Dame Helen Winkelmann, Chief Justice of New Zealand

Address to the Community Law Annual Hui

2 November 2023

Tēnei te mihi,

Ki ngā mana whenua o te Tai Tokerau,

Ki ngā mate o te wā, haere haere haere atu rā,

Ki a koutou, te hunga ora e huihui nā ā-tinana,

Ki a koutou, te hononga i waenganui i te hāpori me ngā kōti,

Tēnā koutou katoa

I am honoured to have been asked to speak at this conference. I can't tell you how disappointed I am that I am not able to be with you in person — I was looking forward to listening as well as talking to you. I hope you will invite me to one of your future hui.

Community Law is a very important organisation because of the work you do in helping people with their legal problems. Yours is one of the most important organisations in the New Zealand legal eco-system.

Given the nature of our legal eco-system your work is not only important, but it is also difficult — we are a nation with complex laws, and a complex civil justice system. This is a justice system comprised of a bewildering thicket of courts, and tribunals, lacking any coherent structure or access pathway. It is a justice system in which legal services are overwhelmingly privately funded — few lawyers are prepared to work for legal aid, and in any case, there is very little legal aid to be had for those with civil justice needs.

Yet as a nation we aspire to the ideal that is the rule of law — that all are equal before the law. What is often overlooked is that ideal entails not just that all are equal before the law, but also that all are equally entitled to the law's protection.

We have good evidence, collected in New Zealand and overseas that we are falling short of that ideal. Overseas research suggests that most people with legal need do not seek assistance — either because they do not see their problem as a legal problem, or they have no expectation that there is a solution available to them.[1]

A 2018 Colmar Brunton Report commissioned by the Ministry of Justice "Legal Needs among Low Income New Zealanders" showed that 29 per cent of people experiencing a legal problem sought information or advice from a doctor or health professional, versus just 21 per cent from a lawyer and 12 per cent from a Community Law Centre.

There is increasing recognition overseas of undiagnosed legal problems as a cause of poor social determinants of health. A report from 2021 by the World Health Organization on the COVID-19 pandemic recognised "Access to Justice" as one of the present and future threats to health. A Canadian study from 2016 estimates the knock-on costs of unequal access to justice on public spending in other areas (including health care costs) to be approximately 2.35 times more than the annual direct service expenditures on legal aid.

[1] Deborah Rhode "Access to Justice: An Agenda for Legal Education and Research" (2013) 62 Journal of Online Legal Education 531.

Because of how short we fall of meeting the ideal expressed through the rule of law, some argue that it is a meaningless notion — a false promise — one which our society is incapable of delivering on.

I agree that if the rule of law is a standard by which we measure ourselves, as a society we fall a long way short. You know better than I the extent to which the benefit of the law is inaccessible to large parts of our society — the extent to which people are unable to access basic information about their rights, the extent to which they cannot afford or access legal representation, and to which they are unable to access the courts or tribunals to assert or defend their rights.

But I agree with those others who understand that it is the ideal itself, and the commitment of a society to it, which is the great social good. A society that subscribes to the ideal of the rule of law is a society that asks itself questions as to how well its laws and its institutions are measuring up to that ideal – at both the individual and societal level. And it is a society that creates plans to address obstacles that lie in the way of access to justice. The work we do of striving for that ideal is a great social good.

I was recently trying to convey this nuance to a news reporter, explaining that the reality was that we would not ever reach the happy place where all in society have full understanding of their rights and the full ability to enforce them, but that the task for us is to continue to strive toward this. This explanation resulted in the somewhat concerning newspaper headline, running alongside a photograph of me: "Access to Justice Problematic". This is not a statement you expect a Chief Justice to be making.

To have the emotional resources to continue to work to support this ideal, it is important to retain a level of realistic optimism, and for that reason some good news from time to time is to be valued. I therefore thought that New Zealand's performance in the recent World Justice Project rule of law project would be of interest to you — particularly as I believe you to have contributed to our ranking. This year, New Zealand was assessed to be 8th across 142 countries on the World Justice Project's measure of the rule of law — the highest ranking in our region, behind Northern European countries. New Zealand's ranking has remained relatively stable over the last five years. It is a prestigious measure, and so I was interested to interrogate how it is arrived at.

The website for the World Justice Project reveals that a nation's rule of law measure is assessed by reference to the ease and quality of access to civil and criminal justice. The analysis on the civil justice front focuses upon accessibility and affordability of civil justice, and the absence of corruption, discrimination, and delay.

These measures fit well with how we typically think about the preconditions for the rule of law. It is often said that for a nation to be under the rule of law, people must have access to institutions and procedures to uphold and enforce their rights. Secondly, people must have access to an understanding of the content of the law, and their rights and obligations under it.

It is clear from the World Justice Project that we are doing something right given that we consistently outperform far richer nations. I have no doubt that part of what we are doing right is through the work of Community Law.

Today I would like to reflect upon the work that Community Law does, and where it connects with how the judiciary is thinking about access to justice. I will also outline a development that has the potential to significantly reshape our legal eco-system — the use of technology to allow remote participation in proceedings. I explain the importance of ensuring that this development is used to facilitate better access to justice. And finally, I discuss new approaches that I believe have the potential to transform our legal eco-system.

Community Law respond in a unique way to society's legal needs.

I have been struck by the fact that the legal problems that present to Community Law Centres are in areas of law we seldom see in the Senior Courts — by which I mean the High Court, the Court of Appeal, and the Supreme Court. Community Law deals with a heavy load of family law and domestic violence issues, with employment and with tenancy, civil and debt collection. Research undertaken on expressed legal needs by Otago University academics in association with the Citizens Advice Bureau adds to this list of common legal problems: consumer rights and neighbour disputes — again we seldom see cases in these categories in the higher courts.[2] Typically, if legal problems in any of these categories make their way to the formal civil justice system it will be to tribunals and less frequently, the District Court.

The reality is that little of the decided case law, case law that emerges from the Senior Courts, addresses or provides solutions to the common legal issues that people need help with. That is a significant problem — as without cases the law will not evolve to meet emerging issues. The cases that the Senior Courts deal with usually concern disputes over significant wealth in the form of businesses, land, or estates. These courts are rarely asked to address unfairness in lending contracts. Nor are they often called upon to review social welfare entitlement with a public law lens. Employment law seldom makes it to the Senior Courts, or indeed, even as far as the Employment Court.

It is worth noting that the law students of the future are overwhelmingly educated by reference to Senior Court judgments — and, as a matter of logic, are seldom educated by reference to the legal problems that are most prevalent in our society.

What is apparent from this narrative also is that those who work in community law have important, perhaps unique perspectives on access to justice issues. You are in a unique position to be able to understand the areas of people's lives that produce the most legal need. You are equally well placed to understand what it is that stands in the way of people accessing justice.

In recent times the judiciary has been trying to lead or effect changes that enable our formal system to respond better to society's legal needs.

In 2021, the Rules Committee conducted a review — we described it as a once-in-a-generation review — of access to civil justice. The Committee consulted widely, approaching community-based legal providers, and community-based social providers. The most important contributions received were from Community Law. These submissions described serious barriers to accessing our courts for those with the most pressing justice needs. They described a court system which was alien to your clients, that remains Eurocentric (even though we live in a country in the South Pacific), and in which communication occurs in complex and obscure language and processes.

Your submissions presented a valuable yet daunting list of issues to address. They described the complex interplay between procedural and substantive law, and the vulnerabilities of many in our society that leave them unable to seek the protection of the law.

The Committee's conclusion was that vital as Community Law is, it cannot carry the responsibility of closing a justice gap of this magnitude. The Committee made extensive recommendations to government, which included that the jurisdiction of the Disputes Tribunal should be expanded to awards of $70,000 as of right, and up to $100,000 with the consent of the parties. Experience has been that the Disputes Tribunal is a very effective means of enabling people to assert and defend their rights.

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[2] Bridgette Toy-Cronin and Kayla Stewart *Expressed legal need in Aotearoa: From Problems to Solutions* (Civil Justice Centre, University of Otago, Dunedin, 2022).

A recommendation was also made that the position of Principal Civil Judge should be created in the District Court to enable a better focus on civil justice there. The difficult reality this recommendation responds to is that, outside the family law jurisdiction, the District Court's civil workload is overwhelmingly dominated by debt collection proceedings brought by debt collection and government agencies.

We are also working to develop better community connection and support for the work of the courts. You will no doubt have heard about Te Ao Mārama, which is being rolled out in the criminal and family jurisdictions of the District Court. Te Ao Mārama has two focuses. The first is upon creating hearing environments and processes that support engagement and comprehension for the people who are the subject of the proceeding. This can be as simple as using plain language or ensuring that communication assistance is available for those who are neurologically or linguistically impaired.

The second aspect of Te Ao Mārama utilises the court process as an opportunity to address the conflict or the harm that underlies the court proceeding. This is sometimes referred to as therapeutic justice — where the court facilitates community engagement and government support for defendants to address the causes of offending.

The concepts behind Te Ao Mārama are not new. They draw on the lessons learnt from the Youth and Rangatahi Courts, where judges have been practising this form of therapeutic justice for over thirty years. Te Ao Mārama also draws on the lesson from various pilot specialist courts aimed at adult offenders, the Alcohol and Other Drug Treatment Court, and the Court of New Beginnings for homeless offenders. If you have had the privilege of attending these courts then you know the profound opportunity they create to change the course of defendants' lives for the better – for the better for them, and also for their family, and the wider community.

This is a model that places the court within the community, drawing upon the strength of whānau, hapū and the broader community to identify and address the causes of the offending. As I have mentioned, because of the community-based nature of your services, you already have a profound understanding of the legal needs of your communities. With that inevitably comes an understanding of the root causes of those legal problems. I would like to ensure that through Te Ao Mārama, the understanding of the community that you have is able to be employed in realising the objectives of this model. I think the judiciary needs to talk to you about how this is best done.

Given the extent to which our criminal and family courts engage with Māori, the community will in many cases be represented by hapū and iwi. This is also an area where Community Law is already leading the way. I understand that you have recently secured funding to pilot Kaupapa Māori Legal Services at up to 15 Community Law Centres across Aotearoa. It will be important that we work with Community Law as we roll Te Ao Mārama out across the country.

Community Law also models a therapeutic approach

As I have mentioned, Te Ao Mārama utilises a model of therapeutic justice and that this includes ensuring individuals have the support they need to participate fully in the court proceeding. The importance of this approach is demonstrated by reference to some simple statistics. 91 per cent of prisoners have been diagnosed with either a mental or substance use disorder over their lifetime.[3]

[3] Jill Bowman *Comorbid substance use disorders and mental health disorders among New Zealand prisoners* (2016) 4(1) New Zealand Corrections Journal.

46 per cent of people imprisoned are affected by traumatic brain injury.[4] Other cognitive disabilities are also prevalent such as fetal alcohol syndrome,[5] autism,[6] and attention deficit disorder.[7]

Earlier this year, the Office for Disability Issues reported that disabled people experience higher rates of victimisation than non-disabled people.[8]

This reality has implications for the arrangements that should be made available to support full participation, it has implications for victim support, for the conduct of hearings, for bail arrangements, custodial care, for rehabilitation, and for sentencing.

Although in the past courts have had little capacity to respond to this reality, there are now some judicial initiatives in this area. The Young Adult List court in Porirua screens participants for mental health, addiction, or cognitive disorders. There is also increasing use of communication assistants in courtrooms throughout the country where counsel or the judge identify cognitive or linguistic obstacles to participation. These approaches will become more mainstream in the courts as Te Ao Mārama is rolled out.

Community Law has long-modelled such a therapeutic approach to the provision of legal services – with a focus on meeting the needs of the individual rather than making the individual meet the needs of the organisation. I am aware that Auckland Disability Law provides free and accessible legal services to those with disabilities — the only provider of its kind in the country. I am very interested in this work. It could not be more important that courts understand how we can reduce barriers and support people with disabilities to participate effectively in the justice system.

For the judiciary, the first step in this regard is to accept the responsibility to educate ourselves. Some initiatives are already in place, such as the "Kia Mana Te Tangata — Judging in Context" Handbook. This online resource provides judges with information about various communities who face barriers to full participation in the courtroom. It provides evidence-based and practical tools judges can employ to make appropriate adjustments to accommodate these challenges.

We are more ambitious than that. We are interested to understand and to carry into effect strategies to create enabling environments. Next week, two judicial committees are jointly hosting a Disability and Access to Justice event that brings together judges, key Ministry of Justice staff, the Law Society and disability advocates to discuss the challenges of disabled people who appear before the court, and who work in our courts. This initiative is focused on educating judicial leaders so that they can bring an enabling frame of mind to their planning and operational decision-making for the courts.

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[4] Natalie Horspool, Laura Crawford, & Louise Rutherford *Traumatic brain injury and the criminal justice system* (Ministry of Justice, 2017).

[5] See Gibbs and Sherwood "Putting fetal alcohol spectrum disorder (FASD) on the map in New Zealand: A review of health, social, political, justice and cultural developments" (2017) 24(6) Psychiatry, Psychology and Law 825; Flannigan and others "Fetal alcohol spectrum disorder and the criminal justice system: a systematic literature review" (2018) 57 International Journal of Law & Psychiatry 42; and Ministry of Health Taking Action on Fetal Alcohol Spectrum Disorder (FASD): A discussion document (2015).

[6] See Robertson and McGillivray "Autism behind bars: a review of the research literature and discussion of key issues" (2015) 26(6) The Journal of Forensic Psychiatry & Psychology 719; and Billstedt and others "Neurodevelopmental disorders in young violent offenders: overlap and background characteristics" (2017) 252 Psychiatry Research 234.

[7] See Knecht and others "Attention-deficit hyperactivity disorder (ADHD), substance use disorders, and criminality: a difficult problem with complex solutions" (2015) 27(2) International Journal of Adolescent Medicine and Health 163; and Cunial and Kebbell "Police perceptions of ADHD in youth interviewees" (2017) 23(5) Psychology, Crime & Law 509.

[8] Office for Disability Issues "Data on disabled people from the latest NZ Crime and Victims Survey" (11 July 2023) <www.odi.govt.nz>.

Community Law also provides access to information about how the eco-system operates

As mentioned above, access to justice depends upon people knowing about their rights and how to access and enforce them. Community Law and Citizens Advice have led the way in this in Aotearoa. The Community Law Manual is a valuable resource that makes legal information accessible to those in situations where they most need it.

I was also pleased to hear about the work Youth Law is doing hosting free education sessions for children and young people about the content of the law. Our judicial committee "Huakina kia Tika" has an initiative underway in its early stages to work with NZQA to develop achievement standards and resources about the role of the courts in our democracy. I think we would benefit from understanding more about the work that Youth Law is doing, and whether there are ways that our work can support this and, on the flip side, whether your work can inform ours.

Several government departments and agencies now also make considerable and commendable efforts to provide online legal information. But this information typically provides only a part of the information needed to navigate through to resolution of an issue. In 2020, David Turner and Bridgette Toy-Cronin released a report "Online Legal Information Self-Help in Aotearoa: An agenda for action" which identified this difficulty with existing resources and emphasised the need, drawing on lessons from other jurisdictions, to take a whole of jurisdiction approach. They concluded that a strategy of cooperation and user engagement is necessary to achieve this, and that this cooperation would require the coming together of people from across the judiciary, legal profession, and community.[9] I pick this point up later.

Remote technology

I now turn to discuss a development that will affect access to justice in the near and distant future — one that is relevant to all the themes I have touched on today — community, accessibility, and disability. That is — the use of technology to support remote participation in our courtrooms.

The use of remote technology is here to stay. The case for it is overwhelming. Recent disruptions to court proceedings caused by COVID-19, civil unrest and natural disasters have made that clear. So too has the incoming government's commitment in their 100-day plan to enact legislation enabling more virtual participation in court proceedings.

Allowing remote attendance has obvious potential to increase access to justice by lowering the barrier that physical distance can present. It can allow more efficient use of judge time. It can reduce the expense of travel for parties, witnesses, and counsel. It can allow a defendant to attend a hearing during a break at work without risking loss of income — or loss of their job. And clearly, remote participation can reduce the cost of the administration of criminal justice for the state.

If used well, remote participation can support better participation in hearings of those with disabilities. It can also reduce the stress of appearing in court for parties and for witnesses — a powerful consideration for complainants.

It is also a critical tool for increasing public participation in and understanding of the work of the courts. We have used this technology to enable the media to attend hearings in circumstances where, resource constrained as they are, they would not otherwise. We have enabled entire hapū to view treaty-based litigation from their marae hundreds of kilometres away from the site of the hearing. We have livestreamed significant cases so that the public in general can view them. We have used the livestreaming of cases to facilitate legal education.

[9] David Turner and Bridgette Toy-Cronin "Online Legal Information Self-Help in Aotearoa: An agenda for action" (2020).

But there are risks and downsides associated with the use of remote technology. There are some places where its use is not appropriate. No one would suggest that a jury should sit remotely from the courtroom. Victims' interests and the value our society attaches to respect for human dignity would also mean that remote attendance of an offender for sentencing might not be appropriate.

There is also a body of research that suggests that remote participation in a hearing is likely to be a poor substitute for in-person attendance for those with some forms of cognitive deficit. When we assess just how effective participation in this way is for defendants, we must add to the picture what I have already mentioned about the defendant population's high rates of cognitive impairment and mental health issues.

The use of AVL at early appearances also must be carefully weighed. Attendance of a defendant at a courthouse can enable community interventions to be staged and counsel and the judge to make critical, in-person assessments of the defendant. The Te Ao Mārama initiative conceives of early appearances as creating an opportunity to intervene in the defendant's life and to create a bridge away from offending — the opportunity of a lifetime, as Professor Ian Lambie puts it.

To ensure that remote technology develops in a way that enhances, not undermines access to justice, last year, the courts developed our own digital strategy — a project led by Justice David Goddard. This strategy was developed against the background of a commitment by government to introduce a digital operating model for courts, Te Au Reka.

The digital strategy aims to ensure that the technological change that is coming is used to better enable access to the courts and tribunals. It conceives of using technology to assist users to gain easy access to the right court and the right procedures, cutting through the procedural thicket I referred to earlier. This digital strategy also emphasises the importance of strengthening the connection between the courts and the community and maintaining the fundamental human quality of our justice system.

The strategy lists areas of focus over the next five years. It is an important document and I hope you read it. I mention today a few aspects that are relevant to Community Law. First, the strategy contemplates using a single court-based portal to direct users to relevant information wherever it sits, expressly mentioning the Community Law Manual. Secondly, distributed justice spaces will be available in public places like libraries, and in Community Law centres. Court users can use these community hubs to file their documents and even appear remotely. The potential for co-ordination of community and institutional efforts to support access to justice are, I suggest, obvious.

New Frontiers

There are some other green shoots to mention. There are hopeful signs in connection with access to justice beyond the courts and the work of Community Law. There are indications the profession is stepping up to the mark, perhaps encouraged by the fact the criteria for appointment as King's Counsel have recently been amended to include the work a lawyer has done to facilitate access to justice. There is a good synergy in this regard with the funding by the Ministry of Justice of Community Law's "Te Ara Ture" pro bono clearing house.

These green shoots are important, but I think more is needed. First, and most fundamentally, I think significant progress in access to justice requires an all of government approach.

Traditionally it is judges, lawyers, organisations like yourselves, and the Ministry of Justice who are the advocates for, and guardians of access to justice. But we have little control of the powerful levers that can solve the problems. Most rights and obligations are sourced from statute and accessed through government departments. There is therefore a compelling case for making access to justice a structural focus for all government departments.

Great strides would be made toward access to justice were legislation designed to facilitate not only comprehension but also enforcement of statutory rights. How rights and obligations are described and enforced impacts directly upon how easily understood and how easily enforced they are. Expressing rights in complex or vague terms sets up the likelihood of dispute. Rights which are only enforceable through the courts will be out of reach for many. And many more may not even be aware of their rights. Legislation can construct rights in a way that are easily understood and easily enforced. It can create dispute resolution pathways that are accessible.

There are signs that institutions and systems are responding to the calls for better access to justice. It is a positive innovation that MBIE has now established a Government Centre for Dispute Resolution Principles. The purpose of this Centre is to provide principles and information to assist government departments to design dispute resolution processes. The information it provides is a fascinating read.

There is also scope for better co-ordination of the many who are working actively in government, the profession and in the voluntary sector to support access to justice. There have been some steps in that direction through the "Wayfinding for Civil Justice" strategy. As you will know, Wayfinding is a strategy for access to justice prepared by a Working Group chaired by Dr Bridgette Toy-Cronin. Again, this is funded by the Ministry of Justice but is sponsored by both me and the Secretary for Justice.

Wayfinding is intended to provide a framework for the justice sector (both government and non-government) to encourage a unified and coordinated approach to designing and planning civil justice initiatives.[10]

The final Wayfinding strategy is intended to be released before the end of the year. The draft strategy document states that Wayfinding will be successful if everyone is aware of each other's efforts and all the efforts are contributing to meeting the strategy's goals. Those goals being:

1. Increase community access to legal information and self-help tools.

2. Increase the availability of affordable legal services and increase lawyers' knowledge and understanding of communities and their needs.

3. Increase the availability of information about the range of dispute resolution mechanisms that are available and ensure equitable access to the courts.

4. Finally, increase knowledge of how the system is currently operating, and evaluate and monitor innovation and change.

I am pleased to say that as part of implementing the Wayfinding strategy, the Ministry of Justice has confirmed funding to establish a National Civil Justice Observatory to facilitate stakeholder engagement. This will be housed at one of the country's tertiary institutions.

I conclude with this observation. Community Law is a great source of strength within our communities and within our legal eco-system. As the Wayfaring strategy identifies, there is much more that can be achieved if we are prepared to cooperate to share knowledge and better align our efforts. I think we are at a point in time at which there are unique opportunities to achieve this. I

[10] Bridgette Toy-Cronin and others *Wayfinding for Civil Justice: Strategy consultation document* (Ministry of Justice, April 2022).

therefore thank you once again for giving me this opportunity to speak. I am happy to take questions.