
NEW ZEALAND COUNCIL OF LEGAL EDUCATION

11 June 2024

Regulations Review Committee

By email: regulations.review@parliament.govt.nz

Dear Chairperson and Members of the Regulations Review Committee

COMPLAINT ABOUT THE PROFESSIONAL EXAMINATIONS IN LAW (TIKANGA MĀORI REQUIREMENTS) AMENDMENT REGULATIONS 2022

1. Thank you for your letter of 22 May 2024, inviting the New Zealand Council of Legal Education (**the Council**) to respond to the matters raised by Mr Judd KC in his complaint about the Professional Examinations in Law (Tikanga Māori Requirements) Amendment Regulations 2022 (**the Tikanga Regulations**).
2. Mr Judd said the Tikanga Regulations should be drawn to the attention of the House under three grounds in Standing Order 327:
 - a. Standing Order 327(2)(a) – that the Tikanga Regulations are not in accordance with the general objects and intentions of the enactment under which they are made;
 - b. Standing Order 327(2)(b) – that the Tikanga Regulations trespass unduly on personal rights and liberties; and
 - c. Standing Order 327(2)(c) – that the Tikanga Regulations appear to make some unusual or unexpected use of the powers conferred by the enactment under which they are made.
3. The Regulations Review Committee (**the Committee**) has accepted that “on the face of it, the complaint relates to Standing Orders 327(2)(b) and (c)”. It has not accepted that the complaint relates to Standing Order 327(2)(a). Accordingly, the Council’s response addresses only the grounds in Standing Order 327(2)(b) and (c).
4. The Council’s response begins with some matters of context, by providing an outline of:
 - a. The Council, its functions and its power to make regulations.
 - b. The Professional Examination in Law Regulations 2008.

5. The response then explains the timeline of and the Council’s reasons for making the Tikanga Regulations. It then addresses the particular matters raised by Mr Judd in his complaint.

The Council, its functions and its power to make regulations

6. The Council was first established in 1930. Since 1961, it has been an independent statutory body with the role of (among other things) defining and prescribing the courses of study for those persons wishing to be admitted as barristers and solicitors (lawyers) of the High Court of New Zealand.
7. The Council is now constituted under the Lawyers and Conveyancers Act 2006 (the Act). Under s 282, membership of the Council consists of:
- a. Two Judges of the High Court nominated by the Chief Justice.
 - b. A District Court Judge nominated by the Chief District Court Judge.
 - c. Five members nominated by the Council of the New Zealand Law Society.
 - d. The Dean of each of New Zealand’s six law schools.
 - e. Two members nominated by the New Zealand Law Students’ Association.
 - f. One member (not being a practitioner or a law student) nominated by the Minister of Justice.
8. All members (other than the Deans of the law schools) are appointed by the Governor-General, on the advice of the Attorney-General.
9. The Act sets out the Council’s functions and powers, including its power to make regulations. Those functions and powers need to be understood in the light of the stated purposes of the Act. These are set out in s 3. Those purposes include, relevantly:¹

3 Purposes

- (1) The purposes of this Act are—
- (a) to maintain public confidence in the provision of legal services ... :
 - (b) to protect the consumers of legal services ... :
 - (c) to recognise the status of the legal profession
- ...

10. The Council’s functions are set out in s 274. They include:

274 Functions

- The functions of the Council are,—
- (a) subject to this Act, to set the qualification and educational requirements for candidates for admission as barristers and solicitors of the High Court:
 - (b) subject to this Act, to define, prescribe, and approve, from time to time and as it thinks fit, the courses of study required to be undertaken by candidates for admission as barristers and solicitors:
- ...

¹ References to conveyancers have been omitted.

11. Section 275(1) says that the Council has “all such rights, powers, and authorities as are necessary or expedient for, or conducive to, the performance of its functions”. The Council’s power to make regulations is set out in s 278. This says, relevantly:²

278 Power of Council to make regulations

- (1) Subject to this Act, the Council may, from time to time, by resolution, make, alter, or revoke any regulations not inconsistent with this Act that are necessary or expedient in respect of—
- (a) any course of study and the practical training and experience of candidates for admission as barristers and solicitors of the court:
 - (b) any matters that by this Act are required or permitted to be prescribed, or with respect to which regulations are necessary or expedient for giving effect to the provisions of this Act, in relation to legal education.
- ...
- (3) The Council may not make regulations under this section unless the Minister has approved the proposed regulations.
- ...

The Professional Examination in Law Regulations 2008

12. The Council has, pursuant to its power in s 278, made regulations prescribing the courses that must be passed by a candidate wishing to be admitted as a lawyer. The current regulations are the Professional Examination in Law Regulations 2008 (**the principal Regulations**).
13. For a candidate who wishes to be admitted as a lawyer after undertaking a law degree in New Zealand, the principal Regulations require (leaving to one side for now the change made by the Tikanga Regulations):
- a. The candidate to complete an LLB or LLB(Hons) at a University in New Zealand (reg 3(1)(a)).
 - b. The candidate to pass the following subjects: the Legal System, the Law of Contracts, the Law of Torts, Criminal Law, Public Law, Property Law and Legal Ethics (**the core subjects**) (reg 3(1)(b) and (d)). The candidate will usually have passed the core subjects as part of their LLB or LLB(Hons).
 - c. The candidate to pass the Professional Legal Studies Course (**PLSC**) (reg 3(1)(c)). The PLSC is a practical legal training course. It is offered by the Institute of Professional Legal Studies (a division of the Council) and by the College of Law.
14. The principal Regulations also prescribe the content of the core subjects and of the PLSC, though in broad terms. For example, the prescription for Criminal Law is “The general principles of criminal liability”.
15. The principal Regulations were made in accordance with the Council’s functions in s 274(a) and (b). Under s 274(a) and (b), the Council has to determine what qualifications and

² Section 278(2) is omitted. This primarily relates to practical legal training (generally taken after a candidate has completed an LLB or LLB(Hons)) rather than to prescriptions for the LLB or LLB(Hons).

courses a candidate for admission should be required to complete and pass. An important aspect of that function is to determine the core subjects a candidate should have to pass (as well as otherwise meeting the requirements of an LLB or LLB(Hons) degree) before being admitted and therefore before being entitled to practise as a lawyer. In short, the Council has to determine the core subject-matter competencies a practising lawyer should have. This reflects two of the Act's purposes: to maintain public confidence in the provision of legal services and to protect the consumers of legal services.

16. This provides the context for the Council's decision to make the Tikanga Regulations.

The decision to make the Tikanga Regulations

Timeline

17. The possibility of adding tikanga Māori as a core subject was raised at a meeting of the Council on 1 November 2019. The Council first resolved to ask the law schools about the extent to which they were teaching tikanga Māori as part of their law degrees.
18. At a Council meeting on 6 November 2020, the Council resolved in principle that tikanga Māori should be taught as a core subject in the law degree. A subcommittee was formed to produce a draft course prescription.
19. The Council next considered the matter at a meeting on 7 May 2021. The Council confirmed its earlier resolution that tikanga Māori be taught as a core subject. It made a further resolution that tikanga Māori be taught in each of the other core subjects.
20. During 2021, the Council consulted a range of stakeholders on the proposal, including the judiciary, law schools, the New Zealand Law Society, the New Zealand Bar Association and law student associations. Eighteen submissions were received. All were supportive of the proposal, though many were concerned that the proposed timeframe for implementation (which at that time was January 2022) would not allow law schools sufficient time to prepare for the proposed changes.
21. At its next meeting, in March 2022, the Council resolved that the tikanga Māori requirements should be implemented for students starting degrees from 1 January 2025.
22. At a meeting on 27 May 2022, a draft amendment to the principal Regulations to reflect the two tikanga Māori resolutions was discussed. The Council then consulted with stakeholders on the draft amendment. Submissions from stakeholders were considered at a Council meeting on 12 August 2022. The drafting of the proposed amendment was finalised by a subcommittee in September 2022.
23. The Council then provided background information on the proposed amendment to the Ministry of Justice (such as the consultation undertaken by the Council, and the preparedness of law schools to implement the proposals), so that the Ministry could provide advice to the Minister of Justice. On 8 December 2022, the Council sent the proposed amendment to the Minister of Justice for approval.

24. The Minister approved the proposed amendment to the principal Regulations on 30 January 2023. The Council then formally made the amendment at a meeting on 5 May 2023.
25. The decisions made by the Council from 7 May 2021 onwards were recorded in the Annual Reports 2021, 2022 and 2023 that the Council laid before the House.

The Council’s reasons for making the Tikanga Regulations

26. The Tikanga Regulations make two related changes to the principal Regulations. The first is to add tikanga Māori as a core subject (amended reg 3(1)(b)). The second is to require the law degree to include teaching and assessment of the general principles and practices of tikanga Māori relevant to the other core subjects (new reg 3(1)(a)(ii)).
27. As can be seen from the timeline, the Council resolved to make these two changes at its meetings on 6 November 2020 and 7 May 2021. The changes were made to reflect the extent to which tikanga Māori had increasingly become relevant to the practice of law.
28. First, Acts of Parliament in a wide variety of fields were referencing tikanga Māori. Examples included the Property (Relationships) Act 1976, the Oranga Tamariki Act 1989, the Resource Management Act 1991, Te Ture Whenua Māori Act 1993, the Trade Marks Act 2002, the Climate Change Response Act 2002, the Coroners Act 2006, the Marine and Coastal Area (Takutai Moana) Act 2011, the Patents Act 2013, and the Education and Training Act 2020. This list was expected to grow. At least from 2018, the *Legislation Guidelines* published by the Legislation Design and Advisory Committee stated that new legislation should, as far as practicable, be consistent with tikanga and that legislation should be drafted with consideration of whether it may affect practices governed by tikanga.³
29. Secondly, New Zealand courts were increasingly acknowledging that tikanga Māori was part of the values of the common law and contributed to the common law’s development. Examples included the Court of Appeal’s decision in *Ngati Apa v Attorney-General* (2003)⁴ and the Supreme Court’s decisions in *Takamore v Clarke* (2012),⁵ *Paki v Attorney-General (No 2)* (2014),⁶ and *Ngāti Whātua Ōrākei Trust v Attorney-General* (2018).⁷ These decisions relied on older common law foundations. For example, when Tipping, McGrath and Blanchard JJ held, in *Takamore v Clarke*, that the common law had always been amenable to taking account of “custom” and therefore had to give due weight to the tikanga concerning Māori burial practices,⁸ they referenced two decisions from the first decade of the twentieth century.⁹

³ Legislation Design and Advisory Committee, *Legislation Guidelines: 2018 Edition* (March 2018) at 3.4 and 5.3. Those were the guidelines current when the Council passed the tikanga resolutions in May 2021. The same guidelines appear at 3.4 and 5.3 of the current (September 2021) edition.

⁴ *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA), for example at [184] per Tipping J.

⁵ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

⁶ *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67, for example at [166] per Elias CJ.

⁷ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

⁸ At [152] and [164].

⁹ At [150], citing *Baldick v Johnson* (1910) 30 NZLR 343 (SC) and *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

30. These decisions were, unsurprisingly, having effects on the approaches taken by lower courts. For example, in 2021, in *Sweeney v Prison Manager, Spring Hill Corrections Facility*, the High Court held that, where material to a case, the courts could recognise and uphold the values of tikanga Māori in applying the law of judicial review.¹⁰
31. Given the legislative references to tikanga and the courts' acknowledgement that tikanga was part of the values of the common law, it appeared to the Council that tikanga Māori would be relevant in a wide variety of legal contexts. A lawyer without some knowledge and understanding of tikanga Māori would not be alive to such issues. Their clients would not be well served. The Council considered that some knowledge and understanding of tikanga Māori, including as relevant to the other core subjects in the law degree, was a core competency that should be possessed by a candidate wishing to be admitted as a lawyer. None of the submissions from the New Zealand Law Society, New Zealand Bar Association, law student associations, law schools or judiciary expressed a contrary view.
32. By the time the Council finalised drafting of the Tikanga Regulations in September 2022, the Supreme Court had delivered a further decision (in late 2021) that confirmed the relevance of tikanga Māori to the practice of law. In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*,¹¹ the Court held that tikanga was an “applicable law” in terms of s 59(2)(1) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. William Young and Ellen France JJ said that “tikanga is a body of Māori customs and practices, part of which is properly described as custom law”.¹²
33. Mr Judd's complaint makes much reference to the Supreme Court's decision in *Ellis v R*.¹³ The Supreme Court delivered that decision in October 2022. By that time, the Council had already resolved to make the Tikanga Regulations and had finalised the drafting of them. However, the decision is yet further confirmation of the importance of an understanding and knowledge of tikanga Māori to the practice of law.

Mr Judd's complaint

34. The Council now turns to address Mr Judd's complaint.

“Tikanga is not law”

35. Much of Mr Judd's complaint is based on his contention that tikanga Māori is not law. He advances that contention by criticising the Supreme Court's decision in *Ellis*. He says that judgments elevating tikanga to the status of law “bear the mark of the naked policy preferences of individual judges”, that the Supreme Court “happily jettisoned” a test that had been developed and refined over the centuries, and that in doing so the Court “turn[ed] legal reasoning on its head”. He says the Supreme Court failed to explain why tikanga fitted within any definition or description of “law”.

¹⁰ *Sweeney v Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27 at [75].

¹¹ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

¹² At [169].

¹³ *Ellis v R (Continuance)* [2022] NZSC 144, [2022] 1 NZLR 239.

36. Mr Judd is entitled to criticise *Ellis* (and other judgments with which he disagrees). Criticism of court decisions in New Zealand is common and to be welcomed.
37. The Council’s functions, however, do not include acting as a critic of the courts. It is not for the Council to take a view on the correctness of *Ellis* or of any of the many other decisions that have acknowledged that tikanga Māori is to be recognised in the development of the common law (just as it is not for the Council to take a view on the correctness of court decisions in other areas of the common law, or to take a view on whether it is “correct” for Parliament to include references to tikanga Māori in legislation). The Council’s functions are (relevantly to this complaint) to determine what courses of study are required to be undertaken by those who wish to be admitted as lawyers. In performing that function, the Council cannot simply ignore the courts’ decisions in this area (nor ignore legislation passed by Parliament).
38. In short, Mr Judd’s complaint under this head is a complaint about the Supreme Court. This is seen in his conclusion, in which he says it is “a matter of great concern that the *Supreme Court* should endorse [tikanga Māori] as ‘first law’ without going through ... the elementary reasoning process of asking itself whether it is law at all”.

“It is not right that law students should be compelled to learn about tikanga beliefs and values”

39. Next, Mr Judd says that the Tikanga Regulations “directly trench upon the human right affirmed by s 13 of the [New Zealand] Bill of Rights [Act 1990], to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions *without interference*”. He says the Tikanga Regulations are intended to “inculcate” beliefs and values that may be held by some within “our Māori community” but that those who do not subscribe to such beliefs and values should not be compelled to partake of them. He says that it is right that a person wishing to practise law should be proficient in the core legal topics, but that it is not right that they should be compelled to learn something “which is not law”.
40. The Tikanga Regulations do not compel law students to “subscribe” to tikanga Māori (just as the principal Regulations do not compel students to “subscribe” to, say, aspects of the criminal law or of the law of negligence with which they may disagree). They merely require law students to learn certain law and pass courses.
41. Council nonetheless accepts that the freedom in s 13 of the Bill of Rights Act is likely engaged. However, s 5 of that Act allows the freedom to be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Sections 274 and 278 of the Lawyers and Conveyancers Act empower the Council to require those who wish to be admitted as lawyers to undertake and pass particular courses of study. Requiring prospective lawyers to pass courses in core legal topics is, as Mr Judd appears to acknowledge, a justifiable limit on their freedom of thought, given the public interest in lawyers competently providing legal services. The Council’s view is that tikanga Māori is a core legal topic (for the reasons set out earlier, under “The Council’s reasons for making the

Tikanga Regulations”). Mr Judd’s contrary view is based on his contention that tikanga Māori “is not law” – a contention that the Council addressed in the previous section.

“Rule of law and the sovereignty of Parliament”

42. Mr Judd says that the tikanga described in the Statement of Tikanga in *Ellis* does not satisfy the minimum requirements of the rule of law, and that the Supreme Court could not endorse tikanga as law “without endorsing a system which does not conform with the rule of law”. Mr Judd also says that when courts endorse tikanga as part of the general law they are “making law”, which trespasses on the sovereignty of Parliament.
43. As already noted, Mr Judd is entitled to make these criticisms, but they are criticisms of the courts’ decisions. The Council cannot ignore those decisions (or decisions in other areas of the law) when determining what courses of study should be compulsory for prospective lawyers.

“The Tikanga Regulations trespass unduly on the personal rights and liberties of law students”

44. This part of Mr Judd’s complaint references Standing Order 327(2)(b). Mr Judd does not otherwise explain this aspect of his complaint. It appears to rest on his earlier assertion that it is not right that law students should be compelled to learn about tikanga beliefs and values. The Council relies on its response to that assertion, and on its explanation of the reasons for making the Tikanga Regulations.

“The Tikanga Regulations are an unusual and unexpected use of the powers conferred by the 2006 Act”

45. This references Standing Order 327(2)(c). Mr Judd says the Tikanga Regulations are unprecedented. He does not otherwise explain this part of his complaint.
46. The Tikanga Regulations are not unprecedented. They add a core legal subject to those that have previously been made compulsory by the Council. The Council has made significant changes to the Regulations before. In 1997, the Council added a course in Legal Ethics to the courses that candidates had to pass. The Council followed a similar consultation process then as it did for the Tikanga Regulations.
47. Standing Order 327(2)(c) is intended to cover situations where, although secondary legislation is authorised by a regulation-making power, it does not represent a proper use of that power.¹⁴ This was a proper use of the Council’s power, for all the reasons the Council has already set out. Further, there is nothing unusual or unexpected about the Tikanga Regulations, either in their substance (see “The Council’s reasons for making the Tikanga Regulations”) or in the process adopted to make them (see “Timeline”). Consultation showed that the law schools were already teaching tikanga Māori in parts of their law degrees (including in some compulsory courses), and submitters supported the Council’s

¹⁴ Regulations Review Committee *Complaint about a Specialist Optometrist Scope of Practice and associated Prescribed Qualification made under the Health Practitioners Competence Assurance Act 2003* (May 2023) at 4.

proposal. Submitters included the New Zealand Law Society, the Bar Association and law student associations. No submitter suggested that the proposal was unusual or unexpected.

Other matters

48. Mr Judd concludes his complaint by suggesting that the Council was required, after it had formally adopted the Tikanga Regulations, to send those regulations to the Minister so that they could be presented to the House. The Council’s view is that, by reason of transitional provisions in the Legislation Act 2019, there was no obligation on the Minister to present the Tikanga Regulations to the House. The Council understands that the Committee is of the same view and does not need the Council to provide further reasons. If the Committee does wish to have further reasons, they can be provided.

Mr Judd’s supplementary submission

49. Mr Judd has made a supplementary submission dated 3 June 2024.

50. Mr Judd first says that the Tikanga Regulations are part of an advancement of a political agenda of decolonisation and that making regulations for political purposes is an unusual or unexpected use of the powers conferred by the Lawyers and Conveyancers Act. Mr Judd refers to extra-judicial writings of Justices Glazebrook and Williams. He says this political agenda is a direct affront to parliamentary sovereignty and democracy.

51. Mr Judd is entitled to criticise those extra-judicial writings. But those writings were irrelevant to the Council’s decision to make the Tikanga Regulations. The Council’s decision, as explained earlier, reflected the extent to which tikanga Māori had increasingly become relevant to the practice of law, as a result of both Acts of Parliament and decisions of the courts.

52. Mr Judd then says that the House should disallow the Tikanga Regulations as that could be “the commencement of a wider campaign to demonstrate that we are one people with one democratically elected parliament”. This is a political matter on which it is not for the Council to comment, other than to observe that it has no relevance to the grounds set out in Standing Order 327(2)(b) and (c).

Conclusion

53. The Council made the Tikanga Regulations because it considered that some knowledge and understanding of tikanga Māori was a core competency that should be possessed by a person wishing to be admitted as a lawyer. The Council came to this view because Acts of Parliament and court decisions had made tikanga Māori increasingly relevant to the practice of law. Mr Judd is entitled to criticise those court decisions (and those Acts of Parliament). The Council, by contrast, cannot ignore those Acts and decisions in performing its statutory function of determining what courses of study are compulsory for those who wish to be admitted as lawyers. Making the Tikanga Regulations was in accordance with the Council’s statutory functions and was a proper use of its regulation-making power.

54. Please let the Council know if the Committee would be assisted by the Council appearing to answer any questions the Committee may have arising from this response.

Yours sincerely

A handwritten signature in black ink, appearing to read "Neil Campbell", with a stylized flourish at the end.

Neil Campbell
Chair
New Zealand Council of Legal Education