



Transcript

White Noise Podcast Episode 10: Achieving a Cognitive Shift with Sir Justice Joe Williams

White Noise Soundtrack

Sir Justice Joe Williams: Although I spend all my time thinking about tribal redevelopment and restoration, I'm a judge and I draw my salary from King Charles the third and there are real compromises in that. Most often I would rather be at home. When I retire, I'm going home, to annoy my cousins.

White Noise Soundtrack

Jaynaya Dwyer: Welcome to White Noise, the podcast of the Indigenous Law and Justice Hub. I'm Jaynaya Dwyer and I'm your host. I'm a non-Indigenous woman who grew up on Wurundjeri Country and who is learning and teaching at the Indigenous Law and Justice Hub at the Melbourne Law School.

This conversation was recorded at the Melbourne Law School on Wurundjeri Woi-Wurrung Lands - Lands of the Kulin Nation. We offer respects to elders past and present, and emerging leaders and custodians of law as well as all Indigenous Peoples listening and particularly the Iwi of my guest Ngati Pūkenga, Waitaha and Tapuika of Aotearoa, New Zealand.

At the invitation of the First Peoples Assembly of Victoria, we support Treaty for Victoria.

What a pleasure to get to share with you this conversation with Justice Joe Williams of the Supreme Court of New Zealand. Justice Williams is a leading Indigenous law expert in Aotearoa, currently sitting on New Zealand's highest court. We recorded this conversation earlier in the year when the judge very generously visited the Hub over a few weeks, during which time I had the pleasure learning from conversations of cross-



jurisdictional knowledge sharing, visiting with colleagues from the Koori Court, the Treaty Authority, the First Peoples' Assembly, the faculty here at the law school, and in our classrooms.

This podcast is about showcasing Indigenous excellence and boy are you all in for a treat today.

intro music

Jaynaya: *So as is always our first question on the White Noise podcast, Who are you, who's your mob, and what are the values that drive you and your work?*

Joe: Well, my name is Joe Williams. I belong to three tribes. Ngāti Pūkenga, which is kind of my primary affiliation, Waitaha and Tapuika, all from the east coast of the north Island. What are the values that drive me in my work?

Jaynaya: Yeah, Big question to start.

Joe: Yeah. Could you ask me a couple of warmups? Well, I guess I'm a judge, and before that I was a lawyer, and before that I was a law student, and before that I was just a kid on the street of Hastings.

Jaynaya: Before that, you were a famous musician? No

Joe: No, yeah, I've been a musician too. And at some point, during my learning about law, I came to understand what its power was for oppressed people. That the law can be force, a terribly destructive force, or it can be a force for good. It can be transformative, or it can stick doggedly to the status quo. The values that have driven me really since my time as a law student, when I discovered the secret about law, was to utilize to liberate. I hope I still do that. Sometimes I might fall short, sometimes I might forget. But as much as I can, that's what drives me.



Jaynaya: *And I'll ask you to share a little bit more about the intricacies of that work in a moment. But before we do, could we talk about, for the audience here, what are some of the things going on for your Iwi at the moment that listeners should understand that you're bringing to the conversation today?*

Joe: Well, I come from a little village in the Coromandel Peninsula called Manaia. Maybe 400 odd people live there full time in the summer, climbs a bit, it maybe doubles. It's got a school of 120 odd kids, it's got a river recovery scheme, it's got a pest clearance scheme. We're trying to get rid of those terrible possums' you guys sent us a century ago. It's got, we've got ocean restoration programs that we're running as a tribe. We are still in the process of settling some of our treaty claims and I think when I look back at home to my people, we are a vibrant community, growing in self-confidence, full of problems, full of the energy to solve them, lacking all the answers, but at least being willing to search for them.

The cool thing about any kāinga, any traditional Māori village is that everybody in the village is related to you, every single person, even if some of them are by marriage, which means anyone that's 15 years older than me as uncle or aunt. Anyone that's 15 years younger than me is niece or nephew. Anyone that's 30 years younger than me is great niece or great nephew and I'm pāpā. Anyone!

And that reflects a sense of woven unity that is quite magical really and is what you would call the whitefellas world has forgotten. It's the thing that makes a community that's been through 180 odd years of bad experience resilient to that and willing to imagine itself differently. So, what's going on for my people is that process of decolonizing ourselves, and it's a bumpy ride. It can be full of conflict, internal conflict amongst us, and it can be full of joy and hope. That's what's going on with my people and in various ways that's what's going on with most mobs around the country in Aotearoa.

Jaynaya: *In your professional life it seems, from reading your bio, that you've played quite a substantial role in growing the present ecosystem of specialist Māori legal firms in Aotearoa. And I read that following completing a Master of Laws program in Canada at University of British Columbia, UBC, you established the first ever practice group specializing in Māori*



issues in New Zealand at a national firm, Kensington Swan. Then you formed your own firm, Walter Williams & Co, which began as a boutique firm focusing on Indigenous law, environmental law, public law. Could you reflect a bit on what the needs you were seeking to address were when you were doing this work and the importance of the present Māori led advice and litigation practices in New Zealand today?

Joe: Okay. So, I went to Vancouver to study Indigenous rights law.

Jaynaya: Yeah.

Joe: Under one of the great Canadian academics who understood comparative Indigenous rights law, who I'd met in New Zealand, a guy named Professor Doug Sanders. I went there specifically to find out what I could learn about myself and our circumstances at home by looking at it through the lens of another reality that is kind of an analog right. While I was there, it dawned on me that there were a bunch of lawyers who spent their time assisting Indigenous people. They weren't government officials, they weren't Indian Affairs. They weren't even necessarily academics. They were practicing lawyers whose only master was the Indigenous people they served. That was not something I'd ever seen at home because there was just no money in acting for Māori's; Māori didn't have any money. If you wanted to focus on the struggle of Māori people in the 1980s, you had to work for the Department of Māori Affairs or you had to be an academic, so that you had someone else keep you alive while you were doing what you were doing. The idea that you could have these specialist firms, and none of them were getting rich, but they were all making enough of a living to do what they loved doing. And, crucially, their only master was the Indigenous nation they were acting for. That was the crucial thing. No compromises, other than the compromises your client nation was willing to make. I thought when I went home that I might learn how to do that so I went to Kensington Swan, which was a national law firm at the time, now called Dentons, now it's international. This is all then an accident of history; the timing was right. This was the late 1980s. The treaty settlement process had just kicked off. The Waitangi Tribunal was undertaking inquiries into the experience of colonization of tribes' valley by valley, and lawyers were needed. So, a complete accident of history that I walked in, with a burning desire, at the time when that burning desire was what was needed.



Jaynaya: It was met.

Joe: Yeah. Yeah. Yeah. It just, you know, it's all about timing. If it had been ten years later, it would have been someone else. Been ten years earlier, it would have been someone else. It just happened to be in at the end of the 80s when I was just breaking out of my egg if you like. Then we set up our own firm, Walters Williams & Co, and we focused a lot on environmental law, Indigenous rights law, treaty claims, public law, often challenging the state and judicial review over decisions affecting Māori people in circumstances where the wider legal ecosystem lacked that expertise, all right. And we could get funding to do it, sometimes through legal aid, sometimes through just donations, and sometimes we would cross subsidize, so we'd act for corporates doing work to help them in their ordinary commercial work and use that to help us do free work for Indigenous peoples when we were in Walters Williams.

Then the rest of the legal ecosystem looked across and thought hmmm, and then there became a proliferation of Māori focused sections within the bigger firms because they saw there might be money in it, and Māori lawyers and allies coming together to create their own firms that would specialize in these things. As time has gone on with the treaty settlement process and tribes settling their claims, the work has changed from litigating to providing you know, structural advice, sometimes commercial advice, and so on to tribes as they have settled and wanted to construct what are called post-settlement governance entities. And, what's happened really in the last ten years is that private sector corporates have discovered the power of the Māori dimension I suppose, so they are now getting advice about how to deal with the Māori community, about how to do things in a way that is principled and values-based and so on. And they are reaching out to Māori specialists, lawyers, and others to assist them in that. So, it's kind of proliferated naturally because, if you like, the soil has slowly developed, largely off the back of the treaty settlement process and changes in the public sector about sensitivity to, and responsiveness to, the needs of the Māori community, has created this need for expertise and advice. Now there's three or four specialist Māori firms who we see routinely in our courts, including in the Supreme Court, who are the go-to people when there is an issue, and often it's a crossover issue, a



commercial issue with a Māori dimension, a structural issue with a Māori dimension, a trust issue, or an equity issue with a Māori dimension, Crime, right across the board. Those sorts of firms, and sections within the larger firms are now a permanent fixture in the legal professional ecosystem.

Jaynaya: *Incredible. You taught the first Māori land law course at the University of Victoria, Wellington. What was that like?*

Joe: Well, I was just a kid, and had an interest in Māori land law and there was a really good teacher at Vic, a man named Alex Frame who was in many ways my mentor and he and I team taught it. It started off as a, this is 1986, 87, 86 - started off with really modest intentions which is, there's a specialist and very technical area of law in New Zealand called Māori land law that exists because, your native title court which was established what in the 1990s? Mid 1990s, something like that, was created in our country in 1865 called the Native Land Court.

Jaynaya: Right.

Joe: And it adjudicated upon claims to title and awarded titles, which then anglicized into individualized titles. And there is still a court called the Māori Land Court now, which administers those lands, is the court to deal with issues in relation to those lands. So, there's this quite narrow specialist area of law that's just about dealing with that remnant of the original tribal estate. That's how it started and then it grew and grew into dealing with treaty claims and the much broader spectrum of areas in which Māori engage with the Law, or the Law engages with Māori issues. In 1986, it started off really small, which was lucky because I was just a kid, but it grew quickly. Now the equivalent of that is three or four or five different subjects.

Jaynaya: *Incredible. Yeah, so then you become a judge of the Land Court, and then chairperson of the Waitangi Tribunal, the Waitangi Tribunal for audiences here is a permanent commission of inquiry making recommendations on claim brought by Māori relating to crown actions breaching Te Tiriti o Waitangi - the Treaty of Waitangi. In 1985*



legislation provided for the tribunal jurisdiction to look at historical actions of the crown, which you've spoken about, and you've commented that this redirected some Māori civil rights energy, that what went on in the street moved into forums of civil debate, starting with the Waitangi Tribunal itself, and then getting into the courts generally. Today, the Tribunal undertakes both location based and thematic inquiries. Listeners here might be particularly interested as Victoria is just beginning to explore this open-ended truth and justice processes through the work of the Yoorrook Justice Commission. What have you seen in the Waitangi Tribunal and its processes in terms of development until today?

Joe: That's a, boy, that's a big question. I came back to New Zealand from the University of British Columbia in 1988, started working as a lawyer for claimants in the Waitangi Tribunal, which at that stage, again, from 1985 on, was spending almost all of its time inquiring into the effect of colonisation on tribal claimants. How colonisation affected tribal cohesion, tribal sovereignty, the tribal land base, and what happened when the tribes lost their land, got broken up and individualized, and had their sovereignty undermined basically. So for, really since 1985, the work of the Waitangi Tribunal has been tribe by tribe, valley by valley, to put colonization on trial by reference to what are called the Principles of the Treaty of Waitangi. The Treaty of Waitangi is, we don't have time for a little tutorial on the Treaty of Waitangi, but it guarantees particular rights. That becomes the measuring stick against which the experience of these tribes is judged. The tribunal was a little bit like the Yoorrook Justice Commission in the sense that it's multi-disciplinary, it's chaired by a judge, a Māori land court judge usually. When I became Chief Judge of the Māori Land Court and chair of the Waitangi Tribunal, I presided over a lot of inquiries of the tribunal. There are elders on it, Kaumātua as we call them, who exercise considerable influence in the work of the tribunal and in the way we hear, or heard I speak in the past tense, the way we heard claims of Indigenous peoples. We have historians who are crucial, of course, because they are literate in the record of our past. And then we have community leaders who are not Māori. The elders are Māori community leaders. We would have community leaders, businesspeople, local government people, just Pākehā leaders of the community, who would sit alongside the Māori members and the mix would be around 50-50 Māori and Pākehā, Māori and White. The dynamic of that was really interesting. We often found as I was a young lawyer going through it and then when I was on the tribunal, that the most radical thinkers were these



Pākehā's, who saw the story for the first time, didn't know about it beforehand because you know the history books are silent on the story, saw what had happened and develop the sense of righteous indignation, which Māori's just got used to, you get used to being downtrodden. It's really striking that often these people were quite conservative people, often appointed by centre-right governments as business leaders and local government leaders and so on. Who would sit on these claims and get really angry at what they were hearing. That was the beauty, I suppose, of the educational process that was going on. We would sit in the villages, always in the villages, in the meeting houses, in the wharehau of the people. We would be in the hands of the people this didn't run like a court. The home people were in control, and we were their guests. That shifts the dynamic and we would be subjected to the traditional Māori processes of welcome. Every day would start and end traditionally, we would be fed far too much, far too often, as is consistent with Māori notions of hospitality and so on. What you saw, what I saw every time, both when I was a lawyer and when I was a judge on the tribunal, was that the process was empowering. That even though these people were telling stories of loss and marginalization, often really tragic eyes-welling-up-with-tears stories, it became a celebration of survival. At the end of these processes, difficult though they were, there was something, the people seemed to just walk a little more upright because they'd done it, they'd told their stories and they'd seen a group of people, Māori and Pākehā, listening and respecting those stories. There was just that human dynamic of telling a story of loss, and knowing that you've been heard. And doing that not as an individual or even as a small group, but as a whole nation, everyone involved.

So, the outcome, of course, was usually reports that explained how colonisation had undermined people, as you'd expect, but the process was just as important.

Jaynaya: *Do you see changes in the process until today, now that the tribunal has been operating in this way for a few decades?*

Joe: from '85 on the tribunal was a historical inquiry. If you think of your native title as inquiring into what's left in law. The Waitangi Tribunal was the flip side of that coin - inquiring into what was lost and why. So, a lot like the Yoorrook commission.



Jaynaya: Yeah.

Joe: It has been doing that now for maybe 30 years or so with specific and technical ways of doing it, combining fairly rigorous forensic inquiry, multidisciplinary forensic inquiry, with culturally appropriate processes, processes that resonate for the people who appear before us. And doing so, in a way that the Crown representatives know they must work within that process and are completely willing to do so. They understand the power of making the process resonate for the people for whom the process operates. More recently, as the historical claims process has reached its peak, the tribunal has pivoted towards what are called Kaupapa inquiries, or crown policy inquiries, in which it has looked at crown health policy and administration and its consistency with the treaty. A more modern inquiry about modern policy and the modern administrative state, I guess. It's looked at the Māori language, it's looked at criminal justice, a few other things too. But over time that is becoming its refocus, which is a very different inquiry to the inquiry of the picking over the coals of the last 200 years.

Jaynaya: *Yeah. The Waitangi Tribunal then makes recommendations to the Crown. As someone who's worked as a lawyer for claimants in settlement processes, you've noted that the nature of these processes of Iwi negotiating with the state involves settling for a small percentage of what is the overall loss experienced through colonisation processes and that limits material outcomes to support recovery. I was also wondering about what is the effect of that on the sense that things are truly 'settled' between parties?*

Joe: Yeah, that's a good question. So, the tribunal does have certain limited mandatory powers, which are actually quite controversial, but by and large it doesn't use them. In my view, that's a good thing. This is a very complex area of law, and we don't have time to discuss it in any real meaningful detail. But the thing that always struck me both as a lawyer and as a judge was how complex the constructing of a recovery plan is and how inappropriate independent third parties are as agencies to impose them unless there's no choice. Because each tribe has different priorities. Each tribe in some ways a different culture.



Jaynaya: Yes.

Joe: Different leaders, different needs. Those need to be expressed in whatever agreement is reached. Settlement agreement as we call them back home. You'd call them treaties here.

Jaynaya: Or, we hope to.

Joe: Yeah. Yeah. Yeah. Fair. But with or without the Tribunal's mandatory powers, which are very limited, the treaty settlement process is compensating at probably two or 3 cents on the dollar lost. So, tiny. There's a risk in that, it's just the simple maths or the physics of human development and recovery. If the point in this process is to reinvigorate and re-empower the tribes to take on the roles or take back the roles that they traditionally performed before colonisation tore it away from them - even a shadow of that, you need a capital base. And, I'm pretty sure that an economist could tell you how big that capital base needs to be per capita to touch the lives of your people in a relevant way. You can say tribe X, Ngāti Pūkenga in my case, and there's a Ngāti Pūkenga settlement organisation, but if it doesn't have enough money to be relevant to its people, if it doesn't have the arms and legs to be the tribe, it will quickly shrink into irrelevance and die. That's the physics of it. Now I don't know what that number is. I suspect it's probably around a capital sum of around 40 or \$50,000 per person in 2024, it might be more now, I'm not an economist. But most of these settlements are incapable of producing the income necessary to be able to touch the lives of all of their people in practical way, in any meaningful way so that the people will look to the tribal organization and see it as a structure that can assist with their lives, be relevant in their lives, make their lives better, whether that's through the provision of community infrastructure, social supports, health, culture, language, all of that stuff.

The great risk now, a long distance through the treaty process. The great risk now is that without careful management of the capital sums acquired, without the focus on an objective of building that capital sum to a point where you can be a force in the lives of your people. These settling organizations may not last, may just fade into irrelevance. Now I say that because this generation of treaty settlements isn't the first time we've tried this. There were



attempts to settle the confiscation claims following the land wars in my country in the 1920s and then in the 1940s. Tribal trust boards were established to administer settlement sums, which were annual payments. And they were relatively large for their time, but one, there was no capital sum, it was just an annual payment and the inflation adjusted and within a generation they were irrelevant. So irrelevant, in fact, that by the time the Crown came to respond to the modern treaty claims in the 1990s and 2000s, not even the Crown was arguing that those settlements had settled these claims. It was a forlorn argument, not even the Crown ran that argument. The real challenge for us is to avoid repeating that mistake.

Jaynaya: Yes.

Joe: I think on reflection, the way we can do that is by using the capital sums that are available and the genius of the leaders to build working partnerships with the state. To leverage those funds so that the tribe can provide social services, health services, educational services, and so forth. In partnership with the Crown, because the Crown has the resources so that the capital sum is not the sum upon which everything depends, it's just the seed fund on which these leveraged partnerships can allow the tribes and encourage the tribes to be actually relevant to the health outcomes of their people, to the criminal justice outcomes of their people, to the Māori language outcomes of their people, to the education outcomes of their people, to the sense of cohesion of their people to the ability of their people to live in their tribal districts, all of that stuff. The way in which a community that's been beaten down tries to rebuild and restore itself to be a force in the lives of its people. Once it does that, it can be an incredible force for good, quite apart from the justice issues involved. And that's because the resilience of tribal cohesion is an important way in which our people avoid negative outcomes, right? Māori kids who grow up in schools that are Māori language based, Kura Kaupapa they're called. Kids who grew up speaking Māori, knowing who they are, don't offend. Statistically, that is the position. The more Māori they are, the more connected they are, the less chance there is that they'll become negative statistics. They get healthier, they don't defend, they don't go to jail, they go to university. All right? These aren't middle class Māori kids. These are the children of working class and unemployed solo parents. The usual poverty-stricken Indigenous people that we're familiar



with all over the world, including here. Those children don't offend, right? The positive outcome of tribal reconstruction is the removal of Māori cost to the State really. It's this great win-win, right? If you empower the tribes leveraging off their treaty settlements, you don't send their kids to jail at \$120,000 per year. You don't have the negative health outcomes that fragmented, atomized, Indigenous peoples have. Because the cohesion of the community becomes the way in which people raise themselves up. Let me give you some examples. During the covid lockdown, we'll just talk about my own people, my village, and the three Ngāti Pūkenga villages that exist set up community support groups that just organically, as you do when you belong to a cohesive community.

Jaynaya: Yes.

Joe: That visited all the elders, made sure they were fed, made sure they were healthy, if there were appeared to be a covid present, then made sure there was health care and so on. These people just did it because, you know, the people that they were taking care of, were their aunts and uncles.

Jaynaya: Yeah.

Joe: Or their nieces and nephews right. And this happened just organically like that. No government officials said, "you should do that". In fact, the government officials were miles behind.

Jaynaya: Yes. They were contemplating a roll out somewhere.

Joe: Exactly, yeah, that's right. They were sort of wringing their hands and wondering what the hell to do while the Māori communities just did it. Everywhere, including setting up roadblocks at the tribal boundaries to stop people from the outside coming in and spreading Covid within the village where you've got a lot of elders and a lot of younger people who were highly vulnerable to this disease. The other thing, last year, year before I think, we had on the east coast quite a serious cyclone, which you Australians are a bit more used to than we are, a big area of the east coast just got flattened, absolutely flattened. The government



farted around trying to figure out what to do, with great respect to the government, while the local tribes just got up in combination. Because the local tribes have local gang members. The gang members were going around the villages in their colours, distributing food, removing damaged material from people's houses. Just doing it, right?

Jaynaya: Yes.

Joe: Because the people's houses that they were supporting were their uncles and aunts and no one gave a toss what were what their gang affiliation was. They were just members of a community, right? And it demonstrated to me really powerfully that the resilience of these communities when the chips go down. So, here's the thing, if the treaty settlement process amplifies that, then you can imagine, how much stronger and healthier my people will be in a generation. Because we've seen the potential, despite all that's gone on, we've seen the incredible resilience and potential. So, full of risk because the capital sums are small, but if we can willingly, positively, optimistically, leverage those sums to build on that resilience and grow it, we may get to a day where Māori isn't an adjective and the noun that follows it is problem, or difficulty, or offending. But the Māori community can provide examples of community cohesion that others want to follow.

Jaynaya: Yeah. The Māori strength, the Māori knowledge.

Joe: Yes.

Jaynaya: *Yeah. On this. It takes us then to our next question, where in a speech at the national Māori governance forum last year, you spoke about this change then in where people's labour is going. The nature of the New Zealand bureaucracy, in your words, getting 'Māori'd' up in terms of more hiring and drawing people into the bureaucracy, a real appeal from the Crown to do that, but then people are not available to the same extent in their Iwi to do this work that you've just talked about. We've spoken a bit so far on your trip here about working in the State for change and navigating accountabilities. I was wondering how are you navigating this in your professional life, and seen your community do so?*



Joe: Yeah, that's a really searching question actually. Yes. One of the problems we face back home is the amount of Māori talent that gets drawn particularly into the public sector, but now into the private sector as well.

Jaynaya: Yes.

Joe: Because it's, not unlike here, become cool, right.

Jaynaya: Yes.

Joe: And that's a massive change from my childhood. We're often in our tribal communities losing the talent we need to the public sector that wants to be more effective. It's kind of a paradox and irony.

Jaynaya: Yes.

Joe: In some ways I guess I'm a bit of an example of that because although I spend a lot more time thinking about tribal redevelopment and restoration, I'm a judge and I draw my salary from King Charles Third. There are real compromises in that. Often, I'd rather be at home, most often I'd rather be at home, but there's big jobs to be done. Yeah, when I retire, I'm going home, to annoy my cousins. So, it's a difficulty for all Māori people in my position whose primary loyalty is to the village to which they belong and the tribe to which they belong. Whose rhetoric is all about the village to which they belong and the tribe to which they belong, yet whose work is much more abstract in its effect. And I haven't, I don't have any deep truth about how you resolve that. I just know it can be quite a painful thing to be stuck in that place.

Jaynaya: *Well, I'm going to take you then to talk about some of the strength of that work. You've sat on some major cases relating to the role of Tikanga Māori in New Zealand law, including the 2022 Supreme Court case of Peter Ellis and the King where the Supreme Court of New Zealand stated, 'the court is unanimous that Tikanga has been and will continue to*



be recognized in the development of the common law of Aotearoa

New Zealand in cases where it is relevant.' So, girstly, could you explain a little bit for our audience about Tikanga and about the case?

Joe: Okay. So Tikanga is our word for custom I suppose. It's basis, Tika, which means correct or appropriate. And the Na at the end of it, as I understand from the grammarians, a nominalization which turns it into the correct way or the correct path or correctness, right? So that's Tikanga. Law is a subset of Tikanga in my system in the sense that if you're talking about law that has mandatory effect with sanctions if you breach it, then Tikanga includes law of that nature, but it includes also values. In fact, it is substantially values driven. And it is just good ideas, politeness, appropriateness, how to behave well. So, it's Tikanga where I come from, that you don't wear your shoes inside the meeting house. In fact, we don't wear our shoes inside houses. That's not a law, it's just a good idea. It's Tikanga that you don't sit on tables because you don't have your bum on places where the food is. It's not a law, it's just a good idea. But there are other things that are definitely laws. It's similar to any system. The Peter Ellis case was about what should happen with a guy who had been convicted of offending against children in a creche in the 1990s. Convicted not once, but twice. Had failed an appeal on two occasions to get his convictions overturned. But despite that, there was a great deal of discomfort in the wider community about whether the convictions should have stood for a bunch of reasons that needn't detain us. In the Supreme Court we agreed to hear his appeal, basically a third go. Not long before we were due to hear the appeal, he died. The general rule is here, as in my country, where a criminal appellant dies, the appeal dies. We asked ourselves in this relatively high-profile case, whether that rule should be applied in the case of Peter Ellis, who sadly was no longer with us. And while we asked ourselves that question, we invited counsel to address us on what Tikanga would say about that problem. Setting aside the general rules of the common law, the English driven rules of the common law, which would have said for example, that you make an exception if there's money at stake or property at stake, where, for example, the spouse or the children of that person might obtain compensation if the appeal succeeds. It typically...

Jaynaya: That's what the 'interest of justice' means to us, in a settler tradition.



Joe: The property rights, yes, property rights basis for continuing is a narrow exception to the rule that if you die, the appeal dies too.

Of course, Tikanga would take a completely different approach. In fact, in Tikanga terms, death is a much less final thing. So, we invited counsel to address us on that. The crown took up the challenge, went away, and set up what we call a wānanga, which was a meeting of elders where they could prepare a report and advise the Court on what Tikanga would say. And that meeting of elders was attended by counsel for all parties, an excellent report was produced by these elders, and filed in the court and then submissions were made on it. That's why the issue of the role of Tikanga in this basic question of criminal procedure arose. We found that Tikanga was potentially relevant and that it spoke in somewhat similar ways but with slightly different priorities about the importance of justice being seen to be done even after someone dies. It's in the context of that that the court said, well, Tikanga is both a value within the common law and, where appropriate, an aspect of the common law where appropriate and necessary. We were no more specific than that because we knew that this re-weaving of Tikanga and the colonial common law was going to take some time and that time needed to be provided. We accepted that the door was open where it is appropriate to open the door, leaving aside the question of when it is appropriate. Except giving some very general guidance about those things.

Jaynaya: Yeah. And leaving us to talk extensively that.

Joe: Yeah, that's right. It was just a dream come true for the academy.

Jaynaya: *Exactly. And really then as the first Māori judge on the Supreme Court and the Māori judge in this case, what might have been different were you not there to bring that perspective? Noting that this came from the court, a request for submissions on Tikanga and I'm interested in your experience of cultural labour in that context as things level.*

Joe: cultural labour, I've never heard that phrase. It's a good phrase. Look, I'm not going to centre this on me, obviously would make a difference to have a Māori in the room when the discussions are taking place, as it would if we were discussing women's issues and there was a woman in the room, it changes the vibe, always. And it can sometimes open hearts and



minds in circumstances where in the absence of such a person, those hearts and minds just don't get opened or don't get the chance to get opened. But we're in an evolutionary process right now with or without me on the court.

Jaynaya: Yes.

Joe: I can't help you with the counterfactual except to know that this issue was going to come up and was going to have to be confronted by judges who know it has to be confronted. You can't pretend away something as important as the legal system of the original inhabitants of the country in which the Law operates. I guess a good way of explaining this is, we have to remember that the legislature has been enacting laws including Tikanga for 40 years.

Jaynaya: Yes.

Joe: in Māori Land law and environmental law and child protection law and criminal justice, intellectual property law, a number of different areas, surprising number of different areas.

Jaynaya: and you've mapped them, in your Lex Aotearoa papers, you talk about them as a heroic attempt.

Joe: Yeah, heroic, and doomed attempt to map.

Jaynaya: But since then, we might see, you know, the mapping might need to go substantially further, even that time since 2018,

Joe: correct, absolutely. So, the substratum of this is a determined legislature willing where it feels it necessary to enact various recognitions of Tikanga. This is Ellis, and a series of earlier cases also dealing with common law issues, is just the courts catching up with a movement that's been going on for a generation or more. The earliest modern common law case about this was a case called Takamore in 2007, I think. 2007, 2008, maybe I've got that



wrong. Something like that. There was no Māori on that court and that's where that phrase, 'Tikanga is part of the values of the common law' comes from.

Jaynaya: Yeah.

Joe: So, it's kind of proof that you don't. Having a Māori there is not necessary. It does help if you've got someone on the panel who has some basic understanding of Tikanga because you can normalize it, right? One of the great problems with judging in this area is ignorance makes it 'other' and scary, when like all systems of law, it's just a system of law. It's not mystical magic, it's law, law for communities seeking to thrive. Can I say this? Over the last five years odd, the number of Māori in the District Court has risen to 50 or 60 out of 200. 3 Māori High Court judges, one Māori Court of appeal judge and myself on the Supreme Court. Three quarters of the Māori Land court judges, one Māori employment court judge, one Māori environment court judge. So, Māori lawyers are really across the entire spectrum of judicial activity. That inherently changes things because almost all of those people are comfortable with Tikanga as not Other, not scary, just law. Once you get to that, you're basically changing the flavour of the water.

Jaynaya: Yes.

Joe: Often those changes can be very subtle. They will, I suspect, take a generation to be felt fully. But once you have that level of acceptance and momentum, then you are in a position where you are, effectively, decolonizing the legal system.

Jaynaya: *I really like the way you summarized it in a recent speech to give one example from a specific criminal law context. You say "in criminal justice, an offender's culture and background has been accepted as important in sentencing. And the Chief District Court judge, who is Māori, now proposes to mainstream the approach of the therapeutic Māori courts to deal with all offending. Tikanga will be a dimension both of the content of sentencing and how we sentence offenders. Not a separate system of justice for Māori but, it might be suggested, a single and more Māori system of justice for all". In this context where things are changing quite quickly, you talked about the growth and number of Māori judges.*



for non-Māori judges, what are some of the recent developments around judicial education on Tikanga to meet, this moment?

Joe: Well, you've given me a chance to advertise our...

Jaynaya: Absolutely, as intended.

Joe: You've done your homework. Once becomes an ordinary part of the judging job, then judges have to understand it. Because if they don't, they may make a mess of it. These changes that are occurring are full of risk. This won't be a process of decolonization, but in fact become a process of the final colonization. You take over even the Tikanga and kill it. Now that's an understandable risk and I'm somewhat fearful of that outcome myself. And we know that the common law courts killed Saxon and Celtic Tikanga. That's what they were designed to do, because the king sent out judges, the king's own judges, to administer the common law and to reduce the power of local custom in the villages. In those areas where the King felt a single law should apply. Those judges would sometimes articulate the custom, freeze it, and kill it. Stop it from developing as a living organic system of law. That's still the danger because we judges, trained in the positivist tradition of the common law, believe we declare and develop the law, at least the common law. We are the oracles of the law. Of course, Tikanga utterly rejects that. Tikanga says the source of law is the elders in the villages declaring it. And if judges have a role in being the arms and legs of Tikanga, where Māori issues are at stake for an offender, for child being removed, for the use of traditional knowledge, for environmental regulation of a particular tribal area or a particular tribal treasure. Then the Judge has a role in invoking Tikanga with the support of the power of the state but is not the source of the Tikanga. Cannot change, it, cannot evolve it, cannot develop it, cannot modify it. The judge must take the Tikanga principle as provided to him or her and apply it and then give it back in humility. And with respect, this is a whole new culture for judges in our tradition of the judge being the final arbiter of the law. We're going to have to learn that - The Māori judges and the Pākehā judges, all of whom are trained in that tradition.



Now we've set up this program in partnership with one of the tribal universities, one of the Whare Wananga, called Awanuiārangi, to train judges in law and Tikanga. The Te Kura, the Institute of Judicial Studies, we now call Te Kura which means the school, and Awanuiārangi developed this partnership. And we're taking on 15 judges a year in a two-year postgraduate diploma in law and Tikanga. which is, and we've designed it specifically this way, hands on, not classroom based, but experiential. I think the weekend before, that's only just started this year, and I think the weekend before last, the judges spent a day on an ocean-going canoe. Learning about navigation, learning about the role of the stars and the seasons in the system of law. This weekend, no, the weekend after Easter, they tend to come together for about three or four days, like Friday through Sunday, or Friday through to a Monday. They are going into the Urewera forest to learn about medicine and the rules of gathering in traditional territories, with the elders, right? Then a month later they're going, they're walking a landscape to learn the way in which land is a law book. This is a fundamental thing to understand about Tikanga. That a landscape is a law report. If you know the names of the places, then you know the ancestors that are associated to those places. If you know the ancestors associated with those places, you'll know the events associated with those places. If you know the events associated with those places, you'll know who has rights and who has obligations and how they connect to the next place. Sometimes only 50 meters away, sometimes a kilometre away. The same in the rivers, the same along the coast and out to sea. So that in a non-literate culture like mine, knowing how to read the landscape is to know the law. They're the same thing. So, we're trying to teach these judges, most of whom are Pākehā, in this 15-judge cohort to the cognitive shift necessary to understand that law that is utterly different to the Law they know and understand. What's cool about that is that it is liberating for them because they come to understand that law is contestable. That law achieves certain things, and the way in which we've learned it is just one way of doing that. So, here's another way, and if you go to the tribe next door there's another way again to do the same thing. They can come to ask themselves about whether the way that they've learned in the traditional system is the best way.

Jaynaya: Yeah, denaturalize your context and question everything.



Joe: Correct. Yeah, we call it the cognitive shift. The experiential approach is the best way to achieve that cognitive shift. Anyway, this course, this is the first year that we've done it. It's an experiment. I went to the first session, and they've had two more and they've been very cool according to the judges who have done it, including one of the Supreme Court judges. So, I'm really positive, positive in mindset rather than sure, I'm positive about the course. And I'm hoping that we'll take on another 15 cohort the following year if it goes well. What I would like to see is the development of this diploma more broadly for the profession, not just for judges, but for the profession as well. As I'm sure you know, legal education of any kind is transformative. It changes the individuals and because our system is individuals it changes the system. Just by, as you say, naturalizing this different dimension into the way all of us do this stuff, Māori, and Pākehā, all of us. Anyway, that's my optimistic take on it. I'll tell you in about three years whether it's worth it.

Jaynaya: yeah [laugh] have to revisit. Beyond what's possible within judicial education and building skill sets and understanding, the Ellis judgment sees the court note the risks that come in operating in this space inherently. the judgment reads, *“the majority judges accept that Tikanga was the first law of Aotearoa New Zealand and that it continues to shape and regulate the lives of Māori. In light of this, the court must not exceed their function when engaging with Tikanga. care must be taken not to impair the operation of Tikanga as a system of law and custom in its own right”*. At the constitutional Kōrero 2022 conference, you offered a pathway in this area, drawing from the Australian Voice to Parliament conversation and model proposing a form of voice to the courts on Tikanga matters. *Could you talk through some of the design thinking that you've been engaging with around risks and ways to proceed?*

Joe: Yes. This takes us back to that point I made about the risk that the judges will take up this Tikanga mantle and run off with the ball to mix my metaphors really badly. The question is, how do we make sure that the judges stay in their lane while being the arms and legs of Tikanga where they need to be.

Jaynaya: See the lane as existing?



Joe: Exactly. See the lane as existing. Contrary to all of their instincts, which is to be the whole game, not just the lane. In 2022 before the constitutional voice referendum, that as we know, sadly didn't go the way we wanted. I was thinking about how Māori could take the steps necessary to keep the system honest. To keep judges, humble, and in their lane. I decided to steal your idea because I think there is something for the tribes, something in the idea that the tribes might come together and appoint a group of people, experts in Tikanga to be the voice to the courts. To say to judges in appropriate cases, "Don't do that. You're making a mistake". And in other cases, to say "this is what Tikanga requires" - To be the guards patrolling the perimeter, between the prerogative of the elders as Tikanga, as the sources of Tikanga, and the prerogative of the judges as receivers of the instructions that Tikanga give to them in their decision making. If we had a group of people whose sole job it was to watch and guard, that would be a good way of ensuring that no one crosses the boundary into another lane. I'm hoping someone will pick up the idea. It doesn't need legislative sanction, doesn't need any permission. It can just be it. And in the circumstances of today, a plainly mandated group of people supported by the Iwi, group of people who purported to be that voice would by definition be that voice. And judges would defer. I think that's an incredibly powerful model for mediating between the old and the new.

Jaynaya: *To return to a conversation about law schools, in 2021, you gave a lecture "decolonizing the Law in Aotearoa: Can we start with the Law schools?". You said that law schools need to play a more active role in creating conditions (of) Decolonization by taking a system's view in the way courts and even parliament aren't called to do. That it will not be enough to teach the treaty and Tikanga through a rear-view mirror. That is to summarize what Parliament and the courts have already said, it is time for the Law schools to illuminate the path going forward. Maybe that spoke to me as someone who works in one [laughs].*

Joe: [laughs] Yeah, I'll bet.

Jaynaya: *But do you think that law schools presently understand their role in this way?*

Joe: We can't speak about it, and I won't speak about Australia law schools. That's your gig.



But New Zealand law schools are teetering on this crest of indecision really. The Counsel for Legal Education, which is our governing body for the requirements of the Law degree, has issued a direction that all law degrees must include Tikanga as a core subject from next year. All the core subjects must include a portion about Tikanga in relation to that core subject. So, contract, tort, constitutional, public law, so on so forth. That's a challenge, and it's an appropriate challenge, I think. The Law schools are, I think, struggling with how they're going to deal with this because it is quite a challenge, but they are struggling with it. I'm not sure whether they've developed models that will work because I'm not close enough to it. But I know how difficult it has been in terms of developing postgraduate qualifications for judges. You're only dealing with a very small cohort there, there are 15 odd people, 15 to 20 odd people. Must be really hard when you've got 400. So, I don't envy them their task.

Jaynaya: Especially when we talked about the resonance and importance of experiential learning.

Joe: Yes, exactly. How you go about doing that in as experiential a way as possible, given the size of the classes and so on. I don't know, but I think the Law schools know that they have to try and do that. There'll be a bit of experimenting going forward before people settle on what is a good model. What I'm hoping is that the Law schools will build partnerships with the Tribal universities, the Whare Wananga, which are replete with people who have the expertise necessary in circumstances where the Law schools often do not. But what I do know is that legal education is the key here into the next stage. Not the judges, not the legislators, not even the lawyers. Because we are engaged in a process of achieving cognitive shift and that's a generational process. Once you get that, once a genuine generation of law students come through the system, having made that cognitive shift, then the system will change. It must do because the people are the system, right? The Law schools are the ones that have to do that. That's why, as I say in that bit you quoted, the Law schools have to stop summarizing what has happened and start summarizing what they predict will happen. Start looking forward and building the generations of lawyers and judges and so forth, legislators, building those generations with the capacity of the cognitive shift. Then the system will decolonize itself.



Jaynaya: Then. Yeah. Then particular individuals can stop pushing so hard and we can share the conversation,

Joe: Correct, yeah.

Jaynaya: *What do you think is the most important if you had to pick a few elements of next steps in these processes for law schools?*

Joe: Well, I can talk about back home. What I do know is, and the Law schools all accept this, they do not have that capacity to teach this material, to infuse it into their qualifications. They have to obtain that capacity from outside. They will need to build partnerships with institutions, communities, or individuals, that do have that capacity. That's a new experience for law schools because there's a certain arrogance about the lawyers, about lawyers generally. And law schools thereby, it has what we call Mana, there's a certain status in law schools that we are not all that comfortable with giving away by accepting that there's some stuff we don't know about. But those partnerships will be necessary, or the experiment will fail. So that's one thing, reaching out and finding new ways of teaching material, albeit to large classes. At least our form of custom, Tikanga is not like law as the system knows it. The law, even the Common law, although it often says it's not, is deductive, right? You start with principles, the Common law often pretends it's not it actually is, start with big ideas and you work down. Tikanga is inductive. It starts at the base with the facts and builds up. So, if you try to teach Tikanga by reference to principles, you'll miss it. That's why I said if you walk the land you will come to understand what Tikanga is. I'm not saying that in some romantic, idealistic woke way. I mean it's actually true. That if you walk the land with the elders and they say there is such and such a place, that place was named after this event. And those involved in that event, these people, and these animals, and that's why that clan or that clan has rights and obligations in that area. You'll come to understand that Tikanga is molecular right. If you try to learn it by creating six working principles in the deductive approach and drip it down, you'll miss its great power. The teachers are going to have to learn new ways of learning, which I think is really cool because it'll stop law being boring.



Jaynaya: Move out of the lecture theatre sometime maybe.

Joe: That's exactly right. Exactly right.

Jaynaya: *The final question today, and it's a huge one, what is your vision for the future of law reform in New Zealand and the legal systems relationship with Māori people?*

Joe: I'm not sure I have one. I think what's needed is structural, as we've talked about. Judges, lawyers, law students, who've made the cognitive shift. If that structural change is made, the people will figure out what law should look like and what the relationship between the tribes and the individuals and the state should be. The people will figure that out. I doubt that I have the wisdom to know what that answer is. It's not my job to answer it. It's theirs. What I'm interested in is making sure that the ingredients are available to allow the conversation about what that vision should be to actually take place, in a fair and even-handed way between peoples of equal power and vision.

Jaynaya: Justice Williams, thank you so much for joining us on the White Noise podcast. It's been a real pleasure to learn from you today. Thanks for sharing so generously.

Joe: You're welcome. Thanks for being such a kind and gentle interviewer.

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Jaynaya: Thank you for listening to White Noise. You can find the show notes with more information about what we have discussed and more episodes on our website. See you next time.

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