



Proposed changes to the *Aboriginal Heritage Act 1988* (SA) explained

The South Australian Government is considering amending the *Aboriginal Heritage Act 1988* (SA) to increase penalties for breaches and to clarify the reporting requirements where Aboriginal sites, objects and remains (together, known as heritage) are discovered.

How have we got here?

These changes are being proposed in line with a national movement to strengthen Aboriginal heritage protection¹.

The national initiative represents a major commitment to harmonise and strengthen Aboriginal heritage protection laws across Australia.

In South Australia

As a key stakeholder participating in this national reform process, the South Australian Government is not seeking to introduce major changes to the South Australian legislation before this process is complete.

However, some immediate changes to the South Australian Act are required.

- The first is to implement the Government's election commitment to increase penalties for offences under the Act.
- In addition, the recent decision by the South Australian Supreme Court in *Dare v Kelaray*² resulted in a need to clarify the obligations to report Aboriginal heritage discoveries. The changes will ensure that heritage discovered while working under an authorisation is reported to the Minister before it may be impacted.

About the Bill

The Amendment Bill will:

- fulfil the South Australian Government's election commitment to strengthen Aboriginal heritage protection in South Australia through increased and enhanced penalty

¹ <https://culturalheritage.org.au/cultural-heritage-reform>

² *Dare, Bilney and Ors v Kelaray Pty Ltd, Premier of South Australia* [2022] SASC 91

provisions under the Act. These changes are consistent with reforms recommended following the destruction of irreplaceable Aboriginal rock art at Juukan Gorge that assessed all state and territory heritage protection legislation as deficient³.

- respond to the Supreme Court's reasoning in *Dare v Kelaray*, by clarifying that:
 - discoveries of Aboriginal heritage must be reported to the Minister, even where the person making the discovery holds an authorisation under the Act
 - authorisations may be granted to classes of persons and cover all Aboriginal heritage in an area, known or unknown.

Key changes

Enhanced penalty provisions

The Amendment Bill proposes to significantly increase the penalties for breaching the Act. Consistently with legislation in most other jurisdictions, the Amendment Bill also creates a lower penalty offence in section 23 of damaging Aboriginal heritage without intention, but with a defence where a person did not know, and could not reasonably have been expected to have known, that the site, object or remains to which the alleged offence relates was an Aboriginal site, object or remains.

The state will also have more time to bring enforcement actions for alleged breaches of the Act.

The table below provides a snapshot of the changes to key penalties:

Provision of the Act	Current	Proposed
Section 10 – disclosing confidential information	\$10 000 or 6 months prison	\$250 000 and/or 2 years prison
Section 20 – failing to report a heritage discovery to the Minister	\$50 000 for companies	\$500 000 for companies
New section 20A – failing to report a heritage discovery to the Minister while	\$10 000 or 6 months prison for individuals	\$250 000 and/or 2 years prison for individuals

³ *A Way Forward – Final Report of the Joint Standing Committee on Northern Australia's Inquiry into the destruction of Juukan Gorge*

Provision of the Act	Current	Proposed
working under authorisation		
New section 20B – ceasing works upon heritage discovery while working under authorisation	No offence	\$500 000 for companies \$250 000 and/or 2 years prison for individuals
Section 21 – excavating land to uncover heritage	\$50 000 for companies \$10 000 or 6 months prison for individuals	\$500 000 for companies \$250 000 and/or 2 years prison for individuals
Section 23 – damaging, disturbing or interfering with heritage	\$50 000 for companies \$10 000 or 6 months prison for individuals	The Amendment Bill creates the following categories of offences: - intentionally or recklessly damages, disturbs or interferes with heritage: \$2 million for organisations, \$250,000 and/or 2 years prison for individuals - damages, disturbs, or interferes with heritage: \$50,000 for organisations, \$10,000 and/or 6 months prison for individuals.
Section 35 - divulging information against Aboriginal tradition	\$10 000 or 6 months prison for individuals	\$250 000 and/or 2 years prison

The Amendment Bill also increases penalties for other more minor offence provisions.

Aboriginal Heritage Fund

The Amendment Bill makes it clear that all fines collected by the state would go into the Fund, as opposed to general revenue. This would mean that fines can be spent on things that will conserve and benefit Aboriginal heritage.

Compensation and other punishment

The Amendment Bill proposes penalty orders beyond fines and imprisonment. Where a person or company is found guilty of an offence under the Act, a court may, in addition to any penalty, order them to:

- pay money towards the repair, restoration or reinterment of the Aboriginal heritage, or any other costs incurred to make good any other harm
- pay an Aboriginal party a sum determined by the court for reasonable costs, or compensation for harm suffered
- pay an amount estimated by the Court as an ‘economic benefit’ that was received as a result of the contravention
- take specified action to publicise the contravention and its consequences – a ‘name and shame’ provision.

Heritage discoveries – reporting and ‘stop work’

Where an authorisation has been granted under the Act, the Amendment Bill:

- requires the authorisation holder to stop work near any discovery of Aboriginal heritage and notify the Minister of the discovery
- gives the Minister a maximum time to respond to the notification - up to 5 business days for Aboriginal sites or objects and up to 10 business days for Aboriginal remains.

During the pause in works, the Minister can consider the discovered Aboriginal heritage, the views of Traditional Owners, and how the authorisation holder intends to protect, avoid, or manage the discovered Aboriginal heritage.

Where there is a new discovery or new information about Aboriginal heritage in an area over which the Minister has given an authorisation, the Minister or an inspector can intervene to issue directions necessary to protect or preserve the heritage. This will protect against a Juukan Gorge type incident in South Australia.

Scope of authorisations

The Amendment Bill clarifies that authorisations can apply to:

- a specified class of persons, such as a proponent’s employees, sub-contractors etc.
- specified Aboriginal sites, objects or remains - or all Aboriginal sites, objects or remains within a specified area (in the case of section 21 and 23 authorisations – uncovering, damaging, disturbing and/or interfering)
- specified Aboriginal objects or Aboriginal objects of a specified class (in the case of section 29 authorisations – sale and/or removal from South Australia).

Validation of past authorisations

The Amendment Bill proposes, for the avoidance of doubt, to provide that current authorisations granted before *Dare v Kelaray* are valid, even where those authorisations did not require discoveries be reported to the Minister in the first instance.

If the Amendment Bill is passed, those with current authorisations will have to report discoveries to the Minister in the first instance.

Consultation and engagement

The Minister for Aboriginal Affairs is keen to understand the views of interested South Australians about the proposed changes to the Act, particularly on the enhanced penalty provisions, the Aboriginal Heritage Fund, compensation and other punishments, the new reporting and 'stop work' requirements where an authorisation has been given, the scope of authorisations and the validation of past authorisations.

Views on these and other proposed amendments will help with drafting the final version of the Amendment Bill.

The draft bill is available on YourSAy for the South Australian community to provide their feedback.

In addition, individual approaches have been made to Aboriginal people from across the state, mainly through representative bodies and heritage associations.

Peak bodies in key industry sectors are also being asked to have their say, as well as government departments responsible for major infrastructure, ground-disturbing projects and/or land management.

The community will likely have many more ideas about how heritage protection laws in South Australia may be improved. These ideas **may not** find a place in the final Amendment Bill. They will, however, be saved so they are available for South Australia's participation in the national reform process.

Have your say

These changes are currently out for consultation until **10:00 am on Thursday 6 April 2023**.

If you wish to learn more, provide feedback or lodge a submission, please:

- **Visit** YourSAy at <https://yoursay.sa.gov.au/aboriginal-heritage-act-changes>
- **Call** Aboriginal Affairs and Reconciliation on (08) 8363 8622 or 8303 0742
- **Email** your feedback to AAR.CIR@sa.gov.au
- **Post** your feedback to:

Aboriginal Affairs and Reconciliation
Attorney-General's Department
GPO Box 464, ADELAIDE SA 5001