

THE IMPACT OF THE COVID-19 PANDEMIC ON MEDIATION AND NEW ZEALAND'S DISPUTE RESOLUTION SYSTEM

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The COVID-19 pandemic has transformed mediation practice in New Zealand's institutional, government-led mediation regimes. The introduction of lockdowns, social distancing and personal protective equipment created a "new normal" for the delivery of consensual third-party dispute resolution in this area. Many of the changes introduced during the pandemic remain despite the removal of restrictions in 2022. This article explores New Zealand's online alternative dispute resolution (ADR) capacity on the eve of the pandemic. This limited capacity was severely tested during the first lockdown in 2020, highlighting barriers and challenges but also opportunities. However, it was the second major lockdown beginning in August 2021 that cemented many of the changes. In addition to exploring the New Zealand experience, this article provides specific case studies, such as employment mediation, and make some comparisons with apposite overseas jurisdictions. ADR, and mediation in particular, is at a crossroads. A choice must now be made whether to return to a primarily in-person model or continue to emphasise online delivery.

I INTRODUCTION

At 11.59 pm on 25 March 2020, New Zealand entered its first COVID-19 lockdown. The Level 4 lockdown was one of the most restrictive in the world and resulted in the temporary elimination of community transmission of the virus. The drastic and unexpected nature of the lockdown placed huge pressure on New Zealand's dispute resolution (DR) organisations and regimes.¹ Formal adjudication in the courts, arbitration, mediation and conciliation could no longer be conducted in person. New

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1 The term "dispute resolution" can include all processes used to resolve disputes: court litigation, arbitration, and consensual third-party approaches (such as mediation, conciliation and facilitation). However, the term is often used as shorthand for what has traditionally (and controversially) been called "alternative dispute resolution", that is, processes used as alternatives to court litigation. This article adopts the latter approach.

Zealand's relatively slow adoption of online dispute resolution (ODR) technology placed it in a particularly difficult position. Our DR community was not ready for an abrupt shift to ODR and was less ready than many other comparable jurisdictions.

This article provides an analysis of the challenges faced by the DR community due to the COVID-19 pandemic and approaches adopted to deal with these challenges. The analysis will compare the first national lockdown (March to May 2020) with the second, mainly Auckland-based, lockdown (August to November 2021). It will also make comparisons with overseas jurisdictions: in particular, with Australia, Britain, the United States, Canada and Singapore.

Most mediation in New Zealand occurs in institutional, government-led mediation regimes. Enough evidence exists with which to analyse the effect of the pandemic on these regimes. This is not the case with the only significant private mediation market in New Zealand, private commercial mediation. The size and nature of New Zealand's mediation market is charted in Morris and Shaw's 2018 publication, *Mediation in New Zealand*.² Though there is anecdotal information relating to commercial mediation since 2020, empirical research is needed for a proper analysis to occur. This will need to be the subject of a future research project. The present article will focus on institutional, government-led mediation, and in particular, New Zealand's largest mediation regime, employment mediation.

The introduction of social distancing and the forced shift to ODR was a once-in-a-generation crisis for DR. New Zealand's reaction features some triumphs of adaptation and also some significant failures. As at August 2023, after two and a half years of various COVID-related restrictions and then one year of relative normalcy, we can begin to address the question of whether it is possible to return to pre-COVID DR as it was in March 2020 and, if so, whether that is desirable.

A discussion of COVID and DR engages many important issues. The following themes are addressed here: access to justice, confidentiality, mediation models, civil procedure and, of course, ODR. This article will also draw on the author's experiences of facilitating mediations during the pandemic, both in person and via online technology.

The COVID-19 pandemic and its aftermath dominated world events for two and a half years. In New Zealand, the first major restriction was closing its borders to China on 1 February 2020. The first case of COVID was announced on 28 February. Events quickly escalated during March, leading to the Prime Minister's Alert Level 3 announcement on 23 March and the national Level 4 lockdown two days later. Level 4 was effectively a stay-at-home order except for essential services. The first lockdown lasted until 13 May, seven weeks in total.³ Auckland experienced a brief Level 3 lockdown

2 Grant Morris and Annabel Shaw *Mediation in New Zealand* (Thomson Reuters, Wellington, 2018).

3 Unless otherwise specified, "lockdown" in a New Zealand context refers to Levels 3 and 4 under the COVID-19 Alert System.

later in the year (12–30 August) and again in early 2021 (14–17 February and 28 February–7 March). However, New Zealand effectively had 14 months without major COVID-related restrictions (June 2020 to July 2021). This affected the nature of COVID's impact on New Zealand. In particular, it provided the opportunity for DR regimes to move back to pre-COVID processes. Many DR providers took this opportunity.

However, on 17 August 2021, the nation once more entered a national Level 4 lockdown due to the spread of the Delta variant. The second lockdown differed from the first in that it was largely contained to Auckland. Thus Auckland's second lockdown officially lasted 15 weeks, until 2 December (although Level 3, step 2 from 9 November was more like Level 2). The rest of New Zealand left lockdown on 7 September after only three weeks (although Northland and parts of Waikato spent some further time in lockdown). For the purposes of this analysis, New Zealand's lockdown story is a national one until 7 September 2021, when it becomes primarily an Auckland story. As at January 2022, Auckland had spent approximately 24 weeks in lockdown compared with 10 weeks for most of the rest of New Zealand.

On 23 January 2022, due to the community spread of the Omicron variant, all of New Zealand entered the "red light" setting of the COVID-19 Protection Framework (the "traffic light" framework, which replaced the Alert Level system in December 2021). This was not a lockdown. In fact, the traffic light framework was developed to avoid the need for lockdowns. However, by February 2022, it became clear that many New Zealand organisations and individuals had entered a self-imposed lockdown.⁴ This reaction meant many DR providers continued with remote DR methods.

The Omicron variant continued to circulate and by winter New Zealand had one of the highest weekly death rates per capita in the world.⁵ While most restrictions were dropped by April 2022, many New Zealanders voluntarily chose to restrict social interaction. This combined with mandatory household isolation requirements to create an environment favouring online DR options. With the coming of spring in September 2022, New Zealand had made it through two distinct periods of the COVID pandemic: the "Fortress New Zealand" period from March 2020 to January 2022, and the spread of Omicron from February to August 2022.

4 Georgina Campbell "A Capital Letter: The Covid elimination strategy is like a bad breakup we need to get over" *The New Zealand Herald* (online ed, Auckland, 16 March 2022).

5 There has been much debate around the calculation of COVID death rates. Some have argued that the death rate data should only include those who died "of" COVID and exclude those who died "with" COVID, thus the death rates are overstated. Others have argued that the gathering of death rate data is not comprehensive and has missed many COVID deaths, thus the death rate is understated. Statistical data for this article is taken from two widely used sources: Worldometer "COVID-19 Coronavirus Pandemic" <www.worldometers.info>; and Johns Hopkins University & Medicine "Coronavirus Resource Center" <www.coronavirus.jhu.edu>.

It became apparent that the longer New Zealand was disrupted by COVID, the more likely that temporary changes would become permanent. After two and a half years, many providers and users had become accustomed to online DR and to working from home. The quick shift back to in-person delivery, which occurred under Level 1 in June 2020, did not occur again as New Zealand moved to a stage of "living with COVID". The "new normal" is close to becoming just "normal".

II THE RELATIONSHIP BETWEEN MEDIATION AND OTHER FORMS OF DISPUTE RESOLUTION

For the purposes of this article, mediation is defined as follows: a real-time negotiation between parties with the assistance of a third party, which is long enough to feasibly explore the issues causing the dispute with the aim of reaching a consensual resolution. Another useful definition in a New Zealand context is:⁶

... a consensual process, involving the assistance of a third party, which enables the other parties to explore issues of difference, or potential difference, in order to prevent or resolve those differences.

An analysis of the largest New Zealand government-run mediation regimes as at August 2023 suggests that approximately 75 per cent of mediations were being delivered via digital online videoconferencing. This includes employment mediation delivered by the Ministry of Business, Innovation and Employment (MBIE; approximately 70 per cent online),⁷ family dispute resolution (approximately 70 per cent online)⁸ and the more complex residential tenancy mediations.⁹ Pre-COVID, nearly all of this mediation was delivered in person. The COVID experience has dramatically changed the way in which third-party consensual dispute resolution is delivered in New Zealand.

New Zealand's DR system is integrated. What happens in the courts and tribunals affects mediation, arbitration and conciliation, and vice versa. Mediation is often used as an early attempt to resolve a dispute. If this attempt is unsuccessful, then determinative and adjudicatory processes are available. The main focus of this article, mediation, reflects the author's research interests. Mediation was more affected than conciliation by lockdowns and social distancing, given that most of it was in person prior to the pandemic. Much of what we term "conciliation" in New Zealand was conducted

6 Virginia Goldblatt "Mediation" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, Melbourne, 2007) 69 at 70.

7 Employment mediation statistics obtained from the Ministry of Business, Innovation and Employment (MBIE) during August and September 2023 through Official Information Act requests.

8 FDR statistics obtained from the Ministry of Justice during August and September 2023 through Official Information Act requests.

9 During 2020–2023, many of the more complex tenancy mediations, which had previously been mediated in person, moved to online (tenancy mediation statistics obtained from MBIE).

by telephone or online pre-March 2020 and thus was less disrupted.¹⁰ This article discusses some examples of "conciliation" and therefore the scope of the study is "consensual third-party dispute resolution" (where parties decide whether or not to achieve an outcome).¹¹

This can be contrasted with non-consensual dispute resolution where parties have a binding decision imposed upon them. In New Zealand this is primarily in the form of court litigation and arbitration. The courts and tribunals were significantly disrupted by the pandemic but our formal, adversarial system reduces the importance of parties' communicating in-person; the focus is not on collaboration and shared problem solving. It is arguable that the more fluid conversational nature of mediation is more directly affected by different modes of delivery compared with court litigation.

Arbitration appears to have been less affected by the pandemic than mediation. The New Zealand Dispute Resolution Centre Arbitration Survey analysed the period from January 2019 to December 2020 and concluded that: "[t]his data shows that the COVID-19 pandemic in 2020 appeared to have no measurable effect on the prevalence of arbitration".¹² However, the pandemic obviously affected the nature of delivery for arbitration with the move to online proceedings. The nature of mediation was more fundamentally affected by the pandemic than was the case for either court litigation, arbitration or conciliation.

10 Nadia Murray-Ragg and Grant Morris "Mapping hybrid dispute resolution in New Zealand" (Victoria University of Wellington and Government Centre for Dispute Resolution, summer research scholarship paper, March 2022).

11 The New Zealand DR community does not have a stable definition for conciliation. The recent definition in Australian Dispute Resolution Advisory Council *Conciliation: Connecting the dots* (November 2021) at [20] is helpful for this article, with the disclaimer that it has been created for another jurisdiction:

Conciliation is a facilitative dispute resolution process in which the disputing parties are brought together and, with the assistance [of] the conciliator, have discussions with the conciliator jointly or separately about key issues for the purpose of resolving their dispute. The process is conducted under and in accordance with legislation or other binding rule[s] which places obligations on conciliators and the disputing parties to comply with the norms and standards required by that context. Conciliations are non-determinative. If the process does not achieve resolution, the matter typically proceeds to a determinative process, either that legislated or governed by other binding rule[s].

Conciliators may use their specialist knowledge and experience to evaluate each disputing party's position, to express their own opinions, to offer advice, and to identify and clarify issues with a view to assisting the disputing parties to resolve their dispute.

12 Royden Hindle and Anna Kirk *The Inaugural Aotearoa New Zealand Arbitration Survey* (New Zealand Dispute Resolution Centre, 2022) at 10. Arbitration innovations such as Kevin Kim and others *Seoul Protocol on Video Conferencing in International Arbitration* (18 March 2020) can provide helpful models for mediation and conciliation.

III METHODOLOGY: ANALYSING A FLUID SITUATION

The biggest methodological challenges involved in this research can be summarised in the following question: how do you analyse a situation as fluid as the COVID pandemic? The societal changes that occurred happened so rapidly that it was impossible to know whether they would be temporary or permanent. The impact of COVID on DR, and in particular, on institutional, government-led mediation, has been immense and the nature of this impact has been changing month to month. The research for this article began in late 2020 with the final version drafted in mid-2023. During this time the author presented "work-in-progress" papers at six different conferences. Some of the conclusions presented in the first paper (August 2021) were significantly revised by the fifth and final paper (August 2023). The further away we get from the heart of the pandemic, the easier it will be to analyse what has actually occurred.

The timeline of the pandemic therefore influences the methodology. The impact of the pandemic began to lessen in the northern hemisphere by early spring 2022 (March 2022). New Zealand ended its elimination strategy around that time as a high vaccination rate was achieved and it became clear that the Omicron variant was too infectious to be controlled. COVID cases increased dramatically and the country had to endure a difficult winter. By the southern hemisphere's spring (September 2022), the worst of the pandemic was over in Australasia. Thus we have had approximately a year during which to reflect on the main crisis. This is not enough time from which to draw firm conclusions. However, one overall trend seems clear. Where the pandemic forced changes which were most likely already coming, these changes remain in place, for example, an increase in ODR in government mediation regimes. Government-led mediation regimes had access to digital online videoconferencing technology long before March 2020, but this technology was not widely used. However, DR scholarship and overseas experience both provided strong arguments for creating more flexible modes of delivery for users, especially via digital means. The COVID pandemic served as the catalyst for quick and widespread change.

The basic methodology adopted in this article is to present the status of ODR in New Zealand on the eve of the pandemic and then analyse the impact of the pandemic on that status. How was the nature of DR transformed? What were the positive impacts and what were the negative? How did DR practitioners and providers respond? How did the impact of the second major lockdown compare with the first? Once the answers to these questions are ascertained, a brief comparison is made to other jurisdictions. This is not meant to be a comprehensive comparative survey but rather an opportunity to compare different impacts and responses. Finally, a conclusion is reached about the state of DR in New Zealand as at mid-2023 and tentative predictions made for the medium-term future.

An analysis of the status of ODR requires a definition. ODR is a very broad term which refers to a number of quite different approaches. "First generation" ODR involves the "basic applications of

internet technology being used as a tool or equipment to support the usual ADR process".¹³ The most obvious examples of "first generation" ODR are web-based videoconferencing and parties communicating via email assisted by a human dispute resolution practitioner. "Second generation" ODR incorporates artificial intelligence. This is primarily to assist the DR practitioner, but a "third generation" approach may dispense with human practitioners altogether. There is a wealth of overseas scholarship on ODR, much of which predates the pandemic.¹⁴ However, there is minimal scholarship specifically relating to New Zealand.

This article is written as dispute resolution scholarship but the author is also a legal historian and an employment mediator. The "COVID crisis" effectively ended in New Zealand in August 2022 as we emerged into spring after a harsh winter in which COVID had been allowed to spread throughout the country. These words are being written in August 2023 a full year later. This gap in time is vital to this article's thesis. We can now start to see whether the COVID-related changes have either been retained or removed. However, has enough time passed for the historian to weigh up the events and competing narratives and make a dispassionate assessment of COVID's impact on dispute resolution? The answer is almost certainly "no". We still live in the shadow of COVID and society's reaction to it. The largest case study in this article relates to employment mediation. This both reflects the importance of employment disputes in New Zealand's mediation environment and the author's professional practical experience. This professional experience includes conducting employment mediations for the MBIE mediation service during the pandemic.

IV ONLINE CONSENSUAL DISPUTE RESOLUTION IN NEW ZEALAND ON THE EVE OF THE PANDEMIC

Overall, the New Zealand DR community was not ready to adapt its systems and processes in a crisis. This is probably true of most, if not all, jurisdictions but commentators had already observed

13 Morris and Shaw, above n 2, at 338.

14 An attempt to summarise this pre-pandemic scholarship, and relate it to a New Zealand context, can be seen in Morris and Shaw, above n 2, at ch 16 ("Online Dispute Resolution"). Most of the chapter sources are from the United States and Australia. Particularly useful sources include Ethan Katsh and Colin Rule "What We Know and Need to Know About Online Dispute Resolution" (2016) 67 SC L Rev 329; Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, The Hague, 2012); Dafna Lavi "No More Click? Click in Here: E-mediation in Divorce Disputes—the Reality and the Desirable" (2015) 16 Cardozo J of Conflict Resolution 479; and the treatment of ODR in Tania Sourdin *Alternative Dispute Resolution* (6th ed, Lawbook Co, Sydney, 2020). Journal articles about ODR started appearing in the mid-1990s, and in 2014 the International Journal of Online Dispute Resolution was launched.

the lack of engagement with ODR in New Zealand. In May 2018, less than two years before the pandemic, Morris and Shaw stated:¹⁵

... ODR clearly is a feature of the dispute resolution landscape. It is one that New Zealand is not currently utilising.

...

It has a place in the dispute resolution spectrum, and should be part of New Zealand's dispute resolution landscape.

To the extent that ODR existed in New Zealand before March 2020, it was in the form of first generation ODR. This consisted of supportive technology such as website information, electronic applications, database systems and videoconferencing.¹⁶ While videoconferencing technology was available, it was not regularly used in most DR regimes. In their book, Morris and Shaw could find no clear examples of second and third generation ODR; that is, ODR incorporating artificial intelligence.¹⁷ However, they noted that New Zealand's relative lack of ODR provided the opportunity for considered implementation based on robust research and the analysis of overseas examples. Unfortunately, there was neither the inclination nor the time to achieve this during the 20 months between publication of the book and the pandemic.

We can look at the state of different mediation regimes on the eve of the pandemic to assess readiness to cope with disruption. Mediation carried out by MBIE mediators under the Employment Relations Act 2000 makes up approximately half of all mediations occurring in New Zealand in any given year.¹⁸ In March 2020, virtually all of this mediation was delivered face-to-face. Less than five per cent was delivered by phone mediation.¹⁹ While both online and offline videoconferencing technology was available in the Ministry, it was rarely used for mediation. The next two largest mediation regimes are family mediation for custody disputes under the Care of Children Act 2004²⁰

15 Morris and Shaw, above n 2, at 357–358; and see Charlotte Austin "Online dispute resolution: An introduction to online dispute resolution (ODR), and its benefits and drawbacks" (Victoria University of Wellington and Government Centre for Dispute Resolution, summer research scholarship paper, February 2017).

16 Morris and Shaw, above n 2, at 344.

17 At 345. In 2023, the debate relating to artificial intelligence became more intense with the introduction of chatbots such as ChatGPT. The increasing sophistication of AI technology suggests that the second and third generation ODR will soon be more prevalent in New Zealand.

18 At 5, 200, 279 and 350.

19 Employment mediation statistics as at February 2020, obtained from MBIE.

20 Approximately 1,800–2,000 mediations per year with 2,044 mediations for the 2020/2021 year: Official Information Act request to the Ministry of Justice (18 March 2022).

and the private commercial mediation market.²¹ The New Zealand Commercial Mediation Study has analysed the commercial mediation market from 2015–2019 and revealed that virtually all mediations were in person during the pre-COVID period.²² In terms of technology, child custody mediation was the most flexible and innovative of the three major mediation regimes. While the norm was to mediate in person, online mediations were offered by some providers.²³

Fair Way Resolution, New Zealand's largest private ADR organisation and one of the main providers of family dispute resolution (FDR), was actively engaging in ODR before 2020.²⁴ The most prescient innovation was online videoconferencing for FDR. This prescience was not just related to utilising existing technology. Safety issues relating to domestic violence required a robust backup to in-person mediation because some mediation could not be conducted in person. Online delivery would become the norm during the lockdowns. Being able to trial this in advance and train staff to use it effectively provided a solid basis for the COVID shift to ODR. Fair Way had also been experimenting with ODR in commercial disputes but these were small in number. This included the introduction of the world's most well-known ODR platform, Modria, in late 2016.²⁵

Interestingly, the most impressive use of technology pre-COVID occurred in the smaller mediation and conciliation regimes. Dispute resolution under the Residential Tenancies Act 1986 is

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- 21 Approximately 1,000 mediations per year: Grant Morris "The Final Piece of the Jigsaw: A Longitudinal Study of New Zealand's Commercial Mediation Market" (2020) 26 NZBLQ 41.
- 22 The study consists of five reports: Grant Morris and Daniella Schroder "Commercial Mediation in New Zealand Project Report" (research paper, Victoria University of Wellington, June 2015); Grant Morris and Amanda Lamb "Lawyers as Gatekeepers to Commercial Mediation in New Zealand' Report" (research paper, Victoria University of Wellington, June 2016); Grant Morris and Freya McKechnie "Users of Commercial Mediation in New Zealand – Insurance Industry Report" (research paper, Victoria University of Wellington, April 2017); Grant Morris and Sapphire Petrie-McVean "Commercial Mediation in New Zealand: The Mediators' Project Report" (research paper, Victoria University of Wellington, August 2019); and Grant Morris and Hanna Malloch "Commercial Mediation in New Zealand: The Judiciary' Project Report" (research paper, Victoria University of Wellington, August 2021). All reports are available on the Social Science Research Network <www.ssm.com>.
- 23 Fair Way's online capacity was arguably an important factor in avoiding a drop in FDR mediation during the COVID period. In fact, FDR mediations experienced a modest increase: Official Information Act request to the Ministry of Justice.
- 24 ADR in this context means dispute resolution which is an alternative to court litigation: Anthony Syder and Sean Jones "Technology in mediation" Fair Way Resolution <www.fairwayresolution.com>.
- 25 Fair Way Resolution "FairWay Selects Modria to Power New Post-sale Resolution Services for eCommerce Merchants, Marketplaces, and Payment Networks" (press release, 4 October 2017). Modria is a digital platform created by Tyler Technologies that assists with simple and complex disputes. It uses a four-step process: using technology to diagnose the issues, facilitating online negotiation between parties, providing access to a mediator (if needed), and referring a case for evaluative outcome: Tyler Technologies "Online Dispute Resolution powered by Modria" <www.tylertech.com>.

more accurately defined as conciliation rather than mediation.²⁶ Most disputes involve rent arrears and are resolved in brief telephone conversations facilitated by an MBIE dispute resolution practitioner. The number of conventional, face-to-face mediations has been declining for many years and constitutes only a small percentage of overall disputes.²⁷ The Human Rights Commission has long adopted a flexible approach to DR delivery with only approximately 100–140 face-to-face mediations per year.²⁸ The majority of disputes are resolved in other ways and primarily via early resolution using online and telephone technology.

Thus some mediation regimes were better placed than others to react to the COVID-19 disruption. However, the ability to adapt in times of crisis is just one facet of a robust dispute resolution regime. It has previously been argued that the MBIE mediators delivering face-to-face employment mediation can be seen as New Zealand's top mediation unit.²⁹ There was little incentive to introduce more online and telephone mediation into a regime that was working very well with in-person mediation. As noted in Morris and Shaw, "[ODR] is not the solution to all problems, and should not be uncritically promoted and accepted as a dispute resolution panacea".³⁰ This reluctance to integrate ODR into everyday practice pre-COVID was also apparent in other jurisdictions.³¹ A survey of United States commercial DR practitioners revealed that 80 per cent were reluctant to use videoconferencing in their work.³² Two major private mediation and arbitration providers, Judicial Arbitration and Mediation Services (JAMS) and UK Mediation, reported ODR rates of only 10 per cent prior to March 2020.³³

26 Using the definitions provided in Australian Dispute Resolution Advisory Council, above n 11.

27 MBIE mediation statistics as at February 2021, obtained from MBIE; and Morris and Shaw, above n 2, at ch 12.2.

28 Morris and Shaw, above n 2, at 233; and Murray-Ragg and Morris, above n 10. While the Human Rights Commission (HRC) moved to online mediation for some of the COVID period, the overall number of mediation meetings has been stable, as noted in recent HRC data provided to the author: "6 years of enquiries and complaints received" (12 January 2022).

29 Grant Morris "Eclecticism versus Purity: Mediation Styles Used in New Zealand Employment Disputes" (2015) 33 CRQ 203.

30 Morris and Shaw, above n 2, at 358.

31 Law Gazette "Law Society Survey Results of Mediation Experiences During COVID-19" (September 2020) <www.lawgazette.com.sg>.

32 David Spencer "ADR Case Notes: *Collins v Queensland*" (2020) 30 ADRJ 184.

33 Timea Tallodi "Love of Video Mediation in the Time of Covid-19: An Initial Insight into Benefits and Challenges" in Carla Ferstman and Andrew Fagan (eds) *Covid-19, Law and Human Rights: Essex Dialogues* (School of Law and Human Rights Centre, University of Essex) 247; and Arienne Publicover and David Ross "Reflecting on Nine Months of Virtual ADR" (podcast, 4 January 2021) JAMS <www.jamsadr.com>.

V ***THE FIRST LOCKDOWN, MARCH 2020: THE IMPACT ON DR AND THE RESPONSE FROM DR PROVIDERS***

The 25 March 2020 Level 4 lockdown was essentially a stay-at-home order for all but "essential" workers: those workers who were needed to maintain the basics of a functioning society and could not work from home. Social distancing became compulsory. DR practitioners were not considered "essential" workers partly due to the fact that they could work from home using remote technology. The obvious options available to DR providers were using the internet or telephone network, or using both. As seen in the following discussion, the initial decisions relating to delivery were heavily influenced by the readiness (or lack of it) discussed in Part IV of this article. Those regimes that were committed to in-person mediation were affected much more than the regimes that had limited face-to-face contact. Two examples used in this article are MBIE's employment and tenancy mediation services. Those examples best illustrate the significant variation in COVID's impact on different DR regimes. Ironically, both services are often run out of the same offices. This created a situation in which part of the office was scrambling to adopt new delivery processes while another part of the office largely continued as per normal.

The 25 March lockdown also highlighted the symbiotic relationship between the traditional court system and "alternative dispute resolution".³⁴ For example, the lockdown resulted in over 47,000 District Court proceedings being adjourned or rescheduled.³⁵ In some overseas jurisdictions, this COVID-19 backlog led to an increase in commercial mediation, as discussed in Part VII of this article. It is unclear whether the same has occurred in New Zealand. During the early period of lockdown, a leading mediator urged the courts to take a more active approach in encouraging mediation in civil disputes.³⁶ Ultimately, this suggestion was not taken up by District and High Court judges.³⁷ In government-provided employment mediation, while the pandemic did create disputes about COVID-

34 For an in-depth discussion of this relationship see Annabel Shaw "ADR and the Rule of Law Under a Modern Justice System" (LLM Thesis, Victoria University of Wellington, 2016).

35 Andrew Little, Minister of Justice "Support to clear COVID-19 affected court cases" (24 July 2020). The New Zealand court system has still not recovered from the COVID impact with worsening delays. While COVID is not the only reason for this trend, it is a major factor. See Sasha Borissenko "What's behind the growing court delays?" *The New Zealand Herald* (online ed, Auckland, 16 April 2023).

36 Geoff Sharp "How Mediation Will Help Flatten the Curve in New Zealand's Civil Courts" (23 April 2020) LinkedIn <www.linkedin.com>. Similar calls were made in other jurisdictions, such as the United Kingdom: see Masood Ahmed "Alternative Dispute Resolution During the COVID-19 Crisis and Beyond" (2021) 32 *King's Law Journal* 147.

37 Grant Morris "To Promote or Not to Promote? The Role of the Judiciary in the New Zealand Commercial Mediation Market" (2022) 53 *VUWLR* 85.

support payments and vaccine mandates, these cases were ultimately offset by the reluctance of some employers and employees to engage with online and telephone mediation.³⁸

A What Were the Barriers and Challenges?

Perhaps the greatest challenge involved in ODR relates to technology. There are two main issues facing DR providers: the implementation of the actual technology, and making sure practitioners have the skills to use it. As noted above, some DR providers were prepared for the online shift while others faced either one or both of these issues.

The technology used in New Zealand's pandemic online shift was primarily "first generation" ODR; that is, technology was used to replicate the in-person experience as closely as possible. In fact, much of the shift was simply a move from in-person delivery to videoconferencing via Zoom, hence the common phrase in New Zealand DR "Zoom mediation". While Zoom has many competitors, it happened to have a strong market position in New Zealand when the pandemic began, making it logical for large organisations such as MBIE to choose it for their ODR processes. The MBIE employment mediation Zoom process was structured to mirror the in-person process. For example, Zoom breakout rooms were used to imitate separate in-person sessions. Software such as Zoom is relatively straightforward to set up, so the main technological challenge was stable and fast internet connections. Much of New Zealand has access to the high-speed broadband network but there is also a digital divide (see discussion in this section below). Unstable internet connections undermine the effectiveness of ODR by hampering communication, interrupting discussions and on some occasions, losing participants altogether.

The biggest challenge with online dispute resolution was upskilling DR practitioners to be able to effectively run online mediation, conciliation and facilitation.³⁹ This included using the software and, more importantly, learning ODR techniques. Mediation is different when the mediator and parties cannot see body language. A face in a box on a screen is fundamentally different to sitting near someone in a room and talking to them face-to-face. Some participants also have a tendency to "hide" behind a device, using it to create distance from the other parties. This detachment can make the process more tiring for mediators who have to work harder to maintain engagement. This has been noted in scholarship⁴⁰ and is also the author's personal experience. MBIE employment mediators also

38 Employment mediation statistics as at February 2020 and February 2021, obtained from MBIE.

39 Keri Morris and Hayden Wilson "Online Mediation – The Challenge to Change our Practice" (New Zealand Law Society webinar, 2020).

40 Some of the best analysis of these issues is found in Tania Sourdin's recent work, for example, Tania Sourdin and John Zeleznikow "Courts, mediation and COVID-19" (2020) 48 ABLR 138; Tania Sourdin "Mediating via Zoom" (2021) 31 ADRJ 280; and Tania Sourdin, Bin Li and Donna Marie McNamara "Court innovations and access to justice in times of crisis" (2020) 9 Health Policy and Technology 447. See also Natalie Byrom, Sarah Beardon and Abby Kendrick "The impact of COVID-19 measures on the civil justice system" (Civil Justice Council, May 2020); Dorcas Quek Anderson "Taking dispute resolution online in a pandemic-stricken

reported that the final steps in online mediation were taking longer than in-person mediation, in particular, to confirm all final details and to sign documentation.⁴¹ This has led to settlement delays as mediations which would have settled on the day in person instead took several days to conclude.

While some organisations had already completed ODR training prior to March 2020, others had not. The MBIE employment mediation service moved to telephone instead of internet mediation in March 2020. This was due to technological and training reasons. The mediators were finally trained in "Zoom mediation" during the first part of 2021.⁴² While telephone mediation may appear to be an inferior form of DR,⁴³ it is important to note that this is the established and dominant approach in Australian employment mediation. The Fair Work Commission conciliates or mediates approximately 95 per cent of disputes this way.⁴⁴ This service experienced a 19 per cent increase in work early in the pandemic but still maintained relatively high settlement rates.⁴⁵ There are several examples of telephone technology being utilised in Australia to cope with pandemic-related disputes: for example, the Western Australia Consumer Protection Landlord Hotline⁴⁶ and the New South Wales COVID-19 telephone mediation scheme for child custody issues.⁴⁷ This highlights the trend towards "conciliation" services relying more on telephone DR than conventional mediation services.⁴⁸ Ultimately, it is a matter of "fitting the forum to the fuss".⁴⁹

world: Do we necessarily lose more than we gain?" in Aurelio Gurrea-Martinez, Mark Findlay and Goh Yihan (eds) *Law and COVID-19* (SMU School of Law, Singapore, 2020) at 215; and Felicity Bell and Michael Legg "Judging During the COVID-19 Pandemic – The Australian Federal Courts' Experience" (2022) 41 CJIQ 242.

41 Based on the author's professional experiences. See also Morris and Shaw, above n 2, at 350.

42 Zoom has been the dominant videoconferencing platform for ADR during the pandemic, partly due to its innovative breakout room feature: *Law Gazette*, above n 31. Other popular platforms include Skype for Business, Webex, and Microsoft Teams.

43 Described as the "most criticised" form of ODR in Sourdin, above n 14, at 405.

44 Fair Work Commission "Fair Work Commission Annual Report 2019–20: Impact of COVID-19" (2020) Australian Government <www.transparency.gov.au>.

45 While settlement rates dropped from 79 per cent to 74 per cent, these figures and fluctuations are similar to those of the New Zealand Employment Mediation Services.

46 Government of Western Australia "Residential tenancies – COVID-19 response" (2020) <www.commerce.wa.gov.au>.

47 Legal Aid New South Wales "COVID-19 telephone mediation scheme" (4 May 2020) <www.media.opengov.nsw.gov.au>.

48 Australian Dispute Resolution Advisory Council, above n 11; Murray-Ragg and Morris, above n 10; and Morris and Shaw, above n 2.

49 Frank EA Sander and Stephen B Goldberg "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure" (1994) 10 *Negotiation Journal* 49.

The rapid shift to ODR during the first New Zealand lockdown raised important security issues. How does privacy and confidentiality work in the digital environment? The challenges of maintaining confidentiality are exacerbated in ODR as the DR practitioner cannot be sure who is actually present and whether the session is being recorded. In a Zoom mediation, it is relatively easy for a person to sit just outside camera range and listen to the entire session. The mediator and other party will be unaware of their presence. This would be impossible in a face-to-face mediation. Any recording devices used in a face-to-face dispute would need to be hidden whereas in a Zoom mediation a recording device could be present in any, or all, of the rooms. Unwanted intrusion is also possible in ODR; for example, "Zoom-bombing", where uninvited people gain access into meetings and disrupt proceedings. Some of these problems were particularly apparent in the early stages of the pandemic as technology users struggled to utilise appropriate security settings.⁵⁰ Cybersecurity is a vital issue in rolling out ODR processes. The pandemic saw an increase in cyberattacks.⁵¹ If providers cannot guarantee the safety and security of ODR then users will be unwilling to engage with these processes.

Maintaining access to justice during a pandemic is a major challenge. In particular, the "digital divide" provides advantages to those who have and can utilise the best technology. For the significant minority of New Zealanders with poor or no internet connection, ODR potentially shuts them out of the wider civil justice system (ADR and the traditional court system).⁵² Lockdowns and social distancing prevented this group from accessing online services through libraries or community centres. Even when these public spaces are available, the lack of privacy and security make them unsuitable for most ODR. From personal experience, parties in employment mediation often struggle with the technology required for effective online mediation. Some issues experienced include unstable internet connections that drop out and/or keep freezing, and using mobile phones with poor visuals and/or limited data plans. The big advantage of telephone mediation compared with Zoom mediation is that nearly every New Zealander has access to a phone. It creates a more level playing field. Unfortunately, it has no visual aspect which means it cannot hope to replicate in-person mediation. For those in the mediation community who see in-person mediation as the "gold standard", this is a serious failing. Telephone mediation also exacerbates security and privacy issues as it is impossible to know what is happening on the other end of a phone call.

Connected to the digital divide is the issue of public awareness. When in-person DR services went online, some users were unaware of the changes. This was reflected in FDR with Fair Way Resolution

50 Letter from Letitia James (Attorney General of New York) to Travis LeBlanc regarding Zoom's privacy and data security practices (7 May 2020).

51 Tania Sourdin and others "COVID-19, technology and family dispute resolution" (2020) 30 ADRJ 270.

52 Estimates of digital exclusion vary from 20 per cent to six per cent: see Baz Macdonald "Covid proved having no access to internet is dangerous in NZ" (29 May 2020) Re: <www.renews.co.nz>; and Bill Dashfield "Digital Divide worse than appears in latest report" (22 June 2018) 20/20 Trust <www.2020.org.nz>, respectively.

experiencing an initial 50 per cent drop-off in mediation applications in the period immediately after lockdown.⁵³ Once DR providers became aware of this issue, innovative methods were used to spread the message. For example, MBIE's employment early resolution service broadcast regular radio advertisements and sponsored newspaper articles during 2021.⁵⁴

Awareness also links to uptake, or lack of it. The Ministry of Justice's heavily subsidised COVID-19 commercial rent dispute service provided a med-arb process for landlords and tenants affected by the pandemic.⁵⁵ Three DR providers (Immediation NZ, Fair Way Resolution, and the New Zealand Dispute Resolution Centre) set up ODR services to ease the pressure on the civil court system. However, the service was under-utilised and, in this case, there was little "fuss" to justify the "forum".⁵⁶

Some jurisdictions, such as Hong Kong, had to make legislative changes to allow ODR to be used in formal court proceedings. Prior to early 2020, Hong Kong had required in-person hearings and paper-based submissions.⁵⁷ By April 2020, hearings were being conducted by teleconferencing or videoconferencing. ADR methods, such as arbitration, also had to quickly adapt and modify rules to support online filing and other digital processes.⁵⁸ Remote attendance technology in court litigation and arbitration is not the focus of this article but it is an important dispute resolution issue which would benefit from greater attention in New Zealand civil procedure scholarship. The legality of online processes was not an apparent issue in New Zealand's civil procedure system.

B What Were the Advantages of ODR?

As outlined in Part III, there is a large amount of scholarship looking at the positives and negatives of ODR. This article has focused primarily on the challenges but it is also necessary to outline the important advantages. ODR can be significantly cheaper than in-person DR as travel and venue costs are either minimal or non-existent.⁵⁹ This in turn can make ODR more accessible than in-person DR, increasing access to justice. In mediations where all parties reside in the same location, these savings

53 Information provided to the author from Fair Way Resolution (20 January 2021).

54 Employment New Zealand "New disputes service filling a gap" *The New Zealand Herald* (online ed, 6 May 2021).

55 Ministry of Justice "COVID-19 commercial rent dispute service" (4 December 2020) <www.justice.govt.nz>.

56 Only 29 cases started arbitration or mediation, and of these, only 15 settled: Sam Sachdeva and Jo Moir "Poor uptake for commercial rent dispute scheme" (1 April 2021) Newsroom <www.newsroom.co.nz>.

57 Hin Han Shum "Delivery of justice in the time of Covid-19" (21 August 2020) International Bar Association <www.ibanet.org>.

58 Paula Hodges "Reasons Why Parties Choose London as Arbitral Seat Remain Unaffected by Brexit" (20 October 2020) CIAR Global <www.ciarglobal.com>.

59 Sourdin, above n 14, at 404; Morris and Shaw, above n 2, at 346; and Noam Ebner and Colleen Getz "ODR: The next green giant" (2012) 29 Conflict Resolution Quarterly 283 at 285–286.

will be relatively small but for mediations involving significant domestic travel the savings for each party could be in the hundreds of dollars. For international mediation, the savings will be in the thousands of dollars and will also reduce carbon emissions which contribute to climate change.⁶⁰

Some disputes actually benefit from having the parties physically separated. Family disputes where there is a history of domestic violence are one clear example.⁶¹ There are also people who prefer to be at home or in their own office when resolving a dispute as it is more familiar and comforting. Certain parties may be more willing to engage with mediation if physical separation is an option.

Evidence provided throughout this article, in relation to the MBIE employment service and the overseas case studies in Part VII, suggests that in mediation ODR settlement rates are similar to in-person delivery. The MBIE employment statistics for January 2020 through to August 2021 show the following settlement rates: in person 73.5 per cent, videoconferencing 73.3 per cent and telephone 70.4 per cent.⁶² By August 2021 the service had completed 548 Zoom mediations and 2,323 telephone mediations in that period, providing robust sample sizes for all three modes of delivery. However, quantity does not equal quality and more empirical research is needed to ascertain whether Zoom mediation is as holistically effective as in-person mediation.⁶³ We can see a general openness from users to at least try online mediation between April and July 2021. New Zealand was "COVID-free" during these months and employment mediation users were provided with three options: in-person, Zoom or telephone. In total, 23 per cent attended by Zoom, 11 per cent by phone and the remaining 66 per cent in person.⁶⁴ However, in-person mediation remained the clear preference for most parties and the August–October 2021 lockdown resulted in a 50 per cent drop off in mediations, as many parties chose not to engage in Zoom mediation but rather to wait until in-person mediation was available.⁶⁵ This was a similar reaction to that in March–May 2020 but this time MBIE maintained most services online post-lockdown.

60 This article does not focus on the overall climate change impact, but beyond travel, ODR also reduces the need for physical office space and paper-based filing.

61 Harriet Broadhurst "FDR and Family Violence: Developing a safe and effective model" (LLM research paper, Victoria University of Wellington, 2022).

62 It should also be noted that the more straightforward, transactional disputes are more likely to be set down for Zoom, potentially giving the online mode an advantage as to settlement rates; the more protracted, complex cases are more likely to be in-person (at least prior to the second lockdown in August 2021).

63 MBIE does conduct user satisfaction surveys but the response rate is very low and the survey does not distinguish between different modes of delivery.

64 During these months there was encouragement from MBIE for parties to attempt Zoom mediation if possible. However, the final decision as to mode of delivery was left to parties and their representatives.

65 "Alternative methods of mediation" (obtained under Official Information Act request to MBIE Employment Services, October 2021).

VI THE SECOND LOCKDOWN, AUGUST 2021: HOW DID IT COMPARE TO MARCH 2020?

The second national lockdown began on 17 August 2021 to reduce the spread of the Delta variant. Most, if not all, DR providers were able to adapt quickly due to the experience gained during the March–May 2020 lockdown and its aftermath. The most striking example is MBIE's employment mediation service. During the first lockdown the service was not ready to go straight to online mediation and relied on the inferior telephone mediation approach. However, due to recent mediation training and technological upgrades, the service immediately began Zoom mediations in August 2021. Even when most of New Zealand left lockdown in early September, MBIE continued running a primarily online service (and completely online in locked down Auckland). The extension of restrictions into 2021 and 2022 strengthened the working from home trend. The working from home approach was particularly pronounced in the public sector and large corporates. Most New Zealand dispute resolution practitioners work directly or indirectly for government ministries and departments. The post-pandemic environment has seen a hybrid approach to work which has further cemented the shift to ODR.

Under the Delta Level 2 restrictions⁶⁶ which operated in New Zealand (except Auckland) from early September to early December, personal protective equipment (PPE) was required for in-person mediation along with a number of other logistical challenges. Based on the author's experience and observations in employment mediation, mediating in masks, albeit face-to-face, arguably made in-person mediation less effective than online. When humans communicate, we rely heavily on facial expressions. A mask covers a significant amount of these expressions and can also muffle the voice, reducing vocal clarity. Participants' faces are visible in the online process, although looking at another person's face through a screen is not as natural as physically seeing them. In-person, masked mediation was not the same as conventional in-person mediation and undermined the collaborative, interest-based philosophy of the modern mediation movement.

However, the triumph of digital technology was not complete. The second lockdown resulted in a drop in the number of mediations.⁶⁷ MBIE officials reported that this was largely to do with parties and their representatives choosing to wait for in-person mediation rather than engaging in the Zoom version. The whole nation entered the red "traffic light" setting on 23 January 2022.⁶⁸ The MBIE service moved to fully online. Any parties then awaiting in-person mediation were faced with the

66 Key elements of Delta Level 2 included mandatory face coverings, record-keeping and limits on gatherings. Thus it allowed freedom of movement but with significant caution required.

67 MBIE presentation on employment mediation (presented to 2021 National Mediation Conference, online, 9–11 September 2021).

68 The "traffic light" settings were designed to avoid lockdowns and allowed freedom of movement. The main restrictions were indoor masking and some capacity limits, with social distancing recommended. The settings operated in parallel with the vaccine mandate system.

following four options: wait for a long period of time for an in-person mediation, engage with Zoom mediation, find and pay for a private mediator who will conduct in-person mediation, or give up on mediation.⁶⁹ From February–August 2022, COVID was widely circulating in the New Zealand community. During this period, most employment mediations were conducted online. By spring 2022, most New Zealanders had accepted "living with COVID" and few official restrictions remained.

Employment mediation provided by MBIE is at approximately 70 per cent online and 30 per cent in-person in the post-COVID era,⁷⁰ which is a similar level to private commercial mediation in England and Wales.⁷¹ The overall amount of employment mediation has largely returned to pre-COVID levels, suggesting that users have accepted the "new normal" in terms of delivery. Settlement rates have experienced a small decline, largely due to a lower settlement rate in online mediations, but the decrease is not statistically significant.⁷²

Further empirical research is needed to ascertain whether MBIE's move to online mediation has boosted the small private employment mediation market. If the free government service is providing limited in-person mediation, then some parties will seek out the service from the private sector. This is another example of the COVID-19 pandemic being a disruptor, and often in unexpected ways. It raises the important question of whether the specific nature of a pandemic led to the disruption or whether the pandemic provided the impetus for inevitable, or planned, changes to occur quickly and with limited opposition.

It is also important to note that other trends are occurring in employment dispute resolution which could be leading to a reduction in the amount of conventional mediation taking place. This article has already mentioned the establishment of MBIE's early resolution service during the pandemic. The increased focus on early resolution and intervention is also happening in the private sector. There is anecdotal evidence that some private employment mediators are getting more requests to carry out early intervention "facilitation" in workplaces. However, anecdotal evidence is not particularly helpful in dispute resolution scholarship.⁷³ There is a solid case study in the form of Fair Way Resolution's new workplace dispute resolution scheme.⁷⁴ A key principle underpinning this private sector scheme

69 Giving up on mediation would effectively block the party from the Employment Relations Authority adjudicatory processes. So beyond mediation, the best option would be to attempt negotiation.

70 Official Information Act request to MBIE Employment Mediation Services, 28 August 2023.

71 CEDR *The Tenth Mediation Audit: A survey of commercial mediator attitudes and experience in the United Kingdom* (1 February 2023) at 3.

72 Official Information Act request, above n 70.

73 Grant Morris "From Anecdote to Evidence: The New Zealand Commercial Mediation Market" (2016) 22 NZBLQ 10.

74 Fair Way Resolution "Work: Find an easier way to work through issues at work" <www.fairwayresolution.com>.

is early invention: getting employees to raise issues as soon as possible and getting employers to bring in conflict coaches and facilitators as soon as possible. This is a fundamental conceptual shift from the primary reliance on mediation that has dominated until recent years. Thus we must see the changes wrought by the pandemic in this wider context.

VII COMPARISONS TO OVERSEAS JURISDICTIONS

Jurisdictional comparisons were very common during the pandemic. The most obvious comparison focused on health responses. However, other comparisons focused on the economy, education and justice. Much of the justice analysis looked at pressure on the court system and threats to civil liberties. This part provides a brief overview of responses in the area of consensual alternative dispute resolution. Virtually every nation was impacted by the pandemic.⁷⁵ While it is not viable to survey every nation, the discussion below looks at apposite examples from Australia, Asia, North America and Europe. While New Zealand managed to achieve some successes in pandemic dispute resolution adaptation, this survey suggests that several jurisdictions showed more adaptability and resilience.

In March 2021, the New Zealand Government Centre for Dispute Resolution and Victoria University of Wellington produced a report summarising the impact of COVID on DR in different jurisdictions around the world.⁷⁶ The main focus was on English-speaking common law jurisdictions: Australia, the United Kingdom, the United States and Canada. However, this report also looked at key international mediation hubs such as Singapore and Hong Kong. March 2021 serves as the halfway point in the COVID-19 pandemic. At that point, the main focus of DR regimes had been to adapt to lockdowns, social distancing and PPE requirements. Post-March 2021 saw the issue of vaccine mandates added to the list of DR challenges.

There are several success stories from these jurisdictions which can provide useful models for New Zealand. The first group of examples shows changes that occurred specifically due to the COVID-19 pandemic.

Lockdowns in Australia placed huge pressure on commercial landlords and tenants. In Victoria, the Commercial Tenancy Relief Scheme offered free mediation to commercial landlords and tenants.⁷⁷ This initiative was funded by the Victorian Small Business Commission and introduced at the start of the pandemic in March 2020. By 30 September 2020, the scheme had responded to

75 For an anecdotal and empathetic account of how these challenges affected mediators around the world, see Sarah Blake (ed) *Mediation Beyond Covid: Hacks, Craics and Crocodile Tears* (KMD Books, Perth, 2023).

76 Louise Goodwin "The Impacts of Covid-19 on Dispute Resolution" (research paper, Victoria University of Wellington and Government Centre for Dispute Resolution, February 2021).

77 Victorian Small Business Commission "FAQs" (2 February 2022) <www.vsbcc.vic.gov.au> at #36.

approximately 9,800 rent-related enquiries and reported a 90 per cent settlement rate for mediations.⁷⁸ The service continued into 2022. The provision of mediation was either via videoconferencing or teleconferencing.⁷⁹ While early resolution and mediation were the main DR methods, the Commission could make binding rent reduction orders where landlords unreasonably refused to cooperate with tenant requests.⁸⁰ This scheme is an example of a new initiative responding to unique COVID-19 disruptions and also of a scheme going online because of lockdowns and social distancing. Similar schemes were enacted in other parts of Australia, for example, the Australian Capital Territory.⁸¹ As noted above, New Zealand introduced a similar scheme but it was barely used by commercial landlords and tenants.

One of the most comprehensive examples of a government initiative was Hong Kong's COVID-19 ODR Scheme.⁸² The Scheme was provided by Electronic Business Related Arbitration and Mediation (eBram) and focused on timely, cost-effective ODR. The process was multi-tiered, beginning with negotiation and potentially moving to mediation and arbitration, if required.⁸³ With a jurisdictional limit equivalent to approximately NZD 100,000, the scheme allowed small- to medium-sized businesses to access ADR to resolve COVID-related disputes and avoid expensive and time-consuming litigation through the Hong Kong court system.⁸⁴ The scheme was well-resourced in terms of funding and staffing and provides a good example of quick adaptation in a crisis.⁸⁵

Many of this article's case studies relate to government-run regimes. In the United States, the leading private commercial mediation and arbitration provider, JAMS, moved to online delivery during the pandemic. Some of these disputes were directly caused by the pandemic while others were more "business-as-usual" disputes that required online, rather than in-person, delivery. The pandemic required mediators and arbitrators who had built careers on face-to-face processes to quickly pivot to

78 Jaala Pulford, Minister for Small Business, Victoria "Fairness Extended for Commercial Tenants, Landlords" (press release, 30 September 2020).

79 Victorian Small Business Commission, above n 77, at #36.

80 At #59.

81 Gordon Ramsay, Attorney-General, Australian Capital Territory "Conflict resolution service now providing mediation for residential tenants and landlords" (press release, 13 May 2020).

82 Government of the Hong Kong Special Administrative Region "COVID-19 Online Dispute Resolution Scheme launched today" (press release, 29 June 2020).

83 eBram "eBram Rules for the Covid-19 ODR Scheme" (31 May 2021) <www.ebram.org> at arts 6–8.

84 At 1.1.

85 Hong Kong Legislative Council Panel on Administration of Justice and Legal Services "Development and Enhancement of an Online Dispute Resolution and Deal Making Platform by Non-governmental Organisation" (23 November 2020) <www.legco.gov.hk>.

online in early 2020. However, JAMS had already been trialling online delivery⁸⁶ and the move was relatively smooth. Nearly all (90 per cent) pre-2020 JAMS mediations were conducted in-person.⁸⁷ JAMS monitored the shift to online and reported that settlement and satisfaction rates were consistent with those from pre-COVID in-person mediations.⁸⁸ This is vital data as it suggests that settlement is just as likely with online mediation⁸⁹ and also that many parties are content to adopt this different mode of delivery. American organisations such as JAMS reported a growth in mediation partly due to economic pressures on small business and the need to access cost-effective DR. Online mediation is now well established in private mediation in the United States, with Kristi Paulson arguing "Online mediation is likely going to become the 'new normal' for the foreseeable future".⁹⁰

Private initiatives can also be seen in other jurisdictions. For example, in England and Wales the Centre for Effective Dispute Resolution (CEDR) and the peak organisation, Chartered Institute of Arbitrators (CI Arb), worked together to establish the Pandemic Business Dispute Resolution Service.⁹¹ The two organisations were able to leverage off their previous private ADR work to provide low-cost, timely online services to affected parties. The service's jurisdiction was set at between £5,000–£250,000. While the British court system moved to remote hearings more quickly than New Zealand,⁹² court backlogs worsened in 2020⁹³ and the CEDR/CI Arb service was able to provide strong support to traditional dispute resolution processes.⁹⁴

86 Rekha Rangachari and Kimberly Taylor "How JAMS Adapted to Virtual ADR in the Midst of a Pandemic and What's Next for the ADR Provider" (podcast, 9 July 2020) JAMS <www.jamsadr.com>.

87 Publicover and Ross, above n 33.

88 Baker McKenzie "The Year Ahead: Developments in Global Litigation and Arbitration in 2021" (4 January 2021) <www.bakermckenzie.com>.

89 This trend is supported by data gathered from MBIE's employment mediation service. The post-August 2021 shift to online mediation has not significantly affected overall settlement rates.

90 Kristi Paulson "Mediation in the COVID-19 Era: Is Online Mediation Here to Stay?" (2021) 51 *Southwestern Law Review* 142 at 148.

91 CEDR "Pandemic Business Dispute Resolution Service" <www.cedr.com>.

92 By 19 July 2020, 90 per cent of United Kingdom civil and family court hearings had been carried out using ODR. See Ahmed, above n 36, at 147–148, who argues that:

Over the past decade, the civil justice system has been on a course of substantial reform with an increasing focus on digitising court procedure. ... These incremental procedural reforms have provided a firm foundation upon which the current Covid-19 changes have been built.

93 Byrom, Beardon and Kendrick, above n 40.

94 Kim M Rooney "The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months" (October 2020) International Bar Association <www.ibanet.org>.

The biennial CEDR mediation audit provides an insight into commercial mediation in England and Wales. The 10th audit for the year ended 30 September 2022 provides two important conclusions. First, the private commercial mediation market bounced back post-COVID:⁹⁵

... the impact of the covid-19 pandemic triggered a downturn in mediation activity, and overall activity dropped by 35% over the period March to September 2021. In the past year, however, this deficit has been recovered.

While this mirrors the anecdotal situation in New Zealand, there is not yet any empirical evidence to make a valid comparison.⁹⁶ Secondly, the prevalence of online commercial mediation appears to be significant in post-pandemic England and Wales:⁹⁷

... the latest Audit confirms the emergence of online mediation with 64% of commercial cases being conducted online. This figure is well below the 89% that we saw during the pandemic period but seems to show that the nature of the field has permanently changed.

This does not mirror the anecdotal situation in New Zealand, which suggests that most private commercial mediation has returned to in-person post-lockdown. Empirical research is needed to ascertain whether this is actually the case or not.

The second group of examples shows how other jurisdictions had already established resilient online DR systems before March 2020 and these systems were immediately ready to cope with the pandemic. In Canada, the Canadian Civil Resolution Tribunal was established in 2016.⁹⁸ The Tribunal is completely online (or via phone) and uses a tiered approach to resolving disputes: negotiation, then mediation, then adjudication. As with the British experience, the Tribunal was able to reduce pressure on the courts during the pandemic.⁹⁹ It also had the benefit of being already established rather than

95 CEDR, above n 71, at 3.

96 This most recent empirical NZ Commercial Mediation Study survey of mediators occurred in 2019, the year before the pandemic. The anecdotal situation reflects recent conversations between the author and New Zealand private commercial mediators and has no empirical basis. However, see the following for insights from one leading New Zealand commercial mediator: Hayden Wilson "Creating our professional community" in Sarah Blake (ed) *Mediation Beyond Covid: Hacks, Craics and Crocodile Tears* (KMD Books, Perth, 2023) 49.

97 CEDR, above n 71, at 3.

98 Shannon Salter and Darin Thompson "Public-Centred Civil Justice Redesign: A case study of the British Colombia Civil Resolution Tribunal" (2017) 3 McGill Journal of Dispute Resolution 113.

99 Civil Resolution Tribunal "Statistics" (2020) <www.civilresolutionbc.ca>.

being a hastily organised reaction. The Tribunal has an 85 per cent settlement rate¹⁰⁰ and a solid caseload (approximately 3,000–4,000 per year).

In Singapore, online mediation has been used since February 2018 through the Community Justice and Tribunals System.¹⁰¹ The Singaporean court system can provide a mediator to parties at low or no cost.¹⁰² In the private sphere, the Singapore International Mediation Centre designed and implemented the SIMC COVID-19 Protocol. This provided online mediation for international commercial disputes.¹⁰³ The emphasis is on efficiency and cost-effectiveness for businesses.¹⁰⁴ Early reports suggested a high settlement rate (80 per cent).¹⁰⁵ The Centre also teamed up with the relatively new Japanese International Mediation Centre to establish the JIMC-SIMC Protocol. This allowed for online commercial mediation in disputes between Japanese and Singaporean businesses during the pandemic.¹⁰⁶ A co-mediator was provided by each centre and cross-border businesses could use the service to resolve commercial disputes in a timely fashion. In the rush to celebrate ODR initiatives it is important to conduct a reality check. In a September 2020 report, six months into the crisis, 77 per cent of Singapore lawyers surveyed noted a preference for in-person mediation.¹⁰⁷

Some of these examples are more applicable to New Zealand than others. But they all demonstrate the potential of ODR, especially during a crisis. There are also examples of particular struggles which can inform the New Zealand response. This article has noted the court backlogs occurring in many jurisdictions, including the United Kingdom and Hong Kong. An extreme example is India, where the Supreme Court managed to complete only 215 cases between 23 March and 24 April 2020, compared

100 Antonia Menezes, Nina Mocheva and Sagar Siva Shankar "'Under Pressure': Integrating Online Dispute Resolution Platforms into Preinsolvency Processes and Early Warning Tools to Save Distressed Small Businesses" (2020) 45 *Vikalpa* 79 at 83.

101 Sharon Lin and Lee Jiale "Resolving disputes via court proceedings and mediation during the COVID-19 pandemic in Singapore" (21 April 2020) Withersworldwide <www.withersworldwide.com>. For a survey of the state of mediation in Asia prior to the pandemic see Raymond HM Leung (ed) *Asia Mediation Handbook* (Sweet & Maxwell, Hong Kong, 2015).

102 Singapore Courts "Alternatives to trial" <www.judiciary.gov.sg>.

103 Singapore International Mediation Centre "SIMC Covid-19 Protocol" (2020) <www.simc.com.sg>.

104 Singapore International Mediation Centre "Dentons Rodyk & SIMC Webinar: Mediation as Alternative Dispute Resolution Mechanism in the Post-Covid-19 Era" (23 June 2020) <www.simc.com.sg>.

105 Singapore International Mediation Centre "New Mediation Protocol for Global Businesses to Manage Disputes During the Covid-19 Pandemic" (18 May 2020) <www.simc.com.sg>.

106 Singapore International Mediation Centre "JIMC-SIMC Joint Covid-19 Protocol" (2020) <www.simc.com.sg>.

107 Law Society of Singapore survey, as cited in Law Gazette, above n 31.

to the usual load of 3,500 per month.¹⁰⁸ The rigidity of formal court proceedings makes it difficult to adapt quickly to a crisis. Court hearings have been delayed in many countries, including New Zealand.¹⁰⁹ As the crisis progressed, most jurisdictions implemented amended court rules to facilitate online hearings and an electronic document filing system. In New Zealand, the High Court (COVID-19 Preparedness) Amendment Rules 2020 took effect in April 2020.¹¹⁰

Many of these examples show jurisdictions adapting to the pandemic environment but some also show an increase in ADR because of the pandemic.¹¹¹ It is unclear whether there has been an increase in ADR in New Zealand because of COVID-19. An examination of mediation and conciliation data over this period suggests that the quantity remains similar to pre-COVID levels.¹¹²

VIII CONCLUSION: IS IT POSSIBLE, OR EVEN DESIRABLE, TO RETURN TO DR PRE-MARCH 2020?

It is possible that the longer the disruption, the more likely it is to permanently change the DR landscape; the "law of inertia". At first it appeared that New Zealand might avoid the need to cement ODR into all DR systems in the long term. For example, after the relatively brief March–May 2020 lockdown, employment mediation immediately returned to the in-person norm and largely stayed with that norm for 14 months until the second lockdown in August 2021. However, the situation has been mixed since the COVID "traffic light" restrictions were finally removed in September 2022. For example, while some employment mediation is being conducted in person, it remains largely online. During the first seven months of 2023, 70 per cent of MBIE employment mediations were held online.¹¹³ As mentioned in Part II, recent statistics suggest that online mediation delivery in New Zealand's government-run mediation regimes is now more prevalent than in-person delivery (75:25), although the split differs in individual mediation regimes.

In the overall mediation market, the general approach is mixed-mode delivery and "fitting the forum to the fuss". Mediators will deliver in-person mediation if this is suitable for the mediation

108 Blake Candler "Court Adaptations during COVID-19 in the World's Two Largest Democracies" (2020) Social Science Research Network <www.ssrn.com>.

109 "Since the pandemic began, Ministry of Justice figures show 144,000 court appearances have been delayed or rescheduled because of Covid": Jimmy Ellingham "Justice system bogged down in 'delays of two to three years' for trials" (10 August 2023) Radio New Zealand <www.rnz.co.nz>.

110 See in particular High Court Rules 2016, rr 3.4A and 5.1A; and see Andrew Beck "COVID and the Courts" [2020] NZLJ 177.

111 The January 2021 Baker McKenzie report provides the most convincing evidence of this trend: above n 88.

112 Government data is available for employment, family dispute resolution and tenancy mediation regimes throughout the pandemic period and has been referred to throughout this article. For conciliation, see Murray-Ragg and Morris, above n 10; and Morris and Shaw, above n 2.

113 Official Information Act request, above n 70.

and/or requested by parties and vice versa for online delivery. It will be intriguing to see which approach becomes the accepted default option. In-person delivery was the default option in pre-COVID times but for institutional, government-led mediation, this appears to have swapped around as at 2023. The author's prediction is that online delivery will be the default option in the future for most institutional mediation regimes. Employment and family mediation will continue to be primarily online. Combined with tenancy mediation, which was already delivered primarily via technology, that is approximately 80–90 per cent of the New Zealand mediation market.

Online mediation solves the tyranny of distance issues in the same way that telephone mediation does, but also provides vital visual engagement. Thus the two main delivery methods of 2020, face-to-face and telephone, were sidelined in New Zealand in favour of online mediation. This can be seen in employment mediation, where face-to-face mediation was relegated to second place and telephone mediation was virtually extinguished. Employment mediation accounts for approximately half of all conventional mediations in New Zealand and has done so for at least a decade.¹¹⁴ As the move to online employment mediation continues beyond the pandemic, mediation in New Zealand will therefore no longer be a primarily in-person experience, regardless of what any other mediation regimes decide in relation to delivery.

The first lockdown provided the impetus to trial new modes of delivery but it was the second lockdown which provided the opportunity to roll out these modes. Without the second lockdown and subsequent period under the "red light" setting, in-person delivery may have remained the primary mode for the medium term. The extension of restrictions into 2021 and 2022 also strengthened the working from home trend, which further cemented the shift to ODR.

There is a pressing need for qualitative research on the effectiveness of online DR versus in-person. This must extend beyond comparison of settlement rates to explore the respective strengths and weaknesses of each approach. COVID forced DR online, but that does not necessarily mean it should stay there. Further research should investigate different perspectives: DR managers, practitioners, users and advocates. These perspectives could vary significantly. For example, the online shift in employment mediation was led by management rather than practitioners (although some practitioners supported the move). It will be important to assess the extent to which changes reflected the famous maxim attributed to Winston Churchill, "Never let a good crisis go to waste". The Lord Chief Justice of England and Wales has indicated that ODR will continue to be used beyond the pandemic to create a more efficient and accessible justice system.¹¹⁵

Now that COVID restrictions have been lifted in New Zealand for a year, the time has come for the institutional, government-led DR community to make an important choice. DR can be provided

114 Morris and Shaw, above n 2, at 200.

115 John Hyde "LCJ: 'No going back' to pre-Covid ways" *The Law Society Gazette* (online ed, London, 14 May 2020); Rooney, above n 94.

online, usually in an effective fashion. Therefore, should any DR remain in person? If the answer is "yes", then the decision becomes one of choice, recognising the distinct benefits of face-to-face contact, rather than necessity. Ideally, all those involved in mediation should be involved in that choice: mediators, advocates, regime managers and, most importantly, users. In private commercial mediation, the market will determine the amount of online mediation that occurs. Regardless of whether it is institutional, public or private, mediation does not exist for mediators, advocates and managers. Mediation exists for users and therefore users should lead the conversation about how our service is delivered in the future.