

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
INAUGURAL SUPREME COURT ADR ADDRESS
ADR, ODR AND AI-DR, OR DO WE EVEN NEED COURTS ANYMORE?
20 SEPTEMBER 2018*

Introduction

1. I would firstly like to acknowledge the traditional owners of the land on which we meet, the Gadigal People of the Eora nation, and pay my respects to their elders, past, present and emerging. I am greatly honoured by the invitation to give this inaugural annual ADR address, which is to become an annual feature on the Court's calendar, presented by the Australian Disputes Centre. I extend my thanks to Deborah Lockhart, the CEO of the Centre and her team for the invitation to speak, and for their considerable effort in the organisation of this event.
2. My topic for this evening is centred on how ADR and the courts are set to be affected in the coming years by technology. This discussion has just happened in the United Kingdom, and has been occurring piecemeal in this country. There have been suggestions that more wholesale reforms might be on the way, at least in this State.¹ What I want to consider is what such reform means for the courts, for ADR and for court-annexed or referred ADR.
3. While aspects of how we resolve disputes can seem ancient and immutable, the courts and ADR are always evolving. The landscape of ADR, in particular, has changed significantly in the past 30 years with the explosion in its use and popularity. In addition, it has become integrated into many court processes, through court-annexed ADR and court referrals. In March, Chief Justice Martin, in

* I express thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

¹ See Angus Thompson, 'Court fights go online in NSW trial', *The Sydney Morning Herald* (online) 12 June 2018 <<https://www.smh.com.au/national/nsw/court-fights-go-online-in-nsw-trial-20180611-p4zku4.html>>.

the West Australian counterpart to this event, gave a comprehensive overview of this history and some of the complex issues which have arisen along the way.² Building on where he ended his address, which I commend to you, my focus this evening will be what the future holds for ADR and the courts. With the advent of ODR and AI-DR, do we even need courts anymore?

The broader social context

4. This question should be understood against the background of broader changes in society. Earlier this month Forbes declared that we are “on the cusp of the Fourth Industrial Revolution, or Industry 4.0”.³ It is said to be fundamentally different from the first three, which used water and steam, electric power, and information technology respectively.⁴ The fourth will instead use AI, nanotechnology and biotechnology “to replace and augment certain kinds of labour and knowledge work”.⁵ Increasingly capable computers will be able to draw on and analyse Big Data to make decisions and educate themselves so that they autonomously increase their own capability, outperforming human experts using “brute-force processing”.⁶ These machines are said not only to be capable of augmenting the decision-making processes undertaken by legal professionals, but of supplanting their role altogether.⁷

² Wayne Martin, ‘Alternative Dispute Resolution – A misnomer?’ (Speech delivered at the Australian Disputes Centre ADR Address, Perth, 6 March 2018).

³ ‘The 4th Industrial Revolution is Here: Are you ready?’, *Forbes* (online), 13 August 2018 <<https://www.forbes.com/sites/bernardmarr/2018/08/13/the-4th-industrial-revolution-is-here-are-you-ready/#673f4622628b>>.

⁴ See generally Klaus Schwab, ‘The Fourth Industrial Revolution: what it means, how to respond’ <<https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/>>.

⁵ Dame Hazel Genn, ‘Online Courts and the Future of Justice’ (Birkenhead Lecture 2017, delivered at Gray’s Inn, 16 October 2017) 2.

⁶ Ibid citing Richard Susskind and Daniel Susskind, *The Future of the Professions* (Oxford University Press, 2015) 272.

⁷ Ibid.

Some definitions

5. It is important at the outset to define a few of the key terms that will recur throughout this discussion. First, what do I mean by ADR? It is not a simple or uncontroversial thing to define. Debate rages over even whether the “A” is for “Alternative”, “Appropriate”, “Additional”, “Assisted” or even somewhat opaquely – “Affirmative”.⁸ For the sake of both sanity and simplicity and for my limited purposes, it means any form of resolving a dispute outside the traditional and adversarial process of a trial or hearing.⁹
6. Second, what do I mean by ODR, or Online Dispute Resolution? The term has been used to refer to the various forms of ADR which are currently carried out online.¹⁰ However, I use it more broadly to refer to any dispute resolution processes conducted with the assistance of technology, including formal court processes conducted electronically or online.
7. Professor Tania Sourdin, in the most recent edition of her text, has identified three main ways in which technology is reshaping ADR, which are equally applicable to the way technology is reshaping the adversarial system. First, there are “supportive technologies” which can assist to “inform, support and advise”. Second, there are “replacement technologies” which supplant functions and activities previously carried out by humans. Finally, there are “disruptive technologies”, which provide for “different forms of ADR”, including systems supported by artificial intelligence.¹¹
8. This is what I termed “AI-DR” in tonight’s topic, by which I simply mean the replication of human decision making by computers. I recognise this is a simplistic definition, and much of what AI is capable of doing is inhuman in speed and ability, but it will suffice for my purposes. What I mean particularly are systems modelled on past data about decisions, which ask users a number of

⁸ Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, 5th ed, 2016) 2-3.

⁹ As similarly defined by Martin, above n 2, 4.

¹⁰ Sourdin, above n 8, 386.

¹¹ *Ibid* 384.

questions and then forms conclusions by applying the rules it knows for specific sets of facts.¹² There are of course limits to the extent to which AI will be used in the actual determination of disputes, a point I will return to shortly. It suffices to note at this stage that as artificial intelligence relies generally upon algorithms drawn from prior experience and outcomes there may still be a need for human expertise to deal with situations that fall outside of the norm.¹³ Ultimately it will depend on the sophistication of the algorithm, but we are still a long way from computerising the human brain.

The influence of technology: the courts

9. Nevertheless, the influence of technology on dispute resolution has already been significant. Those disappointed with the slow uptake, particularly in the Courts, should take heed of Amara's law – that we tend to overestimate the effect of technology in the short run and underestimate its effect in the long run.¹⁴ In any event, supportive technology is used in the Courts as a matter of course – we now have e-filing, e-discovery, real time transcription services, electronic courtrooms, the use of video links and “safe rooms” for vulnerable witnesses and the use of devices on the bench and at the bar table.¹⁵ In NCAT, some hearings are conducted via telephone where it is the most timely and effective way to hear the matter.

10. On the “disruptive” end, an online court is available in NSW for managing and processing preliminary orders in some court lists, including the Supreme Court Corporations Registrar's List.¹⁶ Technology has the capacity to generate significant efficiencies in this area, as traditional in-person arrangements for case

¹² Sourdin, above n 8, 399-400.

¹³ John Zeleznikow, 'Don't fear robo-justice: Algorithms could help more people access legal advice', *The Conversation* (online), 23 October 2017 <<http://theconversation.com/dont-fear-robo-justice-algorithms-could-help-more-people-access-legal-advice-85395>>.

¹⁴ As coined by Roy Amara, former head of the Institute for the Future at Stanford University.

¹⁵ Margaret Beazley, 'Law in the Age of the Algorithm' (State of the Profession Address, Sydney, 21 September 2017) 9-10.

¹⁶ See NSW Online Registry, 'About Online Court' <<https://onlineregistry.lawlink.nsw.gov.au/content/help/online-court>>.

management are time and administration intensive. For directions hearings, physical attendance is ordinarily required of practitioners for each represented party, as well as self-represented litigants. This creates significant inconvenience and cost for matters that are typically uncontroversial. This has successfully been minimised through the use of the online court, and will continue to be minimised as it is rolled out to other lists.

11. Looking to the future, there are two “supportive” technologies which I think could really transform both court proceedings and ADR. The first is the availability of reliable instant translation. This technology can remove barriers for people from diverse backgrounds, and has obvious application in the cross-border sphere.¹⁷

12. Second is the use of virtual reality and augmented reality in the courtroom. For example, this technology might allow witnesses to give evidence remotely but appear in front of judges and jurors in a three-dimensional form using wearables and headsets. This has the potential to mitigate some of the limitations of giving evidence via video-link. It could also allow virtual recreations of physical environments like accident scenes or even crime scenes for the benefit of arbiters of fact.¹⁸ Of course, cost is always a significant consideration but the long term benefits may outweigh the initial capital costs.

The influence of technology: ADR

13. Turning now to ADR, which has also seen the impact of supportive, replacement and disruptive technology. On the supportive side, internet based information sources, video-conferencing, teleconferencing and email supplant and support face-to-face ADR approaches.¹⁹ In the family law sphere, for example, many disputes are dealt with through the Family Relationship Advisory Line and the Telephone and Online Dispute Resolution Service.²⁰

¹⁷ See, eg, Microsoft Translator <<https://translator.microsoft.com/>>.

¹⁸ See Jeremy Bailenson et al, ‘Courtroom Applications of Virtual Environments, Immersive Virtual Environments, and Collaborative Virtual Environments’ (2006) 28(2) *Law and Policy* 249.

¹⁹ Sourdin, above n 8, 384.

²⁰ *Ibid* 404.

14. The internet has also resulted in the creation of ODR specific to disputes relating to itself – for example, the online dispute resolution services offered by eBay and PayPal. The Ebay system is said to resolve 60 million disputes each year.²¹ Wikipedia similarly has its own dispute resolution system, which involves users resolving content disputes through the “Noticeboard”, a platform for discussion, with the view to reaching compromise and resolution with oversight by moderators. If two editors are in dispute they can request a non-binding opinion by an independent third editor, and there is also an “Arbitration Committee” which imposes binding solutions as a last resort.²²
15. While these sorts of dispute resolution mechanisms are not likely to affect the business of traditional ADR – they are servicing new forms of disputes – other disruptive technologies may do so. One example is a program called “Smartsettle”, which uses optimisational algorithms to generate packages as options for resolution, based on private information that remains private to the parties but is visible to the system. Essentially, parties exchange information and offer visible or invisible concessions. Smartsettle generates suggestions based on party preferences and concessions and parties reach a solution by agreeing on the same package.²³
16. FamilyWinner is another example, which is aimed at divorce proceedings. It was developed in Australia to assist divorcing couples rationally to negotiate, distributing items in a settlement to those who most desire them. The program asks parties to list the items in dispute and to attach importance values (out of 100) to each of them. The system then uses algorithms that optimise the outcome for each party.²⁴
17. Ultimately, however, I suspect most of these programs will become part of the toolkits of ADR practitioners and the Courts, rather than replacing us altogether, if

²¹ See Stefan RM Lancy, ‘ADR and technology’ (2016) 27 *Australasian Dispute Resolution Journal* 168.

²² Sourdin, above n 8, 395.

²³ See Smartsettle, ‘The Smartsettle process’ <<https://smartsettle.com/about-us/process/>>.

²⁴ See generally Emilia Belluci and John Zeleznikow, ‘Representations of Decision-making Support in Negotiation’ (2001) 10(3-4) *Journal of Decision Systems* 449, 465-6.

we remain agile enough to adopt and adapt to them. The impact of technology is going to be most transformative in relation to court-annexed ADR, to which I will now turn.

The United Kingdom reforms

18. There were two main catalysts for my choice of topic this evening – the first being the widespread reform currently being undertaken in Her Majesty’s Courts and Tribunals Services in the United Kingdom, and second, a consultation paper into civil justice reform released by the NSW Government last year.

19. In September 2016 in the United Kingdom, the Lord Chancellor, Lord Chief Justice, and Senior President of Tribunals released a “joint vision statement” announcing a £1 billion transformation of the justice system²⁵ to be “digital by default”.²⁶ The announcement came in the wake of three influential reports.

20. First, was the Susskind report in 2015 which investigated the potential for using ODR for civil claims worth less than £25, 000. Its main recommendation was that the government should establish a new online court service, somewhat unimaginatively called “Her Majesty’s Online Court”.²⁷ It was to have three tiers, involving fully integrated ADR.²⁸

21. Second was a report by the organisation JUSTICE, which recommended the reconceptualization of court and tribunal rooms as “justice spaces”, which would be capable of adapting to different processes.²⁹ Finally, Lord Justice Briggs

²⁵ Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, ‘Transforming Our Justice System’ (Joint Vision Statement, September 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf>.

²⁶ See Genn, above n 5, 3.

²⁷ Civil Justice Council Online Dispute Resolution Advisory Group, ‘Online Dispute Resolution for Low Value Claims’ (2015) <<https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>>.

²⁸ See *ibid* as summarised by Joshua Rozenberg, ‘Origins of the Online Court’ <<https://longreads.thelegaleducationfoundation.org/origins-of-the-online-court/>>.

²⁹ JUSTICE, ‘What is a Court’ (2016) <<https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/05/JUSTICE-What-is-a-Court-Report-2016.pdf>>.

reported in 2016 on the structure of the Civil Courts,³⁰ and found that while “the Civil Courts of England and Wales are among the most highly regarded in the world”, their “single, most pervasive and indeed shocking weakness” is that they “fail to provide reasonable access to justice for the ordinary individuals or small businesses with small or moderate value claims.”³¹ This is certainly a problem which exists in courts of this country.

22. To address this “missing middle”, it recommended a three-tiered online court model, initially for claims up to £25, 000, similar to that proposed by Susskind. It would involve an automated “triage” stage including advice to help claimants articulate their cases, exchanges between claimants and defendant and the preparation of the claim form and particulars of claim. The second stage would be an ADR stage, involving telephone, online or face-to-face mediation or early neutral evaluation, and finally, for those cases still not settled, a determination stage which could comprise a conventional hearing, or a telephone or video hearing. It could also be legal determination without a hearing. The “essential concept” was a new, more investigative court, designed for navigation without lawyers.³² In a very real sense this represents a departure from the adversarial litigation system which has always been a feature of the common law.

23. Briggs’ proposal had also taken into account the Canadian Civil Resolution Tribunal,³³ which was launched in 2016 as that country’s first entirely online tribunal. The CRT resolves small claims disputes and is a graduated process of fully integrated ADR going from negotiation, to facilitation, to an online determinative process.³⁴

³⁰ Michael Briggs, ‘Civil Courts Structure: Interim Report’ (December 2015) <<https://www.judiciary.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf>> and Michael Briggs, ‘Civil Courts Structure Review: Final Report’ (January 2016) <<https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>>.

³¹ Briggs, ‘Final Report’, above n 30, 28.

³² Ibid 36.

³³ Ibid 44.

³⁴ Civil Resolution Tribunal, ‘How the CRT Works’ <<https://civilresolutionbc.ca/how-the-crt-works/>>.

24. The resulting reform plan, which is currently under implementation, involves over 50 separate projects. The crime programme is developing a common platform for securely sharing information on a single system, meaning information is shared from the point when a police officer charges a defendant or requests a charging decision from the CPS, to the point the case is decided and the result is formally recorded. Summary “non-imprisonable” offences will be taken out of the courtroom and heard on the basis of a file. In serious cases plea indications will be done online and judges and magistrates will be able to conduct remand hearings remotely. In the civil, family and tribunal program, the plan is to unite all the administrative and judicial procedural steps on one digital platform with a single access portal, with automated triage and more frequent use of ADR.
25. A new set of online procedural rules will allow claims to be brought without legal assistance. There will be less use of physical buildings, with sales generating income required for investment elsewhere as video hearings reduce courtroom needs. A digital tool will automate aspects of scheduling and listing, courts and tribunal “service centres” will be created as centralised locations for contact and case administration, and a new compliance and enforcement programme implemented.³⁵
26. Funding was allocated to these reforms on the expectation that the courts would make long-term spending reductions, from fewer physical hearings and fewer physical buildings to maintain. Court staff numbers are also to be reduced from 16, 5000 to around 10, 000.³⁶
27. There have been some difficulties so far. The House of Commons Public Accounts Committee noted in July 2018 that it had only delivered two-thirds of what it expected to at this stage and had failed to share a sufficiently well-developed plan of its goals. It found that the pressure to deliver quickly and make savings was limiting its ability to “consult meaningfully with stakeholder and risks it driving forward changes before it fully understands the impact on users and the

³⁵ See generally Rozenberg, above n 28, ‘The reform projects’.

³⁶ Rozenberg, above n 28, ‘HMCTS Reform’.

justice system more widely”.³⁷ The National Audit Office published a report this year with similar findings, noting that the business case had been revised twice, with the 10 year economic case weakening each time.³⁸ Expected costs have increased while planned benefits have decreased.³⁹

28. Nevertheless these are some of the most far reaching justice reforms in any country in the world.⁴⁰ It is hardly surprising and perhaps to be expected that there would be difficulties in their execution. One thing also to be noted is that the development of the reform and its implementation were a collaborative exercise between the executive and the judiciary. It is an important matter as it means people responsible for the delivery of justice are involved in ways of better facilitating that process. There is no reason to suggest that the judiciary in this country would not adopt the same proactive approach.

The NSW Government’s consultation paper on civil justice reform

29. You may be wondering what all this has to do with ADR in Australia. In January 2017 the NSW Government released a consultation paper on reforming the civil justice system entitled: “Justice for everyday problems”.⁴¹ The use of technology was a key feature. The second chapter, on “Dealing with problems early” said that the government was considering options like transforming LawAccess to feature a live web-chat or developing it into a smartphone app. It also suggested creating “online tools and apps” that help write letters or emails.⁴² Finally, it suggested “online tools to help negotiate and solve problems”, like “artificial intelligence and other types of smart technology”, referencing the now defunct

³⁷ House of Commons Public Accounts Committee, ‘Transforming courts and tribunals’ (56th Report of Session 2017-19, 16 July 2018) 3.

³⁸ National Audit Office, ‘Early progress in transforming courts and tribunals’ (Report by the Comptroller and Auditor General, 9 May 2018) 7.

³⁹ Ibid.

⁴⁰ See Sir Terence Etherton, ‘The Civil Court of the Future’ (The Lord Slynn Memorial Lecture, 14 June 2017).

⁴¹ NSW Government Department of Justice, *Justice for everyday problems: Civil Justice in NSW* (Consultation Paper, January 2017).

⁴² See Citizens Advice, ‘Consumer Template Letters’ <<https://www.citizensadvice.org.uk/consumer/template-letters/letters/>>.

Rechtwijzer system from the Netherlands, which was an ODR platform for separating couples which would help them resolve issues such as asset distribution. The program's backers announced it would be shut down last year as it had proved financially unsustainable due to limited take-up.⁴³

30. Sir Terrence Etherton, the Master of the Rolls acknowledged this failure in a speech last year but cautioned against drawing conclusions about the consequent viability of the UK reforms, as the fundamental difference between the UK solution and the Rechtwijzer was that the latter was an ODR platform existing outside the court system, while the UK reforms mean ODR is incorporated into the courts own processes.⁴⁴ It appears what the NSW Government was considering is far closer to the British version than the Dutch.

31. This was evident in part 3 of the consultation, which suggested improvements to court and tribunal processes including making greater use of audio-visual technology in civil matters, whereby people could remotely attend certain stages of the court or tribunal process. Finally there was the option to explore "online dispute resolution options" to follow directly from online self-help tools. The paper stated that where an agreement wasn't reached the parties could choose to receive expert online help from a court or tribunal and, where necessary, a binding decision", stating "this would create a beginning-to-end online process".⁴⁵ I should note at this point I have some concern about what "expert online help" a court or tribunal would be providing and the appropriateness of such a scheme. However, given the high level of generality at which the consultation was framed, it would be inappropriate to make any specific criticisms.

32. When this proposal is looked at as a whole, however, one can see some distinct similarities between what is suggested in the consultation paper and the UK "three-tiered" approach, which in turn has drawn heavily from the CRT in Canada. That is, it seems to be suggesting a triage stage, feeding into ODR and then directly into a court or tribunal process.

⁴³ Etherton, above n 40, 16.

⁴⁴ Ibid.

⁴⁵ Ibid 23.

33. The consultation is now no longer available online, and no final report or strategy has as yet been released. However, in June 2018, the Department of Justice announced a \$7m investment in technology and self-help tools.⁴⁶ It also indicated more detail about the government's Civil Justice Strategy would be announced in coming months.⁴⁷

The challenges of the future

34. Whether or not the Civil Justice Strategy includes reform to the extent being undertaken in the United Kingdom, or if it ends up pursuing this sort of reform agenda at all, I would have to agree with Richard Susskind's view that "no change is the least likely future".⁴⁸ Neither ADR, nor the courts, will exist in their current form in 20, 30 or 40 years' time. There will be fundamental shifts in the administration of justice that will be pervasive and transformational.⁴⁹

35. While I now want to turn to some of the challenges and issues that might arise from these changes, I want to make one thing clear. I am supportive of modernising the courts, and I believe ADR will benefit from new technology which can improve efficiencies and reduce costs. The point of what I am about to say is not that we should be circumspect about change, but simply that there will be challenges and unforeseen consequences. Before we jump head on into any sort of reform agenda, these need to be recognised and accommodated where necessary.

36. The proposals for reform all involve a greater integration of ADR with the court process, all have an element of compulsion attached to the ADR component and all invoke the authority of a court or at least an administrative tribunal to make them effective. There are two issues emanating that deserve some consideration. First, what impact will an integrated ODR process have on our present

⁴⁶ NSW Government Department of Justice, 'NSW Budget 2018: Improving Access to Justice' (Media Release, 12 June 2018) <<https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/budget-2018-improving-access-to-justice.aspx>>.

⁴⁷ Ibid.

⁴⁸ Richard Susskind, *Tomorrow's Lawyers* (Oxford University Press, 2nd ed, 2017) 190.

⁴⁹ Ibid 184.

understanding of what is a “Court”, and second, what impact will it have on our present understanding of “ADR”.

The fundamental characteristics of a Court

37. This discussion as to the impact on the courts is one that to some of you may bring on an unwelcome sense of déjà vu, because a similar debate has only just settled down in relation to court-annexed ADR and judges acting as mediators. I’m sure you would all be familiar with the reservations expressed by former Chief Justice French about the “multi-door courthouse”, based on constitutional considerations.⁵⁰ In addition, there have been debates as to whether the participation in ADR by a judge poses Chapter III problems in the sense of being incompatible with the exercise of judicial power.⁵¹ A number of carefully considered papers have concluded that there is no constitutional impediment to judges acting as mediators.⁵²

38. In practical terms the long-standing court-annexed mediation program in the Supreme Court has not, in my view, come at a cost to the integrity of its public adjudicative function. In addition, since 2014, judicial settlement conferences have been used in family provision cases where the estate is valued at less than \$500,000 or where the parties jointly request one. These conferences are conducted by Justice Hallen and are timed to occur at an early stage of case management with a view to achieving settlement as soon as possible so as to minimise litigation costs. They have, on all accounts, been highly successful. Just this year, judicial settlement conferences were conducted in 209 matters, and 158 have settled.⁵³

⁵⁰ Robert French, ‘Perspectives on Court Annexed Alternative Dispute Resolution’ (Speech delivered at the Law Council of Australia Multi-door Symposium, Canberra, 27 July 2009) 20.

⁵¹ See a summary of the issues in Martin, above n 2, 19.

⁵² Michael Moore, ‘Judges as Mediators: A Chapter III Prohibition or Accommodation?’ (2003) 14 *Australian Dispute Resolution Journal* 188; Iain Field, ‘Judicial Mediation, the Judicial Process and Ch III of the Constitution’ (2011) 22 *Australian Dispute Resolution Journal* 72. See generally TF Bathurst, ‘The Role of Courts in the Changing Dispute Resolution Landscape’ (2012) 35(3) *University of New South Wales Law Journal* 870, 874-9.

⁵³ Some of these settlements occurred on a date after the settlement conference, that is, not all cases settled during mediation immediately following the conference.

39. As Chief Justice Martin noted in his ADR Address earlier this year, the issue is largely one of focus and definition, and there is “no practical difficulty in providing court-annexed ADR whilst maintaining the complete integrity of the important public adjudicative function of the court”.⁵⁴ In any event, I think most of us now accept that ADR and the Courts are now inextricably linked and reliant on each other in a significant regard. The courts would be completely overrun within weeks if ADR were to cease, but ADR is not a panacea for all disputes.⁵⁵

40. However, the reform happening in the United Kingdom or that suggested by the NSW Consultation Paper takes the linking of ADR with judicial adjudication one step further. It blurs the boundaries between the two processes, merging them into one convenient online package. In the UK context, Sir Terrence Etherton has stated there is a “fundamental” difference in the new online process – as while the old approach “encourages” ADR processes the online court “embeds them into the pre-trial process for the first time, and requires the court actively to facilitate them”.⁵⁶ Lord Justice Briggs described it as “designed to take the A out of ADR”.⁵⁷

41. It brings into sharper focus some of the concerns articulated by former Chief Justices French and Spigelman about the institutional integrity of the Court. Former Chief Justice Spigelman warned in the past that a “court is not simply a publically funded dispute resolution centre”.⁵⁸ Chief Justice French similarly wrote of court-annexed ADR that “the institutional arrangements” under which they operate require “careful consideration”, as “courts are not and should not be seen

⁵⁴ Martin, above n 2, 20.

⁵⁵ Robert McDougall, ‘Courts and ADR: A Symbiotic Relationship’ (Paper delivered at the LEADER & IAMA Conference, Sydney, 7 September 2015) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/McDougall_20150907.pdf> [23].

⁵⁶ Etherton, above n 40, 9-10.

⁵⁷ Michael Briggs, ‘The Online Solutions Court: affordable dispute resolution for all’ (JUSTICE Lecture, October 2016) <<https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/10/Lord-Justice-Briggs-JUSTICE-lecture-Oct-2016.pdf>> 10.

⁵⁸ James Spigelman, ‘Judicial Accountability and Performance Indicators’ (Speech delivered to the 1701 Conference, Vancouver, 10 May 2001).

to be providers of a spectrum of consensual and non-consensual dispute resolution services”.⁵⁹ However, once a court ceases to be a distinct place, what differentiates it from any other government service? To what extent is an online court truly still a court? What is essential and inessential about courts in modern times, and will an online court with integrated and mandatory ODR still have those essential features?⁶⁰

42. Of course, as foreshadowed earlier, these questions are shaped by our constitutional context – a court in Australia is a body which exercises judicial power, and powers compatible with the exercise of judicial power.⁶¹ But will too strict an interpretation of what is constitutionally essential risk the loss of institutional relevance to the needs of the community?⁶²

43. The characteristics commonly regarded as essential which are tested by technology are procedural fairness and the principle of open justice. In the United Kingdom, it appears that the plan is for virtual hearings to be broadcast via video screens in local courts so that the press and public can follow them.⁶³ In March 2018 the first civil case was heard with neither party present, in a tribunal tax matter. The hearing could be attended at a tribunal centre in London where both the taxpayer, who appeared to be speaking from his home, and the HM Revenue and Customs representative, could be viewed on screens from the tribunal centre.⁶⁴

44. Procedural fairness is another concern. Under the new system envisaged for tribunals in the UK, the idea is that all participants will be able to iterate and

⁵⁹ Robert French, ‘Essential and Defining Characteristics of a Courts in an Age of Institutional Change’ (Supreme and Federal Court Judges Conference, Adelaide, 21 January 2013) 4-5.

⁶⁰ See Murray Gleeson, ‘The Judicial Method – Essentials and Inessentials’ (The District and County Court Judges’ Conference, Sydney, 25 June 2009) <<http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/gleeson25jun09.pdf>>.

⁶¹ *Kable v DPP (NSW)* (1996) 189 CLR 51.

⁶² See Sir Gerard Brennan, ‘Limits on the Use of Judges’ (1978) 9 *Federal Law Review* 1, 14.

⁶³ Rozenberg, above n 28, ‘Virtual Courts’.

⁶⁴ *Ibid.*

comment online about the case papers so that issues can be clarified and explored. This is a significant shift from an adversarial approach to a more inquisitorial one. On the one hand, an iterative process does make sense – avoiding the inconvenience of having to adjourn hearings or decide cases without all the necessary information where critical information is missing.⁶⁵ However, it also shifts the balance of responsibility from our current understanding that the parties define the scope of their claims and defences and take responsibility for the conduct of their case. It has been suggested that there is an increased scope for bias and an impact on judicial independence.⁶⁶ But again it must be remembered that the inquisitorial system used in civil law countries has not been seen to necessarily result in bias or decreased judicial independence. At the bottom line, I don't think adversarial procedure is necessarily the defining characteristic of a court.

45. Finally, questions of fairness also impact the proposed use of artificial intelligence in the ODR stage of online process. The issue of bias in technology has, for example, arisen in the Ebay system, which has been accused of favouring buyers over sellers, as it adopted a “buyer is always right” policy.⁶⁷ While technology and artificial intelligence have long been lauded as impartial alternatives to unpredictable and inexpressible human decision-making, recent experience has shown that programming and artificial intelligence is not bias free. Algorithms can operate in a discriminatory and inconsistent fashion – relying on skewed databases, reflecting the programmer's own biases in their design, and even operating unpredictably, which is a particular problem with learning algorithms.⁶⁸

46. For example, in 2016, Microsoft released its chatbot “Tay” onto Twitter to engage in online conversations with users. In less than 24 hours, Tay began spouting

⁶⁵ Genn, above n 5, 9-10.

⁶⁶ Ibid.

⁶⁷ Michael Legg, ‘The future of dispute resolution: Online ADR and online courts’ (2016) 27 *Australasian Dispute Resolution Journal* 227, 233.

⁶⁸ Orna Rabinovich-Einy and Ethan Katsh, ‘The New New Courts’ (2017) *American University Law Review* 165, 210-211.

racist and sexist comments.⁶⁹ More recently, in courtrooms in the United States, judges are using algorithms to inform bail decisions, receiving an algorithmic generated score that rates a defendant's flight risk and level of danger to the community. However, a 2016 investigation by a non-profit found that such algorithms may be biased against African-American defendants.⁷⁰

47. I should state that at this stage I can't see the process evolving to a point at which AI-DR replaces judicial decision makers all together, in the public justice system. Whether disputants consensually choose to submit their dispute to a robo-judge or robo-arbitrator is another question, but that is for private ADR. In terms of the courts, I think it is safe to say that the ultimate responsibility of judicial decision making will remain in the hands of human judges. This is not least because a significant proportion of cases do require some level of a value judgment, and there is significant scope in our system for judicial discretion. Then again, we cannot be so certain that these elements will continue to be important to future generations – one person's empathy is ultimately another person's bias.

48. If AI-DR does start to assist judicial decision making, or it is used as part of the public justice system as a pre-litigation ADR option, some issues will need to be addressed in relation to the transparency of the systems. Courts need to be impartial, sit in public and give reasons – these are generally considered fundamental characteristics of a court. Any AI platform part of a court will be bound by similar requirements.⁷¹ There are good reasons for these strictures. They maintain trust and legitimacy in the justice system. Where those promoting greater use of technology fail to recognise this, they risk disengagement and a return to traditionalism. For example, in 2002, Michigan enacted legislation creating a court-annexed ODR program titled the Cyber Court, which was ultimately abandoned due to a reluctance of parties and lawyers to use the

⁶⁹ Elle Hunt, 'Tay, Microsoft's AI Chatbot, gets a crash course in racism from Twitter', *The Guardian* (online), 24 March 2016 <<https://www.theguardian.com/technology/2016/mar/24/tay-microsofts-ai-chatbot-gets-a-crash-course-in-racism-from-twitter>>.

⁷⁰ See 'Even Imperfect Algorithms Can Improve the Criminal Justice System', *The New York Times* (online), 20 December 2017 <<https://www.nytimes.com/2017/12/20/upshot/algorithms-bail-criminal-justice-system.html>>.

⁷¹ Legg, above n 66, 233.

system, a misunderstanding and distrust of the system and a concern as to data security.⁷²

49. I also have some reservations about moves away from hearings entirely in adjudicative proceedings. There is evidence in the tribunal field that cases determined solely on the papers are less likely to succeed than oral hearings, possibly because of additional information that can be elicited at the hearing. Credibility of claimants is also rated more highly when they are seen and heard.⁷³ Studies on the use of interactive video technology in US deportation cases found that litigants separated from the traditional courtroom setting simply disengaged with the entire process. One of the judges in the study commented: "If you come into the courtroom ... and you see the judge at a big desk wearing a black robe, then you realise it's a court. If you take that same person and you put him in the video room ... they see me basically as a big, disembodied head on the television. How is that any different than watching People's Court or Judge Judy?".⁷⁴ I think we need to consider how this affects public confidence and trust in the judiciary, which is vital to the maintenance of the rule of law.

50. In addition, if the end of this online process is simply a virtual version of the hearings we already have, all that is really saved in terms of time and money is the need for travel and possibly the courtroom, although I doubt a judge or member will be hearing the case other than from a publically funded building. It might then need to be seriously questioned whether the investment required is worth the benefit, and outweighs the cost that comes from a lack of physical presence.

⁷² Anjanette H Raymond and Scott J Shackelford, 'Technology, Ethics and Access to Justice: Should An Algorithm Be Deciding Your Case?' (2014) 35 *Michigan Journal of International Law* 485, 517.

⁷³ See Cheryl Thomas and Hazel Genn, 'Understanding Tribunal Decision-Making: A Foundational Study' (2013) <http://www.nuffieldfoundation.org/sites/default/files/files/NUFJ0000_Tribunal%28decision_making_27_03_14.pdf> cited in Genn, above n 5, 12.

⁷⁴ Genn, above n 5, 13.

The fundamental characteristics of ADR

51. The next question is what this sort of integrated online process will have on the legitimacy and integrity of ADR. These are concerns that have already been expressed in the literature relating to court-annexed ADR – namely, that removal of consent and court annexation of the process has meant ADR has lost the elements of party control and autonomy, potentially to its detriment.⁷⁵ In the United States, Professor Menkel-Meadow expressed the view that ADR has become just “another battleground for adversarial fighting rather than multi-dimensional problem solving”.⁷⁶ In the Australian context both Professors Sourdin⁷⁷ and Boulle⁷⁸ have made similar observations in their respective texts.

52. In addition, there is the concern that the increasing regulation of ADR that comes with its co-optation into the court process serves to undermine its flexibility and adaptability. One major advantage of ADR is its ability to meet the varying needs of different disputants, something that may inadvertently be stagnated by its devolution into one streamlined process. Chief Justice Martin commented in his address that “processing all cases down an adjudicative track poses a much greater threat to the integrity and efficacy of ADR than ADR has ever posed to the integrity and efficacy of adjudication”.⁷⁹ Is the fact that people might be increasingly forced into ADR to have their disputes determined going to create cynicism in the process? To what extent should courts be withdrawing from the ADR fray rather than melting further into it? ADR was initially developed and in large part maintains its integrity as a consensual process which aims to build consensus. If the ease of starting proceedings in an online court encourages more litigants to go for an adversarial option in the first instance, will it make

⁷⁵ See, eg, R Ingleby, ‘Compulsion is not the answer’ (1992) 27(4) *Australian Law News* 17, 18. See also the discussion in *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427, [24] (Einstein J).

⁷⁶ Carrie Menkel-Meadow, ‘Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or ‘The Law of ADR’ (1991) 19 *Florida State University Law Review* 17 quoted in Sourdin, above n 8, 616.

⁷⁷ Sourdin, above n 8, 645-6.

⁷⁸ Laurence Boulle, *Mediation: Principles, Process Practice* (LexisNexis, 3rd ed, 2011) 99.

⁷⁹ Martin, above n 2, 27.

resolution through ADR more unlikely, as beginning with an adversarial approach further polarises their positions?

53. This raises the question in turn of whether it would be appropriate for what I would call the non-adjudicative steps of an end-to-end online process to be carried out under the auspices of a body such as the Australian Disputes Centre rather than the courts or tribunals. There is no reason of course in theory why an independent dispute resolution body such as, for example, the ADC, could not set up an online dispute resolution project. You would need to convince the government that it was worth funding such a body and that it could provide a better service than one conducted as an adjunct to a state tribunal or court. I raise that possibility because what I am saying is not intended to be court-centric. Indeed, the issues which I raise may be equally applicable to ODR administered by a private organisation as that administered under the auspices of a court.

54. Finally, there is the commonly raised issue that the lack of face-to-face contact in online dispute resolution will make it more difficult to build the rapport necessary to reach resolution.⁸⁰ Professor Sourdin has stated that the physical proximity and face-to-face nature of most facilitative ADR processes such as mediation is “often regarded by practitioners as essential”.⁸¹ It has been suggested that “nuances of expression, timing, communication, framing of persuasion often make the difference between success and failure in bargaining and mediation”.⁸² There are barriers to understanding another party in the absence of face-to-face communication, and web-chat in particular can be “more polemic and oppositional”.⁸³

55. One need look no further than much of the communication, if it can be called that, which happens on social media, where allegations are made behind the veil of a keyboard and without much regard to liability for defamation. Studies comparing

⁸⁰ See generally Lancy, above n 21, 173-4.

⁸¹ Sourdin, above n 8, 407-8.

⁸² Samantha Hardy, ‘Online Mediation: Internet Dispute Resolution’ (1998) 9 *Australian Dispute Resolution Journal* 216.

⁸³ Sourdin, above n 8, 403.

email with face-to-face negotiation suggest that online negotiators enter the process with low expectations as to interpersonal trust, resulting in diminished cooperation and minimal information sharing.⁸⁴ A further question might be whether some of these issues can be sidestepped by simply adopting technology that is already available to mitigate these concerns, like augmented and virtual reality.

56. In terms of the impact on ADR practitioners, an integrated online process would not, on the face of it, seem to raise issues for their practices, as they would play a vital although perhaps augmented role in actually conducting the ADR stage of an entirely online process. That is, even if disputes were increasingly channelled down one end-to-end online process there would still be a need for practitioners to conduct mediations or early neutral evaluations – at least until the point that a computer can actually replicate us entirely.

Access to justice

57. The final issue I want to raise is the potential for digital exclusion. The Civil Procedure Rule Committee in the UK estimated that 52% of both claimants and defendants would require assistance to use the Online Court and that 17% of claimants and 23% of defendants would be unable to use the system even with assistance.⁸⁵ An Australian study from 2017 indicates that digital exclusion affects those on low incomes, people over 65, people with a disability, people who did not complete secondary school, Indigenous Australians and people not in paid employment especially.⁸⁶ It is a particular problem for older persons. The Council on the Ageing in Australia estimate that of the one million adult Australians who have never accessed the internet, 71% were aged 65 or over.⁸⁷

⁸⁴ Ayelet Sela, 'Can Computers Be Fair: How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration' (2018) 33 *Ohio State Journal on Dispute Resolution* 91, 112.

⁸⁵ Martin, above n 2, 46.

⁸⁶ Julian Thomas et al, *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2017* (RMIT University, 2017) 5-6 quoted in Law Council of Australia, *The Justice Project: Final Report* (Report, August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>>, Part 2, 'People: Building Legal Capability and Awareness', 12.

⁸⁷ Law Council of Australia, above n 86, Part 2, 'Legal Services', 37.

58. This was a problem recognised by Lord Justice Briggs, who responded that there is no conceivable form of the litigation process which will not be a challenge to a significant class of disadvantaged litigants without lawyers, and that such individuals often “find themselves tongue-tied when required (or permitted) to address the court orally”.⁸⁸ I think the point that needs to be made is that reform of the civil justice system using technology should not be regarded as a panacea for the problems of access to justice. It should not be assumed that such reforms will make advice or representation, and particularly the adequate funding of legal aid and community legal centres unnecessary. It does have the real potential, however, to be used in conjunction with those facilities to make legal help cheaper for private clients and for government funded legal assistance services.

Conclusion

59. What can be made of all this? First, on the positive side, it is laudable that steps are being taken to improve access to justice. Second, I don't think the proposals will necessarily impact on the essential characteristics of a court, provided they remain to be perceived as independent, impartial and providing open justice. Third, providing these pre-conditions are met, a civil court determining cases by a more inquisitorial or investigative procedure with integrated ODR is not incompatible with its fundamental characteristics.

60. On the negative side, the question must be asked whether some of the proposals, particularly to the extent they impose a procedure for dispute resolution, would lead to a lack of confidence in ADR or for that matter, the courts. Parties may not be happy to see that their cases are being resolved by an Orwellian Big Brother or Big Sister, particularly if that Big Brother or Sister is choosing the mode of resolution.

61. In exploring these issues, consideration must be given not only to direct cost savings but whether processes, particularly mandatory processes, will achieve increased access to justice in a real sense. Will they provide people, who for economic or other reasons are presently unable to access the courts or ADR,

⁸⁸ Briggs, 'Final Report', above n 30, 39.

with a process which is both accessible to them and which they are confident will deliver a just outcome?

62. This requires collaboration from the outset between the executive, the courts and importantly, those people who are at the present delivering alternative dispute resolution services. Such collaboration is likely to achieve a solution which is not only technologically clever but also embraced by courts, ADR professionals and most importantly the public. I urge you in those circumstances to take an active part in resolving these problems and not simply wait for proposals to emanate from the executive, or for that matter from the courts.