



## *Aboriginal Cultural Heritage Act 2021*

# CONSULTATION GUIDELINES

Consultation Draft





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Consultation Draft



## 1. Purpose

The *Aboriginal Cultural Heritage Act 2021* (Act) provides a modern framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage (ACH), while also recognising its fundamental importance to Aboriginal people. Consultation with Aboriginal people is a critical component of better protection of ACH. It puts Aboriginal people at the heart of decision-making for the protection and management of their heritage.

Principles of informed consent are also enshrined in the Act in relation to the process of agreement making.

The Act requires that a proponent who intends to carry out an activity under an ACH management plan (Plan) must consult with the relevant Aboriginal people about the activity within a reasonable time and in accordance with these guidelines.

If consultation has been carried out in accordance with a 'related agreement' and is in line with the requirements laid out in these guidelines, then that consultation is considered sufficient for the purposes of a Plan. A 'related agreement' is an existing agreement that deals with the management of ACH in the area of a Plan and is between a proponent and an Aboriginal party to a Plan or an Aboriginal person to be notified or consulted.

## 2. Overview

### 2.1 Principles of successful consultation

Whilst these guidelines are specific to the legislative requirements for preparing a Plan, successful consultation is the foundation of positive relationships with Aboriginal people and ultimately the protection and management of ACH. Successful consultation in ACH management rests on two principles:

1. All parties have rights and responsibilities.
2. Early engagement results in better outcomes.

The Act promotes early engagement by proponents with the Aboriginal persons to be consulted in order to avoid and minimise harm to ACH. Early and ongoing engagement in a culturally appropriate manner is widely recognised as one of the key elements of best practice consultation with Aboriginal people. Ongoing communication and partnerships with Aboriginal communities is essential to building trust and relationships, to strengthening understanding of proposed activities and to give confidence to Aboriginal people that their views are valued and will be considered and respected, thereby encouraging positive relationships in return.

### 2.2 Who should be consulted?

When preparing a Plan, the Act requires the proponent to consult with the Aboriginal party, defined as:

- Each local Aboriginal cultural heritage services (LACHS) that has been designated for the area of the activity.
- If a LACHS hasn't been designated, then each native title party **and** each knowledge holder.
- Where there isn't a LACHS, a native title party or knowledge holder, then the relevant native title representative body.



Once consultation has been undertaken, the proponent needs to engage and negotiate a Plan as to how activities will be managed in a manner that avoids or minimises harm to ACH with the interested Aboriginal party.

Under the Act, an interested Aboriginal party is the person that is able to be a party to the Plan along with the proponent. An interested Aboriginal party is:

- the LACHS where one has been designated;
- where there is no LACHS, it is the native title party; or,
- if no native title party exists, the relevant native title representative body.

### 3. Scope

These guidelines set how consultation should be undertaken by a proponent for the purpose of the Act regarding the activities the proponent intends to undertake which may harm ACH and which require the development of a Plan.

Proponents are required to consult to assist, where required, in the identification and understanding of the characteristics of the ACH located in the area and to result, where practicable, in the avoidance or minimisation of harm to ACH, including altering their activities to achieve this. Consultation should involve:

- the proponent genuinely attempting to contact and consult in a timely fashion;
- the proponent following up if there are no responses to attempts to contact;
- the proponent providing all persons being consulted with sufficient information to consider the proposal and enable them to understand the proponent’s reasoning and intention;
- all persons being consulted being able to clearly state their position on the proposal including providing input in relation to avoiding and minimising harm to ACH; and,
- the disclosure by all persons being consulted of any relevant and necessary information.

If harm to ACH by a proposed activity is unavoidable and requires a Plan, these guidelines set out how a proponent needs to appropriately consult with the persons to be consulted regarding the activities. An approved or authorised Plan is required for any tier 3 activity (moderate to high ground disturbance) that may harm ACH. A Plan can also be prepared for a tier 2 activity that may harm ACH.

Other instances where engagement with Aboriginal people may be required by the Act, such as notification, are not covered by these guidelines.

## 4. Guideline requirements

### 4.1 Making a genuine attempt to contact and consult, in a timely manner, with persons to be consulted (which includes an organisation)

Principles	Minimum Standard
Effective consultation is whatever works best for the person being consulted	Request information as to whether email, letter, telephone, in person or other methods are preferred. This will vary between persons to be consulted and the types of information shared.



Principles	Minimum Standard
	A LACHS should publicly state its preferred method of contact and consultation.
<p>The use of alternate contact methods, particularly preferred methods where indicated, is appropriate and necessary to demonstrate genuine intent</p> <p>Reasonable steps should be undertaken to follow up where there is no response to initial contact</p>	<p>A proponent must contact via telephone, email, social media or letter the persons to be consulted, providing a brief description of the purpose for the contact.</p> <p>When making initial contact, the proponent should provide a name, the organisation, brief background of the project and an invitation to participate in the consultation.</p> <p>Contact should be made via the preferred form of communication (where indicated) of the person being consulted.</p> <p>Initial contact needs to include at least two alternate methods of contact and should use those methods preferred by the person being consulted where indicated.</p> <p>Attempts for initial contact and follow up must be across a <b>minimum</b> of 12 weeks, as follows:</p> <ul style="list-style-type: none"> <li>• Fortnightly for six weeks, then</li> <li>• Weekly for four weeks, then</li> <li>• Daily for two weeks.</li> </ul> <p>The 12-week period is inclusive of allowances for cultural conventions and commitments. If the body being contacted is a LACHS, the <b>minimum</b> period is one month.</p> <p>Where there is no response to an initial contact, the proponent should use a second method of communication that includes relevant project information. When sending a letter via the post, be mindful of potential delays, especially in remote areas, and consider sending via registered mail.</p> <p>Where it is not possible to make contact, a proponent should take reasonable steps to identify and use alternative methods of contact such as contacting the prescribed body corporate, native title representative body or the Department.</p>
Records of contact (attempted and actual) demonstrate genuine intent to	Records should be kept of all attempts to make contact, and actual contact made.



Principles	Minimum Standard
contact and consult in a timely manner	Those records should include the date, time and form of attempted and actual contact, including details of any information provided and responses received.
Cultural conventions and commitments which may impact the availability of Aboriginal people need to be considered and allowed for	<p>During initial contact, proponents should raise the issue of any constraints the person to be consulted may have. These may include:</p> <ul style="list-style-type: none"> <li>• periods for cultural obligations (this ranges between October to April depending on various factors) and sorry business</li> <li>• cultural and social protocols, such as gender and kinship.</li> </ul> <p>LACHS should publicise details of any unavailability due to cultural commitments.</p>
Effective consultation can be time and resource intensive	<p>Proponents should:</p> <ul style="list-style-type: none"> <li>• provide sufficient time for persons to be consulted to make decisions, including the time for Aboriginal persons to take proposals back to their communities or access appropriate expert advice</li> <li>• not expect an answer at the first consultation</li> <li>• be in a position to demonstrate how consultation encompasses limitations such as remoteness e.g., internet connection, postal services and weather (some communities may be cut off during the wet season)</li> <li>• consider reasonable requests for assistance to participate in the consultation process.</li> </ul>
Timeframes need to be reasonable and take into consideration the needs, responsibilities and requirements of both parties	<p>Those being consulted should make genuine efforts to respond and provide response times as early as reasonably practicable to the proponent.</p> <p>Reasonable timeframes must consider:</p> <ul style="list-style-type: none"> <li>• the personal and cultural commitments of persons to be consulted; and</li> <li>• the proponent's time frames.</li> </ul> <p>The length of time to agree to a timeframe and framework for consultation should <b>not exceed three months</b>.</p> <p>The framework should address consultation timeframes including any meetings required and expected response times to any reasonable requests (from either party).</p>



Principles	Minimum Standard
	Response times should be a minimum of four weeks and a maximum of six weeks unless otherwise agreed.
Persons being consulted may have multiple commitments (in addition to cultural commitments) or resource limitations that affect their availability	<p>Proponents should provide flexibility around scheduling consultation, including methods of consultation.</p> <p>Where those being consulted have reduced capacity or other limitations to respond to proponents, they should inform proponents of such limitations and indicative response timeframes on initial contact, or otherwise within two weeks of becoming aware of the limitations.</p> <p>The consultation timeframe and framework should be updated as required.</p>
Early and ongoing consultation and engagement in a culturally appropriate and respectful manner contributes to the development of trust and relationships, resulting in outcomes that respond to the needs of all parties	<p>The Act requires consultation to be undertaken prior to any application for a Plan.</p> <p>Consultation and engagement should continue throughout the process and may require the use of:</p> <ul style="list-style-type: none"> <li>• interpreters</li> <li>• translated material</li> <li>• simplified technical terminology</li> <li>• supporting material such as diagrams and maps.</li> </ul>
<p>Documentation of consultations undertaken demonstrates the genuineness of the consultation process</p> <p>The views of those being consulted as to how their views should be captured/documentated should be respected and incorporated where practicable</p>	<p>Proponents and those being consulted should seek to agree how consultations should be documented and include this in the consultation framework.</p> <p>Consultation documentation may include evidence such as:</p> <ul style="list-style-type: none"> <li>• signed minutes of meetings</li> <li>• audio or video recordings</li> <li>• summaries endorsed by the parties.</li> </ul>



## 4.2 Providing sufficient information about the proposed activity to enable the persons to be consulted to understand the proponent’s intentions and reasoning

Principles	Minimum Standard
<p>On site/on Country meetings are better for understanding both the proposed activity and potential impacts to ACH</p>	<p>Unless the persons to be consulted prefer an alternative method, where practicable, at least one consultation should happen on Country and should include visiting the area of the proposed activity.</p>
<p>An understanding of a proposed activity and any impact on ACH requires the provision of full and clear information of the intent of and reasoning for the proposed activity</p>	<p>Information should be provided in relation to both the proposal and any impact the proposal may have on ACH.</p> <p>Sufficient information can include, but should not be limited to:</p> <ul style="list-style-type: none"> <li>• on-site presentations</li> <li>• plans</li> <li>• drawings/sketches</li> <li>• diagrams</li> <li>• maps</li> <li>• videos</li> <li>• reports</li> <li>• photographs.</li> </ul> <p>As far as possible it should include details of all potential impacts to ACH including downstream and off-site impacts.</p> <p>Any and all alternatives to the method the proponent intends to use to carry out the activity should be explained and documented as part of the consultation.</p>
<p>English may not be the first language of the persons to be consulted – this may affect how information needs to be presented</p>	<p>Where appropriate, information should be provided in plain English or with plain English explanatory notes.</p> <p>Supporting documents must be clear and easily understood.</p> <p>Information should be provided in advance of any in person consultation, particularly where that is happening on site.</p>



### 4.3 Each person to be consulted having an opportunity to clearly state their position on the proposed activity and explain that position

Principles	Minimum Standard
<p>Consultation protocols of those being consulted, including how their position needs to be stated or explained, should be respected</p>	<p>Proponents should seek to understand and observe any consultation protocols relating to how a person being consulted prefers to state and explain their position and follow these where practicable.</p>
<p>Providing the opportunity for persons to be consulted to clearly state their position ensures their views can be heard and respected</p>	<p>Proponent should seek the views of those persons being consulted as to the most effective means by which they can state and explain their position and, where practicable, facilitate that means.</p> <p>All statements must be authentic, delivered in the words of the consulted person and free from undue influence or interference from other parties.</p> <p>The persons to be consulted should be responsible for deciding how these statements are presented and/or documented.</p>
<p>Decision-making processes need to acknowledge and reflect consultation outcomes</p>	<p>Proponents should clearly explain how consultation outcomes will be incorporated into the decision-making process.</p> <p>Decisions should, where appropriate, reflect consultation processes and outcomes, including clear explanations where decisions that are inconsistent with consultation outcomes have been made.</p>

### 4.4 Disclosing relevant and necessary information as reasonably requested

Principles	Minimum Standards
<p>The exchange of information facilitates an understanding by all parties of the objectives and outcomes sought, particularly in relation to the avoidance or minimisation of harm to ACH</p>	<p>Proponents should provide information, including additional information, as reasonably requested in order for the other parties to feel sufficiently informed about the activity and potential impacts to ACH.</p> <p>Persons to be consulted must disclose the presence of ACH in the area of the proposed activity.</p> <p><b>Aboriginal people are not required to disclose any culturally sensitive information.</b></p> <p>The persons to be consulted should:</p>



Principles	Minimum Standards
	<ul style="list-style-type: none"> <li>• provide information to the proponent in a culturally appropriate manner that enables the proponent to identify ways to avoid or minimise harm to any ACH</li> <li>• provide advice as to how impacts to ACH can be avoided or minimised or disclose reasons why it would otherwise not be appropriate to provide information about the ACH.</li> </ul>
<p>Information should be requested and provided in a respectful manner that reflects, where possible, the preferred means for receiving information</p>	<p>Parties should not make unreasonable, unwarranted or excessive requests for information.</p> <p>Proponents should not request:</p> <ul style="list-style-type: none"> <li>• personal and private information; or</li> <li>• culturally sensitive or confidential information.</li> </ul> <p>Proponents should provide any information reasonably requested clearly and in a culturally appropriate manner to ensure those being consulted are able to understand the proposed activity and method, including feasible alternatives.</p> <p>Commercially or otherwise confidential information is not required to be disclosed.</p> <p>Where information requested relates to potential impacts to ACH but is considered to be commercially or otherwise confidential, the proponent should use their best endeavours to find alternate ways of providing the information in order for those impacts to be understood.</p>

#### 4.5 Taking reasonable steps to follow up with the person to be consulted if there is no response to the initial contact or to a reasonable request for further information

Principles	Minimum Standards
<p>Genuine consultation which seeks to avoid or minimise the impact to ACH includes persevering where there is a lack of response from those being sought to be consulted</p>	<p>If there is no response from the persons to be consulted, the proponent should:</p> <ul style="list-style-type: none"> <li>• repeat the initial contact including any information provided</li> <li>• have regard to the standards outlined in 4.1</li> <li>• include contact details and a date by which an initial response is sought – a maximum of 12 weeks is required</li> </ul>



Principles	Minimum Standards
	<ul style="list-style-type: none"><li>• approach a second contact, noting that some people may have cultural or work obligations where they are away for a number of weeks</li><li>• keep a detailed record of all attempts to follow up, including the steps taken to contact/request further information.</li></ul> <p>If, for various reasons a proponent cannot establish contact, the proponent should seek advice from the Department.</p> <p>Where multiple and alternate attempts have been made over a 12-week period with no response, the proponent may seek advice from the Department.</p> <p>The Department will consider whether a proponent has undertaken consultation consistent with the requirements of the Act and these guidelines on a case-by-case basis.</p>

## 5. Related Documents

The following documents support this guideline:

- Knowledge Holder Guidelines
- State Significance Guidelines
- Prescribed Timeframes
- ACH Management Code
- ACH Management Plan Template and Guiding Notes



## 6. Terms Used

<b>ACH</b>	Aboriginal cultural heritage
<b>Act</b>	<i>Aboriginal Cultural Heritage Act 2021</i>
<b>Plan</b>	ACH Management Plan
<b>Department</b>	Department of Planning, Lands and Heritage
<b>LACHS</b>	Local Aboriginal cultural heritage services
<b>Proponent</b>	Section 100. Terms used A person who — (a) intends to carry out an activity that may harm Aboriginal cultural heritage; or (b) carries out an activity authorised under Division 4

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