UNIVERSITY OF CAMBRIDGE

A Comparative Analysis of Online Dispute Resolution

For

The International Legal Aid Group

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EXECUTIVE SUMMARY

INTRODUCTION

The Cambridge Pro Bono Project (CPBP), a programme within the Law Faculty of the University of Cambridge, was invited by the [International Legal Aid Group] to conduct a research project on the implementation of online dispute resolution (ODR) systems.

The project was prompted by recently announced proposals by Her Majesty's Courts and Tribunals Service (HMCTS) for a £1 billion digitisation effort, encompassing more than 50 distinct projects, including an integrated case management system and online dispute resolution systems. By 2023, HMCTS promises the digitisation effort will deliver millions in annual cost savings and remove 2.4 million cases per year from physical courtrooms.

There has been little consultation by HMCTS and a lack of consideration of the potentially far-reaching implications for justice. Initial reports by the National Audit Office and the Public Accounts Committee cast significant doubt on the ability of HMCTS to deliver the efficiencies and cost-savings promised in its plan. They have also questioned the impact of the proposals on access to justice, particularly as they involve the closure of many courts in England and Wales.

The aim of the project is to explore the concerns associated with ODR, particularly those relating to the proposed Online Court, an online dispute resolution mechanism intended to replace the traditional small claims track and fast track procedures in England and Wales. It is hoped that this research will uncover background information to inform policymakers and provide an analysis of the potential impact of ODR.

England and Wales is not the first jurisdiction to attempt ODR. Jurisdictions within Canada, Australia and the USA, for example, have all established ODR mechanisms of some kind. In addition, ODR has been widely used in private settings such as insurance disputes and by major online marketplaces like eBay. ODR was also attempted in the Netherlands, through the now obsolete Rechtwijzer.

The research that forms the basis of this report was carried out between December 2018 and February 2019. The report therefore reflects the position in each jurisdiction as at the latter date.

TERMS OF REFERENCE

The project's terms of reference were:

(i) to research the use of ODR systems in the following six jurisdictions, focusing on civil as opposed to criminal matters:
   a. England and Wales;
   b. Victoria, Australia;
   c. New South Wales, Australia;
   d. Michigan, USA;
   e. Utah, USA; and
   f. British Columbia, Canada.

(ii) to analyse the use of those ODR systems from the perspectives of access to justice and open justice; and

(iii) to determine whether any lessons can be drawn from the use of those ODR systems in overseas jurisdictions which will assist with the implementation of such systems in England and Wales.

METHODOLOGY

A standard form research questionnaire was formulated in order to structure the research in each jurisdiction and to enable a comparative analysis. The pro-forma questionnaire can be found at Annex 1.

SUMMARY OF FINDINGS

Table 1 is a summary of the project's main findings. The project reveals substantial variation in the extent to which ODR has been implemented in each jurisdiction. ODR is currently being piloted in England and Wales, Victoria and Utah, but the implementation of ODR is much more established in New South Wales, Michigan and British Columbia. This means there is substantial variation in the availability of information and accompanying commentary.

The project reveals that ODR in all the jurisdictions studied here is primarily confined to small civil claims. Certain jurisdictions have taken this further and constrained the use of ODR to claims of a certain value. For example, the pilots in England and Wales make ODR available for small civil

claims of less than £10,000, in Victoria for less than $10,000 AUD (c.£5,500) and in Utah for less than $11,000 USD (c.£8,500). In British Columbia, ODR is available for low value small claims of less than $5,000 CAD (c.£3,000), for some strata property disputes (without a specified monetary limit), and, as of April 2019, for disputes with the public motor vehicle insurer for injury claims up to $50,000 CAD (c.£30,000). In New South Wales and Michigan, ODR is not constrained by claim value but has to satisfy a number of other criteria, for example that the claim must fall within prescribed categories of claim.

The project reveals consistencies in the reasons behind the implementation (or proposed implementation) of ODR. The potential for ODR to result in substantial cost-savings and an increase in efficiency are common reasons for its implementation and feature in every jurisdiction. Justifications in terms of ease of access, reducing reliance on legal representatives and reducing the time to complete a case also feature in every jurisdiction.

Whilst the aims and proposed benefits are substantially similar across each jurisdiction, the methods and systems of ODR vary among the jurisdictions. Certain jurisdictions have implemented ODR as part of a procedural tool which allows easier case management (e.g. New South Wales, Utah) but does not yet replace the traditional role of the court. By contrast, in England and Wales, Victoria, Michigan and British Columbia, ODR will eventually enable applications to be made and considered and judgments to be given. Thus ODR steps in to fulfil the role of the traditional court.

Reviews of the ODR systems studied here are generally mixed and it is difficult to determine unequivocally the value of ODR. It appears to be well-received by users in at least some jurisdictions, as reflected by user satisfaction surveys in, for example, British Columbia. It has been suggested that ODR provides access benefits, particularly for users in rural locations, who may not be able or willing to access a court. ODR may also reduce court time and reliance on costly legal representation, and it may lead to quicker resolution of disputes. However, much of the commentary on ODR is provided by creators of the system (e.g. Matterhorn in the USA) or the policy-makers driving its implementation. It is therefore difficult to obtain neutral insights into the adequacy or inadequacy of the systems. In addition, some ODR systems are in the very early stages of development and as such it is difficult to see a clear picture of their benefits, strengths and weaknesses.

There are also concerns with ODR in principle that may apply to differing extents to the systems under review. Of particular concern is the extent to which users are able to engage with the systems. Although research into precisely how widespread a problem lack of direct access is likely to be is outside the remit of this report, ODR is, for example, likely to be problematic for users who

do not or cannot access a computer. It is also open to question whether ODR is necessarily a quicker and cheaper mechanism for resolving disputes. If insufficient care is taken in designing ODR systems, delays could in fact be caused as users take time to navigate a complex IT system. ODR may also preclude the informal face-to-face discussions which are often considered important for pre-settlement negotiations. The role of legal advisers is also unclear in some cases, and there are important questions about access to justice and whether ODR discourages litigants from obtaining legal advice and encourages greater numbers of litigants in person. This may, in itself, be a false economy as unrepresented individuals, who lack experience and insights into legal processes, could take more time to progress their case through the system. An ODR system and those users with legal experience, in particular judges and lawyers, must adapt accordingly in order to ensure an efficient flow of cases.

It has been determined that England and Wales has much to learn from the use of ODR systems in other jurisdictions. There is also a clear and pressing need for independent research and analysis to determine precisely whether the aims of the system in England and Wales are being met and, if not, how the system can be improved.

TABLE 1

Jurisdiction	England and Wales	Victoria	New South Wales	Michigan	Utah	British Columbia
Stage	Pilot	Month long pilot of ODR in September 2018	Established	Established	Pilot	Established
Type	Small to Medium civil claims only	Small civil claims	Civil claims	Civil claims	Civil claims	Civil claims (various)
Claims	Pilot of money claims >£10,000 inc. interest Not personal injury or Consumer Credit Act 2006 claims. But, the scheme will eventually apply to claims <£25,000	Small civil claims relating to goods and services under $10,000 AUD (~£5,500).	The Online Registry allows forms to be filed in the Supreme, Land and Environment, District and Local Courts. The following matters are eligible for the Online Court: matters on the Supreme Court's Corporations Registrar's list, the Supreme Court's Equity Registrar's list and the Supreme Court's Common Law (Possession of Land) list; civil matters in the Land and Environment Court; matters on the general division list of the District Court (Sydney); and matters on the general division list and small claims (motor vehicles) list of the Local Court (Sydney).	Matterhorn programme limited to traffic, parking and minor civil infractions, drivers licence suspensions and warrant reviews.	Small claims procedures <$11,000 (exc interest and court costs) but excludes landlord and tenant cases, property possession cases and those against the government. [	Current jurisdiction: - Low value small claims ≤$5,000 CAD. - Certain claims related to “strata” property (i.e. commonhold property/ condominiums). Future jurisdiction - From 1 April 2019, claims against the public insurer for motor vehicle injuries ≤$50,000 CAD - Under legislative provisions that are not yet in force, certain claims in respect of cooperatives and societies. - The CRT chair has mooted an increased small claims jurisdiction up to $25,000 CAD.
Reasons	To increase use of IT. To reduce reliance on buildings and rationalise court estate and therefore realise cost savings. To allocate work by district judges to case officers. To increase access to justice.	To make the process for bringing small claims simpler and cheaper. To facilitate access to justice for disadvantaged individuals and individuals living in rural parts of Victoria.	To reduce the time and costs involved in filing documents and in attending court to obtain pre-trial and case management directions.	To address particular problems with traffic violations and warrants. Defendants too intimidated to go to hearings, or unable to attend for other reasons (inc cost)	Intended to provide simple, quick, inexpensive and easily accessible justice. Aimed to reduce difficulties for unrepresented participants, to remove location barriers, reduce costs, increase settlement and improve legitimacy of the process. Hoped to separate access to justice from court facilities.	Aims to provide dispute resolution in a manner that is accessible, speedy, economical, informal and flexible. Aims to use electronic communication tools to facilitate the resolution of disputes. Cost savings, speed and informality were the primary drivers of the project.

How?	Online court system has three stages. (1) Triage inc guidance and signposting to free legal advice; (2) Conciliation- case officers identify and facilitate negotiation, mediation or early neutral evaluation; (3) Binding determination by District Judge based on the papers, aided by video and telephone conferencing if needed.	Online platform allows parties to have matters heard and decided in real time using video and file sharing technologies.	The Online Registry allows for filling in and filing of more than 80 forms in the Supreme, Land and Environment, District and Local Courts. It also allows users to access information about existing cases, download court-sealed documents, check court listings and publish and search probate notices. The Online Court acts as a messaging forum. Once a matter has been placed on an eligible list, a party can log in and request various procedural orders. The other party can then either consent or propose alternative orders. Matter is reviewed by a judicial registrar who will make the orders, or require the parties to come in for a physical hearing.	Online system which enables the user to input case information. The user accesses the online portal to provide information needed to plead their case (including plea and supporting documentation). The case is then reviewed and a decision is provided electronically by a judge or magistrate.	Both parties register for the ODR system. Once registered, the case is assigned to a facilitator who advises the parties on the legal procedures, modes of communications and establishes the time line. Parties can communicate with each other over the portal. Parties can agree to settle, via the facilitator. If no settlement is reached, a trial date will be fixed. The hearings still appear in physical court rooms.	The ODR system is called the Civil Resolution Tribunal (CRT). It is a tribunal, not a court. Adjudicators are government appointees rather than judges. Prospective claimants must first complete the "Solution Explorer". This tool collects information, triages claims and provides educational information for users. The user works their way through the system, providing information about their dispute and receiving guidance on how to structure their claim and alternative courses of action. Once the Solution Explorer step has been completed, the user can then launch the CRT application process, which requests personal and contact information for the applicant and respondent(s) and details of the dispute. Once the user submits the application, CRT staff review it and, if all is in order, they send a Dispute Notice package to the applicant with instructions to serve the package on all respondents. If the respondents file a response, a facilitator is assigned to the case. The facilitator conducts a case-management-type process with the parties, including formal mediation. If the parties do not reach a consensus through facilitation, they may proceed to an adjudication (hearing). This step is usually carried out through exchange of written submissions, although telephone and videoconferencing may be used. Negotiated agreements and adjudicated decisions can be registered with a court and enforced like a court order.
Benefits	+ Access to justice by creating a simplified litigant-friendly system and removing the consequent need to pay for legal advice/advocacy. + Increase number of early settlements and reduce cases for judges. + Remote working, meaning court estate can be streamlined, land sold and financial benefits seen. + Predicted financial savings of £941m over 10 years	It is too early to tell whether there have been any benefits.	+ suggested that this would improve access to justice by cutting down travelling and attendance costs, for parties and their lawyers, and therefore reduce legal costs. + improved access to justice by freeing up time of registry staff to provide advice and to assist unrepresented litigants + has resulted in the publication of a lot of educational material	+ Allow disputes to be resolved in a more informal, convenient setting. + Some courts have no parking, so this was intended to overcome practical issues of parking. +Increase court flexibility while maintaining customer service in the context of reduced budget and reduced staff. + Reduce time spent in court for lawyers, police officers etc = associated monetary savings. + Reduction in the time it takes for cases to complete. + Reduction in time taken to collect fines. + Reduced default rate.	No reported benefits of the system yet. The pilot stage is still in its infancy.	+ Positive rates of adoption and engagement with the tool. + Shorter time period for case resolution. + High rates of user satisfaction. + Flexible scheduling and eliminates need for travel. + Reduces workload of the courts that previously heard these types of matters.

Pitfalls	- may exclude those who are computer illiterate. - two tier justice system whereby claims <£25,000 are treated less seriously. -dissuades litigants from obtaining legal advice and encourages litigants in person. - open justice - no information on how the public could view or engage in the trials. - technical/ usability problems	It is too early to tell whether there are any pitfalls.	- no chance for parties and their lawyers to be heard at the time of the decision making. - online court shifts the administrative burden on to lawyers, which can lead to errors. - no chance to meet the other side face-to-face and to confer on an informal basis. - query whether there is too much educational material - use of the system is limited to legally represented parties for some matters	- Some participants did not find the system easy to use. - Some participants did not understand the state of their case throughout the process. - Data/ privacy concerns. - Only useful for simple claims.	No reported pitfalls yet. However, the system is premised on the parties engaging in settlement negotiations, unrepresented. - Only suitable for disputes which are simple and do not require cross-examination or oral evidence. - Opt out, rather than Opt in system. May cause difficulties for those who do not have internet access or who are not able to use a computer.	- Since the CRT is a tribunal rather than a court, the institutional and personal aspects of judicial independence are attenuated. This issue is currently mitigated by limiting the CRT's authority to hear matters where the government is a party. However, as a result, the CRT's jurisdiction is more complex than it would otherwise be, creating potential for greater confusion among users. - No explicit requirement for CRT members to be lawyers or have legal training (although they currently are), so in some cases they may not be best placed/experienced to make the decisions. Such cases may however be limited, due to the CRT's rigorous merit-based appointment process. - Status of lawyers and other representatives in the CRT process is ambiguous. Lack of clarity can cause confusion and/or delays in navigating cases through the system. - In strata claims, users can only challenge a decision by judicial review. At the other extreme, in small claims decisions, any party who is dissatisfied with the decision can file a notice to have it vacated without supplying any grounds. If a party wishes to pursue the claim further, they must start a new trial in the small claims court.

JURISDICTION REPORTS

Jurisdiction Report: England and Wales[1]

Why this jurisdiction

The home jurisdiction.

Introduction to the online dispute resolution (ODR) system

The 'Online Court' is a concept which forms part of the HMCTS Reform Programme, which was launched in March 2015.[2] The idea is that a user-friendly, online system will be created to deal with straightforward money claims with values not exceeding £25,000.[3]

The 'Online Court' is currently being developed by HMCTS and different stages of the court are being tested in a series of pilot projects. The Online Civil Money Claims process (OCMC) was first introduced to the public as part of a second round of beta testing on 26th March 2018.[4] The OCMC allows litigants to issue and respond to specified money claims online worth not more than £10,000 plus interest. The OCMC currently does not extend to the adjudication of disputes. It is intended to replace the Money Claims Online (MCOL) service, which launched in 2002 and allows for the filing, issue, service and response to fixed money claims up to £100,000 online.

Why was ODR introduced in this jurisdiction?

The concept of an Online Court, for small to medium sized civil claims, was introduced as part of the HMCTS Reform Programme. The focus of the Reform Programme is threefold: to increase the use of IT in the issue, handling, management and resolution of cases; to reduce reliance on buildings

[1] Research conducted and report prepared by James Humphrey, LLM Candidate, University of Cambridge.
[2] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015).
[3] ibid 43.
[4] Civil Procedure Rule Committee, *Evaluation report to the Civil Procedure Rule Committee concerning the Online Court pilot* (February 2018) 7.

and to rationalise the court estate; and to allocate some of the work currently undertaken by judges to case officers.[5]

The original vision for an online civil claims court was presented in an ODR Advisory Group Report, chaired by Richard Susskind, in February 2015. This envisioned the creation of a three-tier internet-based court service, which would be internally structured to encourage early settlement. Tier one would provide litigants with basic legal advice in order to crystallise the substance of any dispute and to provide users with an idea of the merits of their case. Tier two would make use of facilitators who would conduct mediation and negotiation online. Tier three would involve a determination of the dispute by a district judge.[6] A variant of this model was eventually adopted by Lord Justice Briggs in his Final Report on the Civil Courts Structure Review.

The main anticipated benefit of the Online Court is that it will widen access to justice. Briggs LJ argued that the main weakness of the current civil court system is that, for modest and low-value claims, the cost of legal representation is disproportionally expensive[7]. The reduction in Legal Aid funding has further exacerbated this problem. Therefore, the resolution of small-medium sized civil claims is only really available to those who are able to obtain conditional fee arrangements or who are in the minority who qualify for Legal Aid. The Online Court is designed for use by litigants *without lawyers*. Therefore, it is hoped that it will widen access to justice by removing the need to pay for expert legal advice.

Aside from the access to justice benefits, it is anticipated that, by building in evaluation and conciliation devices into the online system, this will increase the number of early settlements and, therefore, reduce the number of cases which need to be dealt with by judges. This will reduce the overall cost of the small claims system.[8] Furthermore, it is envisaged that the use of an Online Court will enable judges to work remotely and, therefore, the court estate can be reduced and the land sold.[9]

HMCTS, the Ministry of Justice and the Senior Judiciary contend that the Online Court will be more than an online platform to issue claims. They argue that it fundamentally reimagines civil litigation in England by embedding conciliation mechanisms, such as mediation, negotiation and early neutral

[5] Briggs, 'Interim Report' (n 2) 4.
[6] Civil Justice Council, 'Online Dispute Resolution For Low Value Civil Claims' (2015) 6.
[7] Briggs, 'Interim Report' (n 2) 51.
[8] ibid.
[9] ibid 4.

evaluation into the pre-trial process and requires the court to actively facilitate them.[10] Moreover, the move from an adversarial system to a more continental style, inquisitorial system is a major departure from traditional litigation in England and Wales.[11]

How was ODR implemented?

Briggs LJ's final report was largely accepted by the Government and the Senior Judiciary and HMCTS has committed to establishing an Online Court for money claims (including damages) up to £25,000 as part of the Reform Programme.[12]

Piloting of the project is being undertaken in incremental stages under the auspices of the CPR.[13] The current stage of piloting is focused on 'Stage 1' of the Online Court relating to the issue and response to claims.

The pilot project of stage 1 was split into two stages: private beta and public beta.

Private beta ran from 9th August 2017 to 26th March 2018. The private beta approach was by invitation only. 1,828 claimants were recruited by HMTCS contact centres as well as the MCOL website.[14] The jurisdiction of claims suitable for the private beta approach was quite restrictive:[15]

- Claims had to be specified money claims not exceeding £10,000 including interest.
- The claim could not be one that ordinarily followed the Part 8 procedure.
- Claims for personal injury were excluded.
- Claims under the Consumer Credit Act 2006 were excluded.
- The Claimant had to have an address of service within the UK.
- The Defendant had to have an address for service within England and Wales.

Following the completion of the private beta phase, the public beta phase went live on 26th March 2018 and will last until 30th November 2019.[16] The public beta pilot was named the Online Civil

[10] Sir Terence Etherton, 'The Civil Court of the Future: The Lord Slynn Memorial Lecture' (2017) <https://www.judiciary.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf> accessed 3 February 2019.
[11] Chloe Smith, 'Bar warns against "lawyerless" online court' *The Law Society Gazette* (London, 14 March 2016).
[12] Civil Procedure Rule Committee, *Civil Money Claims Project Beta Pilot* (June 2017) 2.
[13] ibid.
[14] Civil Procedure Rule Committee, *Evaluation Report* (n 3) 1-2.
[15] 51R PD 2.1(3).
[16] Civil Procedure Rule Committee, *Evaluation Report* (n 3) 7.

Money Claims Project (OCMC) and has the same scope as the private beta pilot. A new practice direction brought OCMC into effect – Practice Direction 51R.

The Online Court is being funded as part of the HMCTS Reform Programme, which has a budget of £816m.[17] HMCTS expects that the Reform Programme will deliver total benefits of £941m over 10 years up to 2024-25.[18]

The ODR process

Description of the envisioned Online Court

As previously mentioned, the Online Court is intended to function in three stages with very similar functions to those suggested by Richard Susskind in his ODR Advisory Group Report. It is anticipated that the Online Court's jurisdiction will be limited to monetary claims worth £25,000 or below. Whilst HMCTS initially felt that the scope should be restricted to specified money claims (i.e. debt rather than damages claims), Briggs LJ did not accept that that assessing damages was inherently more complex than quantifying debt and could see no good reason for excluding damages claims.[19] Certain types of claims will be excluded from the online court en bloc, including all claims for the possession of homes and intellectual property claims.[20] Moreover, all personal injury claims currently in the fast-track (above £1,000) would be excluded.[21] Briggs LJ suggested that litigants pursuing housing disrepair claims could opt-in to the Online Court if they desired. Finally, the Online Court will be restricted to monetary claims (damages or debt) and will not have jurisdiction over non-monetary claims (e.g. those for injunctions or specific performance).[22]

Stage 1 is intended to be a 'triage' system to encourage early resolution of disputes. The Online Court system will offer initial guidance about the need for litigation to be a last resort and will point potential litigants in the direction of affordable or free legal advice. It will also enable the parties to communicate with each other to identify whether there is truly a dispute between the parties which needs to be resolved. Assuming the dispute does not settle at this stage, the software will guide the litigant through a series of questions which will attempt to identify the relevant facts and evidence.

[17] National Audit Office, *Early Progress in Transforming Courts and Tribunals* (2018) 16.
[18] ibid 17.
[19] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) 55.
[20] ibid 55-57.
[21] ibid.
[22] ibid 55.

The software will then insert the gathered information into an online claim form, which may then be amended by the litigant and certified as true.[23]

Stage 2 intends to build conciliation into the online process, whilst participation will not be made mandatory. Case officers will be charged with identifying the most appropriate method of conciliation for the case, such as negotiation, mediation or early neutral evaluation. Briggs LJ anticipates that the current Small Claims Mediation Service provides a suitable model, in which non-qualified case officers work over the telephone to provide litigants with a mediation service. If the dispute does not settle at stage 2, the dispute will progress on to stage 3.[24]

Stage 3 would involve a binding determination of the dispute by a district judge. The default position would be a resolution of the dispute based on the documents, with the aid of video and telephone conferencing facilities if necessary. A traditional face-to-face trial would be a last resort. Furthermore, the process would be more inquisitorial, departing form the traditional adversarial system. This is intended to make the process more suitable for litigants in person and will turn the judge into the parties' lawyer.[25]

Description of the Online Civil Money Claims pilot

The current pilot project, the Online Civil Money Claims process (OCMC), allows litigants to issue claims online, defendants to respond online and integrates a negotiation process into the defendant's responses. However, if a case is not successfully settled, the case gets removed from OCMC and put back into the small claims track.

In order to commence a claim, a potential litigant accesses the OCMC via www.gov.uk/make-money-claim. At this point the online system asks the potential claimant a series of questions designed to ensure that the claim falls within the scope of the OCMC. If it does, the claimant is asked to complete the online claim form (OCON1), which must list any details the claimant wishes to rely on as well as a list of any documents or other evidence.[26] The claimant then pays the appropriate fee and submits the claim form online.

[23] Briggs, 'Final Report' (n 19) 58 – 59.
[24] ibid 59.
[25] ibid 60.
[26] PD 51R 4.1(1) and (2).

It is the court's responsibility to issue the claim form and to serve the claim form on the defendant. It notifies the claimant by email that this has been done.[27]

The defendant has the choice of responding to the claim online or on paper. If the defendant chooses to respond online, he must do so within 19 days after issue giving his response or requesting more time.[28] If the defendant requests more time, he is given an extra 14 days to respond to the claim, bringing the deadline for response to 33 days after issue.[29]

The defendant may choose from a variety of different responses online including: defending the whole of the claim, defending part of the claim/admitting part of the claim, full admission and admission with a request to pay later or by instalments.[30]

If a defendant defends the whole or part of a claim, the online systems asks whether he is willing to negotiate. If both the claimant and defendant agree to negotiate, the court stays proceedings for 28 days, during which the court refers the matter to the Small Claims Mediation Service, if appropriate.[31]

If the parties settle the claim within that period, the case can be discontinued.[32] If no settlement is reached, then the court must refer the matter to a judge for directions, which may include that the claim be sent out of the Online Civil Money Claims, presumably to the standard small claims track procedure.[33]

If the defendant admits the whole of the claim, then the online system allows the defendant to offer either repayment of the whole amount within 5 days or a repayment plan.[34]

The claimant must accept an offer to repay within 5 days. However, if the defendant fails to repay within 5 days, the claimant may request a judgment on admission online.[35]

The claimant may accept a defendant's repayment plan. If it does so it may request a judgment on admission, but need not do so.[36] Instead the claimant may propose a settlement agreement on the

[27] ibid 4.3.
[28] ibid 5.1(1).
[29] ibid 5.1(7).
[30] ibid 5.1(3).
[31] Ibid 6.2-6.4.
[32] ibid 6.4(5).
[33] ibid 6.4(6).
[34] ibid 7.3.
[35] ibid 7.4.

same terms instead. If the settlement agreement is not adhered to, the claimant may then request a judgment on admission.[37]

If a claimant does not accept a defendant's repayment plan, an affordability calculation will be carried out electronically on the basis of information submitted the parties. The claimant may either accept or reject the affordability calculation.[38] If it rejects the affordability calculation, the repayment plan is sent to a judge to be decided.[39]

The above process applies to a partial admission by a defendant.

Has the system seen any benefits?

Anticipated benefits of the completed Online Court

The main anticipated benefit for the public, stated in the ODR Advisory Group Report, was to 'broaden access to justice and resolve disputes more easily, quickly and cheaply'.[40] The prevailing view is that the current civil litigation system for small to medium value claims does not provide access to justice for several reasons. Firstly, the cost of legal representation, absent Legal Aid or a CFA, is prohibitively expensive and often outweighs the expected value of recovery. Furthermore, attempts to navigate the civil litigation system is beyond the abilities of most lay people: the substantive law is increasingly complex and the procedures are written in legalistic language and found amongst the complexity of the Civil Procedure Rules.[41] Therefore, a cheap online court with straight-forward and easy-to-follow rules, which decreases the need for professional legal support, will increase access to justice for most of the population.

Aside from the anticipated benefits for access to justice are the efficiency and cost benefits. It is hoped that by digitising the courts, there will be less reliance on physical buildings. In this way there can be a reduction of the court estate.[42] Moreover, with information being stored online there will be less of a need for back office space, which will enable courts in a single town to be merged to form

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36 ibid 7.6.
37 ibid 7.8.
38 ibid 7.10 – 7.16.
39 ibid 7.15.
40 ODR Report (n 6) 2.
41 Briggs, 'Interim Report' (n 2) 53.
42 Sir Terence Etherton Lecture (n 10) 12.

multi-court centres.[43] All of this is intended to save money by reducing the fixed costs associated with buildings as well as creating revenue from the sale of land.

Finally, the allocation of some aspects of more routine work from judges to case officers is expected to save money, due to the lower salaries paid to case officers.[44] Moreover, it is intended that this will enable judges to focus their time on stage 3 adjudication and complex case management matters.

Benefits seen in the OCMC private beta pilot

Generally, the level of engagement with the OCMC pilot was high. 57% of users recruited issued a claim and 48% of defendants responded using the online service.[45] 65% of defendants intending to defend a claim filed their defence online, which compares with 38% on MCOL.[46]

Overall, 40% of users filed a defence compared to 22% in MCOL and, consequently, the number of default judgments has dropped by 52% compared to MCOL. These statistics indicate a significant increase in defendant engagement.[47]

Furthermore, the number of requests for support from the Assisted Digital team fell to 0.5 calls per claim issued compared with 1.08 calls per claim for MCOL – a 50% reduction in customer contact. This may represent that OCMC is significantly easier to use.[48] Only 24% of users required digital assistance and only 2% needed step-by-step support. However, as the Civil Procedure Rules Committee (CPRC) point out, the private beta pilot was only used by those who elected to take part and they were more likely to have digital confidence in the first place.[49]

Finally, user satisfaction was generally high. 537 users completed the survey and 80% of users indicated that they were satisfied or very satisfied, with 11% declaring themselves to be neutral and 9% dissatisfied.[50]

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43 ibid 13.
44 ODR Report (n 6) 10.
45 Civil Procedure Rule Committee, *Evaluation Report* (n 3) 2 – 3.
46 ibid 3.
47 ibid.
48 ibid 4.
49 ibid 5.
50 ibid 6.

Has the system seen any problems?

Problems with the concept of the completed Online Court

Access to justice

On the issue of access to justice, a criticism made by the Law Society, Bar Council and the Civil Justice Council is that an Online Court will exclude those who are unable to use computers.[51] Statistics suggest that between 18 – 22% of the population have no access to the internet.[52] This criticism was acknowledged in the Final Report, but rejected as a reason for preventing the implementation of the Online Court. Briggs argued that the vast majority of the population did use the internet and, many found online systems easier to use than a paper system. He argued that an 'Assisted Digital' service would provide assistance to those who lacked the ability to access the internet.[53]

Assisted Digital is intended to be a support programme to ensure that users are not excluded from the online systems. HMCTS have announced that they intend the service to be available by telephone, webchat and face-to-face and that they have partnered with the digital inclusion charity 'Good Things' to deliver the face-to-face service.[54] According to the latest quarterly update, users who need face-to-face assisted digital services will be able to make an appointment to see an adviser at a Good Things Foundation Online Centre, 'which includes libraries and other community hubs'.[55] This system is currently being trialled in 9 (increasing to 20) centres.[56]

Contributing to the concerns around access to justice is the programme of court closures which forms an essential part of the HMCTS Reform Programme. Between April 2010 and December 2017, 258 courts were closed[57] and a further 86 closures were announced in February 2016.[58] The extent of the closures and the reported lack of engagement with stakeholders has led to fierce criticism that the court closures are having a detrimental effect on access to justice. Lady Hale entered the debate in 2018, highlighting in a speech how some areas, particularly rural ones, are

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51 Briggs, 'Final Report' (n 19) 38-41.

52 ODR Report (n 6) 27 and John Hyde, 'CJC call for public education on online court' *The Law Society Gazette* (London, 15 November 2016).

53 Briggs, 'Final Report' (n 19) 38-41.

54 HMCTS, 'Reform update' (Autumn 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752790/Reform_Update_issue_2_September_2018.pdf> accessed 3 February 2019, 20.

55 ibid 18.

56 ibid.

57 House of Commons Committee of Public Accounts, 'Transforming courts and tribunals' (July 2018) 12.

58 House of Commons Library Debate Pack, 'Court Closures and reform' (March 2018) 3.

being cut off from access to courts.[59] She gave the example of the Yorkshire town of Richmond, which saw its local magistrates' court shut: 'the nearest magistrates' court is in Northallerton, 15 miles from Richmond with a very limited bus service. It is threatened with closure and the transfer of work to Harrogate 40 miles from Richmond with no obvious way to get there.'[60] Similar reports give the example of the county of Suffolk (1,466 square miles) which is now served by only one magistrates' court in Ipswich, following the closure of courts in Bury St Edmunds and Lowestoft.[61] Clearly, these relate to criminal courts, however the same problem applies to civil courts. Indeed, Lady Hale pointed out that the nearest county court to Richmond is in Middlesbrough, 29 miles away.[62]

The main concerns are that time implications of travelling across a county to access a court, combined with the associated travel costs, will deter people from pursuing legitimate claims and complaints.[63] It has also been suggested that the closure of local courts will hit the most vulnerable people the hardest, such as the elderly, the disabled and lower income families.[64] This has reportedly led to a significant increase in the rate of FTA (failure to appear). In the Bury St Edmunds area, this has increased from 2.7% in a six-month period before the closure of the court, to 12.8% after the closure.[65]

Whilst the Online Court may, eventually, provide a solution to the issue, the reality is that the online solutions do not yet exist. This has led to calls for a halt to the court closure programme until the Online Court pilots are complete and other aspects of the Reform programme have been tested and demonstrated to work.[66]

Two-tier justice

Another criticism made by the Law Society and Bar Council is that the Online Court could create a two-tier system of justice, with claims below £25,000 being treated less seriously than those

59 Monidipa Fouzder, 'Hale enters court closure debate with "imaginary" scenario' *The Law Society Gazette* (London, 25 July 2018).
60 ibid.
61 Penelope Gibbs, 'The demise of local justice' *The Law Society Gazette* (London, 17 July 2018).
62 Monidipa Fouzder (n 59).
63 John Hyde, 'Court closures contradict PM's equality rhetoric' *The Law Society Gazette* (London, 13 October 2015).
64 House of Commons Library Debate Pack (n 58) 4.
65 Penelope Gibbs (n 60).
66 HC Deb 27 November 2018, vol 650, col 184.

above.[67] This criticism was rejected in the Final Report and Briggs argued that an Online Court would actually provide a *better* service than the current process. Moreover, if a claim reaches stage 3 of the Online Court, it will be dealt with by the same judges as would deal with claims in the County Court.[68]

Excluding legal advice and encouraging McKenzie friends

The Bar Council and Law Society also warned that, by designing the system for use without lawyers, the Online Court may exclude litigants from legal advice and encourage McKenzie friends. The bodies pointed out that, while lawyers may not be needed for advocacy, claims at the higher end of £25,000 may be complex and require specialist legal advice.[69] Moreover, they pointed out that wealthy litigants will hire legal advisors anyway, putting the other party at a disadvantage. Furthermore, the current economic model for small claims is that firms will often offer free initial legal advice in order to assess the merits of a case. Firms will then offer to represent clients with a strong case on a conditional fee arrangement basis. The Law Society pointed out that this reduced the number of frivolous claims brought and firms were only able to offer free initial advice on the assumption that they would be able to obtain a CFA to represent a client through to trial, which would not be a feature of the 'lawyerless' Online Court.[70] Briggs softened his 'court for litigants without lawyers' approach in the Final Report, emphasising that layers would have a role in the Online Court. He suggested that lawyers should have a role in giving initial legal advice on the merits and that this should form a part of fixed recoverable costs in the Online Court. Moreover, he stressed that lawyers may still have a role if a case progresses to a stage 3 hearing.[71]

Litigant preference for physical hearings

In his Final Report, Briggs reported anecdotal evidence that litigants in person have a greater distrust of telephone or virtual hearings and prefer traditional face-to-face meetings. However, he emphasised that the physical hearing would not disappear completely and that it would simply no longer be the default option.[72]

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[67] Max Walters, 'Profession expresses concern over online courts plan' *The Law Society Gazette* (London, 16 September 2016).

[68] Briggs, 'Final Report' (n 19) 37-38.

[69] John Hyde, 'Briggs review: online court needed to cut out lawyers' *The Law Society Gazette* (London, 12 January 2016) and Smith (n 11).

[70] Briggs, 'Final Report' (n 19) 43-44.

[71] ibid.

[72] Briggs, 'Final Report' (n 19) 52-53.

Encouraging litigiousness

The City of London Law Society suggested that 'if the online court becomes seen as a way of extracting money for losses perceived to be the fault of someone else, litigation could become the first resort rather than the last… this could have a deleterious effect on business and other relationships.'[73] This has not been addressed explicitly but stage 1 does have initial guidance about litigation being a last resort and may be addressed by the conciliation mechanisms built into stage 2.

Concerns about the role of case officers

Concerns were expressed by a number of professional bodies about the powers of case officers at stage 2 of the Online Court to engage in conciliation activities and exercise case management powers.[74] In his Final Report, Briggs recommended that case officers be qualified solicitors or barristers with some practical experience. Moreover, he recommended that litigants have an unqualified right to refer a decision made by a case officer to a judge for reconsideration.[75] However, as detailed below, neither of Briggs' recommendations were adopted by the government in recent legislation.

Problems encountered with the OCMC private beta pilot

Generally, engagement with the OCMC system has been positive, when compared to the MCOL service. However, the main problem encountered in private beta was the low level of interest in mediation, which is a core feature of the Online Court. 19% of defendants demonstrated an interest in mediation and 15% of cases were referred to the mediation booking team.[76] Only 27% of the cases referred ended up in a mediation appointment being booked, of which 62% actually took place. Of those mediations which did take place, there was an 88% settlement rate.[77] Therefore, despite the mediation service leading to a high rate of settlements when used, there was a disappointing level of interest in the mediation feature.

[73] Chloe Smith, 'City backs online courts for claims up to £25,000' *The Law Society Gazette* (London, 15 March 2016).
[74] Chloe Smith, 'lawyerless online court' (n 11) and John Hyde, 'Controversial online court will need careful piloting – CJC' *The Law Society Gazette* (London, 30 March 2016).
[75] Briggs, 'Final Report' (n 19) 66.
[76] Civil Procedure Rule Committee, *Evaluation Report* (n 4) 4.
[77] ibid.

Another criticism voiced by many users was the inability to upload documentation to support their claim or defence. The CPRC acknowledged this issue and stated that it was feature which was being considered by the sub-committee.[78]

There were some minor software bugs relating to post code look-up and pdf production, but they were resolved within 24 hours.[79]

Problems encountered with the OCMC public beta pilot

There is very little publicly available information on the ongoing public beta pilot. However, minutes of the October 2018 CPRC reveal that there were 'significant issues over the summer of 2018'.[80] The Committee reported that the project was 'under resourced and improvements to governance and communication are needed'. Moreover, it was stated that 'changes to the IT system are complicated'.[81]

The lack of funding is clearly a serious issue, but there is no further detail as to the level of under-funding.

The minutes also suggest that the complexity of creating the software for the Online Court was underestimated. This was also the focus of a Law Society Gazette article which reported problems with creating the decision trees to guide people through the production of the stage 1 claim form: 'an attempt to guide litigants through holiday claims, for example, has quickly ended up with 'hundreds and hundreds of branches – literally like a tree'. It has since been shelved.'[82] Currently the OCMC system still essentially requires a claimant to write his or her own particular of claim and, in this sense, is not much more user-friendly than the existing MCOL service.

Open Justice*:* to what extent does the ODR mechanism affect the openness and transparency of justice?

Briggs acknowledged open justice as one of the challenges which faces the Online Court and the court system generally as systems become digitised.[83] On a general level, Briggs stated that there

78 ibid 6.
79 ibid.
80 Minutes of the Civil Procedure Rule Committee (12 October 2018) 2.
81 ibid.
82 Michael Cross, 'News focus: Don't blow a fuse over online civil court' *The Law Society Gazette* (London, 13 November 2017).
83 Briggs, 'Interim Report' (n 2) 87.

were several initiatives underway to ensure open justice in a digital age, including: public domain publication of information about pending cases and hearing dates, introducing search facilities for case information online, allowing for wider inspection of online court files and making facilities available for the public to observe hearings.[84]

Whist Briggs admitted that the observation of online trials would not be simple, he did not consider it to be an insurmountable challenge.[85]

Several other members of the Senior Judiciary have spoken about the Online Court as a possible threat to the principle of open justice. In a lecture, Lord Justice Fulford suggested that viewing centres could be opened to view online proceedings[86] and a Law Society Gazette article reported that video booths may be installed in courts, from which the public could observe virtual hearings.[87]

Therefore, while there is much talk about the need to ensure open justice in the Online Court, there is very little information about the technology that would allow this to work in practice.

Data: Are there any proposals for storing and using data?

There seems to be very little publicly available information about the approach to the use and storage of data in the Online Court. The only reference to the importance of data was in the Online Dispute Resolution Advisory Group's response to Briggs' Interim Report. The response simply advised that systems to capture data flow should be built into the online system at the outset, which would enable HMCTS 'to predict and guide later users who are contemplating whether or how to proceed'.[88]

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84 ibid 45.

85 ibid.

86 Michael Cross, '"Viewing Centres" to preserve open justice in online age' *The Law Society Gazette* (London, 9 November 2016).

87 John Hyde, 'Prisons and Courts Bill: reforms will create "user-friendly" courts, minister insists' (London, 20 March 2017).

88 Online Dispute Resolution Advisory Group, *ODR Group Response* (31 March 2016) <https://www.judiciary.uk/wp-content/uploads/2016/04/cjc-odr-advisory-group-response-to-lj-briggs-report.pdf> accessed 3 February 2019.

Legislative basis for the Online Court

Several elements of the Online Court require primary legislation, including the creation of a set of bespoke procedural rules outside the framework of the CPR and the power to delegate judicial functions to court officers.[89]

The original legislative basis for these changes was in the Prisons and Courts Bill. This was a lengthy Bill which included 38 clauses and 13 schedules and attempted to deal with the Reform Programme in a global manner. However, this failed to make its way onto the statute books, due to the calling of an early general election in 2017.

The Act which partly replaced the Prisons and Courts Bill was the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018. The Act was granted Royal Assent on 22nd December 2018. This is a particularly short Act with only 3 substantive clauses and 1 schedule, which deals with the delegation of judicial functions to 'appropriately qualified and experienced' court staff. Such functions are not defined in the Act but have been said to include: issuing a summons, taking a plea, extending time for applications and considering applications for various directions.[90]

Although the Act only deals with case officers, the Act deviates from Brigg's recommendations in several ways. Firstly, there is no requirement that case officers be legally qualified and an amendment to require at least three years post-qualification experience as a solicitor, barrister or chartered legal executive was defeated in Parliament.[91] Secondly, the Act contains no automatic right of judicial reconsideration. Instead, decisions on which powers will be delegated and whether there will be a right to a judicial reconsideration will fall to the various Procedure Rules Committees.[92]

The content of the Act, as well as its place within the broader legislative framework of the Reform Programme, attracted criticisms from opposition MPs as well as the Bar Council.[93] The Government were accused of 'drip-feeding' legislation concerning the Reform Programme and that, by

89 Briggs, 'Interim Report' (n 2) 80.
90 John Hyde, 'Courts Bill resurrected, with judges to hand over "routine" functions' *The Law Society Gazette* (London, 23 May 2018).
91 HC Deb 12 December 2018, vol 651, col 308.
92 Schedule Part 6A, 67C(2).
93 ibid cols 308-313.

introducing piecemeal reforms, it was harder for Parliament to scrutinise the Reform Programme as a whole.[94]

Moreover, the Bar Council, as well as some MPs, have stated that the exercise of judicial functions by case officers may undermine the independence of the judiciary, with the Bar Council stating that independence 'is not compatible with a system in which decisions are routinely made by individuals, including those at a relatively junior level, who are directly employed by the government, and who are not subject to the training, experience and oaths of professional judges'.[95]

The Civil Procedure Rules Committee (staffed by senior judges), which will make the decisions on which powers to delegate, has also come under criticism. Yasmin Qureshi MP stated that the Act gave 'legislative power to unaccountable judges sitting on procedural rule committees and of judicial powers to non-independent courts and tribunal staff'.[96]

Any problems arising from the legislative basis for the Online Court are not directly related to the efficacy or otherwise of an ODR system *per se*, however they are additional complicating factors in the implementation of such a system.

94 John Hyde, '"Wafer-thin" courts bill testing the waters for more cuts – Chakrabarti' *The Law Society Gazette* (London, 21 June 2018).
95 ibid.
96 HC Deb 12 December 2018, vol 651, col 308.

Jurisdiction Report: United States (Michigan and Utah)[97]

Why this jurisdiction?

The United States was an appropriate jurisdiction for this study due to the similarity in the underlying legal systems; both the UK and the US deriving from the same common law system and having similar court structures and procedures in several areas.

There are a variety of State courts which use e-filing and e-docketing systems.[98] Some have adopted an online dispute resolution system that is designed to facilitate settlement, such as New York's adoption of the 'Cybersettle' program[99] and Clark County Nevada's use of the Modria program.[100] These schemes do not amount to a fully-fledged online court, however, as they do not and were never anticipated to lead to the resolution of the case other than by settlement or traditional, physical court proceedings. Utah and Michigan were chosen because they represent the closest to a complete ODR court project taken by any US State.

Introduction to the ODR system

Michigan

As of 2014, several Michigan District Courts use the 'Matterhorn' program as a system of online dispute resolution. Some other States use Matterhorn in a limited number of their District courts (in between one and three Districts), and detailed information on the implementation of these programs

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97 Research conducted and report prepared by Laura Hannan, PhD Candidate, University of Cambridge.

98 E.g. Delaware: Delaware Courts, 'eLitigation' (*Delaware.gov*, 2019) <https://courts.delaware.gov/superior/elitigation/tech_efile.aspx> accessed 12 January 2019; King County Washington: King County, 'eWorking Copies: Assembly and Delivery Service' (*KingCounty.gov*, 24 December 2015) <https://www.kingcounty.gov/courts/clerk/documents/eWC.aspx> accessed 13 January 2019; New Hampshire: NH Judicial Branch, 'NH e-COURT PROGRAM OVERVIEW' (*Courts.State.NH.US*, 2018) <https://www.courts.state.nh.us/nh-e-court-project/overview.htm> accessed 14 January 2019; Arizona: 'About AZTurboCourt' (*TurboCourt*, 14 January 2019) <http://info.turbocourt.com/azturbocourt/> accessed 15 January 2019.

99 Karolina Mania, 'Online dispute resolution: The future of justice' (2015) 1(1) International Comparative Jurisprudence <https://www.sciencedirect.com/science/article/pii/S2351667415000074> accessed 12 January 2019.

100 Jennifer Kepler, 'Clark County Court Uses New Technology from Tyler to Resolve Disputes Online' (*BusinessWire*, 17 April 2018) <https://www.businesswire.com/news/home/20180417005157/en/Clark-County-Court-New-Technology-Tyler-Resolve> accessed 20 December 2018; similarly, see Franklin County Municipal Court in Columbus, Ohio: 'Online Dispute Resolution' (*Court Innovations*, 1 October 2016) <https://sc.courtinnovations.com/OHFCMC/home> accessed 21 December 2018.

is not currently publicly-available.[101] By contrast, Michigan sees the greatest use of the Matterhorn program, with 29 of its District Courts using the system.[102] The use of Matterhorn in Michigan is currently limited to traffic, parking and minor civil infractions, drivers license suspensions and warrant reviews.

Utah

Utah is in the piloting stage for an Online Dispute Resolution System. While this does not yet incorporate an online court, Phase II of the pilot aims to implement an online court which will be integrated into the existing dispute resolution system.

The ODR pilot system in Utah (which has no specific name beyond 'Utah's Online Dispute Resolution Program' or 'Utah's ODR Program') was implemented on the 19th of September 2018 in the West Valley City Justice Court.[103] The pilot intends to run until late April before being rolled out across the State.[104] It is currently limited to Small Claims procedures, which have a maximum compensation award of $11,000 (excluding interest and court costs)[105] and exclude landlord and tenant cases, property possession cases and those against the government.[106]

Why was ODR Introduced in this jurisdiction?

Michigan

The Michigan courts had a particular problem in the traffic-violations and warrants contexts: defendants were too intimidated by the courts process to come to hearings, or would be unable to

101 Georgia, Illinois, Ohio, Arkansas, Kentucky and Texas: Katarina Palmgren, 'Churchill Fellowship Report' (*Churchill Trust*, November 2018) <https://www.churchilltrust.com.au/media/fellows/Palmgren_K_2017_Use_of_online_dispute_resolution_to_resolve_civil_disputes.pdf> accessed 1 January 2019, 25.

102 'Welcome! Select your location, find your case, and resolve it online' (*Court Innovations*, 2019) <https://www.courtinnovations.com/> accessed 1 December 2018.

103 Victoria Hudgins, 'Small Claims Online Dispute Resolution Launches in Utah as Lawyers Ponder Disruption' (*Law.com*, 24 September 2018) <https://www.law.com/legaltechnews/2018/09/24/small-claims-online-dispute-resolution-launches-in-utah-as-lawyers-ponder-disruption/?slreturn=20190021062406> accessed 2 January 2019.

104 Felicia Martinez, 'Pilot Program Brings Small Claims Court To Your Computer' (*KSLTV*, 25 October 2018) <https://ksltv.com/402449/online-dispute-resolution/> accessed 20 January 2019.

105 Ibid.

106 'Small Claims' (*West Valley City*, 2019) <https://www.wvc-ut.gov/1556/Small-Claims> accessed 20 January 2019.

attend for other reasons, which would escalate even small matters.[107] It was anticipated that an online dispute resolution procedure in these contexts would reduce the incidence of this occurring by allowing proceedings to be resolved in a more informal, convenient and comfortable setting.

Some courts which have adopted the program had specific anticipated benefits, such as the 54-A District Court which noted that their physical courthouse had limited parking and was not particularly accessible, making it particularly attractive to reduce the need to go to court.[108]

Beyond this, the Michigan courts anticipated that the project would increase court flexibility while maintaining customer service in the context of cut budget and reduced staff[109] and reduce the time spent in court by attorneys and police officers (thereby improving the administration of justice elsewhere).[110]

While there is no statement on whether the system was intended to be a digitisation of existing processes or a re-conception of the litigation process, as will be discussed below Matterhorn largely represents the former.

Utah

The goal of the Utah ODR Program is to provide 'simple, quick, inexpensive and easily accessible justice'[111] with 'individualized assistance and information that is accessible across a multitude of electronic platforms'.[112] In particular, it aims to achieve the following goals:

(1) Reduce the difficulties which unrepresented participants face in filling out and filing court documents properly (in which they often file incorrect documents and are over-reliant on court staff to fix the issue in person),[113]
(2) Remove location barriers across a State with a large and dispersed population[114]

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107 Anna Stolley Persky, 'Michigan program allows people to resolve legal issues online' (*ABA Journal*, December 2016) <http://www.abajournal.com/magazine/article/home_court_advantage/> accessed 3 December 2018.
108 Anethia Brewer, '54-A District Court Announces Ticket Resolution Online' (*Lasingmi.gov*, 7 March 2018) <https://www.lansingmi.gov/150/54-A-District-Court> accessed 22 January 2019.
109 'Traffic Ticket Online Resolution: 29th District Court' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/get-results/traffic-court/traffic-ticket-online-resolution/> accessed 22 December 2018.
110 Brewer (n 108).
111 Justice Deno Himonas, 'Utah's Online Dispute Resolution Program' (2018) 122(3) Dick L Rev 875, 875.
112 Ibid 881.
113 Ibid 877.
114 Ibid 880.

(3) Reduce the costs to parties and the State associated with the above problems;
(4) Increase the number of settlements;
(5) Reduce the costs of resolving disputes;
(6) Reduce the rates of default in debt collection cases;[115] and
(7) Maintain or improve the perceived legitimacy of the process in the eyes of all parties.[116]

The introduction of the facilitator and the provision of automated information, form and document-creation systems make the goal of the Program a re-conception of the litigation process. The system is designed to divorce access to justice from set court facilities, locations and times and change the ways in which court documents are filled in, stored, accessed and distributed and to change the way in which parties communicate and trials are conducted.

How was ODR implemented?

Michigan

The Matterhorn program was first implemented in 2014 in the 14A District Court in Washtenaw County, with a pilot program approved by the Michigan Supreme Court.[117] At this time the system was limited to traffic-violation ticket reviews.[118] This was later expanded to warrant reviews after the perceived success of the program.[119] In the years that followed, separate Michigan courts have made individual decisions to adopt the program on a district-by-district basis. Districts took individual measures to alert the public to the program: the 29th, for example, made press releases in local newspapers, including URLs on tickets, included information on the court website and provided information by phone to those who called the court in relation to relevant matters.[120]

The Matterhorn program itself was developed by two University of Michigan law Professors using a research grant.[121] Grant money continues to be used to develop the program.[122] It is provided to State Courts via the company Court Innovations.

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115 Ibid 881.
116 Melisse Stiglich, 'Final Report: Utah Online Dispute Resolution Pilot Project' (*NCSC*, December 2017) <https://ncsc.contentdm.oclc.org/digital/api/collection/adr/id/63/download> accessed 1 January 2019, 15.
117 Stolley Persky (n 107).
118 '14A District Court Pioneers Online Case Resolution' (*Washtenaw.org*, 10 April 2018) <https://www.washtenaw.org/CivicAlerts.aspx?AID=153> accessed 4 December 2018.
119 Ibid.
120 'Traffic Ticket Online Resolution: 29th District Court' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/get-results/traffic-court/traffic-ticket-online-resolution/> accessed 22 December 2018.
121 Stolley Persky (n 107).
122 Ibid.

Use of the Matterhorn program does not come with a subscription fee, but requires the payment of a 'pay-per-use' license fee each time the platform is used.[123] As Court Innovations does not make its license fees public (and no individual District appears to have released the information), it is unclear how much the system costs any specific District to operate. However, Matterhorn touts itself a purely software solution, and as such carries no server, hardware, maintenance or upgrade costs.[124] Users of the system are not charged any special fees specific to the program,[125] so costs are not recouped directly from users.

Court Innovations claims to be able to launch the system within any given District within six weeks.[126] The first four weeks are used to gather the information needed to implement the system, tailor the program to the courts' particular needs and criteria and define data exchanges between the program and the courts' case management system. The remainder is used for review, approval and staff training sessions. The extent to which this represents a realistic schedule of implementation, as has occurred in any given District, is unknown as this information has not been made public by Court Innovations or the Districts themselves.

There has been mention in some reports of an extensive vetting process prior to the pilot to ensure that Court Innovations was trustworthy in terms of privacy and data protection concerns,[127] though no information is available on what that vetting consisted of, how long it lasted, how it was funded and what the State's specific concerns and criteria were.

Utah

The ODR system in Utah is still in the pilot stage, beginning on the 19th of September 2018 in the West Valley City Justice Court.[128] The pilot intends to run for between six months and a year before being rolled out across the State.[129] Prior to this, there had been a two year consultation process where feedback on the program was obtained from judges, mediators and other relevant

123 ibid.
124 'How it Works: Technical' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/tour/how-it-works-tech/> accessed 22 December 2018.
125 'Frequently Asked Questions' (*Court Innovations*, 2018) <https://www.courtinnovations.com/MID54B/faq> accessed 22 December 2018.
126 'Launch Timeline' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/tour/launch-timeline/> accessed 23 December 2018.
127 Palmgren (n 101) 36.
128 Hudgins (n 103).
129 Martinez (n 104).

individuals.[130] The project has been managed by the ODR Steering Committee, which is composed of court users, employees, judges and attorneys and is chaired by Utah Supreme Court Justice Justice Deno Himonas.[131]

The scheme is currently limited to Small Claims procedures, which have a maximum compensation award of $11,000 (excluding interest and court costs)[132] and exclude landlord and tenant cases, property possession cases and those against the government.[133] This subset of cases was chosen due to their procedural simplicity and their particularly high (almost universal) level of self-representation.[134]

There is little information on how the pilot was funded or what its budget was (and will be in future). The system was developed in-house due to the States' preference against outsourcing and the perception that having a third-party charging the State a fee (which was expected to include a licensing fee for each case entering the system) would be contrary to the principle that the justice system is not a 'money-making operation'.[135]

There is no user fee for parties using the system,[136] though the plaintiff must pay the ordinary fee for filing a small claims affidavit.[137] Despite this, Justice Himonas of the Utah Supreme Court argues that this is not an invitation to vexatious litigation, since the kind of person who is inclined to bring vexatious cases is no more or less likely to be incentivised by the availability of an online service without additional fees.[138]

The ODR process

Michigan

All relevant Michigan courts using the Matterhorn program use it to process traffic infractions. Eleven of the courts use it for warrant reviews and court-date-rearrangement relating to failure-to-pay or

130 Hudgins (n 103).
131 Stiglich (n 116) 6.
132 Hudgins (n 103).
133 'Small Claims' (*West Valley City*, 2019) <https://www.wvc-ut.gov/1556/Small-Claims> accessed 20 January 2019.
134 Palmgren (n 101) 25.
135 Ibid 32.
136 Ibid 39.
137 'Small Claims' (*UTCourts*, 28 September 2018) <https://www.utcourts.gov/howto/smallclaims/> accessed 13 January 2019.
138 Palmgren (n 101) 40.

failure-to-appear warrants.[139] Three use it in relation to applications to clear license suspensions (including those pending a Driving While License Suspended criminal charge).[140] The 54B District Court has extended the program to Parking and other minor civil infractions,[141] while the 54A District Court uses the program for income tax.[142]

The procedure is initiated by accessing the relevant District Court's page on the Court Innovations website. There, the user enters information including their case number, driver's license number or license plate and date of birth into a search function. This allows them to access an online portal where they provide the information needed to plead their case in writing. This will involve providing a plea, statement and uploading any photographic evidence or other relevant documentation.[143]

The process applies for both guilty pleas, not guilty pleas, applications to mediate the number of points put on a driving licenses, and applications to recall a warrant or to alter the court date in relation to an outstanding warrant. The time limit for making the application varies depending on the type of application, plea and the particular court. The case is reviewed, and a decision is provided electronically by a judge or magistrate. Throughout the process, the defendant can opt-in to receiving email or text notifications informing them on the progress of their case. Afterwards, the user is provided with a satisfaction survey, data from which is available to court administrators.[144]

In some Districts, mediation is offered in traffic infraction cases involving otherwise good drivers which can reduce the charge to a lesser one which does not affect the individuals' driving license or insurance.[145] This is restricted to drivers who have a low number of violations and infractions in the previous 3-5 years.

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139 12th District Court, 14A District Court, 14B District Court, 23rd District Court, 29th District Court, 30th District Court, 31st District Court, 46th District Court, 54B District Court, 61st District Court, 74th District Court.

140 14A District Court, 14B District Court, 31st District Court.

141 '54B District Court Online Case Review' (*Court Innovations*, 2018) <https://www.courtinnovations.com/MID54B/> accessed 21 December 2018.

142 '54-A District Court Online Dispute Resolution' (*Court Innovations*, 2018) <https://sc.courtinnovations.com/MILANSING> accessed 21 December 2018.

143 'Traffic Solutions' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/odr-solutions/traffic/> accessed 21 December 2018.

144 'How it Works' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/tour/how-it-works/> accessed 22 January 2019.

145 Joint Technology Commission, 'Case Studies in ODR for Courts: A view from the front lines' (*Virtual Mediation Lab*, 29 November 2017) <https://www.virtualmediationlab.com/wp-content/uploads/2018/01/ODR-Case-Studies.pdf> accessed 11 January 2019, 5.

Matterhorn is largely a digitisation of existing court processes. The online plea mechanism is a digitisation of the already available plea-by-post process available in most Michigan State Courts.[146] The provision of evidence and arguments, while perhaps simplified by the lack of a need to appear in court, largely replicates what would be required if the defendant did appear in court. Indeed, the fact that the online system is no different from the physical court is advertised by the Matterhorn FAQ on most District Court websites to assuage potential users.[147]

Utah

Plaintiffs have seven days from filing their claim in the normal fashion to register for the ODR system, or to file a request for an exemption from having to use the ODR system (known as 'MyCase').[148] They are emailed with a registration link once the claim has been filed.[149] Defendants have 14 days to similarly register or file for an exemption on being served with the claim. If the defendant does not register under the time limit, default judgement can be entered against them.[150] On registration, the defendant is asked a series of generic questions designed to ascertain where agreement and disagreement lies between the parties.[151]

Only 'undue hardship' exempts a party from participating in ODR, arising from an inability to access the system without incurring substantial difficulty or expense (for example due to disability, lack of internet access or an inability to speak English).

Once both parties have registered, the case is assigned a facilitator who advises the parties on the proper legal procedure, modes of communication and establishes the case time-line. This facilitator is court-certified but not court-employed.[152] The facilitator is able to request information from parties on matters such as evidence, means, and how the party would like the case resolved. They can communicate privately with any party with a view to facilitating a resolution. Parties can communicate with each other in a text-based, instant messaging service program and access, share

146 'Plea Online' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/odr-solutions/warrants-pleas/plea-online/> accessed 22 December 2018.

147 E.g. 'Frequently Asked Questions' (*Court Innovations*, 2018) <https://www.courtinnovations.com/MID54B/faq> accessed 22 December 2018.

148 Nicole Wilmet, 'Utah Small Claims Court Launches New Online Dispute Resolution Pilot Program' (*Just Court ADR*, 3 December 2018) <http://blog.aboutrsi.org/2018/pilot-program/utah-small-claims-court-launches-new-online-dispute-resolution-pilot-program/> accessed 9 January 2019.

149 Hudgins (n 103).

150 Ibid.

151 Bob Ambrogi, 'Utah Courts Begin Unique ODR Pilot for Small Claims Cases Tomorrow' (*Law Sites Blog*, 4 September 2018) <https://www.lawsitesblog.com/2018/09/utah-courts-begin-unique-odr-pilot-small-claims-cases-tomorrow.html> accessed 15 January 2019.

152 Palmgren (n 101) 41.

and fill in all relevant documents through an online portal.[153] The facilitator will aim to achieve settlement within 14 days, but can extend this time if they believe it will likely lead to a settlement.[154] Throughout this process, the parties' My Case accounts will inform them where they are in the claims process.[155]

If the parties agree on a settlement, they may request that the facilitator fill in the online settlement form (or they may do it themselves), after which the court will enter judgement.

If settlement does not occur, the facilitator notifies the court, which sets the trial date. The facilitator also provides the court with a summary of each parties' position during ODR (narrowing and clarifying the outstanding issues). Documents filed during negotiations do not automatically become part of the court record and must be submitted in evidence as normal.[156]

The current piloting phase is such that actual hearings still occur in physical courtrooms. Phase II of the pilot will introduce online courts. It is envisaged that it will work as follows. Once the trial preparation document has been submitted by the facilitator, the judge will then make a decision as to whether a live hearing is required. If they do not think so, the parties may elect to have a decision made electronically on the documents provided via the portal.[157]

If an online trial is scheduled, the parties will only be able to communicate with each other on the MyCase system in a special 'On the Record' chat area, which is the forum for the trial itself.[158] Online trials will not have a set time period, beyond each party needing to submit arguments and evidence within deadlines set by the judge.[159] The judge then makes a decision, which is explained to the parties on the chat forum before being posted in official records.[160] The MyCase web portal then provides the parties with information and resources relating to post-judgement issues, such as appeal.

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153 McKenzie Stauffer, 'Utah courts offers new online system to handle small claims cases' (*KUTV*, 29 October 2018) <https://kutv.com/news/local/utah-courts-offers-new-online-system-to-handle-small-claims-cases> accessed 17 January 2019.

154 Laura Bagby, 'From Courtroom to Computer: Utah Initiates Online Dispute Resolution Pilot' (*2Civility*, 31 October 2018) <https://www.2civility.org/utah-initiates-online-dispute-resolution-pilot/> accessed 17 January 2019.

155 Stiglich (n 116) 9.

156 Ambrogi (n 151).

157 Himonas (n 111) 894.

158 Stiglich (n 116) 12.

159 Ibid.

160 Ibid.

The system is currently limited to Small Claims procedures, which have a maximum compensation award of $11,000 (excluding interest and court costs)[161] and exclude landlord and tenant cases, property possession cases and those against the government.[162]

Has the system seen any benefits?

Michigan

There has been limited commentary on the Matterhorn system, most of it positive. Court Innovations claims, that the program has:

(1) Reduced the time it takes for cases to close from 50 days on average to 14 for cases using the Matterhorn system, and 50 to 34 days for cases not using it (they purport that the increased court resources to deal with these latter cases as a result of Matterhorn reduces their closure time);[163]
(2) Reduced the time taken to collect fines: Courts collected an average of 51% of fines within 30 days prior to using the program, compared to 92% after implementation.[164]
(3) Helped citizens by implementing payment plans for these fines at an early stage of the process through the inclusion of a means-testing assessment at the beginning of the online process (an optional feature adopted by an unknown number of Districts);[165]
(4) Reduced the default rate: they claim the number of defaults is 2% on average compared to between 13-37% of cases not using Matterhorn;[166] and
(5) A reduction in staff time spent on 'routine hearings and procedures' to 20% of previous totals.[167]

Court Innovations cite associated cost savings (both to the State and to citizens in terms of reduced costs for travelling to court and so on), though they do not provide specific figures.[168] This data is derived from the experience of nine courts in the State of Michigan, all of which saw a reduction in their average case handling time for both online-resolved and offline-resolved cases after

161 Ambrogi (n 151).
162 'Small Claims' (*West Valley City*, 2019) <https://www.wvc-ut.gov/1556/Small-Claims> accessed 20 January 2019.
163 'Online Dispute Resolution Outcomes' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/static/Matterhorn_Outcomes_White_Paper.pdf> accessed 10 January 2019, 3.
164 Ibid 4.
165 Ibid.
166 Ibid 5.
167 Ibid 1.
168 Stolley Persky (n 107).

implementation of the Matterhorn program. There is no indication of the timescales involved in this reduction, however, nor discussion of other factors which might have contributed to the reduction.

Court Innovations has also undertaken user surveys on the system. They claim that 90% of users found the system easy to use and 92% 'indicated they fully understood the state of their case throughout the online process.'[169] 39% of those surveyed stated they would not have been able to attend court in person, which Matterhorn claims indicates that their system has increased access to justice.[170]

The Joint Technology Committee of the Conference of State Court Administrators state that Matterhorn has improved the speed at which fines are paid: claiming that prior to implementation only 51% of fines were paid within 30 days, while the number increased to 92% post-implementation.[171] They claim that the process typically takes less than 15 minutes for users and most use a mobile device to complete it.[172] This leads to benefits in terms of user convenience as well as 'lower administrative cost per case tied to reductions in the need for courtroom space, court dockets, and magistrate time.'[173] Building security is also stated to be improved due to the reduced foot traffic in physical courthouses.

There is some limited comment from the judicial system. John Nevin, the communications director for the Michigan Supreme Court, claims that the program has increased the courts' efficiency, confirming Court Innovations' claims of significantly reduced resolution times with a study of 17,000 cases over three courts.[174] Magistrate Laura Millmore of District Court 54A reports reduced congestion and case-load, and states that her initial concerns about allowing dangerous drivers to escape with a plea deal have been assuaged by seeing how the system operates in practice.[175]

Utah

The Utah ODR Program is too recent (and has yet to leave the pilot stage) for there to have been any reported benefits.

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169 'Online Dispute Resolution Outcomes' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/static/Matterhorn_Outcomes_White_Paper.pdf> accessed 10 January 2019, 5.

170 Ibid 6.

171 Joint Technology Commission (n 144) 6.

172 Ibid.

173 Ibid.

174 Nevin cites a 74% reduction in average case time: 'Online Dispute Resolution Outcomes' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/static/Matterhorn_Outcomes_White_Paper.pdf> accessed 10 January 2019, 1.

175 Laura Millmore, '54-A District Court Announces Ticket Resolution Online' (*Lasingmi.gov*, 7 March 2018) <https://www.lansingmi.gov/150/54-A-District-Court> accessed 22 January 2019.

Has the system seen any problems?

Michigan

There have been no reported problems with the Matterhorn Program, however most of the available information on the system comes from the company which made the program and court websites advertising and encouraging use of the system, which may be biased sources. In-depth qualitative evidence from users, and quantitative evidence on users collected by independent sources are unavailable or non-existent.

Notably, the data provided by Court Innovations does not provide information on the problems experienced by the 10% of users who evidently did not find the system easy to use and the 8% who did not understand the state of their case throughout. There may, therefore, be significant unstated problems in terms of access to justice for a segment of the population (whose characteristics and demographics are presently unknown).

In addition, the use of a third-party systems provider raises issues concerning the privacy of those using the program and the security of data held within it. As no information is available on the vetting of Court Innovations, it is unclear if Matterhorn provides a sufficiently secure system to avoid security and privacy concerns in future. Information on the security measures inherent in the Program are provided by Court Innovations, however, and they claim flexibility in being able to meet the customer's alternative data requirements.[176]

Finally, the Matterhorn system has only been implemented for relatively simple and minor types of disputes, primarily traffic infractions and other minor criminal disputes. In addition, the program largely digitises the normal procedures of the Michigan courts, which reduces the extent to which it is relevant to English civil proceedings. While a generic 'small claims' version of the program has been implemented in Franklin County Municipal Court in Ohio, this program is an alternative dispute resolution program only and not akin to an online court.[177] The extent to which Matterhorn, or a program like it, would be suitable for more complex disputes (particularly those where legal representation is required for full participation) or civil claims in general is questionable. The lack of live video or audio capacity would seem to make it unsuitable for any dispute requiring oral testimony or cross examination.

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[176] 'Security & Privacy' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/tour/security-privacy/> accessed 22 January 2019.

[177] 'Small Claims' (*Get Matterhorn*, 2018) <https://getmatterhorn.com/odr-solutions/civil/small-claims/> accessed 22 December 2018; 'Frequently Asked Questions' (*Court Innovations*, 2018) <https://sc.courtinnovations.com/OHFCMC/help> accessed 22 December 2018.

Utah

The Utah ODR Program is too recent for there to have been any reported problems by either users or the State. It is perhaps noteworthy, however, that the Utah system appears premised on the parties engaging in settlement negotiations unrepresented, an assumption which may cause access to justice issues if implemented in a sphere where self-representation is not the norm. The system has also yet to begin testing for a true 'online court', and its conception of an online court does not have appear to provide for any video or audio communication capability. This means that it is likely to be only suitable for disputes which are capable of evaluation without the need for cross-examination and oral evidence. In addition, the limitation of the system to small claims means that it is untested how it could be scaled up to different types of claims, and whether these might have special implications for access to justice.

Finally, unlike Matterhorn, the Utah system is 'opt-out' rather than 'opt-in'. This sort of system may raise concerns for those who do not have internet access or who fail to receive notifications from the system (such as due to an over-acting spam filter): defendants face default judgement for their failure to comply, when they may not even be aware a case has been launched against them. While an inability to understand English is sufficient excuse to opt-out, it is not stated in any official materials how Utah intends to deal with non-English-speaking or other vulnerable defendants who may not understand any notification they are given requiring them to register and respond. There is access to justice concerns for vulnerable defendants, particularly if this was applied to more serious cases.

Open Justice: to what extent does the ODR mechanism affect the openness and transparency of justice?

Michigan

The Matterhorn system has no mechanism for public viewing or involvement in proceedings. Cases resolved online are therefore non-public and non-transparent. There does not seem to have been any consideration by the courts on the impact to open justice. It may be, given Matterhorn is limited largely to traffic violations and other minor matters, that it is assumed that the public has little interest in the matter (and that these cases rarely appear in the law reports). However, it is unknown to what extent the public and press view routinely view these kinds of cases when they appear in a physical court.

Utah

As the 'online court' aspect of the pilot has yet to be implemented, it is unclear what impact the system will have on open justice. However, what little can be found about the phase II open court indicates that there is no provision for public viewing or interaction with a case – the courtroom chat function appears limited to the parties and the judge. It may be, given the Utah system is limited to small claims, that it is assumed that the public has little interest in the matter (and that these cases rarely appear in the law reports). However, it is unknown to what extent the public and press view routinely view these kinds of cases when they appear in a physical court. It does appear that an official record of the ultimate judgment is made, which would be accessible in the same manner as judgments made in a physical courtroom.

Data: are there any proposals for storing and using data?

Michigan

It is not stated to what extent Matterhorn stores or uses the data derived from court cases, beyond what it has disclosed on its website (where anonymised data is used to demonstrate the efficiency of the system). It is stated that Matterhorn was extensively vetted because of data security concerns, but the extent and nature of the vetting process and what its criteria were is unknown. In particular, it is not clear whether there is any limitation on Court Innovations using or storing the data. The extent to which the State stores and uses the data is similarly unclear, and likely varies on a District-by-District basis.

It is also unclear to what extent Court Innovations, a third-party company, has access to the substantive court data – i.e. the data concerning the substantive discussions between the parties and the court judgments. There is therefore a lot of mystery around the process, and potential for data security and privacy concerns.

Utah

There is no mention in Utah's pilot documentation of the extent to which data will be stored or used as part of the ODR system (beyond the fact that judgments will be recorded in the usual fashion). The absence of a third-party provider of the ODR platform, however, limits data security and privacy concerns somewhat.

Jurisdiction Report: Australia (New South Wales and Victoria)[178]

Why this jurisdiction?

Australia and England and Wales are both members of the common law family of legal systems. Thus, the two jurisdictions have sufficiently comparable court structures and legal cultures.

Australia is also considered as something of a front-runner when it comes to civil procedure reforms.

Of the various federal, State and Territory jurisdictions within Australia, this project focuses on New South Wales ('NSW') and Victoria.

There are a couple of reasons for this focus:

1. NSW and Victoria are Australia's most populous States, with populations of 7.5 million and 6.4 million respectively.

2. NSW and Victoria may be regarded as at the forefront of ODR in Australia. Since 2015, NSW has operated an Online Court for dealing with case management and pre-trial matters. Victoria, meanwhile, has recently become the first Australian jurisdiction to pilot online hearings.

We note that the Federal Court of Australia (the 'Federal Court') and the Federal Circuit Court of Australia (the 'Federal Circuit Court') have also been operating an eCourtroom, which is similar to the NSW Online Court. We have chosen to focus on the latter for two main reasons.

1. Having been the first of its kind in Australia, the NSW Online Court offers a more meaningful comparison.[179]

2. Where the NSW Online Court operates across a diverse range of matters, the eCourtroom in the Federal Court and the Federal Circuit Court are (essentially) limited to (i) *ex parte* applications for substituted service in bankruptcy proceedings, (ii) applications for examination summonses and (iii) the giving of directions in general federal law matters.[180] The more diverse range of matters dealt with in the NSW Online Courts means that it is more suitable for considering the access to justice issues which arise in the context of ODR.

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[178] Research conducted and report prepared by Long Pham, LLM Candidate, University of Cambridge.

[179] The Online Registry can be accessed at the following link: <https://onlineregistry.lawlink.nsw.gov.au/content/>.

[180] Federal Court of Australia, "eCourtroom" <http://www.fedcourt.gov.au/online-services/ecourtroom> accessed 12 February 2019.

Introduction to the ODR system

New South Wales

Following a successful pilot in 2013, in February 2014, NSW launched an Online Registry.[181] The Online Registry is a 24/7 platform which allows parties and their lawyers to complete, file and access court forms online.[182]

The Online Registry also allows parties to search courts lists and to publish and search probate notices.

The Online Court was introduced in September 2015 as an adjunct to the Online Registry.[183] Like the Online Registry, the Online Court is available 24/7.[184] It is an online message board which allows lawyers and, in some cases, self-represented parties to apply – and respond to applications – for pre-trial and case management directions without the need to attend court in person.

The Online Court is currently available in the following matters:

No.	Matters	Description
1.	Matters in the NSW Supreme Court listed on: • the Corporations Registrar's list; • the Equity Registrar's list; or • the Common Law (Possession of Land) Registrar's list	• The NSW Supreme Court is the superior court of record in NSW. It hears and determines major civil and criminal cases. • Matters on the Corporations Registrar's list include matters arising under corporations legislation, including, most significantly, the Corporations Act 2001 (Cth). • Matters on the Equity Registrar's list include matters arising in the traditional equitable jurisdiction. These include some contractual actions, partnership disputes, and disputes concerning trusts and estates. • Matters on the Common Law (Possession of Land) are those to do with claims for possession of land.
2.	Matters in the NSW Land and	The NSW Land and Environment Court

181 Media Statement of NSW Attorney-General (Greg Smith), "Virtual registry availably anytime anywhere", 11 February 2014.

182 The Online Registry can be accessed at the following link: <https://onlineregistry.lawlink.nsw.gov.au/content/>.

183 Media Statement of NSW Attorney-General (Gabrielle Upton), "Online court makes access to justice easier", 9 September 2015.

184 The Online Court is available via the Online Registry: see above for link.

	Environment Court	has a diverse jurisdiction which includes hearing and deciding: • environmental, planning and protection appeals; • tree disputes; • valuation, compensation and Aboriginal land claim cases; • criminal proceedings for offences against planning and environmental laws; and • mining matters.
3.	Matters in the NSW District Court (Sydney) listed on the general list	• The NSW District Court is an intermediate court in the NSW court system. It has both civil and criminal jurisdiction. In its civil jurisdiction, it can hear and decide civil cases ranging from $100,001 to $750,000 in value. • Most civil cases are put on the general list.
4.	Matters in the NSW Local Court (Sydney) listed on: • the General Division list; or • the Small Claims (Motor Vehicles) list.	• The NSW Local Court is the lowest court in the NSW court system. It has both civil and criminal jurisdiction. In its civil jurisdiction, the Local Court can hear and decide civil cases up to $100,000 in value. • Matters on the General Division list are civil cases the value of which is more than $10,000 but less than $100,000. • Matters on the Small Claims (Motor Vehicles) list are those involving claims up to $10,000 which arise out of a motor vehicle accident.

The Online Court is gradually being extended to other matters.[185]

Victoria

Victoria recently piloted an ODR platform in the Victoria Civil and Administrative Tribunal (the 'VCAT').

Established in 1998, the VCAT is a tribunal that hears a diverse range of cases in Victoria.[186] The VCAT has four divisions: administrative, civil, human rights and residential tenancies.[187] While some

[185] NSW Online Registry, "About Online Court" <https://onlineregistry.lawlink.nsw.gov.au/content/about-online-court> accessed 12 February 2019.

[186] The VCAT was established under the Victorian Civil and Administrative Act 1998 (Vic).

of its members are judges, the VCAT is an administrative tribunal, not a court.[188] The VCAT hears around 85,000 cases each year.[189]

In September 2018, the VCAT undertook a month-long pilot of an ODR platform – developed by an Australian start-up called MODRON[190] – which allowed parties to have their cases heard and decided by a member of the VCAT in real-time using video and file-sharing technologies.[191] The pilot applied to disputes about goods and services under $10,000.[192] The pilot has finished; but there has been no word from the VCAT or the Victorian Government as to whether the platform will be rolled out on a permanent basis.

Why was ODR introduced in this jurisdiction?

New South Wales

In February 2014, in announcing the launch of the Online Registry, the NSW Attorney-General observed that "[l]odging and managing civil claims will be easier, more efficient and faster".[193] The Attorney-General added:

> "[The Online Registry] will save time for lawyers and companies such as debt collecting firms, as well as self-represented litigants, who can file 42 commonly used civil forms online in minutes without having to queue at a court registry."[194]

In the media statement announcing the Online Court's pilot in September 2015, it was said that the Online Court would make "access to justice…faster, easier and cheaper".[195] In the statement, the

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187 VCAT, "About VCAT" <https://www.vcat.vic.gov.au/about-vcat> accessed 12 February 2019.

188 For a detailed discussion of the distinction between courts and administrative tribunals, see Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2009).

189 VCAT, "Our structure" <https://www.vcat.vic.gov.au/about-us/our-structure> accessed 12 February 2019.

190 See: <https://www.modron.com/>.

191 VCAT, "Online Dispute Resolution Pilot" <https://www.vcat.vic.gov.au/news/online-dispute-resolution-pilot> accessed 12 February 2019.

192 VCAT, "Sharing VCAT's Online Dispute Resolution Experience" <https://www.vcat.vic.gov.au/news/sharing-vcats-online-dispute-resolution-experience> accessed 12 February 2019.

193 Media Statement of NSW Attorney-General (Greg Smith), "Virtual registry availably anytime anywhere", 11 February 2014.

194 Media Statement of NSW Attorney-General (Greg Smith), "Virtual registry availably anytime anywhere", 11 February 2014.

195 Media Statement of NSW Attorney-General (Gabrielle Upton), "Online court makes access to justice easier", 9 September 2015.

NSW Attorney-General pointed out that the introduction of the Online Court would "improve access to justice and ensure services meet people's expectations".[196] The statement continued:

> "The change will deliver major benefits to lawyers and their clients from suburban, regional and remote areas who will no longer have to incur travel costs to seek a preliminary court order."[197]

Further detail of the aims of the Online Court were provided in an article on the website of the NSW Department of Justice:

> "[T]he Online Court removes the need to go to court in person by providing an opportunity to deal with call-overs in civil matters from the legal practitioner's office.
>
> In case management, call-over is a process which happens in the lead up to a hearing. When a plaintiff makes a claim and the defendant lodges a defence, the matter is listed. Usually, there would be a four week wait before a solicitor attends court to request for orders such as adjournment for further call-over or hearing date.
>
> Considerable time is spent travelling to and from court to attend call-overs, not to mention having to find their opponent for each case and waiting in line with other legal practitioners. Most legal practitioners set aside half a day for this activity even if they are based in the city.
>
> With the Online Court, as soon as the matter is listed, solicitors log on, request orders and even upload documents. All this is done in minutes in a court that is always open for business.
>
> Being an online service also means greater equality of access for suburban-based lawyers and remote court clients."[198]

The same point is also made on the Online Court's website, which states:

> "The service is aimed at preventing you and your clients from wasting valuable time at court, waiting for your matter to be heard, as well as the travel costs associated with appearing in person."[199]

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196 Media Statement of NSW Attorney-General (Gabrielle Upton), "Online court makes access to justice easier", 9 September 2015.

197 Media Statement of NSW Attorney-General (Gabrielle Upton), "Online court makes access to justice easier", 9 September 2015.

198 NSW Department of Justice, “NSW pioneers online courts” <https://www.justice.nsw.gov.au/Pages/media-news/news/2015/NSW-pioneers-online-courts.aspx> accessed 12 February 2019.

Drawing together these threads, the introduction of the Online Registry and the Online Court had two principal and related objectives:

1. Improve access to justice through cutting the time and costs of filing documents and obtaining pre-trial and case management directions.

2. Make life easier for the users of the courts, and, in particular, parties and lawyers from suburban, regional and remote areas, when it comes to filing documents and obtaining pre-trial and case management directions.

It should be noted that, as pursued through these initiatives, the objective of improving access to justice is limited in three respects.

1. The Online Registry and the Online Court seek to improve access to justice through reducing the time and costs of filing documents and obtaining pre-trial and case management directions. The initiatives do not seek to improve access to justice via other means.

2. The Online Court only avoids the need for in-person hearings relating to pre-trial and case management directions: it still requires the final substantive hearing to take place in-person.

3. While there is a suggestion that it might be expanded to minor criminal proceedings,[200] the Online Court (at least for the time being) is only available in respect of civil matters. This reflects, in part, a judgment on the part of the NSW government that online processes are not appropriate in serious criminal matters. As the NSW Attorney General said in 2015, individuals who are accused of serious crimes are "fronting justice in a very personal way": "We've also got to have a system that treats people who are accused of crime in the most the most serious crimes with humanity".[201]

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199 NSW Online Registry, “About Online Court” <https://onlineregistry.lawlink.nsw.gov.au/content/about-online-court> accessed 12 February 2019.

200 Michaela Whitbourn, "NSW government trials online courts for civil cases in Sydney", *Sydney Morning Herald* (Sydney, 9 August 2015) <https://www.smh.com.au/national/nsw/nsw-government-trials-online-court-for-civil-cases-in-sydney-20150808-giuig2.html> accessed 12 February 2019.

201 Felicity Nelson and Stefanie Garber, "Court technology has limits: NSW Attorney-General", *Lawyers Weekly* (Sydney, 6 November 2015) <https://www.lawyersweekly.com.au/news/17456-court-tech-has-limits-nsw-attorney-general> accessed 12 February 2019.

In addition to the principal objectives above, according to Phillipa Ryan and Maxine Evers,[202] the introduction of the Online Court also had the "offshoot … aim" of reducing the number of hard copies of documents produced during the preparation for trial.

Victoria

The recent ODR pilot undertaken in the VCAT had its origins in an access to justice review which was commissioned by Victoria's Department of Justice and Regulation in 2016. The report recommended (*inter alia*) developing an online system for resolving small civil claims. In particular:

> "The Victorian government should:
>
> - establish an Online Dispute Resolution Advisory Panel with terms of reference to oversee the introduction and evaluation of an online dispute resolution system for small civil claims in Victoria and make recommendation about the possible future expansion of online dispute resolution to other jurisdictions in Victoria;
> - ***provide pilot funding, and, subject to evaluation, ongoing funding, for the development and the implementation of a new online system for the resolution of small civil claims in Victoria; and***
> - introduce legislation to facilitate the use of the new online system for the resolution of small civil claims."[203]

[Emphasis added]

This recommendation was accepted by the Victorian Government.[204]

This recommendation was made on the back of stakeholder concerns that the resolution of small civil claims at the VCAT is too complex and that disadvantaged Victorians and Victorians residing in regional areas continue to experience barriers to accessing justice.[205] In explaining how the introduction of ODR might help to address these concerns, the report observed:

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202 Phillipa Ryan and Maxine Evers, "Exploring eCourt innovations in New South Wales civil courts" (2016) 5 *Journal of Civil Litigation and Practice* 65, 65.

203 Victorian Government, *Access to Justice Review: Summary Report* (August 2016), 29 (recommendation 5.2); Victorian Government, *Access to Justice Review: Volume 1 Report and Recommendations* (August 2016), 281 (recommendation 5.2).

204 Victorian Government, *Access to Justice Review: Government Response* (May 2017), 10.

205 Victorian Government, *Access to Justice Review: Volume 1 Report and Recommendations* (August 2016), 245.

> "Online dispute resolution can improve access to justice in a number of ways, in particular, online dispute resolution provides a convenient and flexible avenue for seeking resolution of small civil claims because it is accessible at any time from any place."[206]

The report continued:

> "People residing outside metropolitan Melbourne face significant disadvantage and additional cost in bring proceedings at VCAT. The availability of online dispute resolution would enable parties to access dispute resolution without needing to travel to a physical VCAT location, assuming broadband coverage would support the online system.
>
> Online technology can also be helpful in providing people with disabilities with remote access to dispute resolution, for example, through the use of screen readers for visually impaired persons or sign language support.
>
> Similarly, for persons with limited English proficiency, online technology such as computer-automated translation may assist them to access legal information, and provide access to interpreters and bilingual assistance that might not otherwise be available at VCAT locations."[207]
>
> [References omitted]

The report continued:

> "A key aim of introducing an online dispute resolution system should be to make the cost of accessing dispute resolution services more affordable and proportionate to the value of the claim. Online dispute resolution will reduce costs associated with travel, time off work to attend VCAT locations and hearings, and other costs such as child care." [208]

The report also suggested that the introduction of ODR in the VCAT might increase the efficiency and transparency of proceedings.[209]

In summary, then, the core objective of introducing ODR in the VCAT is to enhance access to justice (especially for disadvantaged Victorians and Victorians residing in regional areas) through:

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206 Victorian Government, *Access to Justice Review: Volume 1 Report and Recommendations* (August 2016), 245.

207 Victorian Government, *Access to Justice Review: Volume 1 Report and Recommendations* (August 2016), 276.

208 Victorian Government, *Access to Justice Review: Volume 1 Report and Recommendations* (August 2016), 277.

209 Victorian Government, *Access to Justice Review: Volume 1 Report and Recommendations* (August 2016), 277.

1. avoiding the need for physical attendance at hearings;
2. reducing costs; and
3. providing technological assistance to disabled Victorians and Victorians with limited English skills.

The introduction of ODR in the VCAT has the further objective of improving the efficiency and transparency of proceedings.

How was ODR implemented?

New South Wales

NSW first piloted an online court in 2011.[210] Unlike its present incarnation, the original online court was established to handle criminal matters in the NSW Local Court (Downing Centre): it allowed for procedural steps in committal proceedings to be taken without going to court. [211] Some of the steps that could be taken included brief service orders, fixing case conferencing timetables, continuance of bail, and bail variation applications by consent.[212] While 80% of surveyed users indicated that they would use the service again – following a 23-month trial – the online court was abandoned due to a low take-up rates and limitations that constrained the useability of the system in a court context.[213]

The next step in the introduction of ODR in NSW was the introduction of the Online Registry. In 2013, the NSW Supreme Court piloted online filing of forms through the Online Registry: interested clients were given electronic access to the system and able to file different forms without having attend the registry in person.[214] Following this pilot, in February 2014, online filing in the Online Registry was formally launched in the NSW Supreme, District and Local Courts.[215]

At the time of its formal launch, the Online Registry allowed parties and their lawyers to file 42 different forms.[216] Since then, it has expanded: it now allows parties and their lawyers to file more than 80 different forms in the NSW Supreme, Land and Environment, District and Local Courts.[217]

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210 Phillipa Ryan and Maxine Evers, "Exploring eCourt innovations in New South Wales civil courts" (2016) 5 *Journal of Civil Litigation and Practice* 65, 67.

211 NSW Local Court, *Annual Review 2011*, 13; NSW Local Court, *Annual Review 2012*, 14.

212 NSW Local Court, *Annual Review 2011*, 13; NSW Local Court, *Annual Review 2012*, 14.

213 NSW Local Court, *Annual Review 2012*, 14.

214 NSW Supreme Court, *Annual Review 2013*, 7.

215 Media Statement of NSW Attorney-General (Greg Smith), "Virtual registry availably anytime anywhere", 11 February 2014.

216 Media Statement of NSW Attorney-General (Greg Smith), "Virtual registry availably anytime anywhere", 11 February 2014.

217 NSW Online Registry, "Available Forms" <https://onlineregistry.lawlink.nsw.gov.au/content/available-forms> accessed 12 February 2019.

The Online Court followed the Online Registry. A 12-week pilot of the Online Court commenced in September 2015: the pilot involved matters on the General Division list in the Local Court.[218]
In the lead-up to the pilot:

> "The Project Team thoroughly researched and tested the Online Court design with practitioners and registrars to ensure ease of use and relevance to their day-to-day work."[219]

Since the end of the pilot, the Online Court has been rolled out to more and more matters, including matters in the NSW Supreme, Land and Environment, District and Local Courts.[220] The Online Court was most recently extended to Supreme Court matters on the Common Law (Possession of Land) list.[221]

The Online Registry and the Online Court were both introduced as part of the NSW's Government's $9.2 billion Justice Online Project.[222]

Victoria

As mentioned above, the VCAT undertook a month-long pilot of ODR in September 2018.[223] The VCAT received $800,000 in funding from the Victorian Department of Justice and Regulation for the pilot;[224] and the planning stage for the pilot ran from April to June 2018.[225] The pilot was limited to

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218 Media Statement of NSW Attorney-General (Gabrielle Upton), "Online court makes access to justice easier", 9 September 2015.

219 NSW Department of Justice, "NSW pioneers online courts" <https://www.justice.nsw.gov.au/Pages/media-news/news/2015/NSW-pioneers-online-courts.aspx> accessed 12 February 2019.

220 NSW Online Registry, "About Online Court" <https://onlineregistry.lawlink.nsw.gov.au/content/about-online-court> accessed 12 February 2019.

221 The Online Court became available for such matters on 31 January 2019. For additional information, see: <https://onlineregistry.lawlink.nsw.gov.au/content/node/190>.

222 NSW Department of Justice, "NSW pioneers online courts" <https://www.justice.nsw.gov.au/Pages/media-news/news/2015/NSW-pioneers-online-courts.aspx> accessed 12 February 2019.

223 VCAT, "Online Dispute Resolution Pilot" <https://www.vcat.vic.gov.au/news/online-dispute-resolution-pilot> accessed 12 February 2019.

224 Media Statement of Victorian Attorney-General (Martin Pakula), "Major Investment to Improve Access to Justice", 23 May 2017; see also VCAT, "Sharing VCAT's Online Dispute Resolution Experience" <https://www.vcat.vic.gov.au/news/sharing-vcats-online-dispute-resolution-experience> accessed 12 February 2019.

225 Katarina Palmgren, "Churchill Fellowship Report | 2018: Explore the use of online dispute resolution to resolve civil disputes: how to best integrate an online court into the Victorian public justice system", (November 2018), 21.

disputes about goods and services under $10,000.[226] During the pilot, 65 cases were heard using the online platform, with 71 parties participating in online hearings.[227]

What about the future of the online platform?

During the pilot, a video on the VCAT's website suggested that the online platform might be expanded to other matters in the VCAT including minor criminal matters and even larger civil matters.[228] In addition, before the pilot ended, a media report said that the VCAT was looking to embark on a multi-staged, multi-year process to permanently roll out the online platform.[229] The same report stated that the service would become available in 2022.[230]

However, since the pilot ended, there has been no official word from the VCAT or the Victorian Government as to the project's future and whether it will be implemented on a permanent basis. That said, in a report prepared for the Churchill Trust in November 2018, it is suggested that the VCAT's staff are in the process of preparing a business case to expand the ODR project.[231] For the moment, then, we must wait and see.

The ODR process

New South Wales

In describing the ODR process in NSW, it is helpful to distinguish between the Online Registry and the Online Court. The reason for this is that – while related – the two services are also distinct.

The Online Registry

As noted above, the Online Registry can be used for a number of different purposes. These include:

1. completing and filing court forms in civil case (including forms to issue new proceedings);

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226 VCAT, "Sharing VCAT's Online Dispute Resolution Experience" <https://www.vcat.vic.gov.au/news/sharing-vcats-online-dispute-resolution-experience> accessed 12 February 2019.

227 VCAT, "Sharing VCAT's Online Dispute Resolution Experience" <https://www.vcat.vic.gov.au/news/sharing-vcats-online-dispute-resolution-experience> accessed 12 February 2019.

228 See the video at: <https://www.vcat.vic.gov.au/resources/online-dispute-resolution-pilot>.

229 Justin Hendry, "Victoria looks to settle disputes online" *ITnews* (10 September 2018) <https://www.itnews.com.au/news/victoria-looks-to-settle-legal-disputes-online-512159> accessed 12 February 2019.

230 Justin Hendry, "Victoria looks to settle disputes online" *ITnews* (10 September 2018) <https://www.itnews.com.au/news/victoria-looks-to-settle-legal-disputes-online-512159> accessed 12 February 2019.

231 Katarina Palmgren, "Churchill Fellowship Report | 2018: Explore the use of online dispute resolution to resolve civil disputes: how to best integrate an online court into the Victorian public justice system" (November 2018), 21.

2. accessing information about existing cases;
3. downloading court-sealed documents;
4. accessing the Online Court;
5. checking court listings; and
6. publishing, and searching, probate notices.

The discussion in this section focuses on the first – and core – function of the Online Registry: completing and filing court forms in civil cases and, in particular, forms for starting new cases.

The process for starting a new case is as follows:

Step	Description
1.	*The user must go to the Online Registry's website.*
2.	*If the user has not yet done so, the user must register to use the Online Registry's services.* Comments: • To register, the user must pass an identity check.[232] • In addition, where the user registers as an authorised officer of an organisation (including a corporation) which will be a party to the case, the user must register the organisation as an "eOrganisation".[233] • The registration process allows the user to delegate functions to other people.[234] This is of particular relevance to lawyers as it allows them to delegate to other lawyers, trainees, paralegals, as well as other staff.
3.	*Once registered, the user must log into the Online Registry and then choose to start a new case.*
4.	*The user will then be taken to a screen listing the different forms for starting a case. The user must choose a form.* Comments: • The forms are divided into: - forms for starting a case in the Supreme, District and Local Courts; and - forms for starting a case in the Land and Environment Court. • The most common form for commencing civil proceedings in the Supreme, District and Local Courts is a "statement of claim". (For ease of exposition, the following discussion proceeds on the basis that the user is looking to complete and file a statement of claim.)
5.	*The user will then be taken to a screen asking them to select the relief which is sought. The user must choose the relief sought and, if the relief sought is money, the value of the claim.* Comments:

232 NSW Online Registry, "Guide to completing the registration form" <https://onlineregistry.lawlink.nsw.gov.au/content/guide-registration-form> accessed 12 February 2019.

233 NSW Online Registry, "Guide to completing the registration form" <https://onlineregistry.lawlink.nsw.gov.au/content/guide-registration-form> accessed 12 February 2019.

234 NSW Online Registry, "Guide to completing the registration form" <https://onlineregistry.lawlink.nsw.gov.au/content/guide-registration-form> accessed 12 February 2019.

	The screen includes detailed information about the different types of relief which can be claimed. The different types of relief include e.g.: • money – liquidated sum; • motor vehicle damages – unliquidated; • possession of land; • detention of goods; and • personal injury, damages and others – unliquidated.
6.	*Based on the relief claimed, the user's claim will be allocated to the correct court (whether it be the Supreme, District or Local Court). The user will then need to select:* *(a) where the claim is allocated to the District or Local Court, the registry to which their claim will be assigned;* *(b) in some cases, the list to which their claim will be assigned; and* *(c) the type of claim – e.g. a claim for breach of contract or for the tort of negligence etc.* <u>Comments:</u> • Where the claim is allocated to the District or Local Court, the user will need to choose the Sydney registry if the user wishes to later use the Online Court because, at present, only District and Local Court matters in the Sydney registry are available on the Online Court. • Likewise, where the user has a choice of lists, and wishes to use the Online Court, the user will need to ensure that the selected list is one to which the Online Court applies.
7.	*The user will then be presented with two options for completing the statement of claim:* *(a) the user can upload a completed statement of claim (in PDF format); or* *(b) the user can complete the statement of claim online.*
8.	*If the user chooses to complete the statement of claim online, the user will then be asked to complete details about the plaintiff(s) and the defendant(s) in the proceeding.* <u>Comments:</u> • The requested personal details include name, contact details and address details. Where the defendant is an organisation, the plaintiff must provide the defendant's "Australian Business Number" (ABN) or "Australian Corporation Number" (ACN). • The user is also given the option to flag any support services which the plaintiff might require as a result of physical, cognitive, psychiatric or other disabilities – e.g. a hearing loop, wheelchair access, a support person etc.
9.	*The user must choose how the statement of claim will be served on the defendant(s). Two options are given:* *(a) the statement of claim can be posted by the registry (a fee applies); or* *(b) the user can make their own arrangements for personally serving the statement of claim.*
10.	*The user will then be taken to a screen setting out the claim details (including the amount claimed) and asked to state the interest and other fees sought on top of the amount claimed.*

11.	*The user will then be asked to set out the pleadings of their claim – i.e. the material facts on which their claim is based.* Comments: • There are two ways for setting out the pleadings: - If the pleadings are 2000 characters or less, the user can type them into a field on the screen. - If the pleadings are more than 2000 characters, the user will need to upload them as a separate document (in PDF format). • The pleadings are normal court pleadings and therefore must: - be concise; - provide the defendant(s) with sufficient detail about the nation of the claim being made; and - set out in numbered paragraphs.
12.	*The user will then be taken to a screen requesting payment of the relevant filing fee. The statement of claim will not be submitted to the court until payment has been made.* Comments: • The filing fee must be paid using a credit card. • The user is given, at this point in the process, a chance to review and edit the draft statement of claim.
13.	*Once the filing fee has been paid, and the court has approved the filing, the user will receive a confirmation email attaching:* *(a) a tax invoice;* *(b) the filed statement of claim which will now bear the court's seal.* *The filed statement of claim will also be made available on the case file on the Online Registry.*
14.	*Once the statement of claim has been filed, the plaintiff(s) has (have) 6 months within which to serve it on the defendant(s). If the plaintiff(s) elected to make their own arrangements for service (see step 9 above), the plaintiff(s) will need to print out the statement of claim and personally serve it on the defendant(s) within this 6-month period.*

It should be noted that considerable assistance is provided to users throughout the process of starting a new case using the Online Registry. The assistance takes four main forms. These are:

1. The screens displayed during the process provide users with information and advice on how to complete the different fields and how to choose between different options (e.g. different types of relief and claims).

2. The screens displayed during the process also advice users to seek assistance through the NSW Government's LawAccess scheme (which offers free legal assistance over phone). This advice is aimed at users who are self-represented litigants.

3. The Online Registry's website includes details answers to frequently asked questions (FAQs).[235]

4. The Online Registry has uploaded videos which walk users through various tasks (including how to complete and file a statement of claim).[236]

The Online Court

As noted above, the Online Court is an online message board which allows parties and their lawyers to request – and respond to requests – for pre-trial and case management directions in matters to which the Online Court applies.

The process is as follows:

Step	Description
1.	*To make a request, the user must log into the Online Court via the Online Registry's website.* Comments: The user must be registered with the Online Registry in order to use the Online Court: see discussion above.
2.	*Once logged in, the user can search for the case in which they wish to make a request.* Comments: The Online Court will only list cases: • which are eligible to be managed through the Online Court; and • which are listed for an in-person directions hearing.
3.	*Once the user finds the relevant case, they must click on the "Make a Request" button. The user will be taken to a new screen where they are asked:* *(a) to select the type of order requested;* *(b) to select any additional orders which are sought; and* *(c) to provide the reasons for the request.* *Once these fields are completed, the user may submit their request.* Comments: • The types of orders which can be requested depend on the list and court to which the case belongs. For example, where the Online Court is mainly used for seeking adjournments in matters in the Supreme Court, a far greater range of orders can be requested in the Online Court for matters in other courts, including, e.g., orders for pleadings, evidence (fact and expert), discovery and mediation etc.[237]

235 NSW Online Registry, "FAQs" <https://onlineregistry.lawlink.nsw.gov.au/content/faqs> accessed 12 February 2019.

236 The videos are uploaded to YouTube: <https://www.youtube.com/channel/UChDtlPYuIcNhpByUI4LN6LQ>.

237 For a detailed description of the different types of orders which can be requested in different matters, see NSW Justice Department, *User Guide for the Online Court* (30 October 2018).

	• Depending on what type of order is requested, the user might need to fill in additional fields. • The user has the option of uploading documents (in PDF format) to support their request.
4.	*Once a request has been submitted, an email will be sent to all parties in the case notifying them of the request.*
5.	*The other party (or parties) will then have an opportunity to log into the Online Court and either:* *(a) consent to the request; or* *(b) oppose the request and propose alternative directions.* *These involves filling in fields similar to those filled in when making the initial request.*
6.	*The registrar responsible for the case will then either:* *(a) make the requested (or consented) directions or (in their discretion) alternative directions; or* *(b) make no directions and require the parties to attend the in-person directions hearing.*

Some additional points should be noted about the process:

1. The parties may, at any time, send a message to the registrar through the Online Court. All messages are visible to all parties.[238]

2. The Online Court is a virtual courtroom and therefore the parties and their lawyers are required to conduct themselves as if they are in an actual courtroom. This means *inter alia*:
   (a) the Online Court must only be used for issues calling for determination by a judicial offer;
   (b) the Online Court must not be used for inter-party communications;
   (c) appropriate standards of etiquette and courtesy must be adhered to;
   (d) undertakings given in the Online Court are as binding as those given in an actual courtroom; and
   (e) rules of contempt are applicable in the Online Court.[239]

While the process above is fairly straightforward, the process is made more complex because, as mentioned above, the Online Court applies to matters on different lists in different courts. This has led to different courts, and even different lists in the same court, adopting different procedures for using the Online Court.

The following table seeks to summarise some of these differences:

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[238] NSW Online Registry, "About Online Court" <https://onlineregistry.lawlink.nsw.gov.au/content/about-online-court> accessed 12 February 2019.

[239] The relevant requirements are spelled out in the various practice notes which govern practice in the Online Court.

	Who can use the OC?	When is the OC used?	Cut-off times
Supreme Court – Corporations Registrar's List	Registered legal practitioners[240]	All matters on the list will be managed in the OC with the exception of: • the first return date for certain winding up applications; • the first return date in reinstatement applications; and • matters in which litigants or applicants are self-represented[241]	Requests: 12pm the day before the case is next listed for directions[242] Consents and counters: 4pm the day before the case is next listed for directions[243]
Supreme Court – Equity Registrar's List	Registered legal practitioners and self-represented litigants[244]	All matters on the list will be managed in the OC unless otherwise ordered[245]	Requests: 11am two days before the in-person sitting[246] Consents and counters: 2.30pm two days before the in-person sitting[247]
Supreme Court – Common Law (Possession of Land)	Registered legal practitioners and self-represented litigants[248]	All matters on the list will be managed in the OC unless otherwise ordered[249]	Requests: 11am two days before the in-person sitting[250] Consents and

240 Chief Justice of NSW, *Online Court Protocol (Corporations List)* (13 December 2016), ¶4.

241 Chief Justice of NSW, *Online Court Protocol (Corporations List)* (13 December 2016), ¶7.

242 NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 48.

243 NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 48.

244 Chief Justice of NSW, *Supreme Court Practice Note SC Eq 14: Supreme Court Equity Division – Online Court Protocol* (5 September 2018), ¶4

245 Chief Justice of NSW, *Supreme Court Practice Note SC Eq 14: Supreme Court Equity Division – Online Court Protocol* (5 September 2018), ¶8.

246 Chief Justice of NSW, *Supreme Court Practice Note SC Eq 14: Supreme Court Equity Division – Online Court Protocol* (5 September 2018), ¶9; NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 48.

247 Chief Justice of NSW, *Supreme Court Practice Note SC Eq 14: Supreme Court Equity Division – Online Court Protocol* (5 September 2018), ¶9; NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 48.

248 NSW Online Registry, "Supreme Court Common Law (Possession of Land) Registrar's Directions List" <https://onlineregistry.lawlink.nsw.gov.au/content/help/onlinecourt/supreme-court-possession-of-land> accessed 12 February 2019.

249 NSW Online Registry, "Supreme Court Common Law (Possession of Land) Registrar's Directions List" <https://onlineregistry.lawlink.nsw.gov.au/content/help/onlinecourt/supreme-court-possession-of-land> accessed 12 February 2019.

Registrar's List			counters: 2.30pm two days before the in-person sitting[251]
Land and Environment Court	Registered legal practitioners and self-represented litigants[252]	All civil matters in the Land and Environment Court may be managed in the OC[253]	12pm before the in-person or online listing date[254]
District Court (Sydney)	Registered legal practitioners[255]	All matters on the general list of the District Court (Sydney) in which plaintiff is legally represented must be managed in the OC save in exceptional circumstances where the court orders otherwise[256]	Requests: 2pm three days before the in-person listing[257] Consents and counters: 6pm three days before the in-person listing[258]
Local Court (Sydney)	Registered legal practitioners and (for matters on the Small Claims list) self-represented litigants[259]	All matters on the General list of the Local Court (Sydney) in which the parties are legally represented and all matters on the Small Claims (Motor Vehicles) list of the	Requests: 12pm the day before the in-person listing[261] Consents and counters: 3pm the day before the in-person listing[262]

250 NSW Online Registry, "Supreme Court Common Law (Possession of Land) Registrar's Directions List" <https://onlineregistry.lawlink.nsw.gov.au/content/help/onlinecourt/supreme-court-possession-of-land> accessed 12 February 2019.

251 NSW Online Registry, "Supreme Court Common Law (Possession of Land) Registrar's Directions List" <https://onlineregistry.lawlink.nsw.gov.au/content/help/onlinecourt/supreme-court-possession-of-land> accessed 12 February 2019.

252 NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 5.

253 See the handout accessible at: <http://www.lec.justice.nsw.gov.au/Pages/ecourt/ecallover.aspx>.

254 See the handout accessible at: <http://www.lec.justice.nsw.gov.au/Pages/ecourt/ecallover.aspx>; but see NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 58, which suggests different cut-off times.

255 NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 5, 26 and 40; see also Chief Judge of the District Court of NSW, *Practice Note DC (Civil) No. 1B – Online Court and the General List in Sydney* (16 October 2018), ¶4.

256 Chief Judge of the District Court of NSW, *Practice Note DC (Civil) No. 1B – Online Court and the General List in Sydney* (16 October 2018), ¶4.

257 NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 5; Chief Judge of the District Court of NSW, *Practice Note DC (Civil) No. 1B – Online Court and the General List in Sydney* (16 October 2018), ¶5.5.

258 NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 5; Chief Judge of the District Court of NSW, *Practice Note DC (Civil) No. 1B – Online Court and the General List in Sydney* (16 October 2018), ¶5.6.

259 NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 4 and 9; see also <https://onlineregistry.lawlink.nsw.gov.au/content/faq/how-to-(defend-a-small-claim-online>.

		Local Court (Sydney)[260]	

As with the Online Registry, assistance is provided to users in navigating the Online Court. This assistance includes a detailed user guide and videos walking users through tasks in the Online Court.[263]

Victoria

With the ODR process in the VCAT having only recently completed its pilot stage, there is relatively limited information about how the ODR process worked or may work in the future. In essence, however, we understand that the ODR process allowed parties (and witnesses) to participate in hearings over video-call through logging onto the platform from their computers, tablets or smart phones.[264] We also understand that the process had a text messaging feature.[265] Underlying this was a desire to deploy technologies which people are familiar with from their normal day-to-day lives.[266]

Has the system seen any benefits?

New South Wales

There does not appear to have been any sustained analysis of the benefits flowing from the introduction of the Online Registry and the Online Court. However, as explained above, the initiatives were intended to improve access to justice through the limited means of cutting down the time and costs of filing court documents and obtaining pre-trial and case management orders.

It would be surprising if this relatively limited aim has not been achieved at least to some extent.

The ongoing expansion of both initiatives provides a measure of support for this conclusion. For example, more and more forms have become available for filing via the Online Registry. And the Online Court was recently expanded to matters on the Supreme Court's Common Law (Possession of Land) list.

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261 NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 11.

262 NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 11.

260 NSW Justice Department, *User Guide for the Online Court* (30 October 2018), 4 and 9; see also <https://onlineregistry.lawlink.nsw.gov.au/content/faq/how-to-defend-a-small-claim-online>.

263 The videos are uploaded to YouTube: <https://www.youtube.com/channel/UChDtlPYuIcNhpByUI4LN6LQ>.

264 VCAT, "Online Dispute Resolution Pilot" <https://www.vcat.vic.gov.au/news/online-dispute-resolution-pilot> accessed 12 February 2019.

265 See the video accessible at: <https://www.vcat.vic.gov.au/resources/online-dispute-resolution-pilot>.

266 See the video accessible at: <https://www.vcat.vic.gov.au/resources/online-dispute-resolution-pilot>.

This conclusion also draws support from a recent address of the Chief Justice of NSW who stated:

> "[T]he influence of technology on dispute resolution has already been significant … On the 'disruptive' end, an online court is available in NSW for managing and processing preliminary orders in some court lists, including the Supreme Court Corporations Registrar's List. Technology has the capacity to generate significant efficiencies in this area, as traditional in-person arrangements for case management are time and administration intensive. For directions hearings, physical attendance is ordinarily required of practitioners for each represented party, as well as self-represented litigants. This creates significant inconvenience and cost for matters that are typically uncontroversial. ***This has successfully been minimised through the use of the online court, and will continue to be minimised as it is rolled out to other lists.***"[267]
>
> [Emphasis added and references omitted]

Outside of reducing time and costs for parties and their lawyers, there are two further respects in which the introduction of the Online Registry and Online Court might be thought to have improved access to justice:

1. Phillipa Ryan and Maxine Evers have argued that the initiative might free up the time of registry staff for other matters including to provide advice and assistance to self-represented litigants.[268]

2. Considerable educational materials have been published to assist individuals to use the Online Registry and the Online Court: see above.

Outside of the access to justice context, it might be thought that the introduction of the Online Registry and the Online Court have made life easier for lawyers, as well as given suburban and regional lawyers an opportunity to work on matters which they otherwise would not have been able to.

Victoria

It is too early to tell what benefits might be yielded through the use of the ODR platform in the VCAT.

It should be noted, however, that the VCAT itself has signalled the following potential benefits:

1. parties can log into the online platform from their own device at a location convenient to them;

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[267] The Hon TF Bathurst AC, "ADR, ODR and AI-DR, or do we even need courts anymore?" (Inaugural Supreme Court ADR Address , Sydney, 20 September 2018), ¶¶9-10.

[268] Phillipa Ryan and Maxine Evers, "Exploring eCourt innovations in New South Wales civil courts" (2016) 5 *Journal of Civil Litigation and Practice* 65, 70.

2. parties are not required to travel to a VCAT location to have their matter heard;

3. documentation is conveniently and securely uploaded, stored and accessible to all parties relevant to the case through an online portal; and

4. other people, such as witnesses, can also attend a hearing by logging into the online platform.[269]

Has the system seen any problems?

New South Wales

Just as there has been no sustained analysis of the benefits flowing from the introduction of the Online Registry and the Online Court, there has been no such analysis in relation to resulting problems.

However – based on our review of those processes – we identified the following potential problems in relation to access to justice:

1. Documents cannot be filed through the Online Registry until the relevant filing fee is paid; and the relevant filing fee can only be paid via credit card. This might pose an obstacle for some individuals.

2. The existence of differing procedures in the Online Court (depending on the court and list to which a matter is assigned) can be a source of confusion: see the detailed discussion above.

3. While considerable educational material has been released about using the Online Court, on one view, there might be too much material. Further, some of the material (such as the user guide for the Online Court) appears to be pitched at lawyers rather than lay persons. In addition, there appears to be some inconsistencies in the material: see e.g. the discussion above about the cut-off dates and times for making requests in the Land and Environment Court.

4. For some matters, the use of the Online Court is limited to legally represented parties. This includes matters in the District Court and general division matters in the Local Court. This poses a barrier to accessing justice for self-represented litigants, especially given that such litigants are likely to come into contact with the justice system through these lower courts. There does appear

[269] VCAT, "Online Dispute Resolution Pilot" <https://www.vcat.vic.gov.au/news/online-dispute-resolution-pilot> accessed 12 February 2019.

to be a recognition of this issue, however: e.g. since early this year, self-represented litigants in matters on the Local Court's Small Claims list can use the Online Court.[270]

5. To be eligible for the Online Court, a District or Local Court matter must be commenced in the Sydney registry. This might disadvantage parties in suburban and regional areas. That being said, the issue should not be exaggerated. In 2017, 71% of civil cases in the District Court were commenced in the Sydney registry.[271] Further, it appears that the Online Court is in the process of being expanded to small claims matters in the Local Court commenced in other registries.[272]

On top of these potential access to justice issues, the partner of an Australian law firm has suggested that the Online Court raises the following practical issues:

1. The Online Court limits communication to a request from one party and a reply (or replies) from the other party (or parties). As a result, there is little capacity in the Online Court to seek to be heard at the time of decision making on miscommunications/misapprehensions by the other side or the registrar.[273]

2. It can also be time-consuming and costly to address these matters after orders have been made.[274]

3. The Online Court also transfers the data entry of orders way from the Registry and into the hands of solicitors.[275]

4. The Online Court also removes some of the benefits of in-person hearing, such as:
   (a) the chance to meet your opponent face-to-face;
   (b) the opportunity to raise and discuss issues on an informal basis;
   (c) the learning opportunities of a long list; and

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[270] NSW Online Registry, "How to defend a small claim online" <https://onlineregistry.lawlink.nsw.gov.au/content/faq/how-to-defend-a-small-claim-online> accessed 12 February 2019.

[271] NSW District Court, *Annual Review 2017*, 24.

[272] NSW Online Registry, "How to defend a small claim online" <https://onlineregistry.lawlink.nsw.gov.au/content/faq/how-to-defend-a-small-claim-online> accessed 12 February 2019.

[273] Christine Jones, "The Online Court", *Holding Redlich: NSW Government Bulletin (Summer Edition)* (10 January 2019) <https://www.holdingredlich.com/nsw-government-bulletin-summer-edition> accessed 12 February 2019.

[274] Christine Jones, "The Online Court", *Holding Redlich: NSW Government Bulletin (Summer Edition)* (10 January 2019) <https://www.holdingredlich.com/nsw-government-bulletin-summer-edition> accessed 12 February 2019.

[275] Christine Jones, "The Online Court", *Holding Redlich: NSW Government Bulletin (Summer Edition)* (10 January 2019) <https://www.holdingredlich.com/nsw-government-bulletin-summer-edition> accessed 12 February 2019.

(d) the chance for young lawyers to appear and practice advocacy.[276]

While these practical issues have force, it remains to be seen whether they are sufficiently powerful to outweigh the potential benefits of the Online Court to access to justice. Further, it might be thought that at least some of these practical issues could be addressed through tinkering with the Online Court or through lawyers making refinements to their working methods.

Victoria

It is too early to tell what problems might arise from the introduction of ODR in the VCAT and Victoria.

Open justice: to what extent does the ODR mechanism affect the openness and transparency of justice?

New South Wales

Where directions hearings in NSW courts are generally open to the public, the nature of the Online Court means that the public is unable to "tune into" proceedings in the Online Court. This might be thought to raise concerns about open justice. But such concerns should not be overstated for the following reasons:

1. In general, the issues addressed at directions hearing are procedural and uncontroversial – directed at how the case should be conducted – and therefore unlikely to be of public interest.

2. Where a directions hearing does give rise to controversial and/or highly contested issues, the registrar will likely require the parties to proceed with the in-person hearing (which will be open to the public) rather than deal with the issues in the Online Court.

3. The Online Court maintains a record of all requests, consents, counter-requests and orders; and the various practice notes permit non-parties to apply to the court for access to the record.

As to the third point above, it should be noted that, in the case of the Federal and Federal Circuit Courts' eCourtroom (which, as noted earlier, operates in a similar manner to the Online Court), discussion threads between the parties and the registrar are publicly available in the first place:

[276] Christine Jones, "The Online Court", *Holding Redlich: NSW Government Bulletin (Summer Edition)* (10 January 2019) <https://www.holdingredlich.com/nsw-government-bulletin-summer-edition> accessed 12 February 2019.

there is, therefore, no need for non-parties to make an application to see those discussions.[277] The Online Court could enhance its commitment to open justice through adopting a similar position.

Overall, however, the Online Court does not pose any real difficulties for the principle of open justice.

Victoria

It is unclear what implications the ODR platform in the VCAT might have for open justice. Save for mediations, compulsory conferences and hearings the subject of closed court orders, in-person hearings in the VCAT are open to the public; given the need to log onto the ODR platform,[278] we assume that the same is not true of VCAT hearings conducted through the ODR platform. The full implications of this will need to be worked out should the ODR project proceed.

Data: are there any proposals for storing and using data?

We have not been able to find any proposals for the storage and use of data derived from the ODR systems in NSW and Victoria.

277 Federal Court of Australia, "eCourtroom" <http://www.fedcourt.gov.au/online-services/ecourtroom> accessed 12 February 2019.

278 VCAT, " Attend a VCAT hearing or other proceeding" <https://www.vcat.vic.gov.au/media-centre/media-attend-hearing> accessed 12 February 2019.

Jurisdiction Report: Canada (British Columbia)[279]

Why this jurisdiction

Like England and Wales, all Canadian provinces and territories other than the province of Quebec are common law jurisdictions and owe a considerable portion of their substantive and procedural law to the English legal tradition. Another commonality between these jurisdictions is the significant number of self-represented litigants; for example, in the province of British Columbia (BC), the focus of this review, the number of self-represented litigants in small claims disputes reached 90% in 2010, prior to the introduction of online dispute resolution.[280]

Also like England and Wales, Canada is characterized by vast discrepancies in population distribution, with low density and limited travel options in parts of the country creating a natural barrier to obtaining justice in conventional courts. Relatedly, in Canada there is great variability in technological infrastructure across different geographical regions, with some rural areas severely underserved by high-speed internet. This means that although technology can address access to justice in conventional courts, it also has the potential to perpetuate and re-entrench the existing geographical inequalities. Both countries also suffer from poor mobile signals in certain areas, which may limit the accessibility envisioned by internet-based dispute resolution. The latter problem is exacerbated in Canada by mobile data costs that are far higher than those in the UK and other countries.[281] This means that use of an online system may be prohibitive for Canadian users without alternative access to high-speed internet in their homes, libraries, etc., although for most it is likely to be more cost effective to travel to a place with internet access than to travel to a physical court building.

The province of BC is the focus of this review. Nonetheless, it should be noted that some other Canadian provinces and the federal government have made strides towards providing certain online services in civil claims (such as 'e-filing' to issue process and, in some cases, file additional

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279 Research conducted and report prepared by Jennifer Anderson, LLM Candidate, University of Cambridge.

280 Shannon Salter, Chair of the BC Civil Resolution Tribunal, 'B.C.'s Civil Resolution Tribunal' (paper delivered at the Annual Forum on Administrative Law, Osgoode Hall, 23-24 October 2014) 2, <https://cfcj-fcjc.org/sites/default/files//Annual%20Forum%20on%20Administrative%20Law%20Paper%20-%20CRT%20-%20Salter.pdf> accessed 25 January 2019 (citing British Columbia Judges Compensation Commission, 'Final Report of the 2010 British Columbia Judges Compensation Commission' (2010) 19).

281 See the summary tables and other data in the 2017 report commissioned by Innovation, Science and Economic Development Canada (a department of the Government of Canada): NGL Nordicity Group Ltd, ''2017 Price Comparison Study of Telecommunications Services in Canada and Select Foreign Jurisdictions' (5 October 2017), <https://www.ic.gc.ca/eic/site/693.nsf/vwapj/Nordicity2017EN.pdf/$file/Nordicity2017EN.pdf> accessed 25 January 2019.

documents),[282] as well as in the family and criminal/quasi-criminal business lines.[283] However, BC was selected as the focus here, as it is the first and only province to have implemented a fully remote civil dispute resolution mechanism.[284] Notably, BC did so through a tribunal model, thereby placing it outside the conventional court system.

Introduction to the online dispute resolution (ODR) system

Legislative Basis

The ODR system in British Columbia is called the Civil Resolution Tribunal (CRT). It was established by provincial legislation in 2012,[285] although the tribunal did not become active until 2016.[286] The original legislation, the *Civil Resolution Tribunal Act* ('the Act'), moved through the legislature in just 23 days; it is perhaps unsurprising, therefore, that large swaths of the statute were ultimately repealed and replaced in 2015, prior to the commencement of any of the dispute resolution activities of the tribunal.[287] Another extensive wave of amendments received Royal Assent in 2018;[288] some of

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[282] For example, Ontario has an online system to issue process in small claims matters and is phasing in an e-filing system for other civil matters. However, the proceeding itself is conducted in person under the normal rules of court. For further information, see Government of Ontario, 'File Civil Case Documents Online' (last updated 24 August 2018), <https://www.ontario.ca/page/file-civil-claim-online> accessed 25 January 2019. Disclosure: The present author is a former employee of the Ontario Ministry of the Attorney General and participated in the civil claims online project. The province of Quebec and the province of Newfoundland & Labrador also have e-filing systems for small claims matters (see <https://www.justice.gouv.qc.ca/en/your-disputes/small-claims> for Quebec and <https://court.nl.ca/provincial/courts/smallclaims/efiling.html> for Newfoundland & Labrador).

For the e-filing system used by the Federal Court of Canada, see <http://www.fct-cf.gc.ca/fc_cf_en/E-Filing.html>. Note: The Federal Court of Canada is not a court of general or inherent civil jurisdiction, but rather is a statutorily created court whose jurisdiction includes judicial review of federal administrative actions, statutory appeals from federal bodies, intellectual property disputes, and certain other discrete areas.

[283] For example, Ontario launched limited online services for regulatory offences falling within municipal jurisdiction in 2018, and the enabling legislation envisages a subsequent rollout of online, telephone, or e-mail-based "early resolution" meetings between municipal prosecutors and the accused, to replace the existing in-person meetings. For the service, see <https://www.ontario.ca/page/check-status-traffic-tickets-and-fines-online-or-request-meeting-resolve-your-case>. For the legislation, see the amendments to sections 5.1-5.5 of the *Provincial Offences Act*, RSO 1990, c P.33, made under the *Stronger, Fairer Ontario Act (Budget Measures), 2017*, SO 2017, c 34, Sched 35, s 3 (Royal Assent 14 December 2017; this provision not yet proclaimed into force). With respect to family matters, Ontario launched an e-filing system for joint divorce applications, also in 2018, and is scheduled to roll out e-filing for contested divorce in 2019. In a related development, the province worked with a publicly funded organization, Community Legal Education Ontario, to launch a 'wizard' to help users populate the court forms needed for online joint divorce applications. See <https://www.ontario.ca/page/file-joint-divorce-application-online> accessed 25 January 2019.

[284] The public literature on BC's Civil Resolution Tribunal describes it as "Canada's first online tribunal" (see <https://civilresolutionbc.ca/about-the-crt/> accessed 25 January 2019).

[285] *Civil Resolution Tribunal Act* (*CRT Act*) SBC 2012, c 25 (first reading: 7 May 2012; third reading: 30 May 2012; Royal Assent: 31 May 2012). For the statute in its current form, see <http://www.bclaws.ca/civix/document/id/complete/statreg/12025_01> accessed 25 January 2019.

[286] Pursuant to BC Reg 171/2016. The tribunal's small claims jurisdiction was always envisaged in the statute but did not become active in 2017, pursuant to BC Reg 111/2017.

[287] *Civil Resolution Tribunal Amendment Act, 2015*, SBC 2015, c 16.

these amendments came into force on 1 January 2019,[289] while others will come into force on 1 April 2019.[290] These changes significantly restructure the Act in addition to expanding it substantively. The waves of amendments have completed the tribunal's transition from a 'voluntary' option as first described in the debates in the legislature in 2012[291] to a tribunal of exclusive or quasi-exclusive jurisdiction in many cases.

Jurisdiction

Since its inception, the CRT was intended to have jurisdiction for low-value small claims matters and for many types of 'strata' property claims.[292] At present, its competence in small claims is up to CAD $5,000, as compared to $35,000 for the small claims division of the BC Provincial Court. The chair of the CRT has stated that the monetary threshold for small claims matters in the CRT will gradually increase until all such matters up to $25,000 will fall within the Tribunal's mandatory jurisdiction.[293] It is possible that the chair was indicating an expectation that the CRT's monetary jurisdiction in small claims matters will eventually be coextensive with that of the Provincial Court, since at the time of her writing, the Provincial Court's jurisdiction was in fact $25,000.[294]

An important exception to the CRT's jurisdiction is that the government cannot be a party to CRT proceedings, except where the CRT has exclusive jurisdiction or as otherwise provided by regulation.[295]

As of 1 April 2019, the Tribunal's jurisdiction will be extended to include claims arising from motor vehicle injuries up to $50,000.[296] BC has a public insurance regime for motor vehicle accidents and injuries whereby accident victims make claims to the insurer rather than to the driver at fault.

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288 *Civil Resolution Tribunal Amendment Act, 2018* (*CRT Amendment Act 2018*), SBC 2018, c 17.

289 OIC 593/2018.

290 OIC 594/2018.

291 British Columbia, Hansard, 39th Parl, 4th Sess, 8 May 2012 at 11686 (Hon S Bond):

> For many matters, the choice to use the tribunal or the Provincial Court will be up to the parties in the dispute. So perhaps that's one of the critical principles that we need to highlight in my brief comments — the fact that this is voluntary. This is a voluntary tribunal. It will give people the opportunity to make a choice about how they pursue resolution to an issue.

292 Similar to commonhold in England and condominiums in other parts of Canada and the United States.

293 Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34 Windsor YB Access Justice 112, 122.

294 The increase to $35,000 came on 1 June 2017, the same date that the CRT's competence in small claims matters came into effect.

295 *CRT Act*, ss 9, 119.

296 *CRT Amendment Act 2018*, s 32 (creating a new s 133 of the *CRT Act*. See Bill 22, 41st Parl, 3rd Sess (Bill 22), *Civil Resolution Tribunal Amendment Act, 2018*, cl 32.

Consequently, the CRT's new competence in this area will entail adjudicating matters in which a Crown corporation is a party.

The most recent amending act also provides for jurisdiction in relation to non-profit societies and cooperatives,[297] but there is as yet no timetable for entry into force of the new provisions regarding those matters.

A Tribunal, Not a Court

It is critical to appreciate that the CRT is an administrative tribunal, not a court. The adjudicators are government-appointed tribunal members, rather than judges, and they are appointed for fixed terms never exceeding five years (with the possibility of renewal).[298] All of the members other than one vice-chair are currently lawyers, but legal training is not a strict requirement; the Act merely refers to appointment on merit with no specific mention of legal experience or knowledge.[299] The tribunal's procedure is governed by rules that are established by the tribunal and are distinct from the rules of court applicable to small claims matters in the Provincial Court.[300] A final tribunal decision or a consent order may be registered with the court for enforcement purposes, but the decision itself is not a court judgment.

In the case of small claims decisions issued by the CRT, if a party files a 'Notice of Objection' to signify their disagreement with the final decision, the Act effectively provides that the decision is automatically vacated without any requirement for cause to be shown; thus, the final decision ceases to be binding on any party and is unenforceable. At this point, any party can then pursue the claim in a trial in the small claims division of the BC Provincial Court.[301] For strata proceedings, a statutory appeal mechanism had previously been available,[302] but it was eliminated for new proceedings commencing on or after 1 January 2019, leaving judicial review as the only option to challenge decisions in such matters.[303]

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297 Bill 22, cls 124-131 et passim.

298 *CRT Act*, ss 68-69.

299 ibid.

300 The rules do not appear to have the status of a regulation and as such, are not published by the legislature. The CRT publishes current and past rules on its website. However, the version indicated as 'current' as of time of writing (February 2019) are dated 2017 and thus do not reflect the significant amendments to the Act brought into force on 1 January 2019. For access to all sets of 'current' and previous rules, see <https://civilresolutionbc.ca/resources/rules/>.

301 *CRT Act*, s 56.1.

302 Formerly s 56.5 of the *CRT Act*, repealed by *CRT Amendment Act 2018*, s 24.

303 See 'How the Process Ends: What If I Don't Agree with the Decision' (*Civil Resolution Tribunal*, nd), <https://civilresolutionbc.ca/how-the-crt-works/how-the-process-ends/#what-if-i-dont-agree-with-the-decision> accessed 25 January 2019.

The non-court status of the CRT also has an impact on the publicity of its proceedings, and thus on the open justice principle. See the discussion on 'open justice' below for details.

Approach to Dispute Resolution

As described in greater detail below, the CRT's adjudicative functions are nested inside a structure aimed at educating parties and pushing them to a negotiated resolution. In order to submit an application (a 'request' in the language of the system's public interface), a prospective claimant must first complete a fairly lengthy online 'Solution Explorer', which is a sophisticated multi-step 'wizard' that triages their dispute, collects information, and also prompts the user to consider alternative methods of resolution.

If at the end of the Solution Explorer, the user indicates that they want to go ahead with a tribunal claim (and assuming the Solution Explorer has determined that the claim falls within the CRT's subject-matter and monetary jurisdiction), the first step of the proceeding after service on all parties is 'facilitation' (essentially equivalent to case management); this step entails mediation (at a distance) as well as preparation for adjudication if need be. Only if facilitation fails will the tribunal take on an adjudicative role (known as the 'Tribunal Decision Process'). Notably, the parties must pay an extra fee of $50-$100 to proceed down this path, presumably as an extra incentive to encourage settlement. The total fees are roughly equivalent to those that a claimant would pay in court, although various factors affect the applicable fees in both forums.

At every stage, the user is given tools to encourage settlement, beyond mere information. For example, at the end of the Solution Explorer, the user is not only presented with the option of sending the would-be respondent a demand letter; instead, the Solution Explorer actually generates a customizable demand letter using information provided in the wizard. Also, in the website's description of the CRT process itself (i.e. the process after the request is submitted), the user is given tips on how to negotiate in between formal steps. The CRT facilitator is also required to assist the parties to reach a consensual solution through mediation.

Why was ODR introduced in this jurisdiction?

The stated mandate of the CRT, per its enabling Act, is as follows:

> 2(1) The mandate of the tribunal is to provide dispute resolution services in relation to matters that are within its authority, in a manner that

(a) is accessible, speedy, economical, informal and flexible,

(b) applies principles of law and fairness, and recognizes any relationships between parties to a dispute that will likely continue after the tribunal proceeding is concluded,

(c) uses electronic communication tools to facilitate resolution of disputes brought to the tribunal, and

(d) accommodates, so far as the tribunal considers reasonably practicable, the diversity of circumstances of the persons using the services of the tribunal.

(3) In fulfilling its mandate, the role of the tribunal is

(a) to encourage the resolution of disputes by agreement between the parties, and

(b) if resolution by agreement is not reached, to resolve the dispute by deciding the claims brought to the tribunal by the parties.[304]

Thus, consensual resolution of disputes, informality, speed, and cost-effectiveness were critical drivers of the project. This is confirmed by statements made in the course of debates in the legislature when the original bill was introduced in 2012. The sponsoring minister referred, for example, to a goal of reducing the burden on the courts and improving access to dispute resolution in civil matters – both geographical access for British Columbians who live at great distances from a courthouse and temporal access for those who cannot afford to take time to attend court.[305]

A desire for flexibility and informality may also have driven the specific decision to implement an ODR approach outside of the courts rather than within the court framework. In a 2017 journal article, the chair of the CRT, Shannon Salter, argued that the CRT

> provides a template for how transformation and innovation can occur in a public justice context. The CRT model goes beyond incremental measures, such as simply changing forms or allowing online filing. Rather, it inverts the traditional public justice process model by assuming that disputes can be resolved consensually, with the right assistance and expertise.[306]

Elsewhere in the same article, she noted:

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304 *CRT Act*, s 2.

305 British Columbia, Hansard, 37th Parl, 4th Sess, 8 May 2012 at 11687 (Hon S Bond).

306 Salter (n 293) 123.

> [A]s a new entity with no established culture or processes, the CRT was less constrained in pioneering a transformative approach to delivering justice services to the public. The transformative potential of the CRT is that it starts from the principle of putting the public first, while also giving effect to the time-honoured tenets of fundamental justice that are foundational to our legal system. Using these principles, the CRT envisions a dispute resolution process that empowers people to become actively engaged participants in their justice system.[307]

It must be noted that in contrast to the discourse in the UK, there appears to have been no suggestion in BC that the CRT could or should lead to closure of physical courthouses. Rather, the creation and expansion of the CRT was expected to reduce the use of courts for particular types of matters, and thereby alleviate the pressure on those courts so that they could move more quickly through their dockets. (This issue has taken on overriding importance in courts with criminal jurisdiction, such as the BC Provincial Court and BC Supreme Court, on account of a 2016 Supreme Court of Canada decision imposing strict time limits on criminal proceedings on constitutional grounds; if the time limits are exceeded, there is a strong presumption that the case should be dismissed.)[308] In 2017, in the course of a debate in the Legislative Assembly about sheriff staffing levels in courthouses, the then Minister of Justice stated:

> We are tackling this in other ways as well by taking things out of courtrooms — in other words, freeing up court time. The impaired driving cases — 6,000 cases no longer going into courtrooms. The civil resolution tribunal. Very shortly, the minor small claims matters will no longer be in courtrooms. So we are freeing up court time in other ways so that when there are criminal cases that need to go ahead, the resources are there so that those cases can go ahead as needed in all of the courtrooms of British Columbia.[309]

How was ODR implemented?

Development

In the same 2017 article mentioned above, Ms. Salter set out the origins of ODR in BC as follows:

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[307] ibid 118.

[308] *R v Jordan*, 2016 SCC 27.

[309] British Columbia, Hansard, 40th Parl, 6th Sess, 20 February 2017 at 13662 (Hon S Anton).

> The BC Ministry of Justice began exploring the use of ODR in a public justice context in 2011. That year, Consumer Protection BC, a not-for-profit corporation for the protection of consumers and marketplace fairness, began using a Modria-based ODR system to resolve disputes between consumers and businesses. The same year, an administrative tribunal, the BC Property Assessment Appeal Board [...] began using a similar system to resolve disputes about residential property tax assessments, in conjunction with more traditional modes of administrative law dispute resolution. While uptake was initially low for both programs, user satisfaction and resolution rates were encouraging, and these initiatives have become permanent components of both organizations.
>
> The results from these forays into ODR in a public context prompted the BC Ministry of Justice to consider its application more broadly. In 2012, the BC government passed the *Civil Resolution Tribunal Act* [*CRTA*] with the goal of using technology and ADR to increase access to justice for British Columbians with small claims and condominium property disputes. […]
>
> While the CRT was originally planned as a voluntary tribunal, there was strong demand from condominium property stakeholders to make the CRT mandatory for all parties. In their view, a voluntary scheme would allow one party to veto the other's ability to use an accessible dispute resolution forum like the CRT. This would force the initiating party to use the Supreme Court of British Columbia (BC Supreme Court), which prior to the CRT, was the main forum for resolving condominium property disputes. In response to these concerns, the CRTA was amended in 2015 to designate the CRT as the mandatory forum for condominium property and most small claims disputes in British Columbia.[310]

Legislation

As noted above, the CRT is supported by an Act that has gone through essentially three waves, although the entry into force of some provisions has been staggered. Given that the adjudicative (and case management) activities provided in the Act never came into force in its original version, and in light of the very speedy passage of the original bill through the legislature, it seems reasonable to surmise that much of the initial Act was a placeholder awaiting detailed working out of the necessary provisions.

[310] Salter (n 293) 117-18.

Technology

Ms. Salter described the technical aspects of implementation as follows:

> The CRT was developed using a hybrid [public-private design] model. The CRT's case management system is powered by an off-the-shelf customer relationship management platform called Salesforce. Salesforce has an established record for security, robustness, and scalability, which are all important features when managing thousands of claims and related personal information. However, Salesforce was developed for private corporations, not public justice processes. To adapt it to an ODR context, the BC Ministry of Justice contracted with local software design and development companies to create the Solution Explorer, the intake system, and the communications portal, all of which are relatively lightweight applications, built to integrate into the Salesforce platform.[311]

Budget and infrastructure

As described later in this report, there do not appear to be any publicly available annual reports for the CRT, [312] nor are there any other official sources of information on the tribunal's budget. However, in May 2016, prior to the launch of the tribunal's dispute resolution functions, an exchange occurred in the Legislative Assembly that prompted the then Minister of Justice to discuss the costs incurred in establishing the CRT:

> At the start of this fiscal year, the civil resolution tribunal had two employees and one full-time chair — that was the chair, a registrar and executive director, and a tribunal administrator — plus there are 18 part-time tribunal members, who are paid on a per-diem basis.
>
> We are expecting to hire up to 11 additional staff, plus two full-time vice-chairs. That would be two directors, one case manager, one senior resolution support clerk, six resolution support clerks, one member support clerk, vice-chair of strata and vice-chair of small claims. The estimated expenditures in this year are $1.9 million, with a potential revenue of half a million.
>
> In terms of the contractor…. Now, these are the people who are building the tribunal, building the software in the dispute resolution office. We have a contract with PwC, which provides access to 15 software developers and seven CRT knowledge engineers.

311 Salter (n 293) 128.

312 See discussion at n 333. Whether the legislative requirement has been fulfilled is unclear.

> This is all done through our dispute resolution office, which also oversees contracts with the Community Legal Assistance Society for human right services and with Mediate B.C., for the development and maintenance of mediation rosters, as well as an MOU with the UVic [University of Victoria] Law Centre for human rights services. But the first part of that relates directly to the civil resolution tribunal.
>
> In terms of capital spent to date, there has been $4.7 million spent to date.
>
> […]
>
> In terms of the cost for the tribunal, in the '14-15 year and prior it was absorbed within Justice's general budget. It has been separated out in '15-16 and '16-17. The total expenses in '15-16 were $633,425, and the total anticipated expenses this year are $1,930,700.[313]

Ongoing improvements

The CRT collects feedback from users on an ongoing basis and publishes summary results approximately monthly on its blog. On the basis of user feedback, as well as in line with jurisdictional changes, the system's functionality is continuing to evolve. For example, a January 2019 update notes that recently deployed features include the ability to create an account to permit users to return to an incomplete application at a later date, an option to indicate one's preferred pronouns, and an interest calculator built into the application stage, among others.[314]

The ODR process

Pre-Application

As noted above, in order to make an application (or 'request') to the CRT, a person must first complete the 'Solution Explorer'.[315] This system is a highly sophisticated but user-friendly wizard that collects information to populate certain forms and other outputs, triages issues (referred to as 'disputes'), and provides educational information to users.

The Solution Explorer begins by asking whether the issue concerns strata property or a small claims matter. From there, the user is asked more specifically about the nature of their claim. For example, in small claims, the choices are:

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313 British Columbia, Hansard, 40th Parl, 5th Sess, 11 May 2016 at 13040 (Hon S Anton).

314 Tanja Rosteck, 'Continuous Improvement Update – January 2019' (*Civil Resolution Tribunal*, nd), <https://civilresolutionbc.ca/continuous-improvement-update-january-2019> accessed 10 February 2019.

315 Strictly speaking, one could bypass the Solution Explorer by contacting the CRT and requesting a paper form. However, the application fee is $25 higher for paper applications.

- Buying and selling goods and services
- Loans and debts
- Construction and renovations
- Employment
- Insurance disputes
- Personal injury, including motor vehicle injuries and accidents (these are divided at a subsequent step)
- Property

Explanations are provided for each of these options to assist the user in choosing the most appropriate.

After the user makes a selection, the next page provides information on limitation periods, relevant terminology, and a suggestion that the user contact their insurer where applicable. For the sake of convenience, we will assume in what follows that the user is following the 'Construction and renovations' pathway. The user is also asked again whether their dispute concerns strata property; if so, they are redirected to the relevant pathway of the Explorer.

At this stage, the user must accept the terms and conditions to proceed and the Solution Explorer is officially launched. An access code is automatically created to permit the user to return to their session without starting again or creating an account. The user is next asked whether they are using a public or private computer; users on private computers enjoy greater functionality to download customized documents generated by the system and a longer lag time before the system times out.

The system next presents a series of short fact sheets conveying basic information (in the present hypothetical case, they discuss construction and the types of issues that may lead to a construction dispute, as well as information about insurance). The fact sheets open on the screen automatically and can also be downloaded. As the user moves through the system, each resource is 'collected' on the left-hand side of the screen for ease of referral.

In the next step, the user is asked more precisely what the dispute concerns. For construction, for example, the options are:

- I was injured as a result of construction
- Property was damaged as a result of construction
- I have an issue with residential construction
- Something else

The first of these options is designed to proactively identify miscategorized disputes: a personal injury masquerading as a construction dispute. If the user chooses this option, they are immediately brought to the end of the Construction pathway and advised to start a Personal Injury pathway. This is an example of the user-friendly failsafe mechanisms built into the logic of the Solution Explorer.

Assuming the user has not indicated that their construction matter concerns a personal injury, they are next asked to identify who they are: the property owner, contractor, etc. The system then displays a fact sheet customized to the selected user type on the next page. For example, for property owners, the fact sheet provides information on fixed-price vs. 'cost-plus' contracts, unwritten contracts, dispute resolution clauses in contracts, builders liens, and mitigation. It also provides a list of documents the user should gather if they have not already done so.

After a question about whether a builders lien has been filed against the property, the system prompts the user to indicate the nature of the issue, including cost, quality and scope concerns, delays and other timing or completion issues, and nuisance. Depending on the user's choice, the system displays a relevant fact sheet. For example, if quality is selected as the problem, the fact sheet provides information on warranties and post-construction review.

The fact sheet at this stage also provides more detailed information about courses of action the prospective applicant can take, such as contacting the other party to explain their perspective, mutually agreeing to amend the agreement if provision for this was made in the original contract, notifying the insurance company of a possible claim, obtaining professional advice from a lawyer or engineer, and so forth.

On the next screen, the user is asked to choose which of the solutions described on the preceding screen they would like to explore; a warning statement advises the user that if a mandatory dispute resolution process is provided for in the construction contract, it must be followed. To take one example, in the case of a construction dispute concerning quality issues, the listed options are:

- Follow the dispute resolution process set out in the contract
- Contact the contractor or supplier to discuss a solution
- Notify the bonding company of a potential claim against the contractor (if you have a performance bond)
- Seek professional advice
- Make a claim with the Civil Resolution Tribunal

If the user chooses the option 'Contact the contractor …', the system opens an interactive demand letter template. The user is prompted to complete a series of fields and are then given the option to

further edit the letter. They can then choose to print the letter, download it as a PDF, or e-mail it to themselves in both Word and PDF formats. If the user selects various other non-CRT options, they are shown brief information and advice on how to proceed.

However, if the user selects 'Make a claim with the Civil Resolution Tribunal', then the system asks whether the value of the claim is up to $3,000 or between $3,001 and $5,000; this has a bearing on the administrative fees charged by the Tribunal and is therefore an important precursor to the application stage (discussed below).

As a final step before the Solution Explorer concludes, the system assesses the user's inputs and determines whether they have a claim that appears admissible to the CRT, and it also identifies how many separate 'disputes' (issues) the user has described. All of the fact sheets and other resources presented along the way are available for download on the final screen, and links to a lawyer referral service and a legal clinic are also included. Individual access to the Solution Explorer results and resources will remain available to the user for 32 days by entering the access code.

Application

Having reached the end of the Solution Explorer with a dispute identified by the system as falling within the jurisdiction of the CRT, the user can now launch the CRT application process proper. Whereas the Solution Explorer is quite lengthy, the CRT process is shorter. (The website describes it as taking 15-30 minutes, and this appears reasonably accurate.) The user is not obligated to create an account, although if they do not do so, they will lose any information they input if they do not complete the application within 30 minutes.

The CRT application begins by requesting personal and contact information for the applicant. The user can opt to provide a contact person, that being a lawyer or other representative. The parties may also fill in information about any disabilities they may have, so that the file can be dealt with accordingly. If a party states that they have impaired sight, for example, CRT staff will flag the file to ensure that appropriate methods of communication are used that will not put that party at a disadvantage.

Next, the system requests information on the respondent or respondents, and it cautions the applicant to carefully identify any business respondents. A fact sheet entitled 'How to identify a business' is available. This page marks the first point where the simplicity and straightforward language of the Solution Explorer is arguably lost. If the user indicates that a respondent is a business, they are required to indicate the type of business: corporation, sole proprietorship,

partnership, society/non-profit, and other. It appears likely that this question would stymie many users.

The user is also asked whether they 'want the respondent to pay for dispute-related fees & expenses', and a handful of examples are provided.

On the next screen, the user is asked to indicate the requested resolution: the remedy can be monetary, injunctive ('I want the respondent to do or stop doing something'), or both. The user is also asked about applying interest to their claim. This is another point at which the system's language and explanations are arguably insufficiently clear for the average user. For example, they are required to stipulate the precise date from which interest would start to accrue, but with no explanation as to how to determine that date.

The user is then prompted to break down their total claim and justify the entire dollar figure. They are also asked to provide details on the injunctive relief they are seeking. The system provides helpful language to show the user how the order should be crafted.

In the next step, the user is asked for additional information on their 'claims' in what appears to be equivalent to a full statement of claim. At this juncture, they can import stock sentences generated by the Solution Explorer and earlier entries in the CRT application ('My name is X'; 'My dispute concerns Construction and Renovation – Quality'; etc.) While this is a useful feature, the function of pleadings is not explained and therefore this step may appear repetitive to a user who has just stated on the preceding page what each claim is for.

Lastly, the user is asked to review their application and the assessed fee and confirm their submission. In a notable difference from court submissions, the user is required to confirm that none of the information they have provided at this stage is 'false or misleading'. Under the Act, a person is liable on conviction to a fine of up to $10,000 or a sentence of up to six months for violation of this requirement.[316]

The cost of the application ranges from $75 to $125 depending on the matter, with a $25 surcharge if the application is made on paper.[317] Applicants may apply for a fee waiver if they receive public funds or have a low income.

[316] *CRT Act*, s 92.

[317] In the language of the website, this is framed as the inverse – i.e., as a discount on the online application.

‘Process Issuance’ and Response

At this stage, the application is submitted to the CRT. The tribunal’s staff review the application and if it meets the requirements of the Act – that is, if it appears to fall within the jurisdiction of the tribunal and is not vexatious or abusive – then the CRT will send a Dispute Notice package to the applicant, which is equivalent to issuance of process in a court proceeding. The applicant must serve the Dispute Notice on all other parties within 90 days. E-mail is an acceptable form of service for natural persons. The tribunal’s rules provide special requirements where the respondent is a minor or person lacking capacity, a corporation, etc.

Upon receipt of the Dispute Notice, a respondent can prepare and submit their response through the system. If the respondent does not want the dispute to go before the CRT, they can ask the tribunal to decline to hear it or apply to a court for an order prohibiting the CRT from hearing the dispute, but the available reasons are limited and there is no such option for the types of matters over which the tribunal has been granted exclusive jurisdiction.

Filing a response online is free or $25 if done on paper. If the respondent wishes to counterclaim or add a third party, higher fees apply.

Facilitation

After the responses are filed, the parties await the ‘facilitation’ stage, which is equivalent to case management in court proceedings and indeed is referred to as such in the legislation. In the interim, they are encouraged to pursue informal negotiation.

Like the rest of the process, facilitation takes place remotely. The facilitator (case manager) may be a tribunal member or other tribunal staff. The facilitation typically proceeds through four steps:

- Clarifying the claim
- Facilitated mediation
- Exchange of evidence
- Preparation for the Tribunal Decision Process (i.e. adjudication) if a resolution has not been reached.

Under the Act, the facilitator has the power to dismiss the matter on consent and with the agreement of the parties, they can also convert the facilitation into the Tribunal Decision Process and provide a

binding decision on any or all issues in the dispute.[318] Previously, evidence was exchanged by e-mail, but parties can now upload it into the CRT system.[319]

Tribunal Decision Process

The Tribunal Decision Process (or tribunal hearing process, in the language of the Act) is usually conducted in writing, although telephone and videoconferences may be used where warranted. Critically, the parties must pay a further fee of $50-$100 (depending on the matter) in order to move into this final stage. Although this is likely a token amount for most users, it serves as a further incentive to agree to a settlement earlier.

Enforcement and Review

When the tribunal member releases their decision, any party can register it with the appropriate court (BC Provincial Court or BC Supreme Court, depending on the matter) and enforce it like a court order.

For strata matters commenced before 1 January 2019, there is a statutory appeal to the BC Supreme Court with leave, and therefore enforcement cannot begin until the 28-day appeal period lapses. However, for strata matters commenced after that date, there is no longer an appeal mechanism and enforcement will be available at once. Parties wishing to challenge a decision on a strata proceeding must instead apply for judicial review, which is normally available only within 60 days of the decision.[320] For the purposes of determining the standard of review, the CRT is to be considered an expert tribunal.[321]

In the case of small claims matters, as noted earlier, there is no appeal mechanism, but a party can make a Notice of Objection to the CRT at a cost of $200. The Notice of Objection has the effect of immediately rendering the CRT's decision non-binding and thus unenforceable.[322] The Tribunal will issue to each party a Certificate of Completion. At this juncture, any party to the dispute can take the Certificate of Completion to the Provincial Court and file a Notice of CRT Claim to have the matter heard in the small claims division there.[323] Process will issue in the small claims court, and the

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318 *CRT Act*, s 29.

319 'Online Tribunal Decision Plan' (*Civil Resolution Tribunal*, 8 November 2018) <https://civilresolutionbc.ca/online-tribunal-decision-plan/> accessed 25 January 2019.

320 *Administrative Tribunals Act*, SBC 2004, c 45, s 57(1).

321 *CRT Act*, s 56.7.

322 ibid s 56.1.

323 'How the Process Ends: What If I Don't Agree with the Decision?' (n 303).

proceeding 'continues' (in the language of the rules of the court) with the same pleadings and evidence.[324]

Has the system seen any benefits?

Volume

In the roughly 2.5 years since it began taking cases, the CRT has received 8,810 applications, of which 6,779 disputes have had final resolution in one manner or other.[325] Notably, only 994 (almost 15%) of the latter were resolved through adjudication, meaning that in the others the parties agreed to a resolution (on their own or through the facilitation process), withdrew their claim, or obtained a default decision. In December 2018 alone, 376 new disputes were received. Since the system launched, there have been a total of 179 Notices of Objection (in small claims) or appeals (available in strata matters commenced before 1 January 2019).

Far more individuals are using the Solution Explorer wizard: a total of 33,145 in small claims and 20,109 in strata matters since the Solution Explorer's launch. However, there is no information on how many users **complete** the Explorer. It is possible that some individuals launch it in the hopes of quickly 'getting to the end' in order to submit a CRT application, but ultimately quit without finishing. Such an effect could be regarded ambivalently – as both deterring weak claims and also deterring users who are confused or frustrated by the Solution Explorer. The Solution Explorer's figures may also be artificially high if the users repeatedly start a new session to adjust their answers rather than using their access code to re-enter a previously begun session.

With new jurisdiction for motor vehicle injuries up to $50,000 beginning in April 2019, it can be assumed that the CRT's volume of cases will increase significantly.

Speed

Case duration may be another benefit of the CRT. Writing in late 2017, around a year after the strata jurisdiction came into force and a few months after the CRT started hearing small claims, Ms. Salter explained:

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[324] See *Small Claims Rules*, BC Reg 261/93, R 1.1.

[325] All figures in this paragraph are taken from 'CRT Statistics Snapshot – December 2018' (*Civil Resolution Tribunal*, 14 January 2019) <https://civilresolutionbc.ca/crt-statistics-snapshot-december-2018/> accessed 25 January 2019. The cumulative statistics for the CRT are updated monthly on the tribunal's blog: <https://civilresolutionbc.ca/blog/>.

> From beginning to end, the CRT process is intended to take about ninety days for most cases, and the average total cost to the parties is roughly the same as in Small Claims Court, or about $200. However, many parties will pay less than at Small Claims Court because fees are staged so that parties who resolve their disputes early pay less than those who require the full range of the CRT's services.[326]

By contrast, she noted that small claims cases in the Provincial Court as of 2015 could take 'up to twelve months' simply to be heard.[327] This represents a significant difference.

Dispute resolution

The philosophy of the CRT is centred on avoiding adjudication entirely, and in this respect, the tribunal has seemingly been fairly successful: according to the latest published statistics (current through December 2018), only 15% of all disputes have been resolved in adjudication. This means that the other 85% were resolved by consent or default or were withdrawn. That said, the courts see a significantly lower percentage of cases going through to final adjudication.[328] However, as Shannon Salter and Darin Thompson observe, in courts, a very high percentage of matters may be abandoned due to cost and delay,[329] meaning that the comparatively higher rate of final resolution by adjudication in the CRT nonetheless counts as a success.

User satisfaction

The CRT conducts voluntary participant surveys to monitor user satisfaction, and the results suggest what appear to be fairly high levels of satisfaction, although there do not appear to be any available data for court users to permit a comparison. According to the cumulative 2018-2019 results of the survey (to December 2018),[330] representing 350 respondents, 75% would recommend the CRT to others and 77% agreed or strongly agreed that '[t]he CRT provided information that prepared me for dispute resolution'. Overall, 71% agreed that the online system was 'easy to use', although for this

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326 Salter (n 293) 121.

327 ibid 119 (citing 'Semi-Annual Time to Trial Report of the Provincial Court of British Columbia' (30 September 2015) 13-15).

328 In BC, 3% of civil cases in BC are disposed of at trial. BC Justice Review Task Force, 'Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force' (November 2006) 2 (n 3), <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg_report_11_06.pdf> accessed 10 February 2019).

329 Shannon Salter and Darin Thompson, 'Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2016-2017) 3 McGill J Dispute Resolution 113, 117.

330 All figures in this paragraph are taken from 'Participant Satisfaction Survey – April to December 2018' (*Civil Resolution Tribunal*, 15 January 2019) <https://civilresolutionbc.ca/participant-satisfaction-survey-april-december-2018/> accessed 25 January 2019. Cumulative survey results are published periodically on the CRT's blog at <https://civilresolutionbc.ca/blog/>.

question, the difference between strata users (63%) and small claims users (75%) was marked more than for most of the other questions. One of the lowest measures of satisfaction (69% overall) was recorded for the question 'The CRT process was easy to understand', suggesting that improvements may still be needed to clarify the language of the system, introduce additional aids, etc. However, the lowest level of agreement was recorded for the question 'The CRT handed my dispute in a timely manner' at just 61% overall (55% for strata users and 63% for small claims). It is unclear whether further speed is achievable. It should be noted that these survey results represent a small fraction of users of the CRT, and the respondents to the survey may be self-selecting in various ways that could skew the data. There may also be difficulties in separating feedback about the process from the outcome of the proceedings in question.

Has the system seen any problems?

Review of decisions

As noted above, the availability of appeals for strata matters has been eliminated for all matters initiated from 1 January 2019 onwards. Comments made by the Minister of Justice before the Legislative Assembly in the course of debating the amending bill indicate that this change was made to address negative feedback about the appeal process:

> *M. Lee:* In terms of repealing division 6 of part 5, this would…. Just again, with the Attorney General, if he could clarify the rationale for this proposed amendment, which would delete the right of appeal for strata property final decisions.
>
> *Hon. D. Eby:* This relates to appeal provisions for strata property claims — the section that's being struck here. What it did was set out a two-step process for appealing a decision of the tribunal — how you get to Supreme Court.
>
> Generally, the feedback we received from the civil resolution tribunal about feedback they received from the public about this was that this process was inefficient, it wasn't very well understood, it was confusing to people, but everybody understood how judicial review worked.
>
> To avoid the inefficiency that this section unintentionally created and be consistent with review procedures set out for every other type of case under the civil review tribunal act, this was repealed, and it'll just go ahead as judicial review, just like all the other

> review procedures set out in all other cases under the act. That's why this section's being repealed.[331]

Impact on courts

While not a problem with the CRT per se, the semi-annual data on 'time to trial' of small claims lawsuits published by the Provincial Court[332] indicate that despite the existence of the CRT, wait times for trial in small claims court have not improved and may have slightly increased in certain categories. However, caution must be exercised in interpreting these data. First, it is possible that small claims court wait times would have increased even more were it not for the CRT. Second, in this cursory review, it is not possible to take into account a possible transfer of resources (judges, courtroom time, clerks, etc.) away from small claims and into other business lines of the Provincial Court that might have taken place as a direct response to an anticipated decrease in demand due to the CRT.

Statutory reporting requirements

As a final remark, under the terms of the Act, the chair of the tribunal is required to submit an annual report on the activities of the CRT to the Minister of Justice '[a]s soon as practicable after the end of the fiscal year of the government'. The Minister must then either 'promptly lay the report before the Legislative Assembly if it is then sitting, or […] if the Legislative Assembly is not sitting, file the report with the Clerk of the Legislative Assembly'.[333] As of writing, at least two annual reports should have been laid before the Assembly or filed with the clerk. However, no CRT annual report was located in research for this report, nor was any reference to any annual reports found.

Open Justice: to what extent does the ODR mechanism affect the openness and transparency of justice?

Open justice – or the 'open court principle', as it is generally known in Canada – can be divided into three concepts. The first is the right of the general public to attend proceedings in court; note that in Canada, this right generally entails physical presence (or media presence and subsequent reporting), as there is no general practice of broadcasting court proceedings, other than those of the Supreme Court of Canada. The second concept is the right of the general public to read the

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331 British Columbia, Hansard, 41st Parl, 3d Sess, 7 May 2018 at 4373-74 (ellipsis in original).

332 The time-to-trial reports are available at 'Court Reports – Judicial Resources' (*Provincial Court of British Columbia*) <http://www.provincialcourt.bc.ca/news-reports/court-reports> accessed 25 January 2019.

333 *CRT Act*, s 82.

decisions of courts. The third is the right of the general public to view and make copies of any materials found in a court file. All three rights are subject to limitations in the public interest, which may vary from one province to the next (e.g., publication bans on the names of children and sexual assault victims, prohibitions on exhibits containing child pornography, etc.).

The CRT's policy on 'Access to Records and Information in CRT Disputes' expresses a specific concern for open justice. Its Background section states:

> The CRT's online dispute resolution process replaces a model where the trial or hearing is held in-person, in a courtroom that is open to the public. In most cases in the courts, the public has physical access to the hearing rooms and can observe the proceedings and see the parties present their evidence and arguments. Parties can search physical records at court registries to access pleadings, evidence and court decisions.
>
> As most CRT hearings involve written submissions and the hearings are rarely conducted in-person, **there needs to be some way of providing transparency** for the Tribunal's decision-making process. [334]

Attending proceedings

Members of the public cannot 'attend' hearings of the CRT, as these are generally conducted in writing or, if necessary, by telephone or videoconference.[335] While the facilitation sessions may be held in real time, they are private – analogously to case conferences in court proceedings. This point is made in the CRT's privacy policy:

> Another consideration reflected in this policy is that parties may negotiate resolution of a dispute that is before the court away from the court or in a court-hosted environment that is closed to the public (e.g. a small claims settlement conference). Parties who are engaged in discussions intended to resolve a CRT dispute should be entitled to a similar level of privacy and confidentiality, even though the discussions may be facilitated through the CRT's online platform.[336]

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[334] Policy 001-20180501 (*Civil Resolution Tribunal*, 1 May 2018) 2 <https://civilresolutionbc.ca/wp-content/uploads/2018/05/Access-to-Info-in-CRT-Case-Records-20180501.pdf> accessed 10 February 2019 (emphasis added).

[335] See 'How Will the CRT Decide My Dispute?' (*Civil Resolution Tribunal*, nd) <https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/tribunal-decision-process/#how-will-the-crt-decide-my-dispute>.

[336] Policy 001-20180501 (n 334) 2.

Reading decisions

The tribunal publishes its decisions on its website (a practice that has become obligatory for non-default decisions since 1 January 2019),[337] and most if not all decisions have been picked up by legal databases that also publish decisions of other tribunals and courts.[338] On the other hand, the legislation gives the CRT discretion as to the publishing of the **reasons** for decision.[339] Nevertheless, it does appear that the CRT's standard practice is to publish the reasons as well. It may be noted that in reporting all of its decisions, the CRT exceeds the normal practice of small claims courts in Canada.[340]

Accessing the tribunal file

The *Act* expressly requires the tribunal to 'protect personal information in its custody or under its control'.[341] However, the Act also provides that BC's privacy legislation does not apply to the CRT's records of proceedings (somewhat analogously to that legislation's exemption for court records).[342] meaning that although there is no active duty to provide access to the public upon request, there is also no prohibition against doing so, beyond certain exceptions.

This interpretation is borne out by the CRT's privacy policy, which applies to records in the CRT's care, custody, or control that are linked to a CRT dispute, unless those records are filed with another agency or a court. The policy takes a variable approach to public access to records, depending on the stage of the dispute that has been reached. At the intake stage (i.e. prior to any response being filed), 'only CRT staff and the parties to the dispute (including their approved representatives) have access to the CRT's dispute records'.[343] During the negotiation and facilitation period (i.e. after the response is filed but prior to any formal adjudication), 'access to most dispute records is still limited to CRT staff and parties to the dispute', and the policy further provides that pursuant to the Act, 'the CRT will not provide non-parties access to records of discussions or communications aimed at

337 *CRT Act*, s 85(1)(d).

338 See e.g. the CanLII database: <https://www.canlii.org/en/bc/bccrt/>. CanLII indicates that its holdings for the CRT date back to 2017 and that it has a total of 1,027 CRT decisions (as at 7 February 2019). This is actually higher than the total number of adjudicated matters the CRT itself reports, namely 994 since the tribunal started accepting cases in 2016; see 'CRT Statistics Snapshot – December 2018' (n 325). However, the discrepancy may be due to the fact that the CanLII statistic is more recent by approximately six weeks.

339 *CRT Act*, s 85(2)(c).

340 For example, CanLII, the same database cited at n 337, has only 868 decisions of the British Columbia Provincial Court that contain the words 'small claims', dating back to 2000, as compared to 1,027 from the CRT since 2017.

341 *CRT Act*, s 86(1).

342 ibid s 90.

343 Policy 001-20180501 (n 334) 6.

resolution of the dispute, even after the dispute is resolved'.[344] While the prohibition on access to negotiation documents coincides with court practice, the CRT's blanket ban on public access to any materials before commencement of the hearing – the equivalent of trial – is much stricter.

If the dispute proceeds to a hearing (adjudication), the policy provides:

> The public is able to search for and obtain records for most disputes in the Tribunal Decision Process stage. As well, non-parties can request access to most dispute records that do not involve discussions or communications regarding settlement of the dispute. To access the records, non-parties must complete a Public Information Request Form and pay the applicable fees. CRT staff will review the request and, if authorized by this policy, provide the requester with access. In some cases, the request may be reviewed by a CRT member [i.e. an adjudicator], to ensure providing access is consistent with the purposes of this policy.[345]

This level of public access and the process for obtaining access apply both during and after the hearing stage, and largely resemble the access provided by courts. There are special limitations on access to records that contain information about minors and individuals lacking capacity. In addition, requests may be made to the CRT chair at any stage for an order to seal all or part of a dispute file.

A summary of access for specific document types is provided in the policy[346] and is reproduced below:

[344] ibid 7 (citing *CRT Act*, s 89).
[345] ibid.
[346] ibid 8-10.

Legend:

Y:	Yes – can be accessed	N:	No – cannot be accessed	R:	Subject to review by CRT staff or member
P:	Can be accessed by party record is about	SR:	May be searchable, subject to review	N/C	If Intake/Facilitation, No; If complete, Yes
L/V	Listen or View only	S:	Searchable	W:	Available on website

Type of Record (electronic or physical)	CRT Staff	CRT Members	Applicant*	Resp.*	Public
Application for Dispute Resolution	Y	Y	Y	Y	N/C
Dispute Notice	Y	Y	Y	Y	N/C
Proof of Notice Form	Y	Y	Y	Y	N/C
Dispute Response Form	Y	Y	Y	Y	N/C
Request for Waiver of Fees Form	Y	Y	P	P	N
Request for Directions on How to Provide Notice Form	Y	Y	Y	Y	SR
Counterclaim/Third Party Claim Form	Y	Y	Y	Y	N/C
Other CRT Forms	Y	R	R	R	SR
Party contact information	Y	Y	Y	Y	N/C
Indices of CRT disputes	Y	Y	Y	Y	N/C
Party special circumstances	Y	Y	P	P	N
Request for representative	Y	Y	Y	Y	N/C
Discussions and communications between parties and/or CRT, regarding resolution of dispute	Y	N	Y	Y	N
Discussions and communications between CRT case manager and one party, regarding resolution of dispute (caucusing)	Y	N	P	P	N
Notes, summaries, transcripts or other records of facilitated dispute resolution activities	Y	N	Y	Y	N
Settlement Agreement or draft Settlement Agreement	Y	N	Y	Y	N
Other correspondence between CRT and one or more parties	Y	R	Y	Y	SR
Notices from CRT to one or more parties	Y	Y	Y	Y	SR
Tribunal Decision Plan	Y	Y	Y	Y	N/C
Evidence disclosed by a party during Intake or Facilitation	Y	N	Y	Y	N
Evidence submitted by a party during Tribunal Decision Process	Y	Y	Y	Y	S
Submissions and arguments submitted by a party to the CRT (other than as part of TDP)	Y	Y	Y	Y	SR
Summons Form	Y	Y	Y	Y	R
Witness statements submitted during Tribunal Decision Process	Y	Y	Y	Y	SR
Evidence submitted by a witness during Tribunal Decision Process	Y	Y	Y	Y	SR
Consent order	Y	R	Y	Y	S
Default/non-compliance order	Y	R	Y	Y	S
Tribunal final decision and order	Y	Y	Y	Y	W
Request for Cancellation of Final Decision or Dismissal Form	Y	Y	Y	Y	SR
Other Tribunal decisions and orders	Y	Y	Y	Y	SR
Recordings of Oral Hearings	Y	Y	L/V	L/V	L/V
Transcripts from Oral Hearings (if filed with CRT)	Y	Y	Y	Y	S
Public Information Request Form	Y	Y	R	R	P
Other records, not identified	Y	R	R	R	R

* Includes representative of Applicant or Respondent

Data: are there any proposals for storing and using data?

The Act provides for the protection of privacy in relation to storage and handling of data that constitutes personal information:

> 86 (1) The tribunal must protect personal information in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.
>
> (2) The tribunal must ensure that personal information in its custody or under its control is stored only in Canada.
>
> (3) For the purposes of
>
> (a) publication under section 85 [publication of tribunal orders and other information], or
>
> (b) otherwise providing or making accessible information or records referred to in section 90 [application of *Freedom of Information and Protection of Privacy Act*] or other tribunal information or records,
>
> the tribunal may remove or obscure personal information or replace personal information with anonymous identifiers.

The CRT's privacy policy sets out detailed information about the handling and storage of all dispute-related data, including specific software and hardware and the locations of the servers.[347]

The privacy policy is principally concerned with personal information, and hence does not refer to production or disclosure of aggregated data. However, the CRT's practice of publishing summary statistics on a regular basis indicates that the tribunal is maintaining a database that is capable of at least rudimentary analysis.[348] The search capabilities of the database of published decisions provides a means for the public to conduct research as well, in the same way that jurisprudence of courts can be researched. However, nothing in the public record suggests that there are any plans to employ the data in more comprehensive and systematic ways, especially not the substance of the decisions.

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[347] ibid 4-6.

[348] Indeed, section 82(1) of the *CRT Act* requires the CRT to produce an annual report that includes, *inter alia*, performance indicators such as "the number, nature, time to resolution and outcome of disputes that came before the tribunal" and "details of the number and nature of disputes before the tribunal that were outstanding at the end of the preceding fiscal year."

It may be relevant to note that although BC's privacy legislation (the *Freedom of Information and Protection of Privacy Act*) permits disclosure of personal information for certain research purposes, subject to various conditions,[349] the *CRT Act* excludes dispute-related data from the purview of this privacy act, as noted above.[350] As a result, there appears to be no framework applicable to the CRT that is specifically tailored to research uses of data held by the tribunal.

Other relevant information

The status of the CRT as a tribunal rather than a court potentially raises questions as to the law its decision makers apply in reaching decisions. Most tribunals are more or less tasked with applying their home statutes. In the case of the CRT, that is still somewhat true for strata matters, but small claims disputes tend to fall into areas of the law largely left to the common law, sounding in contract, tort, or property. While the CRT's mandate indicates that dispute resolution shall be provided 'in a manner that applies […] principles of law and fairness', it is unclear whether tribunal members are in fact bound to apply the law as strictly as would be the case in a court. This is all the more the case since, as noted above, there is no explicit requirement that the tribunal members be lawyers or have other legal training. As it would certainly not be expected that the parties would come to the tribunal process with knowledge of the law (as the CRT is specifically designed with unrepresented individuals in mind), this creates the prospect of an information deficit on all sides as to what the law requires. In connection with this, it is notable both that no grounds are needed to obtain an automatic vacating of the decision using the Notice of Objection mechanism for small claims matters and that in any subsequent trial at the court, it does not appear that direct consideration of the CRT's reasons is envisioned.[351] This raises at least a theoretical possibility that a party will need to go through the time and expense of a CRT decision that may be wrong in law, just in order to gain access to the Provincial Court and thus obtain a properly "legal" decision – yet one that will not in fact quash or overrule the CRT's decision, strictly speaking, given that the CRT's decision will not be before the judge.

Another point that bears noting is that the status of lawyers and other representatives in the CRT process is ambiguous. The CRT website states "You are welcome to use a lawyer or a trusted friend or family member to help you with negotiation, facilitation, and the tribunal decision process. But it's

[349] RSBC 1996, c 165, s 35.

[350] *CRT Act*, s 90.

[351] Under the *Small Claims Rules*, neither party is required to file the CRT's decision with the court (R 1.1(8)). Moreover, the proceeding is described as 'continuing' the claim initiated at the CRT rather than considering the outcome (R 1.1(9) et passim).

important for you to be there to speak for yourself in the dispute **too**" (emphasis added).[352] As noted above, the application process also includes an opportunity for the parties to designate their lawyer.

Yet the Act and the rules suggest that the use of a lawyer or other representative is regarded as exceptional and is conditional on permission being granted by the Tribunal.[353] This appears to be borne out in practice as well. In a 2018 parliamentary debate on the amending bill that year, the minister provided some statistics on the use of lawyers before the CRT:

> For small claims, [...] there were 28 requests for a lawyer. […] It was approved 11 times, which is a 39 percent approval rating. For strata, there were 120 requests for lawyers, and 45 were allowed. That's a 38 percent approval rating. For non-lawyer advocates, there were 140 requests for advocates in small claims matters, permitted 106 times.

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352 'Tribunal Decision Process: Can I Use a Lawyer?' (*Civil Resolution Tribunal*, nd), <https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/tribunal-decision-process/#can-i-use-a-lawyer> accessed 10 February 2019.

353 Section 20 of the *CRT Act*, *supra* note 6 provides (emphasis added):

> 20 (1) **Unless otherwise provided under this Act, the parties are to represent themselves in a tribunal proceeding**.
> (2) A party **may be represented by a lawyer** or another individual with authority to bind the party in relation to the dispute **if**
> (a) the party is a child or a person with impaired capacity,
> (b) the rules permit the party to be represented, or
> (c) the tribunal, in the interests of justice and fairness, permits the party to be represented.
> (3) Without limiting the authority of the tribunal under subsection (2) (c), the tribunal may consider the following as circumstances supporting giving the permission:
> (a) another party is represented in the proceeding;
> (b) the other parties have agreed to the representation.
> (4) A person representing a party in a tribunal proceeding must be a lawyer unless
> (a) the rules otherwise permit, or
> (b) the tribunal is satisfied that the person being proposed to represent the party is an appropriate person to do this.
> (5) In the case of a party that is a corporation, partnership or other form of organization or office with capacity to be a party to a court proceeding, the person acting for the party in the tribunal proceeding must be
> (a) a director, officer or partner of the party,
> (b) an individual permitted under the rules, or
> (c) an individual permitted by the tribunal.

The 'current' *Rules* of the Tribunal as of 10 February 2019 (dated July 12, 2017, available at <https://civilresolutionbc.ca/wp-content/uploads/2017/07/CRT-rules-effective-July-12-2017.pdf>) state:

> 35) At any time, a party can **ask for permission to be represented** in a dispute by providing information requested by the tribunal.
>
> 36) In **considering a request for permission to be represented**, a tribunal employee or member may consider whether
> a) any other party in the dispute is represented and if so, whether that representative is a lawyer or other person supervised by a lawyer,
> b) every party in the dispute has agreed to representation,
> c) the person proposed as the representative is appropriate, and
> d) in the interests of justice and fairness, the party should be permitted to be represented.

> That's a 76 percent approval rating. For strata matters, 125 requests for lay advocates, approved 69 times. That's a 55 percent approval.
>
> Over the whole of the groups, advocates or lawyers were permitted 70 percent of the time in small claims matters when they were requested and 47 percent of the time in strata matters when they were requested. When you combine everything together, 56 percent of the time — whether it was strata or small claims, lawyer or not — an application for an advocate was approved by the tribunal.[354]

How can we reconcile the legislation and the statistics above with the rather permissive language of the website? It may be that the CRT has come to recognize the practical difficulties of purporting to limit the use of legal counsel in a process that is to a great extent written and never conducted in-person, where reliance on legal representation could be more directly monitored. If so, while the inconsistency is undesirable, it could be argued that the approach reflected on the website is to be preferred, as it should reduce the likelihood that scrupulous parties may abstain from seeking legal advice in reliance on the legislation and thereby find themselves disadvantaged by obeying the letter of the law. On the other hand, it could instead be argued that, given the high cost of retaining a lawyer and its impact on access to justice, a system that **consistently** encourages claims to be pursued without legal representation is preferable.

[354] British Columbia, Hansard, 41st Parl, 3d Sess, 7 May 2018 at 4371 (Hon D Eby).

CONCLUSIONS

1. In Summary

The following general conclusions can be drawn from the foregoing analyses:

a. There is a wealth of useful information and guidance to be obtained from the implementation and use of ODR in other jurisdictions.

b. In practical terms, the technology is available to create a workable ODR system.

c. Ensuring that practical reality, in terms of the design and functionality of an ODR system, lives up to theoretical potential will require investment of time and resources.

d. It is essential for detailed studies to be undertaken in order to determine the success of ODR and to identify areas for improvement.

This chapter will expand on each of these conclusions in turn.

2. There is a wealth of useful information and guidance to be obtained from the implementation and use of ODR in other jurisdictions

Neither the concept of ODR nor the motivations for its introduction are unique to England and Wales. All of the jurisdictions considered in this report have introduced ODR systems in an attempt to reduce costs and increase efficiency. Just as Lord Woolf and Lord Justice Jackson drew on practices and lessons from other jurisdictions in preparing their reports on the reform of civil justice, so there is scope to do the same in implementing an ODR system.

Although the systems considered vary in how long they have been running and the stage of implementation they have reached, they are all at a more advanced stage than the system in England and Wales. This means that they provide ideal comparators from which to draw guidance on implementation and use of ODR systems, in terms of practicalities, means to achieve positive results, pitfalls to avoid and lessons to learn.

Consideration of these jurisdictions should not, however, take the form of a static, one-time analysis. Continual, or at least periodic, monitoring of the progress and development of other ODR systems

will allow the system in England and Wales to take into account of lessons learned elsewhere on an ongoing basis.

3. In practical terms, the technology is available to create a workable ODR system

The jurisdictions considered have used different software and technology to create usable systems.

- British Columbia's Solution Explorer and application/response/document management platform show that the technology is available to triage disputes, collate relevant information and deal with all steps in proceedings, from initiation of the claim through mediation to sharing of evidence and written adjudication. Lessons could be learned here that would avoid repeating the unsuccessful attempt to create a 'decision tree' for the England and Wales online court (see p. 23).

- Victoria's Modron system demonstrates that video and file-sharing technologies can be used to exchange evidence and have matters heard.

- The Online Registry and Online Court established in New South Wales show that electronic structures can be put in place for both filing documents and making applications and dealing with case management matters.

- The messaging system used in New South Wales' online court indicates that it is possible for an online court to incorporate dialogue between litigants and decision-makers.

- The Matterhorn system used in Michigan exemplifies the fact that it is possible to digitize existing procedures.

As indicated in earlier chapters, care needs to be taken when considering statistics on matters such as usability and user satisfaction in respect of these systems. None of them has a perfect record, and insufficient research appears to have been done into precisely why users are satisfied or dissatisfied, as the case may be. The position in the United States in particular is that commentary on the success of the systems originates from the developers of the relevant technology and others with a vested interest in the system succeeding. This highlights the need for independent research. (See section 5, below, for further comments.)

What is clear, however, is that from a purely practical perspective, the technology is available to enable the development of a workable and usable ODR system.

4. Ensuring that practical reality lives up to theoretical potential will require investment of time and resources

If an ODR system is to function successfully, it must be sufficiently resourced in terms of funds, time and personnel. It has already been noted that HMCTS' ODR project is 'under-resourced', which is an ignominious start in life for a project of such fundamental importance.

Such investment is important not only in respect of creating and maintaining the ODR system, but also in providing ancillary services. The British Columbia CRT's Solution Explorer, for example, provides fact sheets for users on particularly important points in the initial steps of determining how to resolve their dispute (p. 75). Similarly, the ODR system in New South Wales provides a range of assistance for users, and ties in with the LawAccess scheme aimed at unrepresented litigants (p. 53). Determining when such services are required, preparing them and keeping them up to date requires time and resources. Care must also be taken to ensure that information and assistance is accurate and user-friendly. Concerns are raised, for example, about the position in New South Wales, where there may be too much material, some of which is aimed at lawyers rather than lay litigants, and which contains some apparent inconsistencies (p.61).

These ancillary services are likely to be key to the success of an ODR system, to ensuring that it meets its aims in terms of access to justice and to ensuring that it does not violate principles of open justice. The opening of viewing centres and installation of video booths, for example, would assuage fears regarding threats to open justice, but would require investment and clear logistical planning. The 'Assisted Digital' service in England and Wales would improve access to justice for technologically illiterate litigants, but only if sufficient resources are applied to creating, maintaining and offering the service. The current trial (p.19) should be monitored closely in this regard.

ODR systems must also be flexible and adapt in order to deal with any issues that arise as implementation and use continues. British Columbia's CRT, for example, collects feedback from users on an ongoing basis which it publishes approximately monthly on a blog (p. 74). The system continues to evolve on the basis of this feedback and other data. This emphasises the fact that investment in an ODR system is not a one-time investment. It must be continual, in order for the system to develop and meet the continuing needs of its users.

Investment in the ODR system must be tied to the results of focused research on the use and functioning of the system and on the extent to which it is achieving its aims. This brings us to our final and most important conclusion.

5. It is essential for detailed studies to be undertaken in order to determine the success of ODR and to identify areas for improvement

All of the jurisdictions analysed have one important matter in common: there are serious deficiencies in the research undertaken to date on key issues such as uptake, usability, user satisfaction, cost and efficiency.

- In British Columbia, the CRT publishes summary statistics on system uptake and also conducts voluntary participant surveys to monitor user satisfaction. Levels of satisfaction are relatively high (p.82), but are significantly lower than, for example, the figures from Michigan (p.37). However, caution must be exercised in comparing these results, in the absence of information about the precise questions that users were asked, the timing of the survey in relation to any given user's dispute, the independence of the survey mechanism, selection criteria for the survey, and other factors.

- The New South Wales Online Court has not been the subject of any extended analysis from an access to justice perspective. The initiative does have relatively limited aims, i.e. improving access to justice through cutting down lawyers' travelling and attendance time and thereby reducing costs. However, there can be no determination as to whether those aims have been met without focused research.

- In Michigan, while figures suggest that the ODR system has increased efficiency and reduced cost, the source of those figures is Court Innovations, the company that manufactures the Matterhorn system. There is a lack of detail in the available figures, in particular as regards precisely what cost savings have been achieved. User surveys (again conducted by Court Innovations) show very high levels of ease of use and understanding on the part of users of the system, but there are no details as to what issues were encountered by those who did *not* find the system easy to use and/or who did *not* fully understand the state of their case throughout the process.

- The ODR system in Utah is too recent for any worthwhile research to have been undertaken or statistics produced.

The ODR systems in all of these jurisdictions could benefit from detailed studies being carried out with a view to determining whether the system is achieving its aims. Moreover, if an ODR system is to be successful in England and Wales, such studies must be carried out here. These studies must

focus not only on reductions in cost and increases in efficiency, but also on the extent to which litigants find the system easy to use and their satisfaction with the manner in which their dispute was resolved. It will be important to focus not only on those users who *are* satisfied, but also on those who are *not*. It is the latter who may in some way be being failed by the ODR system and who are not being provided with the access to justice to which they are entitled. As such, it is their views that will enable the system to be adapted and improved.

Another important area of focus is users' satisfaction with the method by which their dispute was resolved. It has been noted (p. 22) that there was a low level of interest in mediation in the England and Wales OCMC private beta pilot. This may suggest that litigants' views are not in line with those responsible for the system in terms of the focus on mediation and settlement as alternatives to adjudication. This raises wider, more fundamental, questions of the nature of the justice to which litigants are afforded access.

6. In Conclusion

The implications of ODR systems for access to justice, including open justice, remain to be seen. In this regard, we found a number of common concerns across each jurisdiction. There is as yet no clear answer to the question of whether an online court will be able to facilitate easier access to the court system and mitigate some of the challenges currently facing England and Wales, arising from cuts to legal aid and the difficulties in obtaining legal representation. Proponents of the system suggest that ODR will reduce the costs of court litigation and therefore enable greater access to the courts, and that ODR may prove especially beneficial for individuals who are located far from their nearest courts. However, the extent to which these benefits will be realised remains unknown and ODR could, given the challenges described above, prove a barrier in itself to accessing justice. In terms of open justice, HMCTS has not fully articulated or publicised how it will protect and ensure hearings remain open to the public. This remains an important consideration, particularly as transparency and the scope of public governance are important underpinnings of our justice system. Independent, ongoing and thorough research is required to ensure that these fundamental principles are upheld.

ANNEX 1

Pro-forma Research Questionnaire

Jurisdiction:
[Country/ State/Province]

Why this jurisdiction:
[*Briefly explain why this jurisdiction was chosen]*

Introduction to the online dispute resolution (ODR) system in your jurisdiction:
[Name of the ODR system, when was it introduced, type of claims]

Why was ODR introduced in this jurisdiction?
[Goals, purpose, anticipated savings? Anticipated benefits? Justification for it. Objective of the reform – digitalisation of existing processes or re-conception of the litigation process?]

How was ODR implemented?
[*Detail any pilot projects, implementation phases etc. how was it funded? How much was the budget?]*

Describe, in detail, the ODR process:
[*E.g. how do you start a claim, how is the case managed, does the system provide information and/or advice? What are the stages involved? Any limitations e.g. only certain types or value of claims/ other eligibility requirements]*

Has the system seen any benefits? If so, please provide details:
[Describe any seen benefits, do these match the aims/ anticipated benefits/ reasons for its implementation? Consider implications for access to justice but feel free to expand the scope beyond this to provide commentary on any other benefits of the system]

[Distinguish between views of those behind the reforms (Ministry of Justice, courts service, judiciary) and those of users of the system. Compare/contrast where appropriate.]

Has the system seen any problems? If so, please provide details:
[*Describe any problems with the system. Consider implications for access to justice but feel free to expand the scope beyond this to provide commentary on any other problems/ pitfalls of the system]*

[Distinguish between views of those behind the reforms (Ministry of Justice, courts service, judiciary) and those of users of the system. Compare/contrast where appropriate.]

Open Justice: **to what extent does the online dispute resolution mechanism in your jurisdiction affect the openness and transparency of justice?**
[E.g. If there is no longer a public gallery, is there still a way for the public to view/ be involved in proceedings?]

Data: Are there any proposals for storing and using data?
[E.g. has any attention been given to how data is collected, type of data collected, how it will be stored, the value of using the data, how the data could be used, any promises or pitfalls associated with this?]

Any other information you think is relevant: