

Rùnaire a' Chaibineit airson Cùisean Dùthchail, Biadh agus an Àrainneachd  
Cabinet Secretary for Rural Affairs, Food and the Environment  
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Rob Gibson MSP  
Convener  
Rural Affairs, Climate Change and Environment Committee  
Room T3.40  
Scottish Parliament  
Edinburgh  
EH99 1SP



1 September 2015

Dear Rob

Many thanks for your letter of 12 August requesting an update on how the planned Mediation is progressing.

Reflecting that in some cases relationships between landlords and tenants had been damaged in the period since 2003 in consequence of the defect in section 72 of the Agricultural Holdings (Scotland) Act 2003, the mediation process as proposed while the Remedial Order was before the Parliament and outlined in my letter of 5 December 2014 was designed to help address these issues. Mediation was intended to encourage and help find ways to secure the restoration of working relationships and find solutions supportive of the viability of the affected holdings. I can advise that the offer of mediation has been taken up by the Tenant and the Landlord associated with one farm.

The appointment of a mediator required to go through a procurement process which delayed the start of discussions with the successful bidder and in the discussions that followed (involving representatives of both landlords and tenants interests) it has proved more difficult than had been hoped to secure a common understanding of how parties would deal with issues of compensation if either or both parties felt that they had a claim against the Government.

In terms of compensation (whether in the context of mediation or otherwise), members will recall at the time of the passage of the Order (and still at 5 December) the Government could not comment on or commit to the paying of compensation in individual cases as the basis for such claims had not been made known to it. We do not exclude making compensation payments but that clearly only applies where a legal liability could be shown. We cannot pay compensation in settlement of a claim which has no legal or factual basis and accordingly is not due.



In order to try to break the log jam of engaging in a process where compensation was being seen as an essential component to its success but before information had been provided to allow an assessment of whether in principle a legal liability arose, I wrote on 5 December (as enclosed) proposing a two stage process with stage one focusing on the sharing of information and clarifying facts and stage 2 offering the possibility of a negotiated solution if appropriate.

A key requirement from SG was that any party wishing to engage in mediation was that, where at all possible, they should make it clear whether they wished to claim against SG before entering into mediation and for them to make clear in advance the legal basis of any such claim. This process was designed to allow an assessment of such a claim with a view to ensuring that, in sharing information at stage 1, it would be clear whether or not it was accepted that in principle a liability was accepted. If so, the mediation could proceed on that basis and if not, parties could proceed with mediation in the full understanding that compensation from the Government could not be discussed. In light of the concerns set out above, we believed that clarity on this point was essential in order to be fair to all parties (and avoid raising false expectations).

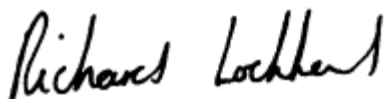
In practice, the proposed procedure has not materialised in the way envisaged in that letter. However, as of 17 August 2015 the Government has now received confirmation that both the interested landlord and tenant who had expressed an interest in mediating wish to make a claim, setting out the basis on which they consider that the Government has a legal liability.

For completeness, I should indicate that the position of the tenant concerned has been known to the SG since March 2015 when they intimated their position by raising legal proceedings in the Court of Session against the SG. Since those proceedings remain live, I was unable to comment further in light of the sub judice rule in standing orders.

Subject to those constraints, I can confirm that, the pre-conditions as set out in my letter of 5 December having been met, I intend to proceed to consider these issues with a view to proceeding along with the appointed mediator as quickly as is practicable.

I appreciate the frustrations that have arisen here in trying to agree the essential ground rules for mediation and then in fully meeting of the conditions necessary to facilitate engagement (where parties wish to pursue compensation as part of the solution).

Yours sincerely



**RICHARD LOCHHEAD**

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In 2014 Scotland Welcomes the World



5<sup>th</sup> December 2014

Dear Rob,

I am writing to update the Committee on progress with the mediation process which the Government has offered to agricultural tenants and landlords affected by the consequences of the Salvesen vs Riddell case.

As you know, the Remedial Order designed to address the ruling of the Supreme Court in this case was passed by Parliament earlier this year. In addition, in recognition of the fact that some tenants and landlords, albeit a small number, could find themselves in difficult circumstances following the ruling, the Scottish Government undertook to arrange for and fund independent mediation for those who wished to make use of it.

We have since then appointed an independent mediation company, Core Solutions, to run the mediation process. Tenants and landlords have been invited to express interest in taking part in mediation, and a number have done so. We have been working with Core Solutions on the form that the mediation, and Government's participation in it, should best take. Unfortunately this has taken longer than we anticipated.

The key issue has been the interaction between the mediation process and any claims for compensation against the Government, bearing in mind the financial and other rules with which Scottish Government must comply in order to assess whether a legal liability might arise. As I'm sure the Committee will appreciate, the Government must reserve the right to carry out its own assessment processes on any compensation claims, so that we can take a view of the risks we might face on the question of liability in each individual case – without which we would not be able to make any compensation payments in compliance with those rules.

We have, with the mediator and with representatives of tenants and landlords, looked at how this imperative can best be accommodated. The mediator had already recommended a two-stage mediation process, of which the first stage would be largely an exchange of information and assessment of how to go forward. I have asked the mediator to indicate to tenants and landlords the following procedure.



In those cases where both landlords and tenants agree to mediation, they and the Scottish Government will undertake Stage 1 discussions. If the landlord, the tenant, or both consider that they might have a compensation claim against the Scottish Government then they should communicate this (along with the legal and factual basis for the claim) before, or at the very latest during, these Stage 1 talks (unless, of course, any such claim only becomes apparent at a later stage). The Scottish Government will then undertake to carry out its own private assessment of the claim(s) before it can return to the mediation process.

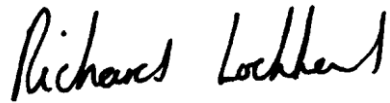
Stage 2 will then follow, which will be the stage of the mediation to seek a mutually agreed outcome between all concerned. Depending on the results of the Government's assessment of the compensation claim(s), the Stage 2 outcome could include a compensation payment from the Government. Whether or not it does, however, will be entirely dependent on the Government's analysis of risk on the question of liability by that point following our assessment, and on the details of each individual case.

We very much hope that all affected tenants and landlords will take up the opportunity for mediation. If any choose not to do so, but consider they have a case for compensation from the Scottish Government, they can of course pursue a claim in the normal way.

I am aware that stakeholders are keen for the mediation process to start. I have asked the mediator to contact landlords and tenants to set out the procedure above, invite them to confirm their wish to take part in mediation, and ask them to communicate to the Scottish Government any compensation claims as quickly as possible. For our part, in order that the process can now take place swiftly, the Government will undertake to respond quickly to all such claims. We will aim in the first instance to give a response, wherever possible, within 3 weeks of receipt, although this will be subject to whether, for example, expert advice or additional evidencing of claims is needed. The submission of such a claim and the response preferably should interact with Stage 1 as described above to make sure that all relevant issues are being considered.

We have also been discussing with stakeholders the issue of the potential cost of mediation for tenants and landlords. We are aware that some people have already expended large amounts of money on legal costs even aside from the mediation process, and it has been suggested to us that the amount we have so far offered to pay towards the legal costs of mediation may not be sufficient to cover the full cost. We are keen that cost should not be a disincentive to participation in mediation, and I have therefore asked our mediator to inform landlords and tenants that the Government is prepared to consider paying for each landlord or tenant up to £2.5k for stage 1 and £3k for stage 2 towards the legal and other expert costs associated with the mediation process, subject to a procedure to confirm that the costs are reasonable. Under that procedure the Government will reserve the right to use an independent third party to assess the reasonableness of such costs. The costs in question must be limited to those associated with the mediation process itself and not, for example, include costs incurred in preparing a compensation claim against the Government – although of course if a claim against the Government were successful then the settlement of it could potentially include payment of costs by the Government. If any landlord or tenant feels that this ceiling will not cover their entire reasonable costs associated with mediation, then they can ask the Government to consider whether an exception is justified.

I hope this update is helpful for the Committee, and that we can now move quickly to helping those involved find satisfactory resolutions in these very difficult circumstances.



**RICHARD LOCHHEAD**