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2017

# Plan Development

## consultation with tangata whenua

## Facilitating consultation with Tangata Whenua

The Local Government (Auckland Transitional Provisions) Amendment Act 2013 introduces a streamlined plan-making process that only applies to the development of the first Auckland Unitary Plan (AUP). This guidance note has not been amended to include changes to the AUP plan-making process, rather it focuses on plan-making prescribed by the Resource Management Act 1991. For information about the process for the first AUP, refer to the Ministry for the Environment's Fact Sheets.

This guidance has been updated to include changes to the RMA as a result of the Resource Legislation Amendment Act 2015 (RLAA15). RLAA15 came into effect on {date}. For more information about the amendments refer to the RMLA15- Fact Sheets and technical guidance available on the Ministry's website.

The RMAA15 introduces a new process for establishing agreements between tangata whenua (through iwi authorities) and councils, known as Mana Whakahono a Rohe – iwi participation arrangements (MWaR-IPA), on ways tangata whenua may participate in RMA decision making and to assist councils with their statutory obligations to tangata whenua under the RMA.

If a council enters into a MWaR-IPA, any relevant processes undertaken by the council must be consistent with any obligations outlined in the arrangement.

Consultation with tangata whenua under the Resource Management Act 1991 (RMA) is a legal requirement in some circumstances. Even when it is not a legal requirement, consultation is generally best practice and can lead to a stronger understanding of the issues, and result in better environmental outcomes.

Consultation requires time and commitment from all the parties involved, whether they be tangata whenua, applicants, council staff or politicians. Consultation is most effective when a mutually trusting relationship is developed.

This guidance note provides practical advice and tools for councils in facilitating consultation with tangata whenua relating to RMA processes. The information will assist RMA practitioners in understanding the statutory context for consultation with tangata whenua and the benefits of consultation.

## Guidance note

### Context for consultation with tangata whenua:

- Treaty of Waitangi Obligations
- Resource Management Act
- Principles of RMA Consultation
- Benefits of Consultation with tangata whenua in RMA processes
- Statutory acknowledgements
- Local Government Act 2002
- Determining which tangata whenua group to consult

### How to facilitate consultation:

- Traditional Maori decision-making
- Developing relationship agreements with tangata whenua
- Developing operational agreements with tangata whenua
- Establishing formal and informal tangata whenua council committees
- Resourcing the participation of tangata whenua in RMA processes and decision-making
- Maintaining records and contact databases
- Developing plan provisions that recognise the interests of tangata whenua
- Assisting in the development of iwi planning documents
- Joint management agreements
- Imposing consent conditions that recognise the interests of tangata whenua
- Recognising kaitiakitanga through the monitoring of resource consent conditions
- Building capacity
- Key definitions

In this guidance note, the term 'tangata whenua' is used when referring to consultation with Maori groups with mana whenua over particular areas. Unless otherwise specified, this should be read as being inclusive of consultation with any group that represents tangata whenua interests, be they iwi, runanga, hapu, whanau, iwi authorities, or in some circumstances, taurahere.

It is important when embarking on any consultation exercise, to understand the differences between different tangata whenua group. However, through both s35A and clause 3B of the First Schedule, the RMA states that recognised iwi authorities should be the primary point of contact.

For the definitions of key terms used in this note please refer to the Key Definitions section below.

## Context for consultation with tangata whenua

### Treaty of Waitangi obligations

The Treaty of Waitangi provides for the exercise of kawanatanga, while actively protecting tino rangatiratanga of tangata whenua in respect of their natural, physical and spiritual resources. All persons acting under the RMA (including applicants, councils and tangata whenua) must take into account the principles of the Treaty of Waitangi (s8). Similar obligations are imposed on councils under the Local Government Act 2002 (LGA).

Statutory obligations and case law developed under the RMA have helped to translate how the obligations under the Treaty of Waitangi are to be given effect to in practice. A guide to the principles of the Treaty of Waitangi, as interpreted by the Waitangi Tribunal and the Courts, has been produced by Te Puni Kokiri.

The Environment Court has said that consultation, or the need to consult, arises from the principle of partnership in the Treaty of Waitangi; this requires the partners to act reasonably and to make informed decisions.

Treaty Settlement Arrangements

In some areas, councils have Treaty of Waitangi settlement arrangements…

## Resource Management Act 1991 (RMA)

Part ~~II~~ 2 of the RMA contains a number of specific provisions relating to tangata whenua that must be considered in RMA processes:

- Sections 6(e),6(f) and 6(g) require that "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites,wahi tapu, and other taonga", "the protection of historic heritage from inappropriate subdivision, use and development" and "the protection of protected customary rights" is recognised and provided for.
- Section 7(a) requires that 'kaitiakitanga'
- Section 8 requires that the principles of the Treaty of Waitangi are taken into account.

Several other general provisions in the RMA need to be considered, including the requirement to take into account iwi planning documents.

RLAA15 has provided a mechanism (known as Mana Whakahono a Rohe – iwi participation arrangements (MWaR-IPA)) for councils and iwi to come to afreement on ways tangata whenua may participate in RMA decision making anf to assist councils with their statutory obligations to tangata whenua under the RMA.

In terms of consultation with tangata whenua, there are different requirements for resource consents, notice of requirements and plan development processes.

Section 36A of the RMA specifically states there is no duty to consult any person about resource consent applications and notices of requirement. This applies both to applicants and local authorities. Nevertheless, for many resource consent applications and notices of requirement, consultation with tangata whenua will play a significant role in assessing the effects on Maori cultural values and the matters set out in Part II of the RMA. Consultation with tangata whenua is mandatory when developing plans and policy statements. Clause 3B of the First Schedule to the RMA sets out a process for consulting with iwi authorities. This process is based on a number of principles to follow to achieve good consultation outcomes, rather than a step-by-step methodology.

### Principles of RMA consultation

The Environment Court has developed a statement of principles for consultation synthesised from a number of decisions. These have been primarily developed through case law relating to resource consents and notices of requirement. Yet, they are equally applicable to the plan development processes, and should be understood before embarking on any consultation process.

### Benefits of consultation with tangata whenua in RMA processes

Effective consultation with tangata whenua can produce better environmental outcomes.

Timely consultation is also able to reduce bottlenecks, delays and added costs that can occur if tangata whenua only become aware of proposals at the last minute and options for influencing the proposal and mitigating adverse effects are past.

Other benefits of consultation with tangata whenua include:

- identifying resource management issues of relevance
- identifying methods to achieve Maori objectives in RMA plans
- providing for their relationship with their culture and traditions with ancestral lands, water, sites, wahi tapu, and other taonga as set out in s6(e)
- ensuring all actual and potential environmental effects are identified
- resolving or narrowing issues down before lodging a resource consent application
- providing tangata whenua with active involvement in exercise of kaitiakitanga
- protecting matters of cultural, spiritual or historical importance and putting measures in place to avoid remedy or mitigate any adverse effects.

It is important that consultation is fully understood and properly managed to avoid:

- time delays
- unnecessary costs for the applicant and affected parties
- misinformation and conflicts
- unrealistic expectations by tangata whenua, council, and applicants about the possible results.

Disadvantages can be managed if realistic expectations are set at the start of any consultation process; and if initial consultation has been undertaken to identify the most appropriate methods and processes to follow where there are no existing arrangements (such as an operational agreement) in place.

## Statutory Acknowledgements

A statutory acknowledgement is an acknowledgement by the Crown that recognises the mana of a tangata whenua group in relation to specified areas - particularly the cultural, spiritual, historical and traditional associations with an area. These acknowledgements relate to 'statutory areas' which include areas of land, geographic features, lakes, rivers, wetlands and coastal marine areas, but are only given over Crown-owned land. Office for Treaty Settlements

Locations of statutory areas in settlements are shown on the Land Information New Zealand website, with the text of each statementthe text of each statement of association set out in Schedules to the Settlement Act that establishes them. Councils must consider statutory acknowledgements when making decisions on whom to involve in resource consents and hearings. They also help address concerns where councils have processed consent applications that relate to an area of significance for certain claimant groups, without consultation or their written approval, and where claimant groups have been adversely affected. While a statutory acknowledgement may vary for each claimant group, in essence, a statutory acknowledgement requires councils to:

- forward summaries of all relevant resource consent applications to the relevant claimant group governance entity - and to provide the governance entity with the opportunity to waive its right to receive summaries
- have regard to a statutory acknowledgement in forming an opinion as to whether the relevant claimant group may be adversely affected in relation to resource consent applications concerning the relevant statutory area
- within the claim areas, attach for public information a record to all regional policy statements, district plans, and regional plans of all areas affected by statutory acknowledgements.

None of the requirements limit or affect councils' existing obligations under the RMA. Statutory acknowledgements can be used in submissions to consent authorities, the Environment Court and the Historic Places Trust, as evidence of a specific claimant group's association with a statutory area.

As claims are progressively settled, more and more councils will need to comply with statutory acknowledgements. Entering into agreements on consultation on consents before the establishment of a statutory acknowledgement is a positive first step in building relationships. See the Office for Treaty Settlements website for further information on settlements.

## Local Government Act 2002

The Local Government Act 2002 (LGA) contains a number of provisions that relate specifically to Maori. The LGA requires that, in order to recognise the Crown's responsibilities, councils must take appropriate account of the principles of the Treaty of Waitangi. The LGA sets out specific requirements for councils to facilitate participation by Maori in local authority decision-making processes. The LGA requires councils to consult with persons who may be affected by or have an interest in their decisions. Iwi authorities and other representatives of Maori interests must be consulted in relation to any decision or matter of interest to Maori.

There are some clear synergies between the consultation required with tangata whenua under the LGA and RMA. The LGA provisions require councils to establish and maintain processes to provide opportunities for Maori to be involved in local government decision-making. Subject to some limitations, Clause 3C of Schedule 1 of the RMA provides for plan and policy-making consultation to be undertaken as a part of consultation under another Act, such as the LGA. The period for such consultation under other Acts, that can be used for RMA plan and policy making purposes, is 36 months. This provides more opportunity to combine LGA and RMA consultation exercises.

Councils should explore how multipurpose consultation can be undertaken, in order to make best use of everyone's time.

## Determining which Tangata Whenua group to consult

It can be challenging to determine which iwi authority, group representing hapu for the purposes of the RMA, or other tangata whenua group to consult. This is particularly so where a number of groups overlap in interests in a particular locality within a district or region.

To address this, the Environment Court has established, through case law, a set of principles to consider when dealing with mandate issues between different tangata whenua groups. In some cases, these principles may also apply to individuals within iwi authorities or tangata whenua groups. These principles are:

- When an iwi or hapu has a formal management body, such as a trust board, a marae committee, or something similar, it is entirely appropriate that an applicant and a local authority should consult that body as the iwi/hapu representative.
- Unless there is some extraordinary factor plainly signalling that the processes of that body are dysfunctional and cannot be relied upon, the responses given by it should be accepted as authoritatively speaking for the iwi or hapu.
- It is human nature that, in any organisation, there will be dissenting views which remain after the decision-making processes have concluded. That can be so even where, as is the custom for Maori organisations, the objective is consensus rather than a majority decision.
- The fact that individuals express dissent with an announced decision does not mean that the applicant or local authority, or the Court, cannot rely upon the decision announced by those whose positions appear to entitle them to announce it.
- The internal processes of such bodies are for the members of them to control and resolve. Outsiders have no ability to do so and no business in trying to do so.
- Unless bodies such as councils or the courts can rely upon the apparent authority of office holders to speak for an organisation, no agreement could be relied upon unless there was a referendum of every member of that organisation. That is obviously completely unworkable and unreasonable.
- If there is a serious issue within a Maori organisation, or between Maori organisations, as to who holds mana whenua or who has the right to express an authoritative view, the Maori Land Court is the appropriate tribunal to resolve it. A timely application to that Court should be made so that only the Resource Management issue, if there is one, comes before the Environment Court.

Additionally, it is important to note that an individual or a tangata whenua group may have a range of interests in a proposal or issue and the wider environment; their

concerns may need to be considered in different roles. For example, an individual or group may have interests as a landowner, or as a person or group with mana whenua, or as an iwi authority, or as a general member(s) of the public.

Councils can assist in dealing with mandating issues by maintaining and regularly updating their s35A register and contact databases, and by recognising the different roles and interest of tangata whenua in the community. Councils should also be prepared to consult with more than one tangata whenua group in case there are overlapping interests within a particular locality within a district or region. Iwi management plans can be a useful guide for assisting councils to determine which tangata whenua group or groups to consult, as they will generally define over which particular areas a tangata group claims mana whenua.

## How to facilitate consultation with tangata whenua

This section describes the tools that councils can use to:

- fulfil their legal obligations to consult with tangata whenua
- build relationships with tangata whenua
- facilitate tangata whenua interest and involvement in RMA processes
- facilitate consultation between tangata whenua and consent applicants.

The key tools available to councils to facilitate consultation with tangata whenua are discussed below. These tools help councils to build relationships with tangata whenua and establish a framework within which effective consultation can occur. In establishing a framework, it is equally important for councils to understand tikanga Maori and traditional Maori decision-making processes.

## Traditional Maori decision-making

Traditional Maori decision-making is characterised by the following:

- Consensus is preferred, even if it takes time. Allow time to consult well: once a decision is made, things are actioned quickly and decisively.
- Emotion is expected, vented and tolerated especially when mana is challenged. Reconciliation is then part of the way forward to the consensus decision.
- Strategic withdrawal may occur and leave the 'take' (the subject of discussion) on the floor. People may turn to te reo Maori and tikanga Maori in conflict situations.
- Speakers and waiata (songs) are important. Whakapapa (genealogy) determines the order of the speakers. More than one person is likely to be involved in the consultation process. You should also be prepared to sing a waiata.
- Silence is important and does not mean consent. What is not said is noted.

## Developing relationship agreements with tangata whenua

### What are relationship agreements?

Relationship agreements are high-level documents that formally acknowledge and identify the scope and extent of understandings and/or working relationships between a council and a specific tangata whenua group who may have mana whenua over a particular area.

Relationship agreements generally do not solely focus on the RMA or the consents process, but are aimed at the wider relationship between council and tangata whenua. Relationship agreements are also known as:

- memoranda of understanding
- charters of understanding.

### Developing good relationship agreements

Successful relationship agreements provide recognition of the underlying Treaty of Waitangi basis, for the relationship between a council and tangata whenua. Developing relationships between councils and tangata whenua to assist in their exercise of kaitiakitanga is very important. However, relationship agreements should not be entered into simply as a means to fulfil either Treaty of Waitangi or other legislative obligations. Relationship agreements represent a formalisation of the development, fostering and nurturing of good relations between the council and tangata whenua. Such agreements must also be active and living documents.

Both elected representatives and staff have roles to play in developing and maintaining good and effective working relationships with tangata whenua and to improve tangata whenua participation. These working relationships are key to developing successful relationship agreements.

Councils should consider the following to develop good and effective relationships:

- The preparedness of the mayor, CEO and other councillors to meet with tangata whenua to review the nature and extent of issues that affects them. Where this occurs, it communicates the commitment of council to recognise and provide for tangata whenua involvement in the process.

- The seniority of staff involved in day-to-day contact with tangata whenua. High seniority affirms the mana and rangatiratanga of tangata whenua.
- The involvement of senior managers who can facilitate contacts within council, where different expertise is required. There is potential for managers to negotiate with managers of other sections of council to achieve a mutually beneficial outcome.
- The provision of information. This is regarded by tangata whenua as a willingness to share the benefits and status of the council in its position of senior partner.
- Staff access to and awareness of information already provided by tangata whenua. Frustration quickly sets in if council staff are clearly unaware of resolutions to previous issues and/or are obviously unfamiliar with specific reports that have canvassed the nature and extent of relationships between the parties.
- Appropriate behaviour within marae or hapu settings, with council representatives demonstrating their competence, accurate and informed positions.

Successful relationships should be recognised through a formal document; one that is clear, keeps the parties 'honest', and 'outlives' the involvement of particular players. Councils using formal agreements to underpin their working relationships with tangata whenua often develop stronger and more effective working relationships.

Increasingly Treaty of Waitangi settlements are requiring/encouraging relationship agreements as part of their redress. This demonstrates the importance many tangata whenua groups place on councils, to ensure their views and concerns are considered in resource management decisions. Settlements can be viewed on the Office of Treaty Settlements website.

### Best practice tips for relationship agreements

There are a number of questions surrounding a relationship that should be addressed prior to entering into any agreement. These questions are:

- How will the need to balance strong leadership and relationships with formal processes and structures be managed?
- Are the parties clear on the differences between governance, participation and consultation?
- Is there clear provision for guidance to council staff around the Council's role in relation to the Treaty of Waitangi and other legislative obligations?
- How will the agreement be monitored and reviewed on an on-going basis?
- How will any conflict between the parties be managed?
- Is there adequate resourcing within the council?
- How will council assist in raising the capacity of tangata whenua to engage with council, both financially and from a technical knowledge perspective?
- How will councillor and council staff understanding of tangata whenua issues, history, tikanga Maori and Maori social and political structures be developed and implemented?

Some key points about entering into relationship agreements include:

- If using a template relationship agreement with standard headings for multiple tangata whenua groups, the contents of each agreement should be modified to reflect the differing expectations of each of the parties involved. Alternatively, if

the tangata whenua groups have the same or similar expectations, then all tangata whenua groups may sign the one relationship agreement.
- A relationship agreement may or may not have legal status, depending on how it has been drafted. Either way, the parties should be clear on whether the agreement is intended to be legally binding.
- Relationship agreements should be signed by senior elected members or senior management. This typically is the mayor or chief executive for a council, and the chair or chief executive of each of the iwi or hapu who are a party to the agreement. Important points of contact, such as invitations to meetings, should come from the mayor or CEO.
- Relationships are dynamic and therefore any processes or structures must be flexible and agreements will need to be reviewed to accommodate changes.

### What to cover in a relationship agreement?

The contents of an agreement can vary, but most contain some or all of the following elements:

- the purpose and background to the agreement
- identification of the parties and their roles
- the goals and objectives of the agreement
- the values and principles of the parties
- a recognition of the Treaty of Waitangi
- a recognition of statutory obligations
- principles to guide the relationship
- processes for consultation and information sharing
- the potential of either working together or transferring council powers
- processes to resolve conflict
- the obligations and expectations of both parties
- issues around protection of sensitive information.

### Council consultation policies and procedures

In addition to formal relationship agreements, councils may have policy documents that provide a stated position on consultation with tangata whenua. These may include:

- Tangata whenua consultation policies. These expand upon the requirements in the RMA to hold records on iwi authorities and hapu, and formalise the rights and responsibilities of the parties.
- Broader consultation protocols or procedures. These outline a council's Treaty obligations, reasons for consultation and the policy framework; and identify how consultation with tangata whenua and other stakeholders will be undertaken.

## Developing operational agreements with tangata whenua

### What are operational agreements?

Operational agreements set out all the areas of RMA operation in which the council intends to engage with tangata whenua. As such they will cover working on RMA policies and plans, dealing with resource consents including monitoring, and any arrangements for general monitoring of the environment.

Operational agreements are also known as service contracts or service level agreements. They outline how a particular service will be undertaken, such as:

- the information and advice to be provided by councils to applicants on how to consult with specific tangata whenua groups
- the distribution of lodged notified, limited notified and non-notified consent applications by councils to tangata whenua for comment
- requirements for cultural impact assessments to be undertaken for certain applications the nature and form of responses from tangata whenua on lodged applications that have been sent to them by councils for comment
- input into aspects of councils' plan development process.

### Benefits of operational agreements

Operational agreements help provide certainty for tangata whenua, the council, resource consent applicants and the public about the processes to be followed for consultation and engagement on RMA policies, plans, resource consents and monitoring. This certainty can improve timeliness and reduce overall costs.

### What can be included in operational agreements?

An operational agreement can start with some general points, followed by specific aspects for policies and plans, resource consents and monitoring. General aspects could include:

- purpose of the agreement
- legal framework
- parties involved
- principles of consultation

- processes through which the principles of the Treaty of Waitangi will be taken into account
- managing the agreement through reporting and review meetings, procedures for resolving conflicts of interest and disputes, and dealing with sensitive information and confidentiality.

Specific aspects could include:

- the procedures for involving tangata whenua in the consultation process for both plan development and resource consents
- the scope of services provided by both the council and tangata whenua
- methods to resource participation, including the value of any payment and who is responsible for that payment
- contact details of the parties involved
- the nature of council advice to applicants on tangata whenua issues
- the nature of applications that tangata whenua can expect to be consulted on
- the nature of applications where tangata whenua can expect to be deemed adversely affected in terms of s95E
- the procedures that will be followed when it is identified that expert advice is required from tangata whenua, such as a cultural impact assessment
- procedures for recognising kaitiakitanga in the monitoring of consent conditions.

## Establishing formal and informal tangata whenua council committees

An increasing number of councils are establishing both standing (formal) and advisory (informal) tangata whenua committees. They are a means of relationship building and increasing tangata whenua participation in RMA processes and decision-making. Options to establish these include:

- standing committees as formal council committees, generally given powers to advise or make recommendations to council on matters of concern to tangata whenua
- advisory committees as informal committees of council, whose role is to provide advice to councils on matters of concern to tangata whenua
- increasing tangata whenua representation on RMA decision-making committees

Under the Local Government Electoral Act 2001, councils can also chose to establish Maori wards and constituencies; these are areas in which only those on the Maori Parliamentary electoral role can vote for local government representatives.

## Resourcing the participation of tangata whenua in RMA processes and decision-making

Tangata whenua groups are rarely resourced to respond to requests for consultation and participation in RMA processes. Yet, they may receive large volumes of requests by councils seeking input on plan development or lodged applications for resource consent, or from applicants seeking to consult on their proposals. The capacity and capability issues that tangata whenua face in engagement in RMA processes in responding to such requests often affect their ability to respond meaningfully, promptly, or at all. Common capacity issues are:

- Basic costs frequently stand in the way of tangata whenua engagement on important issues. These include parking, petrol or bus fares, wages, stationery, office rentals, computers, reference libraries, internet access, expert advice (lawyers, planners, engineers), phones, vehicles, and licences for software.
- Many small and medium-sized tangata whenua groups do not have the administrative capacity to engage.
- Many tangata whenua groups have to be selective about which issues they engage in, due to a lack of resources.

Common capability issues:

- Lack of staff with relevant technical expertise.
- Insufficient resources of some councils.
- Lack of tangata whenua planners.
- Lack of tangata whenua in senior levels of council.
- Lack of strategic direction to prioritise when and what tangata whenua engage in.
- Most tangata whenua groups rely on volunteers, who cannot compete with professional planners and lawyers.
- Often tangata whenua RMA technicians do not have any formal training. Some groups benefit from the expertise of members who work or have worked for councils or central government.
- Lack of young tangata whenua who are developing technical RMA expertise.

There are also capacity and capability issues facing tangata whenua engagement in the plan development process in particular which are additional to those above, these can include:

- councils not having effective processes for involving tangata whenua in planning

- distraction of more immediate developments, such as resource consent applications, Treaty of Waitangi claims; and negotiations or political issues
- scepticism from tangata whenua, based on past experiences, that their efforts to participate will not lead to significant results
- cost, length and complexity of the planning process
- overall lack of understanding among tangata whenua of the impact of council planning on their interests
- difficulty in translating tangata whenua values and customary concepts into technical planning, policy and rules
- lack of strategic direction and iwi management plans
- lack of effective direction and resources from central government.

Assisting in the development of iwi management plans where none exist, or assisting with their implementation where they do, can help overcome capacity and capability issues.

Some councils have determined that, as Treaty partners, they have effectively an obligation to ensure that tangata whenua groups can actively participate in RMA processes; and not just provide opportunities, but also the resources to do so. Clause 3B of the First Schedule to the RMA expressly requires councils to consider ways to foster the capacity of tangata whenua to participate in consulting on policy statements and plans. This requirement is similar to that of the LGA regarding all decisions of significance to tangata whenua. The provision of financial support through an operational agreement can enable tangata whenua to effectively participate in the RMA process, both with applicants and the council.

Tangata whenua often have a legitimate expectation that the costs they incur in responding to requests for consultation, information or advice can be recouped from those who require this information. Having a clear contract for the service with the associated tangata whenua group to provide expert advice, such as through cultural impact assessments, can help provide clarity and determine the expectations of all parties. Resource consent applicants are often not aware of this expectation. To avoid this confusion:

- communicate any information on charging practices by tangata whenua to applicants, when they approach council staff for advice on their proposals
- identify the expectation of charging for consultation, information or advice; do this in plan provisions, on websites, in fees and charges schedules, and on application forms.

The arrangements for payment by councils in consulting with tangata whenua, and the communication of advice on charging to applicants, can be addressed in the operational agreements referred to above. The following matters should be taken into account when considering resourcing tangata whenua consultation and wider participation in RMA processes:

- The RMA is silent on the matter of charging for consultation.
- Some tangata whenua groups see consultation as part of their responsibility as kaitiaki and do not expect payment, although offering a koha is often respectful.

- Where a consultant or specialist is employed by the tangata whenua group to respond to requests for consultation, some form of payment is more likely to be sought.
- Councils should encourage tangata whenua to develop guidelines for costs of providing technical or expert advice, such as preparing cultural impact assessment reports or other 'standardised' assessments or positional statements, so that council can advise applicants.
- Where an applicant consults directly with tangata whenua, the council should ideally be aware of any standard rates so they can advise applicants (although it is a matter for the applicant and tangata whenua).
- Where the council consults directly with tangata whenua on lodged applications, the question of payment should be explicitly addressed in any operational agreement. In these circumstances, it is reasonable for the council to reimburse tangata whenua for the time taken to assess and comment on applications.
- Where the initial assessment of the application reveals that there may be significant adverse effects on matters of importance to tangata whenua, s92(2) of the RMA may be used to commission a cultural impact assessment. This can be charged to the applicant under s36 of (noting, however, may not agree to commissioning the report).
- If the request under s92 is refused, a council officer may wish to consult or confirm the applicant's record of consultation with tangata whenua directly. In these instances, officer time and tangata whenua charges to the council can be recovered under s36 as part of the processing fee.

**Maintaining records and contact databases**

Accurate and up-to-date records and contact information is fundamental to consultation with tangata whenua groups. Section 35A requires councils to keep and maintain records about iwi authorities and groups that represent hapu within their region or district. These records are for their own consultation purposes and to provide applicants with up-to-date information on those groups that councils advise them to consult with. This can be problematic as the nominated contact can change regularly for some iwi or hapu.

It is primarily the responsibility of the Crown to provide councils with information on the contact details and areas over which one or more iwi exercise kaitiakitanga. This information is provided through the Te Kahui Mangai website administered by Te Puni Kokiri. Note that, for the purposes of the RMA, the areas of interest to iwi and hapu may in some cases be different from their traditional tribal boundaries or rohe.

Councils are expected to assist with keeping such records current, by regularly contacting the groups concerned (such as through relationship agreements). Further, the council must hold information on the planning documents recognised by each iwi authority at the council. A good working relationship (and formal relationship agreement) with tangata whenua should make this an easy task.

Information collected under ss35 and 35A on planning documents and contact details must be provided to the Minister for the Environment if requested, within a specified timeframe.

The way in which contact information is communicated to applicants can be dealt with in the operational agreements referred to above.

The following are matters that need to be considered when managing contact details of groups that represent iwi or hapu for the purposes of the RMA:

- The Crown is required to provide records, and the RMA requires these records to be included in the information kept by the council. Many councils, through good relationships, will have a far greater amount of information than that provided by the Crown.
- As the council works with tangata whenua on issues apart from the consent process, it is logical that any contact list for tangata whenua groups is managed centrally by, for example, the iwi liaison officer or Maori unit within the council; or in smaller councils, the mayor's office.
- Applicants should be able to rely on the council to have the most up-to-date contact details for tangata whenua groups that it suggests they should consult.
- Make sure tangata whenua have seen the information and agree with its contents.
- Any contact list needs to be readily available: located on the council website; and in a printed format for handing over the counter, for posting, and for relaying over the phone.
- Contact details must also be provided to the Minister for the Environment, if requested, within a specified timeframe
- Consider how information on tangata whenua is best communicated to applicants. Usually, this will involve a combination of a list of contact details for each group, and an associated map showing areas of manu whenua. Maps can be either a simple diagram or part of a relatively sophisticated, layered geographic information system. The latter may be preferable in situations where areas of interest and identification overlap.

**Developing plan provisions that recognise the interests of tangata whenua**

District and regional plans can include clear directions to readers on where consultation with tangata whenua may be appropriate, and where they may be considered to be adversely affected for the purposes of s95E.

Clauses 3(1)(d) and (e) of the First Schedule require that councils consult with iwi authorities, and any customary marine title group, during the preparation of policy statements and plans. Through such consultation, the significant issues and interests of tangata whenua should become clear. Clause 3B of the First Schedule sets out the general principles required for this type of consultation. However, there are a number of capacity and capability barriers that may affect consultation as noted above.

Iwi management plans are a useful tool to assist in tailoring and targeting consultation, by providing guidance and information on particular matters that may be of concern to tangata whenua. Plans are not an appropriate vehicle for detailed operational matters (as these are subject to change). However, they provide a good mechanism for communicating to applicants the benefits of consultation with tangata whenua on particular types of resource consent applications. Plan provisions recognising the interests of tangata whenua may also help applicants take these into account when developing their proposals; but plan provisions cannot require applicants to consult.

Plan provisions may be used to recognise tangata whenua interests by:

- describing the nature of the relationships that tangata whenua have with the sites, areas, features and other resources they treasure
- avoiding ambiguity in the matters that are significant to tangata whenua
- reinforcing (for prospective applicants) the value of undertaking consultation as early as possible during the development of their proposals
- describing the types of activities and/or the effects that are likely to affect the interests of tangata whenua, and therefore demand some form of communication to identify potential effects
- specifying whether certain types of applications will be publicly notified or whether tangata whenua will be deemed adversely affected under s95E.

Care should be taken in putting provisions in plans, as the specifics of each application still need to be carefully assessed. However, where it is clear that tangata whenua would be adversely affected, such as the modification or destruction of wahi tapu, there should be adequate justification for such a provision.

**Assisting in the development of iwi planning documents**

Iwi planning documents, or iwi management plans, are a very useful tool for documenting issues of significance to tangata whenua, and must be taken into account in the plan development process. Where issues of significance are documented in iwi management plans, they can:

- form a valuable reference for the development or review of plans under the RMA
- help councils determine whether consultation is required in any particular instance
- inform applicants of tangata whenua interests or concerns, when preparing assessments of environmental effects.

Councils can assist the development of iwi management plans by providing:

- funding and resourcing for the development of iwi management plans
- guidance for tangata whenua on preparing iwi management plans
- staff time to assist in project management, policy writing, review and editing.

One of the key challenges that can be faced in preparing iwi management plans relates to the disclosure of sensitive information. Some tangata whenua may not wish to disclose the location of particularly sensitive wahi tapu; this can affect how consultation occurs both at plan development and resource consent stages. For guidance on the use of s42 to protect sensitive information, particularly around historic heritage information, see the guidance note on historic heritage.

**Joint management agreements**

Sections 36B to 36E provide for a council and an iwi or a group representing hapu, to jointly manage resources under a "joint management agreement". Decisions made under such an agreement have the effect of being decisions of the council. The use of joint management arrangements under s36B between councils and tangata whenua offer an opportunity to facilitate better relationships.

**Imposing consent conditions that recognise the interests of tangata whenua**

Applications are usually granted subject to conditions imposed under s108. Many councils use 'standard conditions ' to deal with common situations. While caution should be exercised when using standard conditions, as the particular circumstances of each application need to be addressed, they can be a useful mitigation tool to address tangata whenua concerns or interests in a consistent manner. Typical matters that consent conditions may refer to include:

- the uncovering of koiwi tangata (human remains) or other taonga of importance to tangata whenua
- mitigation measures offered by an applicant as part of their application to address tangata whenua interests or concerns before lodgement of the application
- conditions developed during the application assessment process or through a cultural impact assessment to avoid, remedy or mitigate adverse effects on tangata whenua.

Tangata whenua and the council should share and discuss examples of the types of conditions that may be imposed to avoid, remedy or mitigate adverse effects, particularly while developing relationship and operational agreements. This can prevent situations where tangata whenua seek the imposition of conditions that may be impractical, unenforceable, unreasonable or ultra vires ('beyond powers'). A frank exchange of such information should be seen as part of the role of the council in providing education to tangata whenua on resource management issues.

**Recognising kaitiakitanga through the monitoring of resource consent conditions**

Councils should provide for tangata whenua to be actively involved in the monitoring of consent conditions, where tangata whenua have an identified interest in the outcome the condition is seeking to achieve.

Section 7(a) requires councils to have particular regard to kaitiakitanga. Kaitiakitanga is defined in the RMA as: "the exercise of guardianship by tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources and includes the ethic of stewardship".

This ethic of stewardship often has no temporal or spatial limitations, and extends well beyond the date of the issue of any particular consent, as does the exercise of the consent itself. Tangata whenua often have an interest in the operational aspects of an activity, particularly where information on the effects of that activity may be lacking during the consenting phase, and may need to be developed over time through consent monitoring. This is particularly so where the monitoring of those activities that affect natural and physical resources, such as air and fresh or coastal waters, or heritage and archaeological sites is concerned.

Monitoring by tangata whenua can involve a range of actions:

- developing monitoring programmes in close coordination with council or applicants
- observing the activity with the owner, operator and council monitoring officer
- collecting or being party to the collection and reporting of data, samples, or patterns of activity

- receiving monitoring reports from consent holders or council as these are produced
- ensuring that appropriate tikanga is followed if koiwi tangata (human remains) or other taonga are uncovered.

A challenge of involving tangata whenua in the monitoring of consent conditions is who pays for their time. This needs to be addressed and resolved before the issuing of any consent, and should be addressed in any relationship agreement (in general principle) or condition of consent (for specific consents).

**Building capacity**

As part of being able to engage and consult more effectively with tangata whenua, councils should consider different methods of building their internal capacity. This is a particular consideration for consultation in plan development processes.

There are a number of initiatives that councils can employ in building capacity to address tangata whenua interests. Some examples are:

- establishing a tangata whenua liaison unit or employing iwi liaison officers, translators or facilitators to provide a central point of contact
- providing staff training on Treaty obligations and the means by which these obligations are addressed
- providing staff training in consultation practice, te reo, tikanga Maori, and the history and tikanga of the local iwi/hapu
- establishing funding programmes for environmental monitoring programmes, and making this funding available to tangata whenua groups
- making arrangements for tangata whenua representatives to observe the work of council consent teams, or secondment of representatives into those teams, where resources allow
- arranging reciprocal opportunities, whereby council staff spend time with tangata whenua groups, familiarising themselves with the working environment
- providing training to tangata whenua on resource consent processes including notification, consideration of applications and consent conditions
- providing a scholarship for Maori studies in relation to resource management.

Of theses initiatives, employing iwi liaison officers, translators and/or facilitators is helpful:

- where staff are not familiar with tikanga Maori
- to assist in developing positive working relationships with tangata whenua
- where a neutral position is preferable
- where council staff wish to listen rather than lead the process and do all the talking
- if there is a challenging or tense relationship.

The effectiveness of council-based iwi liaison staff in engaging tangata whenua is often related to their independence from council politics, their status in the organisation and their resourcing.

## Key definitions

Hapu: clan, tribe, subtribe - section of a large tribe. (Source: Maori Dictionary www.maoridictionary.co.nz)

Iwi: tribe, nation, people, race. (Source: Maori Dictionary www.maoridictionary.co.nz)

Iwi authority: the authority which represents an iwi and which is recognised by that iwi as having authority to do so. (Source: s2 of the RMA)

Kaitiakitanga: the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship. (Source: s2 of the RMA)

Kaumatua: adult, elder, elderly man, elderly woman. (Source: Maori Dictionary www.maoridictionary.co.nz)

Kawanatanga: government. (Source: Maori Dictionary www.maoridictionary.co.nz)

Koha: gift, present, offering, donation or contribution. (Source: Maori Dictionary www.maoridictionary.co.nz)

Mana whenua: Territorial rights, power from the land - power associated with possession and occupation of tribal land. The tribe's history and legends are based in the lands they have occupied over generations and the land provides the sustenance for the people and to provide hospitality for guests. (Source: Maori Dictionary www.Maoridictionary.co.nz)

Runanga: council, tribal council, assembly. (Source: Maori Dictionary www.Maoridictionary.co.nz)

Tangata Whenua: the iwi, or hapu, that holds mana whenua over a particular area. For the purpose of this guidance document, the term tangata whenua has been used to apply to both singular tangata whenua groups and multiple tangata whenua groups. (Source: s2 of the RMA)

Taonga: property, goods, possessions, effects, treasure, something prized. (Source: Maori Dictionary www.Maoridictionary.co.nz)

Te Kahui Mangai: a directory of Iwi and Maori Organisations. (Source: www.tkm.govt.nz)

Tikanga: correct procedure, custom, habit, lore, method, manner, rule, way, code, meaning, reason, plan, practice, convention. (Source: Maori Dictionary www.maoridictionary.co.nz)

Tino rangatiratanga: self determination. (Source: Maori Dictionary www.Maoridictionary.co.nz)

Wahi tapu: means a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense (Source: section 2 of the Historic Places Act 1993)

Whanau: extended family, family group. (Source: Maori Dictionary www.maoridictionary.co.nz)

Whanaungatanga: relationship. (Source: Maori Dictionary www.maoridictionary.co.nz)