

National Access Forum – May 2018

SOAR discussion paper on mediation – 2018

Purpose

The attached paper has been produced by SOAR, the 'Scottish Outdoor Recreation Alliance' which is an informal grouping of outdoor recreational bodies. The paper is for information and discussion.

Action

Members are invited to note the contents of the paper and the proposals by SOAR to use mediation as a method for resolving some of the stalled access cases in Scotland. Members are invited to suggest worked examples where mediation has been used successfully or potential case studies for SOAR to take forward.

SORA discussion paper on mediation for NAF

The Scottish Outdoor Recreation Alliance (SORA) is an informal grouping of outdoor recreation bodies working together to pursue the following objectives:

- *a forum for structured discussion and networking between organisations representing outdoor recreation interests.*
- *seeking to positively influence whoever necessary at national level to enable individuals to exercise their legal rights of access.*
- *identifying existing and potential issues or concerns of mutual interest.*
- *developing, where appropriate, a cohesive approach or response to issues, opportunities and consultations of mutual interest/concern.*
- *strengthening and providing a stronger united voice for organisations representing outdoor recreation.*

SORA members are British Horse Society Scotland, Cycling UK Scotland, Developing Mountain Biking in Scotland, Mountaineering Scotland, Ramblers Scotland, Scottish Canoe Association, Scottish Sports Association and ScotWays.

Across Scotland, there are many stalled access cases, unresolved (or unresolvable) by Access Officers / LAFs which are not progressing to the Sheriff Court for a variety of reasons. Notwithstanding the importance of case law, there are drawbacks to court cases, e.g. expense, time, entrenchment of position, inherently adversarial, unpredictability. A concern has been raised that this non-resolution of access cases thwarts the intentions of the LR(S)A and emboldens others in their own attempts to restrict public access rights. The gap between LAF discussions and/or Access Officer / Council action and subsequent recourse to the court system is perceived as too large.

As a result of SORA's shared concern, it was agreed that Eddie Palmer (*Scottish Canoe Association*) and Eleisha Fahy (*ScotWays*) would explore what options might be available to fill that gap. Discussions have been held with solicitors and others working in dispute resolution. At present, mediation and arbitration have both been considered as an alternative to going to court.

WHAT IS MEDIATION?

- A voluntary process; neither participation nor decision is imposed.
- Involves an independent third party, the mediator.
- The mediator helps parties to work out what their issues and options are, and then use those options to work out an agreement.
- Flexible, so can be used to settle disputes in a range of situations and to develop solutions not achievable in an adversarial system.
- As less adversarial, encourages early resolution of disagreement.
- Mediators do not take sides or make judgements - their role is to concentrate on the process.
- Demonstrates intent to resolve the issue amicably.
- Parties in mediation are in control of the process - all parties are involved in the negotiated and agreed outcome.
- Less formal than arbitration or litigation, so likely less stressful and usually cheaper.
- Resolution of dispute can be a quicker process

- The process is confidential to the parties involved unless otherwise agreed.
- If agreement cannot be reached the parties are free to follow other processes, such as arbitration or court action.

Arbitration

Although arbitration has also been explored by us as an option, it currently appears less attractive than both mediation and court. The decision is legally binding and there is only a limited right of appeal. Additionally, the decision is not publicised, so cannot be used as a precedent or even as a guide for similar cases.

USE OF MEDIATION

We acknowledge the important statutory role of LAFs advising in access disputes. Some LAFs do informally mediate and this is of great value, but training would be required to extend informal mediation skills to all LAFs - we suggest that the upskilling of LAFs is a potential future discussion paper. However, the subject of this paper is not such informal mediation, but is instead raising the possibility of using the formal mediation process to solve stalled access issues.

If formal mediation is a valid approach for some public access cases, then mediation training and/or education within the outdoor access sector would be worthwhile in raising its profile. Access Officers, LAFs, access authority legal teams, recreational access bodies and land managers could all benefit from raised awareness of formal mediation as an option. *Scottish Mediation* informs us that Community Mediators have already had quite a few referrals from Ranger services regarding responsible use of the countryside and access routes under the Scottish Outdoor Access Code. They have encountered misunderstanding around the meaning of the Code which has exacerbated conflict. Unfortunately, we do not yet have case studies, but an example given was a recent case between farmers and a local riding establishment where a mediation meeting helped both parties reach a practical working agreement going forward.

SORA notes that mediation does not give us case law. Although case law is invaluable in teasing out the intricacies and developing understanding of the LR(S)A, it is arguably as important to ensure that access issues are resolved both effectively and timeously in order that the intentions of Part 1 of the LR(S)A are not thwarted.

WHAT NEXT?

To advance the case for formal mediation as a potential solution for some access problems, SORA requires either worked examples where formal mediation has already been used successfully in practise, or potential case studies to take forward to test the approach. We envisage the potential for a pilot mediation project. If successful, we suggest that formal mediation as an approach could be added to SNH guidance in due course.

SORA would very much welcome input from NAF with views regarding the potential for formal mediation to successfully address public access issues. We look forward to the discussion.

Eleisha Fahy (*ScotWays*) and Eddie Palmer (*Scottish Canoe Association*)
on behalf of SORA, 4th May 2018