Address by Chief Justice Helen Winkelmann[1]

On the 40th anniversary of the establishment of the Family Court

Securing the vision of its founders 40 years on

Thank you for your invitation to speak today. I see this as an important opportunity to speak to judges of this Court: important because, as I said at my swearing-in two years ago, I am the Chief Justice for all the judiciary – not just the judges of the senior courts. It is right that the Chief Justice should fulfil this role because, no matter what the court, there is high level of commonality between the functional nature of judging and the stresses that judges are subject to. The support needed for courts, and the resourcing issues that confront judges of the different benches, are also largely the same.

Ensuring that the Family Court and its judges are well supported is a key focus for me as Chief Justice. The work you do as Family Court judges is critical to the wellbeing of our whānau. Your work helps families at times of crisis. As Family Court judges, you make critical decisions to intervene in the lives of others to protect the vulnerable from exploitation and from abuse. I cannot think of a more important or more demanding jurisdiction to exercise.

Since my appointment as Chief Justice, I have been reading about the history of this Court and working to understand the nature of the issues that now confront it. I see that history as important to understanding those issues. And so I hope you will bear with me as I sketch out what some of you may already know. It seems, in any event, right to talk about this history in the year of the Court's 40th anniversary.

It was the 1978 Royal Commission on the Courts that led to the establishment of the Family Court. The Commission's recommendations occurred against the

[1] This is an edited version of a speech delivered by Chief Justice Dame Helen Winkelmann at the Family Court Judges' Triennial Conference marking the 40th anniversary of the establishment of the Court.

background of widespread dissatisfaction within the profession and the wider public as to both the content of family law and the suitability of existing court practice. Divorce law was complex and technical, and out of step with social mores. Lawyers traded tales over morning tea of the latest ridiculous or humiliating spectacle in the divorce lists. The courts before which these cases were called were white and were exclusively male and middle-aged. Because family issues were within the jurisdiction of the High Court, there were also problems of expense and accessibility for those living outside of main cities.

The Royal Commission recommended a specialist court that would handle family law issues in a new way – the court was to be a vehicle for counselling, conciliation, mediation and, only as a last resort, hearing and adjudication.[2] This was a step away from the exclusively adversarial approach that had previously dominated the field, and it required doing away with formalities. The new processes wrapped around this court were a social experiment, and self-consciously so. It was acknowledged and talked about that the success of this experiment would involve casting aside past practice and thinking in dealing with family law litigation.

In a 1981 interview, just before the Family Court began operating, the first Principal Family Court Judge Peter Trapski said: "It is very clear to me that the Family Court must be different. It must be a new Court, not a legal sham; not the old under a new name."

Peter Trapski was a communicator. He gave speeches and interviews in which he emphasised the new approach that was needed if this radical vision was to be secured. In large part, this communication strategy was directed at the profession because the Principal Judge knew that if these radical reforms were to take root, there had to be a change in approach on the part of the profession. As to that the Judge said:

" … I would simply ask all who come before the Family Court – parties, lawyers, specialists – to look upon themselves as part of a team formed to solve the problems of this man, this woman and this child."

[2] Family Court History , B D Inglis.

This vision of a new form of justice was further strengthened by the enactment in 1989 of the Children, Young Persons, and their Families Act which had the Family Group Conference at its heart. These reforms occurred against the background of the publication of the Māori Perspective Advisory Committee's 1988 Puao-Te-Ata-Tu report. That Advisory Committee had been asked by the then Department of Social Welfare to advise the Minister as to the laws, practices and structures required to meet the needs of Māori.

Amongst many recommendations, the report writers called for reform to the legislative framework for care and protection of young Māori as part of a suite of reforms necessary to tackle cultural racism in New Zealand. The committee recommended incorporating the values, cultures and beliefs of Māori in all policies developed for the future of New Zealand. In the area of care and protection, the committee recommended that consultation with whānau, hapū and iwi be mandatory when the placement of a Māori child was in issue, and that there be mandatory consideration of the desirability of keeping the child within the child's hapū.

The Family Group Conference, championed by the chairman of the Advisory Committee – Tūhoe elder John Rangihau – drew directly on tikanga Māori principles. And while the term "restorative justice" was not originally used in relation to Family Group Conferences, these were New Zealand's first restorative justice process.

These ideas brought in by the 1980 Family Court Act (and then expanded upon by the 1989 Children, Young Persons, and Their Families Act) created what was at the time a radical conception for a court of law. But today its elements are readily recognisable. The elements that lie at its heart – the notion of a conciliatory rather than adversarial approach, the concept of a team, including lawyers, working together to restore balance within a broken whānau – these are the ideals of therapeutic justice. That vision extended to community connection – a Court that would draw on the knowledge, wisdom and support of whānau, hapū and iwi. These are the very ideas that the District Court has drawn upon when designing the various pilot courts that have been launched over the last 10 or so years. And they are also the ideas that lie at the heart of the Te Ao Mārama vision.

The Court was quickly viewed as a success, with the result that it was given broader jurisdiction, including the relationship property jurisdiction. But there were and there remain difficulties such that the Court has yet to fully achieve that early vision.

The Family Court's primary legislation has been frequently amended, requiring constant changes in practice and approach. New Acts for which the Court is responsible have added sizeable workload. In relationship property, the Court has had to grapple with the explosion of trusts as a family asset planning tool – a development which has led to complexity and delay in the relationship property area. In care of children and care and protection, the work of the Court has become fraught, with the increased prevalence of drug, alcohol, violence and poverty complicating the decisions that judges must make. Hard decisions have simply become harder.

The support provided to the Family Court has not kept pace with its expanded jurisdiction and expanding volumes of work, nor with the increased complexity of that work.

Like the rest of the District Court, the Family Court has had to deal with registry restructurings which have exacerbated rather than addressed existing problems. The digitisation which the Court so clearly needs, so that it can perform its supervisory responsibilities in respect of children subject to care and protection orders, and to progress its overall workload, has not eventuated. The Court is awash in boxes and boxes of paper.

Some reforms have been inconsistent with that initial vision – reforms that removed lawyers from the early stages of proceedings except where the case is urgent – increasing delays and stress in the system. At the same time, free pre-court counselling sessions, which were the cornerstone of the Family Court's therapeutic vision, were removed from the services available to support those before the Court.

As to the ideals of community connectedness, the Court has worked to enliven these ideals in its work with whānau. But until recently it has not had the structures needed to enable the broader engagement with hapū and iwi. The support provided to the Court when it was created did not include these structures. And in 1989 and the years that followed, hapū and iwi simply could

not step into the gap left in that regard – the benefits of the great settlements of the 1990s and 2000s had yet to return to hapū and iwi the resources they needed for this.

For me, this history is critical to understanding the issues the Family Court and the Family Court judiciary now faces, and to see how they fit within the work programme I set myself as Chief Justice. Some of you may remember that at my swearing-in I spoke about the issues to which I would devote my time and effort to as Chief Justice – broader issues that are faced by our wider court system, and therefore issues that also touch the Family Court as one part of this system.

These include creating greater connection between the courts and their communities and improving public understanding of the work of the courts. I also spoke about a fit-for-purpose judiciary – a judiciary capable of judging well and creating a law fit for this group of islands in the South Pacific.

These are the issues I identified way back when, in March of 2019, I was sworn in. A lot has happened since. The day after that swearing-in came the Mosque shootings. And then in March of 2020, New Zealand entered its first pandemic-related lockdown. After leading the courts through these experiences, I would now add the task of building resilience in our courts to the list of tasks for the judiciary and the courts more generally.

How do the specific needs of the Family Court, informed by its history and purpose, overlap with these system-wide issues?

I see two main challenges that the Family Court and its judiciary face. Neither are new to it.

First, you face the challenge of gathering enough resource, and the right kind of resource, to support your work. This is the resource needed so that the early vision for this Court, including that of John Rangihau, can be secured and held fast – resource so that the Court:

- can practise therapeutic justice;
- can work with the support, and draw on the wisdom, of the community; and

- can incorporate the values, culture and beliefs of Te Ao Māori in its work.

Some of this need for resource is being addressed by the executive. The re-admission of lawyers into the early part of the proceedings has provided relief to the Court. The government has now also funded 50 Kaiārahi in the Family Courts. The role of Kaiārahi – Family Court Navigators – has great potential within the Court to support therapeutic justice – I don't think I need to tell you that. These are steps toward a fully-resourced therapeutic model – not as many steps as we would like, but meaningful steps, nevertheless. The other major judge-led innovation which will impact upon this Court is Te Ao Mārama. That work is judge-led but Ministry-supported. It is intended to create structures of connection with the community – with hapū and iwi – that are needed for a therapeutic model. These are structures for the Family Court as well as the criminal jurisdiction.

It seems to me that Te Ao Mārama is a recommitment to the ideals the Family Court was already signed up to, and to some extent has already been doing. Just as was the case in 1980, if the vision is to be delivered then judges, lawyers and the community will need to work together. And just as in 1980 this team will need the appropriate resources and support.

The second issue for this Court is a fit-for-purpose judiciary. I see three strands to this:

- supporting the wellbeing of the judiciary;
- providing the right educational support; and
- supporting diversity within the judiciary.

Foremost amongst the work that can be done to support the wellbeing of judges is to secure the resources you need to do your work to the high standards to which this Court holds itself. Failing systems and overloaded rosters are not conducive to judicial wellbeing. The feeling that the Court has let down a child, a vulnerable person or a family is devastating for any judge.

Heads of bench must have a broader focus on wellbeing than that, however. Last year you were consulted on the Mauri Tū wellbeing programme which

focuses on the provision of counselling services, and also a tuakana/teina mentoring programme.

Part of the stress for judges is the work we do. Some of the issues with which judges must deal are distressing, and at times traumatic. There is also stress arising from media coverage. Our media has an important role to play informing the public about what is happening in our courts and also as one of the means by which the judicial branch of government is held to account for the power it exercises on behalf of the state.

These are weighty responsibilities and the judiciary must work collaboratively with news leaders toward the long-term goal of achieving fuller and more accurate reporting of the work of the courts. This in part is the work of Huakina kia Tika (the Open Justice Committee), and the Media in Courts Committee.

This is a particularly difficult area for the Family Court – in large part because of the framework of statutory suppression and the difficult work of anonymisation that must go on before many judgments can become public. But it must be a focus of work for your Principal Judge and me.

The second strand, then, is judicial education. As you know, Te Kura Kaiwhakawā runs courses that are relevant to the work of this Court. But the Family Court has particular educational needs and they are changing needs, just as society changes. For this reason, I have asked Te Kura to undertake an audit of the educational programmes offered to the Family Court by Te Kura to ensure that they address these needs.

I have also asked Te Kura to increase the content of the course that focuses on judge-craft. It is important that in all of our courts we constantly strive toward the ideal of a fair hearing – that is the ideal that everybody who has business before the court has the same opportunity to be heard, no matter their gender, ethnicity or disability. At my swearing-in I spoke about how it is that we earn our authority to judge, not from the symbols of our power, but from the diligent, skilled and humane service we give. I said that I would work to remind judges that public power should be exercised with humility. And I intend to use whatever platform I am given to do just that.

This ideal is especially important in the Family Court where so many who come before you have experience of trauma; where so many come into court to deal with difficult and deeply personal issues. As judges we have the most profound responsibilities to these people. But I do not need to tell you that. Again, this group of judges has a role to play in sharing the skills it has developed in affording dignity and respect to people in the most difficult of circumstances.

Finally, judicial diversity. In this area, the Family Court is also a leader. The appointments of the last two years have greatly increased the diversity of this bench. As a group, you have a wealth of perspectives and knowledge to draw on. But diversity isn't easy. At times the difference of your colleagues' perspectives will seem difficult. I know this. I sit on a multi-member appellate court. But there is great strength and wisdom to be gained when differences are engaged with respectfully and with kindness. Diversity across the judiciary will continue to be my focus.

I mentioned earlier that resilience was also something I believed that courts and the judiciary must strive for. I have no doubt that addressing the two issues I have outlined will greatly increase the resilience of the Family Court. But I think that you can take pride in the strength and resilience the judges of this Court showed during the COVID-19 lockdown in March, April and May last year. The Court showed how quickly it could adapt to doing its work in a remote world. And where hearings could not be held, the judges put themselves to work reviewing existing files and processes.

I see the work that the Court did during COVID-19 as showing two things. First, you are a resilient and resourceful group of people. And second, that you are full of ambition and hope for your Court. And so you should be. We must all be hopeful that this Court, tasked with mending the fabric of our society when families fail, can achieve the support and strength it needs to deliver on the initial vision of a therapeutic court, connected to its community.

Thank you for listening to me. I hope to have the opportunity to speak to each of you today.