

NATIONAL ACCESS FORUM – MAY 2019

PAPER ON MEDIATION

Purpose

1. To seek NAF agreement to a recommendation by the mediation sub-group that it should prepare a short consultation paper requesting the views of LAs/NPAs, LAFs and NAF members (full & corresponding) on the potential for using mediation in dealing with difficult access cases.

Background

2. At its January 2019 meeting, NAF discussed the work that SORA had been undertaking to examine the potential for mediation in long standing access disputes. It was agreed that a sub-group would consider this matter further and report back to the May meeting. A note of this sub-group meeting is attached as an Annex 1 to this paper (together with, for ease of reference, the papers on this subject that went to the January meeting in Annex 2).

Proposed next steps

3. Subject to NAF agreement, the sub-group will meet again (probably on 26 or 27 June) to develop a consultation paper on the potential for using mediation in dealing with difficult access cases. It is likely that this consultation paper would:

- (a) explain that the potential for mediation is being explored to try to avoid the high-costs of legal action;
- (b) provide background information about current use of mediation and relevant web-links (including, for example, Scottish Mediation and SLC experience with tenant farming cases);
- (c) invite views on (e.g.) the following questions:
 - Do you think it would be useful for NAF to prepare a guidance note on this subject?
 - Do you have any experience of using mediation, and if so would you be willing to share information about any lessons from this for helping to resolve access disputes?
 - What are the potential difficulties (such as funding) and how might these be overcome?

May 2019

ANNEX 1: NOTE OF NAF MEDIATION SUB-GROUP MEETING (24th APRIL 2019)

Chair: Eddie Palmer (SCA)

Sub-group members present: David Henderson (NAF Chair), Karen Ramoo (SLE), Helen Todd (Ramblers Scotland), Eleisha Fahy (ScotWays) + Mark Wrightham (SNH) via phone link

Other members of sub-group: Jamie Smart (NFUS); Douglas Wright (ScotWays NAF rep) has clarified that Eleisha is instead ScotWays' rep on mediation sub-group.

1. The groundwork to date (how we got here)

Background to SORA's work on mediation outlined. Refer also to the SORA mediation update for January 2019's NAF meeting and the *What Mediation Is And Isn't* document.

2. Recent developments

- **SNH's meeting with Scottish Land Commission:** SLC's trial testing the effectiveness of mediation had been very positive, all their cases having been successful. Cost was £2.5k per case. Now waiting on production of the report.
- Advice re mediation is hanging on the forthcoming statutory guidance, but it is not necessary to wait as NAF could take forward the approach in the interim.
- Access cases may be different (more difficult than?) to the SLC examples as more than two protagonists. Would one be the local authority on behalf of the general public?
- Hamish Trench (SLC) had previously offered support in kind via sharing their mediation trial documentation/research. Their pilot was reportedly £10k in total, presumably paid for out of their own budget.
- Scottish Mediation (SM) had recently received funding for a housing related mediation project. It appears funding for mediation initiatives may be available.

3. Perspectives/questions from the working group participants

- Working assumption is that cases would generally have the access authority as a party, on behalf of the general public. Mediation is cheaper than taking cases to court. However, mediation may be between different types of access taker e.g. canoeists and riparian access.
- Query whether there is an appetite for mediation from access officers?
- Local authorities use mediation for neighbour disputes and housing issues, but we don't know the numbers using it or which authorities. There are also examples of mediation being used in planning decisions, notably to involve communities. SLC's reportedly successful tenant farming trial demonstrates that mediation has been applied in the land-use sector.
- Value of site visits and informal mediation noted. Example given of use of informal mediation by Perth & Kinross LAF. Suggested expansion of working group to include NAF's Access Officer and LAF representatives.

- A Fife courtcase developed a pragmatic access solution, although arguably non LR(S)A compliant, a seemingly accepted interpretation. Such examples could be useful, even if themselves not mediation as such.
- There is a risk of a mediated decision being non-Code compliant. Mediation and code-compliance is a red-line, so not necessarily a problem. There are issues that exist already with non-code compliant solutions.
- Where can mediators come from? Scottish Mediation (SM) is a potential source. The background of mediators varies, although some are trained lawyers.

4. What next? Plans over next 3-6 months

- How much work do we need to do on process? We have a What mediation is/isn't document, we have SM support and the upcoming SLC report. What else can we do to promote it?
- Issue of funding for mediation flagged. How much do we do before spending money? Should there be a NAF consultation to the access authorities to get momentum and seek suggestions?
- Do we need to develop guidance on mediation? Or undertake initial work as a prelude to possible guidance? Regarding background, sharing links would be helpful; looking for potential examples (or cases to take forward); what obstacles are there to overcome?
- Previous attempts to elicit responses on mediation from access authorities have had only piecemeal success, so a formal NAF approach would be welcomed. Agreed it should be worthwhile to collect access authority views on the potential for mediation. Suggestion that consultation also broadened out to all NAF participants and corresponding members.
- Any draft consultation paper could perhaps be checked by our SM contact to ensure appropriately "mediation compliant".
- Note of this meeting to be prepared for May 2019's NAF meeting. Seek also NAF agreement re the proposed consultation.
- SNH agrees to help with proposed consultation. Subject to NAF agreement, draft consultation paper at next (wider) working group meeting. Consultation to be issued as soon as possible after this - 2 month response period, so can be considered by 20/09/2019.
- Upcoming SOAN event "*Upholding Access Rights – Recent Land Reform case law: developments and updates*" on 3rd June includes an item on mediation.

Next mediation working group meeting: Wednesday 26th June 2019, 2-4pm

ANNEX 2: SORA mediation update for NAF – Jan 2019

At the NAF meeting in May 2018, SORA presented a paper seeking views, worked examples and potential case studies. We again thank the NAF members for their helpful contributions. Since that time, we have been continuing to explore the possibilities of formal mediation, so this paper is by way of an update on our (slow, but hopefully steady) progress.

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We again met with **Scottish Mediation** to seek clarification regarding issues arising, in particular the questions raised at the NAF, but also to seek input as to how to take mediation forward as an approach.

We have subsequently produced a first draft of a one-page “*what formal mediation is and isn’t*” document (Appendix 1) which we hope addresses many of the queries raised at last May’s NAF meeting.

Karen Ramoo (**Scottish Land & Estates**) expressed interest in our mediation work at an early stage, so we met with her and she has subsequently confirmed that SLE is supportive of the concept of formal mediation as an approach. We also discussed the potential for a wider working group exploring the case for formal mediation in order to ensure more interested parties are engaged and represented. We are now in the process of approaching other organisations to gauge their interest in being more closely involved.

In light of the Land Reform Review Group’s Final Report recommendation of updated guidance, specifically referring to mediation and arbitration, we contacted Malcolm Duce (**Scottish Government**) in November. This updated statutory Guidance to access authorities required by the 2016 amendment to LR(S)A is still being developed. A draft will go out to consultees in due course, but Malcolm was very clear that the work we are doing on formal mediation is very much welcomed as it will inform the development of the guidance.

In late November, we met with Hamish Trench (**Scottish Land Commission**). Hamish agrees there is potentially scope for much greater use of mediation in relation to wider land use issues. The Commission are currently undertaking a pilot study to trial the use of formal mediation in relation to agricultural holdings cases and the feedback so far is positive – including the apparent resolution of a dispute of many years duration. They will be formally reporting in due course. Their pilot is a £10,000 project self-funded by the Commission as part of their Tenant Farming work. Although the lead for outdoor access guidance lies with SNH, we have been invited to come back to the Commission for their further input as some of their own work will be directly applicable to our own endeavours.

We are still seeking input from access authorities, SNH and others; this work is ongoing. However, it is important to note that many of the people and organisations we have spoken with are of the view that SNH need to again be bringing the Code to the attention of the public.

Suggested next steps

In our SORA mediation paper to the NAF last May, we stated that in order to advance the case for formal mediation as a potential solution for some access

problems, we require either worked examples where formal mediation has already been used successfully in practice, or potential case studies to take forward to test the approach. Unfortunately, we have as yet not located any successful worked examples. However, a number of possible case studies have been suggested, so there is the potential for just the type of pilot mediation project SLC are conducting in their own current area of interest. To be clear, we are not proposing any such pilot should be a stand-alone SORA project - if formal mediation in access disputes is to achieve wider acceptance then it needs “buy-in” from all potential sectors, be they representatives of landowners, land managers, the various users of recreational access and access authorities. **We seek the NAF’s support for a pilot mediation study.**

A further step is generally raising the profile and understanding of formal mediation as a useful process. At this stage, we suggest a training session on the use of formal mediation for NAF representatives and Access Officers. **We seek expressions of interest from NAF attendees.**

Eleisha Fahy (ScotWays) and Eddie Palmer (Scottish Canoe Association)
on behalf of SORA, 10th January 2019

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.

Formal mediation – what it is and what it isn't

What it is

- 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.
- 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.
- Mediation might be a step forward, e.g. 'the parties are talking', but not resolve the whole problem.

What it isn't

- Mediation is not about 'rights', but 'interests'. Rights are a separate system, involving often 'guilty parties'.
- It is not a form of court. Mediators do not take sides or make judgements - their role is to concentrate on the process.
- Mediation is not binding on the general public, but as many access cases have at their heart a neighbour or neighbourhood dispute, a mediated agreement may diffuse the situation to such an extent the access issue is resolved as a result.
- It does not establish case law.
- It is not arbitration
- It would appear possible for a mediated agreement to be non-LR(S)A compliant. If there is dispute about the LR(S)A compliance of the mediated agreement there remains recourse to court (or further mediation), however mediating parties can make their own agreement that is not binding upon anyone else.