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ARTICLE

A New Era of Tikanga Jurisprudence: Suggestions on How the New Zealand Courts Should Respond to the Expanding Relationship Between Tikanga and the Common Law

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Recently, the Supreme Court ushered in a new era of tikanga jurisprudence, expanding the relevance of tikanga to the common law. Freed from the restrictions imposed by colonial-era precedent, the relationship between tikanga and the common law is set to evolve on a case-by-case basis as circumstances arise where tikanga is relevant. This article explores the challenges of the developing law, including the difficulty of unclear boundaries, the importance of retaining the integrity of tikanga and the capacity of the courts to resolve cases involving complex tikanga issues. It suggests the current levels of procedural uncertainty expose the integrity of tikanga to unnecessary risk, and calls on the common law to adapt its orthodox methodologies and embrace approaches grounded in tikanga.

I Introduction

The Supreme Court in *Ellis v R* ushered in a new era of tikanga jurisprudence.[1] Previous authority on the incorporation of tikanga in the common law has been cast aside, the Supreme Court unanimous that tikanga has been and will continue to be recognised in the development of New Zealand's common law.[2]

The New Zealand legal system has entered a transitional phase as it endeavours to navigate the practical impacts of an expanded relationship between the common law and tikanga. The previous relationship, confined by colonial doctrines, customary law and

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1 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [108].

2 At [19].

limited statutory recognition, makes way for a jurisprudence to be founded on questions of relevance. In the absence of established authority, the New Zealand courts will be tasked with determining how and when tikanga will be recognised as part of the common law.[3] The Supreme Court now explicitly recognises the particular importance of tikanga being the first law of New Zealand and its uninterrupted regulation of Māori lives, as well as the increasing influence over New Zealand society more broadly.[4] As a result, tikanga is set to have a far more significant influence on the development of the New Zealand common law.

This article argues that to meet the challenges of developing common law, New Zealand courts must rely on external expertise to resolve cases where tikanga is relevant. This article suggests that to promote consistency and avoid misinterpretation during the first stages of development, pūkenga (tikanga experts) should be appointed to all High Court cases involving tikanga. This reflects the current lack of tikanga competency on the bench and the importance of protecting the integrity of tikanga as it encounters the common law. To develop a coherent tikanga jurisprudence, the High Court should consider establishing a Tikanga Panel of Judges to manage and hear the most complex tikanga cases. However, to meet the demands of a specialist panel, the judiciary must first address the lack of tikanga capacity on the bench due to there being too few judges with knowledge and experience in tikanga.

Part II of this article discusses how *Ellis* signalled the start of a new era of tikanga jurisprudence. This part examines the Supreme Court's discussion of tikanga's role in the development of New Zealand common law, as well as the court's various acknowledgements of tikanga's broader significance. In doing so, Part II agrees with the previous commentary that courts tend to miscategorise the influence of tikanga over the development of the common law.

Part III charts the development of the relationship between tikanga and the common law from the original colonial doctrine and customary law foundation. This part exposes the doctrine of continuity's influence over tikanga jurisprudence for over a century before modern thinking emerged in the mid-2000s. Part III returns to *Ellis* and concludes that the Supreme Court decision has developed the law more significantly than first indicated.

Part IV addresses the important challenges of the expanding relationship between tikanga and the common law. Despite fundamental objections to the development of the relationship, the lower courts have readily adopted *Ellis*, indicating that the relationship between tikanga and the common law is expanding. Consequently, the judiciary must ensure the integrity of tikanga is preserved and that courts are equipped with the methods that best enable them to develop jurisprudence consistently and coherently.

Finally, Part V suggests that to best mitigate the immediate challenges identified in Part IV, pūkenga should be appointed in all High Court cases where tikanga is relevant to cure the current emerging inconsistencies. To promote the long-term coherent development of the law, this article endorses the suggestion of the Law Commission to establish a Tikanga Panel of Judges in the High Court—this is subject to more judges with knowledge and experience of tikanga being appointed to the bench.

3 Sarah Down and David V Williams "Building the Foundations of Tikanga Jurisprudence" (2022) 29 Canta LR 27 at 28, note 3.

4 *Ellis*, above n 1, at [22], [110], [168] and [173].

II A New Era of Tikanga Jurisprudence

In *Ellis*, the Supreme Court delivered a landmark judgment that promises a more evolved relationship between tikanga and the common law. The case marks a departure from the prevailing line of historic precedent, which had confined the relationship between the common law and tikanga within the restrictive boundaries of customary law and colonial doctrine. In drawing a line through the former colonial tests for incorporation of tikanga into the common law, the Court in *Ellis* declares that tikanga, as law, is "part of the common law of Aotearoa/New Zealand".[5]

Ellis comprises two judgments: one on the substantive issue of the appeal against conviction and the second which contained the reasons for allowing the appeal to continue despite the appellant having died two months before the first scheduled hearing. It is the latter judgment on the posthumous continuation of the appeal that deals with tikanga and is considered here.

A *The Court considers tikanga's relevance to the appeal*

Glazebrook and Williams JJ prompted the consideration of tikanga in *Ellis* when they suggested that tikanga may be relevant. The case was adjourned as Court requested the parties consider whether tikanga had anything to say on the issue of posthumous appeals.[6] In June 2020, the Court convened specifically to hear argument on tikanga. In the resulting judgments, Winkelmann CJ, Glazebrook and Williams JJ, agreed that tikanga was relevant in allowing the posthumous appeal to continue. However, a second majority, comprised of Glazebrook, O'Regan and Arnold JJ, held that tikanga was not ultimately material to the development of common law rule on posthumous appeals.[7]

Regardless of the substantive outcome, *Ellis* is significant for its contribution to the discussion regarding the status of tikanga in New Zealand law. Glazebrook J accepted that the question of the place of tikanga in New Zealand's law is one of general importance with the reasons delivered in *Ellis* having relevance for future cases, including for other areas of law.[8]

The Court unanimously held that tikanga has been and will continue to be recognised in the development of the common law of New Zealand, in cases where it is relevant.[9] Significantly, the majority judges accepted that tikanga was New Zealand's first law and, therefore, is of particular importance to New Zealand's common law.[10] On whether tikanga was a separate or third source of the law, Glazebrook J noted that:[11]

> … tikanga will continue to be applied by Māori and will continue to develop, independent of its place as part of the common law or as contained in legislation and policy. In this sense, tikanga is a separate or third source of law.

5 At [116].
6 Joel MacManus "Peter Ellis appeal derailed by legal curveball on possible tikanga Māori approach" (15 November 2019) Stuff <www.stuff.co.nz>.
7 *Ellis*, above n 1, at [11], [142]–[145] and [315].
8 At [82].
9 At [19].
10 At [109]–[110].
11 At [111].

The majority judges acknowledged that tikanga continues to shape and regulate the lives of Māori, acknowledging also that in many contexts tikanga regulates the behaviour of non-Māori.[12]

The Court, by a majority of Winkelmann CJ, Glazebrook and Williams JJ, held that the traditional incorporation tests, which have controlled the relationship between tikanga and the common law for over a century, should no longer apply.[13] Glazebrook J categorised the tests as colonial relics that are not suited for modern New Zealand.[14] Glazebrook J acknowledged that the tests for incorporation, with requirements of certainty and consistency, were contrary to the nature of tikanga itself and, therefore, inappropriate.[15] In light of the expanding jurisprudence, and given tikanga's recognised contribution to the regulation of New Zealand society, the courts will be cautious so as to avoid imposing beyond exceeding the scope of their jurisdiction when it comes to engaging with tikanga. The Supreme Court warns against impairing the operation of tikanga as a system of law and custom in its own right.[16]

Dr Carwyn Jones states the significance of *Ellis* to the development of the law to be: [17]

> … partly because tikanga is relevant, not because any of the parties are Māori or because the subject matter is a particularly Māori issue or because there is a legislative requirement to take [account] of Māori interests, but simply because tikanga can be drawn on as part of the values of New Zealand common law. This has greatly expanded the potential scope of the recognition of tikanga in the New Zealand courts. As a result of the Supreme Court's engagement with tikanga in this case, tikanga is becoming visible in many areas of New Zealand law where it had previously been invisible.

Ellis is clear authority that the law in this area is no longer bound by the colonial remnants that have dominated much of the previous tikanga-related jurisprudence. However, the decision is mindful that the common law must learn to walk in this space before it can run. Winkelmann CJ summarised the mood of the Court in this area:[18]

> While the relationship between tikanga and the common law of Aotearoa/New Zealand is of vital importance, describing how that intersection will play out in the law is by no means straightforward.

Ellis has pushed the common law forward and into a state of transition.[19] The resulting challenge for both the common law and tikanga is to establish how the expanding relationship will take shape. How this will occur is unclear considering the Supreme Court declined to reformulate a test for the inclusion and application of tikanga. In her reasons, Glazebrook J expressed doubt that any single test will ever be reformulated given the nature of tikanga and how it may prove to be relevant.[20] Instead, the Supreme Court

12 At [173].
13 At [21].
14 At [113].
15 At [114].
16 At [22].
17 Carwyn Jones "Lost from Sight: Developing Recognition of Māori Law in Aotearoa New Zealand" (2021) 1 Legalities 162 at 183.
18 *Ellis*, above n 1, at [179].
19 At [127].
20 At [137].

expects the relationship to evolve contextually and the context of future cases requires consideration of both tikanga and the common law.[21]

B *Ka mua, ka muri—walking backwards into the future*

Glazebrook J declared in *Ellis* that it was a longstanding and uncontroversial proposition that tikanga is part of New Zealand's common law.[22] However, before the 1970s, tikanga had no meaningful place in the state legal system outside of the Māori Land Court.[23] In fact, the cases often cited as the foundation for tikanga jurisprudence were decided without there being a general recognition in the New Zealand Courts or Parliament that Māori continued to operate according to their own customs. Sarah Down and David V Williams have observed an eagerness by the courts to ignore the complexities of historical tikanga jurisprudence which, when investigated, reveal a lack of clarity as to when and how tikanga became part of the New Zealand common law.[24] Arguing that New Zealand law has always recognised Māori custom ignores a reality in which, for large parts of New Zealand judicial history, Māori were marginalised and dispossessed.[25] Down and Williams propose that:[26]

> Instead of arguing that the common law has always recognised Māori custom, the more salient point is that, in the context of the 21st century, the only position that is not founded on a form of legal terra nullius reasoning is that tikanga Māori may, and should, be judicially recognised and applied.

Ellis represents a clear break from the restrictive colonial logic that previously coloured tikanga jurisprudence. However, not acknowledging the truth of the past risks entrenching those outdated foundations in our modern jurisprudence. Understanding the common law's past restrictions on tikanga ensures an appropriate awareness of the nature of the current transitory period. Before this article looks forward, Part III investigates how the relationship between tikanga and the common law has developed to date.

III How Did the Relationship between Tikanga and the Common Law Evolve?

This part explores the development of the relationship between tikanga and the common law in New Zealand. The cases explored here reveal how recognition of tikanga was limited, strictly confined by the doctrine of continuity and colonial perspectives on customary law.

The terminology used in the early English doctrines and the cases often referred to tikanga as "local custom", "customary law" or "indigenous customary law". The Law Commission has reaffirmed that custom and tikanga are not synonymous terms, and this article respects that distinction.[27] Reference to customary law or Māori custom only

21 At [21].
22 At [108].
23 Natalie Coates "The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 65 at 66.
24 Down and Williams, above n 3, at 37.
25 At 37.
26 At 37 and 50.
27 Law Commission *He Poutama* (NZLC SP24, 2023) at [5.4].

reflects the terminology used by the common law in its early interactions with tikanga. It is not a reference to tikanga itself.

A *Doctrine of continuity*

Tikanga was first introduced to the common law when English law was declared to apply in New Zealand in February 1840.[28] English common law doctrines, imported into New Zealand when the British Crown claimed sovereignty, were the foundation of early interactions between the common law and tikanga. The interaction with tikanga was not considered novel, as the common law had always provided for the recognition of local custom.[29]

The doctrine of continuity was foundational in the early judicial recognition of tikanga as part of the common law.[30] This doctrine permitted long-standing and universally observed customs of a particular community or regarding a particular piece of land, to be granted the force of law and enforced in accordance with the remedies available under English law.[31] The common law extended the doctrine's application to recognise the custom of indigenous peoples in British colonies "unless and until altered by legislation".[32] However, recognition was not unqualified. The test for recognition required evidence of the custom having existed since time immemorial, it having continued as of right and without interruption since its origin, and not having been extinguished by statute.[33] Although the doctrine purported to recognise indigenous custom, colonial actors only intended the continuity of indigenous custom to be a temporary state of affairs, with the unification of the legal systems inevitable.[34]

(1) New Zealand courts applying the doctrine

The doctrine of continuity was applied in New Zealand courts on multiple occasions in the early 20th century. In 1908, *Public Trust v Loasby* considered Māori customs in relation to tangihanga for chiefs or persons of importance.[35] Cooper J accepted that Māori retained their tangihanga customs. The judgment is recognised for establishing a test by which the common law would recognise Māori custom.[36] The *Loasby* inquiry contained three aspects relevant to determining whether a practice could be recognised as customary law. First, whether the custom exists as a matter of fact; second, whether it was contrary to any statute law; and third, whether it is reasonable given all the relevant circumstances.[37]

Then, in 1910, *Baldick v Jackson* gave effect to Māori fishing rights over a 1324 English statute. Here, a statute concerning the King's revenue that deemed whales to be a "royal fish" did not apply in New Zealand because of the local circumstances.[38] General custom

28 Down and Williams, above n 3, at 33, n 30.
29 Law Commission, above n 27, at [5.4].
30 Down and Williams, above n 3, at 30.
31 At 30.
32 Law Commission, above n 27, at [5.4].
33 At [5.5].
34 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 [*Takamore* (CA)] at [113].
35 *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) as cited in Down and Williams, above n 3, at 34.
36 At 806.
37 At 806.
38 *Baldick v Jackson* (1910) 30 NZLR 343 (SC) as cited in *Takamore* (CA), above n 34, at [114]; and Down and Williams, above n 3, at 35.

was recognised in the 1919 Privy Council decision *Arani v Public Trustee of New Zealand*.[39] The case concerned Māori customs for adoption. The Privy Council recognised that despite the Adoption of Children Act 1895, Māori retained their right to adopt according to Māori custom. The Court acknowledged that both the legislation and Māori custom could operate.[40] The case also recognises Māori authority to modify their customs and the ability of Māori customs to evolve.[41]

Over the following century, New Zealand Courts continued to endorse the *Loasby* test as the criteria for recognising tikanga as custom.[42] The interaction between tikanga and the common law occurred under the "tikanga-as-customary-law" banner throughout the 20th century. At this juncture, the relationship between tikanga and the common law was still categorised by colonial laws, doctrine, and language.

B *Kickstarting the modern relationship*

As the common law of New Zealand developed over the 20th century, the courts continued to engage with tikanga as a matter primarily of customary law. In 2003, *Attorney General v Ngati Apa*, Tipping J stated that Māori customary law was an "ingredient" of New Zealand common law.[43] Tipping J's statement that Māori customary title was not a matter of grace and favour but of common law, rejects the early colonial idea that Māori custom would only be a temporary feature of New Zealand law.[44] Being part of the common law (as customary law) meant that tikanga could not be ignored by the Crown.

In the developing relationship between tikanga and the common law, courts recognised customary property rights, allowing land held under tikanga, as custom, to give rise to property rights and interests in the common law.[45] However, it was not until *Takamore v Clarke* that tikanga looked like breaking free from the customary tests which limited the scope of its relationship with the common law.

(1) Moving away from colonial-era cases

Takamore quietly began the modern era of tikanga jurisprudence. The case considered the tension between whānau burial rights under tikanga and the rights of the executrix to determine the burial place of the deceased under the common law.

Through *Takamore* the bench questioned whether a more modern approach for the reception of tikanga, one that did not rely on strict colonial rules, would better fit the changing New Zealand landscape.[46] The Court of Appeal showed a preference for a modified and more exact version of the test in *Loasby*—this, too, borrowed from the laws of England.[47]

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39 *Arani v Public Trustee of New Zealand* (1919) NZPCC 1 (PC) at 1.
40 See Down and Williams, above n 3, at 35; and *Takamore* (CA), above n 34, at [115].
41 Law Commission, above n 27, at [5.31].
42 See *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) as cited in Law Commission, above n 27, at [5.32].
43 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [2] and [185].
44 At [208].
45 See the discussion in Law Commission, above n 27, at [5.14]–[5.16].
46 *Takamore* (CA), above n 34, at [254].
47 Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2017) 5 Te Tai Haruru Journal 25 at 33.

The test, adopted from *Halsbury's Laws of England*, sets out the following requirements for custom to be recognised. The custom must:[48]

> (a) … have existed from time immemorial;
> (b) … have continued as of right and without interruption since its origin;
> (c) … be reasonable;
> (d) … be certain in its terms, and in respect of the locality to which it obtains and the persons it binds; and
> (e) … not have been extinguished by statute.

On appeal, the Supreme Court did not explicitly address the validity or otherwise of the tests, leaving the law open in that regard. The majority held the executor primacy rule was established in New Zealand law and should not be departed from despite the challenge from tikanga.[49] However, they also held that the common law should accommodate tikanga as part of a matrix of considerations for the executor or court.[50] In a minority judgment, Elias CJ stated that Māori custom, according to tikanga, is "part of the values" of New Zealand common law.[51] No members of the Court recognised tikanga as law in and of itself.[52]

Takamore allowed for a more sophisticated engagement between tikanga and the common law.[53] It was the first case where tikanga values were recognised as having legal significance in the common law. Until *Takamore,* the common law engaged with tikanga under the strict confines of the *Loasby* test or the colonial rules of recognising customary property interests.[54] However, the Supreme Court in *Takamore* were prepared to engage with tikanga without relying on previous tests. In doing so, *Takamore* indicates the Courts' willingness to move away from considering tikanga as an external values system only to be recognised when proven as a matter of fact.

(2) If not custom, then what?

Takamore left the law in a confused state. The decision did not engage with tikanga as a *source of law*. Nor did it clarify the foundation for its interactions with the common law.[55] Despite the uncertainty, New Zealand courts continued to engage with tikanga in a broader set of contexts.

In *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board*, the Court of Appeal held that tikanga Māori was an "integral strand" of New Zealand common law.[56] On appeal, the Supreme Court concluded that a statutory reference to "existing interests" in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) included tikanga-based interests, finding that tikanga was "applicable law" in the

48 *Takamore* (CA), above n 34, at [109].
49 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [152]–[154].
50 At [164].
51 At [94].
52 Coates, above n 47, at 36.
53 Jones, above n 17, at 177.
54 Law Commission, above n 27, at [5.39].
55 Down and Williams, above n 3, at 39.
56 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 at [177].

context of the EEZ Act.[57] William Young and Ellen France JJ noted but did not resolve open questions like whether tikanga is a separate or third source of law, or whether changes should be made to the *Loasby* test for the recognition of customary law.[58]

In *Sweeney v Prison Manager, Spring Hill Corrections Facility*, Palmer J cited *Trans-Tasman* to describe tikanga as an "integral strand" of the common law. In *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*, Palmer J commented that tikanga is still governed by iwi and hāpu and is a "free-standing" legal framework recognisable by New Zealand law.[59] In *Mercury NZ Limited v Waitangi Tribunal*, tikanga was recognised as a "source for the developing common law". There, Cooke J thought that in some circumstances tikanga could "*be* the law, rather than merely being a source of it".[60] These cases highlight how the relationship between tikanga and the common law has often been considered, although without serious engagement with the overarching questions of when and how tikanga will be relevant to the common law generally. The uncertainty, over this period, is reflected in the Courts' inconsistent language when describing the relationship between tikanga and the common law.

C *The impact of* Ellis

Despite strong statements from members of the Supreme Court on tikanga, *Ellis* does not lift the cloud of uncertainty from this area of New Zealand law. While the case rids the common law of its colonial baggage, it leaves unclear how tikanga will practically operate as part of the common law. Moreover, as a careful examination of pre-*Ellis* cases reveals, there has been limited recognition of tikanga by the common law to date. And so, the expansion of the relevance of tikanga to the common law, after *Ellis*, is far larger than it first appears. Previously, as canvassed above, the developing jurisprudence was largely confined within the boundaries provided by statutes or customary doctrine. This will no longer be the case. Glazebrook J delivers a succinct summary of the current state of the law in this area:[61]

> At this point in the development of the law, which is in a state of transition, it suffices to reiterate that tikanga as law is a part of the common law of Aotearoa/New Zealand … what this means in practice will need to be worked out on a case-by-case basis in terms of the normal common law method of incremental development.

Tikanga will be considered where it is relevant.[62] As a result, the relationship between tikanga and the common law will expand far beyond the previous boundaries. However, questions about the judiciary's capacity and whether it is at all appropriate for tikanga to be among the sources of New Zealand common law remain.[63]

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57 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 [*Trans-Tasman* (SC)] at [296] per Williams J, broadly agreeing with William Young and Ellen France JJ at [139]–[174], also at [237] per Glazebrook J.

58 *Trans-Tasman* (SC), above n 57, at 865, n 282.

59 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 [*Ngāti Whātua Ōrākei (No 4)*] at [355].

60 *Mercury NZ Limited v Waitangi Tribunal* [2021] NZHC 654 at [103] (emphasis added).

61 *Ellis*, above n 1, at [116].

62 At [117].

63 See at 330 for the "Statement of Tikanga of Sir Hirini Moko Mead and Professor Pou Temara".

Looking at the expanding relationship between the common law and tikanga, Part IV considers the extent to which this may place the integrity of tikanga as an independent system of law at risk. The precedent set in *Ellis* creates several challenges that require a considered response from the common law.

IV Challenging the Tikanga-Common Law Relationship

Part IV challenges the appropriacy of tikanga's expanded relationship with the common law. Accepting the Supreme Court's strong expectation of jurisprudence developing in this area, this part addresses the challenges the common law must answer to build a relationship that respects the integrity of tikanga and the common law.

The Court in *Ellis* opened the door for a more significant relationship between tikanga and the common law; however, it did not prescribe methodologies for future courts to employ in exploring this developing relationship. They deferred that question, expecting the common law to discover appropriate methods on a case-by-case basis.[64] The relevance and weight given to tikanga principles will depend on the context of future cases. Notably, Williams J has acknowledged the immediate unhelpfulness of this answer.[65]

A *Fundamental objections*

First, there are well-founded concerns that, if mishandled, tikanga will be misappropriated and wrongly applied by the Court system.[66] These concerns must be addressed for the common law to proceed without distorting tikanga, and to respect and maintain the integrity of tikanga as an independent legal system.[67]

Moana Jackson was a vocal opponent of any engagement between tikanga and the common law under New Zealand's existing constitutional arrangement.[68] Jackson described the common law process as "inherently assimilative", and likely to distort tikanga.[69] Unsurprisingly, during the development of New Zealand common law and the uptake in judicial recognition of tikanga, positive, tangible outcomes for Māori have been limited.[70] It would be a tremendous failure of the judicial system to inadvertently allow any misappropriations to become embedded in judicial precedent.

Annette Sykes advocates for transformational change to avoid tikanga being co-opted into a colonial paradigm. Sykes argues that accepting the current paradigm is akin to reinventing colonisation with a "light brown lens".[71] Such scholars reject the assumption of state law supremacy and view the recognition of tikanga within the state legal system as continuing the colonisation of the "Indigenous soul".[72]

64 At [121].
65 At [261].
66 At 330; and see also the acknowledgment by Glazebrook J at Appendix and [120].
67 Sarah Down "Tikanga Māori – recognition but key questions unanswered – Ellis" (2022) November Maori LR.
68 See Law Commission, above n 27, at [8.33].
69 Moana Jackson "Changing realities: unchanging truths" (1994) 10 Australian Journal of Law and Society 115 at 116 as cited in Law Commission, above n 27, at [8.33].
70 Coates, above n 23, at 82.
71 Annette Sykes "The myth of Tikanga in the Pākehā Law" (Nin Thomas Memorial Lecture, University of Auckland, 5 December 2020).
72 Coates, above n 47, at 30.

However, despite these fundamental objections, it is now apparent that the stage is set for the relationship between common law and tikanga to develop significantly. Sir Hirini Moko Mead and Professor Pou Temara, leading the wānanga convened by the parties in *Ellis,* considered whether it was appropriate for tikanga to be among the sources of New Zealand common law.[73] The group ultimately supported tikanga as one of the sources of the New Zealand common law, which informs the common law's development and evolution.[74] The experts embraced the continued dialogue between the two systems under the belief that the common law of New Zealand should develop bi-jurally. Williams J supports this notion, believing that the "development of a pluralist common law of Aotearoa is both necessary and inevitable".[75] Natalie Coates agrees, saying that greater recognition of tikanga by the common law can positively impact Māori and the New Zealand legal system, depending on how it is achieved.[76]

B *The Challenge of unclear boundaries*

Ellis exacerbates the challenge of delineating the boundaries between state-law matters and those best left for tikanga-led processes outside of the court.[77] While the relationship between the common law and tikanga is still emerging, tikanga as a coherent system of laws is not. Courts must avoid crossing into the developmental space of tikanga and must carefully consider whether a tikanga issue is suitable for judicial determination.[78]

Coates cautions against courts becoming the primary mechanism for expressing and determining tikanga.[79] The courts have indicated that tikanga will be considered when relevant to a case, but will not be considered when irrelevant or contrary to statute and/or binding precedent.[80] While these comments reflect the hard-edged nature of state law, they ignore other circumstances that would dictate that tikanga not be considered by the court—tikanga will insist that certain things remain in the exclusive purview of tikanga-based resolution methods. Courts must be equipped to recognise the circumstances that require courts to defer to tikanga-based institutions.[81] This respects that tikanga provides a distinct set of laws, obligations and practices exercised by whānau, hapū and iwi, regardless of the state legal system or the courts.[82]

Courts have already wrestled with, and disagreed over, where the boundaries lie. The minority in *Ellis* did not think the case was an appropriate occasion to make general pronouncements of the incorporation or application of tikanga in New Zealand's common law.[83] Part of their hesitancy centred on the Courts not yet addressing issues fundamental to the developing relationship between tikanga and the common law.[84] O'Regan and Arnold JJ also stated their preference for the law to develop where the "consideration and application or incorporation of tikanga in the decision affects the outcome and, preferably,

73 *Ellis*, above n 1, at 330.
74 At 330.
75 At [271]–[272].
76 Coates, above n 47, at 54.
77 Coates, above n 23, at 82.
78 See Law Commission, above n 27, at [8.33].
79 Coates, above n 23, at 82–83.
80 *Ellis*, above n 1, at [117].
81 Coates, above n 23, at 83.
82 *Ellis*, above n 1, at 331.
83 At [281].
84 At [285].

where there has been an adversarial process concerning those issues".[85] In that case, the judges disagreed about the frameworks under which tikanga was considered.[86] All four judgments acknowledge that answering these questions is an appropriate task for the orthodox common law methods.[87]

(1) The difficulty in finding the line

Another example illustrative of the courts' difficulty in defining the appropriate circumstances of judicial involvement is the dispute involving Ngāti Whātua Ōrākei and other central Auckland iwi and hapū.

The *Ngāti Whātua Ōrākei Trust v Attorney-General* dispute began in 2014 when the Crown offered parcels of land in central Auckland as part of a redress package to the Marutūāhu collective without consulting Ngāti Whātua Ōrākei. In response, Ngāti Whātua Ōrākei sought a court declaration of its mana whenua status and the Crown's obligations when applying the Crown's Overlapping Claims Policy in central Auckland.[88] Ngāti Whātua Ōrākei claimed broadly that where Ngāti Whātua Ōrākei has mana whenua, the Crown must act according to their tikanga.[89] Here, different iwi disputed the relevant tikanga on ahi kā and mana whenua asserted by Ngāti Whātua Ōrākei.[90]

In the fourth judgment regarding this dispute, Palmer J details the complex considerations courts must navigate where tikanga is relevant.[91] His Honour articulates that, as a matter of tikanga, disputes involving tikanga should be resolved through tikanga-consistent processes rather than non-tikanga-consistent court resolutions.[92] However, where tikanga-consistent resolutions are not feasible, recourse to a court may be appropriate. Additionally, courts can seek to resolve a dispute over tikanga in ways that are more tikanga-consistent than others.[93]

Determining the boundaries can only be worked out on a case-by-case basis. However, this is challenging, given the diversity and complexity of tikanga-based disputes. The common law must strive to be coherent and respectful with its participation in the development of New Zealand jurisprudence.

C *Preserving the integrity of tikanga*

The primary challenge of the tikanga-common law relationship is protecting the integrity of tikanga. The tikanga experts in *Ellis* expressed caution regarding the potential for unintended misappropriation and misapplication of tikanga in the court system.[94] The bench acknowledged the importance and seriousness of these concerns.[95] The experts emphasised that courts must use processes and practices that preserve the integrity of

85 At [290].
86 At [8]–[10].
87 At [127] per Glazebrook J, [161] per Winkelmann CJ, [273] per Williams J and [290] per O'Regan and Arnold JJ.
88 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 [*Ngāti Whātua Ōrākei*] at [1].
89 See at [3] for a summary of claims.
90 Down and Williams, above n 3, at 42.
91 *Ngāti Whātua Ōrākei Trust (No 4)*, above n 59, [at [34]–[38].
92 At [34].
93 At [35] per Palmer J.
94 *Ellis*, above n 1, at 330.
95 At [120] per Glazebrook J, [181] per Winkelmann CJ and [270]–[272] per Williams J.

tikanga.[96] Coates articulates what the challenge of preserving the integrity of tikanga demands:[97]

> … [it] requires fidelity to content and mitigation of the risk of misinterpretation and misapplication. Central to this is acknowledgment that tikanga has its own validity, source and home outside of the state legal system and that the principles and practices of tikanga are intimately connected to the history, culture and people from which they derive. If tikanga is understood as an ancestral taonga and a living, breathing, functional way of doing law that exists separately from the state legal system but speaks to it, it follows that where possible tikanga needs to be connected to its source or, at the very least, interpreted by individuals or bodies with appropriate expertise.

The essential concern lies in a non-Māori institution having the power to apply and interpret tikanga. Coates observes that New Zealand's current constitutional arrangements, together with orthodox legal thinking, promote the dominance of New Zealand's traditional sources of primary law, being statutes enacted by the New Zealand Parliament and judge-made common law. The existing dominant system is therefore able to control and define the parameters of recognising tikanga.[98] Because the existing actors lack tikanga expertise, this creates significant risk that tikanga will be subject to misinterpretation and for meaning to become lost in translation.[99]

(1) Preserving integrity by luck not process

Given that generally, the judiciary lacks expertise and experience in matters of tikanga, it is unsurprising that occasional litigants will attempt to take advantage of that fact and push the boundaries of what might reasonably be considered a defendable argument in court. One such case was *Doney v Adlam (No 2)*.[100]

Adlam concerned an application by a hapū trust seeking to enforce a previous judgment of the Māori Land Court—to recover funds misused by a trustee.[101] Tikanga principles, including hara, muru, utu, whakapapa, whanaungatanga, tino rangatiratanga and manaakitanga, were considered within the context of debt recovery and trustee duties.[102]

Counsel for the defendant raised the issue of tikanga. The Court adjourned the proceeding to allow counsel to secure a tikanga expert to assist in the preparation of submissions. The defendant's counsel did not do so in the time allotted, and no further extension was requested. Therefore, the case proceeded without the benefit of expert evidence.[103]

In the absence of expert evidence, the judge referred to "several authoritative texts, books, articles and case law, both historic and contemporary, on tikanga".[104] Harvey J, through his research, considered publicly available records to disprove defendant counsel's submission that an adverse decision would "sever … mana whenua and

96 At 330.
97 Coates, above n 23, at 84.
98 Coates, above n 47, at 53.
99 At 53.
100 *Doney v Adlam* (No 2) [2023] 2 NZLR 521 (HC).
101 At [1].
102 Law Commission, above n 27, at [8.95].
103 At [81].
104 At [81].

turangawaewae links of Mrs Adlam and her whānau".[105] Harvey J indicated that there was no evidence to link Mrs Adlam to the iwi groups with mana whenua claim over the disputed land.[106] This case demonstrates that parties cannot expect to "cherry pick" tikanga principles that are favourable to their claim.[107] Harvey J stated that where counsel intends to pursue arguments of a tikanga nature, they must provide an evidential basis to support their argument.[108]

However, it took a particularly diligent judge to recognise the lack of real basis for the defendant's tikanga-based claim. Harvey J's previous position, as a judge of the Māori Land Court, places him in the minority of judges sitting in the general courts that have existing knowledge, experience and comprehension of tikanga.[109] A judge without the knowledge and previous experience attributable to Harvey J would be unlikely to resolve this case without assistance. This underscores the need to up-skill legal practitioners and judges to equip the industry with a general tikanga competency.[110]

Adlam illustrates the risk the common law poses to the integrity of tikanga. When the parties were unable to provide the court with expert evidence, the question of whether tikanga was being appropriately wielded was resolved only because the judge had personal knowledge and experience of tikanga. The inconsistent approach of the courts to cases involving tikanga perpetuates the risks to tikanga's integrity.

(2) Struggling to identify the best method

In the absence of established processes, Palmer J in *Ngāti Whātua Ōrākei* had to grapple with how best to manage a complex tikanga-based dispute. The court first considered how to address the case's tikanga issues during the case management conferences. Palmer J was asked whether he would appoint counsel to assist the Court or a pūkenga. Ngāi Tai ki Tāmaki, Te Ākitai Waiōhua and Marutūāhu Rōpu applied to the Court to request that pūkenga be appointed.[111]

Palmer J reviewed the legal basis for appointing pūkenga in the High Court. Pūkenga can be appointed either under s 99 of the Marine and Coastal Areas (Takutai Moana) Act 2011 or as court experts via Rule 9.36 of the High Court Rules 2016.[112] Palmer J noted that even if the High Court rules did not apply, the Court had inherent jurisdiction to appoint pūkenga.[113] Palmer J acknowledged that as questions of tikanga arise more frequently, the power to appoint pūkenga will be of increasing potential value.[114]

Palmer J held that the relevant factors were similar to those employed when assessing whether to allow an interested party to intervene in proceedings. The overall assessment must weigh the likelihood that the appointment will assist the Court against the risk of

105 At [108].
106 At [108]–[110].
107 Alex Young "How do the Treaty of Waitangi and tikanga Māori affect statutory decision-makers?" (30 May 2023) Wilson Harle <www.wilsonharle.com>.
108 At [110].
109 See the comments of Glazebrook J, in *Ellis*, above n 1, at [124] that "[t]here would not be many judges or indeed counsel who could lay claim to such [tikanga] expertise"; and Te Ture Whenua Māori Act 1993, s 7.
110 Coates, above n 23, at 85.
111 *Ngāti Whātua Ōrākei*, above n 88, at [26].
112 At [28].
113 At [36].
114 At [36].

prejudice or unfairness to the litigants—guided by the overall interests of justice. His Honour stated that the power is more likely to be exercised:[115]

(a) the more important are the questions of tikanga in a case;
(b) the less expert tikanga evidence is provided by the parties; and
(c) the less procedural prejudice or unfairness an appointment would cause to the parties.

The case involved tikanga issues that were complex, controversial and novel to the court. The parties had fundamental objections to the other's submissions on the tikanga they sought to have enforced.[116] To support their respective positions, the parties and interveners provided significant expert tikanga evidence of their own pūkenga. Ultimately, the Court declined to appoint an independent pūkenga to assist them.

In his reasons, Palmer J noted that a considerable amount of expert tikanga evidence from multiple pūkenga was already before the court. His Honour stated that it is the court's role to resolve conflicts in expert evidence.[117] The Court also considered timetabling issues as relevant to the decision.[118]

Despite confidence that the pūkenga witnesses called by the parties would provide sufficient expert evidence regarding tikanga,[119] Palmer J, in the subsequent substantive decision, acknowledged that appointing an independent pūkenga to conduct the conference of tikanga experts would have been beneficial.[120] This case shows that despite concerted effort and engagement, judges struggle to identify the best methods to manage the expanded range of cases involving tikanga.

(3) Party-led processes

In *Ellis*, the Court benefitted from the assistance of the parties who, after the relevance of tikanga was established, agreed to certain processes that assisted the court. The decision was unusual because the consideration of tikanga was promoted by the judges' questions and direction and not the parties' submissions.[121] During the hearing on whether Mr Ellis's appeal should proceed despite his death, Williams and Glazebrook JJs requested further submissions on the relevance of tikanga to the case.[122] The Court requested the submissions cover whether tikanga might be relevant to any aspects of allowing the appeal to continue, and assuming that tikanga is relevant, how it should be considered.[123]

Responding to the request for submissions on the relevance of tikanga, the parties agreed to convene a wānanga with tikanga experts to discuss the issues requested by the Court. Convening the wānanga was not an order from the Court, but an initiative of the parties.[124] In attendance over the two-day wānanga were numerous tikanga experts, representatives of Te Hunga Rōia Māori o Aotearoa, the Māori Law Society (Te Hunga Rōia

115 At [37]
116 At [32].
117 At [39].
118 At [39].
119 At [40].
120 *Ngāti Whātua Ōrākei (No 4)*, above n 59, at [93].
121 *Ellis*, above n 1, at [263].
122 At [33]–[34].
123 At [34].
124 At [35].

Māori), and Counsel of all parties.[125] On the first day, experts freely explored and discussed tikanga with support from Māori lawyers. On the second day, experts met with all Counsel, again supported by Māori lawyers, to assist their understanding of the cases' tikanga issues.[126] The wānanga culminated in a "Statement of Tikanga"—a series of agreed-upon statements that speak to:[127]

> ... the overall place of tikanga in Aotearoa; the intersection between tikanga and the state legal system; the nature of tikanga (and its associated principles); and the key tikanga principles relevant to this case.

Tikanga experts gave their independent views on the identified issues, resulting in an agreed statement of facts filed with the Court.[128] The experts, unconnected to any of the parties to the appeal, were invited to express their independent expert views on the issues. The Statement of Tikanga, co-authored by Sir Hirini Moko Mead and Sir Pou Temara, was agreed to by the seven other experts who attended the wānanga. It was filed as an agreed statement of facts under s 9 of the Evidence Act 2006.[129]

The Court in *Ellis* adopted the Statement of Tikanga's discussion on the general nature of tikanga and accepted the description of tikanga as comprising practice and principle. Through their respective judgments, the judges referred to the Statement of Tikanga's descriptions of relevant tikanga and the experts' elaboration.[130] The Court acknowledged the importance of concerns raised in the Statement of Tikanga about the risk of applying tikanga to the common law.[131] Although O'Regan and Arnold JJ considered the case unsuitable for general pronouncements of tikanga, they expressed gratitude to the tikanga experts for their work and the clarity of the evidence produced as to the tikanga consideration bearing on the case.[132]

The Court's reliance on the Statement of Tikanga highlights the wānanga forum's effectiveness in producing a helpful and reliable source of information. Convening a wānanga is uncommon in senior courts. Yet, it is difficult to believe that courts have the capacity to produce a similarly robust account of the relevant tikanga through other methods.

The experts participating in the wānanga commented on the suitability of the wānanga as a forum to resolve questions regarding tikanga:[133]

> Given the nature of tikanga, being law that is comprised of principle and the custom and practice of people, we consider that the convening of this hui and forum of tikanga experts to be an appropriate way of determining the relevant tikanga that applies to an issue at hand.

This statement was supported by Ms Coates in her oral submissions and endorsed by Williams J as an "extraordinary" and positive process—one with the potential to safeguard

125 At 325–326.
126 At 325–326.
127 At 326.
128 At [35]–[37] and Appendix.
129 At [37].
130 At [128], [133] and [145] per Glazebrook J, [185]–[187] per Winkelmann CJ and [248]–[256] per Williams J.
131 At [120].
132 At [282].
133 At 328.

tikanga from receiving a two-dimensional understanding (of much bigger ideas) by the Court.[134] Glazebrook J endorsed Te Hunga Rōia Māori's submission that the wānanga process "is not only positive for the parties but also highlights the strength of tikanga from a procedural perspective".[135]

Although the Court supported using the wānanga methodology in this case and despite the strength of the process in protecting the integrity of tikanga, the Court was cautious of its general suitability. Instead, it suggested that the courts will develop appropriate methodologies in future cases. Glazebrook J considered that:[136]

> The best approach will be contextual, depending on the issues, the significance of tikanga to the case, as well as matters of accessibility and cost. In simple cases where tikanga is relevant and uncontroversial, submissions may suffice. In other cases, a statement of tikanga from a tikanga expert may be appropriate. Another mechanism is for the relevant court to appoint independent expert witnesses or pūkenga. I also note that, where questions of tikanga arise in the High Court, that Court may state a case and refer it to the Māori Appellate Court, with the decision binding the High Court.

Glazebrook J recognised that, in general, the sources of tikanga and experts on tikanga are fundamentally external to the courts. Her Honour acknowledged the limitation of most current judges and counsel in having such expertise.[137] However, it remains the sole discretion of the judge to invoke methods to manage "tikanga cases". This was shown to be challenging in *Ngāti Whātua Ōrākei* and will likely continue to challenge judges as the relationship between the common law and tikanga continues to develop.

(4) Lessons from the Māori Land Court

Judges of the Māori Land Court have knowledge and experience of te reo Māori, tikanga Māori and the Treaty of Waitangi.[138] They also have the power to appoint pūkenga with tikanga expertise relevant to a proceeding.[139] Despite their extensive experience with tikanga, Māori Land Court judges still appoint pūkenga to carefully navigate the relationship between the common law and tikanga. It would be remiss of the general courts not to look at the experience and process of the Māori Land Court to inform their own.

In *Pokere v Bodger*, the Māori Land Court assessed whether trustees of an ahu whenua trust have duties under tikanga.[140] The Court navigated the relationship between tikanga and state law in two respects. First, to determine the extent of trustees' tikanga-based duties. Second, to apply tikanga to adjudicate whether tikanga was breached. *Pokere* considered whether the trustees had breached tikanga and other duties by demolishing a homestead located on trust whenua.[141] The trustees accepted they owed duties under

134 *Ellis v R* [2020] SC 49/2019 NZSC Trans 19 at [17].
135 *Ellis*, above n 1, at [124].
136 At [125] (footnotes omitted).
137 At [123].
138 Te Ture Whenua Maori Act 1993, s 7.
139 Sections 32 and 32A.
140 *Pokere v Bodger – Ōuri 1A3* (2022) 459 Aotea MB 210.
141 At [1].

tikanga but argued that whānau, not hapū or iwi, tikanga should apply.[142] The Court summarised their approach in the case:[143]

> We address tikanga because tikanga underpins the applications we must determine. We do so in a careful manner to allow tikanga to speak in its own context, and not one cloaked exclusively by a western legal construct. To assist in achieving this level of care, Dr Ruakere Hond was appointed by the Court as a Pūkenga … and the Court is grateful for his expertise.

The judgment, issued by Judge Warren and Dr Ruakere Hond, in te reo Māori and English, was the first bilingual judgment in the history of any New Zealand Court.[144] Dr Hond was appointed for his expertise in both tikanga and te reo Māori. His appointment was the first under section 32A of Te Ture Whenua Māori Act, which permits the court to appoint local tikanga experts.[145] The Court recognised that tikanga underpinned the application. It navigated the tensions between statutory duties, common law and tikanga in the context of trustee duties by establishing a tikanga frame of reference upon which Warren J and Dr Hond responded to the tikanga-based arguments.[146]

The judgment maps the relevant tikanga from its source through to its practical function. The Court acknowledged that mana associated with land, ancestors, people, homes, authority, management and decision-making were relevant.[147] Furthermore, the Court expressed the relationship between tikanga principles, which included a relationship to taonga, with take, kaitiaki and manaaki.[148] Mana permeates the tikanga in all respects in which the decision is made. In the context of the case, mana provides standing, as well as who has the authority to manage, the ability to gift or the right to retain.[149]

The Court first established the regional source of tikanga, finding a foundation within the maunga and in the people.[150] The Court uses the maunga to establish the territorial boundary between hapū. The region's mana tupuna, its source and lineage were explored. The Court then explained the responsibilities of being direct descendants of those paramount Rangatira and the obligations to protect the taonga bestowed to them as mana whenua. It moved between the proscriptive legal reality and establishing who has mana, its source, and how it has been and must be protected.[151] The Court allowed tikanga to speak in its context. The decision records the rohe's history before considering the discrete facts of the case including the whenua and whare at issue. This recognises tikanga's broad conceptual basis but highly contextual application.

Pokere illustrates that New Zealand courts can approach tikanga-based claims in a manner that reflects tikanga processes. The Māori Land Court's process is equally available to judges in the general jurisdiction. The case also shows the advantages of appointing a pūkenga for their expertise. With pūkenga Dr Hond's assistance, the Court

142 At [2].
143 At [4] (footnotes omitted).
144 Rebekah Bright "Te Reo Māori and Tikanga in our Courts" *LawTalk* (online ed, Wellington, 7 June 2023) at 26.
145 Te Ture Whenua Māori Act, s 32A(4); and Bright, above n 144.
146 *Pokere*, above n 140, at [12]–[19].
147 At [12].
148 At [14]–[18].
149 At [16].
150 At [20].
151 At [34]–[41].

was able to take written submissions in te reo and English as well as support the use of te reo during proceedings.[152]

D *Considering the challenges*

The Law Commission has acknowledged that certain areas of law are unsuitable for judicial law-making. For example, where there is a public policy context, the broad nature of the considerations will sometimes fall outside the purview of the court.[153] This reflects the fundamental principle that courts may only decide the case before them. A court is limited in its consideration of broader contexts and cannot account for the thoughts of the community, consult on the impacts of decisions, or perform cost-benefit analyses like other lawmakers.

Nevertheless, the Law Commission believes that the common law can engage with tikanga to address these challenges.[154] Courts often take signals from Parliament regarding the appropriate boundaries in similar contexts—and it is clear that Parliament expects state law to engage with tikanga.[155] In this respect, the Law Commission finds the judiciary has fallen behind other state institutions in its recognition of and relationship with tikanga.[156]

The current transitory state of the New Zealand common law requires courts of all levels to work through the complexities created by the Supreme Court in *Ellis*.[157] Since *Ellis*, tikanga-based arguments have been presented to the court numerous times. The courts' inconsistent approach to these cases is indicative of the complex nature of these claims and the courts' inexperience in dealing with tikanga in its broadest sense.

Adlam, *Ngāti Whātua Ōrākei*, and *Pokere* show the Court's varying treatment of tikanga. The practical impact of the Supreme Court decision in *Ellis*, in not indicating what methodologies should be used or trialled, has resulted in inconsistency in cases where tikanga is a central issue. To properly advance the tikanga-common law relationship, the New Zealand judiciary must determine the most appropriate methodologies for handling cases involving tikanga. Similarly, practitioners would benefit from a keener awareness and utilisation of the processes available at their request to properly hear tikanga issues.

Coates summarises the challenge faced as New Zealand embarks on this new phase:[158]

> One of the greatest challenges for all participants in the Lex Aotearoa endeavour, particularly for courts as they begin to flex their muscle in this space, is preserving the integrity of tikanga Māori and not becoming well-meaning conspirators in a greater assimilation and colonisation project. To mitigate misapplication and misinterpretation of tikanga, at a basic level, the application of tikanga, particularly to novel situations (for example, defamation or climate change), requires at the very least an injection of expertise to undertake the tikanga reasoning and application process. Put in another way, there needs to be a degree of rangatiratanga over how tikanga concepts are drawn on and applied.

152 At [9].
153 Law Commission, above n 27, at [8.35].
154 At [8.36].
155 At [8.35].
156 See the discussion of modern legislative practice in *Ellis*, above n 1, at [100]–[105].
157 See the discussion of *Ellis* and its impact in Part III of this article.
158 Coates, above n 23, at 87.

The challenge is not simple. The Supreme Court has expressed its trust in the orthodox common law method to ascertain when, where and how tikanga will inform the development of the common law.[159] The Law Commission also supports the proposition that the common law can engage with tikanga "in a way that ameliorates the risks".[160] Despite clear faith in the existing procedure, the first cases decided under an *Ellis* precedent indicate the courts' struggle to bring consistency to the law in this space.

Part V suggests the courts' response to these challenges must consider what tools and methods are best suited to assist judges in navigating through the immediate period of increased uncertainty and then, as the jurisprudence matures, ensure that it promotes the consistent and coherent development of the law.

V In Pursuit of a Coherent and Consistent Tikanga Jurisprudence

To pursue an expanded tikanga jurisprudence that both respects the integrity of tikanga and is coherent and consistent, New Zealand courts must acknowledge that the bench lacks proficiency in this area. The common law's intersection with tikanga is unlike other expansions of the common law. Tikanga exists entirely independently of, and does not rely on, the common law for legitimacy. Unlike the common law or legislation, tikanga is not compiled in a written form; the common law must accept that tikanga cannot be treated akin to previous common law developments.[161]

The cases reviewed in Part IV illuminate the procedural inconsistency that is enveloping the early stages of the new era of tikanga jurisprudence.

Despite Sir Hirini Moko Mead and Professor Pou Temara endorsing wānanga as an appropriate forum to determine relevant tikanga, the lower courts face constraints of time, cost and access. This limits the use of similar wānanga in complex cases that reach the senior courts. Recent cases show the lower courts struggle to identify when to appoint pūkenga and how reliance solely on party-submitted evidence can increase complexity for judges.

This part argues that the courts' ordinary processes must be adapted to ensure that tikanga jurisprudence evolves consistently, coherently and with respect for the integrity of tikanga as an independent legal system. I recognise that challenges in this transitory phase will change over time as tikanga and the common law become more comfortable with one another. Therefore, the High Court's immediate task is to navigate the uncertainty of this "transitory" phase of the common law and develop a consistent and coherent tikanga jurisprudence.

First, this part describes the common law method and the orthodox approach to cases involving tikanga.

Second, this part argues that, due to the risk to tikanga's integrity, amplified by the persisting uncertainty, pūkenga should be appointed in all cases where tikanga is relevant. To support this proposition, this article recommends the Chief High Court Judge issue a practice note outlining the process for appointing pūkenga. A practice note would provide flexibility for judges to divert where necessary. I, however, do not believe there would be many instances where this would be appropriate in the short term.

159 *Ellis*, above n 1, at [116], [171] and [183].
160 Law Commission, above n 27, at [8.36].
161 *Ellis*, above n 1, at 328.

Third, this part proposes that establishing a "tikanga panel" within the High Court offers the best solution to navigate the developing relationship between tikanga and the common law and build a tikanga jurisprudence that respects the external integrity of tikanga. The success of the Commercial Panel illustrates the value of utilising the expertise of particular judges where cases have a level of complexity beyond the norm.

A *The common law method*

Common law courts respond to new situations using common law methods. This is the process that courts use to decide the case before them, which in novel circumstances allows courts to develop the common law.[162] The ordinary method searches case law and statutes for provisions and principles to decide cases. The method recognises that case law and statute cannot always give an appropriate answer. Then, the common law method goes to work, allowing the court to look more broadly for an answer.

There are instances when existing statute and case law do not contain the answers to questions the court must determine. In those circumstances, the common law method allows judges to consult sources more widely. Winkelmann CJ explains:[163]

> The common law method allows that various sources may be considered when there is a gap in the law, or when there is a need for the law to develop to meet a different or changed situation. The judge will have reference to any principles in other areas of the law that can be applied by way of analogy, and to underlying values that emerge from the case law and which assist with deciding the case. But they may also look elsewhere for values, and sometimes for detailed rules. They may look to the values in the society—which are of course themselves shaped by the law, but are also shaped by other forces at work in our society.

This approach allows for the incremental development of the law on a case-by-case basis to reflect the evolutions in our society's values. Traditionally, the common law method treats tikanga as "foreign" law. Tikanga must be proved as a matter of fact, established by evidence that experts are called by the parties to give.[164] Williams J has expressed discomfort with this treatment of indigenous law.[165]

The common law method is inextricably linked to the adversarial nature of our judicial system, which is a challenge to the courts interacting with tikanga. Tikanga and its dispute resolution methods often oppose the Crown-led adversarial form of the common law.[166] There are several techniques the courts enlist to illuminate external values to determine the case before them. These tools will be valuable to the courts as they participate in the growth of the tikanga-common law relationship.

For tikanga jurisprudence to develop coherently, especially during this period of uncertainty and transition, courts must rely on the available mechanisms and consider what changes are required to respond to the challenges raised in this article and others.

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162 At [163].
163 At [165].
164 At [273].
165 At [273].
166 Moana Jackson *The Maori and the Criminal Justice System: A New Perspective – He Whaipaanga Hou* (Department of Justice, Study Series 18 Part 2, 1988) at 110–111 as cited in *Ellis*, above n 1, at [286]–[287].

Judges must leverage the orthodox common law method's flexibility and utilise external tools, including new methodologies, when assessing tikanga's application.

The Law Commission's report, *He Poutama*, includes a chapter entitled "Principles for Common Law Engagement". The Commission suggests tools to help courts bolster their response to changing common law dynamics. I support the courts using the entire report to guide state actors working in tikanga contexts. This article considers two of the Commission's recommendations as being the most appropriate solutions for mitigating immediate risks and ensuring the coherent development of the law.

B *Addressing the immediate challenge*

The immediate challenge for judges, especially in the High Court, is responding to far broader categories of claims that involve tikanga. The first question courts must resolve is whether tikanga is, in fact, relevant to the dispute. Then, where tikanga is relevant, courts will need to navigate the complexity of a case that may involve intersected elements of legislation, common law and tikanga.

The Chief Justice has acknowledged that describing how the relationship between tikanga and the common law will play out is not straightforward.[167] Therefore, the judges working through these questions must have appropriate support.

Support is available through the appointment of pūkenga. There are several ways that pūkenga can bring their expertise to a court. Pūkenga may sit on the bench as a co-decision maker of the Māori Appellate Court in the circumstances prescribed by s 62 of Te Ture Whenua Māori Act. A lawyer who is also a pūkenga may be appointed as counsel assisting the court according to the procedures of the High Court and District Court Rules.[168] Pūkenga can be court-appointed experts under r 9.36 of the High Court Rules,[169] or through the High Court's inherent jurisdiction.[170] Pūkenga may assist, as in *Ellis*, as authors and convenors of a process that produces an agreed-upon statement of facts ultimately admitted under s 9 of the Evidence Act. Under the orthodox adversarial process of the court, parties may present pūkenga as independent expert witnesses.

The decision about how and when to bring pūkenga before the court is categorised by the Law Commission as being the result of two considerations.[171] First is a question of admissibility—how tikanga is brought before the court. Second, is a question of decision-making capacity—once tikanga is brought before a court, whether benefit is derived from pūkenga assisting the court in determining the dispute as it relates to tikanga.

(1) Appointing pūkenga

The Law Commission and Supreme Court acknowledged that tikanga will be presented to the court within a spectrum of circumstances, not all requiring the same response.[172] Courts, through more regular interaction with tikanga, will only get better at assessing the relevance of tikanga and responding with the most appropriate methodology. Palmer J's reflection in *Ngāti Whātua Ōrākei* indicates that the general courts currently lack that capacity. After declining an application to appoint pūkenga, Palmer J considered, in

167 *Ellis*, above n 1, at [179].
168 Law Commission, above n 27, at 242, n 186.
169 High Court Rules 2016, r 9.36.
170 *Ngāti Whātua Ōrākei*, above n 88, at [36].
171 Law Commission, above n 27, at [8.112].
172 *Ellis*, above n 1, at [125]; and Law Commission, above n 27, at [8.113].

retrospect, it would have been "beneficial to appoint an independent pūkenga to conduct the conference of tikanga experts and an independent chair of the historian experts."[173] The Law Commission has also suggested that during the transitional phase, in instances where the court may wish to treat the tikanga as settled, courts should permit the involvement of pūkenga even if questions of law are outside the purview of court-appointed experts.[174]

The appropriate role and true utility of pūkenga, if and when they are appointed, was considered in *Ngāti Whātua Ōrākei*.[175] The submissions in that case show an existing disagreement regarding the appropriate role and true utility of appointing pūkenga.[176] Counsel for Ngāti Whātua Ōrākei argued that the true utility of pūkenga emerges where the court would otherwise have insufficient evidence. Counsel also questioned whether appointing pūkenga would confuse the adversarial process and diminish the value of the party's experts and evidence.[177] Further submissions argued the role of pūkenga should be to review the tikanga evidence, attend expert witness conferencing, assist tikanga witnesses and produce, if applicable, a record of agreed propositions.[178] Dr Te Kahautu Maxwell, in an affidavit, emphasised the benefit of independent assistance for the court, considering that pūkenga should help the court understand key tikanga concepts and identify what should be addressed outside of court.[179]

However, during the transitional phase, pūkenga will significantly assist courts not only when the issues relating to tikanga are "complex, nuanced and novel" like *Ngāti Whātua Ōrākei*, but when the court requires help in understanding and identifying where cases sit on the spectrum between complex and simple. Ensuring the courts can understand the different manifestations of tikanga claims during the period of uncertainty is of paramount importance. The Court acknowledged in *Ngāti Whātua Ōrākei* that the Court, in their inherent jurisdiction, can appoint a pūkenga as required on a case-by-case basis.[180]

This article suggests that as the relationship between tikanga and the common law emerges from its infancy, pūkenga should be appointed to assist the court in all cases involving tikanga. This ensures the immediate risks, such as the delineation of the boundaries between common law and tikanga or the misinterpretation of tikanga, are appropriately mitigated. Appointing pūkenga under the courts' inherent jurisdiction would promote flexibility in the nature and breadth of assistance they are able to bring to the court. Limiting the role of pūkenga by appointment under the High Court Rules would dilute the benefits available to the court. The role of pūkenga should be defined broadly and flexibly in each case. This reflects how tikanga jurisprudence has only recently moved past its infancy, and courts, judges and pūkenga are unable to predict all the circumstances where tikanga will be relevant. However, ensuring that an independent individual with relevant knowledge and expertise of tikanga is appointed in proceedings involving tikanga mitigates the risks of delineated boundaries, potential misinterpretations and preserves the overall integrity of tikanga.

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173 *Ngāti Whātua Ōrākei (No 4)*, above n 59, at [93].
174 Law Commission, above n 27, at 242, n 190.
175 *Ngāti Whātua Ōrākei*, above n 88, at [32]–[35].
176 At [32]–[35].
177 At [35].
178 At [32]–[35].
179 At [32].
180 At [36].

(2) A tikanga practice note

Alternatively, the Chief Justice or the Chief High Court Judge have the option to issue a practice note on handling cases involving tikanga. Practice notes contain guidelines on managing cases within a particular context. Practitioners are expected to be aware of and abide by the provisions of a practice note, although it is not mandatory. Judges can depart from a practice note where the circumstances warrant.[181]

During the current uncertainty, judges and practitioners would benefit from guidelines that promote consistency across the courts while allowing flexibility to meet the demands of tikanga's expanded relevance. A tikanga practice note could prescribe that during the transitory period, pūkenga should be appointed to assist judges and parties in navigating the relevant tikanga. A practice note could also refer to *He Poutama* and the suggested lens the Law Commission considers would improve the court's ability to respond to issues of tikanga in a manner that respects challenges of the kind presented in Part IV of this article.[182] While judges may depart from the practice note, such instances are unlikely given the evolving nature of the law in this area and the lack of current judicial experience resolving tikanga issues.

(3) Pūkenga availability

A limiting factor of the suggestions proposed in this article is the availability of pūkenga. The frequency of tikanga cases will continue to be confined to cases where the facts suggest its relevance and tikanga is not otherwise excluded.[183] The developing law is unlikely to result in a run of cases that creates an insurmountable strain on available resources, however, the courts must remain aware of the resources available and continue to develop the capacity of the industry as a whole.

The risks amplified by the transitory phase of the common law should be reflected in the court's approach to cases involving tikanga, particularly while the capacity of the court is in development. In recognition that tikanga is an independent system of laws and values unlike other structures incorporated by the common law, judges should rely on external sources of expertise to assist them as they navigate the expanding tikanga-common law relationship. Pūkenga are an existing tool that should be utilised to achieve consistency and coherency through the early stages of development.

C *Ensuring the coherent development of tikanga jurisprudence*

Williams J considers that the courts today are no longer entirely tikanga-naive.[184] The capacity of the profession to operate more comfortably within an expanded relationship between tikanga and the common law is increasing, in part because of the changes made to legal education and the growth of tikanga-based social norms in New Zealand society. Te Kura Kaiwhakawā, the Institute of Judicial Studies, is educating judges to better engage with tikanga.[185]

181 New Zealand Law Society "Practice Notes" (26 January 2022) Guidelines and Practice Notes <www.lawsociety.org.nz>.

182 Law Commission, above n 27, at 233–240.

183 *Ellis*, above n 1, at [265].

184 At [273].

185 Te Tari Toko i te Tumu Whakawā | The Office of the Chief Justice *Annual Report (For the period 1 January 2022 to 1 December 2022)* (15 August 2023) at 22.

Once the legal profession is more proficient in tikanga, the focus will shift to the long-term stability of the relationship between tikanga and the common law. Implicit in that focus is protecting the integrity of tikanga while ensuring the efficient disposition of cases involving tikanga.

He Poutama considers the efficacy of establishing a specialist tikanga panel of judges to sit within the High Court. The panel would consist of judges with appropriate knowledge of tikanga who would manage and hear cases involving tikanga-related disputes.[186] A specialist panel of judges mirrors the existing commercial panel of the High Court established under s 19 of the Senior Courts Act 2016, where judges in the panel may be selected to hear and determine commercial proceedings. Cases are allocated to members of the panel by the nomination of the parties to the dispute or by the Chief Judge of the High Court.[187]

Section 19 empowers the Chief High Court Judge, in consultation with the Attorney-General and the Chief Justice, to establish other panels of High Court Judges for proceedings other than commercial ones.[188] A panel of qualified judges could be established to hear tikanga cases under s 19(3). The Law Commission articulated how a tikanga panel could operate in a similar way to the commercial panel:[189]

> ... the Chief High Court Judge could determine how many judges are necessary based on the workload of the Court and assign judges to the panel. A list of the types of cases suitable for a tikanga panel could be developed. Although litigants could nominate their cases to be heard by a panel judge, the Chief High Court Judge would determine whether a case should be allocated to the panel.

The commercial panel has adapted over time to the changing nature of cases heard in the High Court. That panel began as the commercial list established in 1986 and has become more formalised, disestablished and re-established according to the needs of the court.[190] This flexibility would serve a tikanga panel well.

There are several advantages to establishing a tikanga panel of judges as they can more efficiently respond to the issues of cases within their specialist area.[191] Harvey J has noted:[192]

> When tikanga is raised, naturally, judges with whakapapa Māori will, where applicable, draw on their own mātauranga Māori, just as any other judge might draw on their personal knowledge of law, legal history and policy, garnered through a lifetime of research, study, practice, as well as via the bench. So is it with tikanga.

Further, specialists can navigate technical details quickly and are more likely to deliver higher levels of consistency, especially in developing law.[193]

186 Law Commission, above n 27, at [8.127].
187 Senior Courts Act 2016, s 19(6).
188 Section 19(3).
189 Law Commission, above n 27, at [8.129].
190 At 247, note 215.
191 Susan Glazebrook "A Specialist Patent or Intellectual Property Court for New Zealand?" (2005) 12 JWIP 524 at 537.
192 *Te Rūnanga o Ngāti Whātua v Kingi* [2023] NZHC 1348 at [103].
193 Glazebrook, above n 191, at 537.

During the common law's transitional phase with tikanga, the courts should seek out external expertise to guide case resolution. However, once the common law emerges from its transitory phase, the courts must consider how best to build a jurisprudence that promotes coherency and consistency—a specialist tikanga panel is a tool that would help achieve this.[194]

(1) Potential resourcing and other concerns?

Establishing a panel of High Court Judges to deal with tikanga proceedings would have its challenges. The Law Commission considers that due to the current lack of judicial capacity, a tikanga panel would be small.[195] A small panel would increase the potential for conflicts and allegations of panel stacking. [196] A specialist panel may also impede the broader development of tikanga-competency across the High Court, which would be an issue for judges who ultimately sit in appellate courts.[197]

The current deficiency of judges familiar with tikanga reflects the need for greater diversity in the judiciary. While the judiciary is not responsible for judicial appointments, they have acknowledged the importance of diverse appointments and have encouraged lawyers from diverse backgrounds to join the bench.[198] As the common law expands its tikanga jurisprudence, more tikanga proficient judges are required, regardless of whether a tikanga panel is established. However, the High Court should be prepared, as it is with complex commercial cases, to understand the limits of generalist judges and utilise the expertise of particular judges.

The Law Commission endorses the consideration of a tikanga panel. The evolving common law requires the courts to adapt to enable the High Court to appropriately and effectively address tikanga matters, as these will have an intergenerational impact.[199] However, as with the commercial panel, the need for a tikanga panel may diminish as the legal professional capacity to engage with tikanga increases. If or when that occurs, it would be appropriate to reconsider the panel's usefulness.

VI Conclusion

The Supreme Court in *Ellis* marked the beginning of a new era of tikanga jurisprudence in New Zealand. The stage is now set for the relationship between tikanga and the common law to evolve unencumbered by outdated colonial doctrine and customary law ideas. Recent developments suggest courts will engage with tikanga in a broader set of circumstances. Consequently, the common law is on a path that better reflects the values of New Zealand society. As the common law enters a transitionary period, the judiciary must be prepared to meet the challenges of a more sophisticated jurisprudence.

This article highlights the challenges of an expanding tikanga jurisprudence. In response, it suggested that the judiciary rely on external expertise to navigate the immediate challenges of a legal landscape in transition. Considering the current lack of

194 At 537.
195 As of 31 December 2022 there were only 3 High Court Judges who identify as Māori: The Office of the Chief Justice, above n 185, at 76–77.
196 Law Commission, above n 27, at [8.130].
197 At [8.130].
198 The Office of the Chief Justice, above n 185, at 3.
199 Law Commission, above n 27, at [8.131].

judicial capacity and the retrospective comments of Palmer J, it proposed that prevailing inconsistencies could be resolved moving forward if pūkenga were appointed to assist the courts in all cases where tikanga is relevant. This article further suggests that as part of the ongoing work to increase diversity on the bench, the High Court should consider establishing a tikanga panel of judges to manage and hear cases involving complex tikanga-based issues. *He Poutama* will be an invaluable resource to courts and practitioners alike as they continue to grapple with the changing tides.

As the common law navigates through a state of transition, particular care must be taken to maintain the independent integrity of tikanga. The judiciary must accept its limitations and refrain from venturing too far into circumstances best left to existing tikanga-based institutions. An expanded tikanga jurisprudence is an opportunity for a more sophisticated and positive relationship between tikanga and the common law. If the courts continue to engage with respectful and legitimate challenges to the common law-dominated status quo, the outlook on the horizon promises a more balanced, fair, and sophisticated set of laws in New Zealand.