



**VICTORIA UNIVERSITY**  
MELBOURNE AUSTRALIA

## *Courts, mediation and COVID-19*

This is the Accepted version of the following publication

Sourdin, Tania and Zeleznikow, John (2020) Courts, mediation and COVID-19.  
Australian Business Law Review, 48 (2). pp. 138-158. ISSN 0310-1053

The publisher's official version can be found at  
<http://sites.thomsonreuters.com.au/journals/2020/07/17/australian-business-law-review-update-vol-48-pt-2/>

Note that access to this version may require subscription.

Downloaded from VU Research Repository <https://vuir.vu.edu.au/41546/>

# Courts, Mediation and COVID-19

Tania Sourdin and John Zeleznikow\* and John Zeleznikow\*\*

## Abstract

Fundamental to the practice of law is the need to adapt to the ever-changing circumstances of human society. The COVID-19 pandemic is requiring lawyers, courts, judges and others (such as ~~a~~Alternative ~~d~~Dispute ~~r~~Resolution (“ADR”) practitioners) involved in the justice system to reassess how they operate in a rapidly changing environment ~~that requires them to use technology to operate remotely and to make use of technological tools that often are not constructed to support the needs of those working in the justice sector.~~ Responses by courts and ADR practitioners ~~have varied~~ considerably from jurisdiction to jurisdiction, and many ~~responses are~~have ~~been~~ ad hoc and informed by a crisis-management approach. At the same time, innovation that has often been stalled by inertia across the sector is challenging many to contemplate how technology can support efforts to ensure that the justice system can continue to deliver outcomes without increasing delay and also enable economic recovery in the face of a projected ~~exponential~~ increase in disputes. Noting such pressure, this article explores the ways in which courts and ADR services are responding to the COVID-19 pandemic ~~and considers such responses~~ in view of past technological developments. ~~The authors note that responses are changing on an almost daily basis in some jurisdictions and therefore consider that some responses may alter again as courts and others continue to innovate in this new environment.~~

## 1. INTRODUCTION

The ~~coronavirus~~ (COVID-19) pandemic presents a unique challenge to legal systems and the justice sphere more broadly. While the outbreak is foremost a public health concern,<sup>1</sup> the effects of COVID-19 on the way in which legal sector services operate are already momentous and are projected to increase.<sup>2</sup> Government directives aimed at reducing the spread of COVID-19 have rendered the more traditional

\* Tania Sourdin: BA, LLB, LLM, PhD; Professor of Law; Dean and Head of Newcastle Law School, University of Newcastle, Australia. The author acknowledges the research assistance of Stephanie Simm (Solicitor and Senior Researcher, University of Newcastle, Australia) and Tom Hammond (Researcher, University of Newcastle, Australia). John Zeleznikow: BSc (Hons), GradDipComp, PhD; Professor of Information Systems, Victoria University Business School, Melbourne, Australia.  
\*\* John Zeleznikow, BSc (Hons), GradDipComp, PHD; Professor of Information Systems, Victoria University Business School, Melbourne, Australia

<sup>1</sup> On 11 March 2020 the World Health Organisation categorised COVID-19 as a pandemic; see: Tedros Adhanom Ghebreyesus, “WHO Director-General’s opening ~~Opening remarks~~ Remarks at the media ~~Media briefing~~ Briefing on COVID-19”, World Health Organisation (Speech delivered at the World Health Organisation/WHO, Geneva, (11 March 2020) <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>>.

<sup>2</sup> For a modelling of how the virus may impact Australia, see generally: The Hon Scott Morrison MP, “Update on Coronavirus Measures” (Media Statement/Release, 7 April 2020) <<https://www.pm.gov.au/media/update-coronavirus-measures-070420>>; Australia Government-Department of Health, “Modelling how ~~How~~ COVID-19 ~~could~~ Could affect ~~Affect~~ Australia”, Australia Government-Department of Health (Australian Government, Web Page, 27 April 2020) <<https://www.health.gov.au/news/modelling-how-covid-19-could-affect-australia>>.

- Formatted: Font: Not Italic
- Formatted: Font: Not Italic, Font color: Black
- Formatted: Font: Not Italic
- Formatted: Font: Not Italic, Font color: Black
- Formatted: Font: Not Italic
- Formatted: Font: Not Italic, Font color: Black
- Formatted: Font: Not Italic

- Formatted: Small caps, Border: (No border)
- Formatted: Not Highlight
- Formatted: Not Highlight
- Formatted: Font: Not Italic
- Formatted: Font: Not Italic
- Formatted: Font: Not Italic
- Formatted: Font: Not Italic
- Formatted: Default Paragraph Font, Font color: Black
- Formatted: Default Paragraph Font, Font color: Black
- Formatted: No underline, Font color: Black, English (United States)
- Formatted: Default Paragraph Font, Font color: Black
- Formatted: No underline, Font color: Black, English (United States)
- Formatted: Default Paragraph Font, Font color: Black
- Formatted: No underline, Font color: Black, English (United States)
- Formatted: Default Paragraph Font, Font color: Black
- Formatted: Default Paragraph Font, Font color: Black
- Formatted: Default Paragraph Font, Font: Not Italic, Font color: Black
- Formatted: Default Paragraph Font, Font color: Black
- Formatted: Default Paragraph Font, Font color: Black

face-to-face administration of justice no longer viable and legal systems around the globe are each working to develop their own response to the pandemic.<sup>3</sup>

The pressure COVID-19 has placed on justice systems around the world is both enormous and unprecedented.<sup>4</sup> It has been suggested that the pandemic will not only cause civil litigation to increase, but the interpersonal and economic impacts will eventually result in a "tsunami" of litigation.<sup>5</sup> Thus the need for justice systems to adapt is paramount. At present, it is clear this pressure has resulted in a range of court-based developments that vary significantly from jurisdiction to jurisdiction, although most have as a centerpiece the use of remote access technology.<sup>6</sup> In the future, the strain on courts and alternative dispute resolution (ADR) services to manage and resolve this tsunami of disputes will also require significant technological shifts. In this way, advances in communications and information technology offer considerable opportunities to enable justice services to continue to be provided effectively during the COVID-19 pandemic.<sup>7</sup> Indeed, the ability of countries to access and implement different tiers of technological change has considerable relevance to how courts and ADR services are adapting to the pandemic.<sup>8</sup>

For instance, countries that function on a "physical presence" model of justice may lack an existing framework to facilitate the transition to online operations.<sup>9</sup> In this regard, as such, in many countries courts have effectively "closed down" to all but the most urgent matters.<sup>10</sup> Other countries such as Australia,<sup>11</sup> Canada,<sup>12</sup> America the United States<sup>13</sup> and the United Kingdom<sup>14</sup> operate in a realm where

<sup>3</sup> For examples of Australian government directions and orders aimed at reducing the spread of COVID-19, see: *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW); *Chief Health Officer (Qld), Home Confinement, Movement and Gathering Direction (Qld)* (2 April 2020); *Deputy Chief Health Officer (Communicable Disease) (Vic), Stay at Home Directions (Vic)* (30 March 2020).

<sup>4</sup> Gert-Jan Boon et al., "The COVID-19 Pandemic and Business Law: A Series of Posts from the Oxford Business Law Blog" (Oxford Legal Studies Research Paper No 15, 15 April 2020) 2.

<sup>5</sup> Christopher Dyess, "The Coming Tsunami of Employment-Related COVID-19 Litigation", *New York Law Journal*, (Web Page, 21 April 2020) <<https://www.law.com/newyorklawjournal/2020/04/21/the-coming-tsunami-of-employment-related-covid-19-litigation/?return=20200328194613>>. For an analysis of how COVID-19 may impact the economy and a discussion of the potential legal responses to reduce this impact, see: Gert-Jan Boon et al., n 4 "The COVID-19 Pandemic and Business Law: A Series of Posts from the Oxford Business Law Blog" (Oxford Legal Studies Research Paper No 15, 15 April 2020).

<sup>6</sup> Judiciary of England and Wales, "Civil Justice in England and Wales: Protocol Regarding Remote Hearings" (Protocol, 26 March 2020), 1.

<sup>7</sup> See generally: Jane Donoghue, "The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice" (2017) 80(6) *The Modern Law Review* 995.

<sup>8</sup> See generally: Tania Sourdin, "Justice and Technological Innovation" (2015) 25 *Journal of Judicial Administration* 96.

<sup>9</sup> *The IT Country Justice*, "Courts and COVID-19: Delivering the Rule of Law in a Time of Crisis", *The IT Country Justice (Blog Post, 26 March 2020)* <<https://theitcountryjustice.wordpress.com/2020/03/26/courts-and-covid-19-delivering-the-rule-of-law-in-a-time-of-crisis/>>.

<sup>10</sup> *The National Judicial College*, "Lessons Learned From Around the World About Managing Courts in a Pandemic" (Webinar, *The National Judicial College*, 23 April 2020). Notably, webinar participants also indicated that in many courts, judges and staff had been infected with COVID-19, thus causing a reduction in capacity to manage court-based disputes.

<sup>11</sup> Tania Sourdin, n 8 "Justice and Technological Innovation" (2015) 25 *Journal of Judicial Administration* 96; see also references to the taxonomy in Tania Sourdin, Bin Li and Tony Burke, "Just, Quick and Cheap? Civil Dispute Resolution and Technology" (2019) 19 *Macquarie Law Journal* 17, 18, 35; Philippa Ryan and Maxine Evers, "Exploring eCourt Innovations in New South Wales civil courts" (2016) 5 *Civil Justice Journal of Civil Litigation and Practice* 65, 66, 68.

<sup>12</sup> Tania Sourdin, Bin Li and Tony Burke, n 11 "Just, Quick and Cheap? Civil Dispute Resolution and Technology" (2019) 19 *Macquarie Law Journal* 17, 24; Philippa Ryan and Maxine Evers, n 11 "Exploring eCourt innovations in New South Wales civil courts" (2016) 5 *Journal of Civil Litigation and Practice* 65, 73; Peter Cashman and Eliza Ginnivan, "Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions" (2019) 19 *Macquarie Law Journal* 39, 43-44.

<sup>13</sup> Peter Cashman and Eliza Ginnivan, n 12 "Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions" (2019) 19 *Macquarie Law Journal* 39, 46-47.

<sup>14</sup> Peter Cashman and Eliza Ginnivan, n 12 "Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions" (2019) 19 *Macquarie Law Journal* 39, 45; Jane Donoghue, n 7 "The Rise

Formatted: Font color: Black, Border: (No border)

Formatted: Font color: Black, Not Superscript/ Subscript, Border: (No border)

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

the use of supportive or replacement technologies is more widespread and are therefore more capable of making the transition to remote access services. ~~Even broader than this~~ Further still, other jurisdictions such as China and Estonia function at a more advanced level, where disruptive technologies have already caused a re-think of the judicial role.<sup>15</sup>

Formatted: Font color: Black, Not Superscript/ Subscript, Border: (No border)

The COVID-19 pandemic has thus placed significant pressure on legal systems to embrace technological change. Yet, despite this, there remain many issues associated with the use of technology in the justice sector.<sup>16</sup> These problems are broader than the mere availability of technologies and involve issues with public confidence in the system.<sup>17</sup> ~~The issues can include~~: a lack of innovation readiness and an impoverished justice budget that hinders technological reform; security and confidentiality concerns; community and business responses; and issues with videoconferencing.<sup>18</sup> In addition, the lack of information about who uses courts and, to some extent, ADR services means that decision-making about justice redesign is often not "human centred" and is undertaken without consideration of the needs of end users.<sup>19</sup> While these issues existed well-before the spread of COVID-19,<sup>20</sup> the authors submit that the current viral outbreak calls for a re-evaluation of how technology and big data can be deployed to meet its challenges.<sup>21</sup>

Formatted: Font color: Black, Not Superscript/ Subscript, Border: (No border)

In exploring these issues, the authors note that in the commercial and business law setting, technological approaches have often been more sophisticated than in other jurisdictional areas. In addition, and perhaps not surprisingly, some justice and policy approaches have supported the greater use of ADR to resolve commercial disputes.<sup>22</sup> This is no doubt because many ADR services are more "innovation ready" in terms of their capacity to offer remote services, and also because such services can be more flexibly deployed than those in the court system. It could therefore be argued that innovation readiness has differed in the commercial and business law sector and thus lawyers, judges and other participants may

of Digital Justice: Courtroom Technology, Public Participation and Access to Justice' (2017) 80(6) *The Modern Law Review* 995, 1004.

<sup>15</sup> Monika Zalnieriute and Felicity Bell, "Technology and the Judicial Role" *forthcoming* in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press/CUP, 2020) 2.

Formatted: Default Paragraph Font

<sup>16</sup> Tania Sourdin, Bin Li and Tony Burke, n 11 'Just, Quick and Cheap? Civil Dispute Resolution and Technology' (2019) 19 *Macquarie Law Journal* 17, 26-27.

Formatted

<sup>17</sup> Tania Sourdin, Bin Li and Tony Burke, n 11 'Just, Quick and Cheap? Civil Dispute Resolution and Technology' (2019) 19 *Macquarie Law Journal* 17, 26-27.

Formatted

<sup>18</sup> Tania Sourdin, Bin Li and Tony Burke, n 11 'Just, Quick and Cheap? Civil Dispute Resolution and Technology' (2019) 19 *Macquarie Law Journal* 17, 30-35; Jena McGill, Suzanne Bouclin and Amy Salyzyn, "Mobile and Web-based Legal Apps: Opportunities, Risks and Information Gaps" (2017) 15 *Canadian Journal of Law and Technology* 229, 244; Lisa Toohey *et al*, Monique Moore, Katelane Dart and Dan Toohey, "Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centred Design" (2019) 19 *Macquarie Law Journal* 133, 145; Suzie Forell, Meg Laufer, and Erol Digiusto, "Legal Assistance by Video Conferencing: What is Known?" (Justice Issues Paper No.15, Law and Justice Foundation of New South Wales, November 2011).

Formatted

Formatted

Formatted

Formatted

Formatted

<sup>19</sup> For an administrative law perspective on this issue, see: Cary Coglianese and David Lehr, "Regulating by Robot: Administrative Decision Making in the Machine-Learning Era" (2017) 105 *The Georgetown Law Journal* 1147.

Formatted

<sup>20</sup> Tania Sourdin, Bin Li and Tony Burke, n 11 'Just, Quick and Cheap? Civil Dispute Resolution and Technology' (2019) 19 *Macquarie Law Journal* 17, 30-35; Jena McGill, Suzanne Bouclin and Amy Salyzyn, n 18 'Mobile and Web-based Legal Apps: Opportunities, Risks and Information Gaps' (2017) 15 *Canadian Journal of Law and Technology* 229, 244; Lisa Toohey *et al*, n 18 'Monique Moore, Katelane Dart and Dan Toohey, "Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centred Design" (2019) 19 *Macquarie Law Journal* 133, 145; Suzie Forell, Meg Laufer, and Erol Digiusto, n 18 'Legal Assistance by Video Conferencing: What is Known?' (Justice Issues Paper No.15, Law and Justice Foundation of New South Wales, November 2011).

Formatted

Formatted

Formatted

Formatted

Formatted

Formatted

<sup>21</sup> Cary Coglianese and David Lehr, n 19 'Regulating by Robot: Administrative Decision Making in the Machine Learning Era' (2017) 105 *The Georgetown Law Journal* 1147, 1164-1167.

Formatted

<sup>22</sup> See, for example, the Australian Government approach to commercial tenancy mediation, which extends pre-existing arrangements in many Australian States: Jessica Warriner, "Scott Morrison announces Rent Relief Package for commercial tenants affected by coronavirus" *ABC News* (News Article, 8 April 2020) <<https://www.abc.net.au/news/2020-04-07/scott-morrison-commercial-tenants-coronavirus-measures/12129178>>.

Formatted: Not Highlight

have been more prepared for reform than those practicing in other sectors.<sup>23</sup> As a result of this disparity, ~~the authors have this article~~ specifically includes ~~sd~~ responses outside the business law setting – primarily because such responses inform developments across the justice sector.

It is within this context ~~in which that~~ this article explores how the COVID-19 pandemic has influenced the provision of justice services around the world. Parts ~~B-II and C-III of this paper article~~ do so by highlighting the various ways in which courts and mediation services have adapted to the outbreak. Part ~~D-IV of this paper article~~ then discusses the issues associated with the use of technology in the justice sector, despite the pressure COVID-19 places on legal systems to embrace technological advances. Part ~~E-V of this paper article~~ ultimately concludes that it is necessary to design user-centric innovations to ensure that advances in the use of legal advisory and communications technology lead to reform that lasts beyond the COVID-19 crisis.

## **B-II. COURT RESPONSES TO THE COVID-19 PANDEMIC**

### **II.A. Digital Taxonomy**

Importantly, the COVID-19 outbreak has challenged traditional face-to-face methods in which courts are engaged in the delivery of services.<sup>24</sup> As a result, ~~g~~Governments around the globe have directed their court systems to turn to remote access technology to ensure some principles of access to justice are maintained.<sup>25</sup> In this sense, the pandemic is somewhat timely with technology having infiltrated the justice landscape for some time – long before the spread of COVID-19 – and ~~so~~ provided for levels of adaptation not previously considered possible.<sup>26</sup> It has also been suggested that ~~the COVID-19 pandemic~~ has resulted in some additional innovation that would not have been thought possible in 2019. However, as the authors note below, such innovation is often patchy and issues remain about the extent to which innovations will endure beyond the COVID-19 era.<sup>27</sup>

Sourdin has previously suggested that there are three primary ways in which technology has already restructured the justice system.<sup>28</sup> First, and at the most rudimentary level, are ~~“supportive”~~ technologies – ~~“These technologies are technologies which~~ aim to inform, support and advise individuals involved in the justice system and include, for example, online legal applications (“apps”).<sup>29</sup> At the second level are

<sup>23</sup> See: Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 6th ed, 2020) ~~ch. Ch 10~~. Notably, ~~electronic filing and more~~ sophisticated electronic case-management systems have developed more rapidly in the commercial court area.

<sup>24</sup> Courts and Tribunals Judiciary, *The Remote Access Family Court* (Version 3, 3 April 2020) [1.1].

<sup>25</sup> Sir Andrew McFarlane (President of the Family Division and Head of Family Justice), ~~“COVID-19: National Guidance for the Family Court”~~ (*Guidance*, 19 March 2020) [2].

<sup>26</sup> Indeed, there is literature on the effects of technology in the legal landscape as early as 1997, see: Law Reform Committee, Parliament of Victoria, ~~“Inquiry into Technology and the Law”~~ (Media Release, 19 November 1997) <<https://www.parliament.vic.gov.au/57th-parliament/lawreform/article/1586#may28>>. For a contemporary example of legal innovation, see: James Metzger, ~~“The Current Landscape of Blockchain-Based Crowdsourcing Arbitration”~~ (2019) 19 *Macquarie Law Journal* 81.

<sup>27</sup> See: Trish Carroll, ~~“Is COVID-19 the mother-Mother of all-All disruptors-Disruptors for the legal-Legal professionProfession?”~~, *Australasian Law Management Journal*, 29 April 2020 (*Law Management Journal (Article, 29 April 2020)*) <<http://www.lmhub.com.au/wp-content/uploads/2020/04/ALMJ-April2020-TrishCarroll-PDF.pdf>>, where it is suggested that COVID-19 is a major disruptor for the legal profession, and this may also be the case for courts. Carroll further notes ~~in this article~~ that ~~“American columnist Thomas Friedman wrote an op-ed piece in The New York Times on 17 March 17, 2020, that spoke of the world BC – Before Corona – and the world AC – After Corona”~~, which further supports the idea of COVID-19 being a major disruptor.

<sup>28</sup> Tania Sourdin, Bin Li and Tony Burke, n 11: ~~Just: Quick and Cheap? Civil Dispute Resolution and Technology’~~ (2019) 19 *Macquarie Law Journal* 17, 19. This taxonomy is also discussed in previous works by the author; see: Tania Sourdin, ~~“Judge v Robot: Artificial Intelligence and Judicial Decision-Making”~~ (2018) 41(4) *University of New South Wales UNSW Law Journal* 1114, 1118; Tania Sourdin, n 8: ~~Justice and Technological Innovation’~~ (2015) 25 *Journal of Judicial Administration* 96.

<sup>29</sup> Tania Sourdin, Bin Li and Tony Burke, n 11: ~~Just: Quick and Cheap? Civil Dispute Resolution and Technology’~~ (2019) 19 *Macquarie Law Journal* 17, 19; Tania Sourdin, n 28: ~~Judge v Robot: Artificial Intelligence and Judicial Decision-Making’~~ (2018) 41(4) *University of New South Wales Law Journal* 1114, 1118.

Formatted: Not Superscript/ Subscript, Small caps, Border: : (No border)

Formatted: Not Superscript/ Subscript, Small caps, Border: : (No border)

Formatted: Not Superscript/ Subscript, Small caps, Border: : (No border)

Formatted: Small caps

Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border)

Formatted: Default Paragraph Font

Formatted: #ref\_pageFirst, Font color: Black, Pattern: Clear

Formatted: #ref\_pageFirst

Formatted: Font: Not Italic

Formatted: Not Highlight

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: #ref\_titleArticle, Font color: Black

Formatted: #ref\_titleArticle

Formatted: #ref\_titleArticle

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: #ref\_titleArticle

“replacement” technologies → These technologies are technologies which replace the roles and activities traditionally conducted by humans and include, *inter alia*, e-filing processes and online mediation services.<sup>30</sup> Finally, and at the most advanced level, are “disruptive” technologies → These technologies are technologies which fundamentally alter the way in which legal professionals work and include, for example, artificial intelligence judges or other algorithm-based decision-making programs that may reshape the judicial role.<sup>31</sup> A justice system’s response to COVID-19 may incorporate any of these three categories. This is illustrated by Table 1 extracted below, which below provides some examples of the ways in which courts around the globe have responded to COVID-19.<sup>32</sup>

**Table-TABLE 1 – Court Responses to the COVID-19 Pandemic**

Response	Jurisdiction	Response Details
	North America	
	United States Federal Circuit Court of Appeals <sup>A</sup>	All cases scheduled to be heard in April and May 2020 will be conducted remotely and parties are no longer required to lodge additional hard copy documents where they have been filed electronically.
Supportive	United States Supreme Court <sup>B</sup>	As of May 2020, the Court will hear all oral arguments remotely.
Developments	New York City, USA Criminal Court <sup>C</sup>	As of 25 March 2020, the Court will be conducting all criminal arraignments through videoconferencing technology.
	Ontario Superior Court of Justice <sup>C</sup>	As of 2 April 2020, the Court will dispense with the requirement to file documents in hard copy; will accept electronically signed documents; permit electronic service of documents where personal service is required; and will hear all criminal matters by way of telephone or videoconference.
	Asia	
	Supreme Court of India <sup>A</sup>	“Important matters” are being heard via videoconferencing and limitation periods have been temporarily suspended by the Court.
	Qatar <sup>A</sup>	Proceedings are now being heard via videoconferencing.
	Dubai <sup>A</sup>	Matters will continue with the assistance of videoconferencing.
	Oceania	
	Northern Territory Supreme Court <sup>D</sup>	Jury trials have been suspended and all pre-trial hearings, mentions and directions will be conducted by audio-visual link or telephone conference.
	NSW Supreme Court <sup>E</sup>	From 24 March 2020, there will be no personal appearances in matters save for “exceptional circumstances” and all documents are to be provided by electronic means.
	Supreme Court of Queensland <sup>F</sup>	Parties and practitioners are only to make physical appearances where the matter cannot be “practicably dealt with by telephone or video”.
	Family Court and Federal Circuit Court of Australia <sup>G</sup>	Hearings are to be conducted virtually using Microsoft Teams and/or AAPT Teleconferencing.

<sup>30</sup> Tania Sourdin, Bin Li and Tony Burke, n 11 ‘Just, Quick and Cheap? Civil Dispute Resolution and Technology’ (2019) 19 *Macquarie Law Journal* 17, 19; Tania Sourdin, n 28 ‘Judge v Robot: Artificial Intelligence and Judicial Decision-Making’ (2018) 41(4) *University of New South Wales Law Journal* 1114, 1118.

<sup>31</sup> Tania Sourdin, Bin Li and Tony Burke, n 11 ‘Just, Quick and Cheap? Civil Dispute Resolution and Technology’ (2019) 19 *Macquarie Law Journal* 17, 19; Tania Sourdin, n 28 ‘Judge v Robot: Artificial Intelligence and Judicial Decision-Making’ (2018) 41(4) *University of New South Wales Law Journal* 1114, 1118.

<sup>32</sup> The authors note that the tiers of technological change are not entirely discrete in nature and that some court responses may fall into multiple categories.

Formatted: Font: Not Italic, Font color: Black, Not Superscript/ Subscript, Border: : (No border)

Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border)

Formatted: No underline, Font color: Black, Not Superscript/ Subscript, Border: : (No border)

Formatted: No underline, Font color: Black, Not Superscript/ Subscript, Border: : (No border)

Formatted: No underline, Font color: Black, Not Superscript/ Subscript, Border: : (No border)

Formatted: No underline

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: #ref\_titleArticle

	District Court of New Zealand <sup>xix</sup>	A Practice Note was issued on 23 April 2020 enabling judges of the Court to make directions as to the form of participation of any person at hearing or trial (whether by telephone or audio-visual link).
Supportive Developments	<b>Africa</b>	
	Supreme Court of Uganda <sup>xiii</sup>	The Chief Justice issued a directive on 19 March 2020 enabling judgments and rulings to be issued to the parties via email.
	South African Superior Courts <sup>xiv</sup>	On 16 April 2020 a direction was issued permitting “unopposed applications already enrolled for hearing” to be heard by videoconference and directing parties to opposed applications to “file their heads of argument electronically”.
	<b>Europe</b>	
	The UK Family Court and Family Division of the High Courts <sup>xv</sup>	The United Kingdom has created a “Remote Access Family Court” which that allows hearings to be conducted virtually using, for example, Skype for Business. These remote hearings are supported by “e-bundling” technology, which allows judges and parties to access documents that have been filed electronically.
	Italian Supreme Court <sup>xvi</sup>	While all court activities were initially suspended, there is suggestion that matters will now be heard via videoconferencing technology.
	Republic of Ireland Criminal Courts <sup>xvii</sup>	Defendants in custody will appear before the Central and Special Criminal Court through videoconferencing technology.
	Hungarian Civil and Administrative Courts <sup>xviii</sup>	On 31 March 2020 the Hungarian government issued a decree ordering that hearings are to be conducted electronically (viz:ie through videoconferencing).
	<b>North America</b>	
Replacement Developments	British Columbia’s Civil Resolution Tribunal <sup>xix</sup>	The Civil Resolution Tribunal (CRT) is an online dispute resolution tribunal that hears “inter alia” simple personal injury, employment, construction and property matters. Applicants apply online to have their dispute resolved by the CRT. The system then automatically classifies the dispute and provides applicants with the necessary documents to file their claim. Thereafter, parties can lodge submissions and evidence for the Tribunal member to assess online. Indeed, if an oral hearing is required, it is conducted by Skype. While the CRT has been was in operation before COVID-19, its inherently digital nature has allowed it to “remain fully operational” since the outbreak.
	<b>Asia</b>	
Disruptive Developments	Beijing Internet Courts <sup>xx</sup>	The Beijing Internet Court is one of three “virtual courts” in China. These courts engage in what is termed “e-litigation” procedures, which enables the entire litigation process from “filing to ruling and mediation” to be conducted online. The system operates 24 hours a day and, since the pandemic, has been investigating procedures to “set protocols of online litigation proceedings in cyberspace”. This Court also has what is termed a “mobile micro court”. This, which enables parties to appear via WeChat — China’s leading social media platform — and is of especial benefit for individuals who do not have easy access to a computer during the COVID-19 outbreak.

Formatted: Default Paragraph Font, Superscript

Formatted: Font color: Black, Border: : (No border)

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

Formatted: Font: Not Italic, Font color: Black, Not Superscript/ Subscript, Border: : (No border)

Formatted: Default Paragraph Font, Superscript

Formatted: Default Paragraph Font, Superscript

<sup>iv</sup> Maurice Kenton and Ben Knowles, "COVID-19 Global: Arbitration and eCourt Impacts", *Clyde&Co. (Clyde&Co. Web-Page*, 24 April 2020) <https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration>.

<sup>v</sup> Maurice Kenton and Ben Knowles, "COVID-19 Global: Arbitration and eCourt Impacts", *Clyde&Co. (Web-Page*, 24 April 2020) <https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration>.

<sup>viiB</sup> Centre for Justice Innovation, "Justice Responses to COVID-19 Around the World", *Centre for Justice Innovation (Excel Spreadsheet*, 2020) <https://justiceinnovation.org/covid19>.

<sup>viiC</sup> Centre for Justice Innovation, "Justice Responses to COVID-19 Around the World", *Centre for Justice Innovation (Excel Spreadsheet*, 2020) <https://justiceinnovation.org/covid19>; <sup>vi</sup> Superior Court of Justice, "Notice to Accused Persons, Profession, Crown, Public Prosecution Service of Canada, Correctional Institutions, Witnesses, Jurors, The Public and The Media Regarding Criminal Operations", *Superior Court of Justice (Web-Page*, 2 April 2020) <https://www.ontariocourts.ca/scj/covid-19-suspension-crim/>.

<sup>viiD</sup> Kenton, Maurice and Ben Knowles, "COVID-19 Global: Arbitration and eCourt Impacts", *Clyde&Co. (Web-Page*, 24 April 2020) <https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration>.

<sup>viiE</sup> Kenton, Maurice and Ben Knowles, "COVID-19 Global: Arbitration and eCourt Impacts", *Clyde&Co. (Web-Page*, 24 April 2020) <https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration>.

<sup>viiF</sup> Kenton, Maurice and Ben Knowles, "COVID-19 Global: Arbitration and eCourt Impacts", *Clyde&Co. (Web-Page*, 24 April 2020) <https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration>.

<sup>viiiD</sup> Supreme Court of the Northern Territory, "Courts and Tribunals COVID-19 Response", *Supreme Court of the Northern Territory (Web-Page*, 21 April 2020) <https://supremecourt.nt.gov.au/about/whats-new/2020/courts-and-tribunals-covid-19-response#Supreme%20Court>.

<sup>viiiE</sup> Supreme Court of New South Wales, "Latest Operational Changes Made in Response to Coronavirus (COVID-19)", *Supreme Court of New South Wales (Web-Page*, 23 March 2020) <http://www.supremecourt.justice.nsw.gov.au/Pages/Oar\_Mace\_Admiralty.aspx>.

<sup>viiiF</sup> Naomi Neilson, "Coronavirus and the Justice System: Updates as They Happen", *Lawyers Weekly (Blog Post*, 26 March 2020) <https://www.lawyersweekly.com.au/biglaw/27825-coronavirus-and-the-justice-system-updates-as-they-happen>.

<sup>viiiG</sup> Family Court of Australia, "Practitioner and Litigant Guide to Virtual Hearings and Microsoft Teams", *Family Court of Australia (Practitioner and Litigant Guide*, 22 April 2020).

<sup>viiiH</sup> Chief Judge of the District Court of New Zealand, "Practice Note: Civil Proceedings – Covid-19 Preparedness", *District Court of New Zealand (Practice Note*, 23 April 2020).

<sup>viiiI</sup> Paul Ampurire, "Chief Justice Suspends Court Sessions Due To Coronavirus", *Soft Power News (Blog Post*, 20 March 2020) <https://www.softpower.org/chief-justice-suspends-court-sessions-due-to-coronavirus/>; Jarpa Dawuni, "The Gendered Face of COVID-19: Women and Access to Justice", *United Nations Office on Drugs and Crime (United Nations Office on Drugs and Crime, Blog Post*, 2020) <https://www.unodc.org/dohadecaration/en/news/2020/04/gendered-face-of-covid19-women-and-access-to-justice.html>.

<sup>viiiJ</sup> Hanibal Goitom, "South Africa: Directions for Court Operations During COVID-19 Lockdown Issued", *Library of Congress (Library of Congress, Blog Post*, 23 April 2020) <http://www.loc.gov/law/foreign-news/article/south-africa-directions-for-court-operations-during-covid-19-lockdown-issued/>.

<sup>viiiK</sup> Courts and Tribunals Judiciary, *The Remote Access Family Court (Version 3, 3 April 2020) [1.10]*, [5.70].

<sup>viiiL</sup> Kenton, Maurice and Ben Knowles, "COVID-19 Global: Arbitration and eCourt Impacts", *Clyde&Co. (Web-Page*, 24 April 2020) <https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration>.

<sup>viiiM</sup> Dentons, "The Impact of eGovernment Provisions to Tackle COVID-19 on the Activity of Tribunals. An Overview of Major European Jurisdictions", *Dentons (Blog Post*, 15 April 2020) <https://www.dentons.com/en/insights/articles/2020/april/15/the-impact-of-government-provisions-to-tackle-covid19-on-the-activity-of-tribunals>.

<sup>viiiN</sup> "The impact of government provisions to tackle COVID-19 on the activity of tribunals: An overview of major European jurisdictions", *Dentons (Blog Post*, 15 April 2020) <https://www.dentons.com/en/insights/articles/2020/april/15/the-impact-of-government-provisions-to-tackle-covid19-on-the-activity-of-tribunals>.

<sup>viiiO</sup> British Columbia, "The Civil Resolution Tribunal and Strata Disputes", *British Columbia (Web-Page*, 31 May 2017) <https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal>; Elizabeth Raymer, "B.C.'s Civil Resolution Tribunal Keeps 'Doors Open' During Pandemic", *Canadian Lawyer (Blog Post*, 27 March 2020) <https://www.canadianlawyer.com/practice-areas/adrb/c.s-civil-resolution-tribunal-keeps-doors-open-during-pandemic/328037>.

<sup>viiiP</sup> Xinhua, "Across China: Internet eCourt Handles eCases Despite eCoronavirus eEpidemic", *China.org.cn (Blog Post*, 10 March 2020) <http://www.china.org.cn/china/Off\_the\_Wire/2020-03/10/content\_75796760.htm>.

The above Table 1 illustrates that court responses to COVID-19 may range from basic digitisation of filing systems to the use of more advanced technologies aimed at supporting or disrupting the judicial

Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...
Formatted	...



function.<sup>33</sup> In this regard, there are some stark differences between courts. For some, digitisation has meant that emailed documents may be accepted. For others, where electronic case management and filing systems were already in place, the responses have been more consistent with an extension of what was already occurring within that jurisdiction. Table 1 also demonstrates that the majority of digital tools employed by courts fall under the “supportive” or “replacement” tiers of technological change. While such simple technological uplift may seem somewhat inadequate in such times of crisis, the authors submit that these tools may provide the necessary building blocks to support the courts’ move to digitisation in response to COVID-19.

### 4.2 COVID-19 and The Courts’ Move to Digitisation

Historically, the practice of law is associated with the creation, exchange and consideration of paper documents,<sup>34</sup> together with hearing and case-management approaches that are founded on an oral, public court process. Zalnieriute and Bell explain that, in the past, the courts’ move to online file management was catalysed by the need to manage the high-volume of documents associated with the growth of corporate inquiries and large-scale legal proceedings.<sup>35</sup> However, in present times, it has been the outbreak of COVID-19 that has caused courts to increase their use of e-filing services exponentially.<sup>36</sup> On 31 March 2020, the Federal Court of Australia issued a “Special Measures” statement altering existing Court processes in response to the outbreak.<sup>37</sup> One adaptation implemented by the Court was to direct practitioners to lodge all documents for filing using the Court’s electronic filing system, eLodgement.<sup>38</sup> While such services were used by the Court prior to the outbreak, their application was typically in addition or supplementary to the physical filing of documents.<sup>39</sup> Now, hard copy versions of documents are not being accepted by the Court, save for exceptional circumstances.<sup>40</sup>

In connection with e-filing, the courts have also acknowledged the significant challenges COVID-19 poses to having documents duly signed, witnessed and/or sworn.<sup>41</sup> To this end, the Family Court and

Formatted: Font color: Black, Border: : (No border)

<sup>33</sup> Extracted from Tania Sourdin, *Judges, Technology and Artificial Intelligence* (Edward Elgar Publishing, 2020) (forthcoming).

<sup>34</sup> Monika Zalnieriute and Felicity Bell, n 15, “Technology and the Judicial Role” forthcoming in Gabrielle Appleby and Andrew Lynch, *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2020) 4.

<sup>35</sup> Monika Zalnieriute and Felicity Bell, n 15, “Technology and the Judicial Role” forthcoming in Gabrielle Appleby and Andrew Lynch, *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2020) 4.

<sup>36</sup> See, for example, Superior Court of Justice, “Notice to Accused Persons, Profession, Crown, Public Prosecution Service of Canada, Correctional Institutions, Witnesses, Jurors, The Public and The Media Regarding Criminal Operations”, Superior Court of Justice (Web Page, (2 April 2020)) <<https://www.ontariocourts.ca/scj/covid-19-suspension-crim/>>; The Supreme People’s Court of the People’s Republic of China, “China steps up online litigation services Amidst coronavirus epidemic”, The Supreme People’s Court of the People’s Republic of China (Web Page, (31 March 2020)) <[http://english.court.gov.cn/2020-03/31/content\\_37534820.htm](http://english.court.gov.cn/2020-03/31/content_37534820.htm)>.

<sup>37</sup> Federal Court of Australia, “Special Measures in Response to COVID-19 (SMIN-1)” (Special Measures Information Note, 31 March 2020) <[https://www.fedcourt.gov.au/\\_data/assets/pdf\\_file/0004/62374/SMIN-1-31-March-2020.pdf](https://www.fedcourt.gov.au/_data/assets/pdf_file/0004/62374/SMIN-1-31-March-2020.pdf)>.

<sup>38</sup> Federal Court of Australia, n 37, *Special Measures in Response to COVID-19 (SMIN-1)* (Special Measures Information Note, 31 March 2020) [3.1] <[https://www.fedcourt.gov.au/\\_data/assets/pdf\\_file/0004/62374/SMIN-1-31-March-2020.pdf](https://www.fedcourt.gov.au/_data/assets/pdf_file/0004/62374/SMIN-1-31-March-2020.pdf)>.

<sup>39</sup> Monika Zalnieriute and Felicity Bell, n 15, “Technology and the Judicial Role” forthcoming in Gabrielle Appleby and Andrew Lynch, *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2020) 5; Philippa Ryan and Maxine Evers, n 11 “Exploring eCourt innovations in New South Wales civil courts” (2016) 5 *Journal of Civil Litigation and Practice* 65, 66, 68–69. Indeed, the author has noted in previous work that eCourt filing systems remain paper-based in many areas; see Tania Sourdin, Bin Li and Tony Burke, n 11 “Just, Quick and Cheap? Civil Dispute Resolution and Technology” (2019) 19 *Macquarie Law Journal* 17, 34.

<sup>40</sup> Federal Court of Australia, n 37, *Special Measures in Response to COVID-19 (SMIN-1)* (Special Measures Information Note, 31 March 2020) [3].

<sup>41</sup> Federal Court of Australia, n 37, *Special Measures in Response to COVID-19 (SMIN-1)* (Special Measures Information Note, 31 March 2020) [4]; Family Court of Australia and Federal Circuit Court of Australia, *Joint Practice Direction (JPD-2 of 2020 – Special Measures in response to COVID-19)* (2020) 2 [9]; Courts and Tribunals Judiciary, n 24, *The Remote Access Family Court* (Version 3, 3 April 2020) [5.2.2].

- Formatted
- Formatted
- Formatted
- Formatted
- Formatted
- Formatted
- Formatted
- Formatted: Font: Not Italic
- Formatted: Font: Not Italic
- Formatted
- Formatted
- Formatted
- Formatted
- Formatted: Default Paragraph Font, Font color: Black
- Formatted
- Formatted

Federal Circuit Court issued a Joint Practice Direction permitting, *inter alia* *inter alia*, documents such as affidavits, financial statements and consent orders, required to be signed under the *Family Law Rules 2004* (Cth) or the *Federal Circuit Court Rules 2001* (Cth) to be executed electronically.<sup>42</sup> Notably, this approach has also been mirrored by the Family Court and Family Division of the High Court in the United Kingdom, which have established a “Remote Access Family Court” in response to the pandemic.<sup>43</sup> To facilitate the provision of online services by that Court, Justice MacDonald<sup>44</sup> confirmed that “wet” signatures are not required on Court documents and that the Court is no longer entitled to reject such documents on that basis.<sup>44</sup> The authors posit that this may provide a new model going forward, with Justice MacDonald<sup>44</sup> noting that a court’s willingness to accept electronically signed documents is reconcilable with recent United Kingdom (UK) authorities such as *Bassano v Toft* [2014] EWHC 377 [39]-[41] and *Golden Ocean Group Ltd v Salgacar Mining Industries PVT Ltd* [2012] 2 All ER (Comm) 978 [32].<sup>45</sup>

- Formatted: Font: Not Italic, Font color: Black, Not Superscript/ Subscript, Border: : (No border)
- Formatted: Default Paragraph Font, Font: Not Italic
- Formatted: Default Paragraph Font, Font: Not Italic
- Formatted: Font: Not Italic

Yet, the authors acknowledge that there are some inherent functional limitations here. Namely, even insofar as online filing is available, there can be vast differences in terms of court capacity. In UK courts, for example, reasonably well-developed online filing systems exist as part of case-management procedures enabling users to access documents and track case-management approaches.<sup>46</sup> In other courts, as noted above, online filing has been equated with a capacity to email documents to the court with little case-management functionality.<sup>47</sup> While well-developed electronic case-management procedures and online filing systems have been used in some courts,<sup>48</sup> in many instances, these same courts remain an exception in their jurisdictions for these reasons.

- Formatted: Pattern: Clear

In addition to considering the use, storage and management of documents, many courts around the globe have implemented remote hearing and case-management options.<sup>49</sup> However again, the approaches vary significantly from jurisdiction to jurisdiction, with some courts posting YouTube links to hearings in real time, and others struggling to manage bandwidth and security concerns. In the past, remote hearings tended to be conducted using audio links (largely, by telephone). However, more recently, many courts have now either adopted or extended their capacity to use videoconferencing technology.<sup>50</sup>

- Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

Forrell, Laufer and Digusto explain that videoconferencing refers to an all synchronous (two-way) communication with audio-visual interface and include, for example, web-based platforms such as

<sup>42</sup> Family Court of Australia and Federal Circuit Court of Australia, n 41 *Joint Practice Direction (JPD 2 – Special Measures in response to COVID-19, 2020)* [9].

- Formatted: Default Paragraph Font, Font color: Black

<sup>43</sup> Courts and Tribunals Judiciary, n 24 *The Remote Access Family Court (Version 3, 3 April 2020)* [5.2.2].

- Formatted: Default Paragraph Font, Font: Not Italic, Font color: Black

<sup>44</sup> Courts and Tribunals Judiciary, n 24 *The Remote Access Family Court (Version 3, 3 April 2020)* [5.2.2].

- Formatted: Default Paragraph Font, Font color: Black

<sup>45</sup> Courts and Tribunals Judiciary, n 24 *The Remote Access Family Court (Version 3, 3 April 2020)* [5.2.2]; *Bassano v Toft* [2014] EWHC 377, [39]-[41]; *Golden Ocean Group Ltd v Salgacar Mining Industries PVT Ltd* [2012] 2 All ER (Comm) 978, [32]; [2012] EWCA Civ 265.

- Formatted: Default Paragraph Font

<sup>46</sup> Courts and Tribunals Judiciary, n 24 *The Remote Access Family Court (Version 3, 3 April 2020)* [5.7].

- Formatted: Font: Not Italic

<sup>47</sup> See, for example, the Supreme Court of Uganda: Paul Ampurire-Paul, “Chief Justice Suspends Court Sessions Due to Coronavirus”, *Soft Power News* (Blog Post, 20 March 2020) <<https://www.softpower.ug/chief-justice-suspends-court-sessions-due-to-coronavirus/>>.

- Formatted: Font: Not Italic

<sup>48</sup> *Modria: A Total Tyler Solution*; Tyler Technologies, “Travis County Uses ODR to Fight Traffic on the Roads and in the Court” (2019 Client Case Study: Travis County Small Claims Court (Report)) <<https://www.tylertech.com/resources/case-studies/travis-county-uses-odr-to-fight-traffic-on-the-roads-and-in-the-court/>>.

- Formatted: Font: Not Italic

<sup>49</sup> See, for example, New South Wales Bar Association, “COVID-19: Information for Attending Court” (Guide, 6 April 2020); Family Court of Australia and Federal Circuit Court of Australia, n 41 *Joint Practice Direction (JPD 2 – Special Measures in response to COVID-19, 2020)*; Judiciary of England and Wales, n 6 *Civil Justice in England and Wales: Protocol Regarding Remote Hearings* (Protocol, 26 March 2020); New York State Unified Court System, “Virtual Court Operations to Commence in NYC Mid-Week” (Press Media Release, 22 March 2020); “Notice to Accused Persons, Profession, Crown, Public Prosecution Service of Canada, Correctional Institutions, Witnesses, Jurors, The Public and The Media Regarding Criminal Operations”; Superior Court of Justice, n 36 (Web Page, 2 April 2020) <<https://www.ontariocourts.ca/cej/covid-19-suspension-crim/>>.

- Formatted: Font: Not Italic

- Formatted: Default Paragraph Font, Font color: Black

- Formatted: Default Paragraph Font, Font: Not Italic, Font color: Black

<sup>50</sup> See, generally: Federal Court of Australia, n 37 *Special Measures in Response to COVID-19 (SMIN 1)* (Special Measures Information Note, 31 March 2020).

- Formatted: Font: Not Italic, No underline, Font color: Black, English (United States)

Teams, Skype, Zoom, Google Hangouts and WebEx.<sup>51</sup> Hearings that employ the use of such technology may be termed “virtual” hearings, given the fact that the visual element of the technology enables remote testimony.<sup>52</sup> Such advancements in communication and information technology have enabled videoconferencing to be largely embraced by some court systems in response to the COVID-19 pandemic. Indeed, Australia,<sup>53</sup> the United Kingdom,<sup>54</sup> America the United States,<sup>55</sup> Canada,<sup>56</sup> Singapore,<sup>57</sup> Peru<sup>58</sup> and China<sup>59</sup> have all employed the use of videoconferencing technology to advance from the traditional physical presence model of justice and instead conduct hearings on a virtual basis.

The way in which the Federal Court of Australia has decided to conduct its virtual hearings is informative. Proceedings in the Federal Court are now being listed for virtual hearing by videoconference using remote access technology known as Microsoft Teams.<sup>60</sup> To establish a virtual hearing, parties are electronically invited by the Court to join a Microsoft Teams meeting.<sup>61</sup> Once joined, parties then queue in the virtual “lobby” where they remain until admitted to the virtual hearing at their scheduled listing time.<sup>62</sup> From here, parties are then able to submit appearances, submissions and oral evidence all through videoconferencing technology. This response by the Federal Court capitalises on existing forms of replacement technology and amends them in a way that enables parties to comply with social distancing legislation.<sup>63</sup> Clearly, litigants, instructing lawyers and counsel are not required to be

<sup>51</sup> Suzie Forell, Meg Laufer, and Erol Digiusto, n 18, “Legal Assistance by Video Conferencing: What is Known?” (Justice Issues Paper 15, Law and Justice Foundation of New South Wales, November 2011) 3.

<sup>52</sup> Frederic Lederer, “The Road to the Virtual Courtroom? A Consideration of Today’s and Tomorrow’s High Technology Technology Courtrooms” (1999) 50 *South Carolina Law Review* 799, 801.

<sup>53</sup> Family Court of Australia and Federal Circuit Court of Australia, n 4 *Joint Practice Direction (JPD 2 – Special Measures in response to COVID-19, 2020)*; Supreme Court of Victoria, “Supreme Court Changes in Response to COVID-19” (Supreme Court of Victoria (Web Page, 20 March 2020) <<https://www.supremecourt.vic.gov.au/news/supreme-court-changes-in-response-to-covid-19>>; New South Wales Bar Association, n 49 *COVID-19: Information for Attending Court* (6 April 2020).

<sup>54</sup> Judiciary of England and Wales, n 6 *Civil Justice in England and Wales: Protocol Regarding Remote Hearings* (Protocol, 26 March 2020).

<sup>55</sup> New York State Unified Court System, n 49 “Virtual Court Operations to Commence in NYC Mid-week” (Press Release, 22 March 2020).

<sup>56</sup> Superior Court of Justice, “Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings – Update” (Superior Court of Justice (Web Page, 2 April 2020) <<https://www.ontariocourts.ca/scj/notice-to-the-profession-the-public-and-the-media-regarding-civil-and-family-proceedings-update/>>).

<sup>57</sup> Supreme Court Singapore, “Guide on the Use of Videoconferencing and Telephone Conferencing & Videoconferencing for Hearings Before the Duty Registrar” (Guide, 27 March 2020).

<sup>58</sup> Poder Judicial Del Peru, “Judiciary Implements Google Hangouts Platform for Virtual Hearings and Administrative Meetings” (Poder Judicial Del Peru (Web Page, 27 March 2020) <[https://www.pj.gob.pe/wps/wcm/connect/cortes-suprema/s\\_cortes\\_suprema\\_home/as\\_inicio/as\\_enlaces\\_destacados/as\\_imagen\\_prensa/as\\_notas\\_noticias/2020/cs\\_n-pj-utiliza-plataforma-google-hangouts-para-reuniones-virtuales-27032020](https://www.pj.gob.pe/wps/wcm/connect/cortes-suprema/s_cortes_suprema_home/as_inicio/as_enlaces_destacados/as_imagen_prensa/as_notas_noticias/2020/cs_n-pj-utiliza-plataforma-google-hangouts-para-reuniones-virtuales-27032020)>).

<sup>59</sup> The Supreme People’s Court of the People’s Republic of China, n 36 *China steps up online litigation services amidst coronavirus epidemic*; The Supreme People’s Court of the People’s Republic of China (Web Page, 31 March 2020) <[http://english.court.gov.cn/2020-03/31/content\\_37534820.htm](http://english.court.gov.cn/2020-03/31/content_37534820.htm)>.

<sup>60</sup> Federal Court of Australia, “National Practitioners/Litigants Guide to Virtual Hearings and Microsoft Teams” (Guide, 2 April 2020).

<sup>61</sup> Federal Court of Australia, n 60 *National Practitioners/Litigants Guide to Virtual Hearings and Microsoft Teams* (Guide, 2 April 2020) [3.1]–[3.2].

<sup>62</sup> Federal Court of Australia, n 60 *National Practitioners/Litigants Guide to Virtual Hearings and Microsoft Teams* (Guide, 2 April 2020) [4.1].

<sup>63</sup> See, for example, *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW); Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction (Qld)* (2 April 2020); Deputy Chief Health Officer (Communicable Disease) (Vic), *Stay at Home Directions (Vic)* (30 March 2020).

- Formatted: Default Paragraph Font, Font color: Black
- Formatted: Default Paragraph Font, Font: Not Italic, Font color: Black
- Formatted: Default Paragraph Font, Font color: Black
- Formatted: No underline, Font color: Black, English (United States)
- Formatted: Font: Not Italic
- Formatted: Font: Not Italic
- Formatted: Font: Italic
- Formatted: Font: Not Italic
- Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border)
- Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border)
- Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border)
- Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border)

physically located in the same place during the hearing; the videoconferencing technology allows for each to be in attendance through separate connections.<sup>64</sup>

Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

The New York City Criminal Court has also issued a similar response. The arrangements are akin to that of the Federal Court of Australia in the sense that, as of 25 March 2020, the New York Criminal Court implemented videoconferencing technology (via Skype for Business) to enable virtual arraignments to be conducted.<sup>65</sup> Under this scheme, all parties are able to participate in the virtual arraignment, with the judge, prosecution and defence attending from different remote locations.<sup>66</sup> However, the New York Criminal Court goes one step further and alters the nature of these virtual arraignments on the basis of whether the defendant is “COVID-19-involved” or “Non-COVID-19-involved”,<sup>67</sup> which ~~Whether defendants are classified as “COVID-19-involved” or “Non-COVID-19-involved”~~ determines at what location they will be detained in before their virtual arraignment. Defendants under the same classification are detained in the same location.<sup>68</sup>

Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

Such digitised responses from Australian, ~~the United Kingdom~~ British and American courts may be contrasted with the COVID-19 measures implemented by Norway. On 12 March 2020, Chief Justice Toril Marie Øie CJ suspended all oral hearings in the Supreme Court of Norway due to the pandemic.<sup>69</sup> However, the Chief Justice confirmed that written hearings were not affected by the suspension, with hearings on the papers permitted by the newly enacted legislation.<sup>70</sup> As a result, on 3 April 2020 the Supreme Court of Norway issued a sentencing judgment for a sexual assault case based on a written hearing – the first of its kind in Norwegian history.<sup>71</sup> While such a decision was not pertaining to the guilt or innocence of the defendant, ~~the authors of this paper article~~ it is submitted that the approach ~~does~~ suggests broader issues involving the adoption of technology in the COVID-19 era.

Formatted: Pattern: Clear, Not Highlight

In this regard, it must also be noted that the issues in commercial courts may differ significantly from those raised in criminal courts. This is partly because jury systems may not be as relevant in relation to most commercial matters. For example, central to the practice of criminal law is the protection of the public interest and this is represented through the use of jury trials. However, many jurisdictions have begun to question the practicality of jury trials amidst the stringent social-distancing measures implemented by governments around the world. In the United Kingdom, for example, the *Coronavirus Act 2020* (UK) ~~(the Act)~~ was enacted to include provisions affecting existing criminal court

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

<sup>64</sup> Federal Court of Australia, “Special Measures in Response to COVID-19, Special Measures Information Note: Appeals and Full Court Hearings (SMIN-3)”, (Special Measures Information Note, 7 April 2020) [7.2].

Formatted: Font: Not Italic

<sup>65</sup> New York State Unified Court System, n 49 “Virtual Court Operations to Commence in NYC Mid-week” (Press Release, 22 March 2020). The Supreme Court of New South Wales has also issued a similar response with respect to arraignments: New South Wales Bar Association, n 49 “COVID-19: Information for Attending Court (Guide, 6 April 2020) 3.

Formatted: Font: Not Italic

<sup>66</sup> New York State Unified Court System, n 49 “Virtual Court Operations to Commence in NYC Mid-week” (Press Release, 22 March 2020).

<sup>67</sup> New York State Unified Court System, n 49 “Virtual Court Operations to Commence in NYC Mid-week” (Press Release, 22 March 2020). According to the statement issued by the State of New York, a defendant is “COVID-19-involved” if they have tested positive for the virus or are classified as being in a high-risk group. In comparison, a defendant is “Non-COVID-19-involved” if they have *not* tested positive for the virus or are *not* in a high-risk group. The authors note that the statement does not offer a definition of “high-risk” groups.

<sup>68</sup> New York State Unified Court System, n 49 “Virtual Court Operations to Commence in NYC Mid-week” (Press Release, 22 March 2020).

Formatted: Pattern: Clear, Not Highlight

<sup>69</sup> Chief Justice Toril Marie Øie, “The Chief Justice on the hearing Hearing of cases-Cases in the Supreme Court During the coronavirus-Coronavirus outbreak-Outbreak”, Supreme Court of Norway (Supreme Court of Norway, Web Page, 24 March 2020) <https://www.domstol.no/en/Enkelt-domstol/supremecourt/arkiv/2020/the-chief-justice-on-the-hearing-of-cases-in-the-supreme-court-during-the-coronavirus-outbreak2/>.

Formatted: Font: Not Italic

Formatted: Font: Not Italic

<sup>70</sup> Supreme Court of Norway, “Written hearing Hearing of a criminal-Criminal eCase” (Supreme Court of Norway (Web Page, 2020)) <https://www.domstol.no/en/Enkelt-domstol/supremecourt/arkiv/2020/written-hearing-of-a-criminal-case/>.

Formatted: Font: Not Italic

<sup>71</sup> Supreme Court of Norway, n 70 “Written hearing of a criminal case”, Supreme Court of Norway (Web Page, 2020) <https://www.domstol.no/en/Enkelt-domstol/supremecourt/arkiv/2020/written-hearing-of-a-criminal-case/>.

Formatted: Font: Not Italic

Formatted: Font: Not Italic

procedures.<sup>72</sup> Section 53 and Schedule 23 of the Act operate to expand on existing legislation to allow any person involved in a criminal trial to take part in the same through audio or video link. However, the section includes a specific provision to exclude jurors, who must be physically present to participate.<sup>73</sup> Given that social-distancing rules eradicate the ability of hearings to be conducted face-to-face, the result is that, as of 23 March 2020, no new jury trials are to commence in the United Kingdom.<sup>74</sup>

The decision by courts to adjourn jury trials amidst the COVID-19 pandemic has been replicated in a number of jurisdictions.<sup>75</sup> The decision is perhaps driven by deficiencies in technological innovations and their specific applicability to the criminal law landscape.<sup>76</sup> The authors note this response may signal a further decline in jury trials and perhaps catalyse the development of very different jury approaches that could rely on much more “disruptive” methods.<sup>77</sup> Yet it is clear the decision to suspend criminal trials is not a viable long-term solution and, ultimately, calls for a re-evaluation of the issues pertaining to the use of technology in the legal landscape. Part D-IV below of this paper article discusses such issues in more detail.

### C-III. MEDIATION RESPONSES TO THE COVID-19 PANDEMIC

#### HA. Technology and Dispute Resolution

Even prior to the extension of the World Wide Webworld wide web, researchers were developing computer systems to assist legal practitioners in litigating cases.<sup>78</sup> For instance, Stranieri et al used artificial intelligence and machine learning to assist Australian family lawyers in understanding how the Family Court of Australia distributed marital property.<sup>79</sup> Indeed, Susskind has predicted and certainly advocated for how information technology would alter the practice of law.<sup>80</sup> However, all of the

<sup>72</sup> Sally Lipscombe and Graeme Cowie, “Coronavirus Bill: implications- Implications for the courts-Courts and tribunals-Tribunals (Briefing Paper, No 08865, House of Commons Library, UK Parliament, 23 March 2020).

<sup>73</sup> *Coronavirus Act 2020* (UK) [sch-Sch 23 et-cl 2](#).

<sup>74</sup> *Courts and Tribunal Judiciary*, “Review of court-Court arrangements-Arrangements due Due to COVID-19, message-Message from the Lord Chief Justice”, (Courts and Tribunal Judiciary (Web Page 23 March 2020) <<https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/>>.

<sup>75</sup> See, for example e.g., *Superior Court of Justice*, n 36: “Notice to Accused Persons, Profession, Crown, Public Prosecution Service of Canada, Correctional Institutions, Witnesses, Jurors, The Public and The Media Regarding Criminal Operations”, *Superior Court of Justice* (Web Page, 2 April 2020) <<https://www.ontariocourts.ca/scj/covid-19-suspension-crim/>>; *Supreme Court of Victoria*, n 53: “Supreme Court Changes in Response to COVID-19”, *Supreme Court of Victoria* (Web Page, 20 March 2020) <<https://www.supremecourt.vic.gov.au/news/supreme-court-changes-in-response-to-covid-19/>>; *Supreme Court of New South Wales*, “COVID-19 Changes to Court Operations”, (Supreme Court of New South Wales (Web Page, 23 March 2020) <[http://www.supremecourt.justice.nsw.gov.au/Pages/coronavirus\\_covid19\\_announcement.aspx](http://www.supremecourt.justice.nsw.gov.au/Pages/coronavirus_covid19_announcement.aspx)>.

<sup>76</sup> Carolyn McKay, *The Pixelated Prisoner, Prison Video Links, Court “Appearance” and the Justice Matrix* (Routledge, 2018) 175, cited in *Monika Zalnierute and Felicity Bell*, n 15: “Technology and the Judicial Role” forthcoming in *Gabrielle Appleby and Andrew Lynch, The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2020) 4-5. Indeed, there is general agreement that the defendant should be present at trial except in well-defined circumstances: Anne Bowen Poulin, “Criminal Justice and Videoconferencing Technology: The Remote Defendant” (2004) 78 *Tulane Law Review* 1089, 1092.

<sup>77</sup> See, for example e.g., Richard Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future* (Oxford University Press OUP, 2<sup>nd</sup> ed, 2017).

<sup>78</sup> See, for example e.g., L.T. McCarty, “Reflections on TAXMAN: An Experiment in Artificial Intelligence and Legal Reasoning” (1976) 90(5) *Harvard Law Review* 837; Phillip Capper and Richard Susskind, *Latent Damage Law: The Expert System* (Butterworths, 1988) 1-3.

<sup>79</sup> Andrew Stranieri et al, “John Zeleznikow, Mark Gawler and Bryn Lewis, “A Hybrid Rule-Neural Nneural Approach for the Automation of Legal Reasoning in the Discretionary Domain of Family Law in Australia” (1999) 7(2) *Artificial Intelligence and Law* 153.

<sup>80</sup> Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Oxford University Press OUP, 1998); Richard Susskind, *The End of Lawyers?: Rethinking the Nature of Legal Services* (Oxford University Press OUP, 2008) 234;

Formatted: Default Paragraph Font

Formatted: Font color: Black, Not Superscript/ Subscript, Small caps, Border: (No border), Pattern: Clear

Formatted: Font color: Black, Not Superscript/ Subscript, Small caps, Border: (No border), Pattern: Clear

Formatted: Small caps

Formatted: Small caps

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font, Font color: Black

Formatted: Font: Not Italic, No underline, Font color: Black, English (United States)

Formatted: Default Paragraph Font, Font color: Black

Formatted: Default Paragraph Font, Font color: Black

Formatted: Default Paragraph Font, Font color: Black

Formatted: Default Paragraph Font, Font color: Black

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: #ref\_etal

twentieth-20<sup>th</sup> century research (and it remained research because very few systems were utilised in practice)<sup>81</sup> focussed upon stand-alone computer systems. This stagnant position was altered with the birth of the modern ADR movement in the 1970s and the subsequent development of the [World-Wide Web](#) world wide web in the 1990s. Ultimately, the amalgamation of these two developments led to the genesis of what is now termed the “Online Dispute Resolution” (ODR) movement.

Formatted: Superscript

Since this genesis, the shift in mediation to videoconferencing platforms – which has now been underway for more than a decade – has accelerated. Indeed, the authors note that such developments have accelerated further amidst the COVID-19 crisis and perhaps now is the time for significant change. [Trish Carroll concurs. In an article published by the Australian Law Management Journal](#), Carroll has stated that “it is as though 20 years of obfuscation has been wiped away, possibly forever, and what a wonderful silver lining that would be from this COVID-19 cloud”.<sup>82</sup> The focus of Carroll’s [article research](#) was to gain insights into how law students perceived their futures after the effects of COVID-19 had receded. Interestingly, many interviewees reported the pandemic as paving a new way forward for the legal profession to embrace technological change. For example, one interviewee said:

Formatted: Font color: Black, Not Superscript/ Subscript, Border: (No border), Pattern: Clear

“Virtual courtrooms and teleconferencing will become more popular. These emerging technologies have been around since before the pandemic and they are only starting to be used seriously by firms and courts now. I also feel that solicitors will start embracing working remotely more and be less reluctant to do so in the future.”<sup>83</sup>

These insights are positive. However, the authors note that there are some concerns about the types of videoconferencing platforms that can be used in the ADR sphere. Certainly, these concerns are exacerbated in the COVID-19 climate as many people now appear to be comfortable to accept a reduction in terms of perceived security and confidentiality in return for a faster, more remote access outcome – particularly as courts may struggle with increased workloads.

### III.B. Online Dispute Resolution

Lodder and Zeleznikow indicate that, [whilst while](#) there is no generally accepted definition of ODR, it can be considered as using the internet to perform ADR.<sup>84</sup> Initially, it was envisaged that this movement would only focus upon disputes arising from e-commerce transactions. Indeed, this was the case between 2000 and 2015.<sup>85</sup> However, over the last five years ODR has begun to be used in a variety of civil justice domains.<sup>86</sup> Two such systems include Rechtwijzer (Netherlands)<sup>87</sup> and the British Columbia Civil

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: #ref\_pubdateYear

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font, Font: Not Italic

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font, Font: Not Italic

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: #ref\_auGivenName

Formatted: Font: Not Italic

<sup>81</sup> Richard Susskind, *n 77 Tomorrow’s Lawyers: An Introduction to Your Future* (Oxford University Press, 2017); Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press OUP, 2019).

<sup>82</sup> John Zeleznikow, “An Australian Perspective on Research and Development Required for the Construction of Applied Legal Decision Support Systems” (2002) 10(4) *Artificial Intelligence Law* 237.

<sup>83</sup> [Trish Carroll, n 27 “Is COVID-19 the mother of all disruptors for the legal profession?” Law Management Journal \(Article, 29 April 2020\) 1 <http://www.lmhub.com.au/wp-content/uploads/2020/04/ALMJ-April2020-TrishCarroll-PDF.pdf>.](#)

<sup>84</sup> [Trish Carroll, n 27 “Is COVID-19 the mother of all disruptors for the legal profession?” Law Management Journal \(Article, 29 April 2020\) 4–5 <http://www.lmhub.com.au/wp-content/uploads/2020/04/ALMJ-April2020-TrishCarroll-PDF.pdf>.](#) Similarly, another student commented that: “The virus has emphasised the importance of having working-from-home and virtual meeting capabilities, but this technology is not ground-breaking. The virus has probably acted as a wakeup call for the firms who didn’t have those capabilities before.”

<sup>85</sup> Arno Lodder and John Zeleznikow, *Enhanced Dispute Resolution Through-Through the Use of Information Technology* (Cambridge University Press CUP, 2010). It is worth noting here that ODR is often referred to as “Technology Assisted Dispute Resolution”, “Technology Facilitated Dispute Resolution”, or “Technology Based Dispute Resolution”.

<sup>86</sup> Colin Rule, *Online Dispute Resolution for Business B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (John Wiley & Sons, 2003).

<sup>87</sup> Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press OUP, 2017).

<sup>88</sup> Jin Ho Verdonschot, “Online Mediation and Dispute Resolution: Legal and Practical Issues” (Workshop, 29 November 2016).<sup>95</sup>

Resolution Tribunal.<sup>88</sup> While both systems were developed prior to the outbreak of COVID-19, the authors posit that they are incredibly significant in the current climate. For this reason, it is helpful to engage in a brief analysis of the two.

The first platform, Rechtwijzer, was designed for couples who are separating or divorcing. The aim of Rechtwijzer is to empower individuals to resolve their dispute by themselves.<sup>89</sup> Indeed, the platform only refers separating couples to experts if necessary.<sup>90</sup> The system promotes a simple and cost-effective process, with couples paying only €100.00 for access.<sup>91</sup> Once joined, Rechtwijzer gathers demographic information<sup>92</sup> from each partner and then guides them through questions about their preferences as to the separation outcome. The model employed by Rechtwijzer is that of integrative negotiation.<sup>93</sup> The platform uses algorithms to find points of consensus, and agreements are reviewed by a neutral lawyer.<sup>94</sup> If the proposed solutions are not accepted, couples can then request a mediator for an additional €30.00, or a binding decision by an adjudicator.<sup>95</sup> Rechtwijzer had aimed to be self-financing through user contributions. This has not occurred.<sup>96</sup> However, the authors note that developers now have a growing market for their product.

The second platform, the British Columbia Civil Resolution Tribunal (~~the Tribunal~~), is arguably the most widely available ODR system. It commences with diagnosing the parties' dispute and providing legal information and tools, such as customised letter templates.<sup>97</sup> If this action does not resolve the dispute, one can then apply to the Tribunal for dispute resolution. Once the application is accepted, the user enters a secure and confidential negotiation platform, where the disputants can autonomously resolve their matter.<sup>98</sup> However, if the parties cannot resolve the dispute, a facilitator will assist. Agreements can be formed into enforceable orders. If negotiation or facilitation does not lead to a resolution, an independent member will make a determination about the dispute.<sup>99</sup>

The Tribunal currently deals with cases ~~which that~~ fall into the following four categories: motor vehicle injury disputes up to CA\$50,000.00; small claims disputes up to CA\$5,000.00; strata property disputes of any amount; and societies and cooperative associations disputes of any amount.<sup>100</sup> For these

<sup>88</sup> Shannon Salter and Darin Thompson, "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2016-2017) 3 *McGill Journal of Dispute Resolution* 113.

<sup>89</sup> The Law Society of England and Wales, "Capturing Technological Innovation in Legal Services" (Report, January 2017) 63.

<sup>90</sup> The Law Society of England and Wales, n 89 *Capturing Technological Innovation in Legal Services* (Report, January 2017) 63.

<sup>91</sup> The Law Society of England and Wales, n 89 *Capturing Technological Innovation in Legal Services* (Report, January 2017) 63.

<sup>92</sup> Such information includes, for example, their age, income, education, and whether they want the children to live with only one parent or part-time with each: The Law Society of England and Wales, n 89 *Capturing Technological Innovation in Legal Services* (Report, January 2017) 63.

<sup>93</sup> Hiil: User-friendly Justice, "Rechtwijzer: Why Online Supported Dispute Resolution Is Hard to Implement", *Hiil: User-Friendly Justice* (Web Page, 21 June 2017) <<https://www.hiil.org/news/rechtwijzer-why-online-supported-dispute-resolution-is-hard-to-implement/>>.

<sup>94</sup> Hiil: User-friendly Justice, n 93 "Rechtwijzer: Why Online Supported Dispute Resolution Is Hard to Implement", *Hiil: User-Friendly Justice* (Web Page, 21 June 2017) <<https://www.hiil.org/news/rechtwijzer-why-online-supported-dispute-resolution-is-hard-to-implement/>>.

<sup>95</sup> The Law Society of England and Wales, n 89 *Capturing Technological Innovation in Legal Services* (Report, January 2017) 63.

<sup>96</sup> Dan Bindman, "Pioneering ODR Platform to Rein-Rein in Ambitions After Commercial-Commercial Setback", *Legal Futures* (Legal Futures, Blog Post, 3 April 2017) <<https://www.legalfutures.co.uk/latest-news/pioneering-odr-platform-to-rein-in-ambitions-after-commercial-setback>>.

<sup>97</sup> Shannon Salter and Darin Thompson, n 88 "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2016-2017) 3 *McGill Journal of Dispute Resolution* 113.

<sup>98</sup> Shannon Salter and Darin Thompson, n 88 "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2016-2017) 3 *McGill Journal of Dispute Resolution* 113.

<sup>99</sup> Shannon Salter and Darin Thompson, n 88 "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2016-2017) 3 *McGill Journal of Dispute Resolution* 113.

<sup>100</sup> Civil Resolution Tribunal, "Welcome to the Civil Resolution Tribunal", *Civil Resolution Tribunal* (Web Page, 2020) <<https://civilresolutionbc.ca/>>.

Formatted: Pattern: Clear, Not Highlight

Formatted: Pattern: Clear, Not Highlight

Formatted: Font color: Black, Not Superscript/ Subscript, Border: (No border), Pattern: Clear

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Font: Not Italic

four domains, British Columbia potential litigants can only use the Tribunal to resolve their dispute. No paper-based solutions are available. This is of considerable benefit amidst the COVID-19 crisis. Indeed, one of the major reasons that the Tribunal has been so successful is that British Columbia residents are mandated to use the system when dealing with these four issues. As a result, the Tribunal is open and operating normally during the COVID-19 pandemic.<sup>101</sup>

Zeleznikow has submitted that a truly helpful ODR system should provide the following six facilities:<sup>102</sup> (1) case management; (2) triaging; (3) advisory tools for reality testing;<sup>103</sup> (4) communication tools;<sup>104</sup> (5) decision support tools;<sup>105</sup> and (6) drafting software.<sup>106</sup> These six facilities are of particular significance in current times. With citizens of many (if not all) communities forced into isolation due to COVID-19 restrictions, litigants are no longer meeting face-to-face. The justice system needs to operate in these circumstances – especially so in cases of family disputes and bail applications. However, the authors note that the systems currently in use, such as Immediation,<sup>107</sup> MODRON,<sup>108</sup> and Our Family Wizard<sup>109</sup> only offer two out of the six essential facilities of Zeleznikow’s ODR model, viz. (ie case management and communication).

The authors acknowledge that there are alternative technologies that do fulfil *other* aspects of this model, but not *all*. For example, Adieu Technologies offers family law advice (facility (3)) and also supports triaging and drafting plans (facilities (2) and (6)).<sup>110</sup> Another example is Smartsettle, which provides decision support to assist negotiation (facility (5)).<sup>111</sup> There are also other technology platforms that exist across a number of jurisdictions that have supported apps, as well as more sophisticated chat robots. Some of these systems have emerged from the vast complaint handling sector, where there is a greater capacity to collect demographic and other information which that can assist with the development of human-centred design. However, the wide variation in terms of capacity and use suggests that jurisdictional variability will continue to be a concern for courts, ADR providers and those using such services. Indeed, this concern is heightened amidst the justice sector’s move to digitalisation in response

**Formatted:** Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

<sup>101</sup> Shannon Salter, *CRT Chair, “CRT COVID-19 Response Plan”*, Civil Resolution Tribunal (Civil Resolution Tribunal, Web Page, 6 May 22 April 2020) <<https://civilresolutionbc.ca/covid-19/>>.

<sup>102</sup> John Zeleznikow, “Using Artificial Intelligence to Support to Provide User Centric Intelligent Negotiation Support” (2020) 29 *Group Decision and Negotiation* (submitted).

<sup>103</sup> John Zeleznikow, n 102 “Using Artificial Intelligence to Support to Provide User Centric Intelligent Negotiation Support” (2020) 29 *Group Decision and Negotiation* (submitted). Zeleznikow has noted that such advisory tools may include books, articles, cases, legislation and videos; there would also be calculators.

<sup>104</sup> John Zeleznikow, n 102 “Using Artificial Intelligence to Support to Provide User Centric Intelligent Negotiation Support” (2020) 29 *Group Decision and Negotiation* (submitted). Zeleznikow explains that such tools are to enable negotiation, mediation, conciliation or facilitation of matters.

<sup>105</sup> John Zeleznikow, n 102 “Using Artificial Intelligence to Support to Provide User Centric Intelligent Negotiation Support” (2020) 29 *Group Decision and Negotiation* (submitted). Zeleznikow submits that if the disputants cannot resolve their conflict, software using game theory or artificial intelligence can be used to facilitate trade-offs.

<sup>106</sup> John Zeleznikow, n 102 “Using Artificial Intelligence to Support to Provide User Centric Intelligent Negotiation Support” (2020) 29 *Group Decision and Negotiation* (submitted). Zeleznikow explains that if and once a negotiation settlement is reached, software can be used to draft suitable agreements.

<sup>107</sup> See generally: Immediation, “What is Immediation?”, Immediation (Web Page) <<https://www.immediation.com/>>.

<sup>108</sup> See generally: MODRON, “Resolve the world’s World’s disputes/Disputes: Whenever: Wherever”, MODRON (Web Page) <<https://www.modron.com/>>. MODRON is the provider favoured by the Australian Resolution Institute: Resolution Institute, “Resolution Institute and MODRON have Have partnered/Partnered to bring/Bring our/Our members Members/Spaces”, Resolution Institute (Web Page) (2020) <<https://www.resolution.institute/resources/online-dispute-resolution-platforms/modron/>>.

<sup>109</sup> See generally: Our Family Wizard, “Better Co-parenting, happier Happier Kids”, Our Family Wizard (Web Page) <<https://www.ourfamilywizard.com.au/>>; Allan Barsky, “The Ethics of App-Assisted-assisted Family Mediation” (2016) 34(1) *Conflict Resolution Quarterly* 31.

<sup>110</sup> See generally: Adieu: Elegant Parting, “Complete your Your financial/Financial disclosure/Disclosure in a fraction/Fraction of the Time”, Adieu: Elegant Parting (Web Page) <<https://www.adieu.ai/>>.

<sup>111</sup> See generally: Smartsettle, “Smartsettle: Beyond Win-Win”, Smartsettle (Web Page) <<https://www.smartsettle.com/about-us/>>.

**Formatted:** Default Paragraph Font

**Formatted** ...

**Formatted** ...

**Formatted:** Default Paragraph Font

**Formatted** ...

**Formatted** ...

**Formatted:** Default Paragraph Font

**Formatted:** Font: Not Italic, Not Highlight

**Formatted** ...

**Formatted:** Not Highlight

**Formatted** ...

**Formatted** ...

**Formatted** ...

**Formatted** ...

**Formatted:** Font: Not Italic

**Formatted:** Font color: Black, Not Superscript/ Subscript, Border: : (No border)

**Formatted:** Font color: Black, Border: : (No border)



to COVID-19. The authors argue that this reality ultimately calls for an evaluation of the issues plaguing the use of technology in the justice sector.

## D-IV. ISSUES

### II.A. Innovation Readiness

Despite the pressure the COVID-19 pandemic has placed s on justice systems to embrace technological change, there remain a number of issues associated with the infiltration of technology in the legal sphere.<sup>112</sup> One of these issues relates to the legal industry's innovation readiness (or lack thereof).<sup>113</sup> It is clear that Australia has acknowledged the benefits of integrating technology into our legal system for quite some time.<sup>114</sup> However, a review of the literature reveals that the technological initiatives implemented by jurisdictions around the globe in response to COVID-19 may not be embraced as anticipated.<sup>115</sup>

Sourdin and Liyanage have noted that innovations aimed at enhancing the efficiency of the justice system are often "patchy" and inconclusive in nature.<sup>116</sup> One example of this pertains to the use of e-filing systems. It was mentioned suprasupraabove that a response to COVID-19 issued by the Federal Court of Australia<sup>117</sup> was to direct practitioners to file all Court documents electronically.<sup>118</sup> However, a recent survey conducted by the Family Court and Federal Circuit Court of Australia revealed that e-filing systems have not been the subject of overwhelming acceptance amongstamong the legal community.<sup>119</sup> The survey indicated that a mere 27% of interviewees had filed documents electronically using the Court's online filing system, the Commonwealth Courts Portal ("CCP").<sup>120</sup> This is despite the fact that the CCP has been in existence since 2007.<sup>121</sup> At the same time, out of the 200 comments made about the Portal, only 15% were complimentary in nature, in comparison to 85% which identified room for improvement.<sup>122</sup>

**Formatted:** Font color: Black, Not Superscript/ Subscript, Small caps, Border: : (No border), Pattern: Clear

**Formatted:** Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

**Formatted:** Font: Not Italic

**Formatted:** Font: Not Italic, Pattern: Clear

**Formatted:** Font: Not Italic

**Formatted:** Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

<sup>112</sup> Tania Sourdin, Bin Li and Tony Burke, n 11 'Just, Quick and Cheap? Civil Dispute Resolution and Technology' (2019) 19 *Macquarie Law Journal* 17.

<sup>113</sup> Tania Sourdin, Bin Li and Tony Burke, n 11 'Just, Quick and Cheap? Civil Dispute Resolution and Technology' (2019) 19 *Macquarie Law Journal* 17, 26–27; Jane Donoghue, n 7 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice' (2017) 80(6) *The Modern Law Review* 995, 997.

<sup>114</sup> Literature on the topic exists from as early as 1997; see: Law Reform Committee, n 26 Parliament of Victoria, 'Inquiry Into Technology and the Law' (Media Release, 19 November 1997) <<https://www.parliament.vic.gov.au/57h-parliament/lawreform/article/1586#may28>>.

<sup>115</sup> Felicity Bell, "'Family Law, Access to Justice, and Automation'" (2019) 19 *Macquarie Law Journal* 103, 120, citing John Zeleznikow, "'Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts?'" (2017) 8(2) *International Journal for Court Administration* 30.

<sup>116</sup> Tania Sourdin and Chinthaka Liyanage, "'The Promise and Reality of Online Dispute Resolution in Australia'" in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice a Treatise on Technology and Dispute Resolution* (Eleven International Publishing, 2012) 483, 499.

<sup>117</sup> This response is also replicated in other jurisdictions: See, for example, Superior Court of Justice, n 36 'Notice to Accused Persons, Profession, Crown, Public Prosecution Service of Canada, Correctional Institutions, Witnesses, Jurors, The Public and The Media Regarding Criminal Operations', *Superior Court of Justice* (Web Page, 2 April 2020) <<https://www.ontariocourts.ca/scj/covid-19-suspension-crim>>; 'China steps up online litigation services amidst coronavirus epidemic'—The Supreme People's Court of the People's Republic of China, n 36 (Web Page, 31 March 2020) <[http://english.court.gov.cn/2020-03/31/content\\_37534820.htm](http://english.court.gov.cn/2020-03/31/content_37534820.htm)>.

<sup>118</sup> Federal Court of Australia, n 37 *Special Measures in Response to COVID-19 (SMIN 1)* (Special Measures Information Note, 31 March 2020).

<sup>119</sup> Family Court of Australia and Federal Circuit Court of Australia, *"Court User Satisfaction Survey"* (Report, 2015).

<sup>120</sup> Family Court of Australia and Federal Circuit Court of Australia, n 119 *Court User Satisfaction Survey* (Report, 2015) 32.

<sup>121</sup> Family Court of Australia and Federal Circuit Court of Australia, n 119 *Court User Satisfaction Survey* (Report, 2015) 31.

<sup>122</sup> Family Court of Australia and Federal Circuit Court of Australia, n 119 *Court User Satisfaction Survey* (Report, 2015) 32–33.

**Formatted:** Default Paragraph Font

**Formatted:** Default Paragraph Font

**Formatted:** Default Paragraph Font

**Formatted:** Default Paragraph Font

**Formatted:** Default Paragraph Font

**Formatted:** Default Paragraph Font

**Formatted:** Default Paragraph Font

**Formatted:** Default Paragraph Font

**Formatted:** Default Paragraph Font

**Formatted:** Default Paragraph Font

**Formatted:** Default Paragraph Font

**Formatted:** Font: Not Italic

**Formatted:** Font: Not Italic

The literature further reveals that the ability of legal systems to embrace technological innovation is dependent on the viability of the innovation itself.<sup>123</sup> Ryan and Evers submit that this comes down to two propositions: whether the technology works; and whether it can be readily understood by its users.<sup>124</sup> It will be recalled that one response to COVID-19 from the Family Court and Family Division of the High Court in the United Kingdom was to develop a “Remote Access Family Court”.<sup>125</sup> The purpose of the Remote Access Family Court is to ensure that justice services continue to be provided effectively by the Court during the COVID-19 pandemic through the use of readily available software.<sup>126</sup> However, the Court goes on to say that it will not be possible to introduce a “single, off-the-shelf” online platform to be used to hear matters.<sup>127</sup> Instead, it proposed that the Court and parties choose from a “suite” or “Smörgåsbord” of IT platforms, subject always to the fundamental requirement that the parties and judge arrive at an agreement at the commencement of the case as to which platform will be used.<sup>128</sup>

Adopting the bifurcated analysis proposed by Ryan and Evers, the authors of this paper/article query whether the “Smörgåsbord” approach implemented by the United Kingdom is a viable option in the present circumstances.<sup>129</sup> Moses and Collyer have noted that, in the adoption of new innovations, it is paramount that the legal profession understands whether the technology is suitable in the first place.<sup>130</sup> Indeed, Chief Justice Chief Justice-Allsop CJ has confirmed that technologies vary in terms of their courtroom appropriateness.<sup>131</sup>

## H.B. Security and Confidentiality

There has been a major dichotomy between how issues of security and confidentiality have occurred in the development of legal technology. Because systems such as Split-Up<sup>132</sup> and Family\_Winner<sup>133</sup> were research prototypes which that were never produced for commercial use, little efforts were made to ensure that the systems focused-focussed upon user-centric design or accorded with prevailing security and confidentiality issues.

If videoconferencing and other technological tools are to be utilised during the current pandemic, users must be confident about the security and the confidentiality of their data. However, most current videoconferencing systems provide minimal security. In this context, Ebner and Zeleznikow claim that

<sup>123</sup> Philippa Ryan and Maxine Evers, n 11 ‘Exploring eCourt innovations in New South Wales civil courts’ (2016) 5 *Journal of Civil Litigation and Practice* 65, 66, 68.

<sup>124</sup> Philippa Ryan and Maxine Evers, n 11 ‘Exploring eCourt innovations in New South Wales civil courts’ (2016) 5 *Journal of Civil Litigation and Practice* 65, 66.

<sup>125</sup> Courts and Tribunals Judiciary, n 24 *The Remote Access Family Court* (Version 3, 3 April 2020).

<sup>126</sup> Courts and Tribunals Judiciary, n 24 *The Remote Access Family Court* (Version 3, 3 April 2020) [1.1].

<sup>127</sup> Courts and Tribunals Judiciary, n 24 *The Remote Access Family Court* (Version 3, 3 April 2020) [1.3].

<sup>128</sup> Courts and Tribunals Judiciary, n 24 *The Remote Access Family Court* (Version 3, 3 April 2020) [1.3].

<sup>129</sup> Philippa Ryan and Maxine Evers, n 11 ‘Exploring eCourt innovations in New South Wales civil courts’ (2016) 5 *Journal of Civil Litigation and Practice* 65, 66.

<sup>130</sup> Lyria Bennett Moses and Anna Collyer, “Technology and the Law” (2020) 94 *Australian Law Journal* 107, 108.

<sup>131</sup> James Allsop, “Technology and the Future of the Courts” (Speech delivered at the TC Beirne School of Law, University of Queensland, 26 March 2019) 13.

<sup>132</sup> Andrew Stranieri et al, n 79 John Zeleznikow, Mark Gawler and Bryn Lewis, ‘A Hybrid Rule Neural Approach for the Automation of Legal Reasoning in the Discretionary Domain of Family Law in Australia’ (1999) 7(2) *Artificial Intelligence and Law* 153. The authors note that a 1998 video about the system from the television program *A Current Affair* illustrates how, at that time, machine learning could be used in Australia to determine property division following divorce. See: John Zeleznikow, “Computer Divorce”, [YouTube](https://youtu.be/u7A3H4UjzM), (26 April 2020) <https://youtu.be/u7A3H4UjzM>.

<sup>133</sup> Emilia Bellucci and John Zeleznikow, “Developing Negotiation Decision Support Systems that Support Mediators: A Case Study of the Family\_Winner System” (2005) 13(2) *Artificial Intelligence and Law* 233.

Formatted: Font: Not Italic

Formatted: Font: Not Italic, Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

Formatted: Font: Not Italic

Formatted: Font: Not Italic, Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Font: Italic

Formatted: Font: Italic, Font color: Black, Pattern: Clear

such systems need to provide three principal forms of security.<sup>134</sup> The first is informational security, which protects parties' information from being shared by outsiders. The second is data security, which includes protections around the communication channels, software, servers and any hardware used. The third is system security. This pertains to the degree to which users feel confident that the service they are using – the technological platform or its human operators – is not utilising their information, participation, behaviour or data in any way.<sup>135</sup>

Security and confidentiality concerns are a real problem in the current climate. Zoom, for example, was required to fix a bug that would have allowed hackers to take over a Zoom user's Mac.<sup>136</sup> Moreover, in the United Kingdom, a *Financial Times* reporter has been suspended after he was accused of listening in on sensitive Zoom meetings held by senior officers discussing staff salary cuts.<sup>137</sup> Hence, there is a palpable need to develop videoconferencing technology that is user-centric and specifically appropriate for the legal domain. Indeed, even systems advertised for the justice landscape may raise significant the security and confidentiality concerns.

Immediation, for example, is now widely used by Australian courts in their response to COVID-19.<sup>138</sup> The system has detailed information on their ODR process.<sup>139</sup> And while the literature emphasises that parties can talk privately, there is no mention of the security of the system. Upon further investigation, it was revealed that Immediation uses the data housing provider "Amazon Web Services" to host and secure the clients' information and that d-Data is protected via encryption.<sup>140</sup> Another example is MODRON. This service claims to implement security procedures to help protect their data from security attacks.<sup>141</sup> But however, no mention is made of exactly how this is performed. Further, the distributors cannot guarantee that any data transmission is totally secure nor can they ensure the security of any

- Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear
- Formatted: Pattern: Clear, Not Highlight
- Formatted: Font: Italic
- Formatted: Pattern: Clear, Not Highlight
- Formatted: Pattern: Clear, Not Highlight
- Commented [BT1]: AQ: Confirm the highlighted change in fn 138.

<sup>134</sup> Noam Ebner and John Zeleznikow, "Fairness, Trust and Security in Online Dispute Resolution" (2015) 36(2) *Journal of Public Law and Policy* 143, 157–159.

<sup>135</sup> A review of the literature reveals that the Australian Government's Cybersecurity Centre concurs, who have which has stated: "Without privacy and security requirements being specified, organisations may not be able to verify a service provider's security claims or whether their information is being appropriately used or not. In particular, attention should be paid to whether a service provider claims ownership of any recorded conversations and content, metadata, or files that are created or shared when using their web conferencing solution. Finally, when seeking legal advice, organisations are less likely to inadvertently accept terms and conditions that breach financial or liability rules" ("Australian Cyber Security Centre, "Web Conferencing Security" *Australian Cyber Security Centre (Web Page)*, April 2020) <<https://www.cyber.gov.au/publications/web-conferencing-security/>>.

- Formatted: Pattern: Clear

<sup>136</sup> Kari Paul, "Worried About Zoom's privacy-Privacy problems? A guide-Guide to your-Your video-Video-conferencing options-Options", *The Guardian*, (News Article, 9 April 2020) <<https://www.theguardian.com/technology/2020/apr/08/zoom-privacy-video-chat-alternatives>>. The authors note that such systems are often hacked. For example, on Monday 30 March 2020, the New York Attorney General Letitia James's office sent Zoom a letter outlining privacy vulnerability concerns, and asking what security measures, if any, the company has put in place. By Wednesday 1 April 2020, researchers had unearthed two more bugs that could allow hackers to take control of webcams and microphones on Zoom users' devices: Rae Hodge, "Using Zoom while-While working-Working from home-Home? Here are-Are the privacy-Privacy risks-Risks to watch-Watch out-Out for", *CNet*, (News Article, 2 April 2020) <<https://www.cnet.com/news/using-zoom-while-working-from-home-here-are-the-privacy-risks-to-watch-out-for/>>.

- Formatted: Not Highlight
- Formatted: Not Highlight
- Formatted: Not Highlight
- Formatted: Font: Not Italic

<sup>137</sup> Mark Sweney, "FT suspends-Suspends journalist-Journalist accused-Accused of listening-Listening to rival-Rival outlets-Outlets' Zoom calls-Calls", *The Guardian*, (Web Page, 28 April 2020) <[https://www.theguardian.com/media/2020/apr/27/ft-suspends-journalist-mark-di-stefano-accused-listening-papers-zoom-calls-independent-evening-standard?utm\\_term=.RWRpdG9yWfSx0d1YXJkaWwFuVG9kYXlXVS19XZlVrZGF5cy0yMDA0Mjg%3D&utm\\_source=esp&utm\\_medium=Email&CMP=GTUK\\_email&utm\\_campaign=GuardianTodayUK](https://www.theguardian.com/media/2020/apr/27/ft-suspends-journalist-mark-di-stefano-accused-listening-papers-zoom-calls-independent-evening-standard?utm_term=.RWRpdG9yWfSx0d1YXJkaWwFuVG9kYXlXVS19XZlVrZGF5cy0yMDA0Mjg%3D&utm_source=esp&utm_medium=Email&CMP=GTUK_email&utm_campaign=GuardianTodayUK)>.

- Formatted: Highlight

<sup>138</sup> It is currently being used in the Federal Court, the Federal Circuit Court and the Family Court of Australia. Indeed, in late March last month, in the first week of the pandemic lockdown, Immediation took on 36 casual staff and demand has grown since then: Hannah Wootton, "Shift to online-Online courts-Courts could-Could help-Help 'smash-Smash the patriarchy-Patriarchy'", *Australian Financial Review*, (News Article, 1 May 2020) <<https://www.afr.com/companies/professional-services/shift-to-online-courts-could-help-smash-the-patriarchy-20200424-p54n3o>>.

<sup>139</sup> See generally: "What is Immediation?", Immediation, n 107 (Web Page) <<https://www.immediation.com/>>.

- Formatted: Font: Not Italic

<sup>140</sup> See, for example: "Amazon, "Security Partner Solutions", Amazon (Web Page) <[https://aws.amazon.com/security/partner-solutions/#Data\\_Protection\\_and\\_Encryption](https://aws.amazon.com/security/partner-solutions/#Data_Protection_and_Encryption)>.

- Formatted: Font: Not Italic

<sup>141</sup> See, for example: "MODRON, "MODRON Privacy Policy", MODRON (Web Page) <<https://www.modron.com/privacy/>>; MODRON, "MODRON Terms of Use", MODRON (Web Page) <<https://www.modron.com/terms/>>.

- Formatted: Font: Not Italic

information transmitted.<sup>142</sup> Even the British Columbia Civil Resolution Tribunal, the use of which is compulsory in certain domains, provides limited details of its security arrangements. Here, Salter explains that the Tribunal's case-management system is powered by an "off-the-shelf customer relationship management platform called Salesforce".<sup>143</sup> Salter goes on to claim that this platform "has an established record for security, robustness, and scalability, which are all important features when managing thousands of claims and related personal information".<sup>144</sup> However, But the authors note no evidence is provided to support this assertion.

For systems such as Immediation, MODRON and even the Tribunal-enhanced systems to be more widely used after the COVID-19 pandemic, the authors submit that more evidence will have to be provided about exactly how data and information is kept private and secure. Currently, these systems advocate that they are private and secure, yet they rely upon software companies to whom they have outsourced the delivery of their systems to take full responsibility for these important issues.

### III.C. Community and Business Responses

The stringent measures implemented by governments around the globe in response to COVID-19 have sparked a number of concerns from the wider community. One such concern is that the strict social-distancing measures will cause family separations and domestic abuse to markedly increase.<sup>145</sup> The authors note that, to date, such concerns have been validated.<sup>146</sup> The Family Court of Australia, for example, has seen a 40% surge in cases being filed since the outbreak of COVID-19.<sup>147</sup> The Federal Circuit Court has been similarly inundated, recording a 23% rise in the past month. The Family Court of Australia has responded appropriately, with Chief Justice Will Alstergren CJ launching a new COVID-19 list on 29 April 2020 to hear cases that have been generated or aggravated by the crisis.<sup>148</sup>

Similar issues plague the UK justice sphere. For example, the United Kingdom House of Commons Home Affairs Committee published a report pertaining to the increased risk of domestic abuse and harm within the home amidst the COVID-19 pandemic.<sup>149</sup> It argued that, for some people, home is not a safe

Formatted: Font color: Black, Not Superscript/ Subscript, Border: (No border), Pattern: Clear

<sup>142</sup> See, for example, "MODRON Privacy Policy", n 141 MODRON (Web Page) <<https://www.modron.com/privacy/>>; "MODRON Terms of Use", n 141 MODRON (Web Page) <<https://www.modron.com/terms/>>.

<sup>143</sup> Shannon Salter, "Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal" (2017) 34(1) *Windsor Yearbook of Access to Justice* 112, 128.

<sup>144</sup> Shannon Salter, n 143 "Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal" (2017) 34(1) *Windsor Yearbook of Access to Justice* 112, 128.

<sup>145</sup> For an Australian example of such measures, see: Australian Government Department of Health, "Coronavirus (COVID-19) health alert", Australian Government Department of Health (Australian Government, Web Page, 30 April 2020) <<http://health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/self-isolation-self-quarantine-for-coronavirus-covid-19>>.

<sup>146</sup> Chief Justice Alstergren of the Family Court of Australia and the Federal Circuit Court has said: "[T]here are always going to be family violence issues, but they had been exacerbated by the coronavirus crisis. You're putting people together who have got issues unresolved, who are losing jobs, losing income. Some of the shared parenting arrangements are physically unable to be enacted because of border difficulties or some of the supervision centres might have closed down" (- Bianca Hall, "Surge in 'urgent' Family Court cases as COVID-19 pressures Pressures boil Boil over Over", *The Sydney Morning Herald* (News Article, 25 April 2020) <<https://www.smh.com.au/national/surge-in-urgent-family-court-cases-as-covid-19-pressures-boil-over-20200424-p54mxi.html>>).

<sup>147</sup> Bianca Hall, n 146 "Surge in 'urgent' Family Court cases as COVID-19 pressures boil over", *The Sydney Morning Herald* (News Article, 25 April 2020) <<https://www.smh.com.au/national/surge-in-urgent-family-court-cases-as-covid-19-pressures-boil-over-20200424-p54mxi.html>>.

<sup>148</sup> Bianca Hall, n 146 "Surge in 'urgent' Family Court cases as COVID-19 pressures boil over", *The Sydney Morning Herald* (News Article, 25 April 2020) <<https://www.smh.com.au/national/surge-in-urgent-family-court-cases-as-covid-19-pressures-boil-over-20200424-p54mxi.html>>.

<sup>149</sup> House of Commons Home Affairs Committee, *Home Office Preparedness for COVID-19 (Coronavirus): Domestic Abuse and Risks of Harm within the Home* (Second Report of Session 2019-21, 27 April 2020).

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: #URL

place.<sup>150</sup> This argument is buttressed by the literature. ~~For example,~~ Counting Dead Women has calculated at least 16 domestic abuse-related deaths of women and children between 23 March 2020 and 12 April 2020.<sup>151</sup> ~~Similarly, the~~ Refuge Charity reported a 49% increase in people contacting its domestic abuse helpline, despite the fact that victims trapped with their abusers are often less willing and able to seek help.<sup>152</sup> ~~and t~~The Men's Advice Line has ~~also~~ seen a 17% increase in calls.<sup>153</sup>

In ~~America~~the United States, there have been major concerns about COVID-19 spreading ~~amongst~~among those who are incarcerated. As of 22 April 2020, 2,011 people (or 78% of all inmates) had~~ve~~ tested positive for COVID-19 at the Marion Correctional Institute in Marion County, Ohio.<sup>154</sup> ~~Twelve-12~~ inmates had~~ve~~ died.<sup>155</sup> As a result of such data, New York State Governor Cuomo's office announced on 14 April 2020 that they will be releasing elderly prisoners across the ~~S~~state who are close to their release dates.<sup>156</sup> Notably, Californian correctional centres have replicated this move, with 1,700 inmates being released from Los Angeles gaols and another 3,500 anticipated to be discharged.<sup>157</sup>

Such concerns pertaining to the criminal law landscape similarly plague Australia's justice system. In this regard, one response from the Victorian ~~g~~Government has been to temporarily suspend bail reporting conditions amidst the COVID-19 crisis.<sup>158</sup> It has been projected that this move will avoid approximately 40,000 non-essential trips to police stations every month.<sup>159</sup> Yet the authors contrast this statistic with the fact that Victorian police have issued a momentous wave of infringement notices in efforts to enforce social-distancing legislation.<sup>160</sup> This is an important point. And while such punitive measures have been

**Formatted:** Font color: Black, Not Superscript/ Subscript, Border: (No border), Pattern: Clear

**Formatted:** Font color: Black, Not Superscript/ Subscript, Border: (No border), Pattern: Clear

<sup>150</sup> House of Commons Home Affairs Committee, [n 149](#) Home Office preparedness for Covid-19 (Coronavirus): domestic abuse and risks of harm within the home (Second Report of Session 2019-21, 27 April 2020) 4.

<sup>151</sup> House of Commons Home Affairs Committee, [n 149](#) Home Office preparedness for Covid-19 (Coronavirus): domestic abuse and risks of harm within the home (Second Report of Session 2019-21, 27 April 2020) 4.

<sup>152</sup> House of Commons Home Affairs Committee, [n 149](#) Home Office preparedness for Covid-19 (Coronavirus): domestic abuse and risks of harm within the home (Second Report of Session 2019-21, 27 April 2020) 6.

<sup>153</sup> House of Commons Home Affairs Committee, [n 149](#) Home Office preparedness for Covid-19 (Coronavirus): domestic abuse and risks of harm within the home (Second Report of Session 2019-21, 27 April 2020) 6.

<sup>154</sup> Josiah Bates, "'Ohio Began Mass Testing Incarcerated People for COVID-10. The Results Paint a Bleak Picture for the U.S. Prison System'", *Time* (News Article, 22 April 2020) <<https://time.com/5825030/ohio-mass-testing-prisons-coronavirus-outbreaks/>>.

<sup>155</sup> Josiah Bates, [n 154](#) Ohio Began Mass Testing Incarcerated People for COVID-10. The Results Paint a Bleak Picture for the U.S. Prison System', *Time* (News Article, 22 April 2020) <<https://time.com/5825030/ohio-mass-testing-prisons-coronavirus-outbreaks/>>.

<sup>156</sup> Josiah Bates, [n 154](#) Ohio Began Mass Testing Incarcerated People for COVID-10. The Results Paint a Bleak Picture for the U.S. Prison System', *Time* (News Article, 22 April 2020) <<https://time.com/5825030/ohio-mass-testing-prisons-coronavirus-outbreaks/>>.

<sup>157</sup> Josiah Bates, [n 154](#) Ohio Began Mass Testing Incarcerated People for COVID-10. The Results Paint a Bleak Picture for the U.S. Prison System', *Time* (News Article, 22 April 2020) <<https://time.com/5825030/ohio-mass-testing-prisons-coronavirus-outbreaks/>>.

<sup>158</sup> Richard Willingham and Danny Tran, "'Victoria's new New laws Laws to deal Deal with coronavirus-Coronavirus pandemicPandemic, including Including bail-Bail changesChanges, trials-Trials by judges-Judges only'Only'", *ABC News* (News Article, 21 April 2020) <<https://www.abc.net.au/news/2020-04-21/coronavirus-victoria-legislation-to-be-passed/12166010>>.

<sup>159</sup> Richard Willingham and Danny Tran, [n 158](#) Victoria's new laws to deal with coronavirus pandemic, including bail changes, trials by judges only', *ABC News* (News Article, 21 April 2020) <<https://www.abc.net.au/news/2020-04-21/coronavirus-victoria-legislation-to-be-passed/12166010>>.

<sup>160</sup> Between 21 March 2020 and 23 April 2020, Victoria Police conducted 27,800 spot checks and issued 1,955 infringement notices: Claudia Farhart, "'Victoria has Has issued Issued the most Most fines-Fines for loekdown-Lockdown breachesBreaches. While the ACT hasn't Hasn't fined Fined anyone'Anyone'", *SBS News* (News Article, 25 April 2020) <<https://www.sbs.com.au/news/victoria-has-issued-the-most-fines-for-lockdown-breaches-while-the-act-hasn-t-fined-anyone>>.

effective in minimising the impacts of COVID-19,<sup>161</sup> political consensus on how to respond to the pandemic may be reducing.<sup>162</sup>

Such contention is especially prevalent in the business sector. ~~For the business sector~~Here, the issues have been significant and, despite ~~g~~Government support, there is already evidence that the commercial landscape is changing rapidly and resulting in greater levels of personal and corporate insolvency.<sup>163</sup> At present, for example, the commercial legal sector has reported increased work in some areas and decreased work in others and that disruption has been limited by remote working requirements rather than infection itself. In future, the authors posit that redevelopment of commercial strategies in the context of ~~“stay-at-home”~~ requirements are likely to result in changed ways of conducting business and that such arrangements may also lead to an increase in disputes as decision-making during a crisis may not have incorporated sound legal advice.

The Australian ~~g~~Government has since evolved to adopt a more awareness-based response to the outbreak. An app has been created by the ~~Australian G~~government ~~which-that~~ detects when users are in proximity with another individual in a manner ~~which-that~~ increases their risk of infection.<sup>164</sup> This data is retained on the users' device for ~~twenty-one~~21 days (~~the~~ duration of contagiousness). If a user tests positive for COVID-19, such data is decrypted and uploaded to a government server. Health officials are then able to contact those potentially-infected users.<sup>165</sup> Yet the authors note that while the app has obvious benefits in tracking the spread of the virus, its implementation has sparked privacy concerns.<sup>166</sup> Teague, for example, has noted that the ~~“centralised”~~ model of the app inevitably allows authorities to obtain a complete list of users' contacts.<sup>167</sup>

#### **IV-D. Issues with Videoconferencing**

The rise of supportive technologies in the modern legal era has enabled videoconferencing to be embraced by multiple jurisdictions in formulating their response to COVID-19. Such technology is of especial benefit in the current circumstances as it eliminates the need for litigants, legal practitioners and judges or mediators to be physically present in one place.

Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

Formatted: Font color: Black, Not Superscript/ Subscript, Border: : (No border), Pattern: Clear

<sup>161</sup> For example, as at 26 April 2020, Victoria (with an estimated population of 6.49 million) has reported only 16 ~~e~~oronavirus ~~COVID-19~~-related deaths and 23 hospitalisations: Nick Evershed *et al.* Andy Ball, Hannah Izzard, Patrick Lum and David Constable, ~~“Coronavirus numbers Numbers in Australia: how-How many-Many new-New cases-Cases are-Are there-There?”~~ COVID-19 ~~map~~Map, ~~statistics-Statistics and graph-Graph~~, *The Guardian* (News Article, 30 April 2020) <<https://www.theguardian.com/australia-news/datablog/ng-interactive/2020/apr/24/coronavirus-australia-numbers-how-many-new-cases-today-maps-deaths-death-toll-covid-19-stats-statistics-graph-map-by-postcode>>.

<sup>162</sup> See, for example ~~eg-~~ Adam Carey and Michael Fowler, ~~“Victoria’s political-Political unity-Unity On schools-Schools turns Turns into open-Open warfare-Warfare”~~, *The Age* (Web Page, 25 April 2020) <<https://www.theage.com.au/national/victoria/victoria-s-political-unity-on-schools-turns-into-open-warfare-20200425-p54n5q.html>>.

<sup>163</sup> See generally: Gert-Jan Boon *et al.*, ~~n 4~~“The COVID-19 Pandemic and Business Law: A Series of Posts from the Oxford Business Law Blog” (Oxford Legal Studies Research Paper No 15, 15 April 2020).

<sup>164</sup> *Digital Rights Watch*, ~~“The Government Covid-19 Contact Tracing Smartphone App”~~, *Digital Rights Watch* (Web Page, 24 April 2020) <<https://digitalrightswatch.org.au/2020/04/24/covid-19-trace-app/>>.

<sup>165</sup> *Digital Rights Watch*, ~~n 164~~“The Government Covid-19 Contact Tracing Smartphone App”, *Digital Rights Watch* (Web Page, 24 April 2020) <<https://digitalrightswatch.org.au/2020/04/24/covid-19-trace-app/>>.

<sup>166</sup> Michael McGowan, ~~“Privacy concerns Concerns persist-Persist Oe~~ver Australia’s ~~e~~oronavirus ~~Coronavirus tracing-Tracing app-App~~”, *The Guardian* (News Article, 20 April 2020) <<https://www.theguardian.com/world/2020/apr/20/privacy-concerns-persist-over-australias-coronavirus-tracing-app>>.

<sup>167</sup> Michael McGowan, ~~n 166~~“Privacy concerns persist over Australia’s coronavirus tracing app”, *The Guardian* (News Article, 20 April 2020) <<https://www.theguardian.com/world/2020/apr/20/privacy-concerns-persist-over-australias-coronavirus-tracing-app>>.

Formatted: Font: Not Italic

Formatted: Not Highlight

However, a review of the literature reveals that the use of videoconferencing technology comes annexed with a number of issues – One of these issues pertains to which is its unreliable functionality.<sup>168</sup> In a study by Forell, Laufer and Digiusto, it was revealed that technological difficulties such as picture freezing, interrupted connections and poor sound quality were a common occurrence in videoconferencing communication.<sup>169</sup> Participants reported these technical issues as frustrating and that the reduced quality of the interface often resulted in delays and the need for extra appointments.<sup>170</sup> Donoghue has thus argued that “investment in the use of high-quality video equipment is essential” in order to reap the benefits of videoconferencing.<sup>171</sup> Yet, considering the pace and degree to which videoconferencing has been implemented by jurisdictions as a response to COVID-19, it seems unlikely that such an investment will be made.<sup>172</sup> Indeed, the Federal Circuit Court is currently calling for feedback from litigants, lawyers and other participants about their experience of court and ADR processes that have been conducted electronically.<sup>173</sup> The authors note the need to survey users is paramount in ensuring issues pertaining to videoconferencing are resolved and, more broadly, to ensure some access to justice principles are maintained during this unprecedented time.

It is clear that the COVID-19 pandemic has impacted on the traditional face-to-face administration of justice. However, research further reveals that the use of videoconferencing technology may not be as effective as its tangible counterpart. One such deficiency is in terms of its ability to establish feelings of trust and rapport between those involved in proceedings.<sup>174</sup> In the mediation context, Braeutigam explains that the nature of face-to-face communication is naturally conducive to building trust and rapport.<sup>175</sup> This is because the flow of communication is uninterrupted and key non-verbal cues such as body language and facial expressions can be assessed without delay.<sup>176</sup> This is not the case in virtual hearings. In such digitised proceedings, the indirect and non-synchronous nature of videoconferencing technology causes these non-verbal “building blocks” of trust to be lost.<sup>177</sup>

Formatted: Font color: Black, Not Superscript/ Subscript, Border: (No border), Pattern: Clear

<sup>168</sup> Monika Zalneriute and Felicity Bell, n 15 ‘Technology and the Judicial Role’ forthcoming in Gabrielle Appleby and Andrew Lynch, *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2020) 4.

Formatted: Default Paragraph Font

<sup>169</sup> Suzie Forell, Meg Laufer, and Erol Digiusto, n 18, ‘Legal Assistance by Video Conferencing: What is Known?’ (Justice Issues Paper 15, Law and Justice Foundation of New South Wales, November 2011) 11–12.

Formatted: Default Paragraph Font

<sup>170</sup> Suzie Forell, Meg Laufer, and Erol Digiusto, n 18, ‘Legal Assistance by Video Conferencing: What is Known?’ (Justice Issues Paper 15, Law and Justice Foundation of New South Wales, November 2011) 11–12.

Formatted: Default Paragraph Font

<sup>171</sup> Jane Donoghue, n 7 ‘The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice’ (2017) 80(6) *The Modern Law Review* 995, 1007.

Formatted: Default Paragraph Font

<sup>172</sup> For instance, UK Government statistics indicate that prior to concerns about COVID-19, approximately 100 hearings per day were held using audio or video link. By 6 April 2020, that number had risen to 1,850 and around 85% of cases England and Wales were heard via audio or video technology: Johnny Tan, “Online Hearings and the Quality of Justice”, [The UK Administrative Justice Institute](https://ukaji.org/2020/04/27/online-hearings-and-the-quality-of-justice/) (UK Administrative Justice Institute, Web Page, 27 April 2020) <https://ukaji.org/2020/04/27/online-hearings-and-the-quality-of-justice/>.

Formatted: Default Paragraph Font

Formatted: Font: Not Italic

<sup>173</sup> The Law Society of New South Wales, “Daily Updates COVID-19”, [The Law Society of New South Wales](https://go.lawsociety.com.au/webmail/533512/421418881/71e31e292c01ab8a741d33809daa788d7809211321c3dfbe6f412a10997360ea) (Web Page, 1 May 2020) <https://go.lawsociety.com.au/webmail/533512/421418881/71e31e292c01ab8a741d33809daa788d7809211321c3dfbe6f412a10997360ea>. See also: Federal Circuit Court of Australia, “Virtual hearing Hearing and electronic Electronic ADR feedback Form”, [Federal Circuit Court of Australia](http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/covid/covid-feedback) (Web Survey, 1 May 2020) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/covid/covid-feedback>.

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

Formatted: Font: Not Italic

<sup>174</sup> Noam Ebner and Jeff Thompson, “@ Face Value? Nonverbal Communication & Trust Development in Online Video-based Mediation” (2014) 1(2) *International Journal of Online Dispute Resolution* 103.

Formatted: Font: Not Italic

<sup>175</sup> Andrea Braeutigam, “What I Hear You Writing Is... Issues in ODR: Building Trust and Rapport in the Text-Based Environment” (2006) 38 *Toledo Law Review* 101, 104.

Formatted: Default Paragraph Font

<sup>176</sup> Andrea Braeutigam, n 175 ‘What I Hear You Writing Is... Issues in ODR: Building Trust and Rapport in the Text-Based Environment’ (2006) 38 *Toledo Law Review* 101, 104–105.

Formatted: Default Paragraph Font

<sup>177</sup> Andrea Braeutigam, n 175 ‘What I Hear You Writing Is... Issues in ODR: Building Trust and Rapport in the Text-Based Environment’ (2006) 38 *Toledo Law Review* 101, 104–105.

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

This issue is of particular relevance in the criminal law landscape. Central to criminal law proceedings is the ability of the judge and other observers to be able to develop an accurate perception of the defendant's character and credibility.<sup>178</sup> However, Poulin has noted that the judge's perception of the defendant may be masked or distorted by the use of videoconferencing technology and, ultimately, "undermine the accuracy of perceptions and corrupt the result of the proceeding."<sup>179</sup> So too in the criminal context may the technology impact the truthfulness of the witness' testimony.<sup>180</sup> Doret explains a witness' physical presence in the "solemn" or "symbolic" space that is the courtroom may encourage them to take the proceedings more seriously and thus give a truthful testimony.<sup>181</sup> This sense of formality is lost in videoconferencing. Haas further points out that a judge's perception as to truthfulness and credibility is particularly relevant in immigration proceedings, with immigrants often having to rely on their "personal story" to win their case.<sup>182</sup> This is of particular concern, with the number of immigration proceedings projected to rise amidst the stringent border restrictions implemented by governments in response to COVID-19.<sup>183</sup>

#### IV. CONCLUSION

In 2015, Bill Gates predicted that if anything were to kill many people and disrupt the global economy "it is most likely to be a highly infectious virus rather than a war".<sup>184</sup> Gates' concerns were not heeded. Despite the first development of technology to assist with legal decision-making occurring in the 1970s, the world has not been ready to cope with prepared for this crisis. As a result, the COVID-19 pandemic has placed enormous pressure on legal systems to embrace technological change. Yet, despite this pressure, the authors noted that there are a number of issues associated with the use of technology in the justice sector.

~~This was first revealed by an analysis of court responses to COVID-19.~~ While the use of technology by the courts is not entirely new, the majority of digital tools employed by the courts fall within the more rudimentary tiers of technological change. This is despite the fact that courts have been moving to online file and case-management systems since the birth of large-scale legal proceedings.<sup>185</sup> In this sense, the authors would have predicted the advent of COVID-19 leading to the more widespread use of virtual services. Yet many criminal law jurisdictions have adjourned jury trials due to deficiencies in technological innovations and their specific applicability to the criminal law landscape. Additional issues that relate to how "public" hearings can continue have also led to sluggish responses.

To some extent, although more developed, the same deficiencies penetrate the ADR and ODR landscape. It is clear that with citizens being forced into isolation due to COVID-19 restrictions, the justice system needs to adapt to meet these new challenges faced by litigants. However, an analysis of currently

Formatted: Font color: Black, Not Superscript/ Subscript, Border: (No border), Pattern: Clear

Formatted: Font color: Black, Not Superscript/ Subscript, Small caps, Border: (No border), Pattern: Clear

<sup>178</sup> Anne Bowen Poulin, n 76 'Criminal Justice and Videoconferencing Technology: The Remote Defendant' (2004) 78 *Tulane Law Review* 1089, 1114.

<sup>179</sup> Anne Bowen Poulin, n 76 'Criminal Justice and Videoconferencing Technology: The Remote Defendant' (2004) 78 *Tulane Law Review* 1089, 1114.

<sup>180</sup> Anne Bowen Poulin, n 76 'Criminal Justice and Videoconferencing Technology: The Remote Defendant' (2004) 78 *Tulane Law Review* 1089, 1125.

<sup>181</sup> David M. Doret, "Trial by Videotape – Can Justice Be Seen to Be Done?" (1974) 47 *Temple Law Quarterly* 228, 256.

<sup>182</sup> Aaron Haas, "Videoconferencing in Immigration Proceedings" (2006) 5(1) *Pierce Law Review* 59, 75.

<sup>183</sup> In the American context, see: Muzaffar Chishti and Sarah Pierce, "Crisis Within a Crisis: Immigration in the United States in a Time of COVID-19"; [Migration Policy Institute \(Migration Policy Institute, Web Page, 26 March 2020\) <https://www.migrationpolicy.org/article/crisis-within-crisis-immigration-time-covid-19>](https://www.migrationpolicy.org/article/crisis-within-crisis-immigration-time-covid-19).

<sup>184</sup> Ariel Zilber, Corazon Miller and Ian Randall, "How Bill Gates warned Warned in 2015 TED Talk that the next Next big-Big threat-Threat to humanity-Humanity was Was a 'highly-Highly infectious-Infectious virus'-Virus" that 'we-We are-Are not-Not ready-Ready for-For"; [Daily Mail, \(Web Page, 20 March 2020\) <https://www.dailymail.co.uk/news/article-8132107/Bill-Gates-warned-2015-TED-Talk-big-threat-humanity-coronavirus-like-pandemic.html>](https://www.dailymail.co.uk/news/article-8132107/Bill-Gates-warned-2015-TED-Talk-big-threat-humanity-coronavirus-like-pandemic.html).

<sup>185</sup> Monika Zalnierute and Felicity Bell, n 15, "Technology and the Judicial Role" forthcoming in Gabrielle Appleby and Andrew Lynch, *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2020) 4.

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Font: Not Italic

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font

Formatted: Default Paragraph Font



available ODR systems such as Immediation and MODRON revealed that these services are unable to fulfil the six essential requirements of Zeleznikow's ODR model. Thus, a significant deficiency exists in the availability of appropriate and user-centric technologies.

It is for these reasons ~~in which that~~ the deep-seeded and underlying issues associated with technologies' infiltration in the justice sector need to be addressed. ~~The authors note that~~ These issues include: a lack of innovation readiness and justice budget; security and confidentiality concerns; community and business responses; and issues with videoconferencing. In this respect, it is suggested that patchy and inconclusive innovations need to be replaced with technologies that are specifically appropriate for courts. However, such innovations need to be developed with security and confidentiality concerns at their forefront. Indeed, an issue with the COVID-19 responses ~~has arisen~~ because videoconferencing tools such as Zoom and Skype have prioritised openness and commercial viability over privacy and security, and therefore such systems are not widely used in the legal domain. It is further suggested that community responses to the pandemic need to be informed and tailored to meet the specific needs of citizens in order to combat the inevitable tsunami of litigation that will occur as a result of COVID-19 – especially so in the family, insolvency, commercial, civil, workplace and criminal law sphere. Indeed, ~~the authors suggest that~~ in order to manage and resolve the coming wave of disputes, the issues associated with videoconferencing technology and its applicability to the varying legal domains ~~needs~~ to be addressed.

Noting such hurdles, at the present time it is difficult to predict what further changes in the justice system will arise from the COVID-19 crisis. Indeed, perhaps the only changes that will occur are those that were already developing prior to the advent of COVID-19. However, the authors consider that the introductions of technologies that were already available will increase and ~~it is hoped~~ that a greater focus on human-centred design in the justice sector will result in more sophisticated and responsible approaches into the future. In this regard, the authors note the contemporary views of Margaret Hagan, who has argued that it is impractical to develop legal technological innovations without human design as the ~~centrale~~ focus.<sup>186</sup> In this sense, it seems necessary to design user-centric innovations to ensure that advances in the use of legal technology ~~leads~~ to reform that lasts beyond the COVID-19 crisis. To do this, courts and those engaged in justice reform need to evaluate the responses to COVID-19 and consider what might be possible to ensure that the system is fit for purpose, meets contemporary needs and is resilient in terms of ~~a~~ capacity to respond to future challenges so that the system embraces technological developments to ensure the needs of all users can be met.

---

<sup>186</sup> Margaret Hagan, "'Participatory Design for Innovation in Access to Justice'" (2019) 148(1) *Daedalus, the Journal of the American Academy of Arts and Sciences* 120. See also generally: Margaret Hagan, "'A Human-Centered-centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Interventions to Make Courts User-Friendly'" (2018) 6(2) *Indiana Journal of Law and Social Equity* 199.

Formatted: #ref\_titleArticle