**Making Justice Work**

**Enabling Access to Justice Project -**

**Overview report of Alternative Dispute Resolution in Scotland**

**November 2014**

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Foreword

Civil problems and disputes can have adverse consequences for people, affecting their confidence, well-being, financial situation and health. We include in our definition all civil matters which raise a legal issue or which, if not resolved earlier, could ultimately result in legal proceedings. For example, issues with welfare benefits, debt, housing, employment, family disputes and consumer rights. Problems and disputes can escalate from simple, minor issues into major, complex challenges. The early resolution or avoidance of these problems can improve people’s lives.

This report focuses on Alternative Dispute Resolution (ADR) and sets out the findings of a Scoping study of the range of existing alternative dispute resolution mechanisms available in Scotland and the policy issues that they raise. For the purposes of Making Justice Work Project 3, ADR is defined as non-court methods of resolving a dispute including the use of mediation, conciliation, adjudication, ombudsmen or arbitration. The aim of this strand of the Enabling Access to Justice Project is to identify the role ADR can play in advancing the wider interests of the justice system and system users alongside other forms of dispute resolution. The focus throughout has been on the extent to which ADR is an appropriate and proportionate means of resolving different types of disputes in different areas of law.

As a first step towards this aim, this report provides Scottish Government with an overview of the range of existing alternative dispute resolution mechanisms available to people living in Scotland. In order to identify the future role of ADR within civil justice, we need a better understanding of how ADR is currently being used within the civil justice system and elsewhere to resolve people’s disputes. The study looks at the prevalence of ADR in different types of disputes, identifies how it is resourced and funded and sets out some of the policy issues raised by current provision and use of ADR within civil justice. It aims to identify the role ADR does and can play in advancing the wider interests of the justice system and system users alongside other forms of dispute resolution.

We hope this report and the issues that is raises can provide the basis for the future development of ADR policy by Scottish Government both within the context of Project 3 (Enabling Access to Justice) but also within the wider context of other dispute resolution-related developments that are evolving and developing within the Justice sphere and elsewhere.

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Identifying the range of alternative dispute resolution mechanisms

1. This paper sets out the findings of a scoping study of the range of existing alternative dispute resolution (ADR) mechanisms available in Scotland and the policy issues that they raise. For the purposes of Making Justice Work Project 3, ADR is defined as a method of resolving a dispute including the use of mediation, conciliation, adjudication, ombudsmen or arbitration.
2. Desk-based research into the range of ADR schemes, programmes and projects operating in Scotland started in September 2012. A survey of ADR schemes available to Scottish residents was carried out using Survey Monkey. Some (but not all) of these schemes were included in the list of ADR schemes available to UK consumers compiled by the Office of Fair Trading in 2010. Taken together, these provided a list of 96 ADR schemes or services covering Scotland, either exclusively or as part of a UK-wide remit. This list is not definitive due to the way in which the research was carried out (primarily using Google) and the time constraints imposed on it. The desk research uncovered lists of trade associations, particularly in the construction and maintenance fields and other home-related fields, some of which may offer ADR schemes as part of their role in promoting their trade. Lack of time made it impossible to research all of these schemes so the list provided can only claim to identify the most prominent and wide-reaching schemes rather than act as a definitive overview of what is available to the public. Nevertheless, the range of ADR schemes identified remains extensive.
3. On top of these schemes and projects, individuals and companies/firms providing generic ADR services were also identified, such as individual mediators registered with the Scottish Mediation Network and solicitor firms providing a range of dispute resolution services across many different areas of dispute.
4. A spreadsheet showing the schemes identified by the desk research is attached as Appendix 1. Appendix 2 identifies seven additional mediation services whose work did not easily fit the data headings in the main survey and which are therefore listed separately. This includes the Relationships Scotland family mediation services and the Edinburgh sheriff court mediation service. Appendix 3 is an amended version of the OFT 2010 research into consumer ADR schemes showing only those schemes that continued to apply in Scotland in 2012/3 (some of the schemes identified in 2010 no longer exist).
5. The objectives of this study are as follows:
	* Identify the range of existing ADR schemes / programmes / projects operating in Scotland
	* Identify the range of policy interests in ADR within Scottish Government and beyond
	* Identify the extent to which current mechanisms target areas of law or specific communities;
	* Identify the nature of funding of ADR
	* Estimate the cost of ADR procedures for individuals
	* Identify any value limits for claims to be admitted to ADR procedures
	* Estimate the extent to which ADR schemes issue binding decisions
	* Identify whether access to the courts is dependent on the completion of ADR or is excluded by ADR
6. Some ADR schemes are well-documented online with information about their remit and uptake easily accessible to the public. Other schemes provide little or no information about cost, uptake or impact and it has only proved possible to identify that the schemes exist and their availability across the country. The following report sets out the information that was available and identifies and analyses the policy issues raised by ADR in Scotland, including those raised by this apparent lack of information.

The range of ADR schemes and processes in Scotland

1. The picture painted by the research is a complex and busy one, with multiple types of ADR being provided by a huge range of organisations: Ombudsman (both government and privately-funded), Trade Associations, dispute resolution companies, third sector organisations and individuals. Very little data is available showing the volume of matters being dealt with in Scotland by ADR but the volume of matters dealt with by each scheme across the UK varies enormously, from more than 263,000 disputes dealt with by the Financial Ombudsman in 2011-12 to the 20 or so matters dealt with annually by the ‘tribunal’ set up by the National Federation of Property Professionals to deal with complaints about estate agents and other property trades.
2. The majority of the schemes identified are consumer schemes operated by Trade associations and Professional bodies, most of them with UK coverage and based in England. Many of the schemes offer more than one ADR process with a typical pattern being conciliation or adjudication (for free) followed by the option of going to arbitration, for which a fee may have to be paid.
3. The following paragraphs provide an overview of the prevalence of each type of ADR across the schemes identified above. The terms used are those identified by the MJW programme, namely mediation, conciliation, adjudication, ombudsmen or arbitration.
4. Other recognised forms of ADR are:

	* Early neutral evaluation – where an independent third party evaluates the claims made by each side and issues an opinion – either on a likely outcome or a particular point of law
	* Expert determination – where an independent third party (usually an expert in the subject of the dispute) is chosen jointly by the parties to evaluate the case and issues a binding decision.
	* Med-arb – where mediation is attempted first, and if no agreement results, the dispute will go to arbitration where a binding decision will be issued

These forms of ADR are most commonly used in the resolution of commercial disputes and they did not feature in the ADR schemes identified by the desk research. This report therefore focuses on the five forms of ADR identified by the MJW programme, namely, mediation, conciliation, adjudication, ombudsmen and arbitration.

Mediation

1. The Advice Services Alliance publication, ‘Advising on ADR: The essential guide to appropriate dispute resolution’ written by Margaret Doyle and published in 2000 provided a very useful guide to the various different definitions given to the different types of ADR. It defined mediation as involving:

*‘an impartial, independent third party helping disputing parties to reach a voluntary, mutually agreed resolution. The disputants, not the mediator, decide the terms of the agreement….in some types of mediation, the mediator will issue an opinion or recommendation to the parties, which the parties are free to accept or not as they wish.’*

1. Only 10 of the 78 schemes (13%) identified by the OFT in 2010 used mediation as a form of dispute resolution, either on its own or with other forms of ADR. Outwith the consumer field however, mediation has a much higher profile and is used across the private and public sectors to deal with a wide range of different types of disputes. The desk research identified an additional four schemes using mediation as well as the seven services listed in Appendix 2 which are all mediation services. These cover disputes between people in the following groups:
* Family
* Neighbours and amongst communities
* School pupils
* Church of Scotland ministers and other clerical staff and congregations
* Parents of children with Additional Support Needs and education authorities
* Young people and their parents which put the young person at risk of leaving the family home and becoming homeless
* Small claims and summary cause court-users in Edinburgh sheriff court
1. In all, 21 of the 97 (22%) schemes and services in Scotland identified by this study used mediation either on its own or alongside other forms of dispute resolution. In addition, mediation services are provided by an unknown number of mediators (many of whom are registered with the Scottish Mediation Network) working independently or within businesses and solicitor firms.

Conciliation

1. ‘Advising on ADR’ describes conciliation as a ‘process in which an impartial third party helps the parties to resolve their dispute by hearing both sides and offering an opinion on settlement.’ It goes on to provide several different variations on this definition but states that all definitions of conciliation have two elements in common: Both parties to the dispute agree to participate and the process is non-binding.
2. Conciliation is the commonest form of ADR favoured amongst the schemes identified for this study with 47 (48%) of the 97 schemes offering it either solely or alongside other forms of ADR. ‘Advising on ADR’ identified the two forms of conciliation that cover the majority (if not all) of these schemes:
	* Where the parties do not meet but the conciliator conducts discussions with the parties separately by telephone – the process most commonly used by the ACAS conciliation process to resolve employment disputes
	* A process in which the conciliator listens to both parties – and/or examines case statements by them – and delivers an opinion as to the best or most likely outcome of the dispute. This opinion forms the basis of an agreement between the parties and is the model used by many trade associations dealing with complaints about their members
3. In 2011/12 ACAS dealt with 72,000 individual conciliations in the UK. This was the second largest number of disputes resolved in a single year by ADR that the research was able to identify (the largest being the 263,375 disputes resolved by the Financial Ombudsman Service).

Adjudication

1. Adjudication can be used as an umbrella term to describe several forms of dispute resolution including arbitration, litigation and some ombudsman[[1]](#footnote-1). 16 of the 97 schemes identified (16%) use it either alone or alongside other forms of ADR. However, in particular dispute areas, adjudication is recognised as a particular form of disputes resolution that is entirely different from arbitration. For example, in the construction field, Section 108 of the Housing Grants, Construction and Regeneration Act 1996 provides parties to construction contracts with a right to refer disputes arising under the contract to adjudication. It sets out certain minimum procedural requirements which enable either party to a dispute to refer the matter to an independent party who is then required to make a decision within 28 days of the matter being referred. It is this fast-track approach to dispute resolution that is one of the elements distinguishing adjudication from arbitration.
2. Another specific use of adjudication within Scotland is in the area of Additional Support Needs disputes between parents and education authorities. Under the Education (Additional Support for Learning) (Scotland) Act 2004, adjudication by an independent adjudicator is available to parents alongside mediation and access to the Additional Support Needs Tribunal. Adjudication schemes are also run by the three tenancy deposit protection schemes in Scotland: My|deposits Scotland, Safe Deposits Scotland and The Letting Protection Service Scotland. This deal with disputes between tenants and their landlords about their deposit.

Ombudsmen

1. ‘Advising on ADR’ defines Ombudsmen as ‘impartial ‘referees’ who adjudicate on complaints about public and private organisations.’ The Ombudsman Association distinguishes between Ombudsmen who deal with complaints about public services and those who deal with private services and mainly (but not exclusively) in regulated areas. The Association has two levels of membership: Ombudsmen and Complaint Handler Members. Members of the latter group have similar functions to ombudsmen but do not meet all the criteria for Ombudsmen membership. There are two public sector Ombudsman who are members of the Association and whose remit covers Scotland. The are the Scottish Public Services Ombudsman, who deals with complaints about the NHS, prisons, universities and local authorities amongst others and the Parliamentary and Health Service Ombudsman who deals with complaints made by Scottish residents about UK government departments and agencies.
2. Private Sector Ombudsmen covering Scotland include the Financial Ombudsman Service, the Pensions Ombudsman and The Property Ombudsman and Ombudsman Services: Property. The Ombudsman Association states that private sector Ombudsmen are usually established in three ways:
	* By statute, giving them compulsory jurisdiction over specified (usually regulated) businesses, eg the Financial Ombudsman
	* Underpinned by statute: Some types of businesses have to be covered by an ombudsman scheme that meets specified minimum criteria, eg the Property Ombudsman and Ombudsman Services: Energy
	* Voluntary: these are established voluntarily, sometimes after government or consumer pressure by a trade association but with independent governance, eg the Removals Industry Ombudsman
3. The different ways in which private sector Ombudsmen can be established means that in some sectors more than one Ombudsman has been given approval by the regulator in their relevant sector. For example, in property matters consumers can opt for either the Property Ombudsman or Ombudsman Services: Property. In telecommunications matters, consumers can complain either to the Communications and Internet Services Adjudication Scheme (CISAS), which is run by IDRS or Ombudsman Services: Communications. IDRS is a dispute resolution service provider, previously owned by the Chartered Institute of Arbitrators and now owned by the Centre for Effective Dispute Resolution (CEDR), the biggest dispute resolution provider in Europe. Both services have been approved by Ofcom to handle these types of complaints. The Ombudsman Association has criticised this practice of competing schemes, arguing that it causes confusion for the public, especially where the business it is complaining about can choose which ombudsman scheme to use.
4. Complaint handling members of the Association include the Advertising Standards Authority, the Institute of Chartered Accountants of Scotland (ICAS), the Independent Case Examiner (who deals with complaints about DWP departments, such as Job Centre Plus and the Pensions Service) and the Scottish Legal Complaints Commissioner.
5. The word ‘Ombudsman’ in an organisation’s title does not automatically indicate that the body is a member of the Ombudsman Association or meets their standards. So while the Glazing Ombudsman is a Private sector full member of the Association the Double Glazing and Conservatory Ombudsman scheme does not appear to be a member at all, either as an Ombudsman or a Complaint Handler.

Arbitration

1. ‘Advising on ADR’ defines arbitration as involving an impartial, independent third party who hears both sides of the argument and then issues a binding decision to resolve the dispute between the parties. There are certain elements that are common to most arbitrations: the parties agree to use the process; it is private; the arbitrator decides the outcome, not the parties; the process is final and legally binding; there are limited grounds for appeal. While arbitration is often less formal than a court, sometimes a hearing can be held or the decision can be made based only on the documents in the dispute.
2. 41 (42%) of the 97 ADR schemes identified use arbitration (sometimes alongside other forms of ADR) to resolve disputes between the parties. In some schemes, such as the Renewable Energy Assurance Ltd scheme, arbitration is offered as an additional form of ADR after the first attempt at resolving the dispute (usually mediation or conciliation) has failed. In other schemes, parties go straight to arbitration if they have been unable to resolve the dispute themselves. For example, the ABTA Arbitration scheme is only available if the parties have reached deadlock. The complainant then has to complete a pre-arbitration process after which ABTA issues a complaint form. Many schemes are free to the complainant, such as the ACAS individual arbitration scheme. Other schemes, such as the ABTA scheme charge a fee to the complainant which may be refundable if the complainant is successful.
3. Most of the arbitration schemes identified by the research cover consumer disputes, apart from the ACAS arbitration scheme, which deals with employment disputes. However, arbitration is a form of dispute resolution that is also commonly used to deal with commercial disputes. The Arbitration (Scotland) Act 2010 reformed and modernised the law of arbitration in Scotland and the Scottish Arbitration Centre was established in 2011. It has two goals: to promote arbitration as a form of dispute resolution within Scotland and to promote Scotland as a venue to conduct international arbitration.
4. In 2012 a new development in arbitration appeared with the establishment of the Family Law Arbitration Group Scotland which was set up to enable separating couples to deal with their financial and other non-child welfare issues through arbitration rather than through the courts (although divorce itself remains the sole preserve of the courts).

The extent to which ADR is being used in Scotland

1. It is evident from the desk research that the identified ADR services are available across a wide range of dispute areas. However, measuring the extent and take-up of these services has proved to be more difficult due to a lack of publicly-available data. While some of the large-scale consumer schemes, such as those run for/by ABTA and ACAS, publish data about their work, at the time of writing this report, many other organisations provide limited or no publicly-available data. This includes the Scottish Government-funded Relationships Scotland Family Mediation Services and the services of the Scottish Community Mediation Network agencies, whose work is overseen by SACRO (although data from SACRO on their work was provided on request)[[2]](#footnote-2).
2. Where we have information about the volume of disputes dealt with by a scheme, it is indicated in the table in Appendix 1. It is clear from this and other evidence that uptake of ADR varies enormously from scheme to scheme and between different types of ADR provision. This is understandable given the differing ease of access to different types of scheme and the resources that they require from the disputants. For example, the Scottish Public Services Ombudsman, whose scheme requires only written evidence from complainants, dealt with 3,981 complaints in 2011-12. The Pensions Advisory Service was used by 98,096 people across the UK, again by providing a service that required only a written complaint to access its conciliation and mediation service.
3. In other areas, uptake is much lower. One of the challenges for policy-makers is understanding why, when ADR is made available, it is not used to resolve disputes. For example, the Additional Support Needs (Scotland) Act requires all education authorities to provide mediation for free to parents wishing to use it to resolve disputes about the education of a child who has additional support needs. However, research carried out in 2011 in three local authority areas entitled *‘Parental experiences of dealing with disputes in Additional Support Needs in Scotland: why are parents not engaging with mediation?[[3]](#footnote-3)’* suggested that usage is not widespread and that many parents preferred to negotiate with their education authority rather than use mediation.
4. Research carried out in 2009[[4]](#footnote-4) in Scotland and England produced similar findings along with establishing that many parents did not know about mediation due a general failure by local authorities and schools to publicise its availability. (However, in an article for the SMN newsletter, ‘Collaborate’ in January 2013, the outgoing Chair, Charlie Irvine, reported that referrals to ASN mediation were increasing with referrals coming earlier in the process, being more appropriate and more successful).
5. In 2011-2012, 5 NHS Boards participated in a six-month mediation/conciliation pilot conducted with SMN and funded by Scottish government. This was a response to the provisions within the Patient Rights (Scotland) Act 2011 and Section 3.11 which require NHS Boards to consider and make provision for alternative dispute resolution such as mediation or conciliation to help resolve complaints where this is considered appropriate and has been agreed by the parties involved. At the outset of the pilot it was estimated that there would be 20 mediations per Health Board but over the six months only five referrals were made to the pilot in total.[[5]](#footnote-5)
6. We have some limited information about the extent of mediation in the UK workplace based on a series of surveys carried out in 2008 by the Chartered Institute of Personnel Directors (CIPD), ACAS/CIPD and the Scottish law firm, Dundas and Wilson. The CIPD survey of its members garnered 766 respondents and revealed that mediation had been used in 43% of these organisations. The ACAS/CIPD survey covered 500 Small and Medium Employers and reported that 7% had used mediation to deal with an employment issue. The Dundas and Wilson survey reported that 36% of firms surveyed had used mediation. Although a Scottish law firm, we have no data on how many of the firms surveyed were based in Scotland. A research paper published by ACAS in 2011 stated that in the CIPD 2011 Conflict Management report 57% of organisations surveyed reported that they were using mediation to resolve workplace conflicts.
7. This research suggests that ADR is making headway within some workplaces at least although an evaluation of the use of mediation to resolve workplace disputes in the NHS in Scotland suggested that uptake remained very low within this particular workplace (see paragraphs 69-71).
8. Within the commercial sphere it has proved almost impossible to obtain figures showing the volume of ADR that is being carried out. The Scottish Arbitration Centre does not collate figures showing the number of arbitrations taking place each year and there were no figures available on the Chartered Institute of Arbitrators (Scotland branch) (CIArb) website. The Scottish RICS website however, states that it appoints RICS professionals to deal with 500 disputes each year to resolve disputes through a range of ADR services including arbitration, mediation and adjudication. The CIArb April 2012 newsletter included an interview with Lord Glennie, one of the arbitration judges. He commented that by that date the Commercial Court in Scotland had only received 4 applications for arbitration, although it was, as he described it, ‘early days’ for the new arbitration regime. Mediation, arbitration and adjudication appear to be used to varying degrees to resolve a range of commercial disputes but to what extent remains unknown.
9. As regards the use of mediation generally to resolve legal disputes, in an article in the Law Society of Scotland Journal in April 2012, former Chair of the Scottish Mediation Network, Charlie Irvine, came to a following conclusion about the use of mediation by Scottish solicitors:

*“However, in spite of having a reasonably high profile, and even its own chapter in the Gill Review, when it comes to the Scottish lawyer’s bread and butter work mediation remains one of the more neglected forms of dispute resolution. It is worth asking why, and exploring whether and how this may change.”*

1. In an article on the SMN website ([www.scottishmediation.org.uk](http://www.scottishmediation.org.uk)) to mark his stepping down from the Chair in January 2013, Mr Irvine also commented that despite an increase in SMN membership,

*“….if we were to ask what proportion of our members earn their living from mediation, the numbers would fall away sharply; even more so if we asked what proportion made their living from practising, rather than managing, mediation. If we asked about mediation activity rather than membership, we might also find the results sobering*.”
2. The various pieces of research and commentary cited alongside the figures supplied in Appendix 1 suggest that in some areas (notably consumer and some areas of employment) ADR is well-known, relatively well-used and appears to be on the increase. In other areas (Additional Support Needs, or resolving workplace disputes in the NHS) the availability of ADR does not appear to have been matched by uptake by the people whom it has been designed to assist. And in the field of mediation at least, the availability of organisations and individuals with the necessary dispute-resolving skills does not appear to have been matched by a demand for their services. In the field of arbitration it has not proved possible to draw any conclusions on uptake.
3. Where uptake of ADR is lower than might be expected, various reasons for this have been cited in the studies and articles mentioned above and elsewhere. They include:
* Lack of publicity about the availability of ADR as an option
* Solicitors not informing clients about it as an option
* Lack of knowledge amongst solicitors about its value
* Lack of understanding amongst the public about its role and potential value
* Preference for formal tribunals/courts or other means of resolving disputes, such as informal negotiation, over formal ADR processes
* The cost or anticipated cost of using ADR
* Lack of support from court service, Scottish government and other agencies for ADR
1. It is reasonable to conclude that within each area of dispute and across each ADR process, the reasons for people using or not using the ADR options available to them will be many and various. The lack of data on the uptake of ADR across all dispute areas and ADR processes makes it impossible to draw any firm conclusions, except that the availability of an ADR process will not automatically lead people to use it.

Identifying the range of policy interests in ADR within Scottish Government and beyond

1. Three types of policy interests have been identified:
	* Scottish Government directorates and other public bodies who fund or promote ADR as a means of improving outcomes for those groups/issues that come within their remit, such as:
		+ Children and Families funding for the Relationships Scotland Family Mediation service
		+ Justice Directorate funding for the Scottish Mediation Network
		+ Housing Division funding for the SACRO-managed Scottish Community Mediation Centre
		+ SLAB’s funding of solicitor mediation in family matters
		+ NHS Scotland – its interests will include identifying ways of dealing with internal disputes such as workplace disputes and complaints from patients
	* Scottish Government directorates and departments and other statutory organisations with an interest in the outcomes achieved by ADR programmes, even though they do not fund them:
		+ Branches responsible for criminal justice with an interest in avoiding homelessness amongst young people who therefore avoid risks of ending up in the criminal justice system
		+ Scottish Court Service who may have an interest in the outcomes of family mediation if that avoids contact and residence issues requiring the attention of the court
		+ Scottish Legal Aid Board, which has an interest in ADR, both within its role as part of the Making Justice Work programme and as a funder of mediation in family disputes through the provision of legal aid.
		+ The section of Scottish Government dealing with consumer issues, particularly given the preponderance of ADR schemes covering the consumer field, that primarily operate from England.
		+ Justice Directorate interest in the Scottish Arbitration Centre
		+ Miscellaneous Scottish Government departments or other public bodies (such as local authorities or the police) who have either funded ADR projects or who have an interest in the use of ADR to deal with disputes and problems that come within their remit, such as planning disputes or the problems caused by sectarianism
	* Statutory interests where ADR is funded/provided as part of a statutory duty or under guidance produced by Scottish government, such as:
		+ The duty imposed on local authorities to provide ADR programmes, sometimes under statute (the mediation available to parents and carers involved in a dispute about the education of the child with Additional Support Needs) or under Guidance (the role of Licensing Standards Officers in mediating between liquor licensees and their neighbours and the community in which they operate).
2. In addition, providers of ADR services, primarily in the private and third sectors, have an interest. These include individual mediators and arbitrators, organisations like Relationships Scotland, SACRO or Children 1st (who provide mediation services for ASN disputes through Resolve: ASN).

The extent to which current mechanisms target areas of law or specific communities

1. There are two fairly distinct types of ADR provision available. Firstly we have those ADR programmes, projects and schemes that are targeted at specific problems or at specific groups of people. This includes many of the consumer schemes established by particular trades to deal with disputes within their area of work. It also includes the work of Ombudsman such as the Finance Ombudsman Service and the mediation schemes funded by Scottish Government to deal with particular disputes such as family mediation and community mediation.
2. Secondly, there is the provision of ADR by generic ADR organisations and individuals who provide the services of an ADR service-provider (such as an arbitrator or a mediator) to disputants looking to use ADR to resolve their dispute. For example, many of the individuals listed on the Scottish Mediation Network register will carry out mediation in a range of different dispute areas. As mentioned above, RICS will appoint different types of ADR professionals to deal with disputes within the building and construction field.
3. One of the largest providers of these generic ADR organisations (and possibly the largest) is CEDR Group Dispute Service, whose website states that they are **Europe's leading independent ADR provider. Between CEDR Solve and IDRS Ltd (which they own) they administer a range of schemes for the resolution of consumer disputes, such as the ABTA arbitration scheme, the British Association of Removers arbitration scheme and the Money Advice Service Independent Complaints Review Service. Another, smaller generic organisation is the Ombudsman Service** which deals with consumer issues relating to communications, energy, property, the Green Deal and copyright licensing.
4. Alongside ADR individuals and organisations, many Scottish solicitor firms and advertise their services in dispute resolution, particularly commercial dispute resolution. For example, Shepherd & Wedderburn advertise themselves as ‘a leading commercial dispute resolution practice’ whose ‘mediation expertise is second to none.’ Dundas & Wilson list their firm’s areas of expertise, one of which is Dispute Resolution, which they describe thus:

*“Our Dispute Resolution team provides a full range of dispute resolution solutions and outstanding client service. When your business faces an unexpected challenge, our team will work closely with you to implement a strategy that not only fits your needs but also maximises the outcome. This often means thinking beyond traditional litigation; we actively promote the use of* [*alternative methods of resolution*](http://www.dundas-wilson.com/Expertise/mediation/dw_cms_6645.asp) *including mediation, arbitration and negotiation. Where litigation is unavoidable, our team has the skills and experience you need to achieve a successful result.”*

1. The processes by which an ADR scheme or service becomes available to a particular group of people or to solve a particular problem are probably as many and various as the schemes that are available. It is outwith the scope of this research to provide a definitive list of the reasons why we have the ADR schemes that we do. However, it is worth noting the prevalence of mediation as a means of resolving disputes and the funding that it has attracted from Scottish government and others over the past twenty years. It is particularly popular as a means of trying to resolve disputes between people in relationships that need to be sustained regardless of the outcome of the dispute. Examples uncovered by the research include: family mediation; neighbour mediation; peer mediation in schools particularly to deal with less serious bullying; mediation between young people and their families to enable them to remain in the family home and avoid the risk of homelessness; anti-sectarianism mediation (SACRO project in North Edinburgh); workplace mediation. Outwith its ‘relationship sustaining’ role, it has also been used in planning disputes and in court through the Edinburgh, Aberdeen and Glasgow sheriff court mediation projects.
2. The policy issues surrounding the use of mediation in this way are dealt with in the Policy Issues section. The funding issues are dealt with below.

The nature of funding of ADR

1. There are three main funders of ADR:
	* Public authorities (both central and local government and others such as the NHS)
	* Businesses and tradespeople (see the many consumer schemes run by Trade Associations but also Ombudsman schemes funded through levies on member companies)
	* Individuals and businesses who pay for ADR when they opt to use an ADR provider or an ADR service instead of, or as well as, traditional litigation
2. Unpacking why individuals, organisations and public authorities choose to fund (and to use) ADR is more of a challenge. The work carried out so far on this report suggests that the following are major drivers for the existence and use of an ADR scheme or other ADR provision:
	* It is perceived to be a cheaper way of resolving disputes than going to court
	* It is perceived to be a quicker way of resolving disputes than going to court
	* It is thought to be more likely to provide solutions that people actually want, which is not always the case with the courts
	* All of the above and it is a means by which particular sectors, industries or services can be compelled to deal with disputes involving their products or services in a way that removes the financial burden from the complainant
	* People don’t like going to court and it therefore provides some form of access to some sort of justice that they would otherwise be denied
	* The court process – particularly its adversarial aspect - and the system of civil justice is not designed to provide an appropriate means of dealing with certain disputes – neighbour disputes and family disputes for example
	* It is a private dispute resolution process rather than a public one – unlike the courts - and therefore enables disputes to be dealt with ‘under the radar’. This may explain its popularity with Trade Associations
	* Choice is perceived to be a good thing and ADR therefore offers disputants a range of paths to enable them to resolve their dispute (see the extracts from the solicitor firms mentioned)
	* For all of the above reasons, it represents a feasible business opportunity to a company, individual or firm with the skills to provide such a service

Public funding for ADR in Scotland

1. The pattern of public funding of ADR in Scotland shows a mixed picture with mediation being most heavily favoured as a means of resolving disputes, particularly within families, schools and communities. The following table gives an idea of the publicly-funded ADR projects and services identified by this research. Details of some of these schemes are given below:

|  |  |  |
| --- | --- | --- |
| **ADR provision past and present**  | **ADR type**  | **Funder** |
| Scottish Public Services Ombudsman | Ombudsman | Scottish government  |
| Private Rented Housing Panel | Mediation and adjudication  | Scottish government |
| Family mediation through Relationship Scotland | Mediation | Scottish government and individuals (some services charge) |
| Solicitor family law mediation through application to the Legal Aid Fund  | Mediation  | Scottish government through SLAB |
| Additional Support Needs mediation | Mediation, adjudication | Local authorities |
| Scottish Mediation Network funding | Mediation  | Scottish government |
| Community mediation network SACRO | Mediation  | Scottish government funding to SACRO |
| Homelessness prevention mediation | Mediation | Local authorities |
| Research into the use of mediation in three planning disputes (2010) | Mediation | Scottish government |
| Peer mediation in schools | Mediation | Local authorities; training carried out by Scottish Mediation Network who are funded by Scottish government  |
| Edinburgh sheriff court mediation project | Mediation  | Scottish government through SLAB |
| Aberdeen and Glasgow mediation pilots (up to 2010) | Mediation  | Scottish government |
| Pilot to test use of mediation and conciliation to resolve complaints against 5 NHS Boards | Mediation and conciliation | Scottish government |
| Public Standards Commission Scotland  | Adjudication | Scottish government |
| Scottish Arbitration Centre funding | Arbitration  | Scottish government (in part) |

1. Scottish Government funds several ADR services such as the Scottish Public Services Ombudsman and the Private Rented Housing Panel. It also funds a range of mediation projects and services either directly or through other organisations. It funds the administration for the Edinburgh sheriff court mediation project, with funding provided through SLAB’s grant-funding programme but the mediation itself is carried out by unpaid volunteer members of the project’s mediation panel.
2. In the environment field, Scottish Government has published a guide to the use of mediation in planning disputes and in 2010, commissioned a qualified and experienced mediator to provide mediation support in three individual planning disputes and invited participants making use of mediation to take part in a study about the impact and value of this support. This support for mediation in this field does not appear to have continued beyond this ‘pump-priming’ exercise to encourage greater uptake of this form of dispute resolution in planning disputes. No evidence has been found showing whether this has had an impact on the use of mediation to deal with these types of disputes. Funding for solicitor-mediators in family disputes is provided by the Legal Aid Fund (costs for this in 2011-12 were £52,000). The Additional Support Needs area is supported by three types of dispute resolution mechanisms funded through Scottish government and local authority funding – mediation, adjudication and the [Additional Support Needs Tribunals for Scotland](http://www.asntscotland.gov.uk/asnts/CCC_FirstPage.jsp).
3. This patchwork pattern of funding will reflect the different policy priorities of the different departments who are providing this funding. Many of them may well have been policy priorities in the past with funding continued year on year without recourse to an overarching policy for ADR. Much of the funding comes from the Justice Directorate, but not all of it and within the Justice Directorate, there has not been a consistent approach to similar forms of ADR (most notably the different approaches to the Edinburgh, Aberdeen and Glasgow court mediation projects). This raises policy issues about the role of ADR within Making Justice Work and how far the MJW remit extends beyond the courts and the formal civil justice system. If more effective dispute resolution is a goal across all parts of government (as it appears to be), it places the role of ADR in a much wider context than simply its use within the courts and the civil justice system. When this is linked to funding issues, it is worth asking whether the outcomes delivered by ADR within the civil justice system are likely to be more valuable and/or cost-effective than the outcomes that could be delivered by ADR to resolve other disputes, eg community mediation or in the planning field or in family mediation.
4. Further research into the amount of funding provided by Scottish Government to support or facilitate ADR services across all sectors would be valuable as it has proved impossible to obtain this information through desk research. As has been noted already, many of the organisations funded to do this work do not disclose a great deal of information about the volume, impact and cost of their work online which raises interesting questions about the accountability of ADR providers to their funder (and to the public purse) and also about the essentially private nature of much of this work and what, if any, implications this has for the Making Justice Work programme.

Business/Trade Association funding

1. The motivations behind the funding provision provided by businesses and trade associations is probably commercial. Membership of a scheme and access to its dispute resolution process is frequently advertised by companies or the scheme itself, as a selling point for using a particular company or firm. Keeping consumer disputes out of the public arena is again, probably, a good thing for the sector or trade if only to avoid adverse publicity for the whole trade, which may be generated by the behaviour of a small minority of its membership. In the case of some Ombudsmen, pressure may have been brought to bear on the trade or business to create a form of dispute resolution to ensure that complaints are dealt with through a process that does not put the consumer at a financial disadvantage. The example given by the Ombudsman Association is the Removal Industry Ombudsman. In some cases, as in the case of the Financial Ombudsman Service, the relevant businesses may have little or no choice and payment of a levy to the ADR provider will be a condition for their being allowed to carry out their business.

Individual (people and businesses) funding

1. It is very difficult to untangle why people choose to pay for ADR from their decision to use it in the first place. It links to the next objective identified for the research, namely ‘the cost of ADR procedures for individuals’ and is therefore dealt with under that objective’s heading.

The cost of ADR procedures for individuals

1. Membership of the third group of funders will range from individual and business disputants with commercial disputes to individuals who choose to use ADR services (or are advised to do so by their legal advisers) to deal with disputes such as contact with their children after the break-up of a relationship. Many if not most, of the ADR schemes and services identified by the research are free to the complainer or described as being ‘low-cost.’ The OFT list of consumer ADR schemes shows that most are free with ‘low-cost’ arbitration being available if the initial complaint procedure is unsuccessful. Most family mediation provided by Relationships Scotland is free or low-cost. Community mediation and ASN mediation is also free. The Edinburgh sheriff court mediation service is free. The Glasgow and Aberdeen sheriff court mediation projects were not free, at least not to begin with. However, charges for summary cause mediation in Aberdeen were removed after lack of up-take and negative comments about the costs from parties.
2. We know very little about the costs of ADR within the private sphere, either for commercial law disputes or for other disputes where ADR is provided by individual mediators. It has also proved almost as impossible to find figures showing the volume of ADR being used in private law disputes, particularly family law disputes, apart from SLAB’s own data about applications for funding for solicitor mediation work. This may be a much greater issue for policy-makers given the importance of the family within social policy and the impact of family disputes on the resources of the civil justice system and the Legal Aid Fund.
3. From a policy perspective, understanding why individuals and businesses choose to use ADR is important if ADR is to be promoted by government as a means of resolving disputes and given greater prominence within the civil justice system. The policy issues that this raises are dealt with below.

Any value limits for claims to be admitted to ADR procedures

1. Research into ADR processes has thrown up very few that impose limits on the claims that can be made by individuals. Exceptions found were as follows:
* Direct Selling Association Complaints scheme – maximum claim of £5,000 per person
* Furniture Ombudsman - £5,000 limit for compensation plus purchase cost
* Postal Redress Service - £500 limit for compensation
* Communications and Internet Services Adjudication Scheme – pay for loss up to £500
* ABTA Mediation scheme – loss up to £100,000
* ABTA Arbitration scheme – claims limited to £5,000 per person

The extent to which ADR schemes issue binding decisions

1. In the consumer ADR field, schemes differ as to whether decisions are binding on parties or not. Generally, if parties choose to go to arbitration, the decision is binding on them; if they choose mediation or conciliation, it is not. However, there are exceptions to these. The main ones are those schemes where the decision is binding on the trader or company but the consumer has the option of rejecting the decision and going to court. Examples are:
* Furniture Ombudsman
* British Healthcare Trades Association
* Property Ombudsman
* Ombudsman Services: Property
* Ombudsman Services: Energy

ADR and access to courts e.g. whether access to the courts is dependent on the completion of ADR or is excluded by ADR.

1. There is no evidence that any ADR processes currently available in Scotland are compulsory. Commercial law firms and FLAGS advertise their dispute resolution services in a manner that suggest their clients can choose an ADR process if that is in their best interests. Although the Edinburgh sheriff court mediation project has until recently taken referrals only from sheriffs, parties were under no obligation to go ahead with the mediation and statistics from the project indicate that in a reasonable number of cases they choose not to do so. The issue of compulsion is further discussed below.

Policy Issues

ADR as an alternative to…..what?

1. Much of the research, debate and rhetoric about ADR has focused on its status as an alternative to ‘normal legal process’, that is the courts. However, a great deal of the ADR that is available to people, particularly that funded by Scottish government and local authorities, is in place to resolve disputes that might never go to court, such as community mediation between neighbours and mediation carried out between families and young people to try and enable young people to stay at home and avoid homelessness. From the perspective of these ADR users, arbitration and adjudication may be no more accessible than the courts nor might they be appropriate, even if they were available, given the nature of the disputes in question. In these cases ADR is possibly an alternative, not to court, but to failing to achieve any resolution of the dispute.

1. This was articulated in an economic evaluation of a range of selected Antisocial Behaviour Initiatives in 2007, which attempted to cost the provision of these projects including community mediation projects in Edinburgh, Fife, North Lanarkshire and the Scottish Borders.[[6]](#footnote-6) After a detailed attempt to analyse the financial costs of these projects the report concluded that :

*“…it seems unlikely that many of the referrals to the mediation services included in this evaluation would have pursued legal solutions in the absence of a local mediation service. Thus mediation services are not expected to result in preventing significant costs for legal services. It is more likely that those in dispute would have endured the problem or possibly adopted evasive action by moving (or requesting to move) elsewhere. These costs would tend to fall on the individuals and/or on the local authority housing department.”*

*Most of the benefits of preventing neighbour disputes from escalating (and, indeed, of preventing them from occurring by teaching people how to manage neighbour relations) will be felt by individuals rather than by publicly-funded services. However mediation services can have a considerable impact on local residents and communities, especially if they are targeted appropriately.”*

1. It also suggested that to some extent, the NHS might benefit from the impact of community mediation on improving the health outcomes for people struggling with the stress of a neighbor dispute.
2. In another respect, ADR may be seen as an alternative, not just to the ‘normal legal process’ of the courts but also as an alternative to what might be called the ‘normal process’ of informal negotiation and dispute resolution that characterises much of the dispute resolution that takes place every day, not just between solicitors but between individuals, communities and agencies in dispute. The contrast between the formal nature of ADR and the informal forms of dispute resolution that go on outwith both the courts and these formal ADR processes is highlighted in the NHS Workplace Dispute mediation evaluation mentioned in paragraph 69. It is also mentioned in the ASN mediation research mentioned in paragraph 30. This highlighted how parents often seemed to use informal negotiation to sort out disagreements with education authorities (or even the tribunal) rather than opt for the free, formal mediation service that was (in theory) available to them:

*“Despite the official promotion of ADR, our research found that it has not been extensively used. Most disagreements were dealt with through informal negotiation at school level, with only a minority of parents choosing to use a more formal dispute resolution route. Of those who did, the tribunal was often preferred to mediation or adjudication.”*

1. Research[[7]](#footnote-7) carried out by Edinburgh Cyrenians into mediation between young people and their families also highlights the difference between the approaches taken by the local authorities who provide these services. Some of this work is carried out by local authority staff homelessness prevention staff, often with a remit for prevention, who use ‘mediation skills’ as part of their work with young people and their families when a young person attends a housing options or homeless presentation interview. Other local authorities, by contrast, have trained ‘mediators’ to carry out mediation between young people and their families. We don’t have any information showing which method is more likely to produce the desired outcome of improving the family relationship so that the young person feels they can remain in the family home. If we did it might enable us to identify the advantages of a formal mediation process over a more informal process that uses mediation-like skills.
2. An evaluation of the use of workplace mediation in the NHS was carried out in 2009[[8]](#footnote-8). This was carried out as part of the NHS Dignity at Work project (funded by the Scottish Government Health Directorates) which was established to promote a positive working culture and behaviours that would reduce the perceived or actual levels of bullying and harassment felt across NHS Scotland. The research evaluated seven workplace mediation services provided by seven NHS Boards. The evaluation, carried out in 2009, attempted to work out the cost in pounds of such a programme within the NHS:

*“We estimate the cost of an in-house mediation intervention to be:*

|  |  |
| --- | --- |
| ***Item*** | ***Cost*** |
| *Absorbed costs of mediation training* | *£750* |
| *Wage costs for mediator(s)* | *£298 to £596* |
| *Wage costs for 2 staff members to participate in mediation* | *£298* |
| ***Cost of mediation intervention*** | ***£1,346 to £1,644*** |

*We also know from our interviews that the cost of an external mediation is usually in the range between £2,000 and £5,000 per case.*

*The start-up costs are relatively high, in terms of training and staff time, and it can be harder for boards to justify the cash expenditure on a training course than the continued ‘hidden’ cost expenditure of wages and staff time in resolving formal processes. As previously mentioned, mediation is not the solution for all conflicts, therefore an investment in mediation does not eliminate all the costs of grievances.”*

1. The NHS Dignity at Work project Steering Group had been given the task of answering the question, ‘is mediation a worthwhile intervention?’ The evaluation was unable to come to any firm conclusion based on the evidence provided by the seven NHS Boards due to several factors including the low take-up of mediation within the Boards, limited data on user experience and a lack of evaluation evidence. The report concluded that the writers did not doubt “the worthwhile and appropriate nature of mediation as an alternative to formal process, provided the process supports parties and enables them to avoid lengthy and expensive formal processes.” However, they went on to say “the question of whether *in-house* mediation is worthwhile is less straightforward to answer.”
2. The report concluded that mediation should be provided within the NHS as part of a range of options that started off with developing managers to enable them to manage their staff more effectively moving through to informal facilitation, operational development interventions, mediation and ending with a formal process such as a grievance procedure or going to tribunal. It placed mediation at the more formal end of the scale, one step down from the formal processes of tribunal and grievance procedures. It recommended that NHS boards should introduce informal facilitation alongside mediation and described the mediation process in the context of workplace disputes as potentially a ‘gruelling’ experience which requires considerable ‘emotional resilience’ from the parties involved.
3. Another example of informal ADR (usually mediation) is to be found in the role of council licensing officers whose role, under the Licensing (Scotland) Act 2005 includes ‘mediation’ which is described, for example by Argyll and Bute council, as follows:

*“Mediation – log complaints; discuss licensing problems and disputes with premises and neighbours separately and together*”

1. The Edinburgh sheriff court mediation project was established in 1995 and has been running ever since, funded first by European Union funding, then Scottish government and, since 2009, SLAB. In 2002 an evaluation of the project[[9]](#footnote-9) and the Edinburgh in-court advice project (which operates alongside it) was published and provided a detailed analysis of how the projects operated and their impact on the courts. In the context of the role of ADR within the courts, some of the findings were particularly interesting. Firstly, it identified that many unrepresented parties who sought help from the project were unaware that negotiating with the other party to the dispute was an option, they did not know how to go about negotiating a settlement and lacked the capacity to negotiate successfully. Secondly, although the project was able to provide access to formal mediation services, the then project mediation co-ordinator actively encouraged negotiation over mediation. Full, formal mediations were encouraged only under ‘special circumstances’, which were described as:

*“The ones I would push on to a mediation hearing are the ones who still say that though they are not prepared to compromise in any way or to alter their perceptions of the dispute, they would nevertheless like to sort it out.”*

1. The research went on to set out why people said they opted for informal negotiation over a full mediation hearing:

*“Some clients, however, expressed a wish from the outset to avoid proceeding to a full mediation hearing. One client, for example, was concerned as to the amount of time which could be spent at a mediation hearing. Another was concerned as to the amount of time it could take before a mediation hearing was set up. Geography also played a role in the preferences of some clients referred to the Mediation Project. While one of the main attractions of both assisted negotiation and mediation was that they were free, there was therefore also considerable concern amongst clients as to the opportunity costs of a mediation hearing. The time involved could be very costly for some clients, for example, tradesmen. In those cases where a negotiated settlement was assisted by the Mediation Co-ordinator, the indebtedness and gratitude of clients to the Mediation Project for the avoidance of a mediation hearing was often very apparent.”*

1. The Board’s grant-funding scheme funds a range of projects that provide advice services in and around the sheriff courts to assist people with court and pre-action disputes. The focus of many of these projects is to try and achieve resolution before they turn from disputes to court actions. Only one formal ADR project is funded in this way – the Edinburgh sheriff court mediation project – but all the projects have an emphasis on negotiation and settling matters with the aim of avoiding, where possible, court actions or decrees and attempting to provide sustainable solutions to the problems that put people at risk of court action in the first place.
2. The projects funded under Stream 2 of the 2012-2015 Economic Downturn grant-funding programme are particularly focused on resolving civil disputes (small claims and others) before they get to court or very early on in the process. The project advisers are not mediators and in most circumstances they will be asked to assist one side in a dispute rather than the other. But we know from evaluations of previous similar projects and from their regular reports to the Board, that their role can be closer to that of finding a way of identifying the parties’ mutual interests (the main one often being to avoid litigation) rather than carrying out the traditional adversarial role of the legal representative.
3. Seen from the above perspectives, ADR is a formal alternative, not just to the traditional court-based justice system, but also to the informal ways in which disputes are resolved, often using ADR-type skills, such as mediation skills or negotiation skills. In effect, there are two fairly clearly defined options for dispute resolution – the courts and formal ADR – but in between is a grey, third area, the extent of which is unknown and probably impossible to measure. It is worth bearing this in mind when considering the policy options open to Scottish government for the future of ADR. Also of importance is the suggestion that given the choice, some people will opt for an informal process that avoids both court and another formal process such as mediation for the reasons set out above and no doubt, for many others.
4. Assessing the role and value of ADR within the civil justice system requires an awareness of the third, informal alternative illustrated above. In order to understand the value of ADR within civil justice, we first need to understand how informal methods of dispute resolution work and why, when given the choice, people will sometimes (and maybe often) choose it over an ADR option, even one they don’t have to pay for.
5. Just as the NHS Dignity at Work Strategy Group had to answer the question, ‘is mediation a worthwhile intervention’ the MJW Project 3 Board has set itself the question ‘is ADR a worthwhile intervention?’
6. Many of the arguments put forward for ADR suggest that it is a cheaper alternative to the formal court system. So far, it has proved quite difficult to find any defining study that suggests this is true for the Scottish system, not least because of the lack of information about the costs of Scottish court system against which to make the comparison. However, whatever the competing costs of ADR and the traditional court process, the promotion, sponsorship or compulsion to use formal ADR processes will bring with it costs, not least because ADR has to be carried out by at least one mediator/arbitrator/ conciliator/adjudicator/ombudsman – and, in the case of mediation, two ADR professionals are often involved. The Edinburgh sheriff court mediation project model, whereby the mediators are only paid their travel expenses, may not be sustainable for good so payment to ADR providers will add more costs to the process. The practice of ADR has the potential to create costs as well as reduce them. While in some areas, it may be able to reduce public funding costs, this is not necessarily going to be the case, particularly, if a situation is created whereby we end up with a dual system of courts and ADR programmes, wholly or partly funded by the public purse.
7. However, the important distinction from a policy perspective is that when a person finds themselves in a dispute they may opt (out of choice or not) for a range of different responses to deal with that dispute. Some people will find they have a genuine choice of responses – go to court, try and settle through mediation or opt to do nothing. Others, may feel they have no option to go to court and therefore, the provision of formal ADR or the use of informal ADR skills may provide a resolution to their dispute that would otherwise not be available to them. Whether the resolution is ‘just’ as would be defined by a litigation lawyer trained in pursuing a client’s rights, is another matter. It may not be just that someone has to continue to live alongside the person whose behaviour has made them ill through stress and because of whom they have suffered a loss (such as having to miss work due to ill-health). But if the other person can be persuaded to change their behaviour, so that the detriment suffered by their neighbour ceases and they can remain in their home (and hold onto their job), it may be a resolution that brings peace of mind and a form of justice. Whether that resolution comes about through the intervention of a Housing Officer with a particular skill set or a mediator with a particular role and job description probably won’t matter to the people in dispute.
8. It may make a difference to the agency that funds that intervention. And the relative costs of the forms of ADR or the use of ADR skills is one that policy-makers may have to grapple with. But if we look at ADR beyond the court system, its value may lie as much in (or more than) its role in providing resolution to disputes that would otherwise remain unresolved and with consequences that go far wider than the costs of the civil court system, eg the costs to people’s physical and mental health and the impact on the NHS or the costs to people’s livelihoods or the costs of homelessness which have to be borne by local authorities.
9. From a policy perspective, understanding why individuals and businesses choose to use ADR is important if ADR is to be promoted by government as a means of resolving disputes and given greater prominence within the civil justice system. This is particularly important because as some of the research identified has shown, it is not merely financial cost that may deter people from using an ADR process. The research[[10]](#footnote-10) into the Glasgow and Aberdeen court mediation projects suggested that payment for the service in summary cause proceedings in Aberdeen may have deterred people from using it (although this was not the case in Glasgow, where many of the parties were commercial entities)[[11]](#footnote-11) But there is other evidence (in the ASN field for example in and in the NHS workplace dispute resolution research mentioned above in paragraphs 69 to 71) that suggests that people may be deterred from using even free ADR services. The NHS research suggests that one of the reasons for this relates to the nature of mediation, a process which the researchers described as ‘gruelling’.
10. The definition of ‘cost’ where individuals are concerned should perhaps extend beyond mere financial cost to encompass non-financial costs such as the emotional demands made by some ADR processes. A clear understanding of both the financial and non-financial motivations behind people’s decision to use ADR or not, would probably benefit any future government policy to promote the use of ADR, particularly mediation, especially if this policy is to be backed up by additional funding. This may be particularly important if people are not going to be compelled to use ADR but are going to continue to be allowed to make a choice between traditional litigation and ADR. Identifying ways of encouraging greater uptake of ADR may be more successful if we have a clear understanding as to what deters people from using it at the moment.

Information gaps

1. As this research has found, there is a lack of information about the nature and volume of ADR that is taking place in Scotland or being used by Scottish residents (eg consumer work). This includes gaps in publicly-available information about ADR being funded by Scottish government, such as family mediation and community mediation.
2. There is also a lack of publicly-available information about the outcomes of ADR schemes, both in terms of financial settlement and resolution. For example, we know little about the short-term or the long-term outcomes of family mediation and we were unable to identify any research on the comparative outcomes of court-resolved contact disputes and mediated family disputes.
3. It would be of benefit to know more about what ADR achieves for two reasons: in the area of dispute resolution where the disputes involve relationships that require to be sustained (such as families or neighbours or some commercial relationships between contractors and suppliers) the sustainability of the resolution will be a key measure of success and there may be no financial resolution required. Where the disputes are between parties who do not have a relationship to sustain (as is the case with many consumer disputes) a key measure of success may be the financial resolution obtained for a consumer or the proper completion of a contract. In either case, the outcomes obtained may not meet traditional ideas of ‘justice’ but may be acceptable to the parties involved particularly if they provide the only means of resolving disputes that are either not justiciable (such as disputes between young adults and their families) or that would never go to court because of the barriers faced by one or other of the parties.
4. There is no publicly available research on the link between the use of mediation in family matters and whether parents end up taking their dispute to court and a contact case. Given the calls made on the Legal Aid fund and the courts by family matters this would seem to be a considerable gap in our knowledge and one which would benefit from further investigation, particularly into the amount of funding going into this area and the outcomes which it currently achieves.

Promoting ADR

1. In the absence of categorical evidence that using ADR is cheaper than the traditional court route the policy issue for Scottish government is to assess, on the evidence available, the future role of ADR within civil justice. To date, the Scottish government has actively supported some forms of mediation (family and ASN) and funded other forms, such mediation in the courts and planning mediation on a pilot basis or through single projects.
2. Should Scottish government decide to take a policy route that increases the takeup ADR particularly to resolve disputes that would otherwise end up in court, there is a range to options available to it to ensure that this could happen, such as changing court rules or requiring parties to explain why they haven’t opted for ADR before going to court. Given the role of solicitors as gatekeepers to ADR and the lack of public awareness and possible enthusiasm for it, some pressure may have to be brought on parties and their lawyers to consider using ADR.
3. Currently, some litigants and disputants can choose which form of dispute resolution they prefer. Family law disputants are not obliged to use mediation. Any future major investment in the provision or promotion of ADR within the civil justice system will have to carry some expectation or requirement that it is used as an alternative to litigation. Otherwise there is the risk that government may find itself continuing to fund an overloaded court system as well as ADR alternatives with little evidence that the two are complementing each other or with any of the perceived benefits of ADR being apparent on a wider scale (quicker, possibly cheaper, providing more sustainable outcomes).
4. Given the legislative framework that surrounds many disputes, the place of ADR will also vary from subject area to subject area. Once a couple are married they can only formally end their relationship through a court order. So even the most successful mediation about their children will not avoid the eventual application to and issuing of a court order pronouncing that they are divorced. The rights of children with Additional Support Needs are enshrined in legislation and the same legislation has provided their parents with three forms of dispute resolution: mediation, independent adjudicators and the ASN tribunal. In the absence of changing the legislation, these options will remain available to parents. The issue for government is where should their focus be: on encouraging parties to take part in mediation, or to arrive at negotiated settlements through less formal means than mediation (which the research suggests is happening now)? Or would greater use of an independent adjudicator result in outcomes that were perceived as being more ‘fair’ and therefore less likely to see the parties falling out again at a later stage?

Regulation and quality

1. This feeds into the issue of the role of government in regulating ADR providers. Currently, controls over quality and access to the ADR role appear to be fairly loose. SMN regulates the mediation profession through training, experience and CPD requirements but doesn’t report to government about the work of mediators, outcomes or policy issues (at least not through a public form). Family and community mediators have to reach additional standards set by Relationships Scotland and the SCMN. Other mediators do not and there appears to be no limit on the types of mediation that a mediator can offer to carry out. Is this acceptable? Should greater professionalisation be pursued? Does government want to know how much ADR is taking place?
2. The existence of generic mediators and ADR organisations raises the issue of monitoring and maintaining standards. It also raises the question of whether dispute resolution skills can be applied to any situation regardless of the issue at stake or whether particular disputes and the circumstances surrounding those disputes require particular skills or a knowledge/experience base that can only come from experience of working with those types of disputes or within those circumstances. Are the skills needed to successfully mediate between two tenants the same as those required to mediate between a parent of a child with Additional Support Needs and an education authority? Does the mediator need to understand the particular circumstances of a tenant living in close proximity with their neighbour and with little or no choice as to whether they can live elsewhere? Does the mediator need to understand the particular stresses and aspirations of a parent of a child with Additional Support Needs or the particular stresses under which the education authority has to operate?
3. To be admitted as a mediator on the SMN mediation register, mediators have to undergo a minimum amount of training, have a minimum amount of experience and maintain their expertise. Those mediators who wish to register as Family and Community Mediators have to comply with the practice standards set by Relationship Scotland for Family mediators and the Scottish Community Mediation Network for Community Mediators in relation to initial training, experience and CPD. There appear to be no other additional requirements to act as a mediator in any of the other specialist areas listed on the SMN Find A Mediator register. The Law Society has a register of accredited Family Mediators (currently there are 61) and one for Commercial Law Mediators (currently there are 5). However, many more solicitor firms offer mediation as an option to their clients which suggests that the Law Society register does not represent either the volume of work being undertaken in this field or necessarily acts as a measure of quality.
4. As things stand there are no universal standards for training or monitoring of ADR provision in Scotland. Different types of ADR and different providers have created their own standards and registration provisions but with very little evidence of outcomes being provided by any ADR providers. An interesting development has been the fairly recent establishment of the Family Law Arbitration Group of Scotland which has drawn up its own procedural rules for arbitrations carried out in the family law field by its members. The publicity surrounding the establishment of FLAGS and its website suggests that the type of cases most likely to benefit from family arbitration are those involving complex financial settlements but also, in some cases, issues such as where a child should be educated or their medical provision. The attraction of arbitration is described as its speed, its lower costs and the freedom it gives the parties to choose their arbitrator. So far, the group has not published any figures showing how many family arbitration matters their members have dealt with, which is to be expected given the private nature of their work. What is of interest in this idea is that it takes a private, usually commercial dispute resolution process and applies it to a range of disputes that the state has traditionally regarded as being within its domain because of the social and policy importance of family life.

Consumer ADR, the CABx and Making Justice Work

1. The extent of ADR usage varies enormously between dispute areas with consumer ADR being the most widespread, both in the number of ADR schemes available and in the volume of ADR taking place. Within consumer ADR there are considerable differences between the nature of the ADR available and the take-up by members of the public. However, there are many consumer ADR schemes available to the public and one of the policy issues that this raises is whether more should be done to promote these schemes to encourage people to make greater use of them and to seek resolution of their problems before considering the courts. We don’t know how many people in Scotland currently use these schemes but numbers obtained so far in the survey suggest that apart from large-scale schemes such as the Pensions Ombudsman, ABTA and ACAS, many schemes are not greatly used.
2. More information might be required on the quality and outcomes of ADR schemes that are available but there is an argument for encouraging people to use what is available, often at little or no cost, if only to provide people with a means of resolving disputes who might otherwise do nothing or might not know how to take a complaint further after it has been ignored by the other party or after they have been unable to resolve the dispute.
3. At the moment, most of these schemes deal with consumer matters and are managed from England, even if they provide a service to Scottish consumers. As such, for the most part they do not come within the policy or practical concerns of Scottish government. However, quite apart from the possible scenarios for ADR that would spring from a Yes vote in the referendum or increased devolution and the subsequent untying of the links between Scottish consumers and non-Scottish organisations and schemes, these schemes also throw up current Access to Justice issues, which do come within the remit of the Scottish government[[12]](#footnote-12). Lack of Scottish data makes it impossible to measure the impact of these schemes on consumers or to try and assess what part they play in diverting cases away from the courts. All consumer advice provision and education has now transferred to the CAB service, which provides telephone consumer advice through Citizens Advice consumer service. As the biggest provider of consumer advice, it would be useful to find out more about how they advise and assist people to resolve their disputes and where they send them if they require further assistance.
4. Given the volume of disputes that could potentially be dealt with by the CABx, it would be useful to have some idea of the size of this dispute resolution sector – particularly if it is likely at any time to have an impact on the court system.

Private/public

1. The private/public nature of ADR raises many policy issues for government, particularly when it is linked to the funding of ADR. Should there be greater regulation of the ADR sector and if so, how should the sector be regulated and should different forms of ADR have different regulators? In Australia the National Alternative Dispute Resolution Advisory Council (NADRAC) has an advisory role to the Federal government and the courts and tribunals about the use of all forms of ADR. There is no such similar body in Scotland. If ADR is privately funded, does government have a legitimate say in how that ADR is provided or regulated? If ADR is publicly funded, to what extent should government oversee the regulation of that provision and how should it carry out that oversight – through a NADRAC-type body or through membership bodies like SMN or through a generic regulation process that ascribes standards but does not require additional qualifications, experience of standards for particular forms of ADR or in particular fields?
2. There is also the issue of accountability for public funding of ADR services. It is possible that local authorities and Scottish government departments have detailed information about the impact and outcomes of the ADR services that they fund. If they do, they are not generally being made public. This may be a situation that funders are happy with but if not, what reporting requirements should be in place to ensure that the public funding of private dispute resolution is working and is effective? And what do we mean by ‘effective?’ As noted above, one of the features of some forms of ADR, such as neighbour mediation is that it may provide the only real means by which people can try and resolve their disputes, given the lack of genuine access to any other means, primarily the courts. Whether this is ‘justice’ or even adequate dispute resolution is another matter. In the context of the wider Access to Justice programme, it might be worth finding out in order to assess the outcomes ADR is producing and whether they meet some (currently undefined) idea of acceptable dispute resolution.

ADR and Choice

1. The other issue raised by funding is whether this brings (or should bring) with it any compulsion on parties to use the ADR process sponsored in part by Scottish government. Debates about whether ADR processes, particularly mediation, should have any element of compulsion in them continue. But if public funds are to be invested in promoting or providing/supporting the use of ADR as an alternative to court procedures there is an argument for advocating that parties should not be allowed the luxury of willfully ignoring the existence of such services. This would replace the luxury of choice advocated by commercial solicitors’ websites with a pragmatic acknowledgment that the system may not be able to sustain the costs of a dual system (the courts and the ADR alternative). Therefore provision of ADR may only be sustainable if it reduces the call on the resources in the court system, or allows the courts to deal more effectively (quickly) with the cases that are not suitable for ADR.
2. This in turn throws into relief the role of the potential gatekeepers to ADR – solicitors and sheriffs. If ADR is to be advocated, promoted or funded by Scottish government in the future, consideration would need to whether solicitors will be willing or able to sell the merits of ADR to their clients. Sheriffs will also have to be persuaded of its value, particularly if they are able to decide when and if a case is suitable for referrals to ADR.
3. In England and Wales legal aid was removed from most family law disputes in April 2013 under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. More couples were expected (by the Ministry of Justice) to start using mediation as an alternative to going to court. However, figures obtained from the Ministry of Justice in September 2013 showed instead that the number of couples attending out-of-court sessions to deal with family disputes had fallen by 38% in 2013/14 compared to the previous year. One reason suggested for the fall was that reducing access to solicitors funded by legal aid meant that couples were no longer being directed to accredited mediators who could help them to resolve their dispute.
4. Both the NADRAC and Republic of Ireland Law Reform Commission have published reports on ADR in the courts in Australia and the Irish Republic coming up with measures that could be introduced to increase the use of ADR within their respective judicial systems. NADRAC[[13]](#footnote-13) went further and suggested a range of changes to court processes and case management that would increase the use of ADR techniques in the Australian civil justice system.
5. These included pre-action requirements and protocols and the use of ADR techniques in courts and tribunals such as Judicial or early case appraisal, whereby an indication of the strength, weakness or likely outcome of the case is provided shortly after filing either by a judge a person engaged by the court and agreed by the parties. They also recommended greater use of Case Management Conferencing whereby parties, their representatives and a registrar or judge come together to discuss the best way of preparing the matter for trial. It can be used to narrow the issues, identify gaps in the information provided or to give appraisals on the strength of the case.
6. Alongside changes in court practice, NADRAC suggested the use of a ‘Genuine steps’ requirement. This would require parties to file a statement that they had taken genuine steps to resolve the dispute, that they had information about the likely cost and length of their proceedings, and if they hadn’t taken genuine steps, their reasons for not doing so. NADRAC also recommended that legislation be introduced to require legal practitioners to provide a prospective party with information about the advantages of using ADR, information about the genuine steps requirement, the costs of litigating and the likely timeframe if litigation were to be pursued and information about ADR services available..
7. The Republic of Ireland Law Reform Commission[[14]](#footnote-14) also supported a requirement that parties should have to explain why they haven’t used ADR before going to court. It recommended that parties should pay for their own dispute resolution services alongside a recommendation that legal aid should be expanded to cover services provided by mediators (not solicitor-mediators) in family, and possibly, other disputes.
8. The balance between persuading parties to make greater use of ADR and the possible unpopularity of such a decision could be a difficult decision for a government to take particularly if it risked generating opposition to government policy amongst civil practitioners. From a policy perspective, however, any increase in funding for ADR that does not carry with it at least an expectation that it will be used, runs the risk of government funding a dual and more expensive system of court dispute resolution and ADR with disputants opting for whichever system they prefer, without either system working particularly well or being cost-effective. This would suggest that an increase in government support for ADR, if accompanied by increased funding would require a definite policy direction positively advocating the use of ADR rather than the current low-key method of providing funding in varying degrees to different forms of ADR across different sectors without any underlying positive public policy commitment to the value of ADR relative to other forms of dispute resolution, particularly the courts.

Conclusion

1. The picture presented by this survey of ADR in Scotland is one of a complex and very broad range of schemes, services and providers.  The majority of ADR provision is in the consumer field, much of it through Ombudsman, trade association schemes and private or not-for-profit schemes and much of it based in England but available to Scottish residents.  Within Scotland, public funding from Scottish Government, legal aid and local authorities provides ADR primarily in non-consumer work through projects and schemes in family, community and Additional Support Needs (ASN) mediation, the Edinburgh sheriff court mediation project and the Scottish Public Services Ombudsman.  Alongside this, there is a private ADR market providing mediation and arbitration in a wide range of private, public and commercial disputes with individual mediators partly overseen by the Scottish Mediation Network (SMN) through their mediation register.
2. Since this report was written, some key areas of ADR have started to be developed as a result of Scottish or Westminster policy initiatives.  In the family law field, Scottish Government has commissioned a literature review to provide insights into the use of ADR to deal with family disputes in other jurisdictions.  The findings from that review along with the findings from this report are being fed into work to develop a family justice strategy which will, in the context of a wide range of current and planned changes in the family justice system, consider the potential contribution of ADR to a family justice system that operates efficiently, effectively and contributes to the delivery of positive outcomes, especially for children.
3. A further strand of work is to be developed through a research project, commissioned by SLAB and jointly funded with Scottish Government, into the impact of ADR and ADR-type processes on disputes in the small claims court.  This will provide greater insights into the factors that make a dispute amenable to settlement through ADR or ADR-type processes and what motivates people in dispute to opt for ADR when they become involved in a dispute that could form the basis of court action in the small claims court.  Findings from this research will contribute evidence to help inform decisions about any future expansion of the use of ADR in Scottish courts.
4. A third strand of significant work on ADR will be the implementation of the European Union Directive on ADR (2013/11/EU) and the Regulation on Online Dispute Resolution (ODR) (524/2013) by the Westminster Government.  This aims to simplify the consumer ADR landscape and increase public awareness of the many consumer redress schemes that this survey has outlined.
5. This review has established that much of the ADR provision available is privately funded, particularly in the consumer field, but some of it is not, most notably in the family field.  The lack of publicly available information about the volume of private and publicly-funded ADR has made it impossible to quantify the amount of ADR taking place in Scotland.  While issues of commercial sensitivity may explain the lack of information about privately-funded ADR, the reason for the gap in information about publicly-funded ADR provision, particularly in the family field, is less clear.
6. Family work remains the largest call on the civil legal aid budget in Scotland so the availability, effectiveness and cost of other means of resolving family disputes such as mediation warrant more consideration and scrutiny.  The lack of publicly-available data on the volume, cost and outcomes of such alternatives hinders the development of robust discussions about how best to use limited public resources to deal with family disputes.  We are aware of current efforts by the Scottish Government to improve the availability of data about SG-funded family mediation. This will be crucial for consideration of mediation as the Scottish Government's Family Justice strategy is developed. However, better information is also required for other forms of ADR, including arbitration, other areas of law and funders other than the Scottish Government.
7. More openness generally across the board about the actual volumes of ADR work being carried out, both in the private and public sphere, its costs and its outcomes would improve the quality of the debate about the use or potential use of ADR to resolve disputes.  Proponents of ADR can be strong advocates of the merits of their favoured form of dispute resolution.  While there are both common sense arguments and research data to show the benefits of ADR for some types of cases or disputants, proponents are able to provide considerably less evidence either that these benefits have translated into widespread use of ADR by a public that is currently under no obligation, in most situations, to use it, or that the wider population would derive the same benefits as those that have been aware of and chosen to use ADR. Until this issue is resolved, it is difficult to see how informed strategic policy decisions can be taken about any wholesale shift towards ADR.
1. ‘Advising on ADR: The essential guide to appropriate dispute resolution’, Margaret Doyle, Advice Services Alliance, 2000 [↑](#footnote-ref-1)
2. In 2011-12 it received 3,566 enquiries relating to issues such as Noise, Children's Behaviour, Racial Harassment, Anti-Social or Abusive Behaviour, Boundary or Property Dispute and Homeless & Family issues. [↑](#footnote-ref-2)
3. Wright, K., Stead, J., Riddell, S. and **Weedon, E.** 2011 International Journal of Inclusive Education, Online, pp. 1-16, DOI:10.1080/13603116.2010.548103. [↑](#footnote-ref-3)
4. http://www.docs.hss.ed.ac.uk/education/creid/Briefings/Briefing23 [↑](#footnote-ref-4)
5. See http://www.knowledge.scot.nhs.uk/ncpas/mediation-via-scottish-mediation-network.aspx [↑](#footnote-ref-5)
6. The Impact of Local Antisocial Behaviour Strategies at the Neighbourhood Level, www.scotland.gov.uk/Resource/Doc/200520/0053611.pdf [↑](#footnote-ref-6)
7. Mediation and Homelessness Prevention in Scotland: A decade of mediation between young people and their families – Edinburgh Cyrenians http://www.cyrenians.org.uk/wmslib/PDFs/Mediation-Report-Exec-Summary.pdf [↑](#footnote-ref-7)
8. http://www.staffgovernance.scot.nhs.uk/improving-employee-experience/dignity-at-work-project/review-of-mediation-services/ [↑](#footnote-ref-8)
9. Supporting Court-Users: The In-Court Advice and Mediation Projects in Edinburgh Sheriff Court, Research Phase 2, Elaine Samuel, University of Edinburgh <http://www.scotland.gov.uk/Resource/Doc/46910/0030657.pdf> [↑](#footnote-ref-9)
10. Report on Evaluation of In Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts, Margaret Ross and Douglas Bain, School of Law, University of Aberdeen With DTZ http://www.scotland.gov.uk/Publications/2010/04/22091346/0 [↑](#footnote-ref-10)
11. [↑](#footnote-ref-11)
12. Scottish Government has published its plan for a Consumer Ombudsman should Scotland become an independent country. Consumer Protection and Representation in an Independent Scotland: Options

http://www.scotland.gov.uk/Publications/2013/08/2253 [↑](#footnote-ref-12)
13. The Resolve to Resolve

http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/the-resolve-to-resolve-embracing-adr-improve-access-to-justice-september2009.pdf [↑](#footnote-ref-13)
14. Alternative Dispute Resolution: Mediation and Conciliation <http://www.lawreform.ie/_fileupload/Reports/r98ADR.pdf> November 2010 [↑](#footnote-ref-14)