

RPF 3 Project – Literature Review on LiPs and NCDR

Literature Review Summary: How litigants in person access NCDR and what works to address digital exclusion

The 2022 World Justice Project (WJP) Rule of Law Index invokes ADR as one of the seven key dimensions of the civil justice function: **Alternative dispute resolution mechanisms are accessible, impartial, and effective.**¹

Benefits of NCDR

- Very few problems make it to court.²
- Nontraditional legal advocates are often much closer and more embedded within community processes, making these forms of NCDR more people centred.³
- Affordability.⁴
- Reduced court costs.⁵
- Increased court efficiency.⁶
- Frontline legal workers have acknowledged a benefit to being able to cover more cases by virtually participating in different hearings in different courts.⁷
- ODR tools enable individuals with disabilities to utilise their own technology and supports.⁸

Barriers users face in accessing NCDR

- The multiplicity of NCDR options and products are hard for the user to navigate.⁹
- Awareness of NCDR¹⁰
 - Public
 - Legal and professional bodies
- Power imbalances.¹¹
- Cultural barriers to accessing NCDR services include religious, linguistic, and social norms, which can differ significantly among participants. These can have implications for communication, the way parties understand issues in dispute, and how they perceive options for resolution.¹²

¹ Sandefur, Rebecca, et al. *People-Centered Access to Justice Research: A Global Perspective*, 2023, www.americanbarfoundation.org/wp-content/uploads/2023/11/People-Centered-Access-to-Justice-Research-A-Global-Perspective.pdf

² Ibid.

³ Ibid.

⁴ Schmitz, Amy J. and Akin Ojelabi, Olufunmilola O and Zeleznikow, John, *Researching Online Dispute Resolution to Expand Access to Justice* (January 26, 2022). Ohio State Legal Studies Research Paper No. 680, , Researching Online Dispute Resolution to Expand Access to Justice, GIUSTIZIA CONSENSUALE (CONSENSUAL JUSTICE) 269-303 (2022)., Available at SSRN: <https://ssrn.com/abstract=4018593> or <http://dx.doi.org/10.2139/ssrn.4018593>

⁵ Ibid.

⁶ Ibid.

⁷ National Self-Represented Litigants Project. "Access to Justice and the Promise of Virtual Proceedings." *Slaw*, 21 Nov. 2023, www.slw.ca/2023/12/19/access-to-justice-and-the-promise-of-virtual-proceedings/

⁸ Ibid.

⁹ Civil Justice Council. *ADR and Civil Justice: CJC ADR Working Group Final Report*, Nov. 2018, www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf

¹⁰ Ibid.

¹¹ Schmitz, Amy J. et al, *Researching Online Dispute Resolution to Expand Access to Justice*.

¹² Ibid.

- The lack of awareness of the many ways in which people can be digitally disadvantaged is in danger of creating and exacerbating existing issues around effective participation.¹³
 - Too often there is a focus on the discrete trinity of hardware, skills, and connectivity as the key issues relating to digital exclusion, and these need to be expanded to take into account multiple-disadvantages and understand how to design user-centred processes.¹⁴
- Virtual hearings run the risk of entrenching existing disparities and inequalities in access to justice.¹⁵
- Not all users have access to safe and private locations from which to access NCDR services.¹⁶
- Not all users have access to secure and stable internet connectivity.¹⁷
- In the post-LASPO landscape, legal advice has become massively inaccessible for legal aid recipients in family mediation.¹⁸

Challenges to making ODR more accessible

- 4 key themes¹⁹:
 - Funding
 - Logistics
 - Quality assurance
 - Regulation
- ODR may expand access to justice if properly designed, implemented, and continually improved.²⁰
- There is no generally accepted definition of ODR, but it includes use of the Internet to prevent and/or resolve disputes. This means that ODR includes online problem diagnosis and self-help tools, as well as technologies to promote online negotiation, mediation, arbitration, community courts, and variations thereof.²¹
- ODR can expand access to remedies for litigants in person who cannot afford lawyers.
- Reduces court costs and increases court efficiency.²²
- ODR runs the risk of being biased against minority and disadvantaged communities (second-hand justice).²³
 - Algorithms may perpetuate biases against vulnerable groups because the algorithms are copying and amplifying the decision-making trends embedded in the legal system.
- Any adoption of ODR must take into consideration not only access to technology, but also the social and cultural contexts of the individuals and disputes involved.²⁴

Recommendations

- Increased public legal education.²⁵

¹³ Linda Mulcahy & Anna Tsalapatanis (2022) Exclusion in the interests of inclusion: who should stay offline in the emerging world of online justice?, *Journal of Social Welfare and Family Law*, 44:4, 455-476, DOI: [10.1080/09649069.2022.2136713](https://doi.org/10.1080/09649069.2022.2136713)

¹⁴ Ibid.

¹⁵ National Self-Represented Litigants Project. "Access to Justice and the Promise of Virtual Proceedings."

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Rachael Blakey (2024) Assessing the availability of legal support through the 'Help with family Mediation' legal aid scheme, *Journal of Social Welfare and Family Law*, 46:1, 82-103, DOI: [10.1080/09649069.2024.2304977](https://doi.org/10.1080/09649069.2024.2304977)

¹⁹ Civil Justice Council. *ADR and Civil Justice: CJC ADR Working Group Final Report*.

²⁰ Schmitz, Amy J. et al, *Researching Online Dispute Resolution to Expand Access to Justice*.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Civil Justice Council. *ADR and Civil Justice: CJC ADR Working Group Final Report*.

- A central website providing information on the available NCDR services.²⁶
- Cost sanctions help encourage the uptake of mediation and NCDR services more generally.²⁷
- Services must be user centred.²⁸
 - A user-centred approach requires considering the application of the justice budget to providing services. In looking at services, institutions should expand the traditional conception of what constitutes a justice service. This approach would help resolve various dimensions of the justice gap, including for hitherto neglected communities.²⁹
- Research on NCDR should make sure to highlight life outcomes (ex: increased confidence, wellbeing) as opposed to just case outcomes.³⁰
- As the push to digital becomes the norm in the provision of government services, the issues of how digital disadvantage (beyond hardware and skills) is defined and intersects with other vulnerabilities needs to be made a key consideration in the design of software programmes, public engagement, or information initiatives, and judicial and court staff training.³¹
- Virtual hearings must be implemented with thoughtfulness and care, acknowledging and addressing limitations, and adopting best practices in order to avoid creating additional barriers and inequities.³²
- Attention should be paid to the increasing innovation of legal services. For example, ‘unbundled services’ enable access to lawyer-led advice for those who cannot afford to pay for support throughout their entire dispute.³³
- There is a need to move beyond a ‘lawyer-centric’ perspective of family justice to one that embraces and scrutinises an increasingly diverse body of family justice professionals, including McKenzie Friends and online divorce services.³⁴
- Investigating alternative services is only possible through enhanced data and research. Interest in justice data has increased in recent years, and efforts must be made to sustain this focus. The first step towards achieving this goal is to improve the availability and accessibility of justice data.³⁵

²⁶ Ibid.

²⁷ Ibid.

²⁸ Linda Mulcahy & Anna Tsalapatanis (2022) Exclusion in the interests of inclusion: who should stay offline in the emerging world of online justice?

²⁹ Maurino, Gustavo. “The Justice Gap and the Budget Black Hole: Promoting Justice through Budget-Based Work.” *Center on International Cooperation*, Dec. 2023, <https://cic.nyu.edu/resources/the-justice-gap-and-the-budget-black-hole/>

³⁰ Sandefur, Rebecca, et al. *People-Centered Access to Justice Research: A Global Perspective*.

³¹ Linda Mulcahy & Anna Tsalapatanis (2022) Exclusion in the interests of inclusion: who should stay offline in the emerging world of online justice?

³² National Self-Represented Litigants Project. “Access to Justice and the Promise of Virtual Proceedings.”

³³ Rachael Blakey (2024) Assessing the availability of legal support through the ‘Help with family Mediation’ legal aid scheme.

³⁴ Ibid.

³⁵ Ibid.