.

There should be agreement between the parties before any mediation process starts as to how the costs will be shared. It is envisaged that in most cases one of the parties involved in any mediation would be an access authority, while the other party could be a landowner/landowning body or an individual access taker/user group representative body. However, it is possible that either a user group body or landowner could take the initiative in instigating mediation. Assuming that the access authority also became involved, there would then be three parties engaging in the mediation. Multi-party mediations may be more complex processes than bilateral mediations, but may be essential in an access context.

The agreed outcome from a successful mediation should be compliant with the 2003 Act and SOAC. Ideally the outcome would be a broad-based solution which is unlikely to be challenged, rather than a solution which simply resolves the issue for one individual. (For example, if a horse-rider has complained about a locked gate which stops them riding a local track, then a solution which simply gives that rider the key to the padlock is not going to resolve the issue for any other rider, cyclist, walker, etc. who uses that route and it is likely that the issue will return in future when other users make a complaint.) However, a limited compromise may be helpful in paving the way for further discussions that eventually lead to a broader-based solution.

8. Initiating professional mediation

As a first stage, parties considering the possibility of professional mediation may wish to approach Scottish Mediation (https://www.scottishmediation.org.uk) for advice on (i) the suitability of a case for mediation and (ii) securing the services of a professional mediator. Scottish Mediation has over 70 accredited professional mediators, who are fairly well distributed throughout Scotland, and are generally willing to travel if necessary. There is a list of the current accredited professional mediators at; https://www.scottishmediation.org.uk/find-a-mediator/.

In advance of the mediation process it will be necessary for the professional mediator to discuss and agree with the parties the "ground rules" for the process, including such matters as:

- Venue. Usually, mediation takes place in a neutral venue where there are facilities for parties to meet both privately and collectively.

- Participation. Parties should be clear about who will be present, including any professional advisers. It is important that those present at the mediation have authority to reach agreement, or at least have quick access to those with such authority.

- Confidentiality of the process – see earlier comment (in Section 3) about keeping details of mediation confidential while aiming to agree an outcome that can be placed in the public domain.

- Timing. Dates will need to be set aside and the professional mediator will advise on (for example) the desirability of allocating consecutive days and the possible need for continuing sessions into the evening in order to maintain momentum.

The professional mediator will also provide advice to the parties on preparing for the meetings.

Before the commencement of the mediation process, the parties will need to sign a "consent to mediation" (see example at Annex) which should include their agreement on cost allocation.

9. Building skills for mediation in access cases

As explained above, professional mediation is not the only approach. One of the best opportunities for developing mediation as a mechanism for resolving access issues in Scotland is to enhance the skills of access officers employed by access authorities and to upskill LAF members so that they can better assist with early stage informal mediation in localised access issues.

Some local authorities have in-house mediation services that may be willing to provide the basic skills in conflict resolution. In addition, Scottish Mediation can provide a short conflict resolution workshop for groups of up to 16 people, for a nominal fee of around £300 to £500. This explores why conflict escalates and provides tips and tools to avoid this and resolve conflict locally. Because it is based on mediation techniques the workshop also improves understanding of how professional mediation can help.

Where professional mediators are invited to mediate in access cases it is important that they should have sufficient knowledge of the 2003 Act, SOAC and other relevant access legislation to ensure that the outcome is compliant. There are various ways of ensuring that the necessary 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 and these individuals could then serve as co-mediators in access cases until they have gained sufficient experience to achieve full accreditation in due course.

10. Illustrative examples

When the NAF consulted stakeholders, in summer 2019, about the usefulness of preparing this guidance note it requested short illustrative examples showing how mediation might help in different types of case. The responses contained a number of useful examples, including the use of informal mediation to address rafting/fishing disputes (see Example 1, below); the use of facilitated mediation to try to address conflict between wildfowlers and access takers (see Example 2); the use of community mediation, for example over 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. It was noted that mediation has helped to resolve some seemingly intractable cases, by helping to improve relationships, identifying mutually agreed outcomes and addressing the strong emotions that disputes over access can generate.

Example 1: Angling Owners and Rafting Companies – River Tay

This study concerns a dispute between two parties over a long period within the Local Access Authority of Perth and Kinross, which was mediated by the LAF Chair. It is important to stress that this was a disagreement between two groups of businesses, not individual rafters or anglers, and involved an attempt to agree a voluntary restriction of days of rafting each week on the River Tay. There was no problem during this time between recreational canoeists/kayakers and recreational anglers. One party was a group of riparian owners, and the other a group of rafting companies. The LAF eventually set up a Water Sub-Committee of four members.

There were three phases to this story.

A new company came into rafting on the Tay, and broke an informal agreement over a voluntary restriction of business, this being for either two or three days a week leaving fishing clear. The issues at stake for this period was over a balance of six days a week, and activity – Sunday was not contentious, as no salmon angling takes place on a Sunday. The LAF Chair stepped in to try and bring peace, and in a first year a Framework Agreement went through several different iterations, with both parties very actively involved. There were many e-mails, and meetings, with behaviour, schedules and numbers of rafting clients all discussed.

After a relatively peaceful period, one of the two major landowners suggested formal bye-laws to control rafting, as they were not totally satisfied. The LAF examined the idea and refused to back this, as did the Local Authority. The agreement was updated, and the days were changed somewhat.

Sometime after this, a single landowner decided on Court action with regard to introducing bye-laws, with the other parties not agreeing to this. Many letters and documents emanated in this period, and the LAF Chair received a Precognition

request. The Court action was eventually settled without a hearing. Both rafting and angling still take place peacefully.

Example 2: Facilitated mediation over wildfowling conflict on Findhorn Bay LNR

This facilitated mediation over wildfowling conflict on Findhorn Bay Local Nature Reserve took place over 2018 and 2019. The mediator was paid by Moray Council and SNH and held 5-6 sessions with multiple (up to 8) stakeholder groups. While it was not an access issue there were areas of overlap since it related to local people wishing to reduce wildfowling pressure and some local and visiting wildfowlers not wishing any restrictions placed on their public right to recreation on the Scottish foreshore. While it was a slow start, after a few meetings, common ground was established between the groups who attended most of the meetings even though they began by being at opposite ends of the spectrum. However, this case also highlighted the need for stakeholder buy-in as one or two stakeholders (who had not attended all of the meetings) raised fundamental questions towards the end of the process.

ANNEX

Consent to mediation

I/We, agree to take part in mediation in an attempt to resolve a dispute with

_____ *(**please insert name(s) of other party/parties**).*

I/We understand that no-one can be forced to mediate and that any participant can choose to end the mediation at any time.

I/we agree that the mediation, and all communications prior to and during the mediation, should remain confidential and I/we will not disclose any of this information to anyone outside of the mediation, unless previously agreed by all participants.

I/We have agreed that the mediation will take place at a time and place to be agreed between myself/ourselves, the other party and the mediator appointed by Scottish Mediation. I/We understand that this may take place by phone and/or online, if this is considered the most suitable method of carrying out the mediation.

I/We understand that the mediation will be charged at a maximum rate of £XX per hour (plus VAT when chargeable), to be shared between the parties to the mediation, unless otherwise agreed by all parties. This fee is payable regardless of the outcome of the mediation. I/we understand that reasonable travel expenses may be charged and that this should be agreed in advance between the mediator and all parties.

I/We understand that a report of the outcome of the mediation can be prepared if this is something the participants would like. This report should make clear what information is confidential to the parties, and what information can be disclosed (and to whom).

I/We understand that no personal details that can identify participants will be shared outside Scottish Mediation without consent. Scottish Mediation complies with the Data Protection Act 1998.

Scottish Mediation evaluates mediation cases and will ask participants to fill in a short feedback questionnaire. I/we agree to complete and return feedback at the end of the mediation when asked for this.

If I/we have a complaint about the mediation itself, I/we will raise this with Scottish Mediation at the address below.

Please complete the table below to consent to mediation:

Full Name	Signature	Date

Please give us an up to date contact number:

_____