



ADR and local government

The findings of a research study into the use of alternative dispute resolution and mediation within local government



Introduction

The primary objective of the research was to assess the levels of awareness of alternative dispute resolution (ADR) within local government.

We wanted to establish how widely ADR is understood as a means of settling legal disputes within local government and to obtain an insight into how extensively local government accepts and uses ADR as a practical, quick and cost-effective alternative to litigation.

Any organisation, including local authorities, facing litigation today should be aware of the need to consider using ADR because of the potentially serious costs and consequences of litigation if this is not done.

Furthermore, recent case law has delivered a clear message that ADR should be considered at all stages of a dispute. Failure to do so can lead to serious consequences for the recovery of legal costs in litigation. In particular, two recent cases highlighted during the course of this survey, and featured below, show that costly sanctions can be imposed by the Courts if this is not done. The rulings have real ramifications for local government.

It is our view that once disputants realise the advantages of the speed, cost effectiveness and the certainty that mediation offers, then they will expect their legal advisers to have this additional tool in their armoury.

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Recent court rulings which impact on the use of ADR in local government

COWL & OTHERS -v- PLYMOUTH CITY COUNCIL **14 DECEMBER 2001**

This case was decided in the context of an application for judicial review concerning a decision to close care homes for the elderly. Lord Woolf said "insufficient attention (was) paid to the paramount importance of avoiding litigation wherever possible". He added: "Today, sufficient should be known about ADR to make failure to adopt it, in particular where public money is involved, indefensible."

DUNNETT -v- RAILTRACK PLC (IN RAILWAY ADMINISTRATION) **22 FEBRUARY 2002**

At the hearing of an application for permission to appeal, the parties to this dispute were directed by the Court to consider ADR. The defendant, Railtrack plc, refused to do so. Despite its success at the appeal hearing, Railtrack did not recover any of its costs of the appeal. "To flatly turn down ADR could place the party so doing at risk of adverse consequences in costs. In this case, given that the defendants refusal to consider ADR had occurred prior to the costs of the appeal having been incurred, no costs order will be made in the appeal."

Executive summary

- In relation to the volume of legal disputes currently handled by local government, nearly half (44 per cent) of all the councils polled said they have dealt with more than 200 legal disputes in the past twelve months.
- Only 24 per cent of the respondents interviewed said that they refer those disputes to mediation, which are mostly referred by the solicitor or the other side. The outcome of the cases referred to mediation was settlement.
- Only eight per cent of respondents were aware of anyone within the council trained in mediation. 92 per cent of the councils polled don't have an accredited mediator within the organisation.
- There was a great emphasis on the importance of cost effectiveness within local government. The advantage of cost effectiveness gained from mediation was rated the highest in importance when resolving disputes. This was closely followed by the percentage of cases resolved through mediation.
- The respondents considered mediation would be most effective when dealing with contract and construction cases.
- 86 per cent of those polled said that they have received no training on mediation skills or techniques. This also substantiates the 92 per cent of respondents who aren't aware of anyone within their organisation who is an accredited mediator. The implication is that there is a clear lack of mediation training and a pressing need for accredited mediators within local government.

Methodology

The research was carried out during August 2002 by telephone interviews conducted by researchers within Nabarro Nathanson. Senior directors of the ADR Group assisted on the structure and content of the questionnaire. Interviews were typically held with the head of litigation, a litigation manager or equivalent within the sample organisation. Each interview lasted approximately 10 minutes.

The sample for the research consisted of 50 councils within the UK. The respondents consisted of:

English Unitary Councils	7	14%
Peterborough City Council		
Plymouth City Council		
Herefordshire Council		
English MBCs	6	12%
Kirkless MBC		
Barnsley MBC		
Stockport MBC		
English County Councils	3	6%
North Yorkshire County Council		
Leicestershire County Council		
Northumberland County Council		
English District Councils	18	36%
Sevenoaks District Council		
East Cambridgeshire District Council		
Worcester City Council		
English City Councils	3	6%
Salford City Council		
Gateshead City Council		
Chester City Council		
London Borough Councils	6	12%
London Borough of Haringey		
London Borough of Lewisham		
London Borough of Merton		
Welsh Unitary Councils	7	14%
Cardiff County Council		
Port Talbot County Council		
Gwynedd Council		

Glossary of terms used in this report:

Alternative dispute resolution (ADR)
Facilitative mediation
Evaluative mediation
Early neutral evaluation
Mini Trial or Executive Tribunal
Judicial or expert appraisal
Expert determination

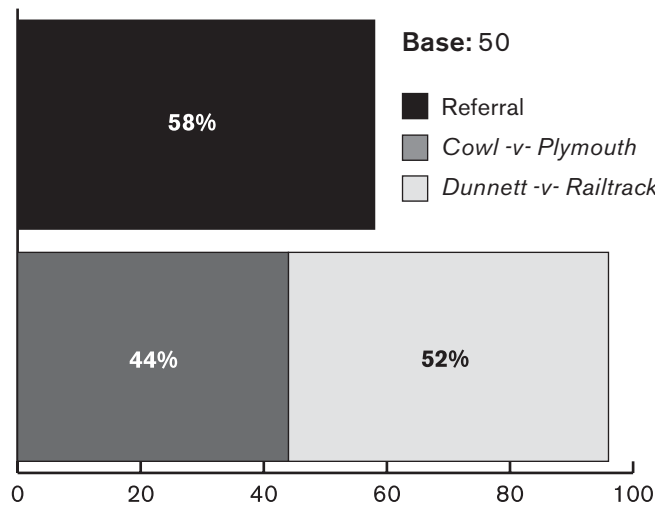
Knowledge and use of mediation and ADR

AWARENESS AND INFLUENCE OF ADR CASES

Q. There have been two recent cases involving ADR, are you aware of the decision in the case of *Cowl & Others -v- Plymouth City Council* and *Dunnett -v- Railtrack plc*?

Also, would the recent cases encourage you to refer matters to mediation?

Proportion of organisations that are aware of recent cases involving ADR

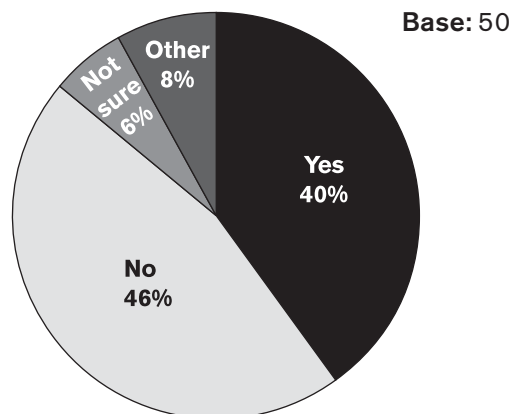


Approximately half of respondents were aware of the two recent cases involving ADR.

Out of those respondents, **58 per cent** said that the recent ADR cases would encourage them to refer matters to mediation.

Q. Does your organisation refer disputes to mediation?

Proportion of councils referring disputes to mediation



40 per cent of the respondents claimed to refer disputes to mediation. However, 25 per cent of those who do use mediation use it occasionally or rarely. The response categorised under 'Other' includes:

- "Have no formal process"
- "Might refer to arbitration"
- "Looking at it"
- "Internal Procedure"

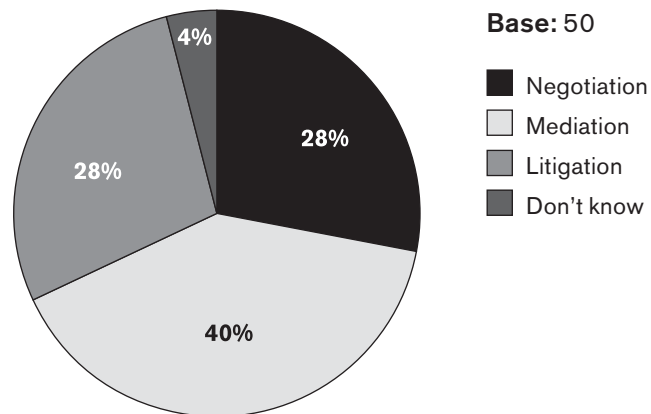
Comment:

- Nearly half of all respondents (46 per cent) are not currently referring disputes to mediation.

APPROACH TO DISPUTE RESOLUTION

Q. What is your current approach to resolving disputes within the local authority?

Approach to resolving disputes within the public sector



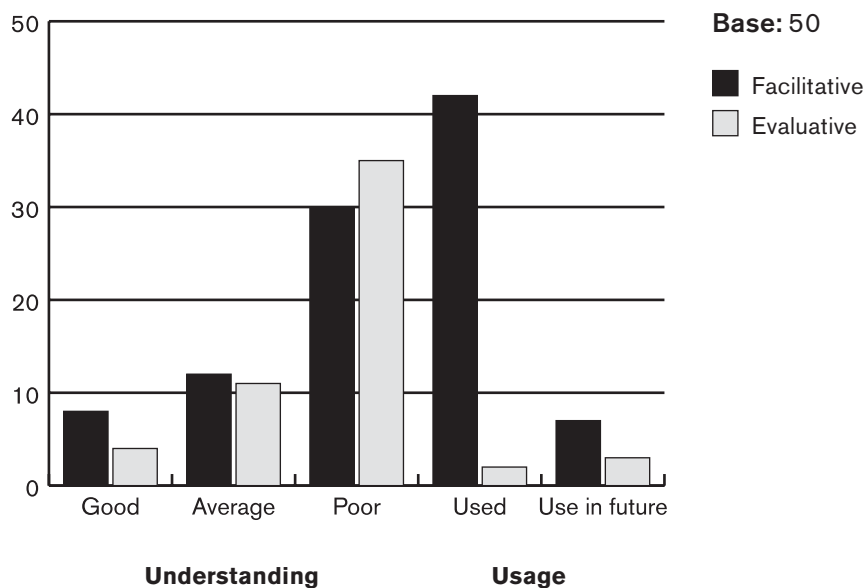
Comment:

- The most popular approach to resolving disputes appeared to be via mediation, cited as such by 40 per cent of respondents. However, 25 per cent of the respondents who use mediation say they only do so occasionally or rarely.
- The remainder utilise negotiation and litigation to resolve disputes. This indicates that negotiation (28 per cent) and litigation (also 28 per cent) still dominate dispute resolution within local government.

KNOWLEDGE AND USE OF MEDIATION

Q. There are two types of mediation: facilitative and evaluative. Could you please tell me your level of understanding and whether or not you have used these forms of mediation or whether you would consider using them in the future?

Knowledge and use of facilitative and evaluative mediation



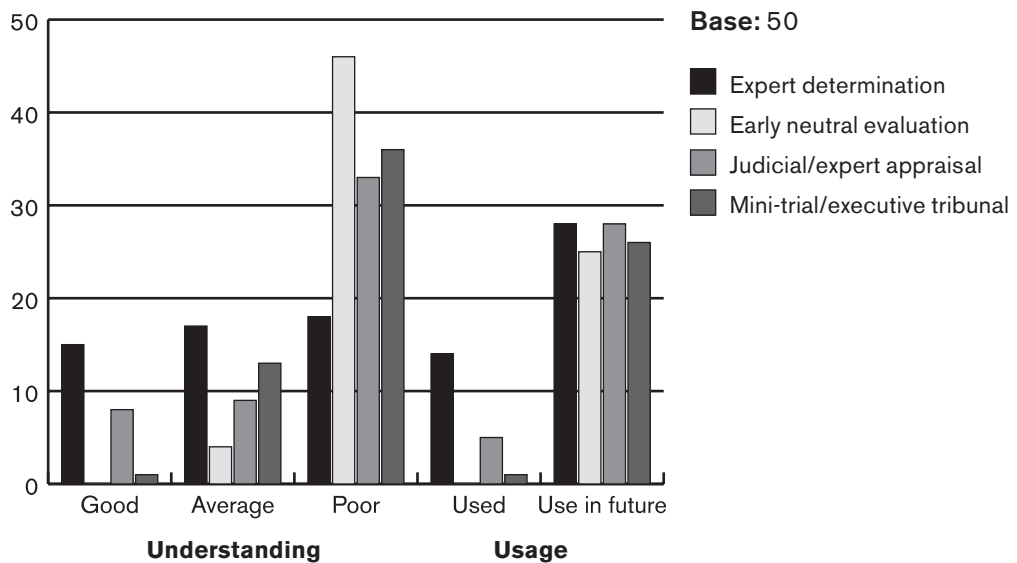
Comment:

- There were poor levels of understanding within local government with regards to both types of mediation. However, facilitative mediation was understood better than evaluative with 40 per cent showing a good or average understanding of facilitative mediation compared with only 30 per cent for evaluative mediation.
- Facilitative mediation is clearly used more than evaluative with 84 per cent of the respondents having used facilitative compared to only two per cent usage for evaluative mediation.
- The future use of the two types of mediation has considerable potential, with 36 per cent claiming that they will definitely or possibly use facilitative mediation and a substantial 52 per cent of respondents claiming that they will definitely or possibly use evaluative mediation in the future. The general attitude towards future use of mediation was that it would be utilised as and when necessary.

KNOWLEDGE AND USE OF TYPES OF ADR

Q. What would you say is your level of understanding and whether or not you have used these types of ADR or whether you would consider using them in the future?

Knowledge and use of ADR



Comment:

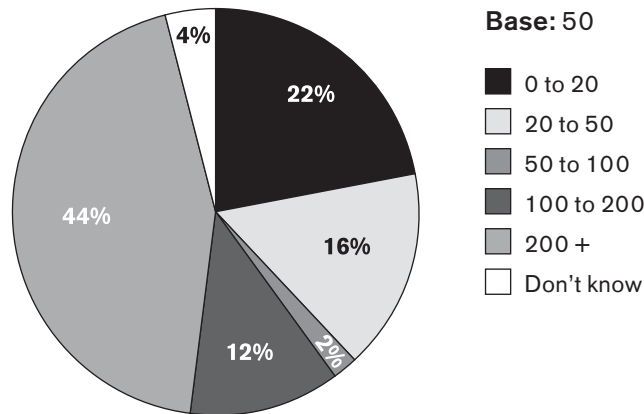
- We found that out of the four types of ADR, 'Early Neutral Evaluation' is the least understood by the respondents. None of the respondents claimed to have a clear understanding of this type of ADR and only eight per cent said they had an average understanding of it. There was also little understanding within the sample of 'Mini-trial or Executive Tribunal' with only 28 per cent of respondents having a good or average understanding of this type of ADR. 'Expert Determination' is by far the best understood and the most used out of the types of ADR, with 64 per cent of respondents saying they have good or average understanding of it and 28 per cent saying they have used it.
- Although 'Judicial/Expert Appraisal' is less understood and used by the respondents, the survey indicates that this type of ADR has equal potential for future use as the more popular 'Expert Determination'. This suggests a gap in the market for future use of 'Judicial or Expert Appraisal' within local government.
- Approximately half of respondents were aware of the recent ADR cases and over half of respondents were encouraged to refer matters to mediation because of the cases.
- There appears to be a level of low usage of mediation within local government, with negotiation being the primary method of dispute resolution.
- Facilitative mediation is by far the most popular and best understood out of the two types of mediation.
- Expert Determination is the most used and best understood out of the four types of ADR. However, all four types of ADR show good potential for future use.

Experience and use of mediation

VOLUME OF DISPUTES

Q. How many legal disputes has your organisation been involved in over the past 12 months?

Volume of legal disputes within local government



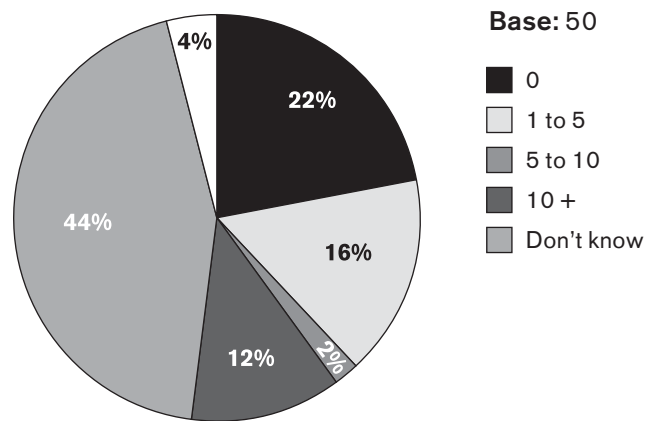
Comment:

- Nearly half of all respondents (44 per cent) were involved in over 200 legal disputes in the past 12 months.
- However, 22 per cent of respondents said that they had to deal with between none and 20 disputes in the last 12 months. This suggests that there is a wide scale of difference between public sector organisations with regards to the volume of disputes they handle.

NUMBER REFERRED TO MEDIATION

Q. How many of these were referred to mediation?

Number of disputes referred to mediation



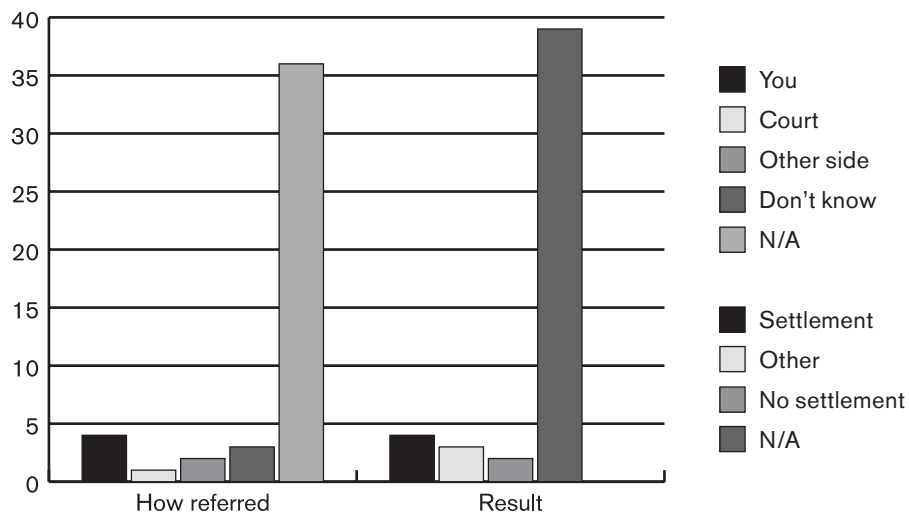
Comment:

- A large majority of local government organisations (60 per cent) do not currently refer any disputes to mediation. Only 16 per cent refer a maximum of five disputes to mediation, with an equal percentage not knowing how many disputes are referred.

REFERRAL TO MEDIATION AND OUTCOME

Q. Of those cases, can you say how the majority were referred to mediation and what has been the result of the majority of mediations?

How disputes are referred to mediation and their outcome



Comment:

- The data again illustrates the lack of referral to mediation within the sample, with 74 per cent not applicable because they don't refer to mediation. The disputes referred to mediation are mostly referred by the solicitor or the other side. Many respondents (eight per cent) weren't sure how the disputes were referred.
- The outcome of the disputes actually referred to mediation in all cases was settlement.

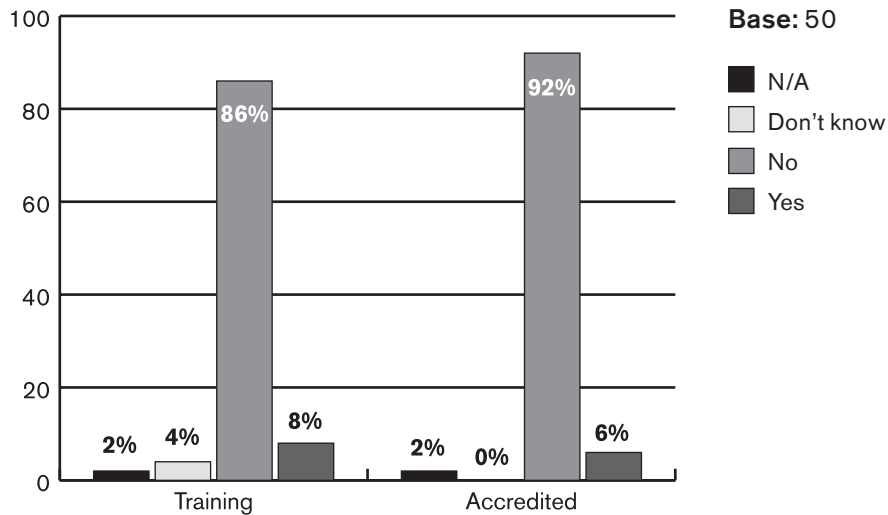
MEDIATION TRAINING AND QUALIFICATIONS WITHIN PERSONNEL

Q. Are you aware of anyone within the organisation who is an accredited mediator?

Also

Has anyone within the organisation received training on mediation techniques or skills?

Proportion of personnel trained and accredited in mediation



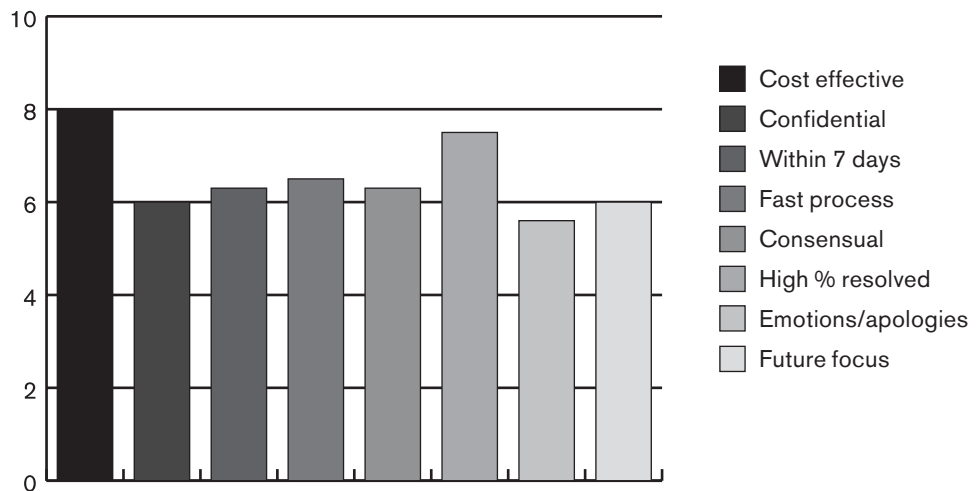
Comment:

- 86 per cent of those polled said that they have received no training on mediation skills or techniques. This also substantiates the 92 per cent of respondents who aren't aware of anyone within their organisation who is an accredited mediator. The implication is that there is a clear lack of mediation training and a pressing need for accredited mediators within local government.

ADVANTAGES OF MEDIATION VALUED BY LOCAL GOVERNMENT

Q. Advantages and Benefits of mediation, how would you rate each in terms of importance when resolving disputes?

Average mean score for importance of mediation benefits



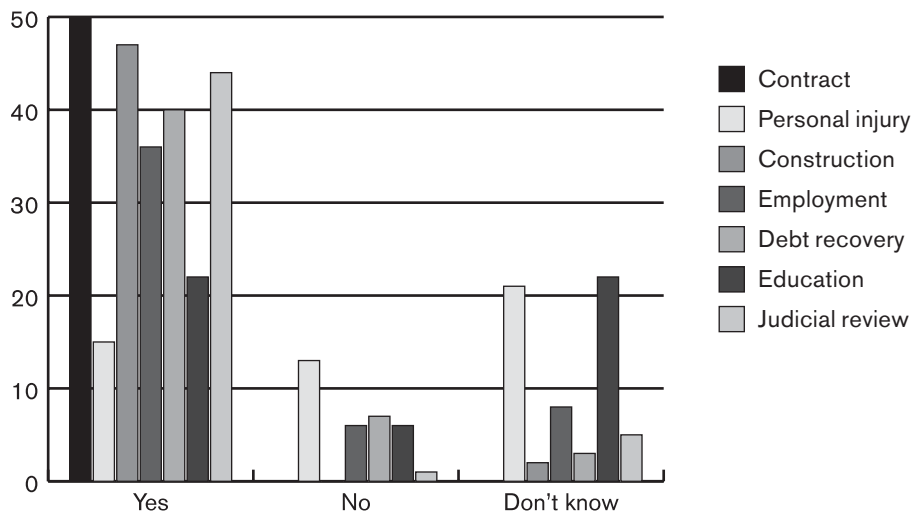
Comment:

- Local government values cost effective resolution as being the most important advantage of mediation. This may reflect the often tight budget the councils have to work within. The resolution rate and speed of resolution were also shown to be important within the sector.

ACTIONS APPROPRIATE FOR EFFECTIVE MEDIATION

Q. In what types of cases do you consider mediation would be the most effective?

Actiona appropriate for mediation



Comment:

- Local government considers that mediation would be most effective in 'Contract' and 'Construction Cases'. However, 'Judicial Review' and 'Debt Recovery' cases were also thought to be suitable for effective use of mediation.

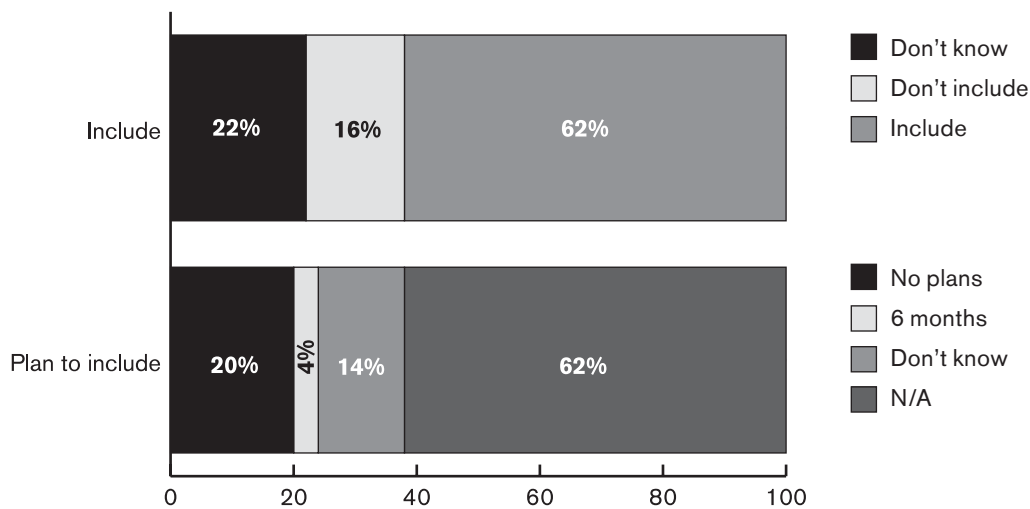
Present and future use of ADR

INCLUSION OF ADR CLAUSES IN CONTRACTS

Q. Are you including ADR clauses in your contracts?

Also

When do you plan to start including ADR clauses in your contracts?



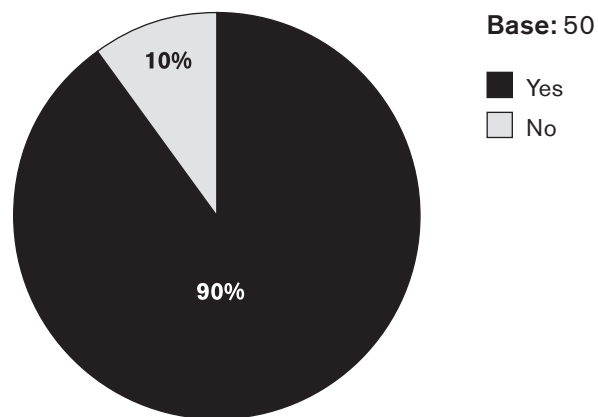
Comment:

• Over half of the councils include ADR clauses within their contracts. However, 20 per cent of respondents have no plans to include ADR clauses, with another 14 per cent not knowing whether they plan to include the clauses in the future. This left just four per cent of respondents who actually plan to include ADR clauses in the next six months. This data suggests that most councils already have ADR clauses within their contracts. The remainder mostly have no plans to include ADR clauses or don't know either way.

USE OF ADR FOR COST EFFECTIVE SOLUTIONS

Q. Do you feel that ADR could assist you in achieving the best value process and discharging your fiduciary duties?

Agreement to whether ADR can assist cost effective solutions



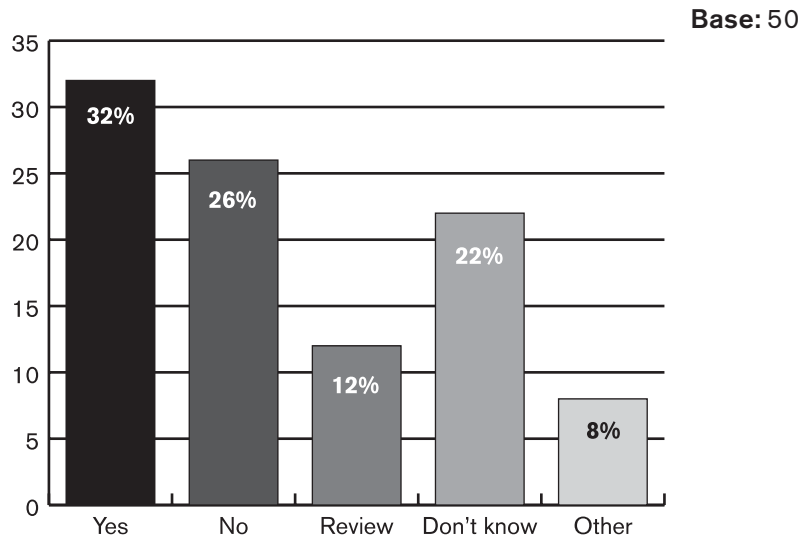
Comment:

- 90 per cent of those interviewed feel that ADR could assist them in achieving the best value process and discharging their fiduciary duties within the council.

FUTURE DISPUTE RESOLUTION POLICIES AND PROCEDURES

Q. Do you intend to revise or review your dispute resolution policies and procedures?

Future review of resolution policies and procedures



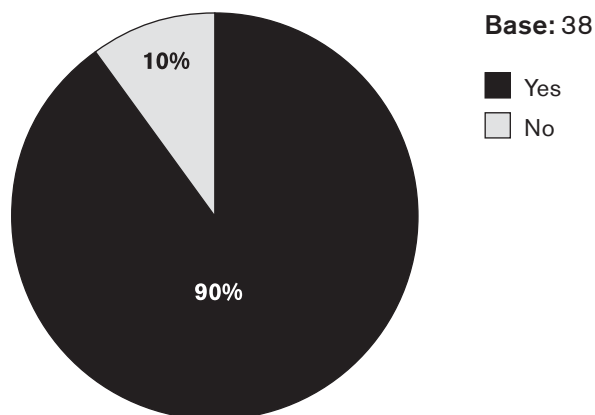
Comment:

- 32 per cent of respondents intend to revise or review their dispute resolution policies and procedures and a further 12 per cent claimed that their procedures are always under review. However, a substantial number (26 per cent) do not intend to review or revise their policies and procedures in the future. The 'Other' responses consisted of respondents who claimed to have no resolution policies.
- 62 per cent of respondents include ADR clauses in their contracts. The remainder don't know of or have any plans to include ADR clauses; with only four per cent of respondents aware of plans to include ADR clauses.
- All respondents feel that they are obligated to resolve disputes cost effectively. 90 per cent of those felt that ADR could help them achieve this.
- 44 per cent of respondents are currently reviewing or intending to revise or review their dispute resolution policies and procedures.

Potential leads for mediation

Q. Would you like to receive more information on mediation?

Requests for further information on mediation and ADR



Conclusion and recommendations

It is clear from the study that there is currently a lack of knowledge and a low level of usage of both mediation and ADR within local government, but recent cases involving ADR have helped raise the awareness of its importance.

There is a particular lack of knowledge of 'Evaluative Mediation' within the sector, which will restrain the level of use of this type of mediation.

Notwithstanding the above, the survey does suggest that many councils:

- already incorporate ADR clauses within their contracts;
- have a strong focus on resolving disputes cost-effectively;
- to achieving 'Best Value'; and
- feel ADR can help them achieve this.

Councils will benefit from education and training about the different forms of ADR in order to encourage and increase its use within local government.

It is clear that mediation and other forms of ADR are not fully utilised within local government, although most councils appear to be open-minded to its use, despite their limited knowledge of how it works in principle.

The emphasis on 'Best Value' within local government can be used as an opportunity to encourage the use of mediation as a cost effective alternative to litigation.

NABARRO NATHANSON

Nabarro Nathanson is one of the UK's leading commercial law firms. It has more than 450 lawyers offering a broad range of legal services to major national and international corporate, government, institutional and public sector clients.

The firm's commercial litigation and dispute resolution group specialises in conducting large scale civil and commercial litigation, both in the UK and internationally. This includes working in the areas of civil fraud, banking, infrastructure, competition (in the UK and European Court of Justice), asset tracing, pensions, corporate, environmental and defamation.

It is also ranked as the leading public sector firm by both The Legal 500 and Chambers, the foremost independent guides to the legal profession.

ADR GROUP

The Bristol-based ADR Group is the oldest and largest provider of both commercial and family mediation training in the United Kingdom. Over the last 13 years it has trained and accredited hundreds of mediators in programmes recognised by both the Law Society of England and Wales and the UK College of Family Mediators.

The ADR Group provides a civil and commercial mediation brokerage and case management service through its ADR Net, a nation-wide network of mediators from 68 legal firms in England & Wales. The ADR Net has a working panel of 217 commercial mediators, all of whom are qualified lawyers and barristers. In the last five years, the ADR Net has handled over 770 commercial mediations, excluding Disabled Rights Commission conciliation cases and court mediation schemes. ADR Group runs a Continuing Professional Development (CPD) training programme of conflict resolution, mediation and advanced negotiation courses throughout the UK.

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Gerard is a partner and head of commercial litigation in Sheffield. He specialises in Commercial Dispute Resolution. He is a fully accredited and registered Mediator with CEDR

and the ADR Group. He has recently been admitted to the Law Society's civil/commercial mediation panel, one of only 17 lawyers nationwide to have achieved this status to date.

Detailed specialist advice should be obtained before taking or refraining from any action as a result of the comments made in this publication, which are only intended as a brief introduction to the particular subject.