UK COLLABORATIVE CENTRE FOR HOUSING EVIDENCE

Alternative approaches to resolving housing disputes

The role and potential of alternative dispute resolution in the UK private rented sector

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About the author

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This is the first project carried out as part of the collaboration between CaCHE, the TDS Charitable Foundation and the SafeDeposits Scotland Charitable Trust. Through this collaboration we are undertaking a diverse programme of research on issues relating to developments in, and operation of, the UK private rented sector. The broad objective of the programme is to contribute to raising standards in the UK private rented sector.

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Executive summary

This report provides a critical review of the role and potential of alternative dispute resolution approaches in addressing landlord and tenant disputes in the private rented sector in England, Scotland, Wales and Northern Ireland. Methods included semi-structured professional interviews, a literature review and international case studies.

Resolving Disputes in the Private Rented Sector: The Current System

A diverse dispute resolution landscape exists both within and outside courts and tribunals. This landscape is, however, complex and confusing. It does not assist many landlords and tenants in the private rented sector. Many are only able to access redress and resolve disputes via courts or tribunals.

Northern Ireland

- Laganside Courts
- No tribunals or housing panels
- Membership with redress scheme not compulsory for letting agents or landlords
- Adjudication service offered by 3 statutory tenancy deposit schemes (compulsory membership)

Wales

- Residential Property Tribunal
- County Court
- Membership with redress scheme not compulsory for letting agents but *not* for landlords
- Adjudication service offered by 3 statutory tenancy deposit schemes (compulsory membership)

Scotland

- First-tier Tribunal for Scotland
- Membership with redress scheme not compulsory for letting agents or landlords
- Adjudication service offered by 3 statutory tenancy deposit schemes (compulsory membership)

England

- First-tier Tribunal (Property Chamber)
- County Court
- Membership with redress scheme not compulsory for letting agents but *not* for landlords
- Adjudication service offered by 3 statutory tenancy deposit schemes (compulsory membership)

Across the UK there is a move towards reforming dispute resolution in the private rented sector, as well as increased policy interest in alternative dispute resolution (ADR). However, very little is known about the use, strengths and limitations of using ADR in this context.

Alternative dispute resolution (ADR) is an alternative process which allows landlords and tenants to resolve disputes outside courts and tribunals.

Alternative dispute resolution in the UK private rented sector: court/tribunal-connected mediation

Across the UK mediation is presented as an alternative way of resolving certain private rented sector disputes. However, the role of ADR/mediation in resolving disputes - beyond those relating to deposits - remains limited.

There is a distinct lack of free or low-cost mediation services available for landlords and tenants.

Mediation is generally only offered as an add-on to court or tribunal processes; often at this point parties have already framed their dispute in adversarial terms and relationships have broken down.

The evidence base suggests that mediation can provide a quicker, cheaper and less stressful way of resolving disputes, whilst both preserving relationships and empowering parties. Mediation does however have its limitations and will not be appropriate for every dispute. There is a risk that in certain cases mediation may exacerbate power inequalities.

Out of court processes: Ombuds services and UK tenancy deposit schemes

The adjudication service provided by tenancy deposit schemes is currently the only ADR service that is specifically designed for private rented sector disputes. The Property Ombudsman and the Property Redress Scheme address complaints against letting agents.

These services are increasingly focusing on multi-tiered resolution mechanisms, early resolution, providing advice and information, and digitalising services. Initial feedback indicates that these developments may improve case handling time and speed of deposit return.

The evidence base for these schemes could be enhanced, with further qualitative and quantitative research needed to assess their effectiveness. In addition, the existing providers only address certain aspects of housing issues, and significant gaps in the dispute resolution landscape remain.

International case studies

This report covers three international case studies on the use of ADR to resolve housing disputes: the Civil Resolution Tribunal in British Columbia, Tenancy Services in New Zealand, and the Residential Tenancies Board in Ireland. The findings from these case studies indicate that the following key principles may help improve dispute resolution for landlord and tenants in the UK private rented sector:

A multi-tiered dispute resolution system that provides access to a consensual form of ADR (such as mediation) before disputes escalate to courts or tribunals, may result in a significant number of cases being resolved early. A clear pathway through the different stages must be made available to ensure that the system is accessible and convenient to the public. The system must also be flexible and responsive to the needs and complexities of different cases.

Prioritising active participation in the dispute resolution process by providing opportunities for early resolution of disputes – for example, through the provision of advice and information - can increase client empowerment and access to justice. Wherever possible, those involved in a dispute should be able to choose a dispute resolution method that is most appropriate to their needs and circumstances.

Delivering proportionate and appropriate dispute resolution by means of a wider array of options for resolving disputes in the private rented sector can potentially remove barriers to accessing the system. The proportionality principle means that methods that involve less procedure, cost, and delay are made available in addition to more formal adjudicative processes. A flexible and proportionate system would provide possibilities for resolving disagreements before they become highly adversarial and escalate to courts and tribunals. Rather than only offering court/tribunal-connected mediation, an improved system for resolving disputes would deliver an array of methods to encourage consensual resolution as early as possible.

A user-focused approach within the digitisation of dispute resolution services will prevent people being excluded from the system. As paper-based or face-to-face processes are increasingly moved online, focus should be awarded to the individuals who will use the technologies. Adopting a user-focused approach entails paying attention to how issues relating to access, literacy, engagement and people's lived experiences will affect the use and impact of these systems. On a practical level this involves rigorous user testing and consultation with those using the system and the organisations that support them.

1. Introduction

Background

Whilst disputes can occur in any consumer market, in the private rented sector they can have particularly harsh consequences, such as the loss of a home and homelessness. An adequate system of dispute resolution is essential in ensuring that landlords and tenants can assert their legal rights and that disagreements can be resolved. Although traditionally this system has involved courts and tribunals, these processes have been criticised as no longer fit for purpose.[1] Concerns have been raised about the confusing and fragmented nature of existing dispute and redress processes,[2] and about housing rights being more difficult to assert than rights in other consumer markets.[3]

A diverse dispute resolution landscape exists both within and outside courts and tribunals. However, across much of the UK, existing mechanisms do not assist landlords and tenants in the private rented sector: many are left without a means of resolving disputes other than formal court models. There is also inconsistency in the available approaches. In the case of some disputes, resolution falls exclusively within the domain of courts and tribunals, whilst in other cases – notably disputes over deposits - other organisations conduct dispute resolution processes mandated by legislation. Some disputes (e.g., those involving letting agents in England and Wales) involve mandatory resolution by a designated industry ombudsperson.

In 2004 the Law Commission was asked to investigate how housing disputes were dealt with in England and Wales. The subsequent report presented various recommendations on encouraging and increasing the use of alternative disputes resolution approaches. However, as a result of changes in the Government, as well as the subsequent economic crisis, these recommendations were largely not implemented.[4]

In recent years the UK private rented sector has grown and developed significantly and currently accommodates approximately 20% of British households. Our recent scoping report - *The private rented sector in the UK* – discusses how this has resulted in an array of policy and regulatory responses, which in turn differ in nature and extent across the nations of the UK.[5] Dispute resolution and access to redress for housing issues is one area of private rented sector policy which has received increased attention. Across the UK, Governments have either introduced legislation or announced legislative measures in order to improve dispute resolution for landlords and tenants.

As part of these developments there has been increased policy interest in the use of alternative dispute resolution approaches to help tenants and landlords resolve disagreements outside formal litigation procedures. Alternative dispute resolution (ADR) is widely used both in and out of the court's civil justice proceedings, and has been promoted as a less stressful and more effective and efficient means of resolving disputes.[6] Some commentators have noted a culture shift away from traditional adversarial trial processes,[7] and, across the UK, ADR mechanisms have been introduced for certain housing disputes in the private rented sector. However, very little is currently known about the use, strengths and limitations of ADR approaches in this context.

[1] Hodges, C. (2019) Delivering dispute resolution: a holistic review of models in England and Wales. Oxford: Hart.

[2] MHCLG (2019) Strengthening Consumer Redress in the Housing Market. Summary of responses to the consultation and the government's response (Accessed: 12/12/19)

[3] Citizens Advice (2017) It's Broke, lets fix it (Accessed: 12/12/19)

[4] Brookes, A. and Hunter, C. (2016) 'Complexity, housing and access to justice', in Palmer, E., Cornford, T., Marique, Y. and Guinchard, A (eds), Access to Justice: Beyond the Policies and Politics of Austerity. Hart: Oxford, pp.157-174

[5] Marsh, A. and Gibb, K. (2019) The private rented sector in the UK: An overview of the policy and regulatory landscape (Accessed: 29/1/20).

[6] In 2010, the Office of Fair Trading carried out a mapping exercise of UK consumer redress, identifying 95 discrete schemes operating across 35 sectors, with more than half of them offering conciliation or mediation practices; this is often the first stage of a multi-tiered process (Accessed: 15/1/20).

[7] Billingsley, B. and Ahmed, M. (2016) 'Evolution, revolution and culture shift: A critical analysis of compulsory ADR in England and Canada', Common Law World Review, 45(2-3):186-213.

The unequal power dynamic between landlords and tenants, and the lack of security experienced by tenants, is regarded as one of the key issues related to renting privately.[8] In England and Wales, many landlords currently have the power to evict a tenant from their home without reason ("no fault" eviction through Section 21).[9] In Scotland, The Private Housing (Tenancies) (Scotland) Act 2016 created a new private residential tenancy and ended no-fault grounds for possession. Whilst it is too early to determine the outcome of this development, it is likely to significantly impact on landlords, tenants and the sector.[10]

Research in England has shown that tenants may be unwilling to make a complaint due to fear of retaliatory eviction or retaliatory rent rises.[11] Increasing affordability problems and the lack of social housing throughout the UK, may force low-income households or vulnerable tenants to live in accommodation that is of particularly low quality. The imbalance of power, lack of alternative affordable accommodation and the precarity and insecurity associated with renting privately, may impact an individual's ability to exercise their rights or engage with a dispute resolution system.

Alternative dispute resolution: Definition and scope

There is no universally agreed definition of ADR, with the term covering activities that embrace a diversity of philosophies, practices and approaches.[12] In this report ADR is understood as a process that allows landlords and tenants to resolve disputes without the use of courts or tribunals. ADR can also be seen as an alternative to processes of informal negotiation occurring with or without the involvement of lawyers, advisors or community organisations, or indeed as an alternative to not taking any action.[13]

Determinative and consensual methods

Image 1 provides an overview of the various types of ADR mechanisms. A distinction can be made between determinative and evaluative ADR techniques involving a third party (e.g., ombuds, adjudicators or arbitrators), and consensual or facilitative processes, where a third party brings the parties together to reach a resolution by agreement (e.g., mediation, negotiation).[14] In determinative processes the third party is responsible for making decisions that may be legally enforceable, whilst in consensual approaches the third party may either help facilitate the discussion, or provide expert advice/recommendations in an evaluative way.

[8] Rhodes, D. and Rugg, J. (2018) Vulnerability amongst Low-Income Households in the Private Rented Sector in England (Accessed: 19/2/20).

[9] In England, the Government is currently consulting on the decision to remove section 21 and improve section 8 eviction grounds. Section 21 will also cease to exist in Wales, when the Renting Homes (Wales) Act 2016 takes effect.

[10] Gibb, K., Livingston, M. and Berry, K (2019) Overview of private rented housing reforms in Scotland (Accessed: 15/1/20).

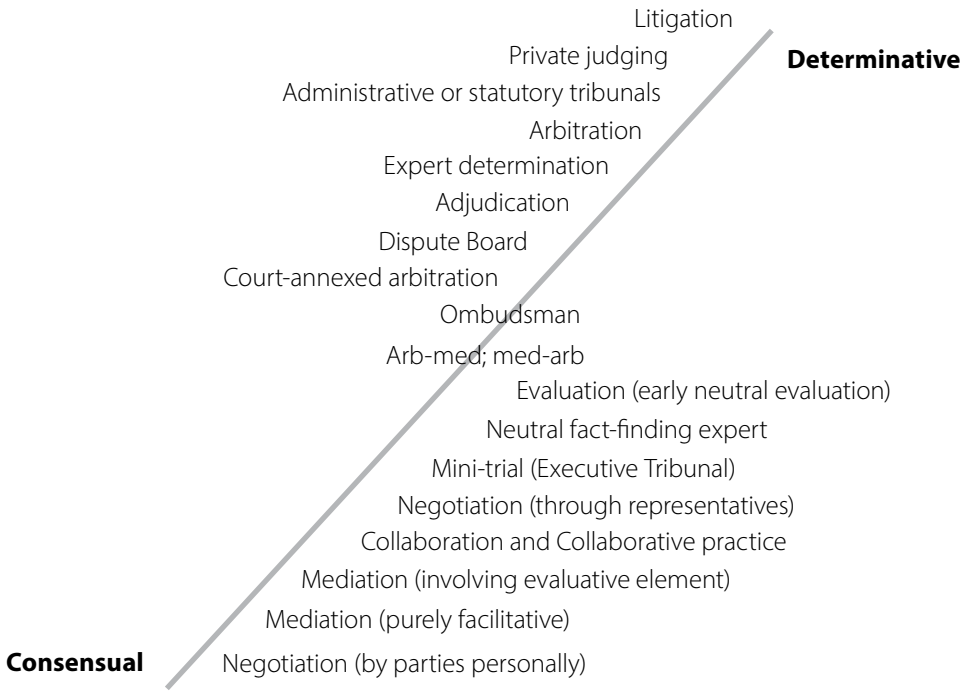
[11] Citizens Advice, It's Broke, lets fix it

[12] Brown, H. and Marriott, A. (2011) ADR Principles and Practice. London: Sweet and Maxwell.

[13] Genn, H (1999) Paths to Justice: What people do and think about going to law. Oxford: Hart Publishing.

[14] Office of Fair Trading (2010) Mapping UK Consumer redress. A summary guide to dispute resolution systems (Accessed: 16/12/19).

Image 1: Dispute resolution processes[15]



Mediation is the most widely known ADR technique: it involves a third party supporting the disputing parties in finding a mutually acceptable solution. The mediator will usually not provide advice, but rather support the parties in finding a resolution. Besides the various mediation services operating within the community, mediation can also be used for civil claims in the courts or tribunals.

Arbitration is widely used for disputes between major corporations, employment rights disputes and consumer disputes. It operates according to defined rules as set out in the Arbitration Act 1996 (for England, Wales and Northern Ireland).

Adjudication involves an independent third party – the adjudicator – who considers claims from both sides of a dispute and then makes a binding decision (unless challenged by either party via litigation). This adjudicator will usually be an expert in the particular subject matter.[16]

Early neutral evaluation is usually a non-binding process in which an evaluator provides an independent assessment of the key facts and legal issues of a case (including an estimate of the likely outcome).

Negotiation is a flexible and informal approach whereby parties try to reach an agreement with or without the assistance of a legal representative.

[15] Adapted from Brown and Marriott, ADR Principles and Practice, pp.20

[16] Brown and Marriott, ADR Principles and Practice

ADR and accessing justice

It has been argued that the term ADR should only be applied to consensual processes such as mediation because in determinative methods such as arbitration or adjudication, parties agree to a binding decision which takes place outside of the civil court process.[17] Litigation features centrally in people's attitudes towards dispute resolution, and some members of the public and the judiciary are resistant to ADR because they believe that claimants must have their rights upheld by a court.[18] Where parties are compelled (e.g. through financial penalty) to use determinative forms of ADR with no possibility of returning to the court, this is considered to be a breach of Article 6 of the European Convention on Human Rights, protecting the right to a fair trial.[19]

The notion that ADR restricts access to the courts can, however, be contested since although ADR may postpone the right to go to trial it often does not deny it.[20] For example, participation in the dispute service offered by the deposit protection services in England and Wales will require consent from both parties, and either party can choose to engage in a court process instead

These discussions relate to wider academic debates on the role of ADR in either facilitating or hindering people's access to justice[21] and discussions on whether to aim for consistency and standardisation in the ADR field or to welcome a diverse range of practices.[22] ADR is not without its critics[23], and it is imperative that those advocating an increased use of ADR or ombuds services can demonstrate the outcomes and impacts achieved by these approaches.[24] Other academics highlighted the need for the nature and value of ADR's contribution to dispute resolution systems to be communicated more clearly and coherently.[25] This in turn raises questions on the available evidence on the nature, operations and impact of ADR in the private rented sector.

[17] Civil Justice Council ADR Working Group (2018) ADR and Civil Justice (Accessed: 29/1/20).

[18] Brown and Marriott, ADR Principles and Practice.

[19] Civil Justice Council, ADR and Civil Justice.

[20] Creutzfeldt, N. and Gill, C. (2014) The Impact and Legitimacy of Ombudsman and ADR Schemes in the UK (Accessed: 13/12/19).

[21] Koo, AKC. (2018) The role of the English courts in alternative dispute resolution, Legal Studies, 38(4):666-683; Anderson, D.Q. (2019) The convergence of ADR and ODR within the courts: The impact on access to justice. Civil Justice Quarterly, 38(1):126-143; Nylund, A. (2014) Access to justice: Is ADR a help or a hinderance?', in Ervo, L and Nylund, A. (eds), The Future of Civil Litigation – Access to Courts and Court-annexed Mediation in the Nordic Countries. Springer: Cham. pp.325-344; Billingsley and Ahmed, Evolution, revolution and culture shift.

[22] Brown and Marriott, ADR Principles and Practice.

[23] For discussion of these criticisms see Koo, The role of the English courts.

[24] Anderson, D.Q. (2019) The convergence of ADR and ODR within the courts: The impact on access to justice, Civil Justice Quarterly, 38(1):126-143; CJC ADR report; Brown and Marriott, ADR Principles and Practice

[25] Creutzfeldt and Gill (2014) The Impact and Legitimacy of Ombudsman.

This research study

This project investigates the operation, strengths and limitations of the ADR approaches already operating within the UK private rented sector and draws on international examples to explore how dispute resolution in this context can be improved.

This study is underpinned by the following key research aim:

To explore the role of alternative dispute resolution mechanisms in the resolution of private rented sector landlord and tenant disputes in the UK, and to provide suggestions on how they might be improved.

The study addresses the following three key research questions:

1. What ADR systems and approaches are currently used in the UK to resolve housing disputes in the private rented sector?

   The first stage of the review maps the alternative dispute resolution mechanisms within the UK private rented sector and provides a critical discussion of the broader dispute resolution landscape in which these approaches are situated. The report provides an in-depth discussion of the three main forms of alternative dispute resolution currently operating in this context: mediation, adjudication and ombuds approaches.

2. What are the strengths and weaknesses of these systems and how are they evidenced?

   This report reviews the evidence base for the use of ADR in the UK private rented sector. It locates, synthesises and critically assesses the existing research and evaluations via a two-part approach: i) assessment of methods and key criteria adopted in the evaluations to determine impact or effectiveness; and ii) assessment of key findings in the evaluations, thereby focusing on the identified strengths and weaknesses of the ADR mechanisms. Key gaps in the evidence base are highlighted.

3. What ADR principles or approaches could be applied to the UK to facilitate landlord and tenant dispute resolution?

   The final part of the review explores three international examples of the use of ADR to address housing disputes: i) Civil Resolution Tribunal, British Columbia; ii) Tenancy Services, New Zealand; and, iii). Residential Tenancies Board, Republic of Ireland. The report concludes with a discussion of the key principles that could be applied to the UK to facilitate improved dispute resolution for landlords and tenants in the private rented sector.

Research methods

The research questions have been addressed by means of a combination of literature review, interviews with key stakeholders, and analysis of administrative data provided by the Tenancy Deposit Scheme and Safe Deposits Scotland.

Qualitative Interviews

A total of 17 semi-structured telephone interviews were carried out with professional participants from services providing ADR services in the private rented sector and from services supporting tenants or landlords in accessing these services (i.e., advice agencies and solicitors). Participants were distributed across England (n:8), Scotland (n:4), Wales (n: 2), Northern Ireland (n:1), Republic of Ireland (n:1) and New Zealand (n:1). The interviews were carried out by telephone between August – September 2019 and lasted approximately 30 minutes – 1 hour.

The project commenced with a preliminary desk-top review to identify where ADR is currently used in the UK private rented sector. At present the only ADR schemes that are specifically designed for disputes between landlords and tenants are provided via three tenancy deposit services. In addition, some landlords may voluntarily sign up as members of the Housing Ombudsman. The Property Redress Scheme and the Property Ombudsman address complaints involving letting agencies. A limited number of mediation services also provide dispute resolution services for the PRS. Given it is a small total population, professionals from all of these services were invited to participate in an interview. The sample also included a number of organisations (advice agencies and law centres) whose key remit includes providing housing advice to landlords and/or tenants and supporting them in accessing ADR services.

A preliminary search of the literature indicated only limited data is available on the use, role and effectiveness of ADR as specific to the UK private rented sector. Without an understanding of the current ADR mechanisms or their practical applications, their strengths or weaknesses could not be assessed, nor could suggestions be made for improvement. The interviews therefore sought to explore the intricacies of the ADR systems that are currently in place, e.g., their availability, their practical operation, and their key characteristics, aims and objectives. The interviewees were also invited to draw on their expertise in the field to comment on the strengths, weaknesses and challenges of using ADR for private rented sector housing disputes. The interviews were transcribed and coded via a thematic approach.

Literature review

A preliminary search of the literature revealed an unmanageably large number of returns on the subject of ADR in general, which highlighted a need to limit the focus of the study to certain specific areas. The project was therefore restricted to a review of the available data on the effectiveness of the two main forms of ADR operating within the UK private rented sector for landlord and tenant disputes: adjudication and mediation. The literature review focused specifically on court/tribunal-connected mediation because it is the main form of mediation currently operating within the PRS. In terms of adjudication, the review was restricted to a review of the available data on its effectiveness in a housing context. The main databases used to search for the literature were Scopus, Web of Science and Google Scholar.

Scope of the review

This report addresses both mechanisms that operate as part of formal court structures (e.g., court/tribunal-connected mediation) and some of those that operate outside of them (e.g., ombuds schemes). Not included in this review are informal mechanisms or other dispute resolution processes that take place outside courts and tribunals, e.g., direct negotiation between participants (with or without the assistance of advice organisations or voluntary organisations), and local authorities being approached for assistance. These processes are a part of the dispute resolution landscape and may provide an alternative for those who are unable to engage with the system due to a lack of knowledge, support or access to legal services. Indeed, these services may be filling a gap where official mechanisms fall short. However, these informal mechanisms are beyond the scope of this particular study. A recent report exploring tenant participation, tenant unions and activism in the private rented sector illustrates their role in supporting tenants to protect their legal rights and push for reforms.[26]

The literature review does not aim to be comprehensive, but rather is designed to raise awareness of the strengths and weaknesses of the current ADR approaches in the UK private rented sector.

[26] Garnham, L. and Rolfe, S. (2019) Tenant participation in the private rented sector. A review of existing evidence (Accessed: 19/2/20).

Report Structure

Chapter 2 provides a critical overview of the existing system for resolving disputes in the private rented sector in England (pg.17), Scotland (pg.20), Northern Ireland (pg.22) and Wales (pg.23).

Chapter 3 explores the extent to which court/tribunal-connected mediation has been adopted in England and Wales (pg.26), Scotland (pg.27) and Northern Ireland (pg.30). The second half of this chapter reviews the evidence base for mediation and is relevant to each nation of the UK.

Chapter 4 discusses the availability, development and evidence base for the adjudication services provided by the UK tenancy deposit schemes. This chapter also address the ombuds services which are available for resolving disputes in the private rented sector.

Chapter 5 discusses three international examples of where ADR has been used to address housing disputes. The later part of this chapter identifies four key principles that could be applied to improve dispute resolution for landlords and tenants. Whilst housing law and policy is different in England, Scotland, Northern Ireland and Wales, these principles could apply equally to each nation.

The conclusion provides further discussion of how dispute resolution in the UK private rented sector can be improved.

2. Resolving disputes in the UK private rented sector: The current system

Housing is a power which has been devolved to the Northern Ireland and Welsh assemblies and the Scottish Parliament. This in turn has resulted in divergence in housing policies and practice across the UK.[27] This is reflected within the mechanisms available to resolve disagreements in the private rented sector, which vary across the UK and depend on the type of dispute.

This Chapter provides a critical overview of the existing systems for resolving disputes in the UK private rented sector. As explored below, questions have been raised in each constituent nation regarding whether courts or tribunals are indeed the best forums for addressing disputes within this context.

Disputes in the private rented sector

Housing makes up a large proportion of all civil cases. From January to March 2019, there were 30,351 landlord possession claims in England and Wales.[28] This figure excludes other types of housing claims such as housing disrepair, unlawful eviction/harassment, deposits, or those cases addressed by the First-tier Tribunal (Property Chamber). In 2018/19, the First-tier Tribunal for Scotland (Property Chamber) received 2,781 applications and the vast majority (85%) covered private rented sector disputes.[29] Half (51%) of the private rented sector applications concerned eviction, whilst 37% were in relation to civil proceedings (primarily payment orders).

In 2006, the Law Commission highlighted the extremely varied nature of housing disputes and the difficulty of classifying the different types of housing problems.[30] However, evidence from advice agencies indicates that certain types of disagreements may be particularly prevalent in the private rented sector. The Housing Rights advice caseload shows that disputes between landlords and tenants in Northern Ireland will often relate to issues of disrepair, affordability, and deposits.[31] Evidence from local Citizens Advice bureaux in England shows that repairs and maintenance issues are the most common advice need among private renters.[32] In Scotland, failure to comply with the duty to protect a tenancy deposit was the third largest category of applications received by the tribunal in 2018/19 (9%).[33]

One widely recorded phenomenon is that legal housing problems will often occur alongside other issues. Research has shown that problems relating to housing, benefits, debt and relationship breakdowns are commonly associated and that the most vulnerable in society are likely to suffer from more interlinked problems.[34] Simply addressing the immediate problem will not, therefore, provide a long-term solution, which in turn suggests that solutions for housing problems must be co-ordinated. Concerns have however been raised about the inability of the courts to deal with this clustering of legal problems; e.g., in housing eviction cases there may be benefit errors or delays that have not come to light.

[27] Marsh, A. and Gibbs, K. (2019) The private rented sector in the UK: An overview of the policy and regulatory landscape (Accessed: 19/9/19)

[28] Ministry of Justice (2019) Mortgage and landlord possession statistics: January to March 2019 (Accessed: 17/2/20)

[29] Judicial Office for Scotland (2019) The Scottish Tribunals: Annual Report prepared by the President of the Scottish Tribunals (Accessed: 17/2/20).

[30] Law Commission (2006) Housing: Proportionate Dispute Resolution: An Issues Paper.

[31] Housing Rights (2017) Alternative Dispute Resolution in the Private Rented Sector (Accessed: 16/12/19).

[32] Citizens Advice, It's broke, let's fix It.

[33] Judicial Office for Scotland, The Scottish Tribunals

[34] Moorhead, R. and Robinson, M. (2006). A trouble shared: legal problems clusters in solicitors' and advice agencies (Accessed: 25/11/19).

Housing Law and the legal response to housing disputes is famously complex. The law governs the landlord and tenant relationship, local authority activity and the provision of housing under a significant body of statute law. Landlords are subject to numerous laws and hundreds of regulations relating to deposits, energy, fire, gas and electricity safety, licensing, eviction and harassment. In most of the UK, there is a wide array of different settings that address legal housing claims. Except for Scotland (see below), there is no single setting where all the different and often interlinked problems experienced by owners and occupiers can be brought.[35] The existing dispute resolution system currently struggles to provide both the specialist expertise needed for complex cases, and the flexibility to deal efficiently and effectively with those that are not.[36]

Despite the prevalence of problems and disputes in the UK private rented sector, tenants are highly unlikely to take legal action. In England, tenants experiencing disrepair can approach the County Court where compensation can be awarded, and landlords ordered to carry out repairs. However, it is generally accepted that there is a low take-up of resolution through the courts in England, Wales and Northern Ireland. Citizens Advice reports that tenants in England are most likely to engage in various informal actions such as fixing the problem themselves or withholding rent.[37] A qualitative study exploring tenant and landlord experiences with the county courts and First-tier Tribunal (Property Chamber) in England and Wales reported that non-professional landlords in particular can be reluctant to resort to formal judicial proceedings.[38] This is reflected in a wider body of academic research showing that many people experiencing justiciable housing problems[39] will fail to address them.[40]

Some of the barriers to accessing court or taking legal action involve a lack of knowledge or understanding of rights and obligations; limited access to advice or assistance; fear of attending court; cost barriers; or (for tenants) fear of a landlord's possible response.[41] A lack of action is difficult to measure; it is therefore impossible to quantify how many potential litigants are dissuaded from approaching courts or tribunals. However, costs, delays, confusion and complexity operate as disincentives and vulnerable tenants are less likely to be capable of engaging with court processes.

England

In the housing sector in England, the process of making a complaint and resolving a dispute is seen as complex and confusing. Private rented sector tenants can only access redress under certain specific circumstances.[42]

Traditionally landlord and tenant disputes in England were dealt with by the County Court, or in exceptional cases by the High Court. Over the last 30 years, dispute resolution has shifted to specialist tribunals and in 2013 the First Tier Tribunal (Property Chamber) (FTT) was established. In the County Court most property cases are claims for possession (circa 50,000 per annum in the private sector), which are primarily dealt with by district judges.[43]

[35] Brookes and Hunter, Complexity, housing and access to justice

[36] JUSTICE (2020) Solving Housing Disputes, (forthcoming)

[37] Citizens Advice, It's broke, let's fix it.

[38] MHCLG (2018) A qualitative research investigation of the factors influencing the progress, timescales and outcomes of housing cases in county courts (Accessed: 16/12/19).

[39] Hazel Genn explored the concept of a justiciable problem, defined as a dispute which might have a legal solution or regardless of whether it is recognised by an individual as such.

[40] Genn, Paths to Justice.

[41] MHCLG, A qualitative research investigation.

[42] Rugg, J. and Rhodes, D. (2018) The Evolving Private Rented Sector: Its Contribution and Potential (Accessed: 17/12/19).

[43] Courts and Tribunals Judiciary (2018) Report on property chamber deployment project (Accessed: 17/12/19).

Tribunals are designed to provide greater informality and accessibility for claimants without legal representation and the FTT was originally considered to offer a faster route for cases that do not have to go to court.[44] However, a recent qualitative study reported that, whilst the FTT is well-regarded by stakeholders and users (considering it to be quick and efficient), non-professional landlords and tenants may fail to appreciate the difference between a court and a tribunal, which 'can still be quite daunting and court-like'.[45] There have also been reports of growing difficulties in taking a case to the FTT, with landlords more frequently securing legal representation and increasing expectations that cases will be presented in detail, which then leads to both landlords and tenants having to secure paid expert advice.[46]

To improve existing court and tribunal services, the Ministry for Housing Communities and Local Government (MHCLG) has proposed the creation of a specialised housing court not unlike the one currently in operation in Scotland (see below).[47] This would consolidate most or all disputes into a single system. The success of this initiative in improving the timescale, process and outcome of housing cases will however depend on a wide range of factors such as tenant awareness and their ability and willingness to use it.

Apart from formal court and tribunal proceedings, disputes in the private rented sector in England can be resolved in a number of other ways. Although providers offer a number of dispute resolution mechanisms,[48] they only address certain housing issues, with compulsory memberships restricted to certain specific circumstances. Since 1 October 2014, all letting and property management agents are required to be members of one of three compulsory redress schemes,[49] and membership with the Housing Ombudsman is mandatory for local authorities and housing associations. However, membership of these schemes is not compulsory for private landlords. Unless they voluntarily sign up – and statistics suggest that very few do[50] – tenants may have no other means of redress than formal litigation procedures (except in the case of disputes for deposits).

Another important option for landlords and tenants experiencing disputes or problems (for example in relation to disrepair) is to contact their local authority for assistance. However, local authorities are operating within a context of increasingly constrained resources. This in turn significantly impacts their ability to respond to complaints received. Some issues may also fall outside of a local authority's remit. For some issues experienced by landlords and tenants, court may be the only way to have their rights upheld.

In January 2019 the MHCLG published their response to the consultation on 'Strengthening Consumer Redress in the Housing Market'.[51] It presented their plans to 'plug the gaps in available redress services so that more people can get their housing disputes resolved without going through the courts'; proposed the introduction of a New Homes Ombudsman for developers of new builds; and proposed compulsory membership with a redress scheme for all private landlords, with fines of up to £5000 for non-compliance.[52]

[44] Rugg and Rhodes, The evolving private rented sector.

[45] MHCLG (2018) A qualitative research investigation.

[46] Usually within the Tribunal, the leaseholder/tenant will be responsible for the landlord's costs under the lease whatever the outcome. The law is particularly complex for long leaseholders, and the use of lawyers may vary depending on the type of case.

[47] This consultation ran from November 2018 to January 2019. We are currently awaiting the Government's response.

[48] These include: The Housing Ombudsman, The Property Ombudsman, The Consumer Code (independent resolution service), Local Government and Social Care Ombudsman, The Property Redress Scheme, First Tier Tribunal Service and Local Authority housing providers.

[49] The Property Ombudsman, The Property Redress Scheme, or Ombudsman Services: Property (the latter was discontinued in August 2018 so agencies transferred to over to one of the other two).

[50] The Housing Ombudsman's 2016-17 annual report showed only 71 'voluntary' members. (Accessed: 30/1/20).

[51] MHCLG, A qualitative research investigation.

[52] Plans to introduce compulsory memberships with a redress scheme for private landlords was originally announced in a Conservative party conference in 2017. This would bring 1.5 million landlords into regulation.

The MHCLG states that obligatory membership is only part of the issue: the multiplicity of schemes creates confusion and deters people from filing their complaint.[53] A proposal has therefore been made for a new single Housing Complaints Resolution Service for the entire housing sector as a 'single one-stop-shop' for housing complaints/point of access for all redress and ADR schemes. MHCLG also proposed a single code of practice for the entire housing sector.

This idea shares marked similarities with the "Triage Plus" idea that was originally proposed by the Law Commission in 2006, which was envisioned to provide not only signposting and referral processes, but also intelligence gathering and oversight to resolve systemic issues.[54]

Of key importance in developing the single access portal will be its underpinning philosophy: i.e., is it based on a professional assessment or will it focus on helping people understand their rights and options and decide for themselves?[55] Chapter 5 discusses how processes which empower people to become actively involved in the dispute resolution process can prevent disputes from escalating. Early resolution can be achieved by equipping individuals with knowledge of their rights, responsibilities and available options.

At present the only ADR scheme specifically designed for disputes between landlords and tenants in the private rented sector in England addresses tenancy deposits (Chapter 4). Since 6 April 2007, deposits for assured shorthold tenancies in England and Wales have to be protected by one of the three government-approved schemes: MyDeposits, the Tenancy Deposit Scheme and the Deposit Protection Service. This measure aimed to ensure good practice in handling a deposit: the resolution of disputes was assisted by requiring all schemes to operate a free dispute resolution service (which aims to be faster and cheaper than court action).[56]

Scotland

In recent years, Scotland has introduced major changes in the ways in which housing litigants can exercise their rights when disputes arise. Housing practitioners, charitable organisations and others had long expressed their frustrations about a system that was principally formal and adversarial.[57] Although multiple routes for redress were in place, most housing cases were addressed by the Sheriff Court. Concerns about costly delays, multiple barriers to entry, and growing pressure on the civil courts were some of the key drivers for reforming the system.

The extensive Housing (Scotland) Act 2014 instigated the transfer of private rented housing civil cases from the Sheriff Court to a new tribunal - The First-tier Tribunal for Scotland (Housing and Property Chamber). The tribunal was designed to provide relatively informal and flexible proceedings, to decide on rent and repair issues in the private rented sector, and to help exercise a landlord's right of entry. There are up to three panel members present at each tribunal; one of them is always a legal representative. Since 1 December 2017, most private rented disputes are dealt with by the tribunal rather than the Sheriff Court.[58] The Act additionally introduced a framework for the regulation of letting agents: since 31 January 2018 tenants or landlords can apply to the tribunal when agents fail to comply with the Letting Agent Code of Practice.

[53] MHCLG, Strengthening Consumer Redress.

[54] Law Commission, Housing: Proportionate Dispute Resolution.

[55] Law Commission, Housing: Proportionate Dispute Resolution.

[56] Wilson, W. and Barton, C. (2019) Tenancy deposit schemes. Briefing paper (Accessed: 15/1/20).

[57] Shone, S. (2012) Housing dispute resolution – improving access and quality. A briefing paper from CIH Scotland (Accessed: 30/1/20).

[58] The tribunal does not deal with criminal matters such as illegal eviction which remains within the jurisdiction of the Sheriff Court.

The tribunal is available for landlords and tenants, who can submit applications by email or post. Since landlord registration for each rented property is a legal requirement in Scotland, it is highly unlikely that unregistered landlords would be able to access the tribunal without triggering enforcement action.

Reform of the system of housing redress forms part of a wider raft of legislative developments and indirect policy reforms affecting the private rented sector in Scotland.[59] Many of these changes – including the tribunal - are still in their early stages, and at present there is insufficient evidence to assess their impact.[60]

Key stakeholders consulted as part of this study reported that continued complexity may act as a deterrent in accessing the tribunal. To apply to the tribunal the relevant party must submit a specific application form for the issue under dispute. There are 49 separate applications linking to specific pieces of legislation. As a result, the initial stages of launching a dispute may be daunting for inexperienced parties and vulnerable claimants. In addition, the new rules are reported to have given rise to a higher number of claims than was predicted, resulting in administrative delays.[61]

The Scottish Government advises landlords and tenants to resolve disputes among themselves and advocates the use of ADR as an alternative to approaching the tribunal. Visitors to the 'resolving rented housing disputes' section of www.mygov.scot are advised that: *'Going to the First-tier Tribunal for Scotland Housing and Property Chamber (the Tribunal) to solve a problem can be stressful. It's usually best to try to find another solution.'* The website then provides information on arbitration and mediation. Although the First-tier Tribunal was designed to provide relatively informal and flexible resolutions for disputes within the private rented sector, ADR seems to be presented as an alternative for both the courts and the tribunal. The extent to which mediation plays a practical role in resolving private rented disputes in Scotland is an empirical question that is addressed in Chapter 3.

In Scotland, The Property Ombudsman and Property Redress scheme deals with complaints about estate agents, letting agents and other property professionals that are members of the scheme. There is no legal requirement for letting agents to join an external redress scheme unless the business also deals with property sales. From 31 January 2018, any person working for or as a letting agent has to adhere to the Letting Agent Code of Practice, which covers the requirement that all agents will have clear and written complaint procedures in place. In the event of a dispute, the agent and tenant will be required to follow the scheme's rules for disputes. Some letting agents may offer access to an independent dispute resolution service if they cannot resolve a complaint internally. If the agent breaches the letting agent code of practice, or if the landlord or tenant remains dissatisfied after raising their complaint with the agent, they can apply to the tribunal.

Scottish tenancy deposit protection is similar to the model adopted in England and Wales. Scotland has three operational statutory tenancy deposit schemes: Letting Protection Service Scotland; Safe Deposits Scotland; and Mydeposits Scotland.

[59] Gibb, Livingston, and Berry (2019) Overview of private rented housing reforms.

[60] Gibb, Livingston and Berry, Overview of private rented housing reforms.

[61] Housing and Property Chamber (2019) Stakeholder Communication: Private Rented Sector Cases and Residential Tenancies (Accessed: 19/12/19).

Northern Ireland

Northern Ireland has limited options for resolving housing disputes. The gap in the dispute resolution landscape is particularly stark for disputes in the private rented sector. The main options available for landlords and tenants to resolve a dispute (other than in relation to deposits), is to approach their local council for assistance or to submit a claim at the small claims court.

A small claim covers a value of under £3000, and fees for a small claims application will depend on the actual amount claimed. The Civil Processing Centre in Laganside Courts initially processes all cases, but if a case is disputed, it will be transferred for hearing to the office specified in the original application. In contrast to Scotland and England, there are no tribunals or housing panels that provide dispute resolution via more informal proceedings. In the absence of a distinct and independent dispute resolution body, redress outside the courts can only take place by approaching a local authority.

The Property Ombudsman (TPOS) addresses complaints about property agents in Northern Ireland, but will only investigate cases against agencies that are members. At present Northern Ireland has no rigorous regulation of letting agents, and letting agents are not required to belong to a redress scheme. As a result, many private rented sector tenants have no access to the TPOS. The Northern Ireland Ombudsman deals with complaints against registered social housing providers (covering Northern Ireland Housing Executive and housing associations), but does not include disputes in the private rented scheme as part of its remit. Unlike in England and Wales, there is no option for private rented sector landlords to join these schemes on a voluntary basis.

The only well-established non-court form of dispute resolution in the private rented sector in Northern Ireland are the dispute resolution mechanisms offered under the tenancy deposit schemes. Here an adjudicative method has been adopted (similar to its UK equivalent).[62] According to the Department for Communities, this has somewhat relieved pressure on environmental health officers because prior to the introduction of the scheme the majority of disputes revolved around deposits.[63] Feedback on the Government consultation indicates that disputes now primarily cover repairs, rent arrears and eviction.[64]

Whilst any legislative developments have been stymied for several years by the lack of a legislature, governmental bodies have criticised existing approaches and expressed the desire to reform the dispute resolution landscape in the private rented sector. The Department for Communities (DfC) has criticised this landscape as 'time consuming and complex' and recognised that the costs associated with bringing a claim may operate as a barrier.[65]

In January 2017, the DfC published 'Private Rented Sector in Northern Ireland – Proposals for Change', aiming to *'consider the current and potential future role of the sector and assess the effectiveness of current regulation, identifying where improvements can be made to help make the private rented sector a more attractive housing option'*. The DfC proposed an independent housing panel for alternative dispute resolution within the PRS. The DfC has expressed concerns about escalations of disputes potentially leading to unnecessary court action, retaliatory evictions and homelessness, and considers the panel as potentially offering a quicker, less costly process than court action.[66]

[62] For more information https://www.nidirect.gov.uk/articles/sorting-out-disputes

[63] Department for Communities (DfC) (2017) Private Rented Sector in Northern Ireland – Proposals for Change (Accessed: 19/12/19).

[64] DfC, Private Rented Sector

[65] DfC, Private Rented Sector

[66] DfC, Private Rented Sector

Wales

The Housing (Wales) Act 2014 requires all letting agents to obtain a licence granted by the regulatory body Rent Smart Wales; a service operated by Cardiff Council. The licence conditions require agencies that let or manage private rented sector accommodation on behalf of a landlord to belong to a government-approved redress scheme (The Property Ombudsman or The Property Redress Scheme).[67] Agents that fail to comply can have their licence revoked.

Under the *Housing (Wales) Act 2014*, all landlords must register, and self-letting landlords must also be licenced, as well as complete training on the code of practice. Membership with a redress scheme is currently not compulsory for landlord licences, although it is recommended in the code of practice.[68] Private sector tenants in Wales renting from a self-letting landlord may have no other means of redress than their local county court, the Residential Property Tribunal Wales, or their local authority. In Wales, Ministry of Justice powers and the County Court is non-devolved but the residential property tribunal is devolved.[69]

The *Renting Homes (Wales) Act 2016* will standardise rental contracts and require landlords to include a written statement of the contract. The contract will include information on what steps should be taken by a tenant to resolve disputes, for example, contacting a local authority or an advice organisation. A key stakeholder consulted as part of this study reported that the Government also plans to develop a website featuring information on all the contractual terms under the Act.

> *Everything will be much more consistent and so people should get a better understanding overall of what their rights and obligations are and therefore be in a better position to seek to enforce them. I'd say that's where we want to get to through Renting Homes [Act] to make dispute resolution hopefully less likely in the first place because people do have a better understanding of their rights and obligations*
> *(Key stakeholder, Welsh Government)*

As explored in Chapter 5, the provision of information is an important part of a dispute resolution landscape and can empower people to assume an active role in resolving their dispute. However, for some problems and disputes, information alone is likely to prove insufficient.

Tenancy deposit protection in Wales is covered by the *Housing Act 2004*. As in England, since 6 April 2007 all deposits relating to an AST (though not other tenancies for or licences), must be protected by a Government-authorised scheme. Existing deposit protection requirements will be replaced when the *Renting Homes (Wales) Act 2016* is implemented. This largely replicates existing provisions and extends the requirements to all occupation contracts (broadly equivalent to the existing assured shorthold tenancy).

[67] Agents who are part of a membership body (e.g., Association of Residential Letting Agents (ARLA), Royal Institute of Chartered Surveyors (RICS), the UK Association of Letting Agents (UKALA) or the National Approved Letting Scheme (NALS)) will usually have access to an independent redress scheme as part of their membership benefits.

[68] https://www.rentsmart.gov.wales/Uploads/Downloads/00/00/00/01/DownloadFileEN_FILE/Code-of-practice-for-Landlords-and-Agents-licensed-under-Part-1-of-the-Housing-Wales-Act-2014-English-Doc-1.pdf

[69] This in turn raises questions regarding where alternative dispute resolution is situated within this landscape. In particular, where a government funded or provided service would sit in relation to the devolution of justice policy.

Summary

As in other areas of private rented sector policy,[70] across the nations of the UK the dispute resolution landscape demonstrates convergence in some areas (e.g., in relation to disputes over deposits) and divergence in others (e.g., tenants' access to an ombudsperson when renting from a letting agent). Tribunals and courts do however remain the primary mechanisms for resolving most landlord and tenant disputes unrelated to deposits. The justice system tends to present multiple barriers of entry, such as cost, complexity and lengthy procedures. For those that do approach the court, lawyers will decide on the key legal issues, the judge will make the decisions, and the disputing parties may have relatively little control over the process or its outcome.[71] These procedures are inherently adversarial, often disempowering, and will generally worsen existing conflicts between parties. Where ongoing relationships exists – as is often the case in the private rented sector – there may be significant advantages in attempting a more consensual approach to dispute resolution (as discussed in the following chapter).

[70] T. Moore (2017) The convergence, divergence and changing geography of regulation in the UK's private rented sector, International Journal of Housing Policy, 17(3), 444-456.

[71] Nylund, Access to Justice

3. ADR in the UK private rented sector: court/tribunal-connected mediation

Across the UK, court/tribunal-connected mediation plays a significant role in cases of family disputes, and there has been some experimentation with housing cases. This Chapter explores the extent to which mediation is adopted within the private rented sector and examines the evidence base of this ADR method.

England and Wales

One of ADR's most powerful supporters is Lord Woolf who, in his reports on reducing barriers to accessing justice, strongly promoted the use of ADR to settle cases. His recommendations led to significant changes in civil procedural rules as contained in the Civil Procedure Rules 1998, covering the introduction of pre-action protocols[72] (applying to England and Wales). The pre-action protocols for disrepair cases state that landlords and tenants are to attempt to resolve disputes prior to court action, e.g., by considering mediation or other forms of ADR.[73] The courts may require the parties to provide evidence of having considered alternative means of dispute resolution, and will take into account compliance with the protocol when deciding which party is to pay costs.

It may appear that the pre-action protocols contribute towards an increased use of ADR to settle housing disputes. However, the protocols do not apply to counterclaims brought as part of other proceedings (e.g., possession proceedings under rent arrears). Pre-litigation dispute activities involve a significant amount of negotiation by lawyers, which then often results in settlements. This may indicate that many landlord and tenant disputes could benefit from earlier intervention by a third party:

> *I can count on one hand the number of times I've been involved in any mediation. When we talk about mediation we always think about formal mediation but solicitors every day are looking to try and settle cases … most of our cases at court do often settle on the day of the court hearing with our intervention, but they've got to court and it's only at that stage that we're intervening to try and resolve it (Solicitor, England)*

In 2002, 140 voluntary and local authority funded organisations that provide mediation to help resolve neighbourhood disputes before they reach courts or tribunals were identified.[74] However, the private rented sector has a distinct lack of free or low-cost mediation services for landlords and tenants:

> *There doesn't seem to be out there a really clear obvious pathway where landlords and tenants can sit down and talk things through, can reach a compromise … I'm a big fan of the possibility of ADR because, as I say, the reality is that … I probably do two or three housing PRS trials every year to 18 months. That's because everything else settles (Barrister, England & Wales).*

Echoing findings from an evaluation of a court-connected mediation service in London,[75] one respondent remarked that once a dispute has escalated into court proceedings, disputants may be reluctant to engage in mediation:

> *So at the point of crisis it's gone a bit past mediation really unless there's going to be a stay of the proceedings for parties to engage in mediation, which is possible, but at the point where you're at the court the landlord just wants a possession order (Solicitor, England).*

[72] These describe the action the court will usually expect prior to start of the proceedings.

[73] Justice (2017) Pre-Action Protocol for Housing Disrepair Cases (England) (Accessed: 19/12/19).

[74] Grey, J. (2002) Responding to community conflict. A review of neighbourhood mediation (Accessed: 19/12/19).

[75] Genn, H. (1998) The Central London County Court Pilot Mediation Scheme: Evaluation Report (Accessed: 19/12/19).

Following the Woolf Report (1996), a number of court-connected ADR initiatives for non-family civil disputes were developed in England. For example, The Birmingham Civil Justice Centre mediation scheme (2001-2004) provided voluntary mediation that addressed all housing disrepair cases regardless of the amount claimed. The Commercial Court also saw several ADR developments, and the Central London County Court Pilot Mediation Scheme addressed disputes in the social housing sector. Despite positive evaluations of these initiatives, they were not extended to housing cases, and for the majority of private rented disputes (i.e., possession claims) there has been little experimentation with mediation.

Scotland

In Scotland the First-tier Tribunal offers no in-house mediation service, but mediation is presented as a divisionary first step for cases taken to the tribunal. For cases identified by the Chamber President as suitable for mediation (e.g., for disputes on disrepair or cases against letting agents), the tribunal must: i) make the parties aware that mediation is available as an alternative means of resolving the dispute; ii) provide relevant information on what mediation entails; and iii) where parties consent, adjourn or postpone the hearing to enable the parties to access mediation.[76]

There are however limitations on the use of ADR; it is only suggested rather than mandatory, and the tribunal does not validate, recommend or refer parties to any particular mediator. Respondents reported that the tribunal does provide internal guidance on meditation and emphasised the President's positive attitude towards mediation. However, mediation does not seem to form a distinct part of the dispute resolution system (e.g., with clearly defined processes and procedures), and it seems to be somewhat randomly applied:

> *It's very much up to the individual legal member as to whether they consider that the case is suitable for mediation or whether they wish to adjudicate it themselves (Tribunal member, Scotland).*

Findings suggest that prior to the tribunal being introduced, mediation may have had a more prominent role in addressing landlord and tenant disputes:

> *When we were the Home Owner's Housing Panel and Private Rented Housing Panel, we did actually have the ability to mediate and a number of panel members who weren't already mediators were trained as mediators and we did mediate some disputes. When we were reconstituted … the ability to mediate was, in effect, taken away from the panel (Tribunal member, Scotland).*

Whilst it was not possible to identify the types or proportion of cases that are referred to mediation by the tribunal, participants suggested that the number is relatively low. As in England, the stage at which mediation is offered – i.e., as part of formal litigation procedures – may partly explain why its role in resolving private rented sector disputes is currently limited:

> *By the time [the dispute] has got to the tribunal it's probably too late, because usually by then the landlord has made the decision they want rid of the tenant. They think the relationship's actually broken down, they just want to actually resolve it and they want somebody else to review it (Mediator, Scotland).*

[76] The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 (Accessed: 19/12/19).

Respondents commented that free mediation services and funding is available to help people access mediation for family or community neighbourhood disputes, but not for private rented sector issues. One exception is the University of Strathclyde Mediation Clinic in Glasgow, which is part funded by SafeDeposits Charitable Trust. This service pairs up accredited mediators with students studying towards their Masters in resolution and mediation to provide free mediation for landlords and tenants in the private rented sector. Whilst this service currently receives most of their referrals from the Sheriff Court, it is exploring ways to promote earlier use of mediation:

> *It's still quite early stages but we're hoping that we will be able to connect with some of the larger housing groups who act as landlords, and what we're trying to do is encourage them to use mediation a lot earlier in the dispute rather than when it's already begun in a court process … as with most disputes, the further into them people are the more entrenched they start to get (Mediator, Scotland).*

The Scottish Mediation Service (SMS) is largely funded by the Scottish Government and creates and maintains the standards of mediation in Scotland.[77] Most of their housing-related queries relate to neighbourhood disputes. SMS has recently hosted a series of workshops with letting agents, and is collaborating with Landlord Accreditation Scotland to increase the uptake of mediation within the sector:

> *Do you really want to be able to nip it in the bud? That's the thing, and the agents are very often in the right place to do that so if we up-skill them and give some sort of awareness and understanding of what mediation is all about, it might avoid things progressing further and going onto tribunals, etc. (Mediator, Scotland).*

Northern Ireland

In Northern Ireland, dispute resolution has traditionally taken place via the court system. Participants highlighted a distinct lack of mediation - or other dispute resolution processes - for landlords and tenants in the private rented sector:

> *So in Northern Ireland currently, unless somebody contacts an advice agency and the advice agency kind of acts as that middle man, there's not really any kind of forum that housing disputes can be heard and if you go to the courts often enough the judiciary are relying on representatives to tell them the law because housing is so technical and it changes all the time (Solicitor, Northern Ireland).*

The Department for Communities has recently funded Housing Rights to pilot Northern Ireland's first housing mediation service for the private rented sector.[78] Their stated intention is to use the data collated from the pilot service to explore the outcomes, effectiveness and cost/time savings associated with resolving disputes prior to court. The Service is provided free at the point of delivery and engagement by the parties is entirely on a voluntary basis. During the pilot period a neutral third party will assist in the resolution of disputes between landlords and tenants with the aim of reaching a satisfactory solution which is agreeable to both parties.

[77] SafeDeposits Charitable Trust has provided some funding to SMS and the Napier Law Clinic (a student-run organisation that provides free legal advice to the public).

[78] The service has been in operation since December 2019. For further information see https://www.housingrights.org.uk/housing-mediation-service

Assessing the evidence base

Court-connected mediation is the most widely researched ADR approach, and it has been the topic of various systematic reviews and smaller scale empirical studies. An extensive evidence review has recently been conducted for the Scottish Government, identifying several large-scale evaluations of the experiences and views of participants, some longitudinal studies exploring longer-term outcomes and impacts, and numerous small-scale studies and evaluations that addressed a range of short-term outcomes (such as settlement and satisfaction rates).[79]

Most studies have been carried out in the USA. Due to the complexity of the different civil justice systems it is difficult to carry out comparative studies. In addition, there is significant variation in the ways in which mediation services are funded, designed and delivered. Caution should therefore be exercised in generalising findings both across different countries and within legal contexts. Nonetheless, as explored below, the literature strongly indicates certain positive outcomes and challenges are frequently associated with mediation.

Some studies have evaluated court-connected mediation within a UK context, drawing primarily on court evaluations and case data. For example, in 2002 the Edinburgh Sheriff Court Mediation Project was reviewed by analysing the records of 674 clients.[80] The Birmingham Civil Justice Centre civil (non-family) court-based mediation scheme was evaluated by assessing court files and follow-up telephone interviews.[81] Whilst these studies are somewhat limited in their ability to generalise outside their particular scheme, when considering the findings alongside the body of research described above, they provide a strong indication of the type of outcomes that mediation can achieve.

Positive outcomes achieved by mediation

Settlement and Satisfaction

The literature on mediation uses rates of settlement and satisfaction as the clearest measure of success. Internationally settlement rates are consistently high (50-85%) across the different types of mediation.[82] In the UK, around 75% of the cases that were referred to the Edinburgh Sheriff Court Mediation Service resulted in a settlement agreement.[83] In the Birmingham evaluation 70% of mediated cases had been settled,[84] whilst the evaluation of the London County Court pilot scheme reported settlement rates of 62%.[85]

Evidence also indicates high levels of satisfaction among those participating in mediation, with figures ranging around 60–80%.[86] In the UK evaluations, user satisfaction is often measured in terms of perception of the process, satisfaction with the outcome, views of the mediator, and impressions of fairness. Levels of satisfaction may depend of the questions that are asked: users may be dissatisfied with the outcome but still happy with mediation as a means of resolving disputes. International evidence also suggests that, compared to adversarial methods, mediation produces greater compliance and lower rates of re-litigation.[87]

[79] Social Research: Crime and Justice (2018) An International Evidence Review of Mediation in Civil Justice (Accessed: 19/12/19).

[80] Samuel, E. (2002) Supporting Court Users: The In-Court Advice and Mediation Projects in Edinburgh Sheriff Court. Research Phase 2 (Accessed: 19/12/19).

[81] Webley, L., Abrams, P. and Bacquet, S. (2006) Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme (Accessed: 19/12/19).

[82] Social Research, An International Evidence Review.

[83] Samuel, Supporting Court Users.

[84] Webley, Abrams, and Bacquet, Evaluation of the Birmingham.

[85] Genn, The Central London County Court.

[86] Social Research, An International Evidence Review.

[87] Social Research, An International Evidence Review.

Cost and time savings

Savings in costs and time are widely cited as key measures of success. The Birmingham evaluation compared mediated cases against a control group of non-mediated cases and found evidence that mediation can lead to a quicker resolution of disputes than would be the case for regular litigation procedures.[88] This point of view was reiterated in the interviews:

> *If you start litigation in a courtroom, I mean, the costs are just going up and up even to make an application into the county court … and you're talking about time, because legal cases are often really protracted. So, for example, you get – you're at the mercy of a court list, also you get things like adjournments, you know, long protracted legal processes (Solicitor, Northern Ireland).*

Additionally, the costs associated with court proceedings are generally accepted to be higher than those of ADR.[89] Cost savings however depend on whether claims are pursued outside the small claims track; the value of the dispute; the UK jurisdiction where the dispute takes place; the involvement of a solicitor; and how far the claim will be pursued within the court process. In addition, unresolved mediation may result in higher costs. Although there may be a need for further empirical evidence to clearly demonstrate the potential cost-savings of mediation, ADR appears to be widely seen as having significant cost-saving potential for both courts and litigants.

Additional key benefits

The literature also identifies several qualitative benefits of the process of mediation, such as its ability to get beyond the primary dispute and address underlying issues and concerns. This is particularly relevant for disputes in the private rented sector, which tend to be complex and multi-layered:

> *What strikes me in most mediation cases is it's not the issue that's presented is actually the main driver of the complaint. We found this a lot … the main driver is about being treated fairly, being listened to, being respected, being given the status as a professional or whatever … a lot of the issues present as being financial but actually beneath that are interests and needs that mediation could help with much more than a legal redress process would (Mediator, Scotland).*

The ADR literature makes a distinction between conflicts and disputes.[90] Conflicts refer to the underlying set of events, the relationships, or the particular factors contributing to a disagreement, whilst a dispute consists of the part of the conflict that a lawyer sees as legally relevant. Resolving the dispute does not necessarily resolve the underlying conflict. Because non-adjudicatory ADR is not limited to rights and to the law, parties can agree to consider a wide range of issues. Additionally, mediation and ADR can also deliver remedies unavailable via a court process, such as an apology, financial redress, review of procedures, or a combination of these. If a party receives an apology or explanation, it may bring about reconciliation.

[88] Webley, Abrams, and Bacquet, Evaluation of the Birmingham.

[89] Social Research, An International Evidence Review.

[90] Nylund, Access to Justice.

The non-adversarial nature of mediation (and ADR in general) is often cited as one of its primary benefits.[91] Unlike formal litigation procedures where there are clear winners and losers, mediation can preserve a relationship. This factor is particularly relevant for the private rented sector, where many disputes will be embedded in an ongoing relationship:

> *I think there's a far greater chance of retaining the landlord and tenant relationship … ideally, the landlord understands the tenant better, the tenant understands the landlord a bit better. They both think of each other now as human beings and are going to communicate better and more frankly with each other and more openly and so on and moderate their language and approach (Solicitor, Wales).*

Limitations and challenges

Substantive justice

The evidence indicates that mediation scores slightly lower on relative substantive justice issues; clients tend to be less happy with the outcome than they are with the process of mediation.[92] In addition, whilst settlement rates are generally high, they can also vary quite dramatically (see above). Cases not resolved by mediation can result in higher overall costs, and lengthier processing times. Parties who are less aware of their rights may also experience unfair or unequal settlement.[93] This is an issue within the private rented sector due to the power relations inherent to the housing market (see below). Statistical analysis reveals that case type, complexity, value or legal representation does not necessarily predict which cases work better for mediation.[94] The literature suggests that success in mediation is more likely to be linked to the attitude or motivation of parties, the skill of the mediator, or some mix of these factors.[95]

Lack of awareness

Some evaluations have reported a relatively low-take up of court/tribunal-connected mediation schemes.[96] Key issues include lack of awareness of the availability and nature of mediation (and ADR more broadly) amongst the general public, lawyers and the judiciary in England and Wales.[97]

> *I mean there's a lot of perception about mediation as well that needs to change, people think it's people sitting with their legs crossed and holding hands and coming to a resolution and it's not (Solicitor, Northern Ireland).*

> *I think there's probably a greater discussion around whether disputes should be going to the court or the tribunal and so I suppose that tends to block out the finer discussion around the potential use of ADR (Key Stakeholder, Welsh Government)*

[91] Roberts, S. and Palmer, M. (2005) Dispute Processes. ADR and the Primary Forms of Decision-Making, Cambridge: University Press.

[92] Social Research, An International Evidence Review.

[93] Social Research, An International Evidence Review.

[94] Genn, The Central London County Court Pilot Mediation Scheme

[95] Genn, H., Fenn, P., Mason, M., Lane, A., Bechai N., Gray, L. and Vencappa, D. (2007) Twisting arms: court referred and court linked mediation under judicial pressure (Accessed: 17/1/20).

[96] Genn, The Central London County Court.

[97] CJC ADR Working Group, ADR and Civil Justice.

Exacerbating power inequalities

Some research indicates that mediation can increase power imbalances between parties and can result in unequal settlements being imposed by the stronger party.[98] This risk has been associated with classical forms of mediation, where the mediator aims to adopt a purely facilitative role.[99] If significant social, economic or psychological disparities exist, there may be a lack of incentives among one of the parties to reach a compromise, whilst the weaker party may feel pressured to accept an outcome that they are not satisfied with. It has been argued that in these circumstances, the aim of neutrality (as is often associated with mediation) can actually play a role in reproducing inequality and disadvantage.[100] Another academic has argued that true neutrality is impossible, and mediators should therefore be more explicit and reflective on the values they bring to a case and how this may affect the process and outcomes.[101]

These observations are particularly relevant within the UK private rented sector, where it is generally accepted that landlords hold considerably more power than tenants.[102] With the exception of Scotland, short-term tenancies are the norm and landlords can evict tenants without giving a reason ('no-fault' eviction). Research has demonstrated that the insecure nature of renting contributes to a lack of control and feelings of powerlessness, particularly among low-income renters.[103] Tenants may also fear retaliatory or 'revenge' evictions when they ask for repairs or raise a complaint. These experiences may further exacerbate the risk that tenants agree to unequal or unfavourable settlements:

> *If there is a disparity in the power between the professional landlord and the tenant where what they're talking about is their home and they're not very well versed in terms of the law and their rights and so on, my worry is that they might agree to something outside court without having sought legal advice, which may not be in their best interest (Solicitor, England).*

Participants emphasised that a key part of the design of the mediation process and skills of the mediator, is to ensure that parties play an equal role in determining the outcome of a dispute:

> *I think with mediation the one thing is always about imbalance of power and a lot of what you are doing in mediation is to try and actually make sure that there is that equal balance of power between each of the parties. I think it's very hard if there are relationships that have been abusive in any way (Mediator, Scotland).*

[98] Genn, The Central London County Court

[99] Dingwall, R. (1988) 'Empowerment or Enforcement? Some Questions about Power and control in Divorce Mediation', in (eds) Dingwall, R., Eekelaar, J. Divorce Meditation and the Legal Process, Oxford: Clarendon Press; Murray, J., Rau, A. and Sherman, E. (1989) Processes of Dispute Resolution – The Role of Lawyers, New York: Foundation Press.

[100] Crenshaw, K., Gotanda, N., Peller, G. and Thomas, K. (1995) 'Introduction', in Crenshaw, K., Gotanda, N., Peller, G. and Thomas, K. (eds) Critical Race Theory, The Key Writings that Formed the Movement. New York: The New Press.

[101] Mulcahy, L. (2001) 'The possibilities of desirability of mediator neutrality – towards an ethic of partiality', Social and Legal Studies, 10(4):505-527.

[102] Madden, D. and Marcuse, P. (2016) In Defence of Housing: The Politics of Crisis. London: Verso Books.

[103] McKee, K., Soaita, A.M. and Hoolachan, J. (2019) ''Generation rent' and the emotions of private renting: self-worth, status and insecurity amongst low-income renters', Housing Studies.

Not a panacea

The development of mediation as the main non-adjudicatory ADR process, and its integration into court and tribunal processes, has somewhat overshadowed other forms of ADR.[104] One of ADR's greatest strengths is arguably its ability to offer a range of practices to suit the needs and circumstances of different situations.[105] However, an exclusive focus on mediation has to some extent prevented a range of ADR processes from being developed.[106] Interview participants emphasised that mediation is not appropriate for all private rented sector housing disputes:

> *Things like rent arrears, to an extent, unless there's some kind of aggravating factor, so if they did not pay their rent because the house is in disrepair and they withheld it, that's a separate issue. But if they did not pay their rent because they couldn't afford it or they just did not pay it and they're behind with it, really, the likes of mediation isn't arguably that suitable (Solicitor, Northern Ireland).*

In some cases, the landlord may simply want to withdraw their property from the market. However, eviction is often a response to a dispute that could, in theory, be identified and addressed before it escalates to possession proceedings.[107]

Evaluation data also suggests that mediation is less straightforward for cases that involve multiple claims and counter claims.[108] Interview responses suggest that the discussion should not be framed in terms of "mediation versus litigation": consideration should be given to full range of ADR approaches which are available:

> *If you have an issue with rent arrears that is quite black and white … something like adjudication, something a little bit more directive like arbitration, where a decision is made, may be more appropriate (Solicitor, Northern Ireland).*

Case Study 3 (pg.56) does however suggest that mediation can be effective in resolving disputes on rent arrears; e.g., where parties agree to a repayment plan. The importance of having a range of dispute resolution methods to meet the needs and circumstances is discussed on pg.62.

Summary

Mediation is available as an alternative means of resolving some private rented sector disputes that are brought to courts and tribunals in England, Wales and Scotland. However, in practice mediation rarely plays a role in resolving disputes unrelated to deposits and is generally only available once a case has been filed. At this point disputing parties have already begun to craft their claims in unequivocally adversarial terms. Whilst there are a considerable number of private mediators operating across the UK, there is a lack of public funding available for mediation services that address landlord and tenant disputes. Private mediator fees are likely to beyond the reach of many tenants in the private rented sector.

Evaluation findings indicate that mediation can provide a quicker and cheaper means of resolving disputes, whilst also addressing underlying issues and preserving a relationship. However, mediation is not without its limitations and where inappropriately applied, can risk exacerbating power inequalities. Further research is needed on the extent to which mediation is successful among parties who hold differing power.

[104] Creutzfeldt, N. and Gill, C. (2014) The Impact and Legitimacy of Ombudsman and ADR Schemes in the UK. The Foundation for Law, Justice and Society.

[105] Brown and Marriott, ADR Principles and Practice

[106] Anderson, D.Q. (2019) 'The convergence of ADR and ODR within the courts: The impact on access to justice. Civil Justice Quarterly, 38(1):126-143.

[107] Arden, A. (2019) Housing dispute resolution, Journal of Housing Law, 22(3):39-43.

[108] Genn, The Central London County Court.

4. ADR in the UK private rented sector: out-of-court processes

The only ADR schemes specifically designed for disputes between landlords and tenants in the UK private rented sectors are the adjudication services provided by the tenancy deposit schemes. A range of ombuds services are also available for housing disputes, and some of these operate within the private rented sector. This Chapter explores the availability, operations, and key developments of these particular schemes. It also considers the available evidence regarding their effectiveness.

Ombuds approaches

The two ombuds schemes resolving complaints against letting agencies in the private rented sector in the UK are the Property Ombudsman and The Property Redress Scheme. In England and Wales, letting agents are required to be members of one of these schemes, but this is not the case for Scotland and Northern Ireland. A small number of private landlords have voluntarily joined the Housing Ombudsman, with, as of March 2018, 65 voluntary members that represent 18,666 housing units.[109] The schemes are generally funded by subscriptions from members on a per unit basis.

The diversity of ombuds services within the housing arena is reported to have given rise to not only a wide range of working practices, but also to difficulties in navigating the terrain, as well as significant diversity in terms of transparency and quality of performance data.[110] In England, the MHCLG aims to address these issues by introducing both a single access portal for all housing redress schemes and a single code of practice for the entire housing sector. Campaigning bodies in England have argued that setting agreed benchmarks and reporting requirements will facilitate the systematic assessment of outcomes and improve performance across the sector.[111]

The principal aim of these services is to provide an independent and impartial dispute resolution service for members of the scheme. Ombuds services will usually only consider complaints after the complainant has exhausted the letting agent's complaint procedure. Ombuds services can generally offer a wider range of outcomes than those available via the courts, e.g., an apology, or review of procedures. The rate of compliance with ombuds schemes in the private rented sector is generally high; the Property Ombudsman's decisions have remained at or above 99%, and for the Property Redress Scheme 86%-94%.[112]

Ombuds services offer a range of dispute resolution processes. Some put significant emphasis on informal dispute resolution processes or early resolution, whilst others offer an array of ADR techniques such as mediation, arbitration, informal hearings and conciliation.[113] The ombuds schemes that operate within the private rented sector generally adopt adjudication as their primary dispute resolution mechanism; this is often as part of a multi-tiered process which focuses on early resolution and the provision of advice and information (see below).

[109] The Housing Ombudsman does not provide data on determinations for private rented sector landlord/tenant disputes. In their 2018-19 annual review they report that 'the numbers of complaints for voluntary members which go through to formal determination are so small as to be statistically insignificant' (Accessed: 30/1/20).

[110] Law Commission, Housing: Proportionate Dispute Resolution; Citizens Advice, (2017) Confusion, gaps and overlaps. A consumer perspective on alternative dispute resolution between consumers and businesses (Accessed: 19/12/19).

[111] Citizens Advice, Confusion, gaps and overlaps.

[112] MHCLG, Strengthening consumer redress.

[113] Citizens Advice, Confusion, gaps and overlaps.

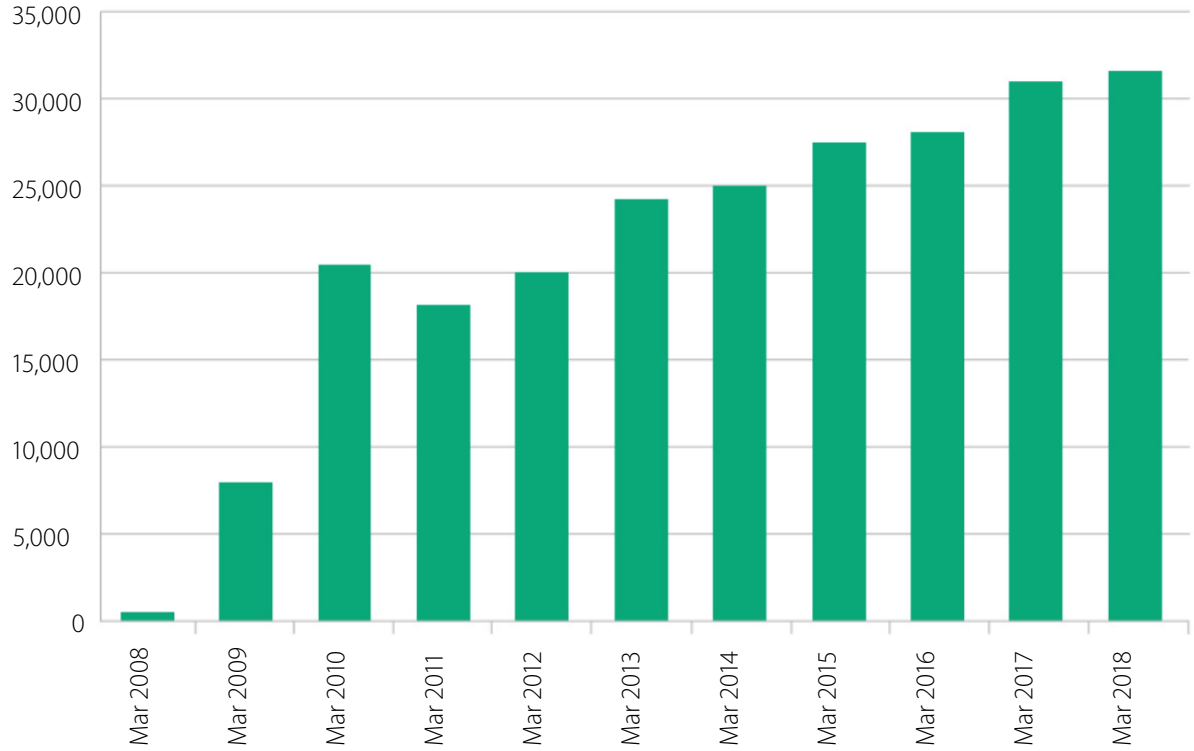
UK tenancy deposit schemes

Each deposit protection scheme operates a free and independent dispute resolution service that can be accessed for disputes about deposits.[114] Adjudication is the main ADR mechanism, and aims to resolve disputes quickly, fairly and cheaply.[115] In this process the landlord and tenant both submit their evidence online, which is then sent to an independent and impartial adjudicator who reviews the evidence and decides how the deposit should be repaid. In England and Wales participation in this process requires consent of both parties. In Scotland and Northern Ireland, the landlord must agree to use the adjudication service if requested by the tenant. The final decision of the adjudicator is binding and can only be challenged through a court of law.

The adjudicatory service operates on the basis of two key legal principles: 1) standard of proof: based on the balance of probabilities, which requires the adjudicator to weigh the evidence to determine who has the stronger claim; and, ii) burden of proof: the tenants own the deposit monies so it is landlords' responsibility to show that they are entitled to some of the money.

In the first few years after the legislation the number of adjudications in England and Wales increased strongly, but have since stabilised (Graph 1). Across all the tenancy deposit protection schemes, disputes are consistently raised in only a small number of cases. In 2018-2019, TDS dealt with 14,344 disputes (14,006 insured, 338 custodial) which is 1% of the total number of deposits protected (1,300,388 insured, 70,632 custodial).

Graph 1: Adjudications completed by all tenancy deposit schemes in England and Wales (March 2008 – March 2018).



Source: MHCLG FOI Data 2018

[114] Landlords can choose between two types of schemes: custodial where the deposit is held by the scheme (this is free to join and is funded by the interest generated by the deposits), and an insurance-based scheme where the landlord keeps the deposit and pays a fee to the scheme. The total number of deposits protected and the total number of disputes dealt with is significantly higher under the insurance scheme.

[115] TDS (2019) Rules for the Independent Resolution of Tenancy Deposit Disputes (Accessed: 16/12/19).

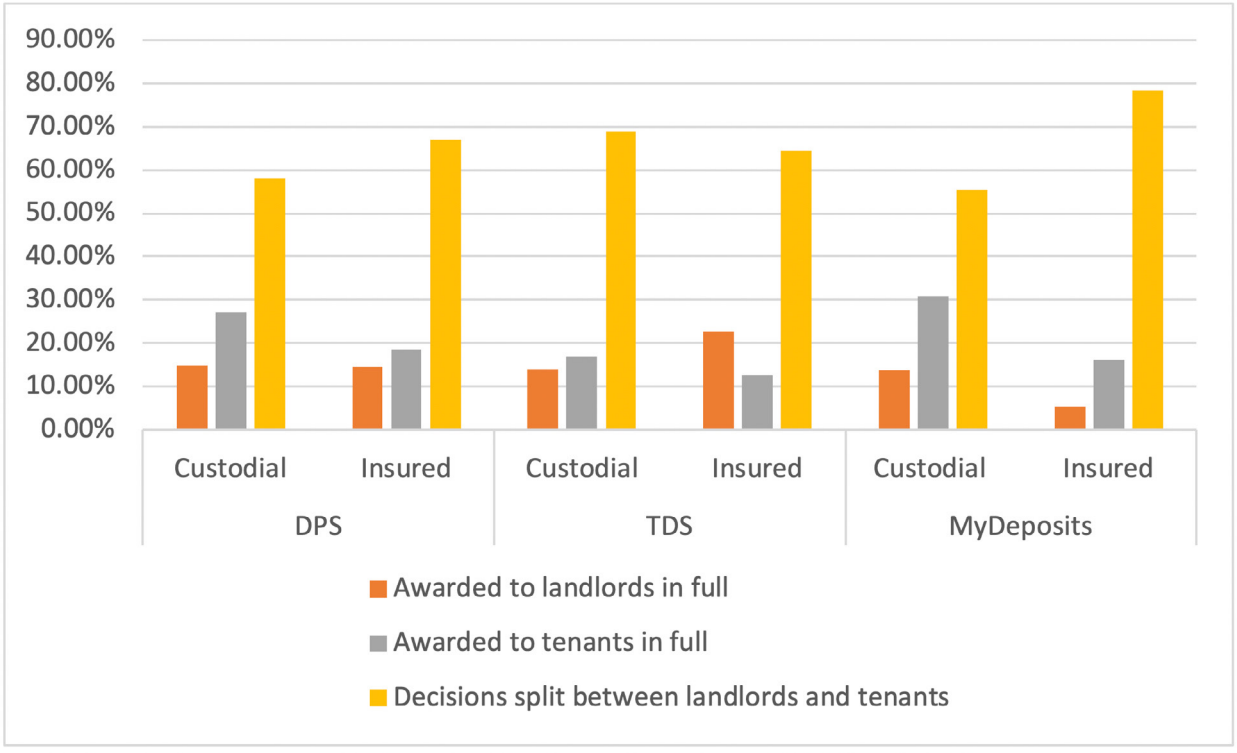
Disputes over deposits most often relate to cleaning and damage to a property (Table 1). Disagreements can arise due to a lack of knowledge on the amounts that can be legally deducted from a deposit.[116]

Table 1: TDS | Reason for dispute (2018-19)[117]

REASONS FOR DISPUTES (INSURED)		REASONS FOR DISPUTES (CUSTODIAL)	
53%	Cleaning	53%	Cleaning
49%	Damage	49%	Damage
30%	Redecoration	12%	Redecoration
15%	Gardening	27%	Gardening
18%	Rent	20%	Rent
55%	Other	30%	Other

In most adjudication decisions across all the schemes, the deposit is split between landlords and tenants (Graph 2). With the exception of the TDS insurance scheme, a slightly larger proportion of deposits is being awarded in full to tenants rather than to landlords:

Graph 2: % of adjudication decisions award, Oct 2018 – March 2019



[116] Which? (2018) Reform of the private rented sector: the consumer view (Accessed: 16/12/19).

[117] TDS (2019) Annual Review 2018-19 (Accessed: 19/12/19).

Key practices and developments

Because of the diversity of practices and terminology associated with consumer ADR schemes, it can be difficult for individuals and quality assessors to fully understand the dispute resolution processes.[118] Key stakeholder interviews indicated, however, that out-of-court dispute resolution services within the private rented sector are increasingly adopting similar practices and principles. Gaining an adequate understanding of these processes may be a helpful first step for those aiming to design a single code of practice for the sector (as proposed by the MHCLG).

Adjudication

Adjudication is the main ADR approach adopted by participating services. The role of the adjudicator is not meant to be investigative, and the responsibility for producing the evidence needed to support a claim rests with the disputing parties.[119] Whilst the formal rules state that the parties cannot expect the adjudicator to request additional information,[120] in practice it is possible to make further inquiries when needed. No hearings will be held nor are visits or inspections carried out. Adjudicators will usually have graduated in law or hold a qualification in dispute resolution. Feedback from interviewees indicated that a system relying solely on adjudication (with administrative support), may contribute to longer processing times. Participating services are reported to be moving towards multi-tiered resolution mechanisms.

Multi-tiered resolution mechanisms

The interviews suggest that although adjudication is the primary method of dispute resolution, some of the schemes are moving towards incorporating more than one process. Whilst the exact method differs between participating schemes, there is an increased focus on providing a more facilitative process at the onset of a dispute and moving towards a more determinate or adjudicative process in the final stage. This has often involved organisational restructuring, with the aim of encouraging dispute settlement before the adjudication phase is reached. Staff who previously engaged in a solely inquisitorial process (i.e., requesting evidence and then passing that onto the adjudicator), will now initially negotiate with each party by phone and e-mail:

> *They get a feel for them and you can just see some of them they might resolve low value ones, or they might resolve a claim for just rent arrears ... It's just a conversation with someone that is away from the whole process so it's not the agent, it's not the landlord or the tenant. I actually think just having that conversation with someone who's totally independent does re-focus people's minds (Adjudicator, Deposit Service, England).*

The interviews indicate that first-stage activities will have an evaluative element which involves providing advice or recommendations on the best course of action (e.g., amount likely to be awarded or chances of success if claim is pursued).

[118] Citizen's Advice, Confusion, gaps and overlaps.

[119] TDS, Rules for the Independent Resolution.

[120] TDS, Rules for the Independent Resolution.

Early resolution

The primary aim of multi-tiered approaches is to resolve disputes at the earliest opportunity. All participating schemes are increasingly focusing on early resolution and aim to provide a more proportionate response to different types of disputes:

> *You know, I think depending on the nature of the dispute or the complaint, sometimes it may take quite a considerable amount of time to search and deal with a compliant, but I think it should be proportional. I don't think you should be "well we got eight weeks, we're going to take eight weeks". I think disputes should always be resolved in the quickest possible method which is why I offer the negotiation ... rather than just saying there's this process and you have to wait all through this process (Ombuds scheme, UK).*

Services reported that the shift towards early resolution and multi-tiered approaches has caused a significant proportion of cases to be resolved before the adjudication phase. This process seems to involve an increased level of human communication and interaction:

> *40% of our cases are not going through to the formal proposition … that is showing that, you know, the effective way in terms of time, money and everything else is to actually get on the telephone and talk to the parties … before we were very process driven, very email driven, less personal touch (Ombuds scheme, UK).*

A shift in focus towards early resolution is reported by participants to be particularly appropriate for lower-value claims. For very large cases, or for cases that involve a substantial amount of evidence, it is not considered practical for someone with less knowledge than an adjudicator to try to resolve it:

> *There will be cases which are not clear cut and there will always be a need for an adjudication team (Adjudicator, Deposit Service, England).*

Information and advice

All participating consumer ADR services operating in the private rented sector provide online information as the first step of the multi-stage process described above. Dispute resolution systems that support with the identification of problems and prevent their escalation are reported to have particular value:[121]

> *In the first instance we would provide help and guidance in terms of information before they make their complaint, try and push them towards the information that's on our website and/or other sources that we've got (Ombuds scheme, UK).*

Some organisations also provide early telephone advice in response to initial enquiries; this is in contrast to the more prescriptive approach of other consumer ADR services that will only look at a complaint once the dispute resolution process has begun. The significant amount of time spent by these services on providing advice and information is perhaps indicative of the small-scale nature of many landlords in the UK private rented sector:

> *A lot of landlords we deal with are very inexperienced, we spend a lot of time telling them about their legal obligations a lot of them are well meaning people that might just have got it wrong, this is where this approach, for disrepair etc. then some service like this might work but you need to be clear when you might escalate (Adjudicator, Deposit Service, England).*

The initial advice or triage function is an important part of the services provided by these organisations, after which a

[121] Hodges, Delivering dispute resolution. pp.17.

[122] Hodges, Delivering dispute resolution.

significant number of enquiries are either dropped, or quickly resolved by using simple early resolution approaches.[122]

Digitalising dispute services

A shift towards digitalising dispute services was a key theme among the consumer ADR schemes that participated in the study. Some services operate an online dispute resolution platform that allows landlords and tenants to upload information, track the progress of their cases, and obtain general information. One service has taken this process a step further by introducing a self-resolution portal that allows the return of the deposit to be negotiated online. With this mechanism, landlords and tenants can see the information that is provided by each party and propose how much of the deposit should be repaid. In principle this process may allow disputants to play a more active role in the dispute resolution process while simultaneously facilitating early resolution. The digitalisation of dispute services is however not without its challenges and limitations (see below).

Assessing the evidence base

Dispute resolution success for the tenancy deposit schemes operating in England and Wales is currently measured via a set of key performance indicators set out by the MHCLG. These cover call answering time and time taken for dispute resolution. The performance target is currently set at 28 days. Besides the performance data, quantitative evaluation data currently consists of an in-house survey by TDS Northern Ireland with a sample of 1,053 tenants,[123] a Scottish Government funded survey of 7,967 tenants and 1,087 landlords,[124] and a multi-method study by Which? covering 1,749 tenants.[125] These studies include a limited number of questions on the adjudication service. However, due to a lack of random sampling, and a low sample size (relative to the total tenant population), there may be a high rate of non-response bias, which means that the findings cannot not be generalized to the wider population. The only academic study addressing the adjudication service of these schemes is a small qualitative study that features interviews with 12 letting agents.[126]

Strengths

Data shows that most schemes perform well against their key performance indicators and are providing speedier dispute resolution than would be accomplished via the courts (Graph 3). The number of disputes that are handled by the deposit protection services clearly indicates their value; the sheer number of cases would put significant pressure on the courts.[127] Respondents in a qualitative study by the MHCLG in England felt that these services have led to fewer cases being brought to the county court.[128]

[123] Tenants were asked questions relating to their experiences of tenancy deposits before and following the introduction of the scheme in April 2013.

[124] Social Research, (2018) Tenancy Deposit Scheme: review (Accessed: 30/1/19).

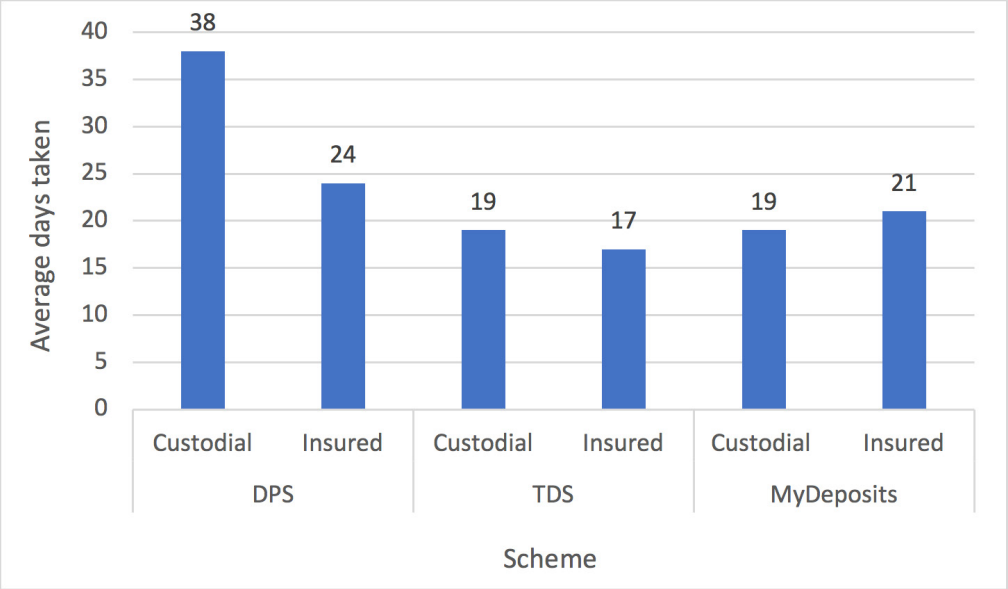
[125] Which?, Reform of the private rented sector.

[126] Sidoli del ceno, J. (2015) Adjudication in tenancy deposit scheme disputes: Agents' perspectives, International Journal of Law in the Built Environment, 7(2):162-172.

[127] Sidoli del ceno, Adjudication in tenancy deposit schemes.

[128] The actual volume of cases or the change over time are unknown as these statistics are not collected by the MOJ; MHCLG, A qualitative research investigation.

Graph 3: Average time taken to resolve dispute from when adjudicators receive papers (October 18 – March 19).



The 28-days target however only commences at the point where the adjudicator receives the papers and does not cover initial investigative activities (such as gathering evidence). Whilst data on end-to-end processing time for adjudicated cases is currently not available, one participant estimated it to be roughly three months. Tenant groups in England expressed concern about the difficulties of saving for a new deposit and securing a new property while the dispute is being processed.[129] In England, the MHCLG has recently consulted on how to address deposit-related affordability issues and improve the speed of deposit return.[130]

The previous section explored how these services are developing hybrid ADR processes and are increasingly incorporating digital technology. Participants estimated that 25-45% of the disputes are now resolved via early resolution. Improving the quality of data collected on the nature and impact of these processes, would help consumer ADR schemes to make informed choices about alternatives that would work well within a private rented sector context.

Existing evidence shows that the deposit schemes provide a robust framework for protecting tenants' deposits,[131] whilst feedback from key stakeholders indicates that formalising deposit protection has improved management practices within the sector:

> *I think very early on, lots of landlords and lots of agents, were surprised they had to – the burden of proof was on them … and it was very interesting when people would say, "Well, it was in great condition when I let the property out." Well, can you prove that? Frequently they couldn't. I think since then I've certainly seen standards of either management and reporting of conditions and things improve dramatically (Solicitor, England and Wales).*

[129] Generation Rent (2014) It's not their money: Reforming tenancy deposit protection (Accessed: 19/12/19).

[130] MHCLG (2019) Tenancy Deposit Reform. A Call for Evidence (Accessed: 19/12/19). This consultation ran from June 2019 to September 2019. We are currently awaiting the Government's response.

[131] Which?, Reform of the private rented sector

Limitations and challenges

Clarifying process design choices

A key advantage of consumer ADR is that processes can be tailored to individual cases, and it is not unusual for a single scheme to incorporate more than one process such as negotiation, mediation, arbitration, and adjudication.[132] However, there appears to be a wide divergence in the types and definitions of consensual forms of ADR that the schemes operating in the UK private rented sector are integrating into the early stages of the dispute process. Interview participants used various terminology to describe this initial process such as 'facilitated negotiation,' 'mediation,' 'conciliation', and 'arbitration' (which at times varied throughout the course of the interview). Certain key features and functions of consensual forms of ADR (such as mediation/conciliation) stand so central in the process, that to employ these approaches without a rigorous assessment of their workings and suitability within this particular context, may affect the effectiveness of the service overall.[133] In addition, without adequate user-testing or evaluation, the extent to which these new multi-tiered processes correspond to the expectations and satisfaction among those raising disputes cannot be assessed.

Access issues

It has been argued that the low number of disputes demonstrates that the majority of landlords and tenants successfully negotiate the return of deposits amongst themselves.[134] However, it could also be the case that some people will accept an agreement that they are less than happy with because they need the money from their landlord, or because of other vulnerabilities. This in turn could replicates existing power imbalances between landlords and tenants. Under these circumstances it is of vital importance that people are aware of and feel able to access the dispute service:

> *Often they don't want to go down the route of disputing because of the hassle that's attached to it, and so that means dispute resolution tends to be behind the scenes, in which case, it often doesn't go in the tenant's favour … I guess that might be skewed a bit by the types of evidence we see and we attend to as an advice agency, of course we would help anybody, but we do tend to help more vulnerable people who may be less, I suppose, aware of their rights or less likely to exact them (Policy manager, advice agency).*

The 2014/2015 English Household Survey reported that 54% of the surveyed tenants who did not have their full deposits repaid, felt that their landlord should not have withheld any of their deposit.[135] There is currently insufficient evidence to ascertain the number of tenants who fail to raise a dispute despite being unhappy with the amount withheld. However, there is some indication that some tenants may experience barriers to accessing these services.[136]

Awareness and understanding of the ADR process may also impact landlord's willingness to access the dispute services. A recent review by the Civil Justice Council, highlighted a chronic lack of public awareness and understanding of the nature and operation of ADR services.[137] The review of tenancy deposit schemes in Scotland reported that 17% of participating landlords did not know there was a dispute process, whilst 18% refrained from using the service because they did not think it make any difference.[138]

[132] Gill, C., Williams, J., Brennan, C. and Hirst, C. (2016) 'Designing consumer redress: a dispute system design (DSD) model for consumer-to-business disputes', Legal Studies, 36(3):438-463.

[133] Baylis, C. (1999) 'Reviewing statutory models of mediation/conciliation in New Zealand: Three Conclusions', Victoria University of Wellington Law Review, 30(1): 279-294.

[134] TDS, Annual Review 2018-19.

[135] MHCLG (2012-2019) English Housing Survey data on new households and recent movers (Accessed: 19/12/19).

[136] Which?, Reform of the Private Rented Sector.

[137] Civil Justice Council ADR Working Group, ADR and Civil Justice.

[138] Social Research, Tenancy Deposit Scheme: review.

None of the participating services collect demographic data or carry out consumer awareness research (this despite evaluation data suggesting that a significant proportion of tenants may not be aware of these schemes[139]). It is therefore not possible to assess who may not be using the schemes. One study explored the profile of consumers and traders using consumer ADR schemes across the UK,[140] and findings indicated that their characteristics differ from the general consumer population: 69% were male, 69% were over 50 years old, 66% held degree level qualifications or higher, and 42% reported a household income of approximately £40,000. This clearly indicates that some people may benefit less from ADR than others.

Digitisation of services

The interviews suggest that some of these services may be operating according to the assumption that most users have the ICT access, skills and abilities necessary to access their service:

> *I would say possibly the only challenge would be for anyone that's slightly older who's maybe not so computer literate but I suppose I mean we do have paper copies available but it does involve people making phone calls to us and having that knowledge to get it sorted. That would probably be my only challenge but then as time goes on, [the number of] those people are gonna be smaller and smaller (Adjudicator).*

Research has shown that straightforward assumptions on digital exclusion or digital proficiency often disregard the diverse and complex ways in which certain groups of people engage with technology. For example, although young people may have high rates of Internet access, they may still only rarely search the Internet for information or advice on how to resolve a problem with a legal dimension.[141] ICT barriers, literacy issues, language barriers, housing precarity, and mental health problems are a few of the many factors which may impact an individual's ability to use online services.[142]

Services reported that they seldom receive requests for off-line processes such as paper application forms. However, it cannot be assumed that limited use of these alternative options is indicative of the IT-literacy of the majority of people who may wish to access the service. Where a system is digital by default, there may be a lack of visibility or awareness of alternative processes. This could in turn prevent people from accessing the system as a result of the incorrect assumption that the process is only available online:

> *We've done work for years and years and years on problems with digital access because there's move to digital by default for everything and the tribunal is no exception … and it's difficult, so I think anybody who's got digital literacy problems, anyone who doesn't even have access to a computer, anyone who lives in a rural area … the deposit scheme as well, certainly the three we've got here in Scotland, we actually don't know of an alternative way [of accessing it]. (Advice service, Scotland).*

[139] Denvir, C., Balmer, N.J. and Pleasence, P. (2011) 'Recreation or Resource? Exploring how young people in the UK use the internet as an advice portal for problems with a legal dimension', Interacting With Computers, 23(1): 96-104; Sourbati, M. (2008) 'On Older People, Internet Access and Electronic Service Delivery: A Study of Sheltered Homes', in (eds) Loos, E., Mante-Meijer, E. and Haddon, L., The Social Dynamics of Information and Communication Technology, Surrey: Ashgate. pp. 95-106.

[140] Department for Business, Energy & Industrial Strategy, Resolving Consumer Disputes

[141] Denvir, Balmer, and Pleasence, Recreation or Resource?; Bennett, S.J., Maton, K.A., Kervin, L.K. (2008) 'The 'digital natives' debate: a critical review of the evidence, British Journal of Educational Technology, 39(5): 775-786.

[142] Recent statistics from the Office for National Statistics shows that 7% of households in Great Britain do not have access to the internet at home.

Consumer ADR schemes in the private rented sector reported online information is increasingly a key aspect of the services delivered. Whilst the provision of information is an integral part of dispute resolution systems (see Chapter 5), an accurate reference point for the design of these services is essential if the services are to adequately reflect the needs, abilities, and circumstances of different groups of users. One service reported that their new online information resources were being designed by asking their employees what they felt should be included on the website. However, research has shown that a user-focused approach in consultation with those who will be using the system, alongside rigorous user testing, is best practice in designing online and telephone services.[143]

Summary

The ombuds schemes and the adjudicatory services offered by the tenancy deposit schemes, are the main forms of consumer ADR operating within the UK private rented sector. Whilst these schemes are often reported to cover a wide range of working practices, findings from the stakeholder interviews indicate that these schemes are increasingly moving towards multi-tiered models, early resolution approaches, and digital processes. As the sector continues to develop and new approaches are adopted, it is essential that the evidence base for these schemes is enhanced. There is a need for more quantitative data evaluating the effectiveness of different methods and stages of dispute resolution, and qualitative data exploring the experience of landlords and tenants using these services.

[143] Silverstone, R. and Haddon, L. (1996) 'Design and the Domestication of ICTs: Technical Change and Everyday Life', in (eds) Silverstone, R. and Mansell, R. Communication by Design. The Politics of Information and Communication Technologies Oxford: Oxford University Press. pp.44-74; Bakardjieva, M. and Smith, R. (2001) 'The Internet in Everyday Life: Computing Networking from the Standpoint of the Domestic User', New Media Society, 3(1):67-83; Facer, K. (2011) Learning futures: education, technology and social change. London: Routledge.

5. International case studies

This Chapter discusses three international examples of the use of ADR in addressing housing disputes.[144] Because of the significant complexity and differences between civil legal systems, it cannot be assumed that a specific model or approach will automatically be transferable or necessarily operate well within a UK context.[145] However, as addressed in the second half of the chapter, the models apply approaches that reflect key lines of argument in the literature on best practice in resolving disputes. This allows us to identify certain key principles that could be applied in a UK context to improve dispute resolution for landlords and tenants.

British Columbia: Civil Resolution Tribunal

The Civil Resolution Tribunal (CTR) is an online administrative tribunal that has operated in British Columbia in Canada since July 2016. The CTR provides an example of a dispute resolution system that uses ADR processes to resolve housing disputes entirely via digital channels. The tribunal has jurisdiction over small claims up to the value of $5,000 (£3,984) as well as over strata (condominium) disputes.[146] Condominium owners account for approximately 50% of British Columbia's home ownership, and prior to the CTR the only means of resolving a dispute (for example between two neighbours) was to file a complaint in the superior court. Research demonstrated that the civil justice system in Canada poses numerous access barriers and often fails to provide adequate dispute resolution.[147] This led to the creation of the CRT under the Civil Resolution Tribunal Act 2012 and its associated amendments. The CTR's operating costs are financed through public funds. The head of the CRT reports that by moving dispute resolution online the Government expects to save $2.5 million in legal system resources which can then be reallocated.[148]

Dispute resolution process

The CTR is a complete end-to-end dispute resolution system covering four key processes (Image 2). Whilst disputants are encouraged to move through the system in a linear fashion, some cases will bypass certain stages.[149] During each stage online dispute resolution techniques are applied, rather than more traditional dispute resolution channels such a face-to-face or telephone communication. The process within each stage is designed to be accessed via a smartphone, tablet or computer. For those unable or unwilling to use technology, a paper-based system is provided.

[144] Residential Tenancies Board: Republic of Ireland (Case Study 3) addresses disputes related to deposits as part of its remit.

[145] An in-depth exploration of the various factors which shape policy in each of these contexts is beyond the scope of this study.

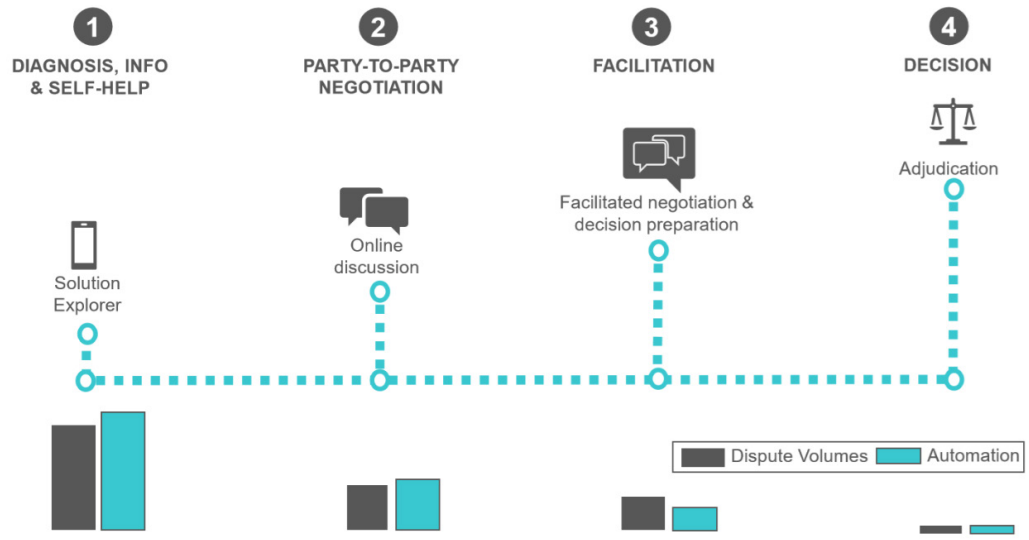
[146] In 2018 the CTR's jurisdiction was expanded to include certain motor vehicle accident claims and disputes involving non-profit societies and co-operative associations.

[147] Salter, S. and Thompson, D. (2016-17) Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal, McGill Journal of Dispute Resolution, 3(44):113-136.

[148] Mulgrew, I. (2016) Ian Melgrew: Civil Resolution Tribunal heralds the no-day-in-court future (Accessed: 30/1/20).

[149] Minor injury determination in a motor vehicle injury dispute don't usually go through negotiation or facilitation. They usually go straight to a CRT decision. https://civilresolutionbc.ca/tribunal-process/

Image 2: Civil Resolution Tribunal, British Columbia[150]



Stage 1 - Self-help: the dispute resolution commences with the CRT's free online Solution Explorer.[151] The Solution Explorer uses a simple question and answer format to help disputants diagnose their problem. Once the nature of the problem has been identified, users then receive specific guidance in the form of self-resolution tools and forms (e.g., letter templates, worksheets to calculate damages). The forms will adapt automatically to characteristics of the party using the system; e.g., an individual representing themselves would be presented with different documents to those presented to a corporate entity. The system does not provide legal advice, but rather functions as an informational tool that is designed to answer two key questions: 'what is my problem?' and 'how do I solve it?'. The Solution Explorer is anonymous but session information can be stored and retrieved via an access code. The left side of the screen contains a progress bar for questions answered versus questions remaining and a running list of answers already provided. At the end of the process, a summary report is presented which includes guidance and possible self-help options. If the user cannot resolve their dispute using the self-help that is suggested then they can begin the dispute process from the summary page. At this point the party will fill out an online form and pay a fee, which varies according to the type of claim.[152] Claimants who cannot afford the fee can apply to have it waived.

[150] https://civilresolutionbc.ca/wp-content/uploads/2019/03/Technical-Briefing-March-29-2019.pdf

[151] https://civilresolutionbc.ca/how-the-crt-works/getting-started/small-claims-solution-explorer/

[152] Fee structure is available via https://civilresolutionbc.ca/resources/crt-fees/#strata-property-disputes (Accessed: 30/1/20).

Stage 2, 3 and 4: Stage two involves voluntary party-to-party negotiations, providing the disputing parties with the opportunity to communicate directly with each other using online, paper-based or telephone channels. The aim of this stage is to resolve some "easy" disputes early and inexpensively. If a negotiated agreement is reached the fee is refunded.[153] If negotiation is unsuccessful or one party is unwilling to engage then parties enter a mandatory facilitation stage. In this stage, staff with mediation skills and experience support parties in reaching an agreement via various channels such as the CRT platform, phone, email, text, video conferencing, and mail. This process differs from mediation in that staff can provide disputants with an evaluation of the dispute and likely outcome if it progressed to adjudication. If the dispute is not resolved at this stage, the facilitator will support parties in preparing for adjudication by helping them organise their claims. The final stage involves an independent tribunal member making a decision in regard to the dispute. Both the facilitated agreements and the adjudication decisions can be enforced like a court order.

Each stage of this process is monitored by CRT staff for abusive behaviour. Where this is identified CRT may decide to end the negotiation phases early and send the case straight to adjudication.

Evidence base and development

The CRT introduced several processes to ensure that no one was excluded from using the digital system regardless of their different needs, capabilities and circumstances. This began with a survey conducted to guide the tribunal's early design work. This found that 92% of respondents used the Internet daily, whilst another 5% of respondents used it on a weekly basis. Whilst most potential users were identified as able to use technology, this research confirmed that additional processes would be necessary to accommodate people with different needs or abilities.[154]

Failure to consider the effect of inequalities in ICT skills, access, and user preferences on people's use of a digital system can result in the exclusion of vulnerable groups. Reflecting best practice in designing online systems, the CRT digital platform was developed from the perspective of the end-user. Throughout the CRT's development the software and associated processes were rigorously tested with community groups and tribunal users.[155] This then led to modifications within the system before the design was finalised and the CRT provides additional support and alternatives for those unable or unwilling to use the technology. As discussed in Chapter 4, the invisibility of offline channels can contribute to digital exclusion and the CRT aims to ensure that these auxiliary channels are properly advertised. Continuous consultation with users was also built into the CRT processes: for example, individual users are asked to rate the effectiveness of each information document they receive as part of the Solution Explorer process.

The CRT evolved from two early online dispute resolution pilot projects,[156] which were found to have positive results. Whilst no independent evaluation of CRT has yet been carried out, system metrics indicate that the CRT is successful in achieving early resolution for a significant number of cases: of 68,000 solution explorations, 11,000 have resulted in the user completing an application for dispute resolution.[157]

[153] Salter, S. (2017) Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal, Windsor Yearbook of Access to Justice, 34(1): 112-129.

[154] Salter, Online Dispute Resolution.

[155] Salter, Online Dispute Resolution.

[156] ODR was used by Consumer Protection BC for consumer disputes and by an administrative tribunal, the Property Assessment Appeal Board, for property tax disputes. Both ODR experiments used Modria's ODR platform

[157] Henderson, B. (2019) Is access to Justice a design problem? (Accessed: 30/1/19).

Tenancy Services New Zealand

In New Zealand the Residential Tenancies Act 1986 established Tenancy Services as an independent judicial body that provides dispute resolution for landlords and tenants. The Act created both a tribunal and a mediation service, allowing parties to reach an agreement amongst themselves rather than to directly approach the tribunal for adjudication, thereby replacing an inefficient and costly court system.[158]

Dispute resolution process

Tenancy Services provide a multi-stage dispute resolution service (Image 3). Landlords and tenants can use the mediation and tribunal process if there has been a breach of the residential tenancy agreement as contained within the Act. Unlike British Columbia, disputants do not move through the pathway in a linear fashion; mediation is available when an application is submitted to the tribunal.

Stage 1 - Self-resolution: Tenancy Services encourages landlords and tenants to resolve the issue amongst themselves by providing online information. No personal or tailored guidance is provided to support tenants in negotiating with their landlords.[159]

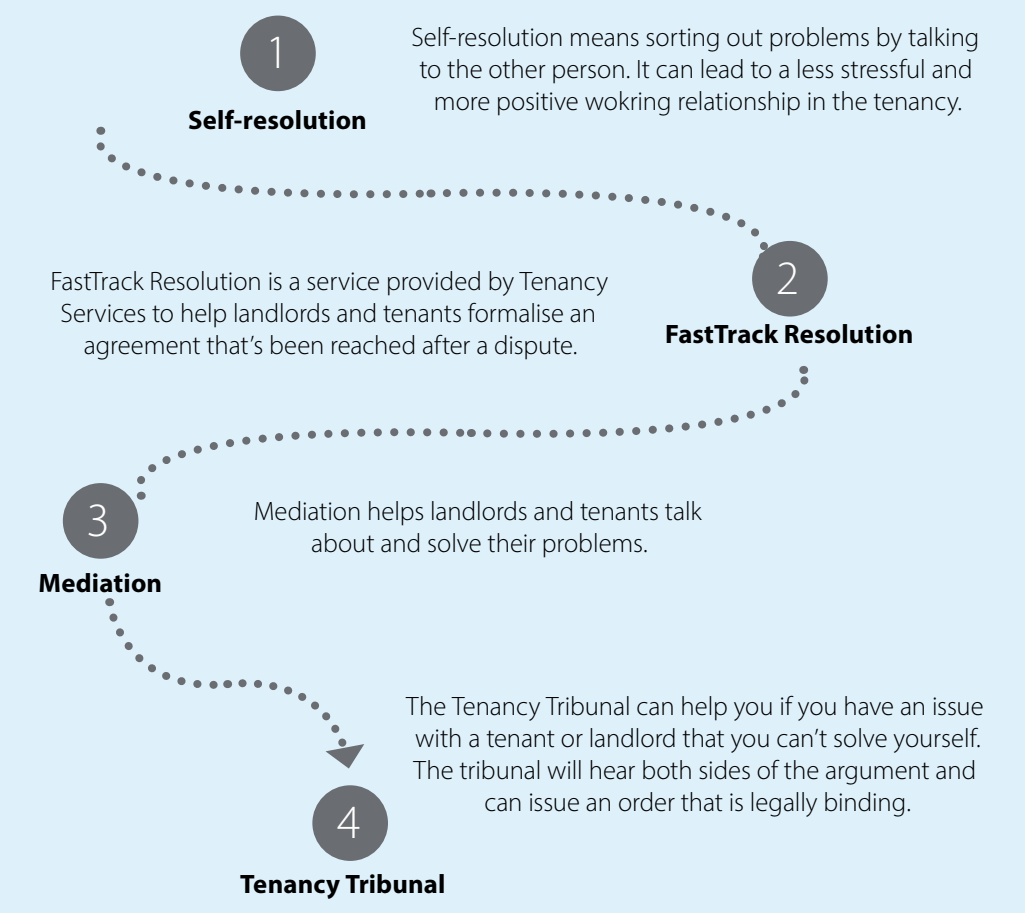
Stage 2 - Fast-track resolution: If an agreement is reached, (only) landlords can apply to have the decision formalised via the fast-track resolution service. If an agreement is not reached, a 14-day notice can be given by the tenant or landlord, giving the other person 14 days to sort the problem.

Stage 3 - Mediation or tribunal hearing: If the problem is not resolved within 14 days, an application can be made to the tribunal, which includes the option of participating in telephone or face-to-face mediation.

[158] Berg, H. (2012) 'Mediation in New Zealand: Widely Accepted and Successful', in (eds) Hopt, K.J. and Steffek, F. Mediation: Principles and Regulation in Comparative Perspective, Oxford: University Press.

[159] Chisholm, E., Howden-Chapman, P. and Fougere, G. (2017) 'Renting in New Zealand: perspectives from tenant advocates', New Zealand Journal of Social Sciences Online, 12(1):95-110.

Image 3: Tenancy Services dispute process[160]



The primary aim of the mediation service is to ensure that disputes are resolved before formal tribunal hearings take place. Whilst participation in mediation is voluntary, the tribunal has the power to halt proceedings and refer parties to mediation. The Act establishes the role of the mediators as also conciliatory in nature, stating that mediators may "make such suggestions and recommendations and do all such things as they think right and proper for inducing the parties to come to a fair and amicable settlement."[161] Whilst the terms mediation and conciliation are often used interchangeably, there are some fundamental differences. Mediators will usually not provide advice, but rather support disputing parties in reaching their own agreement, whilst in conciliation a third party can advise on the best course of action.[162]

This latter approach requires in-depth knowledge of substantive matters, and Tenancy Service mediators are generally experts in tenancy law.[163]

[160] https://www.tenancy.govt.nz/disputes/disputes-process/

[161] Residential Tenancies Act 1986, s76(5)(b)

[162] Baylis, Reviewing statutory models.

[163] Baylis, Reviewing statutory models.

Evidence base and development

The Tenancy Services in New Zealand has been widely discussed in the academic literature and has been subject to a number of qualitative and quantitative investigations. The following key themes can be drawn from the literature:

Positive outcomes

The Tenancy Services is cited as an example of how, in New Zealand, mediation is 'widely accepted and successful'.[164] In 2009-2010, 44% of the 40,000 cases referred to the tribunal were resolved via mediation.[165] Although more recent data is not readily available, evidence suggests that Tenancy Services has performed well as far as timely dispute resolution; in 2002, 82% of the mediations took place within ten days of the application being made.[166] In terms of customer satisfaction the service also scored highly: between 2000-2003, 83% of the surveyed disputants were satisfied with the mediation service, 81% felt they had been treated fairly, and 93% felt they had been listened to.

Effectiveness of the website

The Tenancy Services website was evaluated in 2002 (alongside four other New Zealand Government websites).[167] Whilst some of the issues identified may have been addressed since the evaluation was published, it still provides a useful discussion of criteria for assessing best practice. Unlike the other Government websites, the tribunal performed particularly well in the restructuring of printed documents for an online environment; e.g., large documents broken down into smaller webpages, with numerous hyperlinks added. The website also scored well in terms of compatibility with different browsers and its accessibility for people living with disabilities. All evaluated websites however needed to improve in certain aspects, e.g., in communicating their purpose and scope to users, their retrievability via different search engines, and their interactivity with users.

Accessibility and wider housing context

Some studies have queried the extent to which tenants can access the tribunal and enforce their rights in practice.[168] In New Zealand, the rental market is characterised by poor housing standards, lack of affordability, and insecurity of tenure.[169] New Zealand retains "no-fault eviction," and although retaliatory eviction is prohibited by law, the literature indicates that nonetheless tenants may fear a landlord's response if they were to approach the tribunal.[170] These factors, along with a lack of knowledge of legal rights, plus a lack of confidence or ability to deal with legal institutions, can present key access barriers.[171]

[164] Berg, Mediation in New Zealand.

[165] Berg, Mediation in New Zealand.

[166] Gill, L., Phillips, V. and Farnsworth, J. (2006) 'Satisfaction Experiences with Tenancy Mediation: Why is it so Successful', Systemic Practice and Action Research, 19(4): 325-335.

[167] Smith, A.G. (2001) 'Applying evaluation criteria to New Zealand government websites', International Journal of Information Management, 137-149.

[168] Bierre, S., Bennett, M. and Howden-Chapman, P. (2014) 'Decent Expectations? The Use and Interpretation of Housing Standards in Tenancy Tribunals in New Zealand', New Zealand Universities Law Review, 26(2).

[169] Chisholm, Howden-Chapman and Fougere, Renting in New Zealand

[170] Bierre, Bennett and Howden-Chapman, Decent Expectations; Chisholm, Howden-Chapman and Fougere, Renting in New Zealand

[171] Bierre, Bennett and Howden-Chapman, Decent Expectations; Chisholm, Howden-Chapman and Fougere, Renting in New Zealand

To apply for mediation, claimants must submit a tribunal application. In New Zealand, ADR occupies a central role in the broader dispute resolution environment; mediation is widely available and accepted.[172] A respondent from an advice agency reported that claimants are often willing to attempt mediation but are reluctant to apply to the tribunal. All tribunal orders are publicly available online (searchable via tenant or landlord name), which operates as a further deterrent to accessing the tribunal:

> *There is quite a housing crisis, there is more demand than what there is supply, so landlords can be a bit picky about who they rent to … most of the Tenancy Tribunal orders are online so you can search up the person who is wanting to move into your house and see if they have been to the tribunal and some landlords will just go "if you have been to the tribunal I don't want you", because either you have complained or your landlord had a complaint about you (Advice Service, New Zealand).*

This case study illustrates one way in which the success of a dispute resolution system will be impacted by the wider system in which landlords and tenants are operating.

[172] Berg, Mediation in New Zealand.

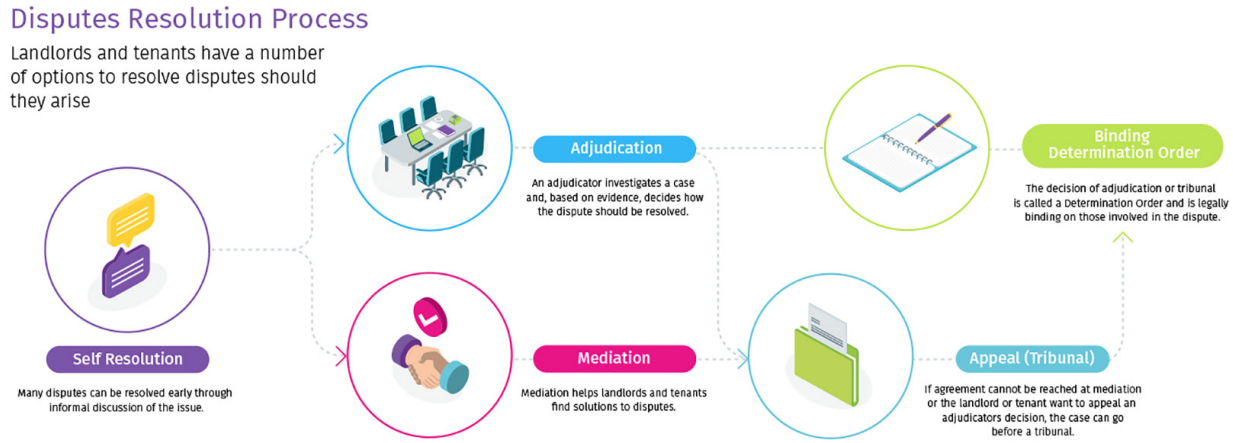
Residential Tenancies Board: Republic of Ireland

In Ireland the Residential Tenancies Board (RTB) was established under the Residential Tenancies Act 2004 to operate both a national register of private residential tenancies and a dispute resolution service, providing landlords and tenants with the opportunity to resolve disputes outside the courts. The RTB deals with a wide range of disputes such as breaches of tenancy obligations, claims for cost and damages and rent disputes.[173] The RTB also addresses disputes that relate to security deposits.[174] Landlords who have not registered their tenancy with the RTB do not have access to the dispute resolution service, but their tenant(s) can still use it.

Dispute Resolution Process

The RTB operates a multi-stage dispute resolution system which offers two forms of ADR: adjudication and mediation. Whilst landlords and tenants are usually required to first attempt adjudication or mediation, under some exceptional circumstances a dispute may be referred directly to a tribunal hearing (e.g., in the case of a serious dispute, such as a threat to life). Certain disputes must be referred to the RTB within a set timeframe (although this can be extended under exceptional circumstances).[175]

Image 4: Residential Tenancies Board, Republic of Ireland[176]



Stage 1 - Self-resolution: The RTB encourages claimants to resolve disputes among themselves. The website provides information on landlords' and tenants' rights and responsibilities, and on how to prevent and resolve disputes. Additional support is provided via an online chat function which is activated as users progress through different pages.

Stage 2 - Mediation and adjudication: If tenants and landlords are unable to resolve the dispute amongst themselves, they can choose to enter the mediation process or request an adjudication hearing. There is no fee for mediation, while an application for adjudication costs €15 if the application if submitted online and €25 if this is done by post. The adjudicator's report is sent to both parties along with letters of acceptance and rejection, which must be filled out and returned to the RTB within ten days. If both parties accept the adjudication decision, it becomes a legally binding determination order of the RTB. Parties can appeal the decision to the tribunal within 21 days.

[173] RTB does not have jurisdiction to deal with issues relating to the standard and maintenance of a rental dwelling, which is the responsibility of local authority enforcement.

[174] RTB, A Short Guide to Tenancy Deposits for Residential Tenancies (Accessed: 30/1/20).

[175] Citizen's Information, Resolving disputes between landlords and tenants (Accessed: 30/1/20).

[176] https://onestopshop.rtb.ie/dispute-resolution/ (Accessed: 30/1/20).

Stage 3 - Tribunal hearings: Where an agreement has not been reached or has broken down, or if the adjudicator's decision is rejected by one of the parties, the dispute can be referred to a tenancy tribunal. It costs €100 (online fee €85) to appeal an adjudicator's or mediator's decision and refer a dispute to the tribunal. Tribunals are heard by three dispute resolution committee members and are held in public. The tribunal will issue a binding determination order detailing the outcome of the case, the conditions that each party must meet, and by when. Since 4 June 2019 the RTB is required to publish all determination orders, which are enforced by the District Court.

Evidence base and development

Providing information is one of the key roles of the RTB and in 2017 the RTB started prioritising prevention by helping people understand recent and major legislative changes. By increasing people's understanding of their rights and responsibilities, the service aims to empower landlords and tenants.[177] To achieve this aim, an online "one-stop-shop" of information resources has been developed. In 2018 the RTB received 243,720 calls, emails and webchats requesting information (an increase of 47% since 2015).[178]

Data suggests high rates of satisfaction with the information provided; 84% of rated chats received a positive rating and 75% of surveyed customers said that their telephone query had been answered to their satisfaction. Performance data suggests that early communications, as well as information on rights and responsibilities, can facilitate early resolution: in 2018, 1,500 cases were withdrawn following early RTB intervention.[179]

However, one of our respondents highlighted that, because of the complexity of legislation, there are limits to what can be achieved through information, which in turn underlines the need for a multi-tiered process:

> *If it's a dispute on the law, I don't know that any amount of information that the RTB or ourselves can give is really going to be enough to equip somebody necessarily to resolve the dispute amongst themselves, simply because of the complexity of the legislation (Adviser, Republic of Ireland).*

In 2013 telephone mediation was introduced in addition to the mediation meetings already offered. Over 95% of the RTB's mediation services are now carried out by telephone. The performance statistics indicate that the RTB mediation service achieved rates of settlement that are consistent with those identified elsewhere in the international literature (see Chapter 3). In 2015, 857 cases were heard via telephone mediation, with 647 agreements (75%) reached. This rate decreased in 2016, when 57% of telephone mediation hearings reached agreement.[180] Consistent with international evaluations, the data also suggests a high rate of compliance with mediated agreements: in 2018, determination order enforcement requests were received for only 3% of the mediation cases.

Mediation may not be suitable for every case. The data suggests that deposit retention, rent arrears, and overholding[181] are the main issues that are resolved through mediation.

> *I suppose mediation doesn't necessarily always fit in well with the way that the regulation of the private rented sector has evolved since 2004 which is very very legalistic, and very very black and white (Adviser, Republic of Ireland).*

[177] RTB (2018) RTB Annual Report 2018. Available at: https://onestopshop.rtb.ie/images/uploads/general/RTB_Annual_Report_2018_Final.pdf (Accessed: 15/1/19).

[178] RTB, Annual Report 2018.

[179] This does not include those withdrawn due to incomplete application, no RTB jurisdiction, invalid tenancy or other reason.

[180] Data for this variable has not been provided for 2018.

[181] This is where a tenant fails to leave a property after receiving a notice of termination.

In 2018, the average processing times from the point of application was ten weeks for the mediation service, 16 weeks for the adjudication service, and 14 weeks for the tribunal. These represent significant improvements since 2016, when the RTB was heavily criticised for slow response times (in 2008, the average processing time for adjudication was 72 weeks). This improvement followed an increase in Government funding:

> *That was the perennial complaint … that it was taking so very long. Now, I think that was largely due to governments not funding the organisation correctly and lack of resources at the RTB itself … I think increased funding just means increased turnaround times, so it's as simple as that (Advisor, Republic of Ireland).*

In 2019 a multi-method research study explored landlord and tenants' experiences with the RTB and rent pressure zones. A survey of 500 tenants indicated that most (62%) are aware of the RTB and would be willing to use it (71%). One respondent stated that adequate resources to clearly advertise the existence of the dispute resolution system is key to its success.

Key learning from the case studies

A multi-tiered dispute resolution system

A two or three-step process, in which mediation precedes other more formal forms of adjudication, is at the core of the case study systems. Performance data from these services suggest that a participatory and facilitated negotiation process may allow a significant number of cases to be resolved before formal adjudication proceedings take place. The benefits of having a range of available ADR options is widely cited within the literature, and the creativity and flexibility associated with ADR is arguably one of its greatest strengths.[182] Hybrid ADR systems can be constructed by combining different consensual (e.g., mediation or facilitated negotiation) with determinative processes (e.g., adjudication). A multi-tiered system that allows procedures to be tailored to the individual requirements of a case can be contrasted to a "one-size-fits all" approach associated with formal justice proceedings, which, as discussed in chapter 2, often excludes and alienates parties.[183]

A multi-tiered approach which includes a non-adversarial method can ensure that all overlapping or underlying issues relevant to the dispute are addressed.[184] Rather than only focusing on the primary matter put before the court or tribunal, consensual methods can ensure that the underlying events, relationships, other factors contributing to a disagreement are brought to the surface, instead of being allowed to fester and potentially worsen.[185]

The case studies indicate the advantages of a system that offers consensual ADR processes (such as mediation or facilitated negotiation) prior to a dispute moving into formal litigation procedures. Mediation is effective where it is integrated into a larger pathway as one of several approaches, such as information, triage and adjudication.[186] When ADR is only available or suggested once a dispute enters the courts or tribunals (as is the case in the UK), claimants are likely to pursue their claim much in the same way as it began: with much hostility and confrontation. It is not possible to directly compare the effectiveness of court/tribunal-connected mediation with that of a complete system redesign. However, feedback from key stakeholders suggests that when parties start off by framing their problem in adversarial terms (see Chapter 3) it may be unrealistic to expect them to suddenly step back from this approach and embrace mediation. This finding is supported by evaluations of court/tribunal-connected mediation services, which indicate that entrenched positions may contribute to a reluctance to use such services - even when they are free.[187]

[182] Stempel, J.W. (1996) 'Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood', Ohio State Journal on Dispute Resolution, 11(2):297-396; Creutzfeldt and Gill, The Impact and Legitimacy.

[183] Stempel, Reflections on Judicial ADR.

[184] Arden, Housing dispute resolution.

[185] Arden, A. (2019) Housing rights and wrongs – the beat goes on, Journal of Housing Law, 22(5):79-92.

[186] Hodges, Delivering dispute resolution. pp.184.

[187] Webley, Abrams, and Bacquet, Evaluation of the Birmingham.

The case studies illustrate the importance of the flexibility of the system and the way in which people move through the pathway, e.g., in what circumstances (if any) cases may go straight to courts or tribunals. The New Zealand case study (where people have to apply to the tribunal in order to access mediation) illustrates how both court/tribunal-connected mediation and inflexibility within the system can form key access barriers.

In the case studies, the different stages of the system are clearly defined and explained to the public through the provision of online information. People experiencing a problem or dispute should therefore know what to expect when seeking a resolution. A clear definition of each resolution process also allows outcomes to be systematically monitored and measured, and comprehensive evaluations to be carried out (even if this potential is not always realised).

Prioritise active participation in the process

Each of the case studies aims to prevent disputes escalating into formal processes proceedings by employing a "self-resolution" stage, which helps clients make informed choices on how to proceed with their housing problem or dispute. Within this stage information is provided to increase knowledge of rights and entitlements. By prioritising early self-help processes, these case studies can be seen to embrace a philosophy of empowerment which encourages participants to become actively involved in resolving the dispute.[188] One of the key benefits of ADR is this contribution to a sense of empowerment, with the literature emphasising that processes that enhance a participant's voice and choice can improve access to justice.[189]

Performance data from the case studies suggest that providing opportunities for early resolution by means of information and other light-touch assistance has a demonstrable effect in reducing disputes in key areas. Information can come in different forms: e.g., static online information, an expert system that mirrors the feedback of a human expert, guided pathways using question-and-answer, video explanations, or webpages that adjust their content to different users. British Columbia and Ireland illustrate that human interactions still play a key role in this process (e.g., an online pop-up chat function which accompanies the online information page). Adopting a user-focused approach is best practice when designing the information (see below).

For certain problems and disputes, information alone is likely to prove insufficient. Each case study example provides alternative options for problems that cannot be solved by self-resolution channels alone. In these instances active participation can be further prioritised by allowing clients to choose between different dispute resolution mechanisms and by providing a consensual form of ADR (such as mediation).[190] The ADR literature suggests that active participation in the dispute resolution process may bring about greater commitment to the solutions the parties themselves helped determine, and consequently leads to higher rates of compliance (when compared to formal litigation).[191]

Proportionate and appropriate dispute resolution

The case studies demonstrate systems of dispute resolution in which courts and tribunals continue to play a key role. However, rather than being the first or only means of dispute resolution, they are positioned as a last resort. The phrase 'appropriate dispute resolution' is used in the literature to refer to a system which provides a range of options for resolving a dispute.[192]

[188] Salter and Thompson, Public-Centred Civil Justice Redesign.

[189] Nylund, Access to Justice.

[190] Law Commission, Housing, Proportionate Dispute Resolution

[191] Salter and Thompson, Public-Centred Civil Justice Redesign.

[192] Otieno, D.N. (2018) 'Reconfiguring 'Alternative Dispute Resolution' as 'Appropriate Dispute Resolution': Some Reflections', Alternative Dispute Resolution Journal, (6)2:193-213.

Appropriate dispute resolution also means that the process required to resolve a case will vary according to the needs of the parties and the dispute at hand.[193] In the case studies, the extent of resources, service involvement, staff expertise, time taken, and cost associated with each stage is designed to escalate and reflect the nature and complexity of individual cases. The effort required from the disputants (e.g., submitting details of the disputes, receiving information on legal rules and processes, fees paid), also gradually increases as the claimant progresses along the pathway.[194] In this sense the systems can be seen as aiming to provide a response that is proportionate to the needs and complexity of individual cases.

As argued by the Law Commission, having a wider range of mechanisms available can contribute to the overall proportionality of a dispute resolution system. It removes access barriers because people are able to bring claims at a proportionate cost.[195] The literature stresses that best practice in designing a proportionate and appropriate dispute resolution system, entails gaining an understanding of the available ADR processes and having a creative willingness to design an approach that matches the mechanism to the needs of the situation.[196]

Each case study system does contain a formal adjudicative stage at the end of the process that delivers binding decisions. Not every dispute can be resolved by, or is necessarily appropriate for, ADR. Providing a pproportionate response means that sometimes courts or tribunals proceedings will be the most appropriate route to resolution. The ADR literature emphasizes that if a claimant's access to justice is to be upheld then binding conflict resolution should be available as an accessible alternative.[197] This also provides certainty that the dispute will be resolved one way or the other.

A user-focused approach

Christopher Hodges' recent in-depth review of models for delivering dispute resolution in England and Wales, explicitly evaluates the structures and techniques from the point of view of users.[198] This avoids the intrinsic bias associated with assessing systems from the perspective of judges or administrative, and puts the users of disputes resolution systems 'at the heart of the design process'.[199] A user-focused approach is particularly important in the design and development of digital processes and systems.

[193] Nylund, Access to Justice.

[194] Salter and Thompson, Public-Centred Civil Justice Redesign.

[195] Law Commission, Housing: Proportionate Dispute Resolution.

[196] Brown and Marriott, ADR Principles and Practice.

[197] Nylund, Access to Justice.

[198] Hodges, Delivering dispute resolution. pp.26.

[199] Lord Chief Justice (2018) Speech by Lord Burnett of Maldon at the First International Forum on Online Courts, London, 3 December.

In each case study technology has been incorporated within the dispute resolution system, and British Columbia provides an example of a system that has been fully digitised. The literature on online dispute resolution suggests that digital tools can offer significant opportunities to deliver faster, cheaper, transparent and more accessible justice.[200] However, e-government initiatives are often defined and pursued without examining people's everyday experiences of using and engaging with digital technologies.[201] At the same time, courts and tribunal forms are rarely designed in collaboration with people who use them.[202] As a result, new technological systems carry a range of potential negative effects. These can be associated with the risk of excluding people with needs such as visual or hearing impairments, mental health issues, or literacy issues. Or they can be associated with taking complex and inaccessible paper-based processes and simply replicating them digitally, thereby failing to take the opportunity of moving online to make the system more responsive and user-friendly.

Sociological analysis of technology illustrates that different people use and interpret technology in a variety of ways.[203] The literature shows that the accessibility of digital systems will depend on the extent to which the abilities, uses, and barriers of different groups of users are recognised and incorporated into the system's design.[204] The British Columbia case study provides an example of a dispute resolution system that has been designed by focusing on those who would actually use the technologies. The system sought to accommodate and respond to the diverse needs of people who would be using the systems by vigorous user testing before the design was finalised. This user testing and consultation was carried out with two key groups: 1) organisations supporting people, 2) people who themselves used the system.

British Columbia also illustrates how a focus on the actual user of the disputes resolution system should be a continuous and ongoing process, since it might not be possible to anticipate all the factors or circumstances that affect a person's ability to use a system.[205] This can be achieved by means of ongoing user testing, as well as by providing opportunities for users to provide feedback.

A user-focused approach is not only about making processes simple; there will invariably be some complexity involved in addressing complicated disputes.[206] The system must seek to strike a balance between addressing user needs, and the creation of a complete set of rules to govern the resolution of disputes. One way in which British Columbia sought to achieve this balance, is by constructing online processes which only provide the legal information and rules to users as and when they need them, rather than all at once.[207]

[200] Gill, Williams, Brennan, and Hirst, (2016) Designing consumer redress.

[201] Olsson, T., Sanstrom, H. and Dahlgreen, P. (2003) 'An Information Society for Everyone?', Gazette: The International Journal for Communication Studies, 65(4-5): 347-363.

[202] Salter, Online Dispute Resolution.

[203] Denvir, Balmer, and Pleasence, Recreation or Resource?; Facer, Learning Futures; Bakardjieva, and Smith, The Internet in Everyday Life; Haddon, L. (2004) Information and Communication Technologies in Everyday life: A Concise Introduction and Research Guide, Oxford: Berg.

[204] Silverstone, and Haddon, Design and the Domestication of ICTs; Grint, K. and Woolgar, S. (1997) The Machine at Work: Technology, Work and Organization. Cambridge: Polity Press.

[205] Salter, Online Dispute Resolution.

[206] Salter and Thompson, Public-Centred Civil Justice Redesign.

[207] Salter and Thompson, Public-Centred Civil Justice Redesign.

6. Conclusion

With the UK private rented sector undergoing fundamental changes,[208] it is essential that policy makers and practitioners ensure an adequate system of dispute resolution is available to landlords and tenants. The UK court services are severely stretched, whilst economic considerations and other barriers may deter a significant number of landlords and tenants from pursuing otherwise legitimate claims.

Although the small number of people approaching the courts might suggest that other formal or informal options are working, evidence suggests that this is not the case. Very few people approach their local authority. Overstretched and under-resourced environmental health teams struggle to respond to the volume of complaints they do receive. Anecdotal evidence suggests that tribunals do not necessarily offer a straightforward solution: continuing complexity or perceived formality may prevent landlords and tenants from accessing justice.

This report illustrates the need for improved dispute resolution for landlords and tenants in the private rented sector. This report does not advocate for one particular ADR mechanism, but rather argues for a wider range of processes that can meet the needs and complexities of different types of cases. Whilst adjudication and mediation have been given particular consideration, these should be seen as part of the wider dispute resolution landscape. ADR must be understood as a range of processes that can be adjudicative, evaluative, facilitative, consensual, or a mix of these elements. Each of the procedures offers both advantages and disadvantages. Each can be adapted to different types of cases.

The evidence suggests that a range of ADR approaches is preferable to having only one in place. Effective dispute resolution systems will usually involve a pathway of interlinked processes that gradually escalate in intensity and resources, while focusing on resolving disputes at the earliest opportunity. This report therefore also advocates for a clear pathway around the system to allow users to navigate it successfully in order to access dispute resolution mechanisms appropriate to their case. To improve dispute resolution in the UK private rented sector, ADR should be not only be available in the form of court/tribunal-connected mediation. Rather it should be seen as an essential part of the justice system that offers a range of approaches and methods to meet the needs of different situations.[209]

Given that courts and tribunals are likely to be inappropriate for many private rented sector disputes, provisions should be made to allow disagreements to be resolved before they escalate to formal litigation procedures. Evidence suggests that early access to a consensual form of ADR (such as mediation) and improved access to advice and information can empower people to actively involve themselves in the dispute resolution process. This results in a significant proportion of disputes subsequently being settled. However, ADR does not necessarily deny access to formal adjudication: courts and tribunals should still play a role in a wider interlinked system.

Out-of-court ADR schemes are likely to play a more prominent role in the resolution of private rented sector disputes.[210] As the dispute resolution landscape becomes increasingly digitised, it is important that any scheme that is operating or developed within this context pays close attention to the impacts of technology, including consideration of any possible exclusionary effects. In cases where an online system has already been designed, the process of consulting and testing the system with users can be revisited, with amendments made accordingly.

[208] For an overview of the changes to the UK Private Rented Sector see Marsh, A. and Gibbs, K. (2019) The private rented sector in the UK: An overview of the policy and regulatory landscape (Accessed: 19/9/19)

[209] Brown and Marriott, ADR Principles and Practice.

[210] For example, MHCLG has proposed to extend compulsory membership to a redress scheme to all private landlords.

Our review indicates that the empirical literature evaluating dispute resolution systems is not as extensive as it could be. The challenges of assembling robust and relevant data for evaluation are considerable. However, the increased emphasis upon online systems opens up new possibilities. With schemes increasingly incorporating hybrid ADR processes, opportunities to incorporate mechanisms for ongoing evaluation and review needs to be explored. It is wise to integrate reflections on monitoring and evaluation in the process of system (re)design rather than evaluation relying on administrative data that is not quite fit-for-purpose.

This report indicates a need to think creatively about the principles and approaches through which dispute resolution in the private rented sector is designed and developed. People approach the justice system with a range of experiences, priorities, and needs. They face a range of possible barriers. Given that people's ability and willingness to navigate a dispute resolution landscape is likely to vary according to their circumstances, from a best practice perspective a user-focused approach will need to be adopted. Rather than compelling people to adapt to a traditional justice concept, we must ensure that the dispute resolution can reorient itself to a changing housing context and the challenges facing those who live and work within it.