Fact Sheet 3 – Consultation Guidelines

The Aboriginal Cultural Heritage Act 2021 (the Act) provides a modern framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage (ACH) while recognising the fundamental importance of ACH to Aboriginal people.

Consultation with Aboriginal people is a critical component of better protection of ACH by putting Aboriginal people at the heart of decision-making about the protection and management of their heritage. The Act enshrines the principles of free, prior and informed consent in its agreement making process.

What is being Co-designed?
The purpose of this co-design process is to develop the consultation guidelines that will provide the standards that will need to be adhered to where consultation is required with Aboriginal people under the Act.

About this Fact Sheet
This Fact Sheet includes information relevant to the co-design process for the consultation guidelines including relevant context and requirements under the Act. Appendix 1 to this document provides all the relevant sections of the Act.

A set of questions to assist with the co-design process are found on page 4 of this fact sheet.
How Does the Act define consultation?
The Act sets standards of consultation required of the proponent and each person to be consulted [s101] as well as providing for consultation guidelines [s294(b)].

101. Consultation about proposed activities
For the purposes of this Part, the consultation that occurs in relation to a proposed activity will depend on the circumstances of the activity but should include the following —

a) the proponent making a genuine attempt to contact and consult, in a timely manner, each person to be consulted;

b) the proponent providing sufficient information about the proposed activity to each person to be consulted to enable them to understand the proponent’s reasoning and intention;

c) each person to be consulted having an opportunity to clearly state their position on the proposed activity and explain that position;

d) the proponent and each person to be consulted disclosing relevant and necessary information about their position as reasonably requested;

e) the proponent taking reasonable steps to follow up with a person to be consulted if there is no response to the initial contact or a reasonable request for further information.

The purpose of this co-design process is to develop the consultation guidelines. These will assist proponents to meet their consultation obligations under the Act.

Who is required to consult?
A proponent who intends to carry out an activity under an ACH management plan must consult with the persons specified in s107 within a reasonable time in accordance with consultation guidelines [s139]. An ACH management plan is required to undertake a Tier 3 activity (moderate to high ground disturbance) that may harm ACH.

Who should be consulted?
The persons required to be consulted in relation to an ACH management plan [s107] for the area of the proposed activity are:

- Each Local ACH Service (LACHS – defined in s11) that has been appointed for the area of the activity.
- Where there isn’t a LACHS, each native title party as well as each knowledge holder (both defined in s11).
- Where there isn’t a LACHS nor a native title party or knowledge holder, the relevant native title representative body.
Considerations
Aboriginal people across the State should be afforded the opportunity to be consulted by proponents. As custodians of their heritage, Aboriginal people are best placed to determine where heritage is located and the values of that heritage. They also need to understand the activities that are proposed to be undertaken in a particular area and the implications for their heritage.

When consulting with Aboriginal people, proponents need to communicate in a way that is clear, culturally appropriate and ensure those being consulted are able to understand. This might include needing to address potential language barriers or simplify technical terminology, using interpreters and/or supporting materials such as diagrams and maps.

Specific considerations:
- cultural conventions and commitments – Lore time and Sorry business;
- respectful communication and cultural and social protocols, such as gender, kinship and after a death in the community;
- remoteness – some communities, including postal services and internet connection, may be cut off during the wet season; and
- user friendly forms and documents that can be viewed on mobile phones and/or completed on electronic devices such as tablets or computers.

The consultation guidelines are specific to the obligations for proponents to consult with regard to an ACH management plan. The Act encourages and incentivises early engagement by proponents with Aboriginal people. Proponents are also required to notify Aboriginal parties of their intention to submit a permit application for a Tier 2 activity.

There may be other instances where engagement with Aboriginal parties may be required. The ACH Management Code, also the subject of the co-design process, is likely to require engagement in different scenarios and these guidelines may assist in that respect. The ACH Council may in future seek to develop guidelines for engagement for matters that do not relate to ACH management plans.
Co-design questions

1. Other than the matters listed in section 101 of the Act, what other factors, if any, should the Consultation Guidelines address?

2. With reference to the requirements set out in s101 of the Act:
   (i) What do you consider to be a genuine attempt to contact and consult?
   (ii) How much time should be allowed for that consultation to be carried out (also referenced in s139)?
   (iii) What is ‘sufficient information’ that a proponent should provide to Aboriginal people and how could that best be provided?
   (iv) How should Aboriginal people be able state and explain their position e.g. does it need to be in writing or can it be verbally? If verbally, how should this be captured?
   (v) What information should the proponent and the Aboriginal people be able to reasonably ask of each other e.g. having regard to commercial or cultural sensitivities?
   (vi) What are the reasonable steps that a proponent needs to take in order to follow up if they haven’t had a response? Should these be different to the original steps taken to contact and consult and, if so, how?

3. Which are the most effective forms of consultation and why?

4. What is considered sufficient or enough consultation?

5. Are there any other factors that would assist with successful consultation?
### Appendix 1. Sections of the Act relevant to consultation guidelines

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
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<tbody>
<tr>
<td>107</td>
<td><strong>Persons to be notified or persons to be consulted about activities or proposed activities</strong>&lt;br&gt;(1) The persons to be notified or the persons to be consulted about an activity that a proponent is carrying out, or a proposed activity that the proponent intends to carry out, in an area are the following —&lt;br&gt;(a) each local ACH service for the area or a part of the area;&lt;br&gt;(b) if there is not a local ACH service for the area or a part of the area —&lt;br&gt;   (i) each native title party for the area or the part of the area; and&lt;br&gt;   (ii) each knowledge holder for the area or the part of the area;&lt;br&gt;(2) In subsection (1)(b)(ii) —&lt;br&gt;   <strong>each knowledge holder</strong>, in relation to an area or a part of an area, means each person who is identified as a knowledge holder for the area or a part of the area, after reasonable steps have been taken to do so in accordance with the knowledge holder guidelines.</td>
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<td>108</td>
<td><strong>Assistance to identify persons to be notified or persons to be consulted</strong>&lt;br&gt;(1) A proponent may request the assistance of the CEO to identify the persons to be notified or the persons to be consulted about an activity that a proponent is carrying out, or a proposed activity that the proponent intends to carry out, in an area.&lt;br&gt;(2) In response to a request under subsection (1), the CEO must provide the proponent with reasonable assistance to identify the persons.</td>
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<td>139</td>
<td><strong>Obligation to consult on ACH management plan</strong>&lt;br&gt;(1) A proponent who intends to carry out an activity under an ACH management plan must consult with each of the persons to be consulted about the proposed activity.&lt;br&gt;(2) Consultation must be carried out within a reasonable time and in accordance with the consultation guidelines.</td>
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<td>140</td>
<td><strong>Consultation carried out under related agreement</strong>&lt;br&gt;Consultation carried out in accordance with a related agreement for an area may be used to satisfy the requirements set out in section 139 in relation to the area to which the ACH management plan relates to the extent that the consultation complies with the requirements in that section.</td>
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| 142       | **Notice about proposed ACH management plan to each interested Aboriginal party**<br>(1) A proponent who intends to carry out an activity in an area under an ACH management plan must give written notice about the plan to —<br>(a) each interested Aboriginal party; and<br>(b) the ACH Council.<br>(2) Notice under subsection (1) must state the proponent's intention to —<br>   (a) use its best endeavours to reach agreement with each interested Aboriginal party about the terms of an ACH management plan; and
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<th>Section 146</th>
<th>Informed consent</th>
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| (1) For the purposes of this Subdivision, the consent of an interested Aboriginal party for an ACH management plan cannot be informed consent unless —  
| (a) the proponent has given to the interested Aboriginal party full and proper disclosure of information about the activity that the proponent intends to carry out under the plan; and  
| (b) the consent is given voluntarily and without coercion, intimidation or manipulation. |

| (2) In subsection (1)(a) —  
| **information**, about an activity, includes a clear explanation about —  
| (a) what the activity will involve, including —  
| (i) the method the proponent intends to use to carry out the activity (the **preferred method**); and  
| (ii) if applicable, each other feasible method available to the proponent to carry out the activity (a **feasible alternative method**); and  
| (b) in relation to the preferred method, and each feasible alternative method available to the proponent —  
| (i) a clear explanation of the risk of reasonably foreseeable harm being caused to Aboriginal cultural heritage by the activity using that method; and  
| (ii) the nature of the harm to Aboriginal cultural heritage that is risked by the carrying out of the activity using that method; and  
| (c) in relation to the preferred method — a clear explanation of how the activity will be managed to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage by the activity using that method, including a clear explanation of the steps, if any, that will be taken to avoid or minimise that risk. |

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<th>Section 147</th>
<th>Application for approval of ACH management plan</th>
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<td>(1) A proponent may apply to the ACH Council for approval of an ACH management plan that relates to the carrying out of an activity in an area if the proponent and each interested Aboriginal party for the plan has agreed the terms of the plan.</td>
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| (2) An application for the approval of an ACH management plan must —  
| (a) be made to the ACH Council in the approved form; and  
| (b) include the plan agreed to by the proponent and each interested Aboriginal party for the plan; and  
| (c) be accompanied by a copy of the ACH management plan. |
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(c) include evidence that each interested Aboriginal party for the plan has given informed consent to the plan; and
(d) include a summary of the information, about the activity that the proponent intends to carry out under the plan, that was disclosed to each interested Aboriginal party for the plan in accordance with section 146(1)(a); and
(e) include details of the consultation about the carrying out of the activity that has been conducted with each of the persons to be consulted; and
(f) include any responses to the proposal to carry out the activity that were provided to the proponent by a person who was consulted; and
(g) be accompanied by the other documents and information, if any, prescribed for the purposes of this paragraph.

Note for this subsection:
If the ACH Council makes a determination under section 176(1)(b)(i) that Aboriginal cultural heritage is of State significance for the purposes of this Act, section 177(1)(a) provides that an application for the approval of the ACH management plan must be considered as if it were an application under section 157(1) for the authorisation of the plan.

Section 151 Approval of ACH management plan

The ACH Council may approve an ACH management plan only if satisfied —
(a) that the activity to which the plan relates is an activity that may harm Aboriginal cultural heritage located in the area to which the plan relates; and
(b) that the area to which the plan relates does not include any area that is part of a protected area; and
(c) that the Aboriginal cultural heritage is not of State significance and does not need to be dealt with under Subdivision 5; and
(d) that there has been consultation with each person to be consulted about the activity; and
(e) that each interested Aboriginal party for the plan has given informed consent to the plan; and
(f) in relation to the other matters, if any, prescribed for the purposes of this paragraph.

Section 157 Application for authorisation of ACH management plan

(1) A proponent may apply to the ACH Council for the authorisation of an ACH management plan by the Minister if —
(a) the proponent intends to carry out an activity that may harm Aboriginal cultural heritage; and
(b) the period specified under section 143(2) for reaching agreement on a plan for the management of the proposed activity has ended; and
(c) the proponent has not been able to reach agreement with each interested Aboriginal party about the terms of a plan.

(2) An application for the authorisation of an ACH management plan by the Minister must —
(a) be made to the ACH Council in the approved form; and
(b) include the plan proposed by the proponent; and
(c) identify each interested Aboriginal party for the plan; and
(d) include details of the consultation about the carrying out of the activity that has been conducted with each of the persons to be consulted; and
(e) include any responses to the proposal to carry out the activity that were provided to the proponent by a person who was consulted; and
(f) include details of the negotiation that has been carried out under section 143(1) between the proponent and each interested Aboriginal party, including —
(i) a summary of the issues that are in dispute between the proponent and each interested Aboriginal party; and
(ii) evidence that the proponent used their best endeavours to reach agreement about the terms of a plan;
and
(g) be accompanied by the other documents or information, if any, prescribed for the purposes of this paragraph.

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<th>Section 163</th>
<th>Recommendation of ACH management plan</th>
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| (1) The ACH Council may recommend to the Minister under section 162(1)(b)(i) that an ACH management plan be authorised in respect of an activity only if the Council is satisfied —
(a) that the activity is an activity that may harm Aboriginal cultural heritage located in the area to which the plan relates; and
(b) that the area to which the plan relates does not include any area that is part of a protected area; and
(c) that there has been consultation with each person to be consulted about the activity; and
(d) that the plan provides for the activity to be managed to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage by the activity; and
(e) in relation to the other matters, if any, prescribed for the purposes of this paragraph.
(2) The ACH Council may recommend under section 162(1)(b)(i) that the Minister authorise an ACH management plan that is any of the following —
(a) the ACH management plan included with the application under section 157(1);
(b) if section 177(1)(a) applies — the ACH management plan included with the application under section 147(1);
(c) an ACH management plan submitted or proposed under section 160(4);
(d) another ACH management plan prepared by the Council.
Section 274

**Onus of proving certain matters**

In any proceedings for an offence under this Act, the onus of proving a matter listed in the Table lies with the person asserting the matter.

<table>
<thead>
<tr>
<th>Item</th>
<th>Matter</th>
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<tbody>
<tr>
<td>1.</td>
<td>That a person has undertaken consultation in accordance with the consultation guidelines</td>
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<td>2.</td>
<td>That a person has undertaken a due diligence assessment in accordance with the ACH Management Code</td>
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<td>3.</td>
<td>That conduct was engaged in with reasonable excuse</td>
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Section 294

**Guidelines**

Guidelines may be made under this Subdivision about the following —

(a) the undertaking of a due diligence assessment for a proposed activity (the *ACH Management Code*);

(b) the carrying out of consultation for the purposes of this Act (the *consultation guidelines*);

(c) the identification of persons who are knowledge holders for an area (the *knowledge holder guidelines*);

(d) the fee structure for the fees to be charged for services provided in connection with the provision of local ACH service functions (the *local ACH service (fees) guidelines*);

(e) the factors to be considered in determining whether Aboriginal cultural heritage is of outstanding significance for the purposes of this Act (the *protected area order guidelines*);

(f) the factors to be considered in determining under section 176(1)(b) whether Aboriginal cultural heritage is of State significance for the purposes of this Act (the *State significance guidelines*).