JUSTICE IN YOUR PYJAMAS?

ANALYSING A PROPOSAL FOR CONTINUOUS ONLINE RESOLUTION IN NEW ZEALAND

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List of Abbreviations

ADR	Alternative Dispute Resolution
AVL	Audio-visual link
CODR	Complete Online Dispute Resolution
COR	Continuous Online Resolution
HMCTS	Her Majesty's Courts and Tribunal Service
ODR	Online Dispute Resolution
LiP	Litigant in person
SSCS	Social Security and Child Support Tribunal

Introduction

Imagine that instead of trekking to the courthouse to resolve a dispute, you could be "dressed… in a fine silk dressing gown or your rabbit-eared onesie… open your laptop from your kitchen table and give your evidence".[1] Continuous online resolution (COR) would allow you to do just that, and at a time that is convenient for you. It is a process that could fundamentally change the adjudication process for some disputes as it is asynchronous, more inquisitorial, and removes the hearing-centric component.[2] It could also harness the promise of technology, which is developing at an exponential rate and is revolutionising many aspects of our daily lives but is yet to bring about substantial change to the way our court system operates.[3]

Responding to and taking advantage of technologies is one of two threads running through this paper. The second is the justice gap, which describes an unmet need for civil justice.[4] COR seeks to tie these two issues together by using technology to make the justice system more accessible. The Rules Committee is open to implementing new processes in New Zealand's civil jurisdiction in order to increase access to justice and there are various creative solutions that can be canvassed to deliver this.[5] However, as Roscoe Pound observed more than a century ago "dissatisfaction with the administration of justice is as old as law."[6] Access to justice is a longstanding problem, and there is no one solution, but implementing COR could be a step in the right direction. This paper seeks to examine whether COR could be useful at increasing access to justice, and if so, where it would be most useful.

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[1] Lord Justice Fulford "Keynote Address" (Bond Solon Expert Witness Conference, Westminster, 4 November 2016).

[2] Joe Tomlinson *Justice in the Digital State: Assessing the Next Revolution in Administrative Justice* (Bristol Policy Press, Bristol, 2019) at 54.

[3] Geoffrey Venning "Online Court: Refresh For Justice" (ODR Forum 2018, Auckland, 14 November 2018) at 6 and 8.

[4] Helen Winkelmann "Access to Justice – Who Needs Lawyers" (2014) 13 OLR 229 at 7.

[5] The Rules Committee *Improving Access to Justice: Initial Consultation with the Legal Profession* (11 December 2019).

[6] Roscoe Pound "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 40 Am L Rev 729 at 729.

Chapter I describes the COR process and considers a useful comparative model – a COR pilot in the United Kingdom. This chapter also highlights the factors for considering COR in New Zealand, which include advances in technology, the justice gap, and an openness to new processes.

Chapter II analyses COR from a litigant's perspective. It sets out that whilst COR may have many attractive features, there are also risks which need to be taken into account. COR may remove physical barriers, reduce costs and minimise confusion. However, these benefits have to be balanced against concerns about digital exclusion, disengagement, losing kanohi ki te kanohi, and reduced opportunities for appeal.

Chapter III examines COR through a jurisprudential lens. It addresses how moving away from a traditional model of judging raises questions about open justice, remote justice, the creation of precedent, the role of the judiciary, and the right to legal counsel.

Chapter IV explores where COR would be most useful. COR is unlikely to be an appropriate mechanism for all classes of disputes. This chapter proposes that COR should be an option available to litigants. Litigants would be asked whether they want to use COR as a case management tool, and if so, whether they also want to use it to obtain a preliminary decision. If the answer to either of those questions is no, then they will revert back to the traditional hearing process. Litigants who would benefit from having this option include litigants in person, litigants with disabilities, and well-educated and well-heeled litigants.

Chapter V considers whether our current legislation is flexible enough to permit a change to this online model, or whether legislative reform would be required to implement COR. It examines both procedural rules and primary legislation.

A range of approaches can be taken to analyse the implementation of COR in New Zealand. These include looking at the economic, administrative and privacy concerns COR raises, but these are outside the scope of this paper. Instead, this paper focuses on the fundamental initial question of whether COR would deliver increased access to justice in New Zealand's civil jurisdiction, and if so, in what circumstances could it be used?

I An Overview of Continuous Online Resolution

COR has been described as an innovation that uses technology to transform our current processes rather than merely doing "old things in new ways".[7] This chapter introduces this radical innovation by outlining alternative dispute resolution (ADR), the COR process, its distinguishing features, and also considers a COR pilot in the United Kingdom. Further, it highlights the reasons for considering COR in New Zealand's civil jurisdiction, which includes developments in technology, a willingness to consider new processes, and an unmet need for justice.

A Alternative Dispute Resolution

There are already a range of techniques that can be used to resolve disputes without going to a courthouse. ADR describes the variety of methods that are used to resolve disputes without a traditional court adjudication process.[8] These alternative methods, such as mediation, conciliation, negotiation, and early neutral evaluation (ENE), are not new. Arbitration has been used during Roman times and mediators have been used from as early as the 1350s.[9] While these techniques may not be novel, they have developed to keep pace with society, and interest in them has increased. This spike in interest is partly attributable to ADR being perceived as cheaper, more convenient, and more effective in comparison to traditional court process.[10]

Online Dispute Resolution (ODR) is a branch of ADR services that are delivered via the internet.[11] ODR emerged as a result of the growing popularity of e-commerce[12] and an early example of ODR is eBay's online mediation service which was developed in 1999 and resolves approximately 60 million disagreements between traders each year.[13] As technological

[7] Richard Susskind *Online Courts and the Future of Justice* (Oxford University Press, Oxford, 2019) at 34.

[8] Hazel Genn *Judging Civil Justice* (Cambridge University Press, Cambridge, 2010) at 81.

[9] Maxwell Fulton *Commercial Alternative Dispute Resolution* (Sweet & Maxwell, London, 1989) at 124.

[10] Susskind, above n 7, at 115.

[11] Susskind, above n 7, at 115.

[12] Kori Clanton "We Are Not Who We Pretend To Be: ODR Alternatives to Online Impersonation Statutes" (2014) 16(1) CJCR 323 at 349; and Thomas Schultz "Does Online Dispute Resolution Need Government Intervention? The Case for Architectures of Control and Trust" (2004) 6 NC JOLT 71 at 73.

[13] John Dyson *Online Dispute Resolution for Low Value Civil Claims* (Civil Justice Council, February 2015).

capabilities have increased, ODR has developed in its reach and ability. COR is an example of such a development.

B The Continuous Online Resolution Process

COR is defined as "the early evaluation of an appeal with the opportunity to gather further information and resolve it without a hearing".[14] This definition is used to describe COR in the United Kingdom, where COR is only used for appeal decisions. It is possible that the United Kingdom has limited the pilot to only appeal decisions because they generally have a tighter scope and the evidence is already refined. This can contribute to the jurisdiction being easier to trial new processes in. It is important to acknowledge that this definition is being expanded for the purposes of this paper and that the following discussion is not limited to only appeal decisions. It is likely that there is nothing prohibiting COR from being used for first instance decisions in addition to appeal decisions. Thus, COR can be defined as the early evaluation of a *dispute* with the opportunity to gather further information and resolve it without a hearing.

The process of bringing a claim by this "entirely new route to justice" comprises of five key steps.[15] These are set out in figure 1 and can be summarised as follows:

1. Appellant submits a claim;
2. Respondent replies;
3. Judge[16] ensures that they have all relevant information by engaging with appellant and respondent as needed;
4. Judge shares view with parties; and
5. Parties accept or reject decision.

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[14] Joshua Rozenberg "Justice Online: Are We There Yet?" (Gresham College Lecture, Bernard's Inn Hall, London, 21 February 2019).

[15] These steps are based of the United Kingdom COR pilot and are set out in HMCTS *Continuous Online Resolution: Social Security and Child Support Tribunal (Appendix B)* (February 2019) <https://ajc-justice.co.uk/wp-content/uploads/2019/02/Online-resolution-intor-and-examples-journeys-B.pdf>; and see also Rozenberg, above n 14.

[16] The decision maker in COR may not be a judge in the true sense. See Chapter III for a discussion about the judiciary, quasi-judicial officers and decision-makers in COR. For consistency, the decision maker will be referred to as a judge when explaining the COR process.

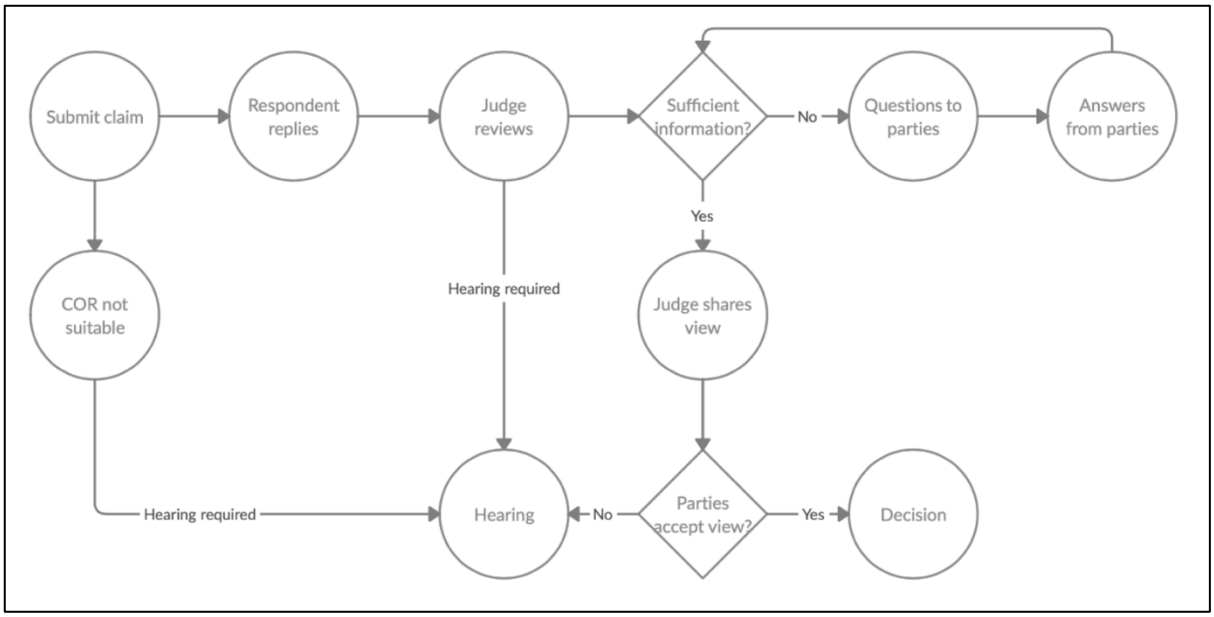

Figure 1. The COR process[17]

First, the appellant submits their claim online. If they do not have the means or ability to use an online process then COR is deemed unsuitable and they revert back to the traditional hearing process. If they are able to submit a claim online then this process begins with the appellant creating an account online and subsequently answering a series of guided questions. These questions are in terms that lay people can understand. Examples of questions include "what help do you need with cooking?" (in the context of a disability allowance claim) and "tell us more about your work in a factory" (in the context of an employment support allowance claim). The interactive software uses decision trees in order to extract from the parties information that is relevant and unique to the dispute.[18] The appellant is able to save their answers at any point and return to the questions later which provides them with an opportunity to check their answers with a friend or advisor; source and upload additional evidence (such as a medical certificate); or continue with their busy day and return to the website when time permits. There is a deadline to provide information by to ensure that the process does not just meander along. Once the appellant has uploaded all necessary information, they then confirm their submission. The claim then progresses to the next stage, where the respondent is invited to reply by uploading answers and supporting documentation. Again, they are given a reasonable time

[17] Adapted from HMCTS, above n 15.

[18] Joshua Rozenberg "Justice Online: Getting Better?" (Gresham College Lecture, Bernard's Inn Hall, London, 20 February 2018); and Dorcas Quek Anderson "The Convergence of ADR and ODR Within the Courts: The Impact on Access to Justice" (2019) 38 CJQ 126 at 138.

period to complete this step within. Users can elect to receive notifications throughout this process (in the form of text or email notifications) and can track the progress of the claim to the decision.[19]

The judge then reviews the answers to determine if COR is suitable. "Challenging" and "potentially landmark" cases are deemed unsuitable for COR and a traditional, oral hearing is required.[20] This could occur when "facts which appear to be important or are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted".[21] If the case is deemed suitable for COR, the judge has the opportunity to seek further information from the parties. Once the judge has sufficient information to make a decision, they then reach a preliminary view which is shared with the appellant and respondent, along with the reasoning behind the view. The parties then have the option of either accepting or rejecting the view. If both parties accept the view then it becomes a binding decision. If one party does not accept the view then the claim can progress to a normal hearing where a different judge will hear the claim. A party will not be prejudiced if they accept the preliminary decision in COR and the other party does not, and then the decision is later challenged at a hearing.[22]

C The United Kingdom's Pilot

As noted prior, the United Kingdom's legal framework is the system that New Zealand turns towards the most for guidance and therefore is a useful comparative model. The United Kingdom's court system is undergoing a process of radical modernisation and a broad spectrum of reforms have been developed for a paperless world.[23] One of the new innovations that has been introduced in the United Kingdom is COR.

The United Kingdom has been trialling a private-beta COR pilot in their Social Security and Child Support (SSCS) Tribunal. This pilot began in Summer 2019 (July to September in the

[19] HMCTS, above n 15.

[20] See Susskind, above n 7, at 148.

[21] *R (Howard League for Penal Reform and The Prisoner's Advice Service) v Lord Chancellor* [2017] EWCA Civ 244 at 41.

[22] COR is a form of early neutral evaluation (ENE). A characteristic of ENE is that the proceedings and the outcome are private and confidential to the parties. See the discussion on ENE, below.

[23] See the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals *Transforming our Justice System* (Ministry of Justice, September 2016).

United Kingdom)[24] with the goal of providing claimants a simpler process and one which would allow them to have their case started, progressed, and decided online.[25] The SSCS Tribunal hears appeal decisions made by the Department for Work and Pensions concerning social welfare payments.[26] The COR pilot is targeting appeals against Personal Independence Payments (PIP). PIP are designed to provide financial aid to people with long term health conditions or disabilities.[27] At this stage, only a small number of PIP cases have been selected to take part in the pilot.[28]

It is likely that the reasons for trialling a COR pilot in the SSCS Tribunal are two-fold. First, the people that this pilot is targeting often experience difficulties with accessing a traditional courtroom. COR means that they do not have to travel to a court building in order to directly engage with the Tribunal.[29] Secondly, this Tribunal has a very large jurisdiction and appellants in this jurisdiction have a wide variety of complex needs.[30] Accordingly, HMCTS's attitude appears to be that if COR is able to improve access to justice in the SSCS Tribunal, then it will be able to achieve justice anywhere.[31] Generally, HMCTS trials procedures in a particular jurisdiction which the intention of rolling them out to more fora once it is proved successful or after further refinements have been made.[32] However, at present, there is little known about if, or how or when, they intend to implement COR in other jurisdictions in the United Kingdom.[33]

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[24] The pilot was intended to launch in mid-2019, but it was delayed. See Ernest Ryder *The Modernisation of Tribunals: Innovation Plan for 2019/2020* (25 May 2018) at 4; and United Kingdom Government "HMCTS Reform Update – Tribunals" (11 July 2019) <https://www.gov.uk/guidance/hmcts-reform-update-tribunals>.

[25] Venning, above n 3, at 30; and see generally The Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, above n 23.

[26] The equivalent of the United Kingdom's SSCS Tribunal in New Zealand is the Social Security Appeals Authority which reviews decisions made by the Ministry of Social Development about benefit payments.

[27] United Kingdom Government "Personal Independent Payment" <https://www.gov.uk/pip>/.

[28] Ryder, above n 24, at 4; and United Kingdom Government, above n 24.

[29] HM Courts & Tribunal Service *Reform Upd*ate Summer 2019 (June 2019); Ernest Ryder "Closing Speech to the First International Forum on Online Courts" (International Forum on Online Courts, London, 4 December 2018).

[30] Tomlinson, above n 2, at 40.

[31] Tomlinson, above n 2, at 40.

[32] United Kingdom Government, above n 24.

[33] Tomlinson, above n 2, at 40.

Unfortunately, at this juncture, there is no indication of the success, or not, of the pilot. It is anticipated that a quantitative and qualitative evaluation will be produced in due course.[34]

D Key Characteristics

COR can be distinguished from other ADR processes because it is a form of early neutral evaluation, is asynchronous and takes a more inquisitorial approach. Whilst some forms of ADR processes have some of these attributes, COR is unique because it possesses all three.

1 Early neutral evaluation

ENE is a process where an independent and knowledgeable evaluator provides a preliminary view of the facts, evidence and merits of each party's claims.[35] This provides the parties with a neutral opinion of the "viability and value" of the case and is designed to help parties avoid unnecessary further stages in litigation.[36] COR is a form of ENE as the evaluator provides their non-binding view of the case and the parties can choose to accept or reject this view, and in turn, decide whether or not they wish to proceed with a hearing.[37] Often a provisional decision regarding the merits of the case is sufficient for the parties' purposes and the party that is anticipated to lose will simply accept the view and move on.[38]

ENE truncates traditional dispute resolution processes which provides opportunities to save time and money.[39] Parties are required to complete their "core investigative homework" earlier (because the evaluator may help identify different routes of reasoning, new lines of inquiry or

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[34] It is unclear when the pilot will end, but it is expected that it will be at some stage during 2020. See Ryder, above n 4, at 4.

[35] Mark Partridge *Alternative Dispute Resolution: An Essential Competency for Lawyers* (Oxford University Press, New York, 2009) at 33 and 64; Wayne Brazil *Early Neutral Evaluation* (American Bar Association Publishing, Illinois, 2012) at 41 and 43; and Karl Mackie, David Miles and William Marsh *Commercial Dispute Resolution: An ADR Practice Guide* (Butterworths, London, 1995) at 10.

[36] Mackie and others, above n 25, at 10; and Brazil, above n 35, at 20 and 46.

[37] If the parties accept the view it then becomes binding. See Rozenberg, above n 14.

[38] This is common in intellectual property and commercial disputes and also disputes under the Construction Contracts Act 2002, which often do not progress past an interim injunction. See Robert Fisher *Whether the Adversarial Process is Past its Use-buy Date – a New Zealand Perspective* (NZ Bar Association and Legal Research Foundation Civil Litigation Conference, 22 February 2008) at 32.

[39] Brazil, above n 35, at 18-19.

other sources of evidence) and thus efficiency is often increased.[40] ENE also often places litigants in a better position to evaluate the transactional costs and the substantive interests at stake. This can help them take a more objective view of the dispute before deciding what their next steps should be.[41]

A key feature of ENE is that both the process and the outcome are private and confidential to the parties.[42] This is beneficial to the parties in COR because they will not experience disadvantage or prejudice if they are the only party that accepts the evaluator's view prior to a hearing. A drawback of this is that if the dispute goes through the COR process and proceeds to a hearing, the new panel does not receive a copy of any of the information collected or the decision reached previously. This results in one of the advantages of COR – the opportunity to have a korero, identify issues early, obtain missing information, and fill in gaps – being lost.[43]

There is one aspect of traditional ENE which is not conducive to the COR process. Normally all parties to the ENE are aware of the information that the evaluator is using to make their decision. This is because it occurs in a group environment and there is face-to-face interaction with the other party.[44] COR is an asynchronous, online process and there is no requirement for the parties to be in the same location or engage at the same time.[45] This makes COR distinctly different from established ENE processes. If COR was to be implemented in New Zealand, it could be considered whether a viewable portal could be included in the design process. This would allow each party to see the information that is being uploaded by the other party.

2 Asynchronous judging

A key characteristic of the traditional litigation process is the gathering of all the participants in the same room at the same time for a single hearing. Users of COR will not experience this. Instead, asynchronous communication allows the parties to ask questions, seek clarification, provide evidence, comment upon issues and build up a wider picture of the issue over a

[40] Brazil, above n 35, at 38, 41 and 46.

[41] Brazil, above n 35, at 46.

[42] Genn, above n 8, at 81; Brazil, above n 35, at 19.

[43] See generally Tomlinson, n 2, at 53-54.

[44] Brazil, above n 35, at 45 and 48.

[45] Ernest Ryder "The Modernisatison of Access to Justice in Times of Austerity" (5th Annual Ryder Lecture, The University of Bolton, England, 3 March 2016) at 24; Susskind, above n 7, at 60; and Rozenberg, above n 14.

reasonable period of time.[46] There is no need for the parties to be on their laptops at the same time, they can make contributions at a time that is convenient for them. This provides users with increased flexibility and accessibility.[47]

Whilst there are numerous benefits associated with asynchronous communication, it could present new hurdles for certain litigants. People who prefer verbal communication or those who have difficulties writing in English may struggle to understand the text-based process or be understood themselves.[48] This could affect vulnerable litigants such as refugees or immigrants (for whom English is not a first language), people living with an intellectual disability and those from low socio-economic backgrounds. But, an asynchronous process can also provide advantages to those who find text-based systems helpful.[49] The types of litigants who could benefit from an asynchronous communication process are discussed in Chapter IV.

3 A hybrid adversarial-inquisitorial approach

The adversarial process, derived from medieval England, is widely used throughout common law jurisdictions, including New Zealand.[50] It is characterised by the judiciary's role being neutral and passive.[51] This results in the parties have greater autonomy to define the issues stake, control the evidential process and determine the information upon which the judge can

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[46] Ryder, above n 45, at 29; John Morison and Adam Harkens "Re-engineering justice? Robot Judges, Computerised Courts and (Semi) Automated Legal Decision Making" (2019) 39(4) JLS 618 at 621.

[47] This could be particularly valuable in cases where an expert opinion is required. Expert evidence may be needed in cases about medical claims, earthquake claims and weathertight homes claims, for example.

[48] See Susskind, above n 48.

[49] For example, some people with autism and Asperger's disorder can struggle with social communication. Alternative approaches and the use of technology can aid in bridging this communication gap. It follows that COR could be valuable to them. See generally Matthew Bennett and other *Life on the Autism Spectrum: Translating Myths and Misconceptions into Positive Futures* (Springer, Singapore, 2018) at 125 and following; and Ethan Katsh and Orna Rabinovich-Einy *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press, New York, 2017) at 33-34.

[50] Sebastian Hartley *Alternative Models of Civil Justice* (9 September 2019) at 8-9; and Fisher, above n 38, at 1.

[51] Stephen Kós "Civil Justice: Haves, Have-nots and What to Do About Them" (Arbitrators' & Mediators of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016) at 55. See also Robert Fisher, above n 38, at 1-2, citing Australian Law Reform Commission *Rethinking the Federal Civil Litigation System* (IP 20, 1998) at 18. See also Hazel Genn "Do it Yourself Law; Access to Justice and the Challenge of Self-Representation" (2013) 32(4) CJQ 411 at 425.

base their decision.[52] COR proposes a shift away from the adversarial process to one which is more inquisitorial. This would result in judges adopting a more proactive and problem-solving approach.[53] Examples of inquisitorial techniques include guiding the parties to explain their positions, engaging in a series of meetings, asking the parties further questions, and focusing on written, rather than oral, communication.[54]

This proposed shift to an inquisitorial system raises some concerns. Some are based on the notion that if a judge investigates, as opposed to just hearing the issues raised by the parties, it could result in them "dropping the mantle of a judge and assuming the robe of an advocate" which would not lend itself to a fair and just process.[55] Since the responsibility for investigating and resolving largely shifts to the state, this could also lead to the process being vulnerable to paternalism, influence, corruption and the inefficiencies of a bureaucracy.[56] Another concern is that inquisitorial processes often lack a final trial date which can cause proceedings to simply meander and be prolonged.[57] These drawbacks do not mean that the inquisitorial system is without benefits. An inquisitorial approach could lend itself to more just outcomes as it can prevent the judge from engaging in confirmation bias and reaching a view of the case without first weighing all of the evidence.[58] It can also make it easier to allocate resources (such as court time) due to the judge having a larger degree of control over the process.[59]

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[52] John Jolowicz "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52 ICLQ 281 at 289; and Kós, above n 52, at 55; and Fisher, above n 38, at 2.

[53] The Rules Committee, above n 5, at 5; Robert Fisher *Whether the Adversarial Process is Past its Use-buy Date – a New Zealand Perspective* (NZ Bar Association and Legal Research Foundation Civil Litigation Conference, 22 February 2008) at 2, citing Australian Law Reform Commission, above n 51 at 18; Tomlinson, above n 2, at 39; and Ryder, above n 25, at 30.

[54] Fisher, above n 38 at 2.

[55] Sebastian Hartley *Alternative Models of Civil Justice* (C40 of 2019, 9 September 2019) at 11, citing Palmer J in *Kelly v Accident Rehibition and Compensation Insurance Corporation* WEC20A/97, 31 July 1997 at 20, and also citing Lord Greene MR in *Yuill v Yuill* [1995] 1 All ER 183, 81 TLR 176 at 189.

[56] Fisher, above n 38, at 26.

[57] See Australia Law Reform Commission, above n 51, at 10-11, 26; and Lord Carloway "The Scottish Courts in the 21st Century" (Law Society of Scotland's Annual Conference, Edinburgh, 19 September 2017).

[58] See Genn, above n 51, at 425.

[59] See New Zealand Law Society *Seeking Solutions: Options for change to the New Zealand court system: Have your say Part 2* (NZLC PP52, December 2002) at 125.

COR proposes to borrow the best features from both an adversarial system and an inquisitorial system. This is consistent with the idea that systems should not be considered as "purely inquisitorial" or "purely adversarial", but rather there is a sliding scale on which procedural systems can be placed.[60] In some common law jurisdictions, including New Zealand, there has already been "intermingling" and some "degree of overlap" between the two approaches.[61] Examples of the adversarial and inquisitorial system converging in New Zealand include case management, assigning particular judges to particular cases, and the judiciary intervening more during the trial itself.

E Why Consider Continuous Online Resolution?

A strong advocate for online court systems, Richard Susskind, believes that "the resolution of civil disputes takes too long, costs too much, and the process is not just antiquated; it is unintelligible to mere ordinary mortals".[62] Whilst this remark was made in the context of the United Kingdom's judicial system, it rings true in New Zealand too. This part identifies that there is a willingness to change court processes and procedures in New Zealand, and that using technology is one way in which we could make improvements. It also considers what is meant by the term access to justice and sets out a framework for evaluating whether an innovation like COR could actually improve accessibility.

1 Advances in technology

Technology can be used to "improve, refine, streamline and optimise" traditional ways of working.[63] Susskind describes this form of process improvement as "automation".[64] This approach to technology and innovation has been adopted in New Zealand in respect to our adjudication processes. Illustrations of automation include parties appearing remotely via audio visual links; [65] using laptops in courtrooms to view and annotate electronic casebooks, practice

[60] See John Jolowicz *On Civil Procedure* (Cambridge University Press, Cambridge, 2000) at 181 and 182; see also Jolowicz, above n 52, at 281.

[61] See Nick Wikeley "Future Directions for Tribunals: A United Kingdom Perspective" in Robin Creyeke (ed.) *Tribunals in the Common Law World* (Federation Press, 2008) 175 at 186; and Fisher, above n 38, at 37.

[62] Susskind, above n 7, at 1.

[63] Susskind, above n 7, at 34.

[64] Susskind, above n 7, at 34.

[65] For example, the defendant primarily appeared via an audiovisual link in *R v Skantha* [2020] NZHC 442. Such an appearance was permitted under the Courts (Remote Participation) Act 2010.

notes and discovery documents;[66] and submitting urgent applications online.[67] Using new technology in old working practices can be useful, but it often simply brings the problems inherent in the current system forward, rather than fixing them.[68] It is evident that we have not fully responded to, or taken advantage of, new technologies in our legal system.[69] Technology is revolutionising many aspects of our daily lives, but is yet to bring about substantial change to the way our court system operates.[70] COR proposes to use technology in an innovative way by transforming, rather than automating, the adjudication process for some disputes.[71]

2 The Rules Committee consultation papers

In December 2019, the Rules Committee published consultation papers which sought recommendations on how the processes in our civil justice system could be improved to increase access to justice in the District Court and the High Court.[72] The Committee are focusing on just one aspect of access to justice – costs. Various innovative solutions can be proposed to deliver this plus other aspects of access to justice, and COR is a possible solution that should be explored. This consultation demonstrates that New Zealand is open to new processes and is not averse to largely changing the way that judges and lawyers work.[73] Further, the Committee has identified in their initial consultation documents that an inquisitorial process could be a possible solution, which suggests that they could be receptive towards a proposal for COR.[74]

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[66] Andrew Bridgman "Information technology in the New Zealand Court System" (2 February 2018) New Zealand Law Society <https://www.lawsociety.org.nz/news/lawtalk/issue-914/information-technology-in-the-new-zealand-court-system/>.

[67] E-duty, an online platform where urgent applications and supporting documents are submitted, being used by the Family Court to review urgent applications. See Nan Wehipeihana, Kellie Spee and Shaun Akroyd *Without Notice Applications in the Family Court* (Ministry of Justice, July 2017) at 22.

[68] See Ryder, above n 45.

[69] See Venning, above n 3.

[70] See Venning, above n 3, at [6] and [8].

[71] Susskind, above n 7, at 34.

[72] The closing date for submissions for the Consulation was 11 September 2020. See The Rules Committee, above n 5, at 1.

[73] The Rules Committee *Improving Access to Justice: Initial Consultation with the New Zealand Community* (2019) at 2.

[74] The Rules Committee, above n 5, at 5.

3 Access to justice

Access to justice is a well-established problem and unfortunately there is no one solution. Access to justice has been described as "the critical underpinning of the rule of law in our society"[75] and the merits of it are indisputable.[76] But as Beverley McLachlin has observed "as long as justice has existed, there have been those who struggled to access it".[77] The reasons why people do not access the justice system when they are wronged is complex. David Engel presents two theories as to why litigants do not pursue claims.[78] The first, an economic explanation, is premised on the notion that the anticipated cost of the claim are expected to exceed the likely benefits obtained.[79] These costs could be in the form of money, time or aggravation. The second is a cultural explanation. Social norms and practices can sometimes deter people from bringing a claim.[80] For example, there can be a stigma attached to pursuing claims and people may not want to be viewed as "whiny", "greedy" or "deceitful".[81] These economic and social barriers prevent people exercising their fundamental rights, and are out of step with the strategic goals of the Ministry of Justice.[82] COR does not purport to remove all of these barriers, or wholly remedy the access to justice problem, but it could be a step in the right direction.

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[75] Winkelmann, above n 4, at 229; see also Stephen Kós "Better Justice" (Legal Research Foundation Annual General Meeting, Auckland, 20 August 2018).

[76] Susskind, above n 7, at 65.

[77] Beverley McLachlin *Access to Civil and Family Justice: A Roadmap for Change* (Action Committee on Access to Justice in Civil and Family Matters, October 2013) at i.

[78] David Engel *The Myth of the Litigious Society: Why We Don't Sue* (The University of Chicago Press, Chicago, 2016) at 15-16.

[79] At 15-16.

[80] At 16, 171 and 172.

[81] At 172.

[82] The Rules Committee *Updating Procedure to Improve Access to Justice* (16 December 2019) at 1; Ministry of Justice "Our Strategy" (6 March 2020) <https://www.justice.govt.nz/about/about-us/our-strategy/>.

Access to justice is an ambiguous term and can be difficult to evaluate.[83] For the purposes of this paper, a framework established by Natalie Byrom will be used to assess whether an innovation is useful at increasing access to justice. Using her structure, COR must provide:[84]

i. Access to a formal legal system;
ii. Access to an effective hearing;
iii. Access to a decision in accordance with substantive law; and
iv. Access to a remedy.

These four minimum standards are mutually inclusive and interrelated.[85] COR could contribute towards remedying the justice gap if it can satisfy all of these elements.

The first element, access to a formal legal system refers to having "practical and effective" legal processes.[86] This means that processes cannot be "so complex that users of the system cannot effectively use them".[87] This may mean that safeguards need to be implemented to ensure that access is not obstructed.[88] In the context of COR, safeguards could include having staff to help people work through an online system, or giving litigants the option of continuing to use a paper channel.[89]

The second element, access to a fair and effective hearing, refers to a litigant's ability to present all relevant information to the judge, and the judge's ability to understand this information and make a determination.[90] A system that is procedurally fair would be one that litigants can fully participate in.

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[83] See Natalie Byrom *Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice* (The Legal Education Foundation, 2019) at 16-26; New Zealand Bar Association *Access to Justice: Report of the New Zealand Bar Association Working Group into Access to Justice"* (1 September 2018).

[84] Byrom, above n 83, at 5.

[85] At 5.

[86] Byrom, above n 83, citing *R (Gudaniviciene & Ors) v Director of Legal Aid Casework & Lord Chancellor* [2014] EWCA Civ 1622; [2015] 1 WLR 2247 at [46].

[87] Byrom, above n 83, at 16, citing Abi Adams and Jeremias Prassl "Access to Justice, Systematic Unfairness and Futility: A Framework" (2020) 40 OJLS (forthcoming).

[88] Byrom, above n 83, at 16.

[89] Byrom, above n 83, at 16.

[90] At 18.

The third element is about providing litigants with access to a determination. This is achieved by applying substantive law to the facts of a case.[91] Some caution needs to be taken when considering this element in the context of ADR because the objective of these processes is often to achieve a resolution, which could lead to less of a focus on vindicating rights.[92]

Finally, the fourth element focuses on access to a remedy. Byrom identifies that remedies need to be determined in a "speedy" fashion.[93] The purpose of providing a remedy can be to reduce the harm suffered or deter future violations. If COR can satisfy the four criteria set out above, then it may be useful at increasing access to justice.

[91] At 25.

[92] At 26.

[93] At 15.

II A Litigant's Perspective

Analysing a proposal for COR from the perspective of the user that will be placed "at the heart of the system" is crucial.[94] It is likely that COR will provide benefits, in the form of reducing physical barriers, costs and confusion, which in turn make it easier to access the justice system. Nevertheless, these attractions have to be weighed against concerns which include the digital divide, disengagement, the loss of kanohi ki te kanohi and limited opportunities to appeal. These potential benefits and concerns will be addressed in this chapter.

A Benefits

This part identifies factors that could persuade people to move away from an established hearing process and use a process that is relatively new and radical. The main advantage of COR is that it could mitigate or remove some of the obstacles that litigants often face when trying to access a traditional adjudication process.

1 Removing physical barriers

Online, asynchronous communication enables litigants to access the justice system at a time and in a location that is convenient to them.[95] Geographical and physical barriers are therefore removed. There would be no need to travel to a local courthouse or tribunal for a dispute to be heard. The absence of physical barriers also gives rise to increased flexibility, not just for the applicant and respondent, but also the judiciary.[96] Greater availability and scheduling options are particularly attractive for members of the judiciary who sit part-time or in cases where expert witnesses are required.[97]

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[94] Tomlinson, above n 2, at 39.

[95] Martha Simmons and Darin Thompson "The Internet as a Site of Legal Education and Collaboration across Continents and Time Zones: Using Dispute Resolution as a Tool for Student Learning" (2017) 34 WYAJ 222 at 230; Rozenberg, above n 14.

[96] Tomlinson, above n 2, at 49; Joseph Goodman "Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites" (2003) DLTR 3 at 8.

[97] Rozenberg, above n 14.

2 Reducing costs

Another frequently cited benefit of ODR processes is that they reduce costs. COR is a process that is designed to be completed by a lay-person, without the assistance of a lawyer. It is not proposed that lawyers are expressly excluded; citizens should be permitted, and entitled, to use their services.[98] Rather, the intention is to implement a process that is so simple that lawyers will not be needed.[99] It is therefore likely that legal costs will be either non-existent or significantly reduced.[100] Research suggests that the number of self-represented litigants in New Zealand is increasing.[101] A technology like COR would be useful for self-represented litigants as it empowers them to pursue claims without the assistance of others.[102] Aside from legal costs, it is likely that indirect costs will also be minimised. Costs such as taking time off work, finding childcare and taking public transport will not be incurred as a result of COR being able to be completed at a time and location that is convenient to each party.

3 Minimising confusion and complexity

For a litigant, navigating the court system can be like sailing through unchartered waters. The procedures and language used can cause confusion and leave them uncertain about their next steps. COR uses simple language and tailors the process to each user (to a degree) based on the information they submit.[103] This helps litigants to identify their issues and needs.[104] As a result, an unstructured grievance can be turned into a "recognisable and justiciable problem".[105] This identification of issues is also useful for the judiciary as submissions are more likely to be concise, relevant and targeted, which could lead to hearing times decreasing.[106]

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[98] Susskind, above n 7, at 237.

[99] Susskind, above n 7, at 237.

[100] Paul Kellar *Access to Justice in the Civil Jurisdiction of the District Court* (C 20, 2019) at 98; and Tomlinson, above n 2, at 49.

[101] See generally Bridgette Toy-Cronin "I Ain't No Fool: Deciding to Litigate in Person in the Civil Courts" (2016) 4 NZLR 723; Winkelmann, above n 4, at 230; and The Rules Committee, above n 5, at 2.

[102] Morison, above n 46, at 618, citing John Zelenikow 'Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts?' (2017) 8(2) ICJA 30; and Susskind, above n 7, at 237.

[103] Paul Kellar, above n 100, at 101, citing Rabinovich-Einy and Katsh, above n 49, at 212.

[104] Paul Kellar, above n 100, at 101, citing Rabinovich-Einy and Katsh, above n 49, at 212. See also Susskind, above n 7, at 121.

[105] Susskind, above n 7, at 121.

[106] Kellar, above n 103, at 105.

B Concerns

COR could fundamentally change the adjudication process for some disputes and it is natural for there to be some apprehension about moving away from a traditional, established system. This part identifies the main concerns litigants may have about adopting a new process like COR.

1 Digital exclusion

A shift to an online platform could result in a dilution of access to justice because of digital exclusion.[107] A person is digitally excluded when they do not have access to the internet,[108] motivation or skills to use the internet[109] or trust in online services.[110] Approximately 20% of households in New Zealand do not have an internet connection.[111] In New Zealand, people most at risk of digital exclusion are families with children in low socio-economic communities; people living in rural communities; people with disabilities; refugees and migrants from whom English is a second language; Māori and Pasifika youth; offenders and ex-offenders; and seniors.[112] Whilst those without internet access at home may be able to use a library or community centre to gain internet access, this access is likely to be substandard in terms of privacy, time and convenience, which are some of the advantages that COR seeks to provide.[113]

A response to this concern is that people have always been excluded from our justice system, especially those with disabilities, parents with young children, and full time workers.[114] It is therefore too aspirational to try and find a solution which is accessible to everyone. COR will provide another avenue to pursue a claim for those with the means and ability to use online

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[107] Tomlinson, above n 2, at 38, 57; and Susskind, above n 48.

[108] Ministry of Business, Innovation and Employment *Digital New Zealanders: The Pulse of Our Nation* (May 2017) at 5; Tomlinson, above n 2, at 38, 57 and 58; and Susskind, above n 7, at 215.

[109] Ministry of Business, Innovation and Employment, above n 108, at 5; Susskind, above n 7, at 215; and Amanda Finlay *Preventing Digital Exclusion from Online Justice* (JUSTICE, April 2018) at 1.8

[110] Ministry of Business, Innovation and Employment, above n 108, at 5.

[111] As of June 2018, 81% of households had an internet connection. Statistics New Zealand "Internet Service Provider Survey" (8 October 2018) <https://www.stats.govt.nz/information-releases/internet-service-provider-survey-2018>.

[112] Ministry of Business, Innovation and Employment, above n 108, at 8.

[113] Tomlinson, above n 2, at 58.

[114] Susskind, above n 7, at 221.

services, but it is recognised that it some people will be digitally excluded. Introducing COR as a compulsory system would not be fair, nor would it align with the objectives of our justice system.[115] Litigants would have to be provided with the option to use the traditional system if they preferred.

2 Disengagement

COR could also affect the way parties participate in the judicial process. Research indicates that "litigants separated from the traditional courtroom setting simply disengage from the entire process".[116] Reasons for disengagement can stem from litigants perceiving the process as illegitimate or becoming frustrated with navigating an online system.

A characteristic of the traditional hearing process is "seeing a judge at a big desk wearing a black robe".[117] Without visual cues that come from being in front of a judge in a physical courtroom, the process may be regarded as unfair or illegitimate.[118] A user of COR would experience the justice system in a manner that could be considered analogous to having to chat on WhatsApp and then having a decision given to them at the end.[119] Consequently, people may not feel like they have been heard or had their day in court.[120]

Litigants may also experience feelings of frustration as a result of trying to use an online platform. These feelings could arise if litigants provide incorrect or incomplete information and keep getting their questions returned to them to answer again. The inquisitorial element of COR which permits the decision-maker to seek more information could exacerbate this issue. HMCTS has tried to mitigate this in their COR pilot by designing the questions to gather

[115] The objective of the rules of practice and procedure is to facilitate the just, speedy and inexpensive determination of proceedings. Senior Courts Act 2016, s 146; High Court Rules 2016, r 1.2; District Court Rules, r 1.3.

[116] Hazel Genn "Online Courts and the Future of Justice" (Birkenhead Lecture 2017, University College of London, 6 October 2017) at 13, citing Ingrid Eagly "Remote Adjudication in Immigration" (2015) 109(4) NULR 933. This empirical study was based on interactive video technology being used in deportation cases in the United States. Some of the findings could be extended to other online processes, including COR.

[117] Eagly, above n 116, at 934.

[118] Genn, above n 116, at 13.

[119] Joshua Rozenberg "The Online Court: Will IT Work?" (July 2020) < https://long-reads.thelegaleducationfoundation.org/will-it-work/>.

[120] Rozenberg, above n 14.

as much information at first instance. This is intended to reduce the number of times the litigant has to return to the website to answer further questions. Further, the asynchronous nature of COR creates delays in responses and removes non-verbal cues which can lead to feelings of distrust.[121] These reasons could contribute to people abandoning their claims because they do not think that a remedy will be worth the time or emotional expense.

3 Losing kanohi ki te kanohi[122]

It is important to consider tikanga Māori when deciding to implement new judicial processes in New Zealand. Tikanga Māori refers to the cultural practices and customs that guide and inform behaviour.[123] Resolving disputes in a manner that respects tikanga is more likely to lead to a just or true, pono, outcome and in turn, the parties are more likely to respect and abide by the decision.[124] A "foundational principle for many processes of tikanga Māori" is kanohi ki te kanohi.[125] Kanohi ki te kanohi is defined as a "physical form of interaction, engagement, and communication".[126] COR would remove kanohi ki te kanohi because it is an asynchronous, text-based system.

It is recognised that tikanga practices have evolved in order to adapt to new contexts, including the internet. Research demonstrates that individuals and communities are enthusiastic about, and frequently use, internet technologies.[127] Nevertheless, it is likely that a move to a digital process like COR would not fit with tikanga and could significantly disadvantage Māori.[128] An inquisitorial process where the judge has more control over the process may not allow Māori

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[121] Kellar, above n 100, at 125, citing Robert Condlin "Online Dispute Resolution: Stinky, Repugnany or Drab" (2017) 18 CJCR 717 at 734.

[122] The term kanohi ki te kanohi in te reo Māori means face to face.

[123] Acushla O'Carroll "Virtual Tangihanga, Virtual Tikanga: Investigating the potential and pitfalls of virtualizing Maori cultural practices and rituals" (2015) 35(2) CJNS 183 at 184.

[124] Jacinta Ruru, Paul Scott and Duncan Webb *The New Zealand Legal System* (6th ed, LexisNexis, Wellington, 2016) at 46.

[125] Acushla O'Carrol "Kanohi ki te kanohi – A Thing of the Past? Examining the Notion of "Virtual" Ahikā and the Implications for Kanohi ki te kanohi" (2005) 11(3) Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health 441 at 441.

[126] O'Carrol, above n 125, at 441.

[127] This is despite being one of the groups at risk of being subjected to the digital divide. See Acushla O'Carrol "An analysis of how rangatahi Māori use social networking sites" (2013) 2(1) MAI Journal 46.

[128] O'Carroll, above n 123, at 197.

to tell their stories in the same manner that they could in an adversarial system. Further, removing the requirement to be physically present does not demonstrate respect to the other parties, nor that you are upholding your responsibilities or investing time and effort into the process.[129]

Removing elements of the traditional hearing process that are beneficial to Māori could also have adverse impacts on Pākehā. A direct interaction makes it difficult to demonise the opposing party, ignore the similarities between the litigants, and use generalities or preconceptions.[130] Conversely, an online process makes it difficult to feel empathy towards, or develop an understanding of, the other party's situation.[131]

COR would result in the loss of kanohi ki te kanohi which would negatively impact not only Māori but also Pākehā. If COR was implemented in New Zealand, it would be imperative to include Māori in the design process. Adopting monocultural attitudes or imposing only Pākehā models can result in systematic bias and unfairness which effectively denies justice to Māori.

4 Opportunities to appeal

Another concern is that the right to appeal is not mentioned at any stage during the COR process in the United Kingdom's pilot.[132] When litigants are presented with the option to "accept the Tribunal's view" they are informed that they will not be able to change their mind.[133] COR differs from other ODR process in this respect. Most ODR processes are non-binding and therefore lack finality.[134] It appears that any decision that both parties accept in COR will be binding and there will be no right to appeal. This raises significant concerns. Commentators

[129] At 197.

[130] Brazil, above n 35, at 50.

[131] At 50.

[132] See HMCTS, above n 15.

[133] The decision is binding if both parties accept it; if only one party accepts then the dispute progresses to a hearing. Roger Smith "Tribunals and Continuous Online Resolution: The Devil is in the Detail" (7 May 2019) Law, Technology and Access to Justice <https://law-tech-a2j.org/odr/tribunals-and-continuous-online-resolution-the-devil-in-the-detail/>.

[134] Amy Schmitz "Drive-Thru Arbitration in the Digital Age: Empowering Consumers Through Binding ODR" (2010) 62 Baylor L Rev 178 at 186.

have proposed that decisions resulting from the COR process should only be binding if they are in favour of the appellant as this would act as a safeguard for vulnerable litigants.[135]

In New Zealand, we have a "comprehensive system of appeals" where each of the general courts have an appellate jurisdiction.[136] This hierarchical structure protects individuals who may have received an incorrect decision in a lower court because they can have the decision checked by courts of a higher standing.[137] The allows legal inconsistences can be rectified and for the law to be clarified and developed.[138] For COR to align with the rest of New Zealand's adjudication processes there would need to be some form of right to appeal. This right would not have to be automatic, but it should exist.[139]

[135] Byrom, above n 83, at 23.

[136] Ruru, Scott and Webb, above n 124, at 272-274.

[137] At 272-274.

[138] At 272-274.

[139] There is no automatic right to appeal in New Zealand. Often leave needs to be sought from the Court. When leave is required this is usually ordered by statute. See, for example, Senior Courts Act 2016, s 73. See also Ruru, Scott and Webb, above n 124, at 272.

III A Jurisprudential Perspective

COR could be seen as a "promising response" to some of the problems and pressures caused by the justice gap.[140] But shifting away from a model of judging that we have been using since the 19th Century will not be without its challenges.[141] This chapter will consider important theoretical and philosophical questions relating to open justice, remote justice, the creation of precedent, the role of the judiciary and the right to engage legal counsel.

A Open Justice and Remote Justice

Transparency is a fundamental characteristic of our justice system.[142] Open justice is considered a principle of "constitutional importance"[143] and this is reflected in both our common law and statutory authorities.[144] Ernest Ryder proposes that this principle is comprised of three related parts – equal access to the court; public scrutiny of judges and their judgments; and public scrutiny of the constitutional role of the courts.[145] When these aspects are satisfied, the courts can be considered as visible, intelligible and accountable.[146] In turn, trust and confidence in the justice system is enhanced.[147]

There are concerns that online judging could have an impact on open justice.[148] These concerns stem from the idea that "justice cannot just be done, it must be seen to be done".[149] Our

[140] Simmons, above n 95 at 230.

[141] Susskind, above n 7, at 55.

[142] New Zealand Law Commission *Delivering Justice for All: A Vision for the New Zealand Court System* (NZLC R85, 2004) at 300; and *Erceg v Erceg* [2016] NZSC 135 at [2].

[143] *Erceg v Erceg*, above n 142, at [2].

[144] See *Daubney v Cooper* (1829) 10 B & C 237 at 240; *Broadcasting Corp of New Zealand v Attorney General* [1982] 1 NZLR 120; Senior Courts (Access to Court Documents) Rules 2017, r 8; and District Court (Access to Court Documents) Rules 2017, r 8.

[145] Ernest Ryder, Senior President of Tribunals "Securing Open Justice" (Max Planck Institute Luxembourg for Procedural Law & Saarland University, Luxembourg, 1 February 2018) at 2-5.

[146] Susskind, above n 7, at 193.

[147] Susskind, above n 7, at 193.

[148] See Genn, above n 116, at 13.

[149] See *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259.

understanding of law and justice is shaped by what we see and experience.[150] Courtrooms, media reporters and public galleries are all symbols of open justice[151] and a digital process like COR removes these visual markers. This could give rise to beliefs that decisions are being made secretly and with less authenticity.[152] But, in actuality, external signs of decision making do not inform people about what is going on inside the mind of a judge.[153]

A convincing response to this concern is that ADR and ODR processes have been used in New Zealand for some time and these processes[154] also do not allow justice to be "seen to be done". Thus, concerns about open justice are not special to online adjudicative processes. What is special to COR is that the parties communicate asynchronously which can give rise to concerns about remote justice.

Remote justice describes proceedings where all parties to the dispute are not in the courtroom at the same time. This change in forum can lead to formalities being abandoned and can result in loss of majesty and gravitas.[155] It can also create distortions in how people behave compared to if they were physically in a courtroom together. Litigants may be more inclined to be untruthful, unkind or lack decorum.[156] It follows that members of the judiciary have found it more difficult to impose their authority when they are judging remotely, and have observed that litigants sometimes do not treat online processes with the same level of respect that they would if they appeared in person.[157] But it may not just be litigants who act in a different manner as a result of a change in environment. Susskind observes that if a judge is sitting in

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[150] Sue Prince "Fine words butter no parsnips: Can the Principle of Open Justice Survive the Introduction of an Online Court?" (2019) 38 CJQ 111 at 114, citing Judith Resnick and Dennis Curtis *Representing Justice: The Creation and Fragility of Courts in Democracies* (Yale University Press, New Haven, 2011).

[151] Prince, above n 150, at 114.

[152] Lord Dyson "Delay Too Often Defeats Justice" (The Law Society Magna Carta Event, London, 22 April 2015).

[153] Susskind, above n 7, at 197.

[154] Such as ENE and judicial settlement conferences.

[155] Susskind, above n 48; and Lord Briggs *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales, December 2015) at 4.

[156] Zoe Schiffer "The Jury is Still Out on Zoom Trials" (22 April 2020) The Verge < https://www.theverge.com/2020/4/22/21230022/jury-zoom-trials-court-hearings-justice-system-virtual-transparency>.

[157] Matthew Terry, Steve Johnson and Peter Thompson *Virtual Court Pilot: Outcome Evaluation* (Ministry of Justice Research Series 2/10, December 2010) at 22.

public, where they are "open to observation and criticism" then they may be more likely to "diligently scrutinise the documents" and thus make a just decision.[158] When people are making a decision behind a computer screen they could me more inclined to cut corners or be reckless. However, this concern is unlikely to be substantiated. Judges are appointed through a rigorous selection program[159] and thus it is unlikely they would abandon their judicial duties because of a change in process.

B The Judiciary's Role

Despite the COR process being conducted online, decisions are still made by "living and breathing human judges" and their decisions would carry the same weight and authority as if they were made in a physical courtroom.[160] COR does not involve judges bring replaced by an online tool (such as Artificial Intelligence). But it is likely that COR would change the role and nature of the judiciary. Judges are regarded as being neutral,[161] passive and distant.[162] COR risks "reshaping [these] conceptions about the role of judges" because it requires them to work in a different environment.[163] This change in mode could have impacts on "judicial attitudes, behaviours and decision making"[164] which could alter the way the public and other members of the legal profession perceive the judiciary.

COR would change how litigants put forward their case and evidence which could impact on how the judiciary perceive the arguments that they are presented.[165] When a judge is making a decision behind a computer screen they cannot take into account the demeanor and presentation of the parties, how parties react to questions, or the conduct of others in the courtroom. These problems have been encountered when audio-visual links have been used. As Lord Wilson has observed "live evidence on screen is not as satisfactory as live evidence in person".[166] It is

[158] Susskind, above n 7, at 151.

[159] Senior Courts Act, ss 94-105; see also Crown Law *Judicial Protocol* (April 2014).

[160] Susskind, above n 7, at 143.

[161] See Winkelmann, above n 4, at 229.

[162] Rabinovich-Einy and Katsh, above n 103, at 183.

[163] Rabinovich-Einy and Katsh, above n 103, 168; Susskind, above n 7at 121.

[164] Byrom, above n 83, at 18.

[165] Byrom, above n 83, at 24.

[166] Byrom, above n 83, at 24, citing *R (on the application of Byndloss) (Appellant) v Secretary of State for the Home Department (Respondent)* [2017] UKSC 42 at [67].

likely that this dissatisfaction would be compounded if there is no visual or oral communication at all, which is the case with COR. On the other hand, an advantage of this approach is that biases may be reduced since litigants cannot be seen or heard.[167] This may increase the impartiality and independence of the judiciary.

COR also represents a departure from the adversarial process which in turn will change the way judging is conducted. As identified in chapter I, a judge is often more proactive in an inquisitorial process. Ultimately, there is no doubt that COR will require judges to work in different ways, and for some, this may mean that they have to acquire new skills.

1 Quasi-judicial officers

As identified earlier, the decision maker in a COR process may not necessarily be a judge in the true sense. Rather, ODR processes often use a quasi-judicial officer instead.[168] Hazel Genn identifies that a "principal trap" when discussing the judiciary is that of "scope and generalisation".[169] Therefore, quasi-judicial officers will also be discussed in their own right.

Quasi-judicial officers are people who are not a part of the judiciary, but they act in a judicial manner when they exercise their powers or functions.[170] Examples of quasi-judicial officers are Community Magistrates, Justice of the Peace, Registrars and Referees.[171] Quasi-judicial officers still have the responsibility of ensuring public confidence in court processes, maintaining public perceptions of fair procedure, and making just and fair decisions in accordance with the law.[172] Therefore, from a public-facing perspective, they are considered

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[167] Genn, above n 51, at 425.

[168] Especially at an administrative appeal level, which are the types of claims being dealt with in the United Kingdom pilot. See generally Peter Spiller (ed) *New Zealand Law Dictionary* (9th ed, LexisNexis, Wellington, 2019) at 251.

[169] Genn, above n 8, at 154.

[170] Spiller, above n 168, at 251.

[171] District Court of New Zealand "Other Judicial Officers" (6 July 2020) <https://www.districtcourts.govt.nz/about-the-courts/the-district-court-judiciary/other-judicial-officers/>.

[172] Genn, above n 8, at 137; and Susan Denham *The 21st Century Judge: The Evolving Role of Judges in the Administration of courts and the Judiciary, with Special Reference to Ireland* (Australasian Institute of Judicial Administration Incorporated, Melbourne, 2010) at 2.

judges and are treated with the same respect as traditional judges. But from a technical view, they are not actually members of the judiciary.

In the United Kingdom's pilot, the SSCS Tribunal relies heavily on the expertise of lawyers and non-lawyers (such as disability specialists and doctors).[173] In these cases, COR is being used to resolve disputes that are more factual, rather than legal. It follows that the facts need to be determined by an expert in the field and given the limited role of law, non-legal adjudicators are appropriate. However, this argument does not work if COR is used in a more legal realm. If COR is used to resolve disputes that focus on more legal arguments (for example it concerns precedent decisions, the creation of law, or strict adherence to rules and procedures), then it is more appropriate for a judge to act as the decision maker.

C Creation of Precedent

Precedents are judicial decisions which are used as the authoritative basis for directing or dictating a decision in a similar case[174] and the creation of precedents is an important function of New Zealand courts.[175] This is because it produces rules which people rely on to conduct themselves and organise their affairs.[176] It also provides stability and consistency in the law and creates a public expectation that similar cases will be decided in a similar manner.[177] A concern about COR is that it could compromise the creation and use of precedent because cases will not progress through a traditional adjudication process.[178] Systematic and widespread use of COR is also likely to exacerbate these concerns.

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[173] See Jeremy Cooper "The New World of Tribunals: A Quiet Revolution" in Jeremey Cooper (ed) *Being a Judge in the Modern World* (Oxford University Press, Oxford, 2017) 91 at 99.

[174] See generally Douglas White "Originality or Obedience? The Doctrine of Precedent in the 21st Century" (2019) 28(4) NZULR 653; Lord Neuberger "Law Reporting and the Doctrine of Precedent: The Past, the Present and the Future" in Simon Hetherington (ed) *Halsbury's Laws of England Centenary Essays* (LexisNexis, London, 2007) at 71; Ronald Dworkin *Law's Empire* (Belknap Press, Location, 1986) at 228-38; and Michael Freeman *Lloyd's Introduction to Jurisprudence* (9th ed, Sweet & Maxwell, London, 2014) at 1554-55.

[175] See generally Jim Evans "Precedent in New Zealand's Permanent Court of Appeal" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oxford, 2009) 1; and *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.

[176] Winkelmann, above n 4, at 231.

[177] White, above n 174, at 653; and Neuberger, above n 174, at 71 and 79.

[178] See Rabinovich-Einy and Katsh, above n 49, at 185.

However, concerns about the common law system are not unique to COR. Objections about the creation of precedents have also been made in regard to ADR.[179] Commentators have contended that redirecting disputes away from the courts and into processes like arbitration or mediation can result in the law not being given an opportunity to develop and respond to new circumstances.[180] This objection is less convincing in respect of COR because there is an opportunity to identify cases that would be better addressed through a traditional hearing. These cases would be identified when litigants answer the initial questions at the start of the COR process as the questions are based on precedent cases and historical data. Cases that have unusual fact patterns or involve issues that the court has not previously addressed are likely to be moved to a traditional hearing.[181] Thus, when applied in this intended manner COR can preserve the judiciary's ability to develop the common law.

D The Lawyer's Role

COR is a system that is designed for lay people to be able to use without the assistance of a lawyer. This raises questions about the role of the lawyer and the impacts on the legal profession. Susskind observes that there is "nothing intrinsically valuable" about lawyers.[182] Rather, the benefit of having a lawyer is that they may assist in obtaining a more desirable outcome.[183] People obtain the services of lawyers so that they can better identify and understand their legal position, be guided through procedures and have a someone represent them in court. Therefore, prohibiting access to legal counsel could be disempowering.[184]

An objection to online courts is that it could raise issues about "sustainable justice".[185] Sustainable justice refers to using practices in the present that will not compromise the ability of future generations to experience a just society.[186] If the need for legal counsel reduces because online processes make it easier for lay people to navigate and understand the justice

[179] Susskind, above n 7, at 238.

[180] At 238.

[181] At 238.

[182] At 236.

[183] At 236.

[184] At 236.

[185] At 237.

[186] Melissa Barlow "Sustainable Justice: 2012 Presidential Address to The Academy of Criminal Justice Sciences" (2013) 30(1) JQ 1 at 1.

system this could discourage people from entering the legal profession because of limited job prospects. It is important that we still have lawyers available to undertake the tasks that technology cannot yet do. It follows that lawyers should never be explicitly excluded from the COR process.

IV Where COR Could be Useful

This chapter proposes that COR could be offered as a process that litigants can elect to use instead of going through the traditional adjudicative process. This would require both parties to mutually agree to use the online platform, and for the decision-maker to consider it appropriate in the circumstances. Providing COR as an option rather than a compulsory process recognises that COR is not an appropriate mechanism for resolving all classes of disputes,[187] nor is it suitable for all classes of litigants.[188] Essentially, the parties would be asked the following questions in respect of using COR:

1. Do you want to use COR as a case management process? If yes;
2. Do you want to use COR to obtain a preliminary decision (which can then become binding if the other party also accepts it) or do you want to go to a traditional hearing?

If the answer to either of the above questions is no, then the parties would proceed to a traditional hearing. This process is set out in figure 2 and figure 3, below.

This chapter will discuss how COR could be useful as a case management procedure and as a form of ENE. It will also identify litigants who could benefit from having this option available. This includes litigants in person (LiPs); litigants with disabilities; and well-educated and well-heeled litigants.

[187] See Dyson, above n 13, at 182.

[188] For example, as identified in Chapter II, COR would not be suitable to those subjected to the digital divide.

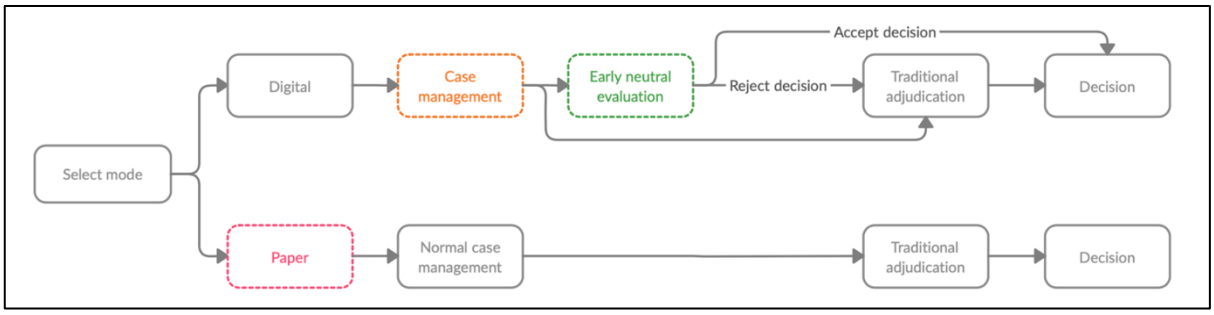

Figure 2. The proposed process which incorporates COR into the current system.

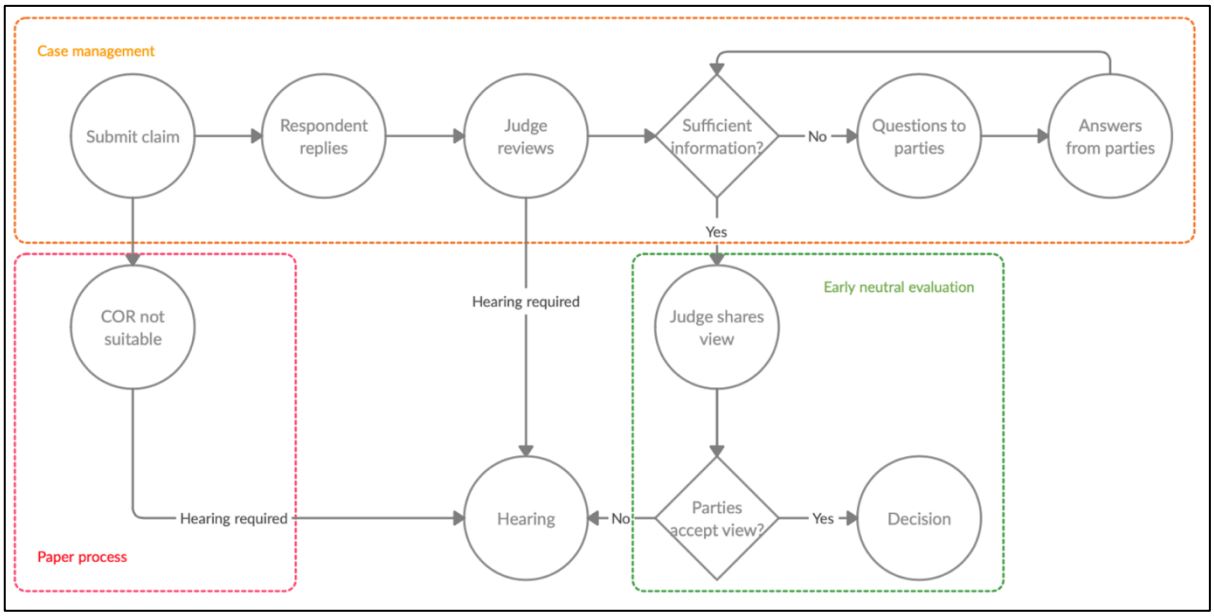

Figure 3. A breakdown of how the different parts of the COR process fit into the proposed system.

A COR as a Case Management Tool

Case management has not always been a feature of New Zealand's justice system. Until the late 1970s, judges were compared to "cuckoo clocks" because they would "[come] out when the clock struck ten, [hear] the case and on conclusion [retire] to their chambers until next required."[189] During the 1980s their role began to change and it was further expanded when case management was introduced nationally in 2000 in the High Court and in 2001 in the

[189] Ian Barker and Graham Wear (eds) *Law Stories: Essays on the New Zealand Legal Profession 1969-2003* (LexisNexis NZ, Wellington, New Zealand, 2003) at 16, referring to an observation made by Thomas Eichelbaum.

District Court.[190] Case management processes can enable the judge to identify issues in dispute earlier, include litigants in the case management process, improve how evidence is ascertained, decide how to best facilitate the hearing and ensure that the costs of the proceeding are proportionate to the issues at stake. Case management processes have continued to develop since they were first introduced and are open to being developed to ensure that they continue to bring about the just, speedy and inexpensive determination of proceedings.[191]

Similarities can be drawn between case management and COR. COR is useful because it provides an opportunity to have a kōrero and gather information prior to a decision being made. The means that key issues can be identified early, missing information can be obtained, and gaps can be filled in.[192] As a result, the decision-maker is likely to have all of the information and evidence necessary to make a decision before the parties come to court. The parts of COR that would be used in the case management process are when both parties upload their information and the judge seeks out further information, if required. This is set out in figure 3, above.

Case management changes the role of the judge because it does not allow them to sit back passively and only jump in when they run into a problem that requires their attention.[193] Instead, they take the reins of the case from the beginning. Members of the judiciary do not share the same views or attitudes towards case management. Some find it "really useful" and consider it "essential" because it helps to progress cases through the justice system.[194] A key benefit is that it also helps them to manage and organise their workload better.[195] Others are more resistant. Some members of the judiciary feel strongly about the adversarial system and are apprehensive about the more inquisitorial nature of case management.[196] Some also find it not

[190] See Bridgette Toy-Cronin and others *The Wheels of Justice: Understanding the Pace of Civil High Court Cases* (University of Otago Legal Issues Centre, 27 November 2017) at 45; and New Zealand Law Commission, above n 59, at 133.

[191] High Court Rules 2016, r 7.1; District Court Rules, r 7.1.

[192] See generally Tomlinson, above n 2, at 53-54.

[193] Steven Gensler "Judicial Case Management: Caught in the Crossfire" (2010) DLJ 60(3) 669 at 671.

[194] Toy-Cronin and others, above n 190, at 98.

[195] Toy-Cronin and others, above n 190, at 8.

[196] Susskind, above n 7, at 230.

that stimulating or "enriching" on a personal level.[197] To make case management, and thus COR, more attractive to the judiciary it needs to be promoted as a process that could improve access to justice and also have benefits in terms of efficiency and effectiveness.

B COR as an ENE tool

Chapter I set out the characteristics of ENE and identified that it can be a useful tool because the parties often have to complete their "homework" earlier[198], it can "inject" the parties with some "common sense"[199], and also lead to reduced costs and delays.[200] Figure 3 demonstrates that the aspects of COR that are recognised as ENE processes are the judge reaching a view and then delivering this view to the parties for them to accept or reject. Often a provisional decision on the merits of the case is enough for the parties' purposes and they will accept the outcome.[201] Joshua Rozenberg opines that it would be "pretty rare" that a party would not accept a decision and thus it is likely that only a small amount of cases that progress through the COR process would result in a hearing.[202] More empirical evidence would be required to support this claim. Nevertheless, it is likely that this process would reduce the amount of claims that progress to a traditional hearing to some degree.

C A Comparison to the United Kingdom's Approach

The United Kingdom's ultimate goal is to become "digital by default".[203] The COR pilot involved them testing the online service with only a small group of people. If it was to be made available more widely, it is likely that they would eventually want COR to be compulsory. The difficulty with this approach is that people will be excluded from the system because they cannot access online services. This is because they do not have the means, educational ability or confidence to navigate such systems. Thus, this proposal for New Zealand which allows users to select either a traditional, paper-based process or an online process is more appropriate. This is because it works towards ensuring that everyone can access the justice system, regardless of their personal needs and characteristics.

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[197] Toy-Cronin and others, above n 190, at 98.

[198] Brazil, above n 35, at 38, 41 and 46.

[199] Susskind, above n 7, at 114.

[200] Brazil, above n 35, at 18-19.

[201] See Fisher, above n 38, at 32.

[202] See Rozenberg, above n 14.

[203] Venning, above n 3, at [32].

D Litigants who Could Benefit from COR

People that could benefit from selecting COR instead of using the traditional litigation process includes litigants with disabilities; self-represented litigants; and well-educated and well-heeled litigants. The value that each of these groups of people could obtain from COR will be discussed in turn.

1 Litigants with disabilities

COR could be useful in promoting positive outcomes for people who are physically disabled or intellectually disabled. In New Zealand, approximately 24% of the population are disabled.[204] This means that they perceive themselves as having a limitation in activity caused by a long-term condition or health problem expected to last at least six months and using an assistive device does not completely remove the problem.[205] People living with a disability can be restricted from participating in a range of areas of their lives, and the justice system is unlikely to be an exception. Susskind observed that there is a great number of people who are "effectively excluded" from the court system because of a physical impairment.[206] The COR pilot in the United Kingdom was designed to target these people so that they could access the justice system without having to travel to a court building.[207] People living with intellectual impairments may also experience exclusion, albeit it in a different form. Rather than physically being unable to attend court, they may struggle with "obtaining, organising, and using sensory and perceptual information".[208] This can prevent them from being able to respond to information at the same pace or in the same manner as a non-impaired person.[209] An asynchronous text-based chat process would give them extra time to digest information, seek help and organise their case before providing a written response. This could be especially

[204] Ministry of Health "Disability" (2 August 2018) < https://www.health.govt.nz/our-work/populations/maori-health/tatau-kahukura-maori-health-statistics/nga-mana-hauora-tutohu-health-status-indicators/disability>.

[205] Ministry of Health, above n 204.

[206] Susskind, above n 7, at 221.

[207] Ryder, above n 29.

[208] See Sylvia Bell and Warren Brookbanks *Mental Health Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2017) at 40, citing Ministry of Health *Guidelines to the Mental Health (Compulsory Assessment and Treatment Act 1992* (Wellington, 2012) at [1.1.3].

[209] See generally Bennett and others, above n 49, at 125 and following.

applicable for litigants suffering from head injuries,[210] severe depression,[211] autism or Asperger's disorder,[212] for example. It is likely that COR would provide value for physically disabled and intellectually disabled people.

2 Litigants in person

COR could also be useful for LiPs.[213] LiPs are defined as someone who represents themselves in court without a lawyer.[214] The number of LiPs appearing in common law jurisdictions, including New Zealand, is increasing.[215] The reasons why people litigate in person are complex[216] but can be based on financial motives,; [217] perceptions about the case and litigant;[218] distrust, or dissatisfaction, of lawyers;[219] and the court being open to, and supportive of, LiPs.[220]

The main difficulty LiPs face is "knowing nothing about the law, procedure, preparing a case, or appearing in court".[221] This problem does not solely affect the litigant, it also has consequences for court staff and judges. Typically, LiPs demand more court time and resources because they have more questions, are less organised, and are unaware of

[210] See Bell and Brookbanks, above n 208, at 40 and 291.

[211] See Bell and Brookbanks, above n 208, at 40 and 291.

[212] See generally Bennett and others, above n 49, at 125 and following.

[213] Susskind, above n 48.

[214] Melissa Smith, Esther Banbury and Su-Wen Ong *Self Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (Ministry of Justice, July 2009) at 17.

[215] The Rules Committee, above n 5, at 2; Toy-Cronin, above n 101, at 724; and Winkelmann, above n 4, at 230.

[216] Toy-Cronin, above n 101, at 724.

[217] Toy-Cronin, above n 101, at 729; see also Julie Macfarlane *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants — Final Report* (Treasurer's Advisory Group on Access to Justice, May 2013) at 9; and Liz Trinder and others *Litigants in Person in Private Family Law Cases* (Ministry of Justice, November 2014) at 15.

[218] Toy-Cronin, above n 101, at 729; Macfarlane, above n 217, at 9, 45; and Trinder and others, above n 217, at 16.

[219] Toy-Cronin, above n 101, at 730; Macfarlane, above n 217, at 45.

[220] Toy-Cronin, above n 101, at 731, citing Smith, Banbury and Ong, above n 214, at 47. See also Richard Moorhead and Mark Sefton *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department for Constitutional Affairs Research Series 2/05, March 2005) at 252.

[221] New Zealand Law Commission *Dispute Resolution in the Family Court* (March 2003) at 187-188.

procedures.[222] Judges also often take a more active role when LiPs are involved to ensure that the issues in dispute are identified and that both parties have an opportunity to explain their case properly.[223] COR could be useful to LiPs because it would provide them with accessible, intelligible information about the law, the court system and how to present their case.[224] COR is specifically designed to be used without a lawyer. Information is set out in terms that lay people can understand and there is an absence of legalese. COR also allows answers to be saved and then revisited at a later time. This provides LiPs with the opportunity to go and check their answers with a friend or advisor and conduct further research or seek out more information before uploading them. The asynchronous element of COR also gives litigants an opportunity to present their case at a speed that is suitable for their needs and the inquisitorial nature could help ensure that the judge obtains all information required to make a decision. It also could create a more even playing field and alleviate imbalances in power which may be experienced in a traditional courtroom.[225] Policy makers are interested in using online methods to help LiPs navigate the justice system.[226] This supports the introduction of COR in this context.

3 Educated and upper-middle income litigants

It is likely that COR could also be suitable for well-educated and well-heeled litigants. This is because they typically have the access to technology and the ability to work with online systems. Cellphones, laptops and internet connections are expensive and people with low levels of income may not be able to afford these devices. Thus, those with the financial means to purchase such devices are likely to use the internet more frequently. In turn, their knowledge about and confidence in using online platforms also increases. Education is also a relevant factor to consider as those with greater literacy levels are more likely to be able to read, interpret and respond to the information that they are given in a text-based COR system.

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[222] New Zealand Law Commission, above n 221, at 187.

[223] At 187.

[224] At 188.

[225] But see Bryom, above n 83, at 21, citing Jennifer Reynolds "Luck v Justice: Consent Intervenes but for Whom?" (2014) 14(2) Pepp L Rev 250, which observes that if ODR systems are informal this can replicate existing power imbalances.

[226] See Prince, above n 150, at 111.

A private company has already tapped into this market. Complete Online Dispute Resolution (CODR) is a New Zealand company established in 2016 by Michael Heron.[227] CODR claims to be "revolutionising" how legal matters are resolved.[228] The cost of resolving disputes starts at $1,500 per party and examples of the types of disputes CODR focuses on are relationship property agreements and separation agreements.[229] CODR gives the user a high degree of control over the process and provides the parties an independent expert who is knowledgeable in the subject matter to ensure that a conclusion is reached.

CODR does not intend to replace the court system, but instead provide users with an alternative method so that judicial intervention is not required. CODR claims that their services can resolve disputes "more quickly and with greater expertise" than public services, and all in a private arena.[230] Having a voluntary private system like CODR is useful but integrating COR into the public system is an entirely different matter. If litigants want to have the power of the state behind them, they would have to use COR instead of a private service. Public systems are created by law and a range of factors are required to be considered when making a decision including the "interests of third parties, the legal system and the background of moral, social and political norms".[231] In comparison, disputes being resolved through a private model will be guided by the parties interests alone which are likely to be based on "compromise, unpredictable social norms, and the market itself".[232] COR would operate in a public arena and thus would have to operate in a transparent and fair manner. This would better achieve access to justice in the manner that Bryom articulated in comparison to the private CODR process.[233]

4 Litigants with low levels of income and education

This chapter has identified three different types of litigants who could benefit from COR. Equally, it is important to consider whom COR would not be suitable for. When people from low socio-economic communities seek solutions for their legal problems, they are often

[227] Nick Butcher "Online Lawyering – Where you rarely meet the lawyer handling your legal matter" (2016) 895 LawTalk 13.

[228] Butcher, above n 227, at 14

[229] Complete Online Dispute Resolution Ltd "About CODR" (2020) <https://codr.co.nz/about/>.

[230] Butcher, above n 227, at 14.

[231] Codlin, above n 121, at 734.

[232] Codlin, above n 231, at 723 and 756; see also Susskind, above n 7, at 22; and Kellar, above n 103, at 122.

[233] Byrom, above n 83, at 5.

confronted with additional obstacles. Educational and material impairments can lead to them not being able to find, understand or use online systems effectively.[234] Implementing COR in an attempt to resolve their claims could actually exacerbate the issues they already face when trying to access justice.[235] Even though the claims they bring are often small in terms of money – it is often only a few extra dollars here and there – but to the individual bringing the claim this difference can have serious consequences and impacts on their day-to-day life.[236] Accordingly, we should not look towards COR for an access to justice solution in jurisdictions where there are a preponderance of people with low incomes and possibly low literacy skills. In general, these people are more likely to struggle with accessing the justice system and therefore implementing COR and requiring them to use it would create an additional barrier.

Despite COR note being useful for some litigants, this does not mean that it should not be introduced at all. Offering a better system for some people would still improve the current system, especially considering how large the justice gap is. As Volitare famously remarked – "we should not let the best be the enemy of the good".[237] This attitude should be adopted when attempting to reduce the justice gap, given that the problem is so complex and well-established.

[234] Tanina Rostain "Techno-Optimism and Access to the Legal System" (2019) 148 Daedealus - Journal of the American Arts and Sciences 93 at 93.

[235] Such as the digital divide and disengagement. See Chapter II Part B for a discussion on these points.

[236] See Cooper, above n 173, at 97.

[237] This notion derives from an Italian proverb quoted in Volatire's *Dictionnaire Philosophique* (Grasset, Geneva, 1764).

V Legislative Reform

If COR was to be implemented in New Zealand, it has to be considered whether our current legislation is flexible enough to permit a change in processes or whether a new framework needs to be crafted to accommodate a COR model. Commentators have observed that even though digitisation can present a significant change to the justice process, this may not be reflected in substantive changes to the law.[238] This chapter will test this claim. Following the proposal in Chapter IV, if COR was to be used as a form of case management procedure it would be subject to Rules reform. But if it was introduced as a process to fit in amongst others that people can select from to receive a decision and thus resolve a dispute it may require something greater than Rule reform and new primary legislation may be required. This is because the Rules Committee may be uncomfortable with making a fundamental change to the adjudicative process and how decisions are issued. This chapter addresses the rules and primary legislation in turn.

A Changes to Rules

If COR was built in as a form of case management procedure it is likely that Rule reform would be required. The rules governing processes and procedures are capable of change and are often amended.[239] The Rules Committee is involved in making changes to rules in the High Court, District Court, Court of Appeal and Supreme Court.[240] To make, amend, revoke or replace rules, the Committee has to work together with the Ministry of Justice.[241] Neither the Committee nor the Government has the ability to make rules unilaterally. In practice rules

[238] Tomlinson, above n 2, at 63. Contrast Doron Menashe "A Critical Analysis of the Online Court" (2018) 39 JIL 921 at 930.

[239] Examples of amendments being made this year include the High Court Amendment Rules 2020 (LI 2020/125); High Court (COVID-19 Preparedness) Amendment Rules 2020 (LI 2020/59); District Court (Contempt of Court) Amendment Rules 2020 (LI 2020/123).

[240] District Court Act 2016, s 228; Senior Courts Act 2016, s 148; see also The Rules Committee, above n 5, at 13.

[241] See generally Courts of New Zealand "Rules Committee" <https://www.courtsofnz.govt.nz/about-the-judiciary/rules-committee/>.

proposed by the Committee have been endorsed by Cabinet and made by the Governor-General by an Order in Council.[242]

Provisions regarding case management are set out in Part 7 of both the District Court Rules and High Court Rules.[243] These are the parts that the Rules Committee would need to turn their attention to. If the Committee wishes to make changes to the Rules, they are required to undertake activities such as consulting those with an interest in the matter, informing the public about new or proposed changes, and promoting statutory change if required to co-ordinate procedural rules.[244] It is likely that reform would be required to introduce COR.[245]

B Changes to Primary Legislation

If COR was introduced as an alternative process that litigants could select from to resolve a dispute (instead of having a traditional hearing), then primary legislation may need to be amended or enacted to accommodate this innovation. This is because the Rules Committee may feel that implementing COR would represent them stepping beyond their role of regulating the practice and procedure of the court. Whether or not the Committee would be encroaching into policy or fundamental decisions is contentious because the parties to a dispute would be consenting to a decision being made. Nevertheless, the Committee may wish to have some enabling legislation behind them before they make any further changes. Legislation that may capture COR includes the Courts (Remote Participation) Act 2010, the Electronic Courts and Tribunals Act 2016 and the Tribunals Powers and Procedures Legislation Act 2018. The usefulness of these Acts will be addressed in turn.

1 Courts (Remote Participation) Act[246]

As identified in Chapter III, COR enables parties to participate in court proceedings remotely. It follows that the Courts (Remote Participation) Act may be useful. Unfortunately, the scope

[242] District Court Act 2016, s 228; Senior Courts Act 2016, s 148; see generally Courts of New Zealand, above n 241.

[243] High Court Rules 2016; District Court Rules 2014.

[244] Courts of New Zealand, above n 241.

[245] Compare r 5 of the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008. See below for a discussion about the differences between the United Kingdom Rules and the New Zealand Rules.

[246] Courts (Remote Participation) Act 2010.

of the Act is less extensive than the title suggests. The Act recognises that technology is becoming more prevalent in courtrooms[247] and because of this we can conduct hearings without parties being "physically present at the place of the hearing".[248] But it only provides provisions for the use of one form of technology – audio-visual links (AVL). COR is premised on being a text-based system; it does not use audio and visual forms of communication. Therefore, the Courts (Remote Participation) Act does not capture COR. New provisions would have to be introduced to allow the use of COR. Despite this, the Act could still provide some utility. It sets out a criteria for allowing the use of AVL which can provide a starting point for considering what might need to be included in a criteria to allow the use of COR. For AVL to be used, a judicial officer or Registrar must take into account the nature of the proceeding, availability of technology, potential impact of the use of technology on the rights of other parties, and any other relevant matters.[249] A similar criteria could be used for assessing the suitability of COR in each case.

2 Electronic Courts and Tribunals Act[250]

The Electronic Courts and Tribunals Act also sounds promising in terms of being able to accommodate a COR model. The Act was introduced to ensure that "our justice system can be more flexible… bring about more modern ways of working and allow courts to transact electronically in the future".[251] Despite these ambitious remarks, the legislation does not live up to its name, which some commentators have described as "disappointing".[252] The Act solely focuses on using technology to present documents in a traditional courtroom,[253] but it does not permit using technology to replace appearing in a physical courtroom. Therefore, COR does not come within the ambit of the Electronic Courts and Tribunals Act.

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[247] See Jan-Marie Doogue "Ensuring Technology Serves the Interests of Justice" (2017) 911 Law Talk 46.

[248] Courts (Remote Participation) Act 2010, s 3.

[249] Courts (Remote Participation) Act 2010, ss 5 and 7.

[250] Electronic Courts and Tribunals Act 2016.

[251] (11 October 2016) 717 NZPD 14122.

[252] David Harvey "New Zealand's Electronic Courts and Tribunals Act 2016" (31 August 2017) Society for Computers and Law <https://www.scl.org/articles/9989-new-zealand-s-electronic-courts-and-tribunals-act-2016>.

[253] Electronic Courts and Tribunals Act 2016, ss 3 and 4.

3 *Tribunals Powers and Procedures Legislation Act*[254]

The Tribunals Powers and Procedures Legislation Act may be more useful. It was introduced to promote a "modern, efficient, and effective courts and tribunals system".[255] More specifically, the introduction of the Act sought to reduce the time it takes to resolve matters, allow for greater use of technology, simplify procedures, and provide greater access to justice.[256] One aspect of the Act which is useful in respect of COR is that it established provisions for Tribunals to operate remotely. These provisions provide for the "use of electronic facilities to hear matters" and set out that "a hearing… may be conducted by telephone, AVL or other remote access facility if the Referee considers it appropriate and the necessary facilities are available".[257] It follows that if COR comes within the scope of a remote access facility, then it may be able to be used in place of a physical hearing (if the Referee considers it is appropriate in the circumstances). The term "remote access facility" is not defined in the Act. Like telephones and AVLs, COR provides a way to communicate remotely using electronic means. But telephones and AVLs require the parties to communicate at the same time, distinguishing them from COR. If a wide interpretation of the term "other remote access facility" was adopted, it is possible that COR would be captured by this Act. Whereas a narrow approach would likely exclude COR because communication does not occur synchronously. Further, this Act only applies to Tribunals, and therefore cannot be used to implement a COR model in courts.

4 *The United Kingdom's Legislation*

The United Kingdom introduced the Courts and Tribunals (Online Procedure) Bill[258] in 2017 which provided rules for an online procedure in courts and tribunals. Clause 1 sets out that specific proceedings could "be conducted, progressed or disposed of… [and] may authorise or require parties… to participate in hearings… by electronic means".[259] It can be deduced that the legislature's intention when drafting this provision was to capture processes like COR. This legislation endeavoured to create separate rules and procedures for online court processes

[254] Tribunals Powers and Procedures Legislation Act 2018.

[255] Tribunals Powers and Procedures Legislation Bill 2017 (Bill Digest No 2521).

[256] Tribunals Powers and Procedures Legislation Bill 2017 (No 286-1) (explanatory note) at 1.

[257] For example, s 50 of the Tribunals Powers and Procedures Legislation Act 2018 acts to insert this new provision into the Disputes Tribunal Act 1988.

[258] Courts and Tribunals (Online Procedure) Bill [HL] 2017-19.

[259] Courts and Tribunals (Online Procedure) Bill [HL] 2017-19, cl 1.

(which would encompass COR) and establish the Online Procedure Rules Committee. But unfortunately this legislation was never passed. Despite the Bill not progressing through Parliament before the end of the session (it reached the Report Stage in the House of Commons),[260] it can still provide a useful starting point for considering what may need to be included in legislation if COR was to be introduced in New Zealand. Thus, at this stage in the United Kingdom no changes have been made to primary legislation.

COR was able to be implemented in the SSCS Tribunal because of the broad powers delegated to the Tribunal in the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules.[261] Rule 5 sets out that the Tribunal can "regulate its own procedure" and "decide the form of any hearing". In New Zealand, the powers in Part 7 of both the District Court Rules and High Court Rules are not this broad and thus may need amended for COR to be introduced. If COR was to be implemented in another jurisdiction in the United Kingdom it is likely that amendments to the relevant rules or primary legislation would be required. This is what the Courts and Tribunals (Online Procedure) Bill intended to achieved.

5 Summary

At present, there is no legislation in New Zealand that would wholly encompass a COR model. The Tribunals Powers and Procedures Legislation Act could be useful for implementing COR in a tribunal setting, but the characteristics of a remote access facility would have to be teased out to determine whether COR could fall within this definition, or whether the definition needs expanded to capture COR. The Courts (Remote Participation) Act and the United Kingdom's Courts and Tribunals (Online Procedure) Bill could also be useful at providing a springboard to consider what might need to be included in legislation in order for COR to be used in New Zealand. Ultimately, if COR was to be introduced as a process that litigants could select from instead of attending a hearing, it is likely that legislative reform would be required because current legislation does not clearly capture a process like COR.

[260] United Kingdom Parliament "Bills and Legislation: Courts and Tribunals (Online Procedure) Bill (23 July 2019) <https://services.parliament.uk/Bills/2017-19/courtsandtribunalsonlineprocedure.html>.

[261] Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008.

Conclusion

Our present justice system was designed in a world of quill pens[262] and has not kept pace with the rest of society. We can complete bank transfers, apply for jobs, order groceries and meet our life partners online from the comfort of our own living rooms, and yet we often still get dressed up and march down to the courthouse when we want to resolve a dispute.[263] We have not taken advantage of the promise of technology in the same manner that we have in other areas of our lives. COR is an innovation that could change this and bring the legal sector into the 21st Century.

This paper has proposed that COR would be most useful when it is incorporated into the current civil justice system. Litigants would be given the opportunity to use COR firstly as a case management tool and subsequently as a form of early neutral evaluation, but neither option would be compulsory; a paper system would continue to exist. The classes of litigants who could benefit from the availability of this online process could include LiPs, litigants with disabilities, and well-heeled and well-educated litigants. Despite COR possibly not being useful to everyone, it is not a bad thing to offer a better system for only the people in these categories, given how large the justice gap is. It is likely that the implementation of COR in New Zealand would be contingent on legislative reform as our current legislation is unlikely to be considered malleable enough. Changes could be made to either the rules or primary legislation. This would be dependent on how apprehensive the Rules Committee is about fundamentally changing the nature of some adjudication processes. While the introduction of COR would pose some challenges, it would also provide litigants with a process that is easier to understand, cheaper, and devoid of physical barriers, which could lead to increased access to justice.

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[262] Anthony Fraze "Feather in Your Cap: Supreme Court advocates carry home traditional mementos" (1 April 2017) ABA Journal <https://www.abajournal.com/magazine/article/supreme_court_advocates_traditional_mementos>.

[263] See generally Ryder, above n 45; and Venning, above n 3.

Judges have warned litigants that "pyjamas are *not* appropriate attire" for the courtroom.[264] But who would not want to sleep in a little longer, stay in their dressing gown, and still have the opportunity to validate their legal rights? COR could enable claimants to do just that.

[264] NZ Lawyer "Lighter Side: Judge warns against pyjama wearing in court" (25 February 2016) < https://www.thelawyermag.com/nz/news/general/lighter-side-judge-warns-against-pyjama-wearing-in-court/199503>.

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