

# Practice briefing: tikanga Māori and Rules 3, 3.1, and 3.9 of the Rules of Conduct and Client Care

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This practice briefing is issued under s 67(3) of the Lawyers and Conveyancers Act 2006 (**LCA**). It provides guidance for lawyers on the relevance of tikanga Māori and tikanga based legal developments in meeting their competence and client service obligations under **the Rules**.

## Recent tikanga based legal developments

In 2022, the Supreme Court in *Ellis v R* confirmed that tikanga has and will continue to influence the common law in Aotearoa New Zealand in cases where it is relevant.<sup>1</sup> The Court observed that tikanga forms part of the law through incorporation in statutes and regulations, is a relevant consideration in the exercise of discretions, and is incorporated in the policies and processes of public bodies.<sup>2</sup> The majority in *Ellis* also recognised that tikanga is the first law of Aotearoa New Zealand and that care is required not to impair the operation of tikanga as a system of law and custom in its own right.<sup>3</sup> There are also several other cases that have confirmed tikanga is part of New Zealand law.<sup>4</sup>

The Professional Examinations in Law Regulations now require tikanga to be taught as a stand-alone compulsory subject within New Zealand Law Schools.<sup>5</sup> This means that tikanga is a compulsory component of all law degrees, reflecting the fact that some knowledge of tikanga is seen as a core competency for lawyers.

## Overview of this practice briefing

Given these, and other legal developments, lawyers will be considering tikanga and its principles and values when meeting their competence and client service obligations under the Rules.

In this practice briefing, where we use the term ‘tikanga’ we are referring to *tikanga Māori and its principles values, and practices*. This phrase reflects the place of tikanga within te ao Māori as well as a source of principles, values, and practices that inform legislation and the common law.<sup>6</sup>

This practice briefing has been prepared with a focus on Rules 3, 3.1, and 3.9. While this practice briefing focuses on those Rules, that is not to limit the broader applicability of tikanga in the approach to professional duties beyond the Rules identified here. For the avoidance of doubt, this practice briefing imposes no new obligations or mandatory requirements on the profession. Rather it should be seen as an aid to lawyers considering tikanga in this context.

The practice briefing serves two purposes:

- To draw lawyers' attention to the connection between recent tikanga based legal developments, and competence and client service obligations in the Rules.
- To provide general assistance on how lawyers may approach meeting those obligations in circumstances where tikanga is relevant.

## Summary of practical considerations for lawyers

For the purposes of Rules 3, 3.1, and 3.9, lawyers should consider:

- Being aware of tikanga based legal developments in their area(s) of practice.
- Considering whether tikanga is relevant alongside other legal matters in advancing their client's instructions.
- Seeking competent assistance when navigating areas relating to tikanga that are outside their expertise, for example from a lawyer that specialises in tikanga or a recognised pūkenga / expert.
- Considering how tikanga may inform client care, such as meeting with clients, responding to queries, and taking instructions from clients.
- Incorporating continuing professional development (**CPD**) on te ao Māori and tikanga based legal developments into their CPD planning to ensure ongoing competence relevant to their area(s) of practice or client base.

## The nature of this practice briefing

It is not the purpose of this practice briefing to address or provide authoritative statements from the Law Society on mātauranga, tikanga, or te reo Māori. The relationship between tikanga and state law has been discussed in depth in Te Aka Matua o te Ture | The Law Commission's study paper on tikanga, *He Poutama*, and its relevance in specific fields of law referenced in legislation and discussed in decisions of the Courts.<sup>7</sup>

*He Poutama* is a significant resource for the profession on the fundamental aspects of tikanga, its broader context, and intersection with the law. There are also many other available resources on tikanga.<sup>8</sup> For further learning and development, we refer lawyers to those resources and provide guidance on CPD below.

## Consumers of legal services

Legal developments referencing tikanga, in turn, should inform how lawyers view their competence obligations. Consumers of legal services are also an important consideration when assessing whether tikanga is relevant in the delivery of a practitioner's legal services. The LCA has a consumer protection imperative. Therefore, many of the Rules are focused on client expectations, needs, and the provision of regulated services to the end consumer which includes Māori.

In relation to unsatisfactory conduct under the LCA, 'competence' is informed by consumers of legal services, not just members of the profession. The standard of competence is what a member of the public can reasonably expect from a competent lawyer.<sup>9</sup>

The Legal Complaints Review Officer has described this as an articulation of the well-established

reasonable consumer test which focuses on the reasonable expectations of ordinary people, and that, while in practice the views of the profession and public will frequently converge, it is important to note the shift in focus.<sup>10</sup>

### Competence and client care (Chapter 3)

We highlight some specific provisions of the Rules relating to competence and client care, drawing attention to how those Rules have been interpreted, and highlight some practical considerations to assist lawyers when considering the role of tikanga in the discharge of each obligation.

*Rule 3: In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.*

In essence, competence entails the ability to complete instructed work. As the authors of *Professional Responsibility and the Lawyer* note, it is impossible for a lawyer to be an expert in all areas of legal practice. Competence does not require the ability to accept any work that is offered; rather, it relates to the areas in which the lawyer practises. Competence means having the ability to complete the work by finding the relevant law and applying the necessary skills, without demanding exhaustive knowledge of every area of law or procedure in any particular area.<sup>11</sup>

The approach that the Legal Complaints Review Officer (**LCRO**) takes to competence is that it is a basic and universal expectation. This duty does not demand exceptional service levels, but rather ensures lawyers meet minimum service standards. In short, it is a duty not to be incompetent.<sup>12</sup>

The Rules also direct that 'reasonable care' is required to achieve competence. This includes what has been recognised as an active duty for lawyers to be alive to their own levels of competence, or lack thereof.

The Lawyers and Conveyancers Disciplinary Tribunal (**Tribunal**) has identified the need for lawyers to seek competent assistance, where required, in order to meet their own professional obligations of competence.<sup>13</sup> Where a lawyer accepts instructions in a field with which they are not familiar, they may be found to have breached the standard of competence, for failure to recognise the need for 'competent assistance'.<sup>14</sup>

#### Practical considerations

Given the construction and interpretation of Rule 3 as requiring minimum standards of service, being aware of tikanga based legal developments, particularly those in the lawyer's practice area, will be an important starting point. Also important is a basic understanding of te ao Māori as it exists independent of the law. We address these two areas when discussing CPD planning below.

A client's instructions, references to tikanga in legislation, or tikanga developments in the lawyer's area(s) of practice will all inform what is required to deliver minimum standards of service in each case.

For example, those practising in areas where tikanga is frequently considered by courts or Tribunals, or incorporated into legislation, will require a knowledge of tikanga proportionate to the ongoing requirements of that practice area. In the case of litigators, for example, this will include the skill set required to identify and brief relevant, appropriate, and cogent tikanga evidence in support of a relevant case. As is the case in other areas of law, lawyers may also require sufficient knowledge to

identify and provide advice on instances where tikanga does not apply or would be inappropriate to advance.<sup>15</sup>

The concepts of 'reasonable care' and seeking 'competent assistance' are relevant for practitioners navigating the intersect between tikanga and client instructions. There are analogous situations which arise during legal practice where a client's needs or instructions straddle the area of practice and knowledge held by the lawyer, and that outside of that lawyer's areas of knowledge. As is the case in those instances, seeking advice from another lawyer knowledgeable in that area, or an expert in tikanga is appropriate, as is identifying with the client that their case raises matters outside of the lawyer's field of knowledge and advising that they seek that specialist advice. A lawyer should also be mindful of how to best assist the court. For example, where tikanga is directly relevant in legal proceedings, a litigator should consider whether the court would be assisted by appointing a pūkenga (tikanga expert) as a court appointed witness.

Those seeking to engage colleagues for assistance on tikanga-related issues should note that Rule 10.1 requires any approach for assistance to be made with appropriate respect and courtesy, reflecting the nature of the assistance being sought.

*Rule 3.1: A lawyer must at all times treat a client with respect and courtesy and must not act in a discriminatory manner in contravention of section 21 of the Human Rights Act 1993.*<sup>16</sup>

Basic concepts of respect and courtesy are commonly understood and therefore their meaning is not elaborated on in the Rules. These concepts are considered by the Tribunal and LCRO primarily in the breach, and therefore only assist in the event of alleged conduct said to have fallen short of those standards.<sup>17</sup> Primarily lawyers will be guided by their own sense of professional responsibility in this regard.

Although there are basic common elements of courtesy and respect that are understood by most, it is natural that a lawyer and client's expectations of each will be further informed by their respective cultural backgrounds and upbringing. As noted by the authors of *Professional Responsibility in New Zealand*, where there are cultural differences, there is the potential to affect the lawyer-client relationship, highlighting the need for cultural competence.<sup>18</sup> This was addressed in *Regulating Lawyers in Aotearoa New Zealand*, the report of the independent review into the regulation of the legal profession, where the review majority observed that, from a consumer's perspective, a competent lawyer is one who understands their needs and is responsive to the client's culture.<sup>19</sup>

### **Practical considerations**

The nature of tikanga is that it comprises beliefs, values, practices and procedures to be followed in conducting the affairs of a group or individual.<sup>20</sup> Looking at the work of the lawyer then, tikanga will not only be relevant to specific legal considerations but will also be relevant to how the lawyer and client relate and work with each other. Lawyers might consider discussing this in their initial engagement with clients as a sound basis for interaction moving forward.

For example, clients with te reo Māori names, may find efforts to correctly pronounce their name as a basic mark of respect and courtesy. For some clients, the simple opportunity to discuss and contribute to the processes involved with engaging their lawyer is also an important measure of courtesy and respect. For others, accommodating whānau support within the lawyer-client relationship may be

important. These examples are by no-means exhaustive, and, again, this issue should be considered in the context of the client, their legal needs, and subject to other important provisions of the Rules.<sup>21</sup>

## Continuing Professional Development

As we referred to above, the extent to which a lawyer's CPD planning and learning might incorporate tikanga will be informed by the needs of their area of practice, clients, or both.

*Rule 3.9: A lawyer must undertake the continuing education and professional development necessary to ensure an adequate level of knowledge and competence in his or her fields of practice.*

### Practical considerations

There is a degree of flexibility to what constitutes CPD, providing any activity aligns with the lawyer's learning needs and meets the definition of activities in the [Lawyers and Conveyancers Act \(Lawyers: Ongoing Legal Education—Continuing Professional Development\) Rules 2013](#). For more on CPD requirements, please see the Law Society website: [NZLS | CPD requirements](#).

For lawyers considering the place of tikanga in their CPD planning, we note the guidance provided by Professor Wiremu Doherty, Distinguished Professor Tā Hirini Moko Mead, and Professor Tā Pou Temara in *He Poutama*, "it is important for those wishing to build their understanding of tikanga and to engage authentically with it to consider tikanga within a Māori world view. Exploring aspects of te ao Māori (the Māori world) and the Māori knowledge systems underpinning tikanga provides a basis for better understanding."<sup>22</sup>

Practically then, lawyers should consider learning opportunities that:

- Help build their understanding of tikanga within te ao Māori – within this we note the importance te reo Māori plays in understanding tikanga and te ao Māori;<sup>23</sup> and
- Further their understanding of how tikanga engages with their area(s) of legal practice.

To assist lawyers exploring their learning needs and how they might be met in these areas, we have compiled a list of resources.

- 1 Ellis v R (Continuance) [2022] NZSC 114, [2022] 1 NZLR 239. See, for example, the judgment of Glazebrook J at [117].
- 2 At [19].
- 3 At [22]. On the recognition of tikanga as a "free-standing" legal system, see *Ngāti Whātua Ōrākei* (No 4) [2022] NZHC 843, [2022] 3 NZLR 601 at [355] and see *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [169], fn 282 per William Young and France JJ, agreed to by Glazebrook J at [237], Williams J at [296]-[297] and Winkelmann CJ at [332].
- 4 See for example *Wairarapa Moana ki Pouakani Incorporation v Mercury Energy NZ* [2022] NZSC 142 and *Ngāti Whātua Ōrākei Trust v Attorney-General* (No 4) [2022] 3 NZLR 601.
- 5 A complaint about the amendments to these Regulations was upheld in part, leading to the disallowance of a requirement that tikanga be taught as a part of all compulsory law subjects. However, the complaint was not upheld in respect of the requirement for a compulsory standalone paper to be taught.
- 6 See NZLC SP24, *He Poutama*, Appendix 1 – *Tikanga* and fn 3 above.
- 7 NZLC SP24, *He Poutama*.
- 8 See the list of resources and CPD opportunities compiled by the Law Society to assist lawyers.
- 9 Lawyers and Conveyancers Act, s 12.
- 10 AJ v BN [2020] NZLCRO 185 at [57].
- 11 Duncan Webb, Kathryn Dalziel and Kerry Cook Ethics, Professional Responsibility and the Lawyer (3rd ed, LexisNexis, Wellington, 2016) at 303.
- 12 VW v EX [2021] NZLCRO 59 at [81].
- 13 Auckland Standards Committee No 5 of the New Zealand Law Society v Patel [2014] NZLCDT 67 at [14] (i).
- 14 Wellington Standards Committee 2 v Lagolago [2015] NZLCDT 43 at [20].
- 15 See Rule 5.2 – lawyer to exercise professional judgement at all times, within the bounds of the law, and professional obligations of the lawyer solely for the benefit of the client. Rule 5.3 – A lawyer must at all times exercise independent professional judgement on a client's behalf. A lawyer must give objective advice to the client based on the lawyer's understanding of the law. See also Rule 13.1 – duty to obtain and follow informed instructions.
- 16 See also: Rule 10.1 which applies to all individual lawyers interact with professionally.
- 17 See, HM v PL [2020] NZCLRO 197 and TB v KP LCR0174/206.
- 18 Matthew Palmer (ed) *Professional Responsibility in New Zealand* (online looseleaf ed, LexisNexis). Chapter 2: Paranihia Walker and Horiana Irwin-Easthope, The enduring importance of Tikanga Māori and Te Reo Māori for the legal profession, at [2.4]. See also:
- 19 Regulating Lawyers in Aotearoa New Zealand | Te Pae Whititahi i te Korowai Rato Ture o Aotearoa, Independent Review Final Report, March 2023, at p.96
- 20 Tikanga Māori- Living by Māori Values, 2003, Hirini Moko Mead at page 12.
- 21 For example, Rule 8 – confidential information, Rule 10.4 communicating with another lawyer's client.
- 22 Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [2.60], see: *He Poutama* at [2.1].
- 23 Doherty, Mead and Temara "Tikanga", Appendix 1at [1.3]. See also, Alana Thomas, Corin Merrick, Kia Kākano Rua Te Ture – a te reo Māori Handbook for the Law, 2019, at xi.