

National Rifle Association

Dispute Resolution Policy

Adopted by Council on 5 December 2020

1 Background

- 1.1 This policy is intended to provide guidance to assist Trustees in resolving disputes. It draws on the experience of recent disputes and will be updated to reflect future experiences.
- 1.2 Trustees must also refer to Charity Commission Guidance CC38 (*Charities and litigation: a guide for trustees*).

2 Dispute Resolution

- 2.1 The first step in resolving a dispute is dialogue. This should be approached in a constructive fashion, with an open mind and a genuine intention to find a resolution. In many cases disputes can, and are, resolved by dialogue. Sadly, that is not always possible if Trustees are to act in the best interests of the charity. It may be in the best interest of the NRA to engage in a formal dispute resolution process.
- 2.2 If there is a dispute about how the charity is run, an organisation like the Advisory Conciliation and Arbitration Service ("ACAS") could be contacted for assistance. Usually the Charity Commission does not get involved in internal disputes unless particular circumstances apply as described in the Schedule to this policy. This policy focuses on methods for resolving disputes with third parties, rather than disputes as to how the charity is run.
- 2.3 There are four types of dispute resolution process in which the NRA may become involved:
 - (a) Mediation – This is a voluntary process in which the parties negotiate a settlement of their dispute through the services of a mediator who helps guide the negotiations. The mediator has no power to impose any decision on the parties;
 - (b) Arbitration – This is similar to a court process but the matter is referred to an arbitrator rather than a judge. The functions of the arbitrator and the judge are similar in that both of them deliver a legally binding decision but there are a number of procedural differences;
 - (c) Expert Determination – in this process the parties agree to put their case to an expert who renders a decision that is binding on the parties but is not

directly enforceable in the way as a court order or arbitral decision. It is useful for disputes where expert knowledge on a technical area (rather than the law) is important as the expert will usually not be legally-qualified; and

- (d) Litigation – this involves a court process in which both parties put their case before a judge who then makes a binding decision.

- 2.4 In each case Trustees must obtain legal advice on the merits of the NRA’s case to inform the negotiation process or to justify the decision to commence or to continue to defence dispute resolution proceedings. That legal advice is confidential and must not be disclosed to anyone other than the Trustees without very careful thought and advice on the consequences of doing so.

3 Mediation

- 3.1 Mediation is encouraged by the Courts and by the Charity Commission as a consensual way of resolving disputes without the time or expense of litigation, arbitration or expert determination.

- 3.2 Some of the lessons from mediation in which the NRA has participated are:

- (a) Incentive – mediation may be of little value if the other party is insured and so has little interest in settling the dispute. In these cases, the mediation needs to involve the insurer to be of any value;
- (b) Choice of Mediator – The mediator should be trained as a mediator and be accredited to a mediation organisation such as the Centre for Effective Dispute Resolution. The fact that a person is a barrister does not mean that they are competent to conduct a mediation – indeed they may approach it is a mini-trial and this can be counter-productive;
- (c) Committee – the trustees should appoint a committee of trustees to pursue the mediation on behalf of the NRA. It is not practical for all trustees to be involved in this process. The mediation agreement will require that the people attending the mediation have full authority to reach agreement and this authority should be evidenced by a minute of the trustee meeting that appointed the committee. The mediation committee should have people with an appropriate range of skills. This is likely to include legal skills, financial expertise, and some technical knowledge of the matter in dispute;
- (d) Timing – A complicated dispute may not necessarily be settled at mediation but mediation may provide the basis for a settlement that can be pursued by the parties after the mediation ends;

- (e) Mediation agreement – both parties will need to sign a mediation agreement with the mediator. In particular, the NRA must review the confidentiality clause carefully to ensure it does not limit the NRA providing information to the Charity Commission;
- (f) Timing – as a general rule, the NRA should not engage in mediation in the case of litigation before the disclosure process is complete. It is important to understand the strength of the other side’s case in order to negotiate a settlement that represents a better alternative than continuing the litigation;
- (g) Without prejudice – the mediation process is conducted on a “without prejudice” basis, which means that neither party may refer to the fact that mediation has taken place or anything said or disclosed as part of the mediation process in the on-going court proceedings;
- (h) Post-mediation - discussions that continue after the mediation has ended may be conducted on a “without prejudice” or an “open” basis. If the discussions are held on an “open” basis then the parties may refer to the negotiations and information obtained as part of the negotiations in the ongoing court proceedings; and
- (i) Advisers - once the parties have moved from mediation to implementing a transaction as part of a negotiated settlement, it is important that both sides engage transactional lawyers rather than their litigation teams to continue the matter. The NRA has encountered difficulties where the negotiation of transaction documents was done by litigation lawyers. The skills and approach of litigators are quite different to those of transactional lawyers.

4 Arbitration

4.1 Arbitration follows a similar path to litigation and the decision of the arbitrator is binding on the parties and can be enforced in the same way as a court judgment. The key differences between litigation and arbitration are:

- (a) the process is confidential; and
- (b) the parties must pay the costs of the arbitrator.

4.2 The arbitration is conducted following the rules agreed by the parties eg the Rules of the London Court of International Arbitration, rather than the more complex rules that govern court proceedings

5 Expert Determination

- 5.1 The benefits of expert determination, particularly in relation to leases of land granted by the NRA, are:
- (a) it allows for the appointment of a technical specialist to resolve the dispute;
 - (b) it is usually quicker cheaper and less formal than arbitration or litigation (but the costs are still significant); and
 - (c) it is confidential and is perceived as less adversarial.
- 5.2 The expert is able to carry out his own investigation rather than simply making a decision based on the information the parties choose to put before him.
- 5.3 The disadvantage of expert determination is that the ruling by the expert cannot be enforced in the same way as a decision of a judge or an arbitrator. If the other party does not comply with the ruling of the expert then the winning party will need to bring a court action to compel the losing party to comply. There are also limits on the power of the expert eg to award interest.

6 Litigation

- 6.1 Litigation should be considered a last resort. It is time consuming and expensive. The NRA should not commence litigation without first being able to demonstrate that it has made all reasonable efforts to resolve the dispute by some other means and after careful review of CC38. Where litigation is commenced against the NRA then it should defend that litigation where it is the best interests of the NRA to do so.
- 6.2 The trustees must be involved on any decision to commence or defend litigation, since they are ultimately responsible for the costs and the results of that litigation. The Charity Commission will not review the decisions made by the trustees on these issues, but will review the process that the trustees followed. It is therefore important that all advice obtained is properly documented and all discussions are minuted to demonstrate that the trustees followed an appropriate process.
- 6.3 The litigation process involves the claimant sending a claim form to the defendant setting out the details of its claim, and the defendant then responding with its defence. Both the claimant and the defendant may amend these documents during the course of the litigation. Each party will then be required to disclose all documents in its possession relevant to the matter. That includes documents that support its case and those that do not. The purpose of this is to enable each party to form a view on the relative strength of its case. It is essential that once litigation is foreseeable the NRA does not destroy any documents relating to the matter in dispute.
- 6.4 Each side will also have the opportunity to exchange witness statements that provide further evidence. Expert witnesses may also be engaged to provide evidence. Each side may engage its own experts, but the Court encourages parties to agree a joint expert wherever possible. A hearing date will then be set at which a barrister for each side will put forward its case and the court will hear evidence from witnesses. The

judge then makes a decision that is binding on the parties. The losing party may be able to appeal the decision in certain circumstances.

- 6.5 The litigation system encourages parties to settle their dispute before the trial. The obligation to disclose documents, for example, means each party sees the strengths and weaknesses of the other side, and can form a view on the expected outcome of the trial. The court will also encourage the parties to engage in mediation and may in some cases require the parties to engage in mediation before trial.
- 6.6 It is never possible to predict with certainty the outcome of the litigation. Even the best legal case may founder if it is poorly argued by the barrister, or the judge misses a key point of evidence. That uncertainty means that a negotiated settlement is the most common outcome of any litigation, rather than a trial and a decision by the judge.
- 6.7 The winning party will usually only recover a portion of its costs from the losing side. There is also the risk that the losing side will become insolvent as a result of losing and the winner will recover little, if anything. This is of particular concern where the other party is a limited liability company. The court does have power to order a party to provide some security for any costs award against it, but the court will generally be reluctant to do so.
- 6.8 As part of the process the court will require the parties to agree a costs budget. This sets a limit on the amount that the winning side can recover from the losing side, and assists each side in budgeting for the costs of the process. These costs can be considerable and the NRA must manage its legal costs budget carefully in any litigation process.

7. Best Alternative to a Negotiated Agreement (“BATNA”)

- 7.1 Before entering into any negotiation to settle any dispute, it is important that the NRA identifies its BATNA. The BATNA in any situation is the most advantageous alternative available to the NRA if negotiations fail and an agreement cannot be reached.
- 7.2 To establish the BATNA for any particular situation:
 - (a) Alternatives - consider all alternatives to the current negotiation. What would the NRA do if negotiations are unsuccessful;
 - (b) Value - evaluate the value of each alternative. How much is each alternative worth to the NRA; and
 - (c) Selection - select the alternative that would provide the highest value to the NRA.
- 7.3 After determining the BATNA, calculate the lowest-valued deal that the NRA should accept.
- 7.4 In the case of litigation, the BATNA will involve a consideration of:
 - (a) the costs in legal fees and management time in continuing to trial;

- (b) the likely outcome of the trial based on legal advice, recognising that even the best case may only be given a 70% chance of success given all the uncertainties in the trial process;
- (c) the likely recovery, assuming the NRA is successful, having regard to the risk that the other party may refuse or be unable to pay
- (d) the legal fees that will not be recoverable even if the NRA is successful and the other side remains able to pay;
- (e) the cost to the NRA of losing, and being required to pay costs to the other side.

Schedule - *When to involve the Charity Commission in a dispute*

The Charity Commission can only get involved in internal disputes when:

- there are no trustees (or correctly appointed trustees) in place, and
- you can show that all attempts to resolve the dispute have failed

Any trustees must have been appointed following the directions laid out in the NRA's governing document. If there are no properly appointed trustees, the Commission may step in to help arrange for a full body of trustees to be appointed.

If the Commission finds evidence of misconduct or mismanagement that put the funds or users the Charity at risk, it will step in and provide advice and guidance.

Even after the Commission gets involved, the Trustees need to work together to find solutions. If the Commission thinks a solution will not be reached, it may withdraw its help or even instruct the charity to cease operating and wind up.

The Commission will not get involved in disputes about trustees' decisions or policies. Trustees are free to make decisions for the charity, so long as they are acting within the law and within the rules of the NRA's governing document.

There may be other organisations that are better placed to get involved in certain disputes. For example, an employment tribunal can assist in resolving employment issues including unfair dismissal.