

Dame Helen Winkelmann, Chief Justice of New Zealand

Address to the Law Association Breakfast

InterContinental Hotel, Wellington

Thursday 4 July 2024

Kei ngā tini hoe o te waka o te ture

Tēnā koutou, tēnā koutou,

Tēnā koutou kātoa

Thank you all for getting up so early and attending this breakfast this morning. It's a pleasure to speak with the Law Association's members. Lawyers play a vital role in supporting the work of the courts. The work of administering justice is a collaborative enterprise, and lawyers are key to it. If we are to have a well-functioning court system, there must be good lines of communication between the judiciary and the profession. This breakfast is one forum in which we can speak, and I value the opportunity.

Good lines of communication are never more important than when there are challenges to the system of justice. This morning, I am going to sketch out for you my perspective on the state of this system — describing some of the challenges that the courts face and the steps that the judiciary is taking to address them. I am afraid this means that I am going to begin by listing challenges. This is perhaps a depressing way to start, but I ask you to bear with me as there is light at the end of the tunnel.

The challenges we face

First, the courts have come out of the COVID-19 pandemic with a significant backlog of criminal cases in the District Court. This backlog is proving difficult to clear because there is more at play than the COVID disruptions. The system has not been running smoothly — with multiple appearances occurring where once one would have sufficed. Late pleas, high rates of jury election, difficulty with police disclosure, difficulty for counsel gaining access to their clients in custody, and significant delays in obtaining health reports, all play a part in slowing the system.

So too does our basic operating system. This is a paper-based system, and given the number of courts, defendants and charges, often the right document will not be on the right file, and the right file will not be in the right court. A sluggish system creates more delays as people begin to factor the delay into their own strategies and thinking. Because of delay, defendants are increasingly held in custody for prolonged periods. Recent statistics showed that more than one in five prisoners were being released on the day of their sentence — a fair portion of those will have served more time than required under the sentence ultimately imposed upon them.¹ We also see complainants and witnesses who must carry the stress of adjournments and the anxious wait to give their evidence. There is a great social cost to a criminal justice that is beset by delay.

¹ “Court delays: 1 in 5 offenders released on time-served sentences” (Radio New Zealand, online ed, Wellington, 23 December 2022).

Secondly, the court system is resource constrained. You will have seen the media reports about the state of the court's estate. This is the result of decades of neglect, so there is no finger-pointing to be done. Its implications, however, are that the courts are constrained in their ability to clear the backlog. To take an example — the High Court in Whangārei has only one courtroom available to it. This means that a murder trial in Whangārei may have to wait many months longer for trial than elsewhere. The same sort of issues arise in Rotorua and Tauranga. The buildings we do have were built for a world in which different values held sway and in which lower expectations were placed upon the courts. They were not built for a world in which it was understood that complainants and witnesses should be protected when attending court from contact with the defendant's family and supporters. They were not built for a world in which the security risks to participants were so high. Nor were they built for a world in which technology will play such a significant part.

A stressed and, at times, distressed profession is another source of challenge to the overall functioning of our system of justice. Recent studies suggest that long-term underfunding of legal aid has resulted in a reducing pool of legal professionals prepared to take on work at legal aid rates — whether it be criminal, family, or civil.² Add to that the stressful nature of much of the work of criminal lawyers and, to some extent, family lawyers. And then there is the increasing cost of doing business as a lawyer, as revealed through the NZLS-commissioned KPMG study.³

Finally, there is the challenge of maintaining the strength and legitimacy of the judicial branch of government in a world where the legitimacy of institutions is increasingly up for debate. Like all institutions, the courts must operate in a world of highly polarised opinion. A world dominated by new media, and in which the capabilities of artificial intelligence are beginning to be felt. In such a world, institutions can struggle to maintain their strength. All institutions must be aware of this and be planning and working to meet this challenge.

And yet we have many advantages and opportunities

Before I move on to the steps that the judiciary is taking to address these challenges, I want to pause for a moment to focus on some positives.

First, we have a strong profession which has not splintered into factions or fractions. Our legal professionals are among the best educated in the world. This is a profession that sets and maintains high levels of professionalism and integrity.

We also have a strong judiciary — indeed its strength is one of the key reasons for New Zealand consistently ranking highly in international rule of law measures.⁴

I see the mutual respect between the judiciary and profession as a powerful positive. We are good at working together to identify and address issues. We do this in a variety of forums. For example, every month the Chief High Court Judge and Chief District Court Judge meet with representatives of the New Zealand Law Society | Te Kāhui Ture o Aotearoa, the New Zealand Bar Association | Ngā Ahorangi Motuhake o te Ture, the Law Association, the

² Kantar Public | Colmar Brunton *Access to Justice Research 2021* (New Zealand Law Society | Te Kāhui Ture o Aotearoa, October 2021).

³ KPMG *Benchmarking costs of law practice in New Zealand* (New Zealand Law Society | Te Kāhui Ture o Aotearoa, March 2024).

⁴ World Justice Project *Rule of Law Index 2023* (Washington, October 2023).

Criminal Bar Association and other professional organisations to discuss pressing issues and opportunities for on-going work on joint projects.⁵ Professional representatives also attend the Criminal Practice Committee. The Criminal Practice Committee is a forum chaired by me, as Chief Justice, and attended by representatives of the profession and significant entities and agencies in the criminal justice system including the Ministry of Justice, Police, Corrections, the Legal Aid Commissioner, the Public Defence Service, and Crown Prosecution network.

The respectful relationships between the legislative, executive and judicial branches of government are important to the functioning of our system. Just two weeks ago, the Attorney-General spoke at another Law Association event about the important principle of comity, which regulates and guides relationships between the three branches of government. Constitutionally, the Attorney-General, as the Crown's senior law officer, and I, as head of the New Zealand judiciary, share the responsibility of looking after the relationship between the executive and the judiciary. We have established channels of communication to discuss matters in which our branches share an interest. It was heartening to hear the importance that the Attorney-General attaches to this issue. Of course, from time to time there may be flare-ups along the lines that delineate the spheres of responsibility between the judicial and executive branches. But what is vital is that the importance of these lines is understood and reasserted when it needs to be.

We are fortunate also to have a good working relationship with the Ministry of Justice. As I am sure most of you will be aware, the judiciary does not have the means to run a court system — it is not funded by Parliament to do so. Rather, it depends upon a branch of the executive, the Ministry of Justice, for courtrooms, court staff and technology. There is obvious potential for this relationship to be fraught, especially in strained times. Over the last several years, working through COVID, the judiciary and the Ministry have developed a strong, shared understanding of the issues facing the system.⁶ I am pleased to say the work I shortly come on to discuss is undertaken together with, or with the support of, the Ministry of Justice.

And finally, we are fortunate that many of the issues we confront are issues that other judiciaries in other jurisdictions are also working through. As you will hear, there is a good deal of cooperation going on regionally and internationally between judiciaries as we resolve these issues. For example, I sit on the Council of Chief Justices of Australia and New Zealand, where we can discuss issues and share ideas. I also meet or speak regularly with Chief Justices from other jurisdictions.

The work that is underway

Which brings me to the work that is underway to address the challenges and make use of the opportunities I have outlined.

⁵ Officials from the Ministry of Justice | Te Tāhū o te Ture, and representatives from the New Zealand Police | Ngā Pirihimana o Aotearoa and Department of Corrections | Ara Poutama Aotearoa also attend.

⁶ There is a Statement of Principles observed by the judiciary and Ministry of Justice in the administration of the courts which provides guidance as to responsibilities: Ngā Kōti o Aotearoa | Courts of New Zealand "The Statement of Principles" (29 November 2018) <courtsfnz.govt.nz>.

Digital Strategy

The Digital Strategy for the Courts and Tribunals of Aotearoa New Zealand, launched in 2023, sets out the judiciary's objectives and guiding principles for using technology in the courts.⁷ The strategy outlines how the judiciary, supported by the Ministry of Justice, will work to capture the benefits of technology without compromising the quality of our model of justice. The work on this strategy was led by Justice David Goddard, drawing on experience overseas. Justice Goddard engaged extensively with judicial leaders in Australia, Singapore and the United Kingdom to learn from their experiences. He also undertook broad consultation within New Zealand, particularly with the profession.

The strategy is structured around core objectives and foundational principles that every use of technology in the courts must comply with. The strategy sets out four objectives central to any use of digital technology in the courts.

They are:

- facilitating and expanding access to justice;
- supporting informed and effective participation in the court system;
- maintaining and enhancing public confidence in the court system; and
- enhancing resilience and sustainability of the court system.

I can sum this up by saying that while the efficient administration of justice is important, access to, and the quality of, justice is at the core of the strategy.

One matter of note is the inclusion of tribunals within the strategy. While tribunals are not courts, and therefore do not formally fall under my remit as Chief Justice, they play a vital part in our civil justice system. Indeed, access to civil justice occurs mostly through tribunals. It was sensible from an efficiency point of view and, fundamentally, from an access to justice point of view, to include them in the strategy.

Te Au Reka

The Digital Strategy has informed the development of Te Au Reka — the digital caseflow system. The government's approval of the funding for Te Au Reka was a conscious investment in the quality of justice, in that it was not dependent upon any rationalisation of the court footprint or staff numbers. This can be contrasted with the approach taken in other jurisdictions.

Te Au Reka will enable people to engage with the courts online; commencing proceedings, filing documents, and giving participants real-time access to the status of the proceedings. It is designed to make it easier for participants to communicate digitally, and to automate the monitoring of compliance with deadlines.

⁷ Chief Justice of New Zealand | Te Tumu Whakawā o Aotearoa *Digital Strategy for Courts and Tribunals* (Te Tari Toko i te Tumu Whakawā | The Office of the Chief Justice, March 2023).

For the courts, it will remove the burden, risk and delays associated with a paper-based system. And, equally importantly, it should enable every court event to be meaningful, because compliance with deadlines will be transparent.

Te Au Reka is the subject of careful project management — any large-scale digital project carries serious risks. The judiciary and Ministry are working closely together on this. But critical to this work is the input that the profession is having into the project.

The new digital system will be progressively introduced — starting with the Family Court in 2025–2026, then the District Court criminal and civil jurisdictions, and finally the Senior Courts and Environment Court and Disputes Tribunal in 2027–2028.

Artificial intelligence

Other changes of a digital nature are requiring our attention. Industries, workplaces, governments, and people are reckoning with the opportunities and risks that AI tools might pose for us all. Late last year, a working group led by Justices Sarah Katz and Paul Radich prepared a series of guidelines for the use of generative AI in courts and tribunals.⁸ Again, the judiciary was assisted in this by the profession’s engagement with drafts of those guidelines. You might be interested to know that we released the guidelines as “open source”, and therefore they have been heavily drawn on by several other judiciaries. We are also working with the Ministry of Justice to identify how AI can and should be used in the courts. We are guided in this work by the framework established by the Digital Strategy.

The operational side of the courts:

The Digital Strategy has implications for the courts in the medium to longer term. But judicial leadership is also focused on improving the quality of justice in the here and now, including by addressing issues of timeliness.

Toward this end, the District Court has introduced a national roster to ensure the most effective and efficient use of a scarce resource — judges’ time. It has also published timeliness standards.⁹ For the courts, timeliness standards are difficult. This is because judges do not control all the variables that can cause delay. As outlined earlier, causes of delay come from throughout the system. But the timeliness standards that the Chief District Court Judge has published are nevertheless important. They are a stake in the ground about what is an appropriate time frame to dispose of proceedings. They thereby provide the basis for modelling as to how other agencies must perform if these deadlines are to be met. I believe they are a necessary support for a whole-of-system effort to address delay.

These initiatives are critical supports for Te Ao Mārama, the model of justice being rolled out in the District Court. Most of you will know that there are two basic concepts that underpin Te Ao Mārama: the first is to support those who engage with the court system to fully participate and understand the proceeding. The second is to provide space for the community and government agencies to identify and address the circumstances that have led to the offending, or to the conflict that brings the participants to court. Te Ao Mārama is

⁸ Ngā Kōti o Aotearoa | Courts of New Zealand “Guidelines for use of generative artificial intelligence in Courts and Tribunals” (7 December 2023) <courtsfnz.govt.nz>.

⁹ Chief District Court Judge Heemi Taumaunu *Timely Access to Justice* (District Court of New Zealand | Te Kōti-ā-Rohe o Aotearoa, Judicial Protocol Ref#1, June 2024)

currently funded to operate in only eight court centres, but aspects of it, such as taking care to ensure full participation, are non-negotiable in a fair system of justice. And so, the District Court Judges are proceeding with a focus on that work throughout the Courts.

The High Court faces different challenges to the District Court. It is much smaller in terms of judge numbers and the physical courthouse footprint. In the criminal jurisdiction it deals primarily with homicides. All the same, it is not immune from the systemic delays that affect the District Court. Delays in criminal disclosure have been a particular issue in that regard. The Court, working with the profession and the Police, prepared a protocol designed to achieve more timely criminal disclosure.¹⁰ This protocol was issued by the Chief High Court Judge last year, and the reports we have received are that the protocol is effective in flushing out disclosure issues early.

Unlike the District Court, the High Court undertakes a significant workload of civil litigation. Indeed, civil litigation makes up more than half of the High Court's workload. In the past, the Court ran a commercial list to meet the needs of commercial civil litigation. That list enabled the cases to be managed promptly and efficiently. That was good for the parties. But it was also good for the courts as it prevented large-scale litigation from clogging up the courts. The list was disestablished as it had procedural limitations. However, I believe that our Senior Courts must take reasonable steps to meet the needs of business for efficient and timely adjudication of commercial disputes — this is necessary for the strength of the economy and for the development of the common law to regulate markets.

Work is currently being done on reinstating a Commercial List in the Auckland region. Once established, this list will procedurally enhance the current Commercial Panel which operates under the Senior Courts Act 2016. It is proposed that the list will be based on the New South Wales Commercial List. We are beginning consultation with the profession over the next few weeks.

There is also on-going work underway on various access to justice initiatives which I have spoken about.

Other initiatives to improve access to civil justice include the release of “Wayfinding for Civil Justice”, the stakeholder-led national strategy that the Secretary for Justice and I announced in December 2023.¹¹ Developed at the initiative of our Access to Justice Advisory Group, it provides a framework to encourage a unified, coordinated approach to developing access to justice initiatives. This may be led by government and non-government agencies, all of which seek to realise the vision of citizens equipped and enabled to solve civil justice problems.

I'd also like to highlight the work that the Rules Committee is doing following release of its “Improving Access to Civil Justice” report in November 2022.¹² The Committee has focused on making and consulting upon proposals to amend the High Court Rules. The big picture reforms of strengthening the role of the Disputes Tribunal by increasing its jurisdictional

¹⁰ Chief High Court Judge Susan Thomas *2023 Practice Note: Criminal Disclosure in High Court Trials* (HCPN 2023/1, 3 November 2023).

¹¹ Bridgette Toy-Cronin and others *Wayfinding for Civil Justice: National Strategy* (Ministry of Justice | Te Tāhū o te Ture, ISBN 978-0-473-70229-8, December 2023).

¹² Rules Committee | Te Komiti mā ngā Tikanga Kooti *Improving Access to Civil Justice* (Ngā Kōti o Aotearoa | Courts of New Zealand, November 2022).

limit, and establishing better oversight of, and capacity to deliver, civil justice in the District Court by establishing a Principal Civil Judge and new part-time civil judicial officers, are currently with the government.

Finally, as lawyers in those areas know, the criminal and family bars are struggling to attract, develop and retain members. Adequate remuneration, recognising the difficult nature of the work as well as the costs of practice, would go some way to making this work more sustainable. Moreover, getting large firms back into this essential work provides their newer staff with opportunities. A fair, just and sustainable legal aid system is necessary to provide access to justice and promote respect for the rule of law. Improving the regulatory settings is an important first step, as is a commitment by all firms to play their part.

Public confidence in the judiciary

I mentioned earlier that one of the challenges the courts face is operating in a world of highly polarised opinion. Some have called it a “post-truth” world, in which institutions cannot take for granted that the public will understand or take action to protect the critical constitutional role played by an independent judiciary — or indeed by an independent profession.¹³ The principle of open justice helps to maintain public confidence in our judicial system by allowing the public to see that the judges who administer justice do so diligently and in accordance with the demands of the judicial oath.

Ideally it allows the public a deeper understanding of the issues and tensions that judges must confront and resolve when making decisions about bail and in sentencing. In New Zealand, the accredited media are the public’s eyes and ears, and the judiciary is conscious of the need to support them in this role. Because, of course, the media also suffers from constrained resources and the need to respond to disruptive technology.

Over the last couple of years, the courts have undertaken initiatives to improve transparency. This has included the publication of an Annual Report. It has also included various outreach programmes, at present centred upon the Supreme Court. These include:

- educational outreach programmes aimed at schools;
- publication of all Supreme Court submissions and transcripts on the Courts of New Zealand website;
- livestreaming of most Supreme Court hearings;
- the Supreme Court’s engagement programme, which includes our roster of “away hearings” to give the public the opportunity to see the Court in action and hear the arguments as they are being made.

Stability with change, change with stability

The role of the law and the courts is to support a just society, and in doing so, to provide a basis for a stable, socially prosperous society. To fulfil this role, we must respond to the challenges I have outlined, but also take the opportunities that changes in technology and within society provide. As we do so we will need to draw upon those natural advantages I

¹³ Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal: Ideas For Constitutional Change In New Zealand* (Victoria University Press, Wellington, 2018).

have described earlier, not the least of which is a strong and independent profession. As Chief Justice, I would like to acknowledge the role that the profession plays in explaining and defending the importance of an independent judiciary.

I close with this thought: working together, the bench and the profession have come through some tough times in the recent past and we have completed some significant projects. This shows the strength of our legal community. That is something of which we can all be proud.

Thank you for your time, and thank you, the Law Association, for organising this event. I am happy to take questions.

Tēnā tatou kātoa.