

Major change within court system must happen: Chief Justice

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KATHRYN RYAN The Chief Justice says major change within the court system must happen and the COVID-19 pandemic has highlighted the issues. Jury trials were suspended in March because of the virus and will only resume in August. At last estimate 60,000 events were backlogged across the court system. Chief Justice Dame Helen Winkelmann says people on remand awaiting trial, or sentencing, are most affected. She sees the remand population as unacceptable, the court system too complex, and the cost of litigation too high. Justice Winkelmann describes the experience of the pandemic as a cauldron, but maintains significant change can happen quickly.

HELEN WINKELMANN Unprecedented. The courts shut down for a substantial part of their work, for an eight week period. The public couldn't really access the courts physically, and the courts are usually a physical space in which the public, the profession, judges come together to solve societal problems. And that aspect of the courts' functioning was stopped. Some cases continue to be heard, but they're a very narrow category of cases in the first two weeks of the lockdown. But over time, as we shifted through the alert levels, we were able to conduct more work. But overall the impact of the lockdowns has been an increasing backlog in the courts' workload.

KATHRYN RYAN Jury trials have actually been suspended. You suspended them back in March, out of extra care clearly. Suspended still to the beginning of August.

HELEN WINKELMANN Yes, so we took the decision before we even had the alert system to suspend jury trials because the service that is asked of jurors is a very particular thing. You ask people come away from their ordinary lives and step in to the criminal justice system for a period of days usually, sometimes weeks. They sit in close confines with eleven of their fellow citizens. They work over some of the most vexing issues to try and reach agreement. It's quite an intimate process and in the context of a pandemic we felt that we couldn't really wait any longer, there was too much concern amongst the profession and amongst the jurors about continuing, so we took the step of suspending them. Now we're not starting again until August and people ask why that is, and that's because of the lead time for a jury summons. So there's a five to six week lead time on that.

KATHRYN RYAN That in itself shows that there's inevitably been an impact on access to justice during this time. The court system so impacted, jury trials suspended, people have been waiting to hear their cases heard in a timely manner, and you must reflect on that as Chief Justice. You must reflect on how, reflect on how it has affected people.

HELEN WINKELMANN Yes it's of enormous concern, because we talk about backlog and we talk about case numbers, but these are people's lives. The justice system impacts on individuals, it impacts on families, impacts on communities and every piece of delay in that system is something that we all should deeply regret. This pandemic hit a system, which was already clogged with a backlog. In our District Court in particular, we'd had an upsurge in workload just before the lockdown, we'd had to add 21 new judges appointed, some to

replace retirements, but some to increase our capacity to address that backlog. Now we've had about a 13-15 percent increase in the workload of that court, as a consequence of COVID-19 and that's of huge concern to the Chief Judge of the District Court, to all of the judges of the court. And of course to me.

KATHRYN RYAN It's the heads of bench who must now try to find ways of dealing with a backlog in their individual courts?

HELEN WINKELMANN Yes, we work as a group, because there is so much in common across the courts, but it is predominantly for the Chief District Court Judge to address that.

KATHRYN RYAN Where are you at then as the top judge in looking at the preexisting pressures on the courts, now so massively exacerbated by this, and what it should mean for changes to the court system and operations?

HELEN WINKELMANN We had already resolved that change was needed. There were many things telling us that. In the civil jurisdiction, we knew we had significant access to justice problems. We weren't seeing those who should most be able to seek the protection of the law before our civil courts, the people who are at the margins of our society. I should say in that regard that this is a problem that affects court systems across the world, so it wasn't a unique one, but we had resolved to take active steps. We had reform projects underway in that regard. The Ministry of Justice, who supports the operation of the courts, were also similarly resolved to support the judiciary in addressing this issue. The Ministry provides us with our courthouses, our registry staff, our IT. And we had underway a rules reform project, but we're also working within the community to see what access to justice projects the judiciary and the Ministry could work with.

In the criminal justice area, we had all the information coming to us from the various reports about the stress that was existing within the criminal justice system, about the rising numbers in our prisons, about increasing numbers of those who are on remand in our prisons. These are people who haven't even been sentenced to a stay, spending lengthy periods of time in our prisons and that of course is of great concern. So these were issues that we were already taking steps to address. And we were initially frustrated the pandemic was stopping us carrying forward our objectives in that regard. But I can say one thing about the pandemic, which is that I think has been observed by other people, that it is a sort of a tear in the ordinary way of doing things. It's a point at which we've all had to stop and reflect about how we've been doing things in the past. It's made us see that things we have thought are inevitable, or unchangeable, effectively are not. So it's made us reflect about what we should take forward into our future from that past way of doing things. And it's also given us an opportunity to see some new ways of doing things and make decisions about whether we take that forward into the future.

KATHRYN RYAN How much can you say about where you were heading, in a bit more detail, before we look at what you're resetting? For example, when you talk about in civil system, people on the margins, specifically what kinds of areas are you alluding to?

HELEN WINKELMANN The cost of litigation is so high. And that's acknowledged as one of the major barriers to accessing our courts. So too is a lack of knowledge. If you don't know

about your rights, that's a problem. If the court system is too complex, that's a problem. It requires a multi-factorial response really. It's a very complex thing and it's not just the judiciary, the judiciary can't solve the problems completely. There are issues about the level of legal aid that is provided. That's not a thing over which the judiciary has control, but as Chief Justice, I've said I have an interest in that, because anything which affects access to our courts, I believe the judiciary has a legitimate interest in, and that's something we have been advocating for, that there is better legal aid available to the public, rules reform, simplifying the rules of court. There is a major rules reform project underway. If you speak about rules reform to lawyers, even probably worse non-lawyers, their eyes tend to glaze over. But actually the procedure that courts have can impact substantive outcomes. And we have said through the Rules Committee that we are open to quite radical reform. We have seen some quite radical approaches being taken in the last little while. So that's in the civil justice area, those are the areas we were looking at. We're also trying to work with communities to understand what the unmet legal need is in the communities.

KATHRYN RYAN And in the criminal area, where it is always a question, as you said, of how long people are waiting, the way an individual case can go through various delays and permutations, people on remand, where had you got to before this about what might improve there?

HELEN WINKELMANN So we have a concern about churn in our system. That's one way of describing events. We have multiple 'events', as we call them. People coming into the courthouses and really their case is not progressed at all by that appearance. The justice system is an extremely complex system. The judiciary appears to have control of it, but actually the judiciary can't on its own solve delay. The actions of police can impact upon whether, when a case comes to court, it's ready to move on. The actions of the Corrections Department can impact on whether the defendant's available to make an appearance. A case could be unnecessarily called because the defendant's actually not there. And particularly how the profession responds to the courts timetables can have an impact. So that was an issue we had identified. But we had yet to, I'd say make particular headway on bringing together those voices, in a way which moved us forward.

KATHRYN RYAN So after this period of extreme stress on the system, but also the system being suspended, where have you got to now on what could and should change that?

HELEN WINKELMANN That issue of churn is a particular focus. The Chief District Court Judge has formed a special committee to address this. It's a committee made up not just of judges, but also of the profession, of Corrections, of the Police. And we've tried that before, but I think what's happened is that the pandemic response has been such a stress test, such a cauldron of an experience, that there is a high level of resolve that we can make a difference now. People believe that they can, through working together, change how things are done. And really, honestly, we have to, because our remand population is unacceptable. Those on remand, often they're not even convicted, they're actually awaiting trial. Some are just waiting sentence. They don't have access to rehabilitation, so they can often be sentenced and then released immediately. And that should be of great concern to us as a society, because what are we putting them in there for? We want them to have access to rehabilitation programs during their sentence, not being sentenced and then immediately released.

KATHRYN RYAN What would it take for the kind of root and branch reform in some ways, of the system problems that cause churn? Which is all the different elements not coordinated, one bit's missing, and it's another delay to the next list day or whatever. You mentioned IT earlier.

HELEN WINKELMANN Yes.

KATHRYN RYAN And is that a big missing part of the puzzle of coordinating all these complex individual systems, into one that works?

HELEN WINKELMANN Yes, it is part. I mean, I would not back away from a commitment to thinking that the most significant answer is human, it's people working together and understanding the system, and understanding how they can improve how they work together. But IT is certainly a part of it. When we went into this pandemic, our court system was a very kanohi ki te kanohi, face-to-face system based on 65 courthouses throughout New Zealand. And that worked well, but what didn't work well was that our files in our busy trial courts, the District Court and the High Court, were still paper-based. We are a digital court system. Judges use computers. They are sophisticated computer users, but the problem is that our files are paper-based. And that means that pieces of information that should be together are sometimes not together. It also means of course that when you can't access the courthouses, it's quite hard to conduct business.

KATHRYN RYAN What happened to that court's computer project of some years ago now that was undertaken, that was meant to transform away from a paper-based system? Well I can tell you what happened, it stopped.

HELEN WINKELMANN Yes. It stopped.

KATHRYN RYAN Was there a reason for that? Is there a barrier, whether it is financial, or whether it is logistical, or whether it is legal, to making a system work, getting away from paper and having an IT system that would allow you to immediately access what you need to access wherever you are in the system?

HELEN WINKELMANN Yes. That previous IT project failed and there are various reasons it did. As I said, the judiciary wasn't in charge of it, because it's actually the Ministry of Justice who provides our IT systems, so I prefer not to speak to why it failed. For one thing, I wasn't involved in it, because I think it was about 10 years ago. There are no legal barriers to us having a properly functioning digital operating model, but it is an extremely hard thing to achieve. Many court systems throughout the world have attempted it and failed. When we talk about the court system, it's easy to think of it as a simple monolithic thing, but the courts conduct widely varying work. We have the principal trial courts, the District Court, the High Court, we have the Family Court, the Youth Court, we have specialist courts, Environment Court, Māori Land Court, Employment Court. It's a huge system and with many inputs. So it's complex. What the judiciary has learnt, I think, along with the Ministry of Justice, is the best solution to finding a digital operating model is small steps. That avoids the risks of the big bang type solution, which was the 10 year ago solution, and it is what we're now working through.

So that's an opportunity that has been created by that pandemic, because of the need to shift from a paper operating model to one that could operate in a more remote, even virtual sphere. The court quickly reconfigured, with the judges working with the Ministry of Justice to a virtual operating model. And some of the some of the ways of working then, some of the lessons, I'm resolved that we carry forward. I'm quite resolved that we continue to maintain electronic filing. And I'm also resolved that we continue to support lawyers for instance being able to appear in court in low-importance matters from their offices, by remote, so AVL type TV. It's called a virtual courtroom. Because that just reduces the costs for all parties. It means that we're respectful of people's time. We can have people there when they need to be. They do not have to wait in great big queues to come into the courtroom. So there are a lot of opportunities created by the pandemic that we can look forward to carrying forward.

KATHRYN RYAN Effectively you have trialled things out of necessity that you believe can become permanently part of the system. What if anything prevents that happening right now?

HELEN WINKELMANN Nothing prevents it happening. And we are carrying it forward. I suppose if we look back, people often joke about judges being resistant to change. My experience is that in many respects that's not so, but judges are by nature conservative, because they're protectors of a system which creates stability in our society. The law is the stabilising influence in our society. And when you understand a system, you're concerned that you not break it. And so in every respect, there is an anxiety not to tinker with a system which protects such fundamental values, such as the liberty of the person, particularly the vulnerable.

KATHRYN RYAN People want to know that it will not impact negatively on justice, that there will not be a difference in the ways if someone reads body language, for example ...

HELEN WINKELMANN Yes.

KATHRYN RYAN ... where very practical. And that people won't be reduced to numbers in a list. I can see that these are the sorts of debates that would be had. And there's just an innate reluctance sometimes isn't it, to system change, when people believe in the system?

HELEN WINKELMANN And sometimes for very good reason. One of the significant issues that was in play from my perspective, before the pandemic, was the use of AVL to bring people in from remand into the courtroom. So everyone was gathered in the courtroom, except the defendant who was there on a screen. I am very opposed to the use of AVL to bring defendants in to matters in the courtroom, where everyone else is entitled to be there except them, and yet they are the person whose future status is at issue in the proceeding. Yes we can AVL for low significance matters, procedural matters, but I do not think that it's appropriate to use those sort of remote technologies for when a person is appearing first or second time, in first or second appearance in the court system. Because that's the point in time in which the most critical decisions are made about them, about whether they have mental health issues, about whether they can be released on bail. It's the opportunity to bring the community in to support them, to bring their family in to support them. So those are the kind of considerations that are in play when we make decisions about a digital future for the

courts. Yes we can use digital technologies, but fundamentally, the justice system is a face to face system. Justice is a human value and it should be administered respecting human dignity.

KATHRYN RYAN There's also the cultural lens on this as well, and we know they are grossly disproportionate, the representation of Māori in our court system and our prisons. And as you think about how the system might work much more efficiently in the interests of access to justice, are you also mindful of that, and is there is there a chance to think again about even what our courts look like, and what our system looks like? There's already been changes of course.

HELEN WINKELMANN Yes. There has, over the last 10 or so years, we've had the introduction of therapeutic courts, which are courts which operate under the underlying premise that we shouldn't should be just looking to put people in prison through our court system, we should actually be trying to address the problems, to stop reoffending. Because that's the best thing we can do for our communities, for our society. Stop the harm that's caused to victims, to the family of the defendant, to the defendant, by offending, by imprisonment. And so that is something we've been working on for the last 10 or so years. In in the last year, I've been working predominantly with the Chief District Court Judge to mainstream those therapeutic courts, and the concept of that is that we bring in to the court system the community and because of the over overrepresentation of Māori within our criminal justice system, we need the support of iwi in that, because they can be part of the problem solving that is done through this system.

KATHRYN RYAN If you are looking, particularly with the backlogs that there are now, they are long, that the respective heads of bench are dealing with in their courts, if you are looking at continuing some of the efficiencies, and I use the word in the context of trying to speed up access to justice, becoming permanent, and really establishing a system that cuts out a lot of this churn, or cuts out a lot of the delays, the pointless delays, it will have a logistical and a resourcing impact, I'm sure. It may well be that as a result a lot of money saved to the taxpayer. In the short term, is it likely there would need to be an investment?

HELEN WINKELMANN We had the investment of additional District Court Judges in February and March, and there may well need to be some investment, but there are more fundamental things that we need to do before we think about spending extra money on judges, or courthouses, we have to design the model. And then we have to implement it. It is a human enterprise. And the most fundamental thing we have to change is human behavior. And so the work is already underway reaching out into community and getting support in place. We have the support of the Ministry of Justice, and I know the present Minister of Justice is also very supportive of the mainstreaming of therapeutic courts. So I'm not so focused on additional resources at the moment, but if we look in the future, it's going to have an impact on the way our courthouses look. For instance, when we build new courthouses, they'll look differently. They should be community places really where the community service providers are there supporting victims, defendants, defendants' families.

KATHRYN RYAN But alongside that, this current issue you have of saying "Look there's a lot more we can do in the court system as it is to speed things up and to reduce churn and

make more use of some of the remote working we've done in an appropriate way". Is there going to need an upfront investment in technologies, or otherwise?

HELEN WINKELMANN We already have strategies in place to address the backlog. We're working closely with the Ministry of Justice and in terms of judicial resource, I think it will need some additional resource in the District Court and we've indicated that. And so that's underway is, yes.

KATHRYN RYAN In the legal profession itself, the lawyers. You mentioned perhaps that some of the judges would be looking at systemic change and saying that they need to be satisfied, it's not going to have any implications on the justice system. What of the lawyers themselves, the legal profession? Are they hungry for the sort of change that sees much less wasted time?

HELEN WINKELMANN Yes. They're hungry for change, yes. They look forward to a time when they don't have to wait around in a courtroom for 15 other matters to be called, for instance. But more fundamentally, they want a system that operates better for their clients. And also lawyers, defence counsel have an interest in how the overall system serves society, so they're concerned about the impact, beyond their clients on the victim for instance, of delay. So they're very keen to work with us.

KATHRYN RYAN Is this an iterative project, or have you over these past weeks actually mapped out something that has a beginning and an end time, or some deadlines that you'd like to meet?

HELEN WINKELMANN We already had a plan mapped out before the pandemic...

KATHRYN RYAN So did a lot of us...

HELEN WINKELMANN [laughing] Everyone has a plan till they get hit with a pandemic...

KATHRYN RYAN Yes.

HELEN WINKELMANN ... the plan has been changed by the pandemic, but yes there is a plan and the starting point is what's already underway, which is to reduce churn. If you reduce the number of court events per proceeding, if you reduce the times you drag people into court, all for no purpose, then you actually increase the ability of the court to clear the backlog. So that's the first step. The second step is to reconceptualise the criminal justice system, to make it a system which is on a human scale. Because of the increasing backlog, there were moves to speed things up, and it's easy to slip into an industrial model of criminal justice and our resolve is not to allow that to happen, to bring back the human scale, so that every time someone comes into court, it's a meaningful event. And meaningful not just in the sense that their proceeding has moved on, but also in the sense that there are steps taken to address the causes of offending. Defendants present as people who have multiple issues. They don't just suddenly appear as an offender. Normally there are background issues such as addiction issues, severe head injuries, poverty, learning disabilities, and so in a way the court system is a triage system for that. A person presents as in need of support, to assist them from offending again. And so the second step is for us to use that opportunity.

KATHRYN RYAN Chief Justice Dame Helen Winkelmann.