

Dame Helen Winkelmann, Chief Justice of New Zealand

Address to Auckland Disability Law AGM

Mangere Community Law Centre

Monday, November 18 at 11.15 am

Tēnā koutou katoa,

Ka rere āku mihi,

Ki ngā mana whenua o Tāmaki Makaurau,

Ki ngā mate o te wā, moe mai rā,

Ki a koutou, te hunga ora e huihui mai nei, kia rangatira ai te whānau turi, te whānau whaikaha – kia whāia te kaha, whāia te ao mārama,

Tēna koutou, tēnā koutou, tēnā koutou katoa.

Thank you for the invitation to speak. I am honoured by it and by the invitation to share a little of today with you. I very much value this opportunity to hear about the work you do to transform lives and to make justice accessible.¹

Making justice accessible is a purpose we share. This morning, I am going to explain a little about my role, and how I see issues affecting access to justice for Deaf and disabled communities within that context. I will also outline the steps being taken by the judiciary to ensure that our courts, and indeed our law, better meet the needs of Deaf and disabled people. I acknowledge that this is an area of work in which there is much to do — and indeed that there is much for me, and other judges to learn. I am keen to hear of your experiences, ideas, and suggestions. While I am here to speak to you, I am also here to learn.

How does access to justice fit into my role as Chief Justice?

A core responsibility I have as Chief Justice is to support the work of the courts. In doing this I work to address challenges and lead improvement where it is needed. The fundamental role the courts play in our society is to uphold the rule of law through the administration of justice. When I speak about the rule of law I speak about an ideal — the ideal that all are equal before the law, and equally entitled to its

¹ Auckland Disability Law *Disability law 2028* (Auckland, 2023).

protection. The courts are a critical expression of our society's commitment to that idea. They allow people to come to court to argue for, or defend, their rights. They do so in a hearing that occurs in accordance with procedural rules designed to ensure it is fair. The hearing occurs in front of an independent judge who will impartially, and with skill and diligence, resolve the issue through the delivery of a reasoned judgment. That judgment in turn will contribute to law that itself should have fundamental characteristics consistent with the rule of law.

The rule of law as administered through the courts is an easy ideal to state but harder to achieve when you consider the wide variety of people that the courts must serve. The courts serve people with different means (can they afford a lawyer and the court fees?), with different understandings of what their rights are (do they even know they have rights or that they have been breached?), and with different abilities to participate in court proceedings, constructed as they are with buildings, processes and systems easily traced back to Victorian times.

I break these challenges to securing the rule of law into two headings:

- a) enabling people to access the courts; and
- b) supporting people who have made it into the court system to find their way through it.

These two topics are both about participation and are to do with what we refer to as “procedural justice”. People must be able to participate in these two senses if our justice system is to be fair and just.

Along with other judges, I am critically concerned with both aspects of procedural justice. That is because no society can say that it subscribes to the rule of law if significant portions of its population are excluded from access to the courts or excluded from proper participation in the processes thereby invoked.

The judiciary does not control all the levers required to secure procedural justice in this sense. The legal market is beyond our control and legal aid funding is decided upon by the Executive.² More broadly, judges do not have the funding to run courts, and so rely upon the Executive, the Ministry of Justice | Tāhū o te Ture, to provide the courthouses, staff and technology for that purpose. In return, the Executive is permitted to charge fees — which provide another barrier to access.

But to the extent we do have input or control, we use such influence as we can to argue for and work toward procedural justice as I have described it. And we do have control and input. Subject to resource constraints, judges control how individual proceedings are run. And judicial leadership has significant input into the processes employed in courthouses and court proceedings, most particularly through the rules of court.

² The Executive branch of government refers to Ministers and Government departments: Ministry of Justice | Tāhū o te Ture “Going to Court: New Zealand’s constitutional system” <www.justice.govt.nz>.

Something else judicial leadership must think about is substantive access to justice. Even if the procedural side is well organised and resourced, the content of the law should be such that it does not work injustice when applied to different people or different parts of society. You can see this notion of substantive access to justice operate in all sorts of areas of the law. A simple example can be seen in the interaction of mental health and criminal liability — what we refer to as the insanity defence — now a statutory defence, but which was once a development of the common law. The content of the law has very real implications for access to justice.

I should say also that procedural and substantive access to justice are connected — if certain groups of people cannot come to court, or cannot fully participate in proceedings, then the development of the substantive law will be stifled and fail to reflect our society.

In New Zealand the task of development of the substantive law is done in large part by Parliament when enacting statutes. But individual judges also play a role in developing the law — they do so by applying statute law to the individual case, and also in applying that part of the law which is not statute based — that part of the law we call common law — to the individual case.

In this area, as Chief Justice, I have a responsibility to ensure that as they go about this work, judges have sufficient education and information to enable them to understand their society, and to understand the support that is needed to enable full participation by those who come before them.

How do the access to justice needs of Deaf and disabled people fit into this picture I have painted?

It will not be news to you that there are an estimated 1.1 million disabled people in Aotearoa New Zealand — nearly every one in four people.³ This proportion rises to approximately one in three for Māori.⁴ In the criminal justice system, the representation of disabled people is even higher. There are longstanding and significant intersections between disability and the criminal justice system.⁵ The 2022 United Nations report on New Zealand's implementation of the UN Convention on the Rights of Persons with Disabilities convention expressed concern as to the over-representation of disabled people in the care and protection, youth justice, and prison populations, recommending the development of a disability justice strategy.⁶

We know that many — perhaps most — offenders experience language difficulties or dyslexia. For many, their dyslexia is diagnosed for the first time in prison. Around 90 per cent of young offenders have below average language skills for their age — a relevant factor when you consider that reading

³ Statistics New Zealand | Tatauranga Aotearoa *Disability Survey: 2013* (17 June 2014) at 2. Another Disability Survey was conducted in 2023, and the results are expected to be published in late 2024.

⁴ At 9.

⁵ Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister's Chief Science Advisor | Kaitohutohu Mātanga Pūtaiao Matua ki te Pirimia, 29 January 2020)

⁶ *Concluding observations on the combined second and third periodic reports of New Zealand* Un Doc CRPD/C/NZL/CO/2-3 (9 September 2022) at [23(a)].

comprehension has been found to be predictive of future offending.⁷ There is also a high prevalence of autism spectrum disorder⁸ and attention deficit disorder amongst the criminal defendant population.⁹

Almost all people in prison in New Zealand (91%) have a lifetime diagnosable mental illness or substance-use disorder, which can co-occur with brain and behaviour issues such as fetal alcohol spectrum disorder (FASD) from birth or traumatic brain injuries (TBI) that they have sustained at a point in their lives.¹⁰

That is one side of the criminal justice system. Disabled people are also more likely to interact with the courts as victims — a report released last year by the Office for Disability Issues reported that disabled people experience higher rates of victimisation than non-disabled people.¹¹ They are more likely to experience sexual assault and intimate partner violence than non-disabled people. They are also more likely to be victimised by a family member and experience deliberate use of force or violence.¹²

These figures tell one story. There is another story to be told about disabled victims of crime who are unable to engage with the criminal justice system in order to see the crime against them investigated, or successfully prosecuted. As to this we gain insight from the important work of the Royal Commission into Abuse in State and Faith-based Care.¹³ At least two case studies in that report make plain how disabled survivors of abuse were unable to interact with the courts and describe the deeply problematic effect of the adversarial system when it came to giving their evidence — the difficulty they experienced with being understood.

There is yet another story of those who have a legal need but who cannot access the court system — because of a lack of legal knowledge and assistance, or because of the many barriers a system not designed for accessibility can create.

In the civil justice system, Deaf and disabled communities are perhaps better measured through their absence rather than their presence. Again, we can get some sense of this from the Royal Commission

⁷ Lambie, above n 5, at [138] and [181].

⁸ See Caitlin E Robertson and Jane A 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 Eva Billstedt and others “Neurodevelopmental disorders in young violent offenders: overlap and background characteristics” (2017) 252 *Psychiatry Research* 234.

⁹ See Carlos 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 Kimberley J Cunial and Mark R Keibell “Police perceptions of ADHD in youth interviewees” (2017) 23(5) *Psychology, Crime & Law* 509.

¹⁰ Lambie, above n 5, at [4] and [15].

¹¹ Whaikaha | Ministry of Disabled People “Data on disabled people from the latest NZ Crime and Victims Survey” (11 July 2023) <www.whaikaha.govt.nz>.

¹² Ministry of Justice | Tāhū o te Ture *New Zealand Crime and Victims Survey: key findings – Cycle 5 report* (June 2023).

¹³ Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *Whanaketia: Through Pain and Trauma, From Darkness to Light* (25 June 2024).

Report where survivors of abuse in care who sought compensation and redress through the civil courts explain the many legal and practical barriers they faced.

Legal need is a dramatically under researched area in New Zealand. For that reason, the publication of the *Justice Access To Justice: 2023 Legal Needs Survey* last month is a welcome contribution to this area.¹⁴ The results of that survey show us that the most common categories of legal problems experienced by the disabled community are consumer law, debt, welfare, housing and ACC.

Of the disabled respondents surveyed, over half had experienced a legal problem in the past year, compared to just a third of the general population. A third of disabled respondents also admitted they felt confused as a result of receiving legal help.

The survey paints a clear picture of the multiple, compounding nature of these legal problems, and the intersection with other socio-economic factors such as housing, unemployment, gender, and ethnicity.

It is not surprising therefore that people with unmet legal needs often do not identify that their problem is a legal one.¹⁵ 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. 35 per cent of those with a long-term health problem or disability cited the cost of lawyer’s fees as the barrier that stopped them seeking help.

Those who find their way into the civil court system are also not well served. In October 2023, Auckland Disability Law made a submission to the Judiciary’s Diversity Committee, *Tomo Mai*, in which you described inadequate and inaccessible information to enable Deaf and disabled people to access the support that is available in our courthouses. You identified the lack of information for lawyers as to how to obtain communication assistance as another obstacle.

The picture I have just sketched out makes the case that the justice needs of disabled and Deaf people have clear and pressing implications for the design of our court processes, how we provide information, how we conduct hearings, how we design our bricks-and-mortar, *and* our digital, courtrooms. It is for that reason that it is a central focus of my thinking and work as Chief Justice.

What is the judiciary doing about this?

A judicial committee led by Justice Susan Thomas, *Tomo Mai*, has oversight of a broad work programme directed at improving access to justice for Deaf and disabled people. *Tomo Mai*’s disability working group is developing principles to guide the judiciary’s engagement on disability matters. These principles will draw on the recommendations of the United Nations 2022 report, including the recommendation that government engage with external organisations of disabled people in finding solutions and develop

¹⁴ Ministry of Justice | *Tāhū o te Ture Access To Justice: 2023 Legal Needs Survey* (29 October 2024).

¹⁵ Deborah Rhode “Access to Justice: An Agenda for Legal Education and Research” (2013) 62 *Journal of Online Legal Education* 531.

meaningful partnerships to co-design, co-produce and co-evaluate processes. The design of these principles will give full weight to the message we have heard loud and clear that such engagement must be respectful and not exploitative.

A significant stream of work already underway is focused on judicial education. For the judiciary, accepting the responsibility to educate ourselves regarding disability and the experience of disabled people is an important first step in improving the system. As part of a broad educational programme offered by Te Kura Kaiwhakawā | the Institute of Judicial Studies, seminars are run for judges exploring how diversity and vulnerabilities intersect with judicial decision-making. At the same time, a broader programme is under development in response to the recommendations of the Royal Commission.

For the last few years Te Kura has also been developing the “Kia Mana Te Tangata — Judging in Context” Bench Book. 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 that judges can employ to make appropriate adjustments to support full participation. Within the bench book is a chapter on neurodiversity, while a chapter on physical disability is currently under development. The material is developed in consultation with community groups, and on occasion experts, who can speak to the subject matter. We hope to be able to release it to the public in the not-too-distant future.

The work I have just outlined is judicially led. But much of the work that the judiciary does to better support procedural justice is done in association with the Ministry of Justice. That is because, as I mentioned earlier, the Ministry of Justice provides the courthouses, staff and technology to enable the courts to run.

Although judicially led, Te Ao Mārama is now a joint project with the Ministry of Justice.¹⁶ It is, in essence, what is called a therapeutic court model, which has as one of its core design principles that support should be available for those who are drawn into our courtrooms to ensure that they are able to fully participate in matters affecting them. It also uses community connection and government agency support to find solutions to the issues that underlie the proceeding.

The Te Ao Mārama best practice framework was reviewed and improved by experts in the disability sector. At the local level, the engagement with community providers has included engagement with external groups representing disabled communities.

A working example of the Te Ao Mārama model is the District Court Young Adult List for 18-to-25-year-olds. This List simplifies standard court processes to assist engagement. It connects young adults with community supports who can help them through court and possibly beyond.

Early next year, new approaches in the Porirua Young Adult List will be piloted for six weeks to improve the Court’s response to neurodiversity. These approaches include training for court staff about neurodiversity, resources, and guidance to enable the court to respond to neurodiversity, and a

¹⁶ See District Court of New Zealand | Te Kōti-ā-Rohe o Aotearoa “Te Ao Mārama – Enhancing Justice for All” <www.districtcourts.govt.nz>.

screening tool to identify defendants who might benefit from procedural supports and accommodations.

Perhaps the greatest potential for improving access to justice for Deaf and Disabled Communities lies in digital technology. There are two main developments in the courts' use of digital technology I wish to touch upon. The first is the work being done to provide a complete digital operating system for the courts — we presently have a partial digital operating system made up of bits and pieces, some of which are antique in computing terms. I say our present system is partial only, because all the courts still have paper files, even if some now also use parallel digital copies.

The second area of development is the increased use of remote participation in proceedings. By this I mean the adoption of Audio-Visual technology (AVL) to enable witnesses, parties, victims, defendants and sometimes even judges to be beamed into court on a screen from a remote location.

The use of AVL in this way can lower the barrier that physical distance can present, it can reduce the time commitment that can be so disruptive of people's lives, and it can increase public participation in, and understanding of, the courts' work. Importantly for today's purposes, it can better support participation by Deaf and disabled people, reducing barriers to access.

But there are risks and downsides. Replacing in-person appearances and in-person hearings can impede communication and understanding for some people and in some circumstances. It has the potential to obstruct the flow of information in proceedings and to diminish the richness of human interaction. Its impact on decisionmakers is not yet fully understood. For some people and in some cases it may just not be appropriate.

The judiciary needs to be sure that use of remote technology develops in a way that enhances, rather than undermines access to justice. For this reason, the judiciary has developed our own digital strategy.¹⁷ One of the four pillars of the strategy is facilitating and expanding access to justice, by reducing barriers to the court system, particularly for neurodivergent and disabled people.

The strategy commits to several design principles. It mandates a people-centred approach, involving users in the design, development and testing of systems. Another design principle is inclusivity — technologies should only be adopted that reduce barriers to access, including barriers currently faced by people with disabilities.

Included amongst the strategy's aspirations is the implementation of technological solutions designed to facilitate participation of Deaf and disabled communities in all aspects of the court system, including serving as jurors.

¹⁷ 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)

These principles are now guiding the development of the new operating system — which is called Te Au Reka.¹⁸ Te Au Reka is therefore being designed with accessibility in mind including meeting the Web Content Accessibility Guidelines.

The courts, like all public institutions, are going through a period of change. It is change that is being driven in part by a recognition of the need to make the courts accessible for all, but it is also being driven by different and better possibilities offered by technology. As we plan for that change, the judiciary has accessibility at the forefront of its mind — those design principles I mentioned from the digital strategy — people centred and inclusive, are design principles that are being applied in all areas. In this commitment we have the support of the Ministry of Justice.

I don't describe this activity to suggest that we are doing enough or that we have all the answers. I return to the point I made at the beginning, that there is much to be done, and much for the judiciary to learn. We are keen for on-going engagement with Auckland Disability Law and disability advocacy organisations to improve the justice system. This organisation is a role model for the profession and the broader justice system. What you do matters.

Before I sit down, I wish to take this opportunity to pay tribute to the late Robert Ludbrook, who passed away in October after a lifetime of working to ensure people had access to effective legal services. Part of Robert's legacy is the Citizens Advice Bureau. He helped set up the very first office of CAB in Ponsonby in the early 1970s. He was also one of the people behind the establishment of the Neighbourhood Law Office in Grey Lynn in the early 1980s, which of course was the first Community Law Centre. This seemed to me to be an appropriate forum to acknowledge the passing of someone who was one of those responsible for the creation of Community Law and who devoted his working life to access to justice. Robert Ludbrook — moe mai rā.

Thank you for giving me your time. I am happy to take questions.

Tēnā tātou kātoa.

¹⁸ See Ministry of Justice | Tāhū o te Ture “Te Au Reka” <www.justice.govt.nz>.