



ENGLISH HERITAGE

Marine Archaeology Legislation Project

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Marine Archaeology Legislation Project

Part 1: The Existing Legal Structure: Underwater Cultural Heritage

Part 1: The Existing Structure

Introduction

This Part reviews in depth the genesis and the nature of the present legal framework relating to maritime archaeology in England and Wales. It also considers what advantages and difficulties have resulted from the United Kingdom's continued adherence to this structure. Annexed to this Part is a Report of a survey conducted by *NAS Training* of the experiences of stakeholders regarding the functioning of the designation and licensing processes under the *Protection of Wrecks Act 1973*.

Two principal characteristics determine the legal structure for maritime archaeology in England. The first is the continued reliance on the law of salvage to govern the recovery of wreck from the sea, irrespective of its antiquity. Consequently, the corner stone of this structure is the law of salvage, with its associated legislation, principally the *Merchant Shipping Act 1995*, which incorporates the *International Convention on Salvage 1989* into United Kingdom law.

However, it has been recognised that the application of the law of salvage to archaeological material is not considered appropriate by many in the archaeological community, as this approach is contrary to the internationally recognised precautionary principle, which seeks as the first option to preserve the heritage in situ¹. Consequently, a few statutory amendments to the salvage regime have been introduced to take account of the particular cultural nature of archaeological material, the desirability of preserving it in situ if possible and the importance, if recovery is necessary, of regulating that process so to preserve archaeologically significant information. However, these amendments are fairly limited in nature, being confined to limitations on the freedom to access wreck sites and initiate salvage operations. Otherwise, the rights and duties of the participants in the maritime archaeological process and the disposal of the recovered wreck material continue to be determined by the law of salvage.

The second principal characteristic of the legal structure is the absence of a satisfactory mechanism for protecting archaeology which is not derived from shipwreck, since the salvage regime is not applicable to the protection and recovery of evidence relating to submerged landscapes, dwellings or other former human habitation or activity. Only one statute, the *Ancient Monuments & Archaeological Areas Act 1979* enables such archaeological material to be protected and its application underwater has been very limited, never having been applied underwater to remains other than wrecks².

¹ A principle now enshrined in *European Convention on the Protection of the Archaeological Heritage (revised)* ETS no. 143, commonly known as the 'Valletta Convention' and the in the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*. See further O'Keefe, P. J. 'A Commentary on the UNESCO Convention on Underwater Cultural Heritage' Institute of Art & Law (2002): Leicester.

² In 2001 Historic Scotland scheduled as monuments three battleships and four cruisers of the scuttled German High Seas Fleet in Scapa Flow (References AMH/9298 & AMH/9308 respectively). At the time of writing (March 2003) it is proposed to schedule the remains of eight sailing fishing vessels in

This conservative approach to the legal regime for maritime archaeology has generated controversy and numerous documents have drawn attention to the alleged inadequacies of the present framework³. To many in the archaeological community, this framework is unduly limited in scope, fails to provide adequate protection to maritime archaeology and, by continued adherence to the salvage regime, has facilitated the use of inappropriate practices relating to the excavation and disposal of artefacts. This, it is claimed, is in stark contrast to the more regulatory stance taken by some other countries, where the diving and excavation of historic wrecks is far more heavily regulated and the protection of historic shipwreck has been taken entirely outside the ambit of the salvage regime.

The Salvage Regime

The Ambit of Salvage

The *Merchant Shipping Act 1995*, through its incorporation of the *International Convention on Salvage 1989* into United Kingdom law, effected a welcome modernisation of salvage law⁴. However this modernisation related principally to commercial salvage. 'Voluntary' salvage, where the salvor does not act under a contractual obligation, the normal case in maritime archaeology, retained most of its essential characteristics. Furthermore, the concepts of a *derelict* and of *salvor in possession*, created by 18th. & 19th. century case law, remained unaffected by this statutory reform. Consequently it is these concepts and the traditional elements of salvage which shape much of the legal structure surrounding the maritime archaeology of 'wreck'.

A *salvage operation* is defined as "any act or activity undertaken to assist a vessel or any other property in danger ..."⁵ and entitlement to a salvage reward for "a useful result" is expressly conferred⁶. The term '*property*' appears to be extremely wide, but legal opinion is that, at its widest, it only encompasses maritime property, i.e. it is synonymous with 'wreck'⁷ under the *Merchant Shipping Act 1995*. Consequently the salvage regime has no application to archaeological material deriving from submerged

Aberlady bay, Scotland (reference AMJ/7512/1/1). CADW scheduled the wreck of the *Louisa* in December 2001 but the vessel is now part of the reclaimed area of the Cardiff Bay project.

³ See further; Joint Nautical Archaeology Policy Committee, 'Heritage Law at Sea' (2000): University of Wolverhampton; Joint Nautical Archaeology Policy Committee, 'An Interim Report on The Valletta Convention & Heritage Law at Sea' (2003): University of Wolverhampton; Fletcher-Tomenius, P. & Williams, M. When is a Salvor not a Salvor? Regulating Recovery of Historic Wreck in UK Waters *Lloyd's Maritime & Commercial Law Quarterly* [2000] Part 2, 208-221 .

⁴ The Convention is incorporated by s. 224 and the text of the Convention is contained in Schedule 11 to the Act.

⁵ Shed. 11, Article 1(a) *ibid*; a 'salvor' is not defined but presumably will be someone conducting a salvage operation.

⁶ Article 12 *ibid*.

⁷ Defined as " includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water." (s.255(1)). In *Sir Henry Constable's Case* (1601) 5 Co. Rep. 106a *Jetsam* was defined as goods cast into the sea to lighten an endangered ship, the ship later sinking; *Flotsam* as goods left floating after a ship sinks and *Lagan* as goods cast into the sea with a buoy attached to mark their location for later recovery. A *derelict* is a vessel abandoned at sea by the master and crew, without hope of recovery (*The Aquila* 1 C. ROB. 38 (1798) per Sir W Scott at 40).

landscapes. The traditional elements of voluntary salvage, a service provided *ex contractu*, which successfully recovers endangered property, are preserved by the Convention and this has significant implications for the underwater cultural heritage. Since there is no requirement for a contractual nexus, any person may initiate salvage of another's property, indeed an owner cannot unreasonably refuse such a service⁸. This freedom to initiate salvage means that archaeological material can be lawfully recovered when some in the archaeological community may argue that it would have been more appropriate, from a heritage perspective, for it to have been preserved in situ. Archaeologists also feel that a further consequence of this freedom can be that museums are faced with unsolicited offers of archaeological material which they lack the resources to conserve and curate. Material held in private hands can also suffer from the same problems, but there is the additional difficulty faced by those wishing to study collections in the future that they are widely dispersed and their locations unrecorded.

'Danger' in Salvage Law

This freedom to salvage is enhanced by the wide interpretation afforded to *danger* by case law, which is not restricted to physical peril but encompasses situations where the property is physically secure but economically unusable⁹ or simply out of the control or possession of its owner¹⁰. Given this wide interpretation, any property resting on or below the seabed may be viewed as being in *danger*, for the purposes of salvage law, and thus may lawfully be recovered. This concept of danger contrasts starkly with the view archaeology takes of underwater sites. In most underwater sites the remains reach a state of equilibrium or near equilibrium with their surroundings and this is characterised by low or even zero rates of degradation¹¹. Indeed, where material is buried in seabed sediments, often in anaerobic conditions, even organic material will survive for centuries. To the archaeologist such sites are stable and preservation is best achieved in situ by non-disturbance¹². Certainly, in the absence of disturbance by seabed movement, excavation or wash from propellers, such sites cannot be said to be physically *in danger*. However, within the terms of salvage law, such remains are *in danger* and it is this legal justification which many archaeologists feel directly contributes to archaeologically inappropriate conduct by salvors, in that it confers upon salvors a freedom and an incentive to make recoveries, irrespective of the physical nature of the site.

Clearly, on the basis of this traditional judicial approach, the archaeological concept of the stable site being in no physical danger can have no basis in salvage law, at least where artefacts of a pecuniary value are present¹³. In the single case in which the

⁸ Article 19 *ibid*; this is a reflection of the imperative which the public policy behind salvage placed upon returning endangered property to the main stream of commerce in society, thereby minimising society's economic dislocation.

⁹ *The Troilus* [1951] A.C. 820 at 824.

¹⁰ *The Cythera* [1965] 2 Lloyd's Rep. 454 at 461.

¹¹ See further 'Archaeology Underwater The NAS Guide to Principles and Practice' Dean (et al.) Nautical archaeology Society (1992): London pp.51-52.

¹² A principle now enshrined in *European Convention on the Protection of the Archaeological Heritage (revised)* ETS no. 143, commonly known as the 'Valletta Convention' and the in the *UNESCO Convention on the Protection of the Underwater Cultural Heritage*. See further O'Keefe, P. J. 'A Commentary on the UNESCO Convention on Underwater Cultural Heritage' Institute of Art & Law (2002): Leicester.

¹³ It might be otherwise if the wreck contained no material of any market value.

United Kingdom courts have considered whether the recovery of historical wreck constituted salvage, the court appears to have treated the matter as axiomatic¹⁴. However, since this matter was considered some 30 years ago, when marine archaeology was very much in its infancy, a court may now give the matter some consideration. The matter has indeed received rather more consideration in other jurisdictions, where the courts have specifically addressed the issue of archaeology, albeit with inconsistent conclusions.

In *H.M. The Queen in the Right of Ontario v. Mar-Dive Corporation et al*¹⁵, a Canadian court¹⁶ specifically discussed whether the wreck of a vessel sunk in 1852 and embedded in mud at a depth of approximately 54 metres was in danger and therefore a legitimate subject of salvage. The court noted that, in the deep cold waters, a high degree of preservation had occurred and stated that the wreck was not in any 'danger'. Indeed, the court concluded that the only danger posed to the wreck or other property on board was "... through the unskilled recovery of artefacts by the claimant salvors.". While such a conclusion is sustainable on the grounds of mere physical danger, it becomes rather more difficult to justify on the basis of danger posed by financial or possessory loss¹⁷. A similar approach was adopted by an American court in *Platoro Ltd. v. Unidentified Remains of a Vessel*¹⁸, where the court held that archaeological material was not in danger as it was buried in sand, making it impervious to weather and deterioration. This ruling was followed in *Subaqueous Exploration and Archaeology Ltd. v. The Unidentified Wrecked and Abandoned Vessel*¹⁹ and *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*²⁰. However, other courts, especially at appellate level, have persisted in the traditional view that sunken property is legitimately the subject of salvage and in danger when it has sunk and cannot be utilised²¹.

It is open to the United Kingdom courts to follow the approach taken by the Ontario court in determining whether historic wreck, which is in no physical danger, can be a legitimate subject of salvage. However, as with all developments in case law, one is dependent upon the happy circumstance of the appropriate case coming about. Moreover, given the numerous authorities determining that the inability of property to be put to beneficial economic use and even the loss of possession constitutes danger for the purposes of salvage law, it is entirely possible that the traditional judicial view

¹⁴ *Morris v. Lyonesse Salvage Co. (The Association and The Romney)* [1970] 2 Lloyd's Rep. 59

¹⁵ (1997) A.M.C. 1000

¹⁶ Ontario Court, General Division.

¹⁷ No owner or successor in title appeared to argue this point. In this respect it is significant that the court did not address any of the above authorities on this point. Therefore, its contemplation of the issue of danger in salvage law may fairly be said to have been incomplete and that a fuller review of precedent may have led to a different conclusion.

¹⁸ 508 F 2d 1113.

¹⁹ 577 F Supp. 597.

²⁰ 1985 AMC 2970.

²¹ *Columbus- America Discovery Group v. Atlantic Mutual Insurance Company* (1995) AMC 1985; see also *Cobb Coin Co. INC v. Unidentified Wrecked and Abandoned Sailing Vessel* 525 F. Supp. 186, upheld on appeal at 549 F. Supp. 540. Conversely, in *Simon v. Taylor* [1975] 2 Lloyd's rep. 338. the High Court of Singapore, rather surprisingly, ruled that a cargo of mercury, contained in a sunken submarine which had lain on the seabed for 28 years, was not exposed to an imminent or pending danger. Since the court did not give reasons for this conclusion, nor did it appear to have considered any of the appropriate authorities, the basis upon which this unusual determination was reached cannot be determined.

as to what constitutes *danger* for salvage purposes would prevail in the United Kingdom courts.

Disposal of Historic Wreck

The disposal of wreck, irrespective of whether it is of historical interest or not, is governed by Part IX of the *Merchant Shipping Act 1995*. This part of the Act virtually replicates the provisions of the *Merchant Shipping Act 1894*, which itself pre-dates the emergence of the discipline of maritime archaeology by at least 50 years. Consequently, the provisions of the *Merchant Shipping Act 1995* are designed to deal with commercial salvage and no specific recognition is given to society's interest in the cultural value of historical material. In an attempt to make the existing system more responsive to the cultural value of historic wreck, the Receiver of Wreck²² has introduced an administrative policy to deal with recoveries of such wreck. This attempts, within the constraints imposed by the legislative framework of the *Merchant Shipping Act 1995*, to ensure that society's interest in the cultural value of historic wreck is given effect, while at the same time giving effect to the legitimate rights of salvors.

Where an owner or successor in title²³ can establish a claim to wreck²⁴, it must be returned by the Receiver of Wreck, subject to the payment of salvage and the Receiver's expenses, irrespective of its cultural value²⁵. Such claims in relation to historic wreck are not an unknown occurrence²⁶, especially given the United Kingdom's pre-eminence as a centre for marine insurance²⁷. However, most historic wreck remains unclaimed and it is in respect of such unclaimed wreck that effective changes in the administrative policy relating to the disposal of historic wreck have been introduced by the Receiver of Wreck.

If wreck remains unclaimed for one year after it came into the Receiver's possession, title to it will vest in the Crown²⁸ and the Receiver is obliged to sell it²⁹. Formerly, this was achieved by auction and museums were obliged to bid thereat but, following representations from the archaeological community, a more appropriate policy

²² The Office of Receiver of Wreck was established by the Merchant Shipping Act 1854. The office is now held by a single incumbent who is an official of the Maritime & Coastguard Agency. The Receiver is responsible for the disposal of recovered wreck and, in respect of historic wreck, works closely with relevant government departments and heritage agencies to actively support the interests of maritime archaeology.

²³ Insurance companies who indemnified the original loss acquire title by subrogation, unless they waive this right.

²⁴ The term 'wreck' is used here in its legal context, meaning any material recovered from a maritime casualty and not merely the vessel itself; see further s.255(1) Merchant Shipping Act 1995.

²⁵ s.239 *ibid*.

²⁶ The heirs to the original owners of the *La Juliana*, a Catalonian merchant ship pressed into service by Phillip II for the Spanish Armada in 1588 and wrecked at Streedra Strand, County Sligo, Ireland, have been traced by Stephen Birch, a member of the diving team who located the wreck in 1985; the Dutch government, as successor in title to the Dutch East India Company, lays claim to all the Company's wrecks.

²⁷ The Post Office laid claim to the hull of the postal packet *Hanover*, sunk in 1765, on the basis that it indemnified the loss. The claim was not substantiated.

²⁸ s. 241.

²⁹ s.243(3).

regarding historic wreck³⁰ was introduced³¹. The Receiver now obtains a market valuation and may then dispose of the property as she thinks fit, the salvage award being paid by the person or institution that acquires the material upon the basis of the valuation, together with any expenses of the Receiver³². The salvor's interest is protected because the salvage paid by the acquiring institution is negotiated with the Receiver upon the basis of the valuation(s)³³. The public interest in archaeological material being disposed of as a single collection to a publicly accessible museum is facilitated by the Receiver firstly offering the wreck to such an institution in the United Kingdom. If no institution in this country is prepared to acquire it, then it will be offered to similar institutions abroad. Finally, the material will only be disposed of by way of public auction or returning the wreck to the salvor in lieu of salvage if no suitable institution is prepared to acquire it³⁴.

In this manner, an attempt is made to draw a balance within the salvage regime between the private interests of salvors and the public interest. This policy has been reinforced by an extremely strong educational drive aimed at sea-user groups. This has emphasised both the desirability of good archaeological practice in leaving discovered remains undisturbed on the seabed, while at the same time emphasising that compliance with the legal requirement to report recoveries will secure fair treatment for finders of wreck. For the last ten years, there has been unprecedented co-operation between the archaeological, museum and recreational diving communities to formulate and promulgate this message, chiefly under the auspices of the Joint Nautical Archaeological Policy Committee and the Receiver of Wreck.

Salvage Awards

The criteria used to determine salvage awards are prescribed by *Article 13 International Convention on Salvage 1989*, which is reproduced in Schedule 11 to the *Merchant Shipping Act 1995*. In keeping with that Act's preoccupation with commercial salvage, the criteria do not make any specific reference to archaeological material. Indeed, by and large they are irrelevant to archaeological values, being mainly concerned with market values and prevention of environmental damage. Consequently, in so far as they can be related to archaeological material, they focus on the 'salved value'³⁵ of recovered wreck and the 'skill and efforts of the salvors'³⁶. The latter does enable some recognition of the additional skill required in recovering archaeological material in an appropriate manner. However, the Convention's focus on the market value of the salvaged material means that no or little salvage reward is

³⁰ As a matter of working practice any wreck over 100 years old is regarded as being of historical interest but this does not exclude the possibility that material younger in age will have historical interest.

³¹ On which see Joint Nautical Archaeological Policy Committee, *Heritage at Sea* (May 1989) National Maritime Museum London pp. 19-21 and Joint Nautical Archaeological Policy Committee, *Still at Sea* (May 1993) National Maritime Museum London pp. 2-4.

³² Where wreck is disposed of to a publicly accessible collection the Receiver's fees are waived but any expenses incurred by the Receiver must be paid, since the Maritime and Coastguard Agency has no funding for conservation etc. and must recoup these costs.

³³ In practice many finders waive their right to salvage in return for the material being disposed of to a museum.

³⁴ A notable exception occurs where wreck, recovered outside UK territorial waters, is landed in the UK and remains unclaimed; the court in *The Lusitania* [1986] 1 Lloyd's Rep. 132. held that title to such wreck does not vest in the Crown and must be returned to the salvor.

³⁵ Article 13(a).

³⁶ Article 13(b).

forthcoming where the material has a low salved value, notwithstanding that its cultural value may be somewhat higher. Moreover, it can sometimes result in cultural material remaining un-conserved. Neither the Receiver of Wreck, the Department of Culture, Media and Sport nor English Heritage have specific funds for conservation of underwater cultural material. Consequently, funding for conservation normally has to come from the salved value of the recovered material. Where the salved value of this material is so low that it cannot cover the cost of conservation, the material may remain un-conserved³⁷. Even where the salved value exceeds the cost of conservation, enabling the material to be properly conserved, it may end up in private hands as museums lack the resources to acquire it. In such an event the material is returned to the salvor in lieu of salvage and the salvor may then sell it on the open market to recover the costs of salvage and conservation. Consequently, public access and curatorial control is lost. The prospect of pecuniary reward is also felt by many in the archaeological community to encourage the unrestrained recovery of archaeological material, rather than its preservation in situ, and the perception of archaeological material in terms of its market value, rather than its cultural significance.

Conversely, the ability to pay salvage awards is believed to provide a powerful incentive to honesty. Both the Receiver of Wreck and the Department for Culture, Media and Sport are strongly of the opinion that salvage rewards provide an incentive to report the recovery of cultural material, which otherwise may well go undisclosed. Indeed, the prospect of finders either receiving a pecuniary award or being allowed to retain the salved material in lieu of salvage has been described as a “key part of the strategy”³⁸ and as such has formed the corner stone of an educational message to sea users that they ‘cannot lose by reporting’. A broad consensus has been attained in that this message has been endorsed by organisations representing both nautical archaeological interests and diving organisations. It is argued that the success of this policy of ‘incentive to honesty’ can be judged by:

- the increasing awareness of good archaeological practice by sea user groups, principally divers. This is assessed as being a “*tangible change in culture*”³⁹, with a downward trend in the disturbance or recovery of cultural material⁴⁰. Indeed, some recreational diving groups have gone as far as to adopt a policy of non-recovery of artefacts from wrecks and the Receiver is of the opinion that this change in attitude is of a permanent nature;
- the year on year increases in the reporting of wreck discoveries and/or recoveries to the Receiver of Wreck, which have been described by the Receiver as “massive” in comparison to historic levels of reporting⁴¹.

The policy is credited with significant archaeological discoveries being reported to the Receiver of Wreck. The Salcombe Cannon site⁴², the Kinlockbovie site⁴³, *HMS*

³⁷ As indeed has occurred with material recovered from *HMS Venerable* (sunk 1803) and the *Gossamer* (clipper ship sunk in 1868). In each case no museum would acquire the items and they were returned to the salvor in lieu of salvage. The salvor cannot afford the costs of conservation and the items remained with the salvor and are deteriorating.

³⁸ Unpublished briefing paper entitled “Salvage Law and Historic Wreck” by Receiver of Wreck to JNAPC.

³⁹ *Ibid.*

⁴⁰ Receiver of Wreck Annual Report 2002, Maritime & Coastguard Agency.

⁴¹ Unpublished briefing paper entitled “Salvage Law and Historic Wreck” by Receiver of Wreck to JNAPC.

*Colossus*⁴⁴ and the Mingary Castle⁴⁵ site are perhaps the most prominent amongst these. Consequently, the Receiver of Wreck is strongly committed to the retention of an incentive to honesty, which is regarded as an indispensable element of the protection for underwater cultural heritage. In support of the retention of an incentive to report the Receiver has emphasised that while the archaeological community is committed to concepts such as the ‘common heritage of mankind’ and the primacy of the public interest in cultural material, the perception of many of the public is somewhat different. Consequently, the Receiver’s policy is predicated upon the philosophy that “*There must be a recognition that the motives which drive archaeologists are often very different to those of members of the public*”⁴⁶. It is feared that the removal of such an incentive might result in a decline in reported material, with a corresponding development in a ‘black market’ in recovered cultural material, as finders sought a pecuniary reward elsewhere. For this reason alone the Receiver has described the possibility of an incentive as “*so important*” to the protection of the underwater cultural heritage⁴⁷. Added to this many recreational groups have used salvage awards to fund further archaeological work on sites. While this method of funding is less than ideal, not least because it depends upon the lucky coincidence of the cultural material having a pecuniary value, it would be true to say it has for some sites been a significant source of funding, which would need to be replaced by alternative sources should cultural material be removed from the salvage regime. While statutory powers now exist to provide support for sites of historic interest⁴⁸, it remains to be seen whether sufficient resources will be made available to achieve a comparable level of support.

Finally, given the archaeological community’s commitment to the concept of a ‘seamless’ approach between terrestrial and maritime archaeology, it is argued that salvage awards maintain a degree of parity with terrestrial archaeology, where payments of awards for finds of ‘Treasure’ are made under the Treasure Act 1996⁴⁹, and that the removal of salvage awards would be an inequitable and unjustifiable differentiation between finders of cultural material on land and at sea.

Salvor in Possession & Derelict

Many in the archaeological community feel that the inappropriateness of the salvage regime to protect archaeological interests is compounded by the continued application of the concepts of *derelict* and *salvor in possession*, both of which have their origins in the case law of previous centuries. A *derelict* is a vessel abandoned at sea by the master and crew, without hope of recovery⁵⁰. The vessel is abandoned not in the sense that legal title (ownership) to it is lost, but purely in the sense that it is no longer in the

⁴² Wreck of an unidentified vessel, probably mid 17th century, from which a collection of Islamic coins and jewellery has been recovered. Collection acquired by the British Museum.

⁴³ Believed to be a wreck from the Spanish Armada of 1588.

⁴⁴ Ship of the Line sunk in 1758 returning from Mediterranean with a consignment of classical pottery on board.

⁴⁵ Unidentified mid 17th. century site.

⁴⁶ Unpublished briefing paper entitled “Salvage Law and Historic Wreck” by Receiver of Wreck to Joint Nautical Archaeology Policy Committee.

⁴⁷ *Ibid.*

⁴⁸ s.6 National Heritage Act 2002.

⁴⁹ See further The Treasure Act 1996, Code of Practice (England and Wales) Department of National Heritage 1997. 66. For an overview of the Treasure Act and the Portable Antiquities Scheme see post.

⁵⁰ *The Aquila* 1 C. ROB. 38 (1798) per Sir W Scott at 40.

physical possession nor under the control of the owner or crew⁵¹. The concept originated as long ago as the 13th. century when wooden vessels were often abandoned but remained afloat. Any person discovering such a vessel could board it as a salvor and, if it was successfully brought to port, a salvage reward was payable⁵². Along with the concept of *derelict* went that of *salvor in possession*. The first persons boarding and taking possession of a derelict as salvors acquire the status of *salvor in possession* and, as such, "...have a legal interest, which cannot be divested ... and it is not for ... any other person ... to dispossess them without cause."⁵³. In short a *salvor in possession* has a legal right to entire and exclusive possession and control of a *derelict* which is good against the world.

During the 20th. century, in a series of cases, the courts extended both the concept of a *derelict* and of *salvor in possession* to embrace the remains of sunken vessels which are worked upon by divers⁵⁴. In 1924 in *The Tubantia*⁵⁵ the court applied the concepts to a wreck lying broken into three parts in 30 metres of water and in 1970 in *Morris v. Lyonesse Salvage Company Ltd.*⁵⁶ to the scattered remains of two wooden vessels lying on an exposed reef off the Isles of Scilly. Finally in 1986 in the case of *The Lusitania*⁵⁷ the court held that "... it is clear beyond doubt that a derelict which sinks remains a derelict."⁵⁸.

The *Morris* case is particularly instructive in two respects: firstly, because it involved an archaeological excavation⁵⁹, rather than a traditional commercial salvage operation, it established that maritime archaeologists could become salvors in possession and thereby protect their sites from intrusion⁶⁰; secondly the court accepted for the first time that possession could be taken of a site where the remains of a vessel were scattered⁶¹ rather than, as previously, where possession had only been afforded to substantial remains of the vessel⁶². Thus an archaeologist or a salvor (in the traditional sense), by manifesting control over a site, may acquire a possessory right which is enforceable against the world, including the Crown. This has profound implications for maritime archaeology, which are discussed below in relation to the *Protection of Wrecks Act 1973*, the *Ancient Monuments and Archaeological Areas Act 1979*, the

⁵¹ *H.M.S. Thetis* 3 HAGG. 223 (1835) per Sir John Nicholl at 235, cited with approval in *The Tubantia* [1924] P 78 per Sir Henry Duke (President) at 87.

⁵² The Black Book of the Admiralty, compiled between the early 13th. century and late 15th. century speaks of entitlement to salvage for "... vessels floateing or waving found ..., without any man therein ..."; see further Twiss, Sir Travers. (1871) ed. & trans. *The Black Book of the Admiralty*, vol. 1 London Longman & Co. pp. xx-xxi.

⁵³ *The Blenden Hall* 1 DODS. 414 (1814) per Sir W. Scott at 416.

⁵⁴ The process actually commenced in the 19th. century when in *H.M.S. Thetis* 3 HAGG 228 Sir John Nicholl held a cargo of sunken gold to be derelict.

⁵⁵ [1924] P. 78.

⁵⁶ sub. nom. *The Association and The Romney*, [1970] 2 Lloyd's Rep. 59.

⁵⁷ [1986] 1 Lloyd's Rep. 132.

⁵⁸ *ibid.* per Sheen J. at 135.

⁵⁹ While many in the present archaeological community would dispute that the work was archaeological in nature, the court expressly accepted it as such.

⁶⁰ Given that designation under the *Protection of Wrecks Act 1973* requires the location of a site be published, this possessory right has been used very successfully by at least one archaeological group to protect a site for three years prior to designation.

⁶¹ The vessels were wooden men of war and given the very exposed location must have broken up within days, if not hours, of the wrecking. Certainly no substantial structures remained and the artefacts were very scattered.

⁶² *The Tubantia*, although broken, remained in three substantial sections.

Protection of Military Remains Act 1986 and the European Convention on Human Rights.

Statutory Restraints upon Salvage

The result of this incremental development of the salvage regime by case law over the centuries, much of it now enshrined in the International Convention on Salvage, is that the law confers upon divers and commercial operators the freedom to initiate the salvage of any property, irrespective of its antiquity and, in doing so, confers upon them possessory rights enforceable against third parties. To temper this freedom a number of statutory and administrative reforms have been introduced, which constrain the liberties of a salvor and, in doing so, confer an element of protection upon the underwater cultural heritage.

The Protection of Wrecks Act 1973⁶³

This Act was passed as a direct consequence of the looting of wrecks of historical interest. Designation and licensing are the chosen mechanisms of control. The Act authorises the Secretary of State⁶⁴ to designate as a restricted area the site of a vessel of *historical, archaeological or artistic importance*⁶⁵ lying wrecked in or on the seabed⁶⁶. There is no further definition of these criteria in the Act but non-statutory guidance has been issued⁶⁷ and the criteria therein reflect those used for scheduling monuments under the *Ancient Monuments & Archaeological Areas Act 1979*. In practice the age of vessels designated dates from possible 500 BC to 20th. century. The objective is to protect the restricted area itself from unauthorised interference and not merely the vessel or its contents. It is an offence, within a restricted area, to tamper with, damage or remove any object or part of the vessel or to carry out any diving or salvage operation⁶⁸. Further operations within the area are then controlled by the issuing of licences, authorising only certain specified activities. The Secretary of State may grant a licence, subject to conditions or restrictions, to persons considered to be competent and properly equipped, for the carrying out of salvage operations in a manner appropriate to the importance of the wreck or associated objects⁶⁹. In determining whether to designate a vessel and/or grant a licence authorising diving or salvage operations⁷⁰ the Secretary of State will receive advice from the Advisory Committee on Historic Wreck Sites (ACHWS) and the relevant heritage agency⁷¹.

⁶³ For a detailed account of the Act see 'Legal Protection of the Underwater Cultural Heritage' Dromgoole, S. (ed.) Kluwer Law International (1999) chp.12; Fletcher-Tomenius, P. & Williams, M. 'A Diving or Salvage Operation ? ROV's & the Protection of Wrecks Act 1973' *International Maritime Law* (1999) Vol.6 (10) pp. 270-272.

⁶⁴ For the purposes of the 1973 Act the term 'Secretary of State' now denotes, in England, the Secretary of State for Culture, Media and Sports, in Scotland the Scottish Ministers and in Wales the Welsh Assembly respectively.

⁶⁵ S.1(1)(b).

⁶⁶ s.1(1); The Act has, as its title suggests, no application to submerged landscapes. In determining whether to designate a vessel and/or grant a licence authorising diving or salvage operations the Secretary of State will receive advice from the Advisory Committee on Historic Wreck Sites and Cadw (in Wales), English Heritage, Historic Scotland and the Environment and Heritage Service (Northern Ireland), as applicable.

⁶⁷ See further Advisory Committee on Historic Wreck Sites, Report for years 1999 and 2000 Department for Culture, Media and Sport March 2002 Annexe E pp.40-41.

⁶⁸ s.1(3).

⁶⁹ s.1(5).

⁷⁰ The licence does not necessarily authorise activities which are intended to lead to a salvage award.

⁷¹ Cadw (in Wales), English Heritage, Historic Scotland and the Environment and Heritage Service (Northern Ireland), as applicable.

Although the ACHWS is a non-statutory committee, it is widely seen as a valuable resource in the decision making process. Principally its advantages are seen as:

- Providing a wide range of expertise, not always available within Heritage Agencies. Membership of the Committee is widely drawn, with persons from the academic, museum, archaeological and avocational diving communities.
- Providing a forum for initiation of debate and review and development of policy, which complements and adds to the work of the Heritage Agencies.
- The wide nature of its expertise is seen as adding value to the decision making process.
- The wide nature of its membership is seen as giving most stakeholders both a voice and a representation within the decision making process.
- This wide representation is also seen as providing a valuable channel of communication between the Heritage Agencies and stakeholders, both professional and avocational. This is particularly seen as advantageous in respect of the latter group and a confidence building measure.

A diving contractor has also been appointed, to visit both potential sites to advise on their condition and nature and to visit existing sites for the purpose of monitoring their condition and the activities of the licensee, if any⁷².

Where a licence is granted, it will be subject to conditions or restrictions, appropriate to each individual site. These conditions will normally require that all divers are listed in a schedule kept by the issuing authority, that activities are kept to those noted on the licence, that intrusive activities are carried out under the direction of the approved archaeologist, that recovered artefacts are given immediate preservation treatment as approved by the archaeologist and that an annual report is submitted and records are deposited with the relevant heritage bodies. The present policy is that initially only certain limited activities on the site will be authorised, short of excavation and recovery. In practice, four categories of licence are issued. These are:

- ‘visitors’; used where there is no active work on site but monitoring of stability is required or to facilitate public access for recreational purposes, rather than archaeological, on those sites considered sufficiently robust;
- ‘survey’; this is the most common form of licence issued, authorising survey activity;
- ‘surface recovery’, where recovery is limited to material exposed on the surface of the seabed, without involving disturbance of underlying material or stable sediments;
- ‘excavation’; the Act does not prohibit excavation per se. It prohibits diving or salvage operations, tampering with, damaging or removing the wreck or objects associated with it. The term ‘excavation’ occurs in licences that authorise such activity but does not define the term. The Oxford Dictionary states ‘excavation’ means [inter alia] “... *make hollow, make hole, unearth ...*”, which is generally interpreted by the Heritage Agencies as any intrusive activity, including coring, probing, etc.. Since such activity involves disturbance of the site, an excavation licence will normally require an archaeologist on site for most of the time while excavation is taking place and

⁷² Previously, the contract was held by the Archaeological Diving Unit at the University of St. Andrews. Since April 2003 it has been held by Wessex Archaeology.

will not normally be issued until a completed pre-disturbance survey has been submitted.

Finally, a licence may be varied or revoked by the Secretary of State at any time upon not less than one week's notice⁷³. However any such revocation would be subject to the constraints imposed by Administrative Law in that, e.g. the revocation should be reasonable, taking into account only material considerations and after the licensee has been consulted and been afforded an opportunity to make representations. A breach of any condition or restriction contained in the licence is treated as having been done without the authority of the licence, thereby making it a criminal offence⁷⁴. Where authorised recoveries of wreck are made, a salvage award can be claimed and disposal of the wreck (archaeological) material is made in accordance with the Receiver of Wreck's policy for historic wreck under the terms of the Merchant Shipping Act 1995.

Shortcomings

The Act, although limited in terms of the number of sites designated⁷⁵, has enjoyed some measure of success. However, it originally suffered from a number of shortcomings. These predominantly stemmed from its origin as a Private Member's Bill, intended as a temporary expedient, and not as a mainstay for protecting the underwater cultural heritage for thirty years. Former criticism of the Act centred upon the fact that as the Act did not originate as a departmental measure, it could not commit funds for public expenditure. Consequently, there was no provision for expenditure upon archaeological investigation and management of designated sites. The result was that the overwhelming majority of work executed on designated sites was carried out by avocational divers. While nothing should be taken away from these divers in terms of enthusiasm and their intention to further the public interest, it is widely acknowledged that their training was not fully resourced and that they frequently lacked resources in terms of equipment, skills and support. Indeed, notwithstanding that these sites were acknowledged to be of national or international importance, their protection and investigation was almost exclusively financed from the personal resources of the licensees and their team members. As a result much of the work would not now be considered as 'best practice' and the results of their investigations were either not disseminated or failed to meet appropriate academic and professional standards. However, the National Heritage Act 2002 has potentially remedied this situation by providing a power for English Heritage to defray or contribute to the cost of providing assistance to wrecks designated under the Act⁷⁶. This assistance is defined very widely and includes the preservation and maintenance of the wreck⁷⁷, 'maintenance being defined as including repairing, covering or the doing of any act required for repairing or protecting the wreck from decay or injury'⁷⁸. This provision has gone a considerable way towards resolving the shortcomings in the Act and thereby increasing its effectiveness as an instrument for the management of the underwater cultural heritage.

⁷³ S.1(5)(b).

⁷⁴ s.1(6).

⁷⁵ In March 2003 there were 53 sites designated.

⁷⁶ S.6

⁷⁷ s.6(1)(c).

⁷⁸ s.6(2).

The Act's remaining shortcomings are:

- The Act is potentially restricted in its application due to the use of the term 'vessel'. The term is not defined in the Act but the *Merchant Shipping Act 1995* defines the term as "... including any ship or boat or any other description of vessel used in navigation."⁷⁹. Clearly, this would encompass log boats and rafts but it is uncertain if flying boats or amphibious vehicles would be included. The remains of historic aircraft would undoubtedly be outside the definition, which is a significant omission⁸⁰.
- The Act lacks any capacity for 'area' designations to protect locations of high archaeological potential⁸¹, relying as it does on upon a 'spot' designation of an individual vessel.
- The Act fails to take account of the proprietary and possessory rights which can exist in historic wrecks. Their importance usually only becomes apparent over a period of time as investigation proceeds. Such investigation can confer possessory rights upon the divers involved as salvors in possession. Consequently, any subsequent designation of the site is potentially draconian, in that any further acts of possession become unlawful, including any diving operations for mere exploration, unless authorised by the Secretary of State. Therefore, designation can result in immediate and complete loss of possession and beneficial use of the wreck. Since the 1973 Act has no mechanism for compensation, designation, unless followed by the grant of a licence, will infringe the possessory rights of a salvor. This point was brought dramatically home when the wreck of the postal packet *Hanover*⁸² was designated in August 1997. The designation forced the salvor in possession to cease operations and quit possession of the site. The salvor subsequently obtained an injunction restraining the Secretary of State from giving effect to the designation order. The injunction was obtained upon the administrative law ground of inadequate prior consultation with the salvor and the matter was subsequently resolved by a negotiated settlement⁸³. However, further limitations have emerged upon the use of the Act in relation to the *European Convention on Human Rights* and these are discussed below. Similar constraints will operate where a person has a proprietary interest in a wreck which is designated.

Ancient Monuments & Archaeological Areas Act 1979

This Act has seen little application below Low Water until recent times⁸⁴. In principle, the Act has significant advantages over the *Protection of Wrecks Act 1973* and a

⁷⁹ S.255(1).

⁸⁰ Aircraft do come within the meaning of 'wreck' for the purposes of the Merchant Shipping Act 1995 by virtue of the Aircraft (Wreck and Salvage) Order 1938 (S.R.&O 1938 No.136) and s.51 Civil Aviation Act 1949

⁸¹ e.g. the Goodwin Sands.

⁸² Sunk in 1765, it is the only known site of a postal packet.

⁸³ The salvor being granted an excavation licence under the 1973 Act so salvage could recommence.

⁸⁴ In 2001 Historic Scotland scheduled as monuments three battleships and four cruisers of the scuttled German High Seas Fleet in Scapa Flow (References AMH/9298 & AMH/9308 respectively). At the time of writing (March 2003) it is proposed to schedule the remains of eight sailing fishing vessels in

recent study⁸⁵ has identified it as the one single piece of legislation having the greatest potential to satisfy the United Kingdom's obligations under the *European Convention on the Protection of the Archaeological Heritage (revised)*⁸⁶. The Act works by the *scheduling of monuments*⁸⁷. The definition of a 'Monument'⁸⁸ encompasses, inter alia, buildings, structures or work, cave or excavation, vehicle, vessel, aircraft or other movable structure⁸⁹. Thus the Act is far more flexible in its possible application than the 1973 Act and, in particular, can apply to flooded landscapes such as quarries, cave dwellings and fish traps⁹⁰.

To be scheduled, the monument must be of '*national importance*'⁹¹. Once scheduled, it is an offence to, inter alia, demolish, destroy, alter or repair a monument without '*scheduled monument consent*'⁹². In practice, such consent is rarely given, except for rescue excavations, and it is the practice of the heritage agencies to pursue a policy of preservation in situ, rather than encourage active investigation of monuments by excavation, which is seen as destructive. This principle is now enshrined as a cornerstone of the *Valletta Convention*⁹³.

Shortcomings

Notwithstanding the perceived advantages of the *Ancient Monuments & Archaeological Areas Act 1979* over the *Protection of Wrecks Act 1973* it would appear to suffer from some significant limitations, which make its future use underwater unlikely to be widespread:

- The definition of a Monument is rather narrow. Presently it is defined as:
 - “(a) any building, structure or work, whether above or below the surface of the land, and any cave or excavation;
 - (b) any site comprising the remains of any such building, structure or work or of any cave or excavation;
 - (c) any site comprising or comprising the remains of, any vehicle, vessel, aircraft or other moveable structure or part thereof which neither constitutes nor forms part of any work which is a monument within paragraph (a) above; “⁹⁴.

This means that the Act's protection can only be extended to something which has been consciously fashioned or made by humans and this has been identified as a significant weakness by the Council for British Archaeology (CBA), which has

Aberlady bay, Scotland (reference AMJ/7512/1/1). CADW scheduled the wreck of the *Louisa* in December 2001 but the vessel is now part of the reclaimed area of the Cardiff Bay project.

⁸⁵ Joint Nautical Archaeology Policy Committee, 'An Interim Report on The Valletta Convention & Heritage Law at Sea' (2003): University of Wolverhampton.

⁸⁶ ETS no. 143. Hereafter 'the Valletta Convention'.

⁸⁷ Under s.53 a monument situated in, on or under the seabed within the seaward limits of UK territorial waters may be scheduled.

⁸⁸ Curiously although the title of the Act refers to 'Ancient' monuments there is no age limit and post 1945 structures have been scheduled.

⁸⁹ s.62(7).

⁹⁰ For an account of the Act in so far as it may be applied to underwater archaeological remains see 'Legal Protection of the Underwater Cultural Heritage' Dromgoole, S. (ed.) Kluwer Law International (1999) chp.12

⁹¹ This term is undefined.

⁹² s.2(1); consent may be granted subject to conditions s.2(4).

⁹³ *European Convention on the Protection of the Archaeological Heritage (revised)* ETS no. 143.

⁹⁴ S.61(7).

advocated an extension of the definition for over 13 years⁹⁵. The CBA have proposed an amended definition which would encompass “ *any deposit that has been formed by past human activity, or that reflects the effects of such activity on the environment.*”⁹⁶. Such a definition would permit the scheduling of, e.g. submerged landscapes which had been subject to human inhabitation. It would also be consistent with the extremely wide definition of the ‘archaeological heritage’ in the *European Convention on the Protection of the Archaeological Heritage (revised)*⁹⁷, which is defined as “ ... *remains and objects and other traces of mankind from past epochs shall be considered to be elements of the archaeological heritage...*”⁹⁸.

- The Act lacks any capacity for ‘area’ designations underwater to protect locations of high archaeological potential⁹⁹, relying as it does upon ‘spot’ scheduling of a known individual vessel or a group of vessels. There is in fact a power¹⁰⁰ under Part II of the Act to designate *Areas of Archaeological Importance*¹⁰¹ (AAI). These are not defined as being exclusively terrestrial but accompanying provisions make such a conclusion inescapable¹⁰². The concept of an AAI centres around a suspected archaeological potential. Within a designated area notice must be given of disturbance to the ground or certain works, thereby giving an opportunity for archaeological investigation to be carried out. AAI have not been extensively used¹⁰³ and in the main are not highly regarded within the archaeological community. The reasons appear to be that PPG 16¹⁰⁴ appears to deal more effectively with the impact of development upon archaeological remains on land¹⁰⁵ and that there is no capacity to recover the costs of investigation from the developer. It has been proposed that Part II of the Act should be repealed and the existing AAI designations removed¹⁰⁶. However this view is not entirely shared by the CBA, who have pointed out that the few local authorities with designated areas are pleased with their experience and that AAI’s remain the only area designation United Kingdom archaeology has at present. Consequently, there may be merit in adapting the concept to complement more effectively the scheduling of monuments¹⁰⁷.

⁹⁵ See further the comments of Richard Morris, Director of the CBA in *British Archaeology*, no.34 May 1998.

⁹⁶ See further *The Valletta Convention on the Protection of the Archaeological Heritage: the CBA Position*, CBA 2001.

⁹⁷ Commonly known as the ‘Valletta Convention’. This Convention is discussed in outline below.

⁹⁸ para. 2.

⁹⁹ e.g. the Goodwin Sands.

¹⁰⁰ But not a duty.

¹⁰¹ S.33(1).

¹⁰² A copy of a draft designation order must be supplied to a local authority (s.33(1)); there must be consultation with the local authority (s.33(1), Sched. 2 para.2(a), (aa)); the designation must be registered as a local land charge (s.33(5)); six weeks notice of certain works or disturbance to the ground within an area must be given to a local planning authority (s.35(5)(a),(aa)); since few local authority areas extend significantly beyond the Low Water Mark and local planning authority jurisdiction cannot extend beyond it the context supplied by these provisions appear to confirm that Parliament’s intention was that AAI’s were not intended to be maritime in nature.

¹⁰³ Five historic town centres have been designated.

¹⁰⁴ *Planning Policy Guidance 16 Archaeology and Planning* (1990).

¹⁰⁵ See further PPG 16 Annex C para. 20

¹⁰⁶ See further *Protecting Our Heritage*, Department of National Heritage (1996) pp.43-44.

¹⁰⁷ See further the comments of Richard Morris, Director of the CBA in *British Archaeology*, no.34 May 1998.

- Unlike the *Protection of Wrecks Act 1973*, the *Ancient Monuments & Archaeological Areas Act 1979* lacks the flexibility to restrict public access by diving upon maritime scheduled monuments, where this would be appropriate in terms of heritage management. Scheduling per se does not create a public right of access to terrestrial monuments. Where a monument is under public ownership¹⁰⁸ the public have a right of access, but this right may be regulated or negated¹⁰⁹. Although nominally these provisions apply underwater, in fact they sit very uneasily with the maritime legal framework. The public would appear to enjoy a right to swim in tidal waters, unless specifically prohibited¹¹⁰. On the basis that the courts would equate swimming with underwater diving, it would appear that the public enjoy a right to access scheduled monuments in tidal waters, unless specifically prohibited. No underwater scheduled monuments are currently in the ownership or guardianship of the relevant Secretary of State and few, if any, are likely to become so. Thus the power to regulate or prohibit access cannot be utilised unless the monument in question is brought into such ownership or guardianship. This would involve a legal process, which would probably not be entered into lightly, as well as the possibility of the payment of compensation to the owner of a monument, e.g. a wreck, brought into such ownership or guardianship.. Given this limitation, the use of the Act underwater may be restricted to a few suitably robust sites of public interest, unless it is amended.

- Unlike the *Protection of Wrecks Act 1973*, the *Ancient Monuments & Archaeological Areas Act 1979* does not impose upon the Secretary of State a duty to consult “... with such persons as he considers appropriate ...”¹¹¹. Consequently, the system of scheduling under the Act has no equivalent of the non statutory Advisory Committee on Historic Wreck Sites (ACHWS). The ACHWS is regarded as a very successful addition to the system of designating historic wrecks and consideration should be given to establishing an equivalent committee in respect of the scheduling process.

- In relation to ‘sites’ comprising, or comprising the remains of, any vehicle, vessel, aircraft or other movable structure or part of it the object cannot be scheduled “...unless the situation of that object in that particular site is a matter of public interest;”¹¹². This provision is not easy to interpret. The limitation appears to arise because the purpose of the Act is to schedule significant sites, rather than simply to protect significant objects themselves. A narrow interpretation would suggest that a wreck of a vessel or aircraft could not be scheduled unless the fact that it came to rest in a particular location made its conservation a matter of public interest. Conversely, a liberal interpretation might allow one to take the view that the very presence of a significant wreck in a particular location makes that location of some historical or archaeological interest and therefore a matter of public interest. Clearly, the Act, being based upon the concept of the scheduling of sites, should not be concerned with the conservation of an object that is still capable of movement in accordance with its

¹⁰⁸ I.e. in the ownership or guardianship of the Secretary of State, local authority or English Heritage.

¹⁰⁹ S.19(1), (2)(a)(b), (3).

¹¹⁰ Decided law provides no assistance on the question of whether there is a right to bathe in the sea. Since it is not expressly prohibited then, on the Common Law basis that that which is not expressly or impliedly prohibited is lawful, it would appear to be a residual right. It is probable that the public right of navigation is restricted to craft and does not extend to persons swimming.

¹¹¹ S.1(4) Protection of Wrecks Act 1973.

¹¹² S.61(7)(c); (8)(a).

design. Thus, an aircraft that can still fly or a vessel that can still be navigated are inappropriate subjects for scheduling. However, where such an object has been incorporated into a site and is incapable of movement according to its design e.g. because it has crashed or been wrecked at a particular location, then scheduling may be appropriate. It may be that this is what the limitation is attempting to achieve. In any event it is desirable that this confusion is clarified by amendment of the provision in order to make its purpose explicit.

- The use of metal detectors on scheduled monuments is prohibited under s.42, unless authorised. A metal detector, for the purposes of the Act, is defined as “... *any device designed or adapted for detecting or locating any metal or mineral in the ground.*”¹¹³. Remote sensing technology has advanced considerably since 1979 and the detection of archaeological remains other than metal is now possible. Consideration should be given to prohibiting the unauthorised use of remote sensing equipment directed at the location of archaeological remains on scheduled sites. Such a provision could also usefully be extended to wrecks designated under the *Protection of Wrecks Act 1973*. In both instances the penalties should encompass the possibility of the confiscation of equipment used in the commission of the offence, which would act as a powerful deterrent.

Protection of Military Remains Act 1986¹¹⁴

In respect of United Kingdom waters *s.230(1) Merchant Shipping Act 1995* states that the law relating to civil salvage shall apply to services in assisting any of Her Majesty's ships. The provision is subject to a number of exceptions¹¹⁵ but, in general, salvage claims may be brought against the Crown in respect of warships, sunken or otherwise¹¹⁶, located in United Kingdom waters. Such wrecks will, for the purposes of salvage law, be 'in danger', they can be the subject of voluntary salvage and, as derelicts, they can be taken into possession by divers acting as salvors, who will then be entitled to exclusive possession, even against the Crown. This means that salvors, whether commercial or simply recreational divers, are free to initiate recovery of any material from the wrecks of Crown vessels in United Kingdom waters and that, provided such recoveries are notified to the Receiver of Wreck, such activity will constitute legitimate salvage. If successful it also confers a right to a reward and, if the appropriate acts have occurred, the possessory rights of a salvor. This inclusion of such naval shipwrecks within the salvage regime has the consequence that freedom to commence salvage is given to the commercial and recreational diving communities, unless a constraint is imposed by use of various statutory mechanisms¹¹⁷, including the *Protection of Military Remains Act 1986*. In February 2001 the Ministry of Defence¹¹⁸ published a 'Consultation Document'¹¹⁹, inviting interested parties to

¹¹³ S.42(2).

¹¹⁴ For a detailed account of the Act see 'Legal Protection of the Underwater Cultural Heritage' Dromgoole, S. (ed.) Kluwer Law International (1999) chp.12

¹¹⁵ The Receiver of Wreck cannot obtain a valuation, detain the property nor sell it under ss. 225, 226 and 227 respectively.

¹¹⁶ Since s.230 expressly refers to 'ships', it would appear that all wrecks of military aircraft remain outside the salvage regime, unless the government otherwise expressly consents.

¹¹⁷ E.g. by use of the *Protection of Wrecks Act 1973*, the *Ancient Monuments and Archaeological Areas Act 1979*; see further 'Legal Protection of the Underwater Cultural Heritage' Dromgoole, S. (ed.) Kluwer Law International (1999) chp.12

¹¹⁸ Hereafter 'MOD'

express their views on the protection of wrecked military vessels which had sunk with loss of life¹²⁰. This consultation exercise had been announced¹²¹ by Dr. Lewis Moonie¹²² in response to the growing public controversy over interference with last resting places associated with sunken military vessels¹²³ and a concerted campaign by interested parties and ex- service associations to have such interference regulated under the *Protection of Military Remains Act 1986*¹²⁴. In November 2001 the MOD published its report on the consultation exercise¹²⁵ and this document heralded a radical new policy for administration of the *Protection of Military Remains Act 1986*¹²⁶.

The primary objective of this Act is to prevent disturbance of military remains, irrespective of the presence of human remains or the cause of the loss¹²⁷. It is wide ranging and has the potential to control many archaeological excavations. The regulatory framework of the Act works upon the concepts of '*Protected Places*', '*Controlled Sites*' and the prohibition of certain excavations¹²⁸.

Protected Places are the remains of any aircraft which crashed in military service or of any vessel *designated* (by name, not location) which sunk or stranded in military service¹²⁹ after 4th. August 1914¹³⁰. Although the vessels, as opposed to aircraft, need to be specifically designated by name, the location of each vessel need not be known, since it is the presence of the remains and their designation that makes the place protected and not knowledge of the location. If there is a belief or reasonable grounds

¹¹⁹ "Military Maritime Graves and The Protection of Military Remains Act 1986: A Consultation Document"[February 2001] Ministry of Defence, Whitehall, London.

¹²⁰ Ibid. p.6

¹²¹ See statement of Dr. Moonie on Maritime Graves House of Commons Written Answers 25 Jan. 2001 at www.parliament.uk

¹²² Under Secretary of State for Defence

¹²³ See further '*Ripping Off The Dead*' , *Diver*, May 1999; '*Divers raid seabed war graves for trinkets*', *The Independent*, 11/11/1999; '*Divers set to plunder battleship war graves*', *Sunday Telegraph* 27/11/2000; '*Wartime wrecks looted by Divers*' 3/12/2000 at www.telegraph.co.uk and '*The Depths of Dishonour*', *Western Daily Press*, 9/1/2001. Between 19th. October 1999 and 20th. April 2000 the MOD received 51 Parliamentary Questions relating to this issue; see further statement of Dr. Moonie, Parliamentary Under Secretary of State for Defence, 26th. June 2000, at www.parliament.uk cols.415W - 417W.

¹²⁴ Which hitherto had not been utilised, except in relation to the remains of military aircraft. For a discussion of the genesis of this controversy and the law relating to the salvage of military remains see Williams M. "*War Graves" and Salvage: Murky Waters ?*" IML 7(5) pp. 151-158.

¹²⁵ "Military Maritime Graves and the Protection of Military Remains Act 1986: Consultation Report" [November 2001] Ministry of Defence, Whitehall, London.

¹²⁶ Hereafter 'the Act'.

¹²⁷ A common misconception is that the 1986 Act is concerned solely or primarily with 'war graves'. It is not, but the habitual reference to maritime military remains as 'war graves' has led to a confused perception of the law. The term appears to be a corruption of the terminology used in the Royal Charter incorporating the Imperial War Graves Commission. Under the Charter the Commission is charged with "... caring for the graves of officers and men ... who ... have been, or may be, *buried* ..." and "... to make fit provision for the *burial* of officers and men ...". Predictably the legal advisers to the Commission have taken the view that it is not responsible for unrecovered human remains and that it is quite erroneous in law to refer to ships with unrecovered human remains as 'war graves', since they do not constitute a '*burial*' as such.

¹²⁸ The Act applies to both United Kingdom and international waters but foreign vessels may only be designated within UK waters.

¹²⁹ This would include support vessels of the Fleet Auxiliary and requisitioned vessels.

¹³⁰ The date hostilities commenced against Germany; see further s.1(2).

for suspecting that a place is comprised of the remains of a military aircraft or designated vessel then it is an offence to conduct unlicensed diving or salvage operations to tamper with, damage, remove or unearth any remains or enter any hatch or other opening. Thus diving upon such remains is permitted, provided no tampering or removal of objects etc. occurs¹³¹.

Controlled Sites are *designated* areas comprising the remains of a military aircraft or a vessel sunk or stranded in military service less than two hundred years ago¹³². It is an offence within a controlled site to tamper with, damage, move or unearth any remains, enter any hatch or opening or conduct diving, salvage or excavation operations for the purposes of investigating or recording the remains, unless authorised by licence¹³³. Since unauthorised investigation is prohibited, it would seem that any unlicensed diving is prohibited on these sites¹³⁴.

Finally, the Act appears to prohibit any excavation in the United Kingdom if undertaken to discover whether the place comprises the remains of a military aircraft or vessel of any nationality, whenever the casualty took place, i.e. regardless of age¹³⁵. This is a surprisingly wide provision and would appear to prohibit the archaeological investigation of any possible military wreck, since one of the purposes of excavation would be to establish the identity of the remains.

The non statutory criteria for determining designation are whether or not¹³⁶:

- (a) lives were lost;
- (b) there is evidence of sustained disturbance or looting (and strength of evidence);
- (c) designation is likely to curb or put a stop to such disturbance or looting;
- (d) diving on the vessel or site attracts sustained and significant public criticism;
- (e) the vessel is of historical significance;

It is important to note that loss of life is merely one criterion and that the presence of other criteria, such as whether the remains are of historical significance, emphasises that the Act protects the remains of the aircraft or vessel itself and loss of human life is not essential for designation. Many Second World War wrecks are now of historical interest, as they may represent the only surviving examples of that type of vessel or equipment. Thus, the destruction of historical data by physical interference with a wreck can by itself justify the designation of such remains. Nor do these criteria tell the whole story. The Consultation Report also makes it clear that they are not exhaustive. In other words, additional factors can be taken into account. Unfortunately, the Report itself is rather vague as to what these might be. Safety is the sole other factor mentioned, but it is not made clear whose safety would be of concern, that of contractors, due to the vessel's depth, condition or the presence of munitions on board, or that of the public generally. What else other than safety might

¹³¹ Provided that the location of datums etc. did not constitute tampering within the meaning of the Act.

¹³² s.1

¹³³ s.2(3)(a).

¹³⁴ The issue would turn upon whether the court interpreted 'investigation' to include mere visual inspection without physical contact.

¹³⁵ s.2(3)(c).

¹³⁶ "Military Maritime Graves and the Protection of Military Remains Act 1986: Consultation Report" op.cit. para.16 p.6.

be considered? Environmental risk through inadvertent puncturing of fuel bunkers, as with *HMS Royal Oak*, could certainly justify designation. As the Consultation Report indicates, the idea is not to restrict the MOD's discretion to take many factors into account when deciding whether to designate and so the discretion is extremely wide and the reasons for designation may be very varied¹³⁷.

Sixteen wrecks in United Kingdom waters have been designated as *Controlled Sites*¹³⁸. The MOD has stated that further designations as *Controlled Sites* will occur "...if vessels are subject to sustained disturbance or are considered dangerous"¹³⁹. If a significant number of *Controlled Sites* are eventually designated, then a licensing regime will be introduced to enable *reasonable commercial non-diving*¹⁴⁰ activities to proceed, together with a licensing charging scheme¹⁴¹. In lieu of widespread designations of *Controlled Sites*, the MOD determined upon a 'rolling programme' to identify all British vessels lost in military service and assess whether, in the light of the criteria published in the Report, they should be designated as *Protected Places*. The presumption is that eventually all British vessels lost in military service will be designated. This will encompass an estimated 4,000 wrecks in United Kingdom waters.

Shortcomings

Shortcomings exist in both the terms of the Act and its administration:

- The drafting of the Act is complex and to all but a legal professional, it may well appear to be incomprehensible.
- Several legal ambiguities remain, particularly in relation to *Controlled Sites*.
- In relation to those operations which are prohibited in *Controlled Sites*, the use of the term "... diving or salvage operation ..." poses a number of difficulties. The term 'diving operation' is neither defined by the Act nor by any other primary legislation and therefore carries its normal grammatical meaning¹⁴². Clearly, the expression would encompass submersion by a person using diving apparatus, as well as the use of a machine carrying persons, such as a manned submersible. What is not clear is whether it would also include the use of a Remotely Operated Vehicle (ROV) simply to locate a wreck and inspect it¹⁴³. Given that the purpose of the Act is to prohibit unauthorised exploration of maritime military remains, it would surely be open to the courts to take the view that the means of underwater observation, whether manned or

¹³⁷ Ibid. paras. 15-16.

¹³⁸ These sites are *HMS Bulwark* (Sheerness 1914); *HMS Dasher* (Clyde 1943); *HMS Formidable* (S. Devon 1914); *HMS Hampshire* (Scapa Flow 1916); *HMS Natal* (Cromarty Harbour 1915); *HMSub A7* (Whitsand bay, Plymouth 1914); *HMS Vanguard* (Scapa Flow 1917); *HMSub Affray* (English Channel 1951); *HMS Exmouth* (Moray Firth 1940); *HMS Royal Oak* (Scapa Flow 1939); *U-12* (English Channel 1939); *HMSub H5* (Anglesey 1918); *HMS Sheffield, Coventry, Antelope & Ardent* (Falklands 1982). In addition five vessels, all lying within international waters, have been designated as *Protected Places*. These vessels are *RFA Sir Galahad* (Falklands 1982); *HMS Hood* (N. Atlantic 1941); *HMS Prince of Wales & Repulse* (Far East 1941); *HMS Gloucester* (Mediterranean 1941); see further S.I. 2002 No.1761.

¹³⁹ Ibid. para. 25 (b) p.8.

¹⁴⁰ Author's emphasis added.

¹⁴¹ "Military Maritime Graves and the Protection of Military Remains Act 1986: Consultation Report" op.cit. p.2.

¹⁴² The expression is defined, for the purposes of the Diving At Work Regulations (S. I. 1997 No. 2776), as "... a diving operation identified in the project plan ...". A search of Canadian, Australian, American and New Zealand legislation revealed no use or definition of the expression.

¹⁴³ *Quare* could the use of a towed sonar device be a 'diving operation' within the meaning of the Act?

not, is irrelevant and that the use of a robotic machine, where the operators remain above the surface constitutes a ‘diving operation’. However, the Act renders a breach a *criminal* offence and it is a cardinal principle of statutory interpretation that penal statutes are construed strictly in favour of the individual¹⁴⁴. Consequently, the court may take a more forensic and restrictive approach to interpretation and consider that the use of remotely controlled machines *per se* does not amount to a diving operation.

- An additional difficulty in relation to *Controlled Sites* arises from the fact that diving or salvage operations are prohibited “... *for the purpose of investigating or recording details of any remains...*”¹⁴⁵. The term ‘*investigating*’ has been taken literally to mean simply visually examining a wreck¹⁴⁶. Since this is an inevitable ingredient of all recreational and commercial diving operations¹⁴⁷, this would amount to a prohibition of all diving operations within a *Controlled Site* without the authority of a licence. Certainly, the MOD has publicly adopted such an interpretation¹⁴⁸. However, while this interpretation has merit, there are grounds for taking a more restrictive approach. If a total prohibition on all diving operations had been intended, there would be little point in specifying the purposes for which the diving operation was prohibited. The fact that the Act refers to such operations for specified purposes suggests that Parliament’s intention was to allow diving operations for other, unspecified, purposes¹⁴⁹. This conclusion is reinforced by the fact that, had a total prohibition been contemplated, then one envisages clear and unambiguous wording would have been utilised, comparable to that in the Protection of Wrecks Act 1973, which talks of “...*diving or salvage operations directed to the exploration of any wreck ...[or the use of] equipment constructed or adapted for any purpose of diving operations;*”¹⁵⁰. Moreover, if a total prohibition on diving within a *Controlled Site* is imposed by the Act, then no apparent purpose is served by the provision of the additional offence of taking part in a diving operation carried out for the purpose of tampering with, unearthing, removing etc. or entering military remains within the site. Simply executing a diving operation *per se* within the site, without this additional seabed activity, would constitute an offence. Consequently, it is arguable that ‘*investigation*’, for the purpose of the Act, envisages activity which amounts to more than merely diving to visually examine military remains within a *Controlled Site*. Given that the objective of the legislation is to protect military remains from unauthorised interference, a purposive interpretation would be that diving operations are only prohibited if they are intended to, or are likely to, result in physical interference or entry into a wreck. Such an interpretation would then permit a purely visual examination, whether by a diver or by a Remotely Operated Vehicle (ROV), without the necessity for a licence.

- This ambiguity is compounded when one also considers the meaning of ‘*salvage operation*’. A ‘*salvage operation*’ is not defined in the Act. However, it is defined by

¹⁴⁴ See further *R. v. Cuthbetston* [1980] 3 W.L.R. 89 (H.L.)

¹⁴⁵ S.2(3)(a).

¹⁴⁶ See ‘Legal Protection of the Underwater Cultural Heritage’ Dromgoole, S. (ed.) Kluwer Law International (1999) chp.12. Contextually, this would be the grammatical meaning.

¹⁴⁷ At least initially, preparatory to other operations.

¹⁴⁸ “Military Maritime Graves and the Protection of Military Remains Act 1986: Consultation Document” *op.cit.* para. 14 p.6.

¹⁴⁹ Any diving operation to secure safety or health or prevent serious damage to property is permissible under s.2 (6).

¹⁵⁰ S.1(3)(b).

the *Merchant Shipping Act 1995* as " ... any act or activity undertaken to assist a vessel or any other property in danger in navigable waters ... "¹⁵¹. Clearly the words "...any act or activity...", per se, would embrace the use of a remotely operated vehicle, but the qualification that, in order to be a salvage operation, the activity must be undertaken to assist a vessel in danger is problematic, in circumstances where there is no intention to ultimately recover the vessel or any part of it. While success is undoubtedly a precursor to entitlement to a salvage award, the conferment of a benefit upon the property in danger is not a pre-requisite of the status of a 'salvor'. Salvage by its very nature is speculative and the rendering of assistance, i.e. a salvage service, per se, without the attainment of success, will still amount to a salvage operation and make the operative a 'salvor'. This is well illustrated by the principle that a person engaged in work preparatory to recovery of a sunken vessel or its cargo will nevertheless be a salvor in law and have the possessory rights of a salvor in possession, notwithstanding that actual recovery has yet to be effected¹⁵². As Brice stated¹⁵³, no exhaustive list of salvage services can be given, but it is clear that the locating of an endangered vessel, inspecting it and assessing its predicament can constitute a salvage service, where it is accompanied by an intention to effect recovery or, at least, such an intention is not excluded. Indeed the American courts have conferred the status of salvor in possession upon persons where location of a wreck and assessment of its condition have been undertaken by a ROV with a view to raising material from the wreck¹⁵⁴. Consequently, it is arguable that a person using a ROV to locate and survey a wreck would be conferring a salvage service and therefore would be engaging in a salvage operation. On the other hand, the absence of a firm intention to recover a vessel or any of its contents in the foreseeable future and the lack of proximity between survey and any eventual recovery may make it difficult for a court to regard merely locating and inspecting a vessel as a salvage service in the conventional sense and therefore a salvage operation, contrary to the Act.

- Most, if not virtually all, of the wrecks potentially falling within the ambit of the Act are of some historical interest, some 58 years having elapsed since the end of the Second World War. Furthermore, the historical significance of a wreck is a criterion for designation. Consequently, the Act potentially applies to a significant proportion of the United Kingdom's maritime heritage. Notwithstanding this, the Act's potential as an instrument of heritage management is severely compromised because:

- It is essentially reactive and protective against human activity rather than proactive.
- In particular it makes no provision for expenditure upon archaeological investigation and management of designated sites, for mitigation of accidental disturbance or environmental degradation, formulation of a management strategy for each site or for publication of archaeological investigations.
- The administration of the Act lacks the equivalent of the Advisory Committee on Historic Wrecks Sites and it is unclear how the MOD is

¹⁵¹ Sch. 11 Article 1(a).

¹⁵² *The Tubantia* [1924] P. 78.

¹⁵³ Brice, G. *Maritime Law of Salvage* 3rd ed. (1999) Sweet & Maxwell. London. at pp. 103-105.

¹⁵⁴ *Colombus-America v. Unidentified Etc. Vessel* 1988 AMC 2957.

to obtain specialist historical or archaeological advice in relation to the designation or licensing decision making process.

- Given the potential for most of the remains falling within the ambit of the Act to be of historical significance many in the archaeological community are of the opinion that it is incongruous for it to be administered by a non heritage Department of State.
- Balanced against this view is the fact that the Act's primary purpose is not one of heritage conservation or management. The purpose of the Act is to prevent interference with military remains for a variety of reasons, of which heritage considerations are merely one example. Whether these considerations are so prominent as to outweigh others considerations and justify a transfer of responsibility for administration of the Act from the MOD to the heritage agencies should be a matter for further consideration.
- It is possible that application of the Act to wrecks of warships located in United Kingdom waters may have adverse implications for the MOD under the European Convention on Human Rights. This is discussed below.
- The criteria for designation are not exclusive and it is unclear what considerations they fully encompass¹⁵⁵.

¹⁵⁵ To some extent this provides flexibility, so that in unforeseen or special circumstances cultural heritage can still receive the Act's protection. Conversely, excessive ambiguity in the criteria for designation can result in an individual wreck not being designated due to its failure to satisfy the criteria. Excessive ambiguity may also dissuade interested parties from proposing designation of a vessel, in the belief that such designation is unlikely to occur.

Further Legal Provisions Relevant to Protection of the Underwater Cultural Heritage¹⁵⁶

European Convention on Human Rights¹⁵⁷

The incorporation of the Convention into United Kingdom law, by the *Human Rights Act 1998*¹⁵⁸, has been described as the largest single constitutional innovation since the settlement of 1688. What is beyond question is that almost every aspect of Crown activity is now subject to the provisions of the Convention and that any amending legislation relating to designation or scheduling will be required to be in conformity with those provisions. In relation to the management of underwater cultural heritage, two of the Convention's provisions are particularly applicable. These are *Article 1 of the First Protocol* to the Convention¹⁵⁹, which entitles persons to peaceful enjoyment of possessions and *Article 6* of the Convention¹⁶⁰, which requires certain procedural standards in the determination of civil or criminal matters. These procedural standards would be applicable to decisions to designate or schedule or to refuse a person with a proprietary or possessory interest a licence (under the *Protection of Wrecks Act 1973* or the *Protection of Military Remains Act 1986*) or scheduled monument consent (under the *Ancient Monuments and Archaeological Areas Act 1979*). Consequently, such decisions fall within the ambit of *Article 6* as a determination of civil rights and obligations¹⁶¹.

Following the litigation arising from the designation of the Postal Packet *Hanover* in 1997, attention has invariably focused upon the issue of the potential remedy a Salvor in Possession has under the *European Convention on Human Rights*. However, the

¹⁵⁶ Fletcher-Tomenius, P. & Williams, M. The Protection of Wrecks Act 1973: A Breach of Human Rights? *International Journal of Marine and Coastal Law* (1998) Vol.13, No 4 pp 623-641.

¹⁵⁷ The United Kingdom was a founder signatory and the Convention came into effect on 3rd September 1953. It was given direct applicability in the United Kingdom by the Human Rights Act 1998.

¹⁵⁸ The United Kingdom was a founder member of the Convention and had been subject to it since its inception. However, an individual could previously only seek redress under the Convention having exhausted all national remedies. In practice this meant appeal to the House of Lords, logistically and financially an exhausting process that could take several years.

¹⁵⁹ Article 1 states:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

¹⁶⁰ Article 6(1) of the Convention, in so far as it is relevant, states:

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing ... by [a] ... Tribunal."

¹⁶¹ In his review of the compatibility of the United Kingdom's land use planning system Loveland concluded that "... there is little scope to argue that development control decisions do not fall within Article 6...". Scheduling of terrestrial monuments has traditionally been regarded as a component of the Town & Country Planning system, along with designation of Conservation Areas, SSSI's, Areas of Outstanding Natural Beauty and National Parks and the listing of buildings. If scheduling is regarded as falling within Article 6 on land, and there seems little doubt that it does, there would be no logic in regarding scheduling in tidal waters as not doing so. Similarly, there would be little logic in drawing a distinction with designation of wrecks in tidal waters. See further Loveland, I. "The Compatibility of the Land use Planning System with Article 6 of the European Convention on Human Rights" *JPL* (2001) pp.535-547.

range of interests potentially falling within the ambit of the Convention within this context is extremely wide and would include:

- Owners of historical vessels¹⁶². Designation or scheduling will clearly affect the proprietary rights of the owner(s) of any vessel or its cargo since, without authorisation, the owner or successor in title will be unable to recover his property. Even where recovery is authorised, an owner's proprietary rights may still be restricted in a number of ways. This may occur because a survey of the site, not excavation, is initially authorised, thereby precluding recovery of the owner's property¹⁶³. Even where authority to recover is granted, it may be granted to divers who are not selected by the owner, thereby precluding choice or the exercise of any degree of control over the salvage of his property¹⁶⁴. Moreover, conditions imposed may well only permit recovery of property in a manner consistent with accepted archaeological practice and the consequential increase in costs may well be reflected in an enhanced salvage award, adding to the financial loss imposed on the owner. Finally, where the identity of the owner of an historic vessel or its cargo cannot be ascertained until some property has been recovered, designation will delay the exercise of the owner's proprietary rights.
- Owners of cargo would be placed in a similar position.
- Insurers of vessels or cargoes. Where an insurer has paid out on a loss a proprietary interest in the lost property arises in the insurer by subrogation¹⁶⁵. The historical pre-eminence of the City of London as a centre of marine insurance has ensured the survival of quite comprehensive loss records.
- Salvors who have entered into possession prior to the designation or scheduling¹⁶⁶. Prohibition or restrictions upon recovery imposed by designation or scheduling will result in immediate and complete loss of beneficial use of the site by the salvor in possession.
- Grantees from the Crown of the Foreshore and Tidal Watercourses. The foreshore comprises the area lying between the high and low water marks of ordinary tides¹⁶⁷. Title to the foreshore, as well as to the bed of arms and estuaries of the sea and the bed of tidal navigable rivers within the ebb and flow of the tide is, prima facie, vested in the Crown¹⁶⁸. However, this presumption may be rebutted by evidence to the contrary, such evidence taking the form of express grant¹⁶⁹, presumed grant¹⁷⁰ or adverse possession¹⁷¹. Alternatively the Crown may retain title to the foreshore but

¹⁶² Ownership of historical vessels can still be established notwithstanding their age. This has been the case for ships from the Spanish Armada, for those belonging to the former Dutch East India Company and in any event is usually so for state vessels.

¹⁶³ It would be accepted 'best practice' in archaeological procedures.

¹⁶⁴ To that extent an owner's right to prohibit salvage or to supersede existing salvors with those of his own choosing under Art. 19 of the Salvage Convention would be constrained.

¹⁶⁵ This interest may be waived by election of the insurer.

¹⁶⁶ For a full discussion of the potential impact of the ECHR on the Protection of Wrecks Act 1973 see Fletcher-Tomenius, P. & Williams, M. *The Protection of Wrecks Act 1973: A Breach of Human Rights?* *International Journal of Marine and Coastal Law* (1998) Vol.13, No 4 pp 623-641.

¹⁶⁷ *A.G. v. Chambers* (1854) 23 L.T.O.S. 238.

¹⁶⁸ *A.G. v. Emerson* [1891] A.C. 649.

¹⁶⁹ *A.G. v. Parmeter* (1811) 10 Prince 378.

¹⁷⁰ *Lord Advocate v. Wemyss* {1900} A.C. 48.

¹⁷¹ *A.G. of Southern Nigeria v. Holt & Co. Ltd.* [1915] A.C. 599.

grant a franchise, typically to an individual, a manor or a corporation, to exercise certain privileges upon the foreshore. Such a franchise will not carry a presumption of grant of title to the foreshore but will permit a right of access to facilitate that privilege¹⁷². Such franchises may confer a right to take seaweed growing or cast upon the foreshore¹⁷³, to take sand, shells or shingle¹⁷⁴, to lay moorings¹⁷⁵, to take Royal Fish¹⁷⁶ or to acquire wreck, recovered from the foreshore¹⁷⁷, which remains unclaimed. Designation of a wreck lying upon the foreshore clearly restrains an owner of the foreshore or franchisee from fully exercising such rights¹⁷⁸. Any activity within the restricted area, such as the driving of heavy machinery, the placing of structures, or removal of material, which causes damage to any part of a designated or scheduled site may be an offence¹⁷⁹.

- Grantees from the Crown of the seabed. Any activity which disturbs the seabed within territorial limits necessitates a grant of title or licence from the Crown. Consequently, the Crown will grant a lease or a licence for e.g. the placing of structures or moorings upon the seabed or for dredging or mineral extraction, the scale of the development, the economic resources of the developer and the degree of security required determining whether a lease or licence¹⁸⁰ is utilised. Designation or scheduling, subsequent to the granting of a lease or licence, will clearly restrain the lessee or licensee from carrying on the authorised activity and the degree of interference will be as relevant as it is with franchises of the foreshore.

¹⁷² *Calmady v. Rowe* 6 B.C. 881.

¹⁷³ *ibid.*

¹⁷⁴ *Hamilton v. A.G.* (1880) 9 L.T. Ir. 271.

¹⁷⁵ *A.G. v. Wright* [1897] 2 Q.B. 318.

¹⁷⁶ Howarth, W. (1992) *Wisdom's Law of Watercourses* 5th. ed. Crayford: Shaw & Sons Ltd.

¹⁷⁷ A grant of wreck given after 1189 will only entitle the grantee to wreck claimed above the Low Water mark; a grant of wreck given prior to 1189 may extend below the Low Water mark; *R. v. 49 Casks of Brandy* 3 HAGG. 257.

¹⁷⁸ The extent of the foreshore in England and Wales is determined by the high and low water marks of *ordinary* tides i.e. a medium averaged on the tides of a year; *Tracey Elliot v. Morley (Earl)* (1907) 51 S.J. 625; whereas designation under the Act extends to areas reached by ordinary *spring* tides, s.3(1); therefore designation can occur to landward beyond the foreshore up to the limits of High Water Spring tides.

¹⁷⁹ However it is important to note that, in relation to grantees from the Crown, the degree of interference with their interests which results from designation or scheduling may differ significantly from that suffered by owners or salvors in possession of vessels. The latter will suffer either complete loss of benefit or at least substantial loss of control or use upon designation. By comparison, where a vessel lying upon the foreshore is designated, the owner of the foreshore will suffer from a degree of interference with his proprietary rights within the restricted area but the remaining area of the foreshore which he owns is available for his beneficial exploitation. Thus the degree of interference is a question of fact, determined principally by the area the designated vessel occupies in relation to the area of the foreshore owned by that individual. The same is true of owners of specific franchises over the foreshore. The exercise of the franchise may be impossible within the restricted area but the remainder stipulated in the grant will be unaffected. This may even be true of a franchise to unclaimed wreck. Recovery of items from the remains of a vessel within the restricted area will be impossible or restricted by archaeological procedures, but the grantee would be free to benefit from unclaimed material salvaged from any other wrecks lying upon the foreshore coming within his franchise¹⁷⁹. Consequently, in these circumstances, interference with such interests will vary from case to case and may be of a far lesser degree than that suffered by owners or salvors in possession of vessels designated or scheduled on the seabed.

¹⁸⁰ While a licence is unlikely to be regarded by the courts in the United Kingdom as a proprietary interest, it can amount to a '*possession*' within the meaning of *Article 1 to the First Protocol*.

- Contractors whose commercial operations are constrained or prohibited by designation or scheduling, subsequent to the entry into the contract.

Human Rights & Management of the Maritime Heritage

In relation to *Article 1 of the First Protocol* the lack of any provision within the *Protection of Wrecks Act 1973* or the *Protection of Military Remains Act 1986* for compensation, whatever the circumstances, may well, in an appropriate set of circumstances, result in a violation of *Article 1*. In relation to *Article 6* it is difficult to avoid the conclusion that the requirements of *Article 6* are not satisfied in a number of respects under present provisions and practice relating to designation or possibly scheduling of underwater cultural heritage.

Perhaps this conclusion is not surprising. Although the United Kingdom has been a signatory to the Convention since its inception, it would be true to say that relatively little attention has been paid to it by the legislature until it was directly incorporated into the law of the United Kingdom in 1998. Furthermore, like all legislative provisions, its impact and to some extent its breadth has inevitably been extended by decisions of the European Court of Human Rights, sometimes to a degree perhaps not envisaged by the original authors of the Convention. Consequently, it is not surprising that the *Protection of Wrecks Act 1973*, the *Ancient Monuments and Archaeological Areas Act 1979* and the *Protection of Military Remains Act 1986* were not formulated with the requirements of the Convention foremost in the mind.

In future it is beyond dispute that all regulatory frameworks for heritage management will need to operate in compliance with the Convention and this will undoubtedly place constraints, which previously were not present, upon such management. However, the view should not be taken that the Convention forms an insurmountable impediment to such management in the public interest. In particular, sight should not be lost of the fact that:

- the Convention does not prohibit the imposition of a burden on an individual in the general interest, simply the imposition of a *disproportionate* burden; in short a balancing exercise is required;
- in assessing this proportionality, the Court has emphasised that the so-called *margin of appreciation* given to States is extensive in implementing social and economic policies;
- the Court has consistently upheld the wide discretion afforded to States in the general interest and a wide range of regulatory schemes have been upheld as legitimate exercises of State power;
- the Convention simply requires the presence of certain provisions in the legislation to safeguard the rights of individuals, e.g. the possibility of providing compensation. That does not mean that frequent recourse will need to be made to such provisions. The legislation must be equipped to provide for such situations if they arise. It does not determine the frequency with which they may arise.

While it is true that the Heritage Agencies will not in the future enjoy the same latitude of freedom they once did, with appropriate amendments to the *Protection of Wrecks Act 1973*, the *Ancient Monuments and Archaeological Areas Act 1979* and the *Protection of Military Remains Act 1986* and the administrative procedures accompanying them, compliance with the Convention can be secured within an

effective regulatory framework for the management of underwater cultural heritage. This has been achieved in a terrestrial context with land use regulation and there is no impediment to the establishment of a similarly compliant regulatory regime for underwater cultural heritage. What is required is primary legislative amendments to the Acts in question, in order to secure that compliance with the Convention. There is no prescribed list of procedural requirements and reform is not a matter of ‘ticking the boxes’. What is required is the formulation of a regulatory system which evidences sufficient characteristics of impartial determination and which does not impose a disproportionate burden upon any individual in the name of the public interest. When formulating these amendments this can be achieved by giving consideration to including:

- the provision of compensation or continued availability of compensation in circumstances where designation or scheduling would result in a disproportionate burden falling upon persons;
- the provision of compensation or continued availability of compensation in circumstances where a refusal of a licence (under the *Protection of Wrecks Act 1973* or the *Protection of Military Remains Act 1986*) or a refusal of scheduled monument consent (under the *Ancient Monuments and Archaeological Areas Act 1979*) would result in a disproportionate burden falling upon persons;
- the provision of consultation prior to designation or scheduling, which would, inter alia, encompass the circumstances of those persons adversely affected by such proposed designation or scheduling;
- the provision of a statement of reasons for the proposed designation or scheduling;
- the provision of an opportunity to make representations in respect of the proposed designation or scheduling, such representations not being restricted to the merits of the proposed designation or scheduling;
- the provision of a statement of reasons for a designation or scheduling;
- the provision of an opportunity to appeal against the merits of a designation or scheduling to a person specifically appointed to hear such appeals;
- the provision of a statement of reasons for a refusal of such an appeal;
- the provision of a statement of reasons for a refusal of a licence (under the *Protection of Wrecks Act 1973* or the *Protection of Military Remains Act 1986*) or a refusal of scheduled monument consent (under the *Ancient Monuments and Archaeological Areas Act 1979*);
- the provision of an opportunity to appeal against the merits of a refusal of such a licence or consent to a person specifically appointed to hear such appeals;
- the provision of a statement of reasons for a refusal of such an appeal;
- the continued availability of judicial review of the legality of such administrative decisions.

The Valletta Convention¹⁸¹

The aim of the Convention is to protect the European archaeological heritage “... as a collective memory and for historical and scientific study.”¹⁸². It is made under the aegis of the Council of Europe (not the European Union), and is a revision of the 1969 *European Convention on the Protection of the Archaeological Heritage*¹⁸³. It replaces the 1969 Convention and is based upon Recommendation No. R(89) 5¹⁸⁴. During the 1960’s clandestine excavation was seen as the major threat to archaeological heritage, whereas during the 1980’s large scale construction projects were seen as the greater danger. At the same time the professional emphasis in archaeology shifted from the recovery and display of objects to their preservation in situ, with recovery as a last resort and with equal prominence being given to examination of the context as well as the object itself. Accordingly, the Valletta Convention seeks to remove or mitigate the threat posed by commercial developments and to reflect this change of emphasis and procedures in archaeology. To this end it contains provisions for, inter alia, the identification and protection of the archaeological heritage, its integrated conservation, the control of excavations and the use of metal detectors. While States are required to control illicit excavation and ensure that any intrusion into the heritage is conducted with appropriate and, preferably, non destructive methodology, the recovery of heritage for commercial gain is not prohibited per se¹⁸⁵. As the Preamble to the Convention makes clear, the heritage is not inviolate but any disturbance must be conducted using appropriate archaeological methodology, thereby securing the archaeological information arising from the context as well as the object itself. The Convention applies underwater as well as on land. Consequently, when the United Kingdom implements changes to conform with the Convention some amendments will need to be made to maritime legislation¹⁸⁶ and existing policy on underwater cultural heritage. To date the Valletta Convention has been ratified by 25 European States, including the United Kingdom¹⁸⁷.

¹⁸¹ So called because it was opened for signature by member States of the Council of Europe and other States party to the European Cultural Convention on 16th. January 1992 at Valletta in Malta. See further ‘*The Council of Europe and Cultural Heritage 1954-2000*’ Council of Europe Publishing 2001 Strasbourg pp.87-95.

¹⁸² Article 1.

¹⁸³ For a summary of the background to the Convention see ‘*Explanatory report on the European Convention on the Protection of the Archaeological Heritage (revised)*’ published in ‘*The Council of Europe and Cultural Heritage 1954-2000*’ op.cit. pp. 95-106.

¹⁸⁴ Adopted by the Committee of Ministers of the Council of Europe. The Committee consists of the foreign ministers of member States. Such recommendations are directed at all member States of the Council but are not binding. Such resolutions are now termed ‘recommendations’, which perhaps better illustrates their purpose.

¹⁸⁵ Although, indirectly the Convention may well have the effect of reducing commercial interest in ‘archaeological salvage’, since complying with the safeguards imposed under the Convention will inevitably increase the costs of any recovery.

¹⁸⁶ See further ‘*The Valletta Convention: The CBA Position*’, Council For British Archaeology.

¹⁸⁷ The Treaty entered into force with four ratifications on 25th. May 1995. The United Kingdom ratified in September 2000 and the Convention came into force in the UK in March 2000. As of 23rd. September 2002 the following States have ratified: Andorra, Azerbaijan, Bosnia and Herzegovia, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Georgia, Hungary, Ireland Liechtenstein, Lithuania, Malta, Moldova, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Switzerland, Turkey and the United Kingdom. Additionally, 13 States have signed but not yet ratified, including Croatia, Denmark, Germany, Greece, Italy, Netherlands, Russia and Spain. See further <http://conventions.coe.int>

This section outlines the salient provisions of the Convention, highlighting those aspects which may require legislative amendments to secure the United Kingdom's compliance with the Convention. The extent to which the United Kingdom's present legal framework surrounding underwater cultural heritage accords with the Convention and what possible reforms are required to secure full compliance has been the subject of a recent report by the Joint Nautical Archaeology Policy Committee¹⁸⁸. The report's deliberations and recommendations in relation to each individual article in the Convention are reproduced in Part 2 of this review and the full text of the report is reproduced in Annex C thereto.

The Treaty commences by defining in *Article 1* the archaeological heritage to which it relates. This definition is strikingly wide. In summary all “... *remains and objects and other traces of mankind from past epochs shall be considered to be elements of the archaeological heritage...*”¹⁸⁹ provided three specified criteria are met. These criteria are that:

- (i) the preservation and study of the remains, objects or trace helps to retrace the history of mankind and its relation to with the natural environment;
- (ii) the main sources of information are discovery, excavation or other methods of research;
- (iii) the location is in the jurisdiction of the Parties [to the Convention].¹⁹⁰

Article 1 also states archaeological heritage ‘includes’, inter alia, “...*structures, constructions, developed sites, moveable objects, monuments of other kinds as well as their context, whether on land or underwater.*”¹⁹¹ Since the archaeological heritage ‘includes’ these things it is not a definitive listing and therefore any remains or trace of mankind from a past epoch¹⁹² may comprise archaeological heritage. Indeed, such is the width of the definition that by contemporary standards of United Kingdom's draftmanship, it could hardly count as a definition at all. It is the absence of any concept of significance that contrasts so strongly with the United Kingdom's present policy in relation to archaeological territorial waters or . At present, the United Kingdom's two primary legislative tools for protecting the underwater cultural heritage, the *Protection of Wrecks Act 1973* and the *Ancient Monuments and Archaeological Areas Act 1979*, both rely entirely upon selective mechanisms, based upon a detailed assessment of the significance of the individual archaeological remains. This selective approach has resulted in relatively few designations or even fewer schedulings in comparison to the estimated number of shipwrecks in United Kingdom waters. Thus the United Kingdom's policy on maritime heritage is entirely characterised by a concept of selection, only the most important archaeological material being deemed to be heritage worthy of protection. This selective approach is the very antithesis of the ‘blanket’ policy underpinning the Convention, which seeks

¹⁸⁸ Joint Nautical Archaeology Policy Committee, ‘An Interim Report on The Valletta Convention & Heritage Law at Sea’ (2003): University of Wolverhampton.

¹⁸⁹ para. 2.

¹⁹⁰ Ibid.

¹⁹¹ para. 3 *ibid.*

¹⁹²The Oxford Dictionary defines *epoch* as a inter alia “... period of history...”. Could the last epoch be said to be 1945 or, for example, the cultural revolution of the 1960's or 1990 with the end of the ‘Cold War’ in Europe and the start of a new European age? The ambiguous nature of the term raises awkward questions.

protection for the entire heritage by reference to the widest possible definition of the same.

Having defined the archaeological heritage the Convention sets out in *Articles 2, 3 and 4* the measures required of each State for the identification and protection of that heritage. These Articles stipulate certain basic measures, which every member State must provide.

Article 2 requires each State to provide a legal system for protection of the archaeological heritage and make certain stipulated provisions. In respect of territorial waters the United Kingdom can be said to provide a legal system for protection of the heritage under the *Protection of Wrecks Act 1973*, the *Ancient Monuments and Archaeological Areas Act 1979*, the *Protection of Military Remains Act 1986* and the *Merchant Shipping Act 1995*. Three specific measures are additionally stipulated, that of the maintenance of an inventory¹⁹³, the designation of protected monuments and areas¹⁹⁴, the creation of archaeological reserves¹⁹⁵ and the mandatory reporting by a finder of

“... *the chance discovery of elements of the archaeological heritage...*”¹⁹⁶, which must be made available for examination¹⁹⁷. It is this final requirement in particular which poses several complex issues relating to present United Kingdom law and will certainly require amendments to be made to *s.236 Merchant Shipping Act 1995* or the introduction of primary legislation. At present the only obligation to report underwater cultural heritage arises somewhat indirectly under *s.236* and this provision fails to encompass all the requirements of reporting under *Article 2*. Under *s.236* any person who “... *finds or takes possession of any wreck...*”¹⁹⁸ or who does so outside United Kingdom waters and brings it into the jurisdiction must give notice to the Receiver of Wreck, stating that he has “... *found or taken possession of it ...*”¹⁹⁹. Wreck is defined as “...*includes jetsam, flotsam, lagan and derelict...*”²⁰⁰ and while not exclusively defined clearly does not encompass all elements of the archaeological heritage, as defined by *Article 1* above, such as ‘traces’ and ‘remains’ of mankind that

¹⁹³ Article 2(i). The existence of the National Maritime Records in Scotland, Wales and England, which record sites and the powers under the 1973, 1979 and 1986 Acts may satisfy this obligation¹⁹³. However, the inventory is stated to be of the “archaeological heritage” and not merely sites. Consequently, the inventory contemplated by the Convention includes individual objects, possibly irrespective of whether they are in public or private ownership. Certainly, the Explanatory Report considers that this obligation extends to objects. At present there are no powers under the 1973, 1979 or 1995 Acts to compel notification of transfers of possession of objects recovered underwater. Thus, no inventory of objects exists, once they are disposed of by the Receiver of Wreck. The maintenance of such an inventory would require primary legislation and presumably would require considerably more resources than are presently made available.

¹⁹⁴ Ibid.

¹⁹⁵ Article 2(ii). Would the designation under the 1973 and 1986 Acts and scheduling under the 1979 Act satisfy this obligation ?

¹⁹⁶ i.e. including traces and not just objects

¹⁹⁷ Article 2 (iii).

¹⁹⁸ *s.236(1)*.

¹⁹⁹ *S.236(1)(a)(b)*.

²⁰⁰ *s.255(1)*. Jetsam is goods cast into the sea to lighten an endangered ship, the ship later sinking, flotsam is goods left floating after a ship sinks, lagan is goods cast into the sea with a buoy attached to mark their location for later recovery; *Sir Henry Constable's Case* (1601) 5 Co. Rep. 106a; Derelict is a vessel which has been abandoned at sea by master and crew, without hope of recovery; *The Aquila* 1 C. Rob 37; Under *s.255(2)* any fishing boats lost or abandoned at sea are treated as wreck for the purposes of *s.236*.

are not derived from shipwreck. Consequently, old quarries, flooded habitats and prehistoric landscapes are not required to be reported under *s.236*²⁰¹ but the Convention envisages their reporting under *Article 2*.

Article 3 requires the application of procedures for the authorisation and supervision of excavation and other intrusive archaeological activities to protect the ‘archaeological heritage’ through ensuring that appropriate research techniques and conservation measures are adopted²⁰² by suitably qualified, specially authorised persons. In particular it requires the authorisation of excavations²⁰³, in order to prevent illicit recoveries²⁰⁴, and that any excavations are supervised and conducted by qualified, authorised persons²⁰⁵ utilising appropriate methodology²⁰⁶. Where metal detectors are used in relation to the archaeological heritage their use must be regulated²⁰⁷.

Article 5 requires the integration of the conservation of the archaeological heritage into development control processes, which in the context of underwater cultural heritage currently means into the miscellaneous consent procedures for seabed development, as the Town & Country Planning system does not currently extend beyond the Low Water Mark²⁰⁸. One of the principal objectives of this provision is to ensure that the archaeological heritage is placed on a comparable basis to other environmental considerations, such as conservation of natural flora and fauna, in these development control processes²⁰⁹. This requires that “*full consideration*” is given to the archaeological heritage in environmental impact assessments, that the development in question seeks to conserve the archaeological heritage in situ wherever possible²¹⁰ and that due time and resources within each development are devoted to achieving these aims and, if necessary, to investigation of the site where in situ preservation is not feasible²¹¹. *Article 5* is complemented by *Article 7*, which requires that an up to date inventory is made of sites and that this is made available, so as to inform the decision making in these development control processes²¹².

For a detailed description of the provisions of the Convention and an analysis of the extent to which the United Kingdom’s legislative framework for underwater cultural heritage complies with the Convention, together with a discussion of what reforms could usefully be introduced to achieve additional compliance, the reader is referred to Part 2 of this review.

²⁰¹ Rather intriguingly the Explanatory Report states that a State may only require reporting of precious metals or [finds] on already listed sites. This conclusion is not supported by the actual text of *Article 2*.

²⁰² *Article 3 b*.

²⁰³ *Article 3*.

²⁰⁴ *Article 3i a*.

²⁰⁵ *Article 3 ii*.

²⁰⁶ *Article 3 i b*.

²⁰⁷ *Article 3 iii*.

²⁰⁸ Concurrently with this review the DTI is conducting a review of the various consent regimes for seabed activities and of the possibility of introducing an unified consent procedure.

²⁰⁹ *Article 5 iii*.

²¹⁰ *Article 5 iv*.

²¹¹ *Article 5 ii b*.

²¹² *Article 7 i, ii*.

Conclusion

Within territorial waters, the United Kingdom utilises a modified salvage regime in relation to important cultural sites, whereby reported recoveries are rewarded by the payment of a salvage award. The material is not normally publicly auctioned and future recoveries can be prohibited on protected sites, unless they comply with archaeological standards, in which case further awards may be made. Despite strong opposition to the salvage regime by archaeologists and heritage managers this regime has been regarded as conferring some advantages. These advantages can be summarised as:

- The provision of a strong incentive to honesty, in terms of the reporting of recoveries of items of historic wreck. A consistent educational message has been sent by official bodies to divers, fishermen, salvors and sea bed developers that if they report such recoveries they cannot lose but, indeed, stand to gain.
- Such reports materially contribute to historical environment records.
- A broad consensus that has been attained in that this message has been endorsed by organisations representing both nautical archaeological interests and diving organisations.
- The success of this policy of “incentive to honesty” can be judged by the increasing awareness of good archaeological practice by sea user groups, principally divers, and the year on year increases in the reporting of wreck discoveries and/or to the Receiver of Wreck.

Inevitably, compromises have been required from all the constituent communities, not least the archaeological and diving communities. Such a regime provides an incentive to honesty and may provide additional resources for the investigation of sites, by providing all groups with a stake in protection of the heritage.

Against these advantages must be set the disadvantages that reliance upon a salvage regime, albeit modified, can bring. These disadvantages may be summarised as:

- The use of a salvage regime is alleged to encourage recoveries, not the reporting of discoveries or in situ conservation.
- This difficulty is compounded by the fact that, prior to designation under the *Protection of Wrecks Act 1973* or the *Protection of Military Remains Act 1986*, neither public access nor disturbance of sites can be controlled, except by civil action initiated by an owner or a salvor in possession, and any recovery can be made regardless of good archaeological practice and the absence of conservation funds.
- Not only does this leave the initiative for recoveries with the salvor but also allows that person to acquire substantive legal (possessory) rights in the site.
- To many in the archaeological community the continued use of the salvage regime continues to equate wreck diving with recoveries.
- It still remains to be seen if an educational approach can achieve a lasting change of culture towards that of 'look but don't touch'²¹³.

²¹³ The Receiver of Wreck and the recreational sports diving organisations are firmly of the opinion that a permanent culture change has indeed been achieved.

- The incentive to honesty only extends to a particular aspect of underwater cultural heritage, which is ‘wreck’ as defined by the *Merchant Shipping Act 1995*.

To the extent that the operation of the salvage regime has been modified in relation to sites of underwater cultural heritage, the United Kingdom can be said to have achieved a degree of success. To date some 53 sites have been designated under the *Protection of Wrecks Act 1973*²¹⁴ and in Scotland two underwater sites have been scheduled under the *Ancient Monuments & Archaeological Areas Act 1979*, with a third in prospect. The introduction of designations under the *Protection of Military Remains Act 1986* has added a further measure of protection to selected wrecks, some of which are of historical interest. The high degree of consensus on the necessity for respecting underwater cultural material which has been reached with stakeholders, particularly recreational divers, reinforces this regulatory regime. Further reinforcement has been provided by the Maritime & Coastguard Agency’s raising of the awareness of the mandatory requirement to report all recoveries of wreck, including those of cultural material, under the *Merchant Shipping Act 1995*.

However, notwithstanding these successes, the regulatory regime relating to underwater cultural heritage can be said to suffer from a number of deficiencies:

- The legislation is fragmentary in its application to underwater cultural heritage. The *Protection of Wrecks Act 1973* only applies to certain wrecks, as does the *Protection of Military Remains Act 1986*. The *Ancient Monuments & Archaeological Areas Act 1979* is also restricted in its application, due to a narrow definition of a ‘monument’. There is no statutory protection for archaeological landscapes per se.
- The *Protection of Wrecks Act 1973*, the *Ancient Monuments & Archaeological Areas Act 1979* and the *Protection of Military Remains Act 1986* lack transparency and appropriate consultative mechanisms in their decision making process. This is particularly true in relation to proprietary and possessory interests that can potentially be adversely affected.
- This fragmentary legislative approach also extends to the management powers available under the different Acts. In relation to the *Protection of Military Remains Act 1986* it can also be said that the Act lacks many of the management provisions necessary for conservation of cultural remains. The exclusion of the public from sensitive archaeological sites is only possible in relation to those wrecks which are designated under the *Protection of Wrecks Act 1973* or military remains designated as *Controlled Sites* under the *Protection of Military Remains Act 1986*. Sensitive sites of archaeological significance that do not fall within these legislative measures cannot be protected by exclusion of the public.

Few would deny that an examination of the effectiveness of the whole legal framework for maritime archaeology is long overdue and that the conservation of the underwater cultural heritage would be best served by the introduction of a single legislative provision. However, the most difficult issue is not whether the present structure should be amended in relation to underwater cultural heritage. Rather it is

²¹⁴ As at March 2003.

what should replace it. Ideally, any new system should preserve the success of the United Kingdom in building a consensus between the various stakeholders. It should also provide a 'complete' holistic framework for all underwater cultural heritage, replacing the fragmentary legislative approach which characterises the present, essentially 19th century, system with one which secures the fullest possible compliance with the *Valletta Convention*. Finally, it will need to comply with the limitations imposed upon by administrative law and, in particular, the European Convention on Human Rights. The latter will almost certainly require the introduction of appropriate administrative processes which are transparent and impartial, in a manner similar to that in terrestrial land use planning.

Marine Archaeology Legislation Project

Part 2: Previous Proposals for Reform

Part 2: Previous Reform Proposals

Introduction

This part of the review examines previous proposals for reform of the legal structure surrounding underwater cultural heritage. The question of reforming this legal structure first appears to have been raised in the middle to late 1980's, the motivation behind being primarily driven by dissatisfaction with the provisions of the *Protection of Wrecks Act 1973*. To some extent this appears to have focused the debate principally upon the issue of adequate protection for shipwrecks, a preoccupation which continued until the publication of the Joint Nautical Archaeology Policy Committee's *Interim Report on The Valletta Convention & Heritage Law at Sea*²¹⁵ in 2003.

Many of the proposals outlined here reflect this preoccupation and many of them may no longer be considered appropriate, given the United Kingdom accession to the *European Convention on the Protection of the Archaeological Heritage (revised)*²¹⁶. Nevertheless, they have been included because there is a value in illustrating the evolutionary process through which debate matured and some aspects of these proposals remain relevant. However, where particular proposals have now been implemented they have been excluded.

This part of the review proceeds by examining the proposals for amending the *International Convention on Salvage 1989*²¹⁷, a reform which was perhaps the most minimal of all those advanced. It then considers the proposal to remove underwater cultural heritage from the salvage regime²¹⁸, while retaining an incentive to honesty by rewarding reports of recovery of *unclaimed* historic wreck to the Receiver of Wreck by a system of discretionary payments under *s.243 Merchant Shipping Act 1995*. Finally, it examines the proposals advanced by the Joint Nautical Archaeology Policy Committee in its two reports, *Heritage Law at Sea*²¹⁹ and *Interim Report on The Valletta Convention & Heritage Law at Sea*²²⁰.

²¹⁵ Joint Nautical Archaeology Policy Committee, 'An Interim Report on The Valletta Convention & Heritage Law at Sea' (2003): University of Wolverhampton.

²¹⁶ Hereafter the '*Valletta Convention*', so called because it was opened for signature by member States of the Council of Europe and other States party to the European Cultural Convention on 16th January 1992 at Valletta in Malta. See further '*The Council of Europe and Cultural Heritage 1954-2000*' Council of Europe Publishing 2001 Strasbourg pp.87-95.

²¹⁷ The Convention is incorporated by s. 224 *Merchant Shipping Act 1995* and the text of the Convention is contained in Schedule 11 to the Act.

²¹⁸ An option available to the United Kingdom under Article 30 International Convention on Salvage 1989.

²¹⁹ Joint Nautical Archaeology Policy Committee, 'Heritage Law at Sea' (2000): University of Wolverhampton.

²²⁰ Joint Nautical Archaeology Policy Committee, 'An Interim Report on The Valletta Convention & Heritage Law at Sea' (2003): University of Wolverhampton.

Amending the International Convention on Salvage 1989

During the negotiations preceding the adoption by UNESCO of the *Convention on the Protection of the Underwater Cultural Heritage* the Foreign and Commonwealth Office held a series of public consultation meetings at its offices. In the course of these meetings the late Geoffrey Brice Q.C.²²¹ proposed that, as an alternative to the United Kingdom acceding to that Convention, it should pursue an amendment to the *International Convention on Salvage 1989*. His proposals for such an amendment were circulated to participants and some support for the suggestion was forthcoming, both from the floor and the government panel leading the meetings²²². In the event the United Kingdom declined to sign the UNESCO Convention and no further process on the suggested amendment to the *International Convention on Salvage 1989* appears to have been made, although the option remains open to the United Kingdom to pursue the matter.

The basis of the amendment is a change to the definition of a ‘*Salvage Operation*’ in *Article 1* of the Convention and the insertion into that Article of new definitions of ‘*Historic Wreck*’ and ‘*Damage to Cultural Heritage*’. The Convention defines a *Salvage Operation* as “... any act or activity to assist a vessel or any other property in danger ...”²²³. This definition would be amended to include “*services to or involving historic wreck*”. It is not clear quite what purpose would be served by this extension of the definition of a *Salvage Operation*. Any act or activity to assist a vessel or property in danger has always been a salvage service, irrespective of whether the wreck in question is historic or not. As noted in Part 1 a Canadian court has recognised the validity of the argument that a stable wreck site is not ‘*in danger*’ in a physical sense and not therefore a legitimate subject of salvage but this amendment does nothing to qualify or extend the meaning of ‘danger’ for the purposes of Article 1. It simply appears to make express what was already encompassed within Article 1 and appears to add nothing to the meaning of a *Salvage Operation* for the purposes of that Article.

A definition of *Damage to Cultural Heritage* is inserted into *Article 1c*, being defined as “... damage to historic wreck including damage or destruction at the salvage site of any significant information relating to the wreck or in its historical and cultural context”. This amendment is clearly designed to address the criticism often levied by archaeologists against salvors that the cultural information that can be gleaned from the artefacts themselves and their context is as, if not more, valuable than the physical object itself. It is often alleged that the physical recovery of an object often destroys this contextual information or that commercial salvors make little or no attempt to capture such information, preferring to focus simply upon recovery of the physical object itself. The amendment seeks to address this deficiency by making the loss of such contextual information ‘damage’ and as such it would amount to misconduct by the salvor within the meaning of *Article 18* of the Convention, that Article also being amended to incorporate “... causing damage to the cultural heritage.”. The combined effect of these amendments would be to place a duty on a salvor when engaging in a

²²¹ Master of the bench of the Middle Temple, Member of the Panel of Wreck Commissioners, Visiting Professor of Maritime Law, Tulane University, Louisiana, USA.

²²² The full text of the proposals is reproduced in Annex A.

²²³ Article 1 a.

Salvage Operation to preserve contextual information as well as the physical property itself.

The amendment then seeks to reward the salvor for engaging in more appropriate archaeological conduct towards sites of cultural significance by adding to the criteria to be used quantifying a salvage reward. These criteria are set out in *Article 13* of the Convention. A new paragraph (paragraph k) would be inserted, which would permit the following to be taken into account:

- Consultation and co-operation with scientific, archaeological and historical bodies.
- Compliance with any codes of practice notified to the International Maritime Organisation;
- Compliance with the “...reasonable and lawful requirements ...” of State authorities who have “ ... a clear and valid interest for prehistoric, archaeological, historic or other significant cultural reasons ...” in either the salvage operations or the vessels or any part of it.
- The avoidance of damage to the cultural heritage as previously defined in the amendment to *Article 1 c*.

A few brief comments should be made in relation to this proposal to amend the *International Convention on Salvage 1989*, since it may yet be revived at some point in the future.

- It may be worth noting that what a commercially orientated salvor and what the archaeological community would regard as a ‘reasonable’ requirement is not likely to be co-extensive and this factor alone may do much to undermine the utility of the proposed amendment in practice.

Perhaps this inherent incompatibility of objectives between the two communities could be addressed by the use of a Code of Practice, such as the International Council of Monuments and Site’s *Charter on the Protection and Management of Underwater Cultural Heritage (1996)*²²⁴. To some degree such a precedent has been set by the use of rules derived from this Charter as an annex to the proposed agreement by Canada, France, the USA and the United Kingdom for the protection of the wreck of the *RMS Titanic*²²⁵. The principles within the Charter could form a Code of Practice notified to the International Maritime Organisation for the purposes of an amended *Article 13*, as well as providing a yard stick to what may be regarded as a ‘reasonable requirement’.

- It may also be possible for State authorities to argue that since they are permitted an interest in a salvage operation for “cultural reasons“, as opposed to an interest arising from ownership of a vessel or its parts, this would legitimise intervention by a coastal State claiming something in the nature of a ‘cultural zone’ of interest beyond its territorial waters.

²²⁴ Ratified by the 11th. ICOMOS General Assembly held in Sofia, Bulgaria 5-9th. October 1996. See further http://www.international.icomos.org/under_e.htm

²²⁵ See further ‘Consultation on UK Implementation of the Agreement for the protection of the wreck of the *RMS Titanic*’, Department For Transport: 7 April 2003.

To some extent this may reduce the attraction of the proposed amendment, especially to the more traditionally minded western maritime States, which have consistently sought to negate any extension of coastal State jurisdiction beyond that contemplated by the United Nations Convention on Law Of the Sea (UNCLOS)²²⁶.

- The proposed amendments to the *International Convention on Salvage 1989* are designed merely to enhance the protection of ‘historic wreck’, as defined by the proposed amendment.

It would do nothing to protect other archaeological remains, such as submerged habitations and landscapes²²⁷. Since its accession to the *Valletta Convention* the United Kingdom is committed to protecting the ‘archaeological heritage’, which is defined by that Convention as “ ... remains and objects and other traces of mankind from past epochs shall be considered to be elements of the archaeological heritage...” including “ ...structures, constructions, developed sites, moveable objects, monuments of other kinds as well as their context, whether on land or underwater.”²²⁸. It would seem to be beyond dispute that these amendments would only enhance protection for a part of the archaeological heritage, i.e. historic wreck, and would not assist in securing the United Kingdom’s compliance with the Convention in terms of other parts of the archaeological heritage. Given this width of the definition of ‘archaeological heritage’ in the *Valletta Convention*, the debate on reform of the existing legislative structure for underwater cultural heritage has become somewhat more holistic in nature. Previously the emphasis had tended to be focused on the conservation in situ of shipwrecks and the contents thereof. Following the United Kingdom’s accession to the *Valletta Convention* and the resulting commitments it has undertaken to the wider heritage attention will inevitably have to focus upon more comprehensive reforms, designed to enhance the protection not only of wrecks but also of other forms of underwater cultural heritage.

²²⁶ As one Foreign & Commonwealth Office lawyer put it to the author on an unattributable basis “there is a whole generation of lawyers scarred by the negotiations preceding UNCLOS and any ‘unpicking’ of the UNCLOS regime is unthinkable, until a generation of ‘post UNCLOS’ lawyers arrive”.

²²⁷ Indeed the *International Convention on Salvage 1989* only applies to, inter alia, “*Vessel*” (defined in Article 1(b) as “...any ship or craft, or any structure capable of navigation.”) and “*Property*” (defined in Article 1(c) as “... any property not permanently and intentionally attached to the shoreline and includes freight at risk.”).

²²⁸ Article 1.

Utilising Discretionary Payments Under s.243 Merchant Shipping Act 1995 in Respect of Unclaimed Historic Wreck

This reform was proposed in article published in Lloyd's Maritime & Commercial Law Quarterly²²⁹. It is based upon the provisions of *s.243 Merchant Shipping Act 1995* and the apparent discretion it gives the Secretary of State²³⁰ to make payments by way of a salvage award in respect of the recovery of *unclaimed* wreck. In essence, this discretion, coupled with a withdrawal of maritime cultural property of pre-historic, archaeological or historic interest from the ambit of the *International Convention on Salvage 1989*²³¹, would enable awards to be made by the Secretary of State in respect of recoveries of *unclaimed* historic wreck without reference to the rather inappropriate criteria in *Article 13* of that Convention. The objective is similar to that of the proposal advanced by the late Geoffrey Brice Q.C. to amend the *International Convention on Salvage 1989*, but in this instance the amended regime would operate outside the terms of that Convention. In particular, since the Secretary of State would not be tied to the terms of *Article 13*, criteria which are more appropriate to historic wreck could be devised which could place an emphasis in calculating an award on e.g. the cultural, rather than the market, value of the recovered material as well as the appropriateness, in archaeological terms, of the recovery methodology.

Presently, when determining the quantum of a salvage award in respect of *unclaimed* historic wreck²³², the Secretary of State is fettered by the terms of *Article 13*. The criteria contained in *Article 13* are patently inappropriate for dealing with historic wreck, as they take no account of archaeological context, the recovery of archaeological information or the use of archaeological methodology²³³. *S.243* deals with the disposal of *unclaimed* wreck²³⁴ and states "... *that salvors shall be paid the amount of salvage determined under subsection (5) below*"²³⁵. In turn *subsection (5)* states that "*The amount of salvage to be paid by the Receiver to the salvors shall be such amount as the Secretary of State directs generally or in the particular case.*". Thus, it would appear that in relation (only) to *unclaimed* wreck the Secretary of State has a discretion to pay such amounts as he or she shall generally direct or upon the facts and merits of the particular circumstances. At present this discretion is fettered by the criteria in *Article 13*, in that in exercising this discretion to determine the amount of the award reference would have to be made to these criteria. However, this fetter could be removed in respect of historic wreck by exercising the reservation under *Article 30*, thereby removing historic wreck from the ambit of the *International*

²²⁹ Fletcher-Tomenius, P. & Williams, M. 'When is a Salvor Not a Salvor ? Regulating Recovery of Historic Wreck in UK Waters' Lloyd's Maritime & Commercial Law Quarterly [2000] Part 2, pp.208-221.

²³⁰ For Transport. In practice the quantum of the award is determined by the Receiver of Wreck, who then 'advises' the Secretary of State.

²³¹ By exercise of the reservation made under Article 30 of the Convention at the time of signing by the United Kingdom.

²³² As a general rule the Receiver of Wreck regards wreck over 100 from the date of sinking as 'historic' in nature, while accepting that wreck of a lesser age may also be regarded as historic e.g. unusual vessels, war casualties or vessels involved in specific events.

²³³ As we have seen, it was for these reasons that Brice Q.C. proposed amendments to *Article 13*.

²³⁴ *S.239* deals with payment, inter alia, of salvage who have claimed wreck and *s.242* similarly in the case of persons proving entitlement to unclaimed wreck, e.g. as a manorial right.

²³⁵ *S.243(3)*.

Convention on Salvage 1989 within the United Kingdom's jurisdiction. In relation to *unclaimed* historic wreck this would leave the Secretary of State free to devise alternative criteria for determining salvage awards under *s.243*. Preferably, to avoid the appearance of arbitrary determination, such awards would need to be made by reference to pre-determined and well publicised principles. Such criteria could place an emphasis upon rewarding appropriate archaeological conduct²³⁶ and reflecting the cultural significance, rather than the market value, of the historic wreck recovered. In respect of historic wreck which, when recovered, was claimed by an owner or some other person entitled, the quantum of the award would still be fixed without reference to *Article 13*, as all historic wreck (maritime cultural property) would have been removed from the ambit of the *International Convention on Salvage 1989*. However, since the statutory discretion under *s.243* extends only to *unclaimed* wreck, arguably in such cases awards would have to be fixed according to the well established principles in the United Kingdom's Admiralty Law prevailing prior to the United Kingdom's accession to the *International Convention on Salvage 1989*²³⁷. Consequently, reference would presumably have to be made to the pecuniary value of the salvaged property to the owner. This would be unlikely to produce a result significantly different from the present position. Although instances of historic wreck being claimed by an owner or person otherwise entitled are not unknown, they are relatively infrequent, with the exception of historic vessels owned by the Crown²³⁸.

This proposal appears to suffer from a number of potential or actual limitations. Firstly, the proposal relies upon a particular interpretation of *s.243* and while this interpretation cannot be said to be particularly controversial it must be conceded that it remains, to a degree, speculative, in that it has not been confirmed by judicial scrutiny. This alone makes its adoption unlikely. Secondly, since the award would remain a salvage award it would continue to be open to the allegation that it would encourage recoveries. Thirdly, it does not address maritime cultural heritage in a 'holistic' manner. Relying, as it does, on *s.243*, its ambit is restricted to *unclaimed* 'wreck' and would not have any applicability to those elements archaeological heritage that fall outside that category. Consequently, it would not, by itself, secure the United Kingdom's compliance with the obligations of the *Valletta Convention* to protect the whole archaeological heritage, as defined by that Convention²³⁹. Overall, this proposal could be said to have had some merit while the likelihood of a complete amendment of the legislative structure relating to underwater cultural heritage remained small and the focus was primarily upon conservation of historic wreck. Now the accession of the United Kingdom to the *Valletta Convention* demands a more

²³⁶ However, since successful 'salvage' is being rewarded there would have to be a recovery, which would mitigate against in situ preservation.

²³⁷ It is debatable whether salvage law, as it existed prior to the International Convention on Salvage 1989, would then apply to historic wreck or whether this vacuum would be filled by the Law of Finds, something which would be even more disadvantageous to marine archaeology. Opinion would seem to favour the preservation of pre-existing rules of salvage. In particular see further the commentary by Prof. N. Gaskell on the Merchant Shipping Act 1995 in Current Law Statutes (annotations to *s.224(6) & Sch. 11 Part II*).

²³⁸ Crown vessels wrecked in the United Kingdom's territorial waters are subject to salvage under *s.230* Merchant Shipping Act 1995 but otherwise Crown vessels are not liable to salvage under *Article 4* International Convention on Salvage 1989, unless the Crown consents.

²³⁹ Which is defined by *Article 1* of that Convention as "... remains and objects and other traces of mankind from past epochs shall be considered to be elements of the archaeological heritage..." including "...structures, constructions, developed sites, moveable objects, monuments of other kinds as well as their context, whether on land or underwater.".

comprehensive, holistic approach to reforming the legal structure surrounding maritime archaeology. However, if it is established that comprehensive legislative reform is unlikely for a considerable period then it may retain some small merit purely as a temporary expedient.

Heritage Law at Sea (JNAPC)

Heritage Law at Sea (HLAS) was published in 2000²⁴⁰. Compiled by the Joint Nautical Archaeology Policy Committee²⁴¹, the document built upon earlier reports by the JNAPC²⁴². HLAS contained proposals for changing the legal structure securing protection of underwater cultural heritage. These proposals were compiled following extensive discussion and consultation with a wide range of stakeholders. Given the extent of this consultation and the fact that the proposals were very incremental, building upon the existing framework and seeking only relatively modest changes, it would be true to say that the document reflected a high degree of consensus. In saying this, nothing should be taken away from the merit of the document. Although not radical in nature the proposals had the potential to effect significant improvements in the protection and treatment of underwater cultural heritage. Indeed, the document appears to have been well received by all stakeholders and government departments and agencies, with many of the proposals contained in HLAS having been subsequently implemented or made possible by the *National Heritage Act 2002*. Where this has occurred no further reference will be made to these recommendations. HLAS left the main tenets of the existing legal structure in place and sought only to continue to ‘fine tune’ the existing system. Thus the salvage regime would continue to apply to underwater cultural heritage, salvors could continue to acquire possessory rights in historic wreck and the *Ancient Monuments & Archaeological Areas Act 1979* would remain virtually unamended²⁴³.

The principal outstanding recommendations are:

- To introduce a general obligation to report disturbances to historic wreck, which for this purpose would be defined as wreck which appears to have been submerged for 100 years or more²⁴⁴.

This recommendation was aimed at the problem that notification to the Receiver of Wreck is only required if wreck is recovered. As a result any amount of damage can occur to a wreck site without it being brought to the attention of the Receiver and consequently, archaeologists. The problem arises because under *s.236 Merchant Shipping Act 1995* any person finding or taking possession of wreck in UK waters must give notice to the Receiver of Wreck. However, there is no duty to report disturbance to a wreck in the absence of any recoveries being made. Such disturbance may occur where a wreck site is excavated, surveyed or otherwise investigated. While not seeking to prohibit disturbance, the JNAPC recommended that divers and other sea-users should be obliged to report any disturbance to the Receiver, thereby enabling the

²⁴⁰ Joint Nautical Archaeology Policy Committee, ‘Heritage Law at Sea’ (2000): University of Wolverhampton.

²⁴¹ Formed in 1987 from representatives of several bodies and individuals with an interest in preserving Britain’s underwater heritage.

²⁴² Joint Nautical Archaeology Policy Committee, ‘Heritage at Sea’ (1989): National Maritime Museum; Joint Nautical Archaeology Policy Committee, ‘Still at Sea’ (1993): National Maritime Museum.

²⁴³ In so far as HLAS made recommendations relating to seabed and off shore developments and consent procedures, these are dealt with in Part 4 of this review.

²⁴⁴ HLAS para. 1.1

Receiver to consult with appropriate persons and agencies. This obligation to report disturbance would also open up an avenue for providing appropriate advice and guidance to divers and sea-users who are engaged in activities which are causing disturbance.

- To extend the Crown's right of ownership of unclaimed wreck to that recovered beyond territorial waters²⁴⁵.

This recommendation arose from the decision in the case of *The Lusitania*²⁴⁶, which determined that where artefacts are recovered from beyond territorial waters, then unless the original owner or successor in title comes forward, the salvor is entitled to have the artefact returned, subject to the payment of the Receiver of Wreck's expenses. As diving groups can journey far offshore, the recovery of historic wreck from beyond territorial waters is an increasing problem. Furthermore, there is evidence that the United Kingdom is becoming the favoured destination for salvors of historic wreck because of this legal regime in respect of recoveries made beyond territorial waters. The JNAPC felt that a very real prospect existed that the United Kingdom will obtain an undesirable reputation for allowing trade in historical material. For these reasons the JNAPC recommended the extension of the Crown's entitlement to wreck recovered from beyond territorial waters, which remains unclaimed by an owner²⁴⁷.

- To improve the transparency of procedures under the *Protection of Wrecks Act 1973* for designation and licensing²⁴⁸.

The JNAPC was concerned about the deficiencies identified in Part 1 of this review in respect of the European Convention on Human Rights. It recommended that the Secretary of State²⁴⁹ should be required to consult with interested parties, provide a written statement explaining the reasons for decisions to designate and that a formal dispute resolution procedure be established to re-examine the reasoning behind particular decisions regarding designation and licensing and to reverse such decisions, if they are shown to be unreasonable. The JNAPC concluded that these amendments would ensure that the United Kingdom Government met its obligations under *Article 6 of the European Convention on Human Rights* and *Article 1 of the First Protocol* thereto. HLAS made no recommendation in respect of the *Ancient Monuments & Archaeological Areas Act 1979*.

²⁴⁵ HLAS para. 1.3.

²⁴⁶ [1986] 1 Lloyd's Rep. 132.

²⁴⁷ Prior to the decision in *The Lusitania* it was believed that the Crown was entitled to unclaimed wreck recovered in international waters and brought within United Kingdom's jurisdiction. The decision in *The Lusitania* has been subject to learned criticism.

²⁴⁸ HLAS para. 2.1.

²⁴⁹ In the provisions below, 'Secretary of State' is used to denote the Secretary of State for Culture, Media and Sport, the Scottish Ministers, the Welsh Assembly and the Secretary of State for Northern Ireland, as appropriate.

- To promote high standards of archaeological investigation and management²⁵⁰.

The JNAPC concluded that the standard of investigation and management of sites protected by the *Protection of Wrecks Act 1973* is highly variable. This could be addressed by incorporating professionally-recognised standards of investigation and management within the procedures used in designating protected wrecks and licensing activities within restricted areas. Non-statutory guidance on such standards is available in the form of accepted standards of best practice promulgated by the Institute of Field Archaeologists, and the ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage. It also recommended that the Government should make a formal commitment to promoting consistently high standards of investigation and management.

- To prohibit activities which cause disturbance in areas restricted under the *Protection of Wrecks Act 1973*²⁵¹.

This recommendation addressed the problem that damage can be caused to wrecks designated under that Act by the poor handling of anchors, dredging equipment or other ground tackle. Successful prosecution is hampered by the difficulty of proving that the activity has caused damage. The necessary proof of damage can only be obtained on the seabed, after the damage has occurred and probably some time after the person who caused the damage has left the scene. However, proof of disturbance can be obtained from the surface at or even before damage to the wreck has occurred, and when the person causing disturbance is still present within the restricted area. Consequently, it was felt that the solution was to extend the scope of prohibited conduct within restricted areas to cover ‘disturbance’ as well as ‘damage’. The proposal was also considered to have a welcome deterrent effect, insofar as it would facilitate prosecution, and to be analogous to the Government’s proposal to prohibit unauthorised operations which cause disturbance to the ground in and around scheduled monuments.

- To extend the scope of the *Protection of Wrecks Act 1973* to include aircraft and vehicles²⁵².

Since there are there are a number of aircraft and vehicles of historical importance situated in United Kingdom waters and the Protection of Military Remains Act 1986 does not always prohibit public access, the JNAPC recommended that a similar level of protection should be afforded to such aircraft and vehicles as is currently afforded to vessels designated under the 1973 Act.

²⁵⁰ HLAS para.2.5.

²⁵¹ HLAS para. 2.6.

²⁵² HLAS para.2.10.

- To formalise consultation between the Receiver of Wreck and local and national curatorial authorities²⁵³.

The JNAPC was concerned that although recovered artefacts must be reported to the Receiver of Wreck, there is no requirement for the Receiver to seek advice or to pass the information to archaeologists²⁵⁴. In practice this is invariably done and the Receiver has established excellent liaison with such authorities. However, the JNAPC felt that it would be advisable to introduce a statutory duty on the Receiver to consult with appropriate archaeological authorities, rather than rely upon administrative practice.

- To establish Marine Sites and Monuments Records on a statutory basis.

It was felt that the absence of formal support for Sites and Monuments Records could lead to these records being abandoned, even though they play an increasingly vital role in protecting, understanding and promoting underwater cultural heritage. Accordingly, the JNAPC recommended that a statutory duty be placed upon local authorities to maintain Sites and Monuments Records, which sites and monuments on the foreshore and seabed. The JNAPC pointed out that in its Consultation Document "Protecting Our Heritage"²⁵⁵, the Government expressed its intention to establish local authority Sites and Monuments Records on a statutory basis.

- To extend licensing procedures to the removal of human remains found underwater, since these are not subject to the rigorous licensing procedure which applies on land²⁵⁶.

Human remains are a relatively common component of sites of archaeological interest. In England and Wales it is necessary to seek a licence from the Home Office for the removal of human remains discovered in archaeological contexts on land under the *Burial Act 1857*, and equivalent provisions apply in Scotland and Northern Ireland. Such licences are normally granted subject to conditions, which provide that disturbance is carried out with due care and attention to decency, that the remains be examined by a suitably qualified person, and that the remains are then stored or reburied in an appropriate place. Human remains found on wreck sites fall outside the terms of current procedures, hence a licence is not required and there is no control over the treatment of such remains. The JNAPC was of the opinion that the scope of procedures relating to the treatment of human remains on land should be extended to bring human remains on underwater sites within the terms of the existing licensing procedure.

- To extend the range and appropriateness of the available sanctions in respect of offences relating to underwater cultural heritage²⁵⁷.

²⁵³ HLAS para.3.1.

²⁵⁴ It was envisaged that the appropriate archaeological authorities would include RCAHMS, RCAHMS, local government archaeological officers, English Heritage, Historic Scotland, Cadw and DOE (Northern Ireland).

²⁵⁵ (May 1996) Department of National Heritage and the Welsh Office, DNHJ0098NJ.

²⁵⁶ HLAS para. 4.1.

The JNAPC felt that where important underwater sites are damaged the existing criminal sanctions do not reflect the seriousness of the damage done to the public interest. This would be addressed by providing for confiscation of equipment as a sanction, thereby bringing penalties for illicit diving or salvage activity on historic wrecks into line with the *Protection of Military Remains Act 1986* and with proven approaches to penalising certain poaching offences which are already applicable to divers in fresh water.

While HLAS was undoubtedly timely it was characterised by an incremental approach, rather than being a fundamental reappraisal of the legislative framework surrounding marine archaeology. The accession of the United Kingdom to the *Valletta Convention* created a new scenario²⁵⁸. The United Kingdom undertook significant obligations in relation to the archaeological heritage. In response to this changed circumstance the JNAPC undertook a review of the recommendations in HLAS. Given the wide nature of the archaeological heritage encompassed within the breadth of the *Valletta Convention*, this review had a much wider ‘holistic’ focus on protecting the whole range of maritime archaeological heritage²⁵⁹. The JNAPC’s review ‘*An Interim Report on The Valletta Convention & Heritage Law at Sea The legal framework for marine archaeology in the United Kingdom*’²⁶⁰

²⁵⁷ HLAS para.4.2.

²⁵⁸ For an outline of the most significant provisions of the Convention see Part 1 of this review.

²⁵⁹ In so far as recommendations relating to seabed and off shore developments and consent procedures were made, these are dealt with in Part 4 of this review.

²⁶⁰ Joint Nautical Archaeology Policy Committee, ‘*The Valletta Convention & Heritage Law at Sea The legal framework for marine archaeology in the United Kingdom*’ (2003): University of Wolverhampton.

'An Interim Report on The Valletta Convention & Heritage Law at Sea The legal framework for marine archaeology in the United Kingdom'²⁶¹

As the Introduction to the Interim Report states, only two years had elapsed between the publication of this Interim Report and the publication of the JNAPC's report *Heritage Law at Sea*²⁶². However, during that time there had been several significant developments relating to underwater cultural heritage in the United Kingdom. A very successful 'Wreck Amnesty' for unreported wreck recoveries had been held in the Spring of 2001 by the Receiver of Wreck, which resulted in over thirty thousand recoveries of wreck, previously unreported, being declared and the educational message being widely disseminated of the necessity to report all future recoveries²⁶³. Additionally, the Ministry of Defence, following an extensive public consultation exercise²⁶⁴, activated, for the first time in relation to shipwrecks, the *Protection of Military Remains Act 1986*²⁶⁵. Historic Scotland also scheduled several wrecks of the scuttled German High Seas Fleet in Scapa Flow as monuments under the *Ancient Monuments and Archaeological Areas Act 1979*²⁶⁶. This marked the first utilisation of that legislation to protect underwater cultural heritage anywhere in the United Kingdom²⁶⁷ and Historic Scotland had also indicated an intention to schedule other wrecked vessels, where appropriate. The recreational diving organisations had also launched an educational initiative, '*Respect Our Wrecks*', which emphasised the best practice in wreck diving of leaving shipwrecks undisturbed in situ, while the Nautical Archaeology Society (NAS) had launched its 'Diving with a Purpose' initiative, which included the 'Adopt a Wreck' scheme. These widely supported initiatives²⁶⁸ emphasised non-intrusive wreck diving and actively promoted avocational marine archaeological activity, as well as fulfilling government's commitment to promote responsible public access to the underwater cultural heritage²⁶⁹. However, the most the most significant changes had occurred in relation to the legal framework surrounding maritime archaeology. Responsibility for underwater cultural heritage in

²⁶¹ Joint Nautical Archaeology Policy Committee, 'An Interim Report on The Valletta Convention & Heritage Law at Sea' (2003): University of Wolverhampton.

Hereafter referred to as 'The Interim Report'.

²⁶² Joint Nautical Archaeological Policy Committee, '*Heritage Law at Sea*' (2000) School of Legal Studies: University of Wolverhampton.

²⁶³ 'Wreck Amnesty, Final Report, 23rd. January – 24th. April 2001' (2002) Maritime and Coastguard Agency, CD Rom.

²⁶⁴ "Military Maritime Graves and The Protection of Military Remains Act 1986: A Consultation Document" (February 2001) Ministry of Defence, Whitehall, London.

²⁶⁵ "Military Maritime Graves and the Protection of Military Remains Act 1986: Consultation Report" (November 2001) Ministry of Defence, Whitehall, London.

²⁶⁶ The Ancient Monuments & Archaeological Areas Act 1979 does not apply in Northern Ireland.

²⁶⁷ CADW scheduled the wreck of the *Louisa* in December 2001 but the vessel is now part of the reclaimed area of the Cardiff Bay project.

²⁶⁸ Support was lent by the British Sub Aqua Club, Professional Association of Diving Instructors, Sub-Aqua Association, JNAPC, Maritime and Coastguard Agency, Ministry of Defence Police, Department for Culture, Media and Sport, English Heritage, CADW, Historic Scotland, Environment and Heritage Agency, Nautical Archaeology Society, and the National Trust.

²⁶⁹ "broaden access and appreciation of the heritage". English Heritage's mission statement. 2003.

England had been transferred to English Heritage Under the *National Heritage Act 2002* and the United Kingdom had ratified the *Valletta Convention*²⁷⁰.

Individually each of these developments would have been significant, but taken together they transformed the social, economic and political environment surrounding the underwater cultural heritage. Accordingly, notwithstanding the short time elapsed since the publication of *Heritage Law at Sea*, the JNAPC felt it was appropriate to review the legal structure surrounding the underwater cultural heritage. Since the United Kingdom's obligations to the archaeological heritage are now governed by the *Valletta Convention*, that instrument formed the template against which this assessment of the United Kingdom's legislative structure was made. Consequently, the Interim Report was far more comprehensive than *Heritage Law at Sea*, in that it related to the whole of the archaeological heritage, as defined by the *Valletta Convention*²⁷¹. Indeed it amounted to a fundamental review of the legislative structure, assessing what amendments the United Kingdom should implement in order to comply with the *Valletta Convention*²⁷². The Interim Report made a number of recommendations, most of which would require primary legislation. Virtually all of these followed directly from *Heritage Law at Sea*. In addition the Interim Report identified further issues which it recommended should be the subject of further substantive research and deliberation²⁷³.

The Interim Report concluded that in order to comply fully with the articles of the *Valletta Convention*, the United Kingdom would be required to make amendments to the legal and procedural framework surrounding the management of the underwater cultural heritage. It recommended that the following amendments, most of which will require the introduction of new legislation, should be implemented as soon as possible:

- The scope of the Protection of Wrecks Act 1973 should be extended to include aircraft and vehicles²⁷⁴.
- Local Authority Sites and Monuments Records should be a statutory requirement and in coastal authorities should include a maritime component²⁷⁵.
- Sites recorded on Maritime Sites and Monuments Records should be verified in-situ²⁷⁶. *Article 2i* requires that each State's legal system must provide for

²⁷⁰ The United Kingdom ratified on 21st September 2000 and the Convention came into force in the United Kingdom on 21st March 2001. The full text of the Convention is available at <http://convention.coe.int/Treaty/en/Treaties/Word/143.doc>

²⁷¹ Defined in Article 1 as "... remains and objects and other traces of mankind from past epochs shall be considered to be elements of the archaeological heritage...".

²⁷² The issues identified in the Interim Report is report were also relevant to the commitment by the Department for Culture, Media and Sport to conduct a review of marine archaeology legislation in order to ensure that it can meet present day requirements. See further *Force for our Future* ('*Force for our Future: The Future of the Historic Environment*'). Department for Culture, Media and Sport. (2000) Para. 4.38; also available on-line at www.english-heritage.org.uk/discovery/heritage-review.

²⁷³ The full text of the Interim Report is reproduced in Annex C.

²⁷⁴ Para. 1.1-1.3. Also recommended in HLAS.

²⁷⁵ Para. 2.1-2.5. Also recommended in HLAS.

²⁷⁶ Para. 2.5.

the maintenance of an inventory and the designation of protected monuments and areas. The Interim Report recommended that the accuracy of Historic Environments Records should be verified in situ and that consideration should also be given to extending the Record to encompass vessels out to the limit of the United Kingdom's jurisdiction, in waters of United Kingdom dependencies and United Kingdom vessels in international waters.

- A general obligation to report disturbances to historic wreck should be introduced²⁷⁷.
- The transparency of procedures for designation and licensing should be improved²⁷⁸.
- Activities which cause disturbance in areas designated under the Protection of Wrecks Act 1973 should be regulated²⁷⁹.
- Licensing procedures for the removal of human remains should be extended to those found underwater²⁸⁰.
- Support for educational and museum initiatives to develop public awareness of the value of the archaeological heritage should be continued²⁸¹. *Article 9.i* requires the State to conduct educational actions to develop awareness in public opinion of the value of the archaeological heritage in terms of understanding the past and of threats to it. The Interim Report recognised that the government and the heritage agencies have already made funding available for diver training and education for the past twelve years and as a result the general public and the diving community are now more aware of the value of maritime archaeology than at any time in the past. It also concluded that the success of the NAS Training Programme and its associated Diving with a Purpose and Adopt a Wreck projects have initiated a cultural change in attitudes toward the underwater cultural heritage. Nevertheless, it recommended that support for such educational initiatives should continue in order to ensure the United Kingdom's compliance with Article 9i.
- The Ministry of Defence should be prepared to licence appropriate intrusive activities under the *Protection of Military Remains Act 1986* where a sound archaeological case can be made for granting a licence²⁸². *Article 9.ii* requires the State to promote public access and displays of archaeological heritage. In relation to the *Protection of Military Remains Act 1986* public access is freely available to the exterior of wrecks, which are designated as Protected Places, but is not available to sites designated as Controlled Sites, except by licence to named individuals. The Interim Report recommended that the Ministry of Defence should be prepared to licence appropriate invasive activities where a

²⁷⁷ Para. 2.9-2.12. Also recommended in HLAS.

²⁷⁸ Para. 3.1-3.13. Also recommended in HLAS.

²⁷⁹ Para. 2.9-2.12. Also recommended in HLAS.

²⁸⁰ Para. . 3.1-3.13. Also recommended in HLAS.

²⁸¹ Para. 8.1-8.7.

²⁸² Para. 8.5-8.7.

sound archaeological case can be made for granting a licence and noted that the Ministry of Defence is legally obliged to consider each case on its merits.

- Provision should be made in the *Protection of Wrecks Act 1973* and the *Ancient Monuments and Archaeological Areas Act 1979* for the confiscation of equipment used in diving or salvage operations as a sanction in offences relating to underwater cultural heritage, on a similar basis to that provided for in the *Protection of Military Remains Act 1986*²⁸³.
- Consultation between the Receiver of Wreck and local and national curatorial authorities should be formalised²⁸⁴.
- Consultation between the relevant Secretary of State and local and national curatorial authorities should be formalised²⁸⁵.
- Consultation between Government departments and heritage agencies prior to the salvage or sale of government owned vessels should be formalised²⁸⁶.

In addition the Interim Report issues identified the following issues, which it recommended be subject to further substantive research and deliberation to determine what specific amendments are needed to the United Kingdom's legal framework relating to underwater cultural heritage legislation to ensure compliance with the *Valletta Convention*²⁸⁷. It also recommended that this research be undertaken as a matter of urgency. These issues were that:

- Part II of the *Ancient Monuments and Archaeological Areas Act 1979* (relating to areas of archaeological importance) should be reviewed, with a view to applying it below the Low Water Mark²⁸⁸.
- The definition of a monument in the *Ancient Monuments and Archaeological Areas Act 1979* should be amended to achieve conformity with the definition of archaeological heritage in the *Valletta Convention*²⁸⁹. This recommendation is consistent with the Council for British Archaeology's proposal that "... the definition of 'ancient monument' should be extended to include 'any deposit that has been formed by past human activity, or that reflects the effects of such activity on the environment.'"²⁹⁰.
- The definition of 'wreck' material, which must be reported under the *Merchant Shipping Act 1995*, should be amended thereby extending the

²⁸³ Para. 9.4. Also recommended in HLAS.

²⁸⁴ Para. 9.4. Also recommended in HLAS.

²⁸⁵ Para. 9.4. Also recommended in HLAS.

²⁸⁶ Para. 9.4. Also recommended in HLAS.

²⁸⁷ The Interim Report also recommended certain administrative or policy reforms, which could be implemented without the need for primary legislation. See further para. 3 of the Executive Summary.

²⁸⁸ Para. 2.1-2.12.

²⁸⁹ Para.1.1-1.3.

²⁹⁰ '*Valletta Convention: A Summary of the CBA Position*' British Archaeology, No.62 (December 2001) pp. 43-42; see also '*The Valletta Convention – Full Position*' British Archaeology at http://www.britarch.ac.uk/valletta/valletta_final_cba_fullhtml

Receiver of Wreck's jurisdiction²⁹¹. *Article 2iii* requires that each State's legal system must provide for the mandatory reporting of the chance discovery of elements of the archaeological heritage and the making available of them for examination. The Explanatory Report on the *Valletta Convention* states that, "A State ... may only require mandatory reporting of finds of precious materials, or on already listed sites"²⁹². Currently, mandatory reporting of underwater sites is restricted to the 'finding or taking possession of wreck' under the *Merchant Shipping Act 1995*. The Interim Report noted that in this respect this provision exceeds the requirement in Article 2 iii, because all wreck material must be reported if taken into possession irrespective as to whether it consists of precious materials. Therefore in this respect the United Kingdom's current provision exceeds that required by the *Valletta Convention*. However there is no requirement to report maritime cultural heritage finds which do not constitute *wreck* under the *Merchant Shipping Act 1995*²⁹³. The Interim Report also noted that it is unclear whether the *Merchant Shipping Act 1995* applies to harbours, which are areas of high archaeological potential. In the light of the above the Interim Report recommended that further consideration should be given to extending the definition of 'wreck' material (which must be reported under the *Merchant Shipping Act 1995*) to include all finds below low water covered by the definition of archaeological heritage in the *Valletta Convention*²⁹⁴ and to extending the Receiver's jurisdiction to include harbours if they are not currently covered by the *Merchant Shipping Act 1995*.

- In the light of the above the Interim Report also recommended that further consideration should be given to continuing support and encouragement should be given to the Maritime and Coastguard Agency's policy for the Receiver of Wreck to deal with all finds irrespective of their context²⁹⁵.
- The remit of the Portable Antiquities Scheme should be extended to include maritime finds²⁹⁶.
- An alternative mandatory reporting scheme should be introduced in the longer term, which would become the prime legislation relating to the reporting of antiquities²⁹⁷.
- The problem of salvors acquiring possessory rights to maritime cultural property, especially in relation to sites designated under the *Protection of*

²⁹¹ Para. 2.9-2.12.

²⁹² *European Convention on the Protection of the Archaeological Heritage (revised) (ETS no. 143) Explanatory Report* p.7. The full text of the Explanatory Report is available at <http://convention.coe.int/Treaty/en/Treaties/Word/143.doc>

²⁹³ There is no full definition of wreck, but it is defined as including *flotsam, jetsam, derelict & lagan*. Section 255 (1).

²⁹⁴ Further consideration should also be given to the Receiver of Wreck's view that this already happens on a voluntary basis.

²⁹⁵ Para. 2.12.

²⁹⁶ Para. 2.12.

²⁹⁷ Para. 2.12.

Wrecks Act 1973 or scheduled under the *Ancient Monuments and Archaeological Areas Act 1979* should be addressed²⁹⁸.

- Maritime cultural property should be removed from the salvage regime, while continuing to provide an incentive to honesty²⁹⁹.
- A general obligation to report disturbances to maritime archaeological remains should be introduced³⁰⁰. This would go beyond the recommendation in *Heritage Law at Sea*, which recommended that disturbance to only historic wreck be introduced.
- A Code of Practice should be introduced in relation to authorisation and supervision of maritime archaeological activities³⁰¹.

Under *Article 3ia & b* each State undertakes to apply procedures for the authorisation and supervision of excavation and other archaeological activities, so as to prevent illicit excavations or removals and so that appropriate methodology is applied to archaeological excavations and prospecting. The Interim Report noted that the Council for British Archaeology does not envisage that ‘blanket protection’ will be applied to terrestrial sites in the United Kingdom. It felt that presumably, parity of policy should be exercised in relation to maritime sites. Currently, in relation to specifically selected sites there are procedures to control activities under the *Protection of Wrecks Act 1973*, *Ancient Monuments and Archaeological Areas Act 1979* and *Protection of Military Remains Act 1986*, which can require both authorisation and supervision by a competent person. Otherwise, there is no requirement for archaeological authorisation or supervision³⁰².

- Legislation requiring a form of authorisation for the use of metal detectors, or other detection equipment, where these are specifically directed at the underwater cultural heritage, should be introduced³⁰³.

Article 3iii requires the State to subject to specific prior authorisation, whenever foreseen by the domestic law of the State, the use of metal detectors and any other detection equipment or process for archaeological investigation. The Interim Report noted that in relation to the maritime environment this is the most difficult provision to interpret and a matter that required substantial further consideration. Taken at its broadest the use of any equipment that could detect the presence of archaeological remains would need authorisation. However, in a maritime context, such equipment is routinely used for marine navigational and survey purposes, thereby making the presence of such equipment on a vessel perfectly legitimate. The Interim Report concluded that

²⁹⁸ Para. 2.12.

²⁹⁹ Para. 2.12.

³⁰⁰ Para. 2.12.

³⁰¹ Para. 3.1-3.6.

³⁰² Although archaeological activity may require consent under other regulatory schemes or proprietary rights. However, archaeological considerations may not be material in determining any application for such consents.

³⁰³ Para. 3.11-3.13.

consideration could be given to introducing legislation requiring a form of authorisation for the use of metal detectors, or other detection equipment, where these are specifically directed at the underwater cultural heritage. However, it is clear that in a maritime context formidable difficulties present themselves when seeking to incorporate this obligation into domestic law.

The Interim Report accepted that some of the proposals for change made in *Heritage Law at Sea* had been addressed since its publication in 2000, but stated that some of the issues raised in that report still remain to be addressed. More importantly, it recognised that the adoption of the *Valletta Convention* by the United Kingdom has added a further imperative for amendment to the legal framework surrounding the underwater cultural heritage. The United Kingdom's acceptance of the obligations under the *Valletta Convention* has undoubtedly moved reform of the legislative structure surrounding marine archaeology considerably beyond the issues raised in *Heritage Law at Sea*. This progression is underlined by the fact that even if all the proposals made in *Heritage Law at Sea* were implemented this would still not fully satisfy the United Kingdom's obligations under the *Valletta Convention*.

Previous Reform Proposals: An Overview

Not surprisingly, previous reform proposals cover a wide range of possibilities, ranging from fairly minimal amendments to the *International Convention on Salvage 1989*, through to the removal of cultural heritage from the salvage regime to a more fundamental reform of the whole legislative framework, following the United Kingdom's accession to the *Valletta Convention*. Given this accession it would now seem to be beyond dispute that the minimalist reforms advocated by the late Geoffrey Brice Q.C. would not now secure the United Kingdom's compliance with the *Valletta Convention*. Furthermore, given the width of the definition of 'archaeological heritage' in the Convention, it would be true to say that the debate on reform of the existing legislative structure for underwater cultural heritage has become somewhat more holistic in nature. Previously the emphasis had tended to be focused on the conservation in situ of shipwrecks and the contents thereof, a characteristic which is reflected in the contents and recommendations in *Heritage Law at Sea*³⁰⁴. Following the United Kingdom's accession to the *Valletta Convention* and the resulting commitments it has undertaken to the wider maritime archaeological heritage, attention has inevitably focused upon more fundamental reform, designed to enhance the protection not only of wrecks but also of other forms of underwater cultural heritage. Given this wider perspective and the fact that, as the JNAPC acknowledged in its introduction to its *Interim Report on The Valletta Convention & Heritage Law at Sea*³⁰⁵, many of the reforms proposed *Heritage Law at Sea* have indeed been implemented, the requirements of the *Valletta Convention* and the JNAPC's Interim Report must now be regarded as the starting point in any discussion of reform of the legislative structure for marine cultural heritage.

³⁰⁴ ; Joint Nautical Archaeology Policy Committee, 'Heritage Law at Sea' (2000): University of Wolverhampton.

³⁰⁵ Joint Nautical Archaeology Policy Committee, 'An Interim Report on The Valletta Convention & Heritage Law at Sea' (2003): University of Wolverhampton.

Marine Archaeology Legislation Project

Part 2: Annexe

Annexe A : Draft Protocol to the Salvage Convention 1989

Draft Protocol to the Salvage Convention 1989 (by the late Geoffrey Brice, Q.C.)

Please note Mr Brice's draft is in italics

Article 1

Definitions

For the purpose of this Convention:

- a) Salvage Operation means any act or activity to assist a vessel or any other property (*including services to or involving historic wreck*) in danger in navigable waters or in any other waters whatsoever.
- b) Vessel means any ship or craft, or any structure capable of navigation.
- c) Property: means any property not permanently and intentionally attached to the shoreline and includes freight at risk.

Historic wreck means a vessel or cargo or artefacts relating thereto including any remains of the same (whether submerged or embedded or not) of prehistoric, archaeological, historic or other significant cultural interest.

Damage to the cultural heritage means damage to historic wreck including damage or destruction at the salvage site of any significant information relating to the wreck or in its historical and cultural context.

- d) Damage to the environment means substantial physical damage to human health or marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.
- e) Payment means any reward, remuneration or compensation due under this Convention.
- f) Organization means the International Maritime Organization
- g) Secretary General the Secretary-General of the Organization

Draft Protocol to the Salvage Convention 1989

Article 13

Criteria for fixing the reward

1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

- a) the salvaged value of the vessel and other property;
- b) the skill and efforts of the salvors in preventing or minimising damage to the environment;
- c) the measure of success obtained by the salvor;
- d) the nature and degree of danger;
- e) the skill and efforts of the salvors in salvaging the vessel, other property and life;
- f) the time used and expenses and losses incurred by the salvors or their equipment;
- g) the risk of liability and other risks run by the salvors or their equipment;
- h) the promptness of the services tendered;
- i) the availability and use of the vessel or other equipment intended for salvage operations;
- j) the state of readiness and efficiency of the salvors' equipment and value thereof;
- k) *in the case of historic wreck, the extent to which the salvor has:*
 - i) *protected the same and consulted with, co-operated with and complied with the reasonable requirements of the appropriate scientific, archaeological and historical bodies and organizations (including complying with any widely code of practice notified to and generally available at the offices of the Organisation.*
 - ii) *complied with the reasonable and lawful requirements of the governmental authorities having a clear and valid interest (for prehistoric, archaeological, historic or other significant cultural reasons) in the salvage operations and in the protection of the historic wreck or any part thereof and*
 - iii) *avoided damage to the cultural heritage.*

Draft Protocol to the Salvage Convention 1989

Article 18

The effect of salvor's misconduct

A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct. *In the case of historic wreck misconduct includes a failure to comply with the requirements set out in Article 13 paragraph (k) or causing damage to the cultural heritage.*

Article 30

Reservations

1. Any State may at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply the provisions of this Convention:
 - a) when the salvage operations take place in inland waters and all vessel involved are of inland navigation;
 - b) when the salvage operations take place in inland waters and no vessel is involved;
 - c) when all interested parties are nationals of the State;
 - d) when the property involved is *historic wreck (delete maritime cultural property of prehistoric, archaeological or historic interest) and is wholly or in part in the territorial sea (including on or in the seabed or shoreline) or wholly or in partly in inland waters (including the seabed and shoreline thereof).*

Annex B: Heritage Law at Sea

HERITAGE LAW AT SEA

PROPOSALS FOR CHANGE

The proposals contained in this document for changing the legal structure securing protection of underwater cultural heritage have been compiled following extensive discussion and consultation by the Joint Nautical Archaeology Policy Committee. The JNAPC is particularly grateful to the British Sub Aqua Club, the Professional Association of Diving Instructors, and the Sub Aqua Association for their endorsement of these proposals.

The JNAPC was formed over twelve years ago from representatives of several bodies and individuals with an interest in preserving Britain's heritage and especially those parts which lie underwater. The JNAPC launched *Heritage at Sea* in May 1989 with the particular aim of raising awareness of Britain's underwater heritage and persuading government that underwater sites of historical importance should receive no less protection than those on land. Since then the JNAPC has published *Still at Sea*, a review of progress of *Heritage at Sea*, the *Code of Practice for Seabed Developers*, a leaflet for divers *Underwater Finds- What to Do* and the more detailed *Underwater Finds - Guidance for Divers.*, Further details of the membership of the JNAPC are shown in Appendix 1.

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The cover illustration is by Joanne Fletcher, School of Legal Studies, University of Wolverhampton

Heritage Law At Sea

Introduction

It is now some 25 years since the Protection of Wrecks Act 1973 was enacted to provide a mechanism to safeguard wrecks considered to be of historical, archaeological or artistic importance and nearly 50 wrecks have been designated in that period. However, as the theory and practice of nautical archaeology continues to mature, awareness of the need for more comprehensive provision for the care of submerged archaeology is increasing. In particular, the disparity between the care afforded to important remains on land and those submerged in the territorial sea is becoming increasingly apparent.

In its consultation papers *Heritage at Sea* (May 1989) and *Still at Sea* (May 1993) the Joint Nautical Archaeology Policy Committee identified a number of deficiencies in the law and administration relating to nautical heritage. Recommendations made by the JNAPC in these papers have been influential in securing progress in a number of areas including Government support for compilation of information about submerged archaeology in the territorial sea; education of the diving community regarding conservation of wrecks; improvements in reporting mechanisms for historic material recovered from the sea; and greatly improved consultation in advance of damaging commercial seabed activities through production of a Code of Practice for Seabed Developers. This progress has been secured almost exclusively by administrative action or educational initiatives. While further progress can be achieved in this manner, new legislation is required to address the most significant needs. Foremost amongst these are improvements in the reporting of wreck, the management and physical protection of designated sites, the enhancement of public access to them, the elimination of uncertainties relating to rights in wreck and improving the transparency of the decision making process.

The JNAPC has concluded that the best course of action would be to build upon the existing legal structure, in collaboration with the diving community. Consequently the JNAPC is proposing further modifications to this structure, although such modifications would be quite extensive in certain areas. It is proposed that the existing provisions relating to the underwater cultural heritage in the Merchant Shipping Act 1995, the Protection of Wrecks Act 1973 and the Ancient Monuments and Archaeological Areas Act 1979 shall remain in force, except in so far as they are amended by the proposals in this document. A series of objectives for change are set out below. Each objective is accompanied by a statement of the problem that needs to be addressed, a proposed solution and an explanatory comment. The objectives are grouped in relation to the Merchant Shipping Act 1995, the Protection of Wrecks Act 1973, provisions relating to advice and information, and miscellany. It is envisaged that these proposals will provide a framework for a public debate as to the legal structure which will protect our nautical heritage into the 21st. century.

The JNAPC invites consideration of these proposals by interested parties and welcomes responses in writing by 30th June 2000 to:

JNAPC: Heritage Law At Sea

c/o M. V. Williams

School of Legal Studies

University of Wolverhampton WV1 1SB

Part 1 Merchant Shipping Act 1995

1.1 Introduce a general obligation to report disturbances to historic wreck

Problem

Notification to the Receiver of Wreck is only required if wreck is recovered. As a result any amount of damage can occur to a wreck site before it is brought to the attention of archaeologists.

Solution

Introduce a general obligation to report disturbances to historic wreck, defined for this purpose as wreck which appears to have been submerged for 100 years or more.

Explanation

Under s. 236 Merchant Shipping Act 1995 any person finding or taking possession of wreck in UK waters must give notice to the Receiver of Wreck. However, current implementation of this provision suggests that there is no duty to report disturbance to a wreck in the absence of any recoveries being made. Such disturbance may occur where a wreck site is excavated, surveyed or otherwise investigated. While not seeking to prohibit disturbance, the JNAPC believes that divers and other sea-users should be obliged to report any disturbance to the Receiver, thereby enabling the Receiver to consult with appropriate persons and agencies. The obligation to report would also open up an avenue for providing appropriate advice and guidance to divers and sea-users who are engaged in activities which are causing disturbance.

This objective is seen as complementing the educational initiatives aimed at the diving community in recent years by the diving organisations, the Nautical Archaeology Society, the Department for Culture, Media and Sport, The Maritime and Coastguard Agency and the JNAPC. In respect of wrecks where less than 100 years have elapsed since their loss it is envisaged that the above organisations, departments and agencies will co-operate in the formulation of a voluntary code to facilitate appropriate diving practices.

However it is important to emphasise that merely diving on a site would not in itself constitute disturbance and nothing in this proposal removes the freedom to dive on a wreck whatever its age.

1.2 Introduce statutory discretion to delay giving notice of wreck finds

Problem

Premature publicity arising from the Receiver of Wreck's obligation to give notice of recoveries can result in damage to important sites.

Solution

Introduce a statutory discretion for the Receiver to delay giving notice of wreck finds.

Explanation

Under s.238 Merchant Shipping Act 1995, where the Receiver takes possession of any wreck, the Receiver must make available a record of it for inspection by any person and, if the value exceeds £5000, inform Lloyd's in London. A difficulty with these provisions has arisen in relation to sites containing artefacts scattered on the seabed which are both visible and easily recoverable. Archaeological recovery of such artefacts can take a number of years. If the Receiver makes public these recoveries during that time, the security of an important archaeological site might be compromised.

The JNAPC believes that the Receiver should have discretion to delay giving notice of wreck where, in the opinion of the Receiver, the archaeological integrity of a wreck site would be endangered by giving such notice.

1.3 Extend the Crown's right of ownership of unclaimed wreck to that recovered beyond territorial waters

Problem

Title to unclaimed wreck recovered outside territorial waters and landed in the United Kingdom does not vest in the Crown. Instead title will vest in the salvors of such wreck and must be returned to the salvors, regardless of its historical importance.

Solution

Extend Crown ownership of unclaimed wreck to that recovered beyond territorial waters and landed in the United Kingdom.

Explanation

A problem has arisen in relation to artefacts raised beyond the 12 mile territorial limit and landed in the UK. This is due to the decision in the case of the *Lusitania*³⁰⁶, which determined that where artefacts are recovered from beyond territorial waters, then unless the original owner or successor in title comes forward, the salvor is entitled to have the artefact returned, subject to the payment of the Receiver of Wreck's expenses. As diving groups can journey far offshore, the recovery of wreck from beyond territorial waters is an increasing problem. Furthermore there is evidence that the United Kingdom is becoming the favoured destination for salvors of historic wreck because of this legal regime in respect of recoveries made beyond territorial waters. There is a very real prospect that the United Kingdom will obtain an undesirable reputation for allowing trade in historical material and the British diving and archaeological communities will be seen not to care. For these reasons the JNAPC believes that it is necessary to restore the Crown's entitlement to wreck recovered from beyond territorial waters, thus enabling artefacts to be placed in publicly accessible collections.

³⁰⁶ [1986] 1 Lloyd's Rep. 132.

1.4 Re-introduce a power to purchase rights to wreck

Problem

In the past the Crown has granted its right to unclaimed wreck to individuals and corporations along most of the United Kingdom's coastline and this right may be exercised by the grantee regardless of the historical importance of the recovered material.

Solution

Re-introduce the statutory power to purchase rights to unclaimed wreck from the current franchise holder.

Explanation

Over the preceding centuries the Crown's right to unclaimed wreck has been granted to others over much of the coastline of England and Wales, often to coastal landowners and the holders of manorial titles. This has proved to be a problem in relation to at least three sites of historical importance. Material of archaeological importance is the most likely to be affected by such grants, since, by its very age, it is rarely claimed by an owner within the time limit laid down in the Merchant Shipping Act 1995. Where the Crown is entitled to unclaimed wreck, the Maritime and Coastguard Agency is committed to a policy of disposal to publicly accessible collections. However where a grantee from the Crown is entitled to unclaimed wreck the material is likely to be disposed of to a private individual. The power to purchase rights to wreck, contained in s.528 Merchant Shipping Act 1894, was repealed by the Merchant Shipping (Registration) Act 1993. It is not clear why this provision was repealed and it may erroneously have been thought to have been obsolete. Although it is envisaged that the power will only rarely be exercised, there may be very limited occasions in the future when such a specific power could be exercised in the national interest to purchase the right to wreck of historical, archaeological or artistic importance.

Part 2 Protection of Wrecks Act 1973

The Protection of Wrecks Act was enacted in 1973 as an interim measure to prevent damage to wrecks of special importance threatened by competing salvage teams while long term improvements to the Merchant Shipping Act 1894 were discussed. The weaknesses of the Act were recognised from the start, and it was criticised as a 'string and sealing wax law'. Furthermore at the time of its introduction a commitment was given by the government of the day to review the effectiveness of the 1973 Act at a future date. To date no such review has been undertaken. Some time later, after introduction of the 1973 Act, changes to the Merchant Shipping Act were shelved and the Protection of Wrecks Act 1973 became established as the principal measure used in managing historic shipwrecks in the UK. Terrestrial ancient monuments legislation was amended in 1979 to cover monuments in territorial waters and vessels, but at this time the Government stated its preference for using the 1973 Act to protect wrecks, even though the 1979 Act has many advantages. Insofar as Government policy continues to favour the Protection of Wrecks Act 1973 over the Ancient Monuments and Archaeological Areas Act 1979, then JNAPC believes that a review of the Act's effectiveness should be undertaken and that a range of improvements are needed to the regime of the Protection of Wrecks Act in order

to offer an appropriate level of protection to wrecks of archaeological and historic importance.

2.1 Improve the transparency of procedures for designation and licensing

Problem

Existing procedures under the 1973 Act fail to incorporate the safeguards required by the European Convention on Human Rights regarding consultation, transparency of decision-making and the resolution of disputes.

Solution

Increase the transparency of decision-making and establish a formal procedure for resolving disputes arising from use of the Act.

Explanation

The JNAPC is concerned by the lack of transparency in deliberations concerning designation of wreck sites. The Secretary of State³⁰⁷ should be required to consult with interested parties and to provide a written statement explaining decisions to ensure that designations are underpinned by procedures which comply with standards required by the courts. Inevitably, disputes can arise from decisions regarding the designation of sites and licensing of restricted activities. Since such disputes could jeopardise the integrity of archaeological sites if they are not resolved promptly, the JNAPC recommends that a formal dispute resolution procedure is introduced to re-examine the reasoning behind particular decisions regarding designation and licensing, and to reverse such decision, if they are shown to be unreasonable. Such provisions would also ensure that the United Kingdom Government meets its obligations under Articles 1 & 6 of the First Protocol to the European Convention on Human Rights.

2.2 Funding the investigation and management of protected wrecks

Problem

There is no provision under the 1973 Act for expenditure on archaeological investigation and management of protected wrecks.

Solution

Introduce statutory powers authorising expenditure upon protected wrecks equivalent to the powers in the Ancient Monuments and Archaeological Areas Act 1979.

Explanation

While the protective elements of the 1973 Act can be very useful, there is no provision in the Act for investigation and proactive management. This omission reflects the origin of the 1973 Act as a private member's Bill, which cannot commit public funds. As a result

³⁰⁷ In the provisions below, 'Secretary of State' is used to denote the Secretary of State for Culture, Media and Sport, the Scottish Ministers, the Welsh Assembly and the Secretary of State for Northern Ireland, as appropriate.

there is a contrast between the protective regime offered by the 1973 Act and that offered by the Ancient Monuments and Archaeological Areas Act 1979.

The JNAPC recommends that any amendment to the 1973 Act is carried out through a government sponsored Bill, containing provisions enabling expenditure upon such matters in a similar manner to the 1979 Act. Provisions on expenditure should include the power to commit funds to the promotion of high standards of investigation and management, publication and public access.

2.3 Publish annual reports

Problem

There is little information in the public domain relating to the state of protected wrecks.

Solution

Annual reports on the work of the Advisory Committee on Historic Wreck Sites should continue to be published and funding should be made available to assist the publication from time to time of reports on the results of work on protected sites.

Explanation

In the past, the Departments of Trade and later Transport published annual updates on the implementation of the Protection of Wrecks Act 1973, setting out details of restricted areas introduced each year. For many years, however, there has been almost no publicly-available information about activities on historic wrecks, notwithstanding the number of licences granted and the activities of the Archaeological Diving Contractor. The JNAPC notes that some satisfactory reports are being produced but the process is ad hoc and reliant upon the resources and good will of amateur groups. The JNAPC believes that the Secretary of State should continue to provide funding for the publication of an annual report on the work of the Advisory Committee and should also from time to time provide funding to assist in the publication of reports providing information about the wrecks protected by restricted areas, the criteria used in selecting new restricted areas, the efforts to promote public access, the pursuit of high standards of investigation, the activities of licensees and the implementation of management strategies.

2.4 Improve public access to protected wrecks

Problem

The 1973 Act does not facilitate non-damaging public access, even to robust sites.

Solution

Amend the 1973 Act to improve public access where appropriate and amend licensing provisions to facilitate non-damaging access.

Explanation

While the provisions of the Protection of Wrecks Act 1973 are necessary for proscribing unauthorised access to sensitive sites, the restrictive character of the Act sits uneasily with the Government's emphasis on managing sites by engaging with and educating the

diving public. In order to alleviate this disjunction, the JNAPC believes that the principle of promoting non-damaging public access to robust sites should be enshrined within the administration and, if necessary, the provisions of the 1973 Act.

The JNAPC acknowledges the value of the existing visitor licence schemes and believes that there is scope for achieving greater flexibility in permitting and encouraging non-damaging public access to appropriate sites. Suitably robust sites could be made available for controlled and supervised public access. At the moment, however, it is difficult to add people to an existing licence swiftly and flexibly, due to the statutory requirement of competence that each person on a licence must satisfy. Accordingly, the JNAPC believes it is necessary to introduce powers to delegate responsibility for permitting access to some sites to the licensee.

In addition to promoting physical access to historic wrecks, the JNAPC believes that further efforts should be made to increase access by the non-diving public to the results of investigations in restricted areas. In particular, the programme of providing interpretative panels could be expanded and greater assistance provided to licensees to help them publish the results of their activities.

2.5 Promote high standards of archaeological investigation and management

Problem

The standard of investigation and management of sites protected by the 1973 Act has been highly variable.

Solution

Professionally-recognised standards of investigation and management should be incorporated within the procedures used in designating protected wrecks and licensing activities within restricted areas.

Explanation

In the past, the standard of investigation and management of sites protected by the Protection of Wrecks Act 1973 has not been of a consistent quality. The JNAPC believes that the Government should make a formal commitment to promoting consistently high standards of investigation and management. Non-statutory guidance on such standards is available in the form of professional standards promulgated by the Institute of Field Archaeologists, and the ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage.

2.6 Prohibit activities which cause disturbance in restricted areas

Problem

Damage can be caused to protected wrecks by the poor handling of anchors, dredging equipment or other ground tackle. Successful prosecution is hampered by the difficulty of proving that the activity has caused damage.

Solution

Extend the scope of prohibited conduct within restricted areas to cover ‘disturbance’ as well as ‘damage’.

Explanation

Proof of damage can only be obtained on the seabed, after the damage has occurred and probably some time after the person who caused the damage has left the scene. Proof of disturbance can be obtained from the surface at or even before damage to the wreck has occurred, and when the person causing disturbance is still present within the restricted area. Insofar as it facilitates prosecution, this proposal will also have a welcome deterrent effect.

The proposal is analogous to the Government’s proposal to prohibit unauthorised operations which cause disturbance to the ground in and around scheduled monuments.

2.7 Reduce environmental degradation of protected wrecks**Problem**

The 1973 Act is currently incapable of addressing environmental degradation of protected wrecks.

Solution

Funding should be made available to identify, monitor and reduce environmental degradation in restricted areas.

Explanation

The designation of restricted areas provides some protection against damage to vessels and objects caused by human activity, but such areas remain unprotected from environmental degradation. The JNAPC believes that the Government should take steps to mitigate environmental degradation of vessels and objects within restricted areas, possibly through the introduction of a statutory duty on the Secretary of State.

2.8 Prepare explicit management strategies for protected wrecks**Problem**

Although a wreck may be protected by law, there is no requirement to say how it should be managed.

Solution

The Secretary of State should be empowered to formulate and implement clearly defined aims and objectives for conserving individual historic wrecks, and to assess the effectiveness of the adopted measures.

Explanation

The JNAPC believes that it is necessary to establish clearly defined aims and objectives for conserving historic wrecks, and to assess the effectiveness of adopted conservation

measures. Consequently, the JNAPC recommends that the Secretary of State be required to prepare, publish and implement a management strategy for each protected wreck. The management strategy should be drawn up in consultation with any identifiable owners and with prospective licensees. The scope and conditions of licences for each restricted area should reflect the aims and objectives of the management strategy. Allocation of responsibility for acting on the management strategy and resourcing its implementation should be made explicit.

2.9 Provide long-term support for a diving team of professional archaeologists

Problem

As there is no statutory requirement to provide expert advice in support of the 1973 Act, current funding for a diving team of professional archaeologists could be withdrawn.

Solution

The Secretary of State should be required to maintain expert advice based on the services of professional diving archaeologists.

Explanation

The Government currently operates a contract for the provision of professional services relevant to the Protection of Wrecks Act 1973. Experience has shown that the Archaeological Diving Contractor forms an essential link between the amateur diving community, licensees of sites designated under the Protection of Wrecks Act 1973 and government departments and agencies. This vital function lacks any statutory basis and could be removed. The JNAPC recommends that the provision of professional advice is established on a statutory basis.

2.10 Extend the scope of the Act to include aircraft and vehicles

Problem

The Act does not apply to aircraft or vehicles.

Solution

Amend the Act to include aircraft and vehicles.

Explanation

At present, the 1973 Act applies only to 'vessels' and does not apply to aircraft or vehicles. There are a number of aircraft and vehicles of historical importance situated in United Kingdom waters and although some military aircraft are protected by the Protection of Military Remains Act 1986, that Act does not always prohibit public access. The JNAPC believes that a similar level of protection should be afforded to such aircraft and vehicles as is currently afforded to vessels designated under the 1973 Act. Therefore the JNAPC recommends that the Act is amended to include civil and military aircraft and vehicles, including amphibious aircraft and vehicles.

2.11 Transfer responsibility for protected wrecks to English Heritage

Problem

English Heritage's statutory functions cannot be exercised below the low-water mark.

Solution

Introduce primary legislation extending English Heritage's statutory remit below the low-water mark.

Explanation

While responsibility for the 1973 Act has been devolved to Cadw and Historic Scotland in Wales and Scotland respectively, and the Department for Media, Culture and Sport has an agency agreement with the Department of the Environment in Northern Ireland, the transfer of such responsibility in England from the Department for Media, Culture and Sport to English Heritage has not yet taken place. The transfer requires primary legislation because English Heritage can only discharge its functions in England and this expression generally excludes areas below the low-water mark. The JNAPC notes the Government's stated intention to introduce legislation extending English Heritage's statutory remit below the low-water mark and to transfer responsibility for the 1973 Act to English Heritage. The JNAPC calls for this legislative amendment be introduced as soon as possible.

Part 3 Consultation, Advice and Information

Although liaison between the various government departments, agencies and other bodies, whose responsibilities and actions impact upon the underwater cultural heritage, has improved considerably in recent years there remains no formal requirement to exchange information relating to the underwater cultural heritage. Consequently such informal arrangements that exist are vulnerable to changes of personnel.

3.1 Formalise consultation between the Receiver of Wreck and local and national curatorial authorities

Problem

Although recovered artefacts must be reported to the Receiver of Wreck, there is no requirement for the Receiver to seek advice or to pass the information to archaeologists.

Solution

The Receiver of Wreck through the Maritime and Coastguard Agency should make a formal commitment to communicating with appropriate bodies in relation to historic wreck.

Explanation

Although administrative changes over the past five years have increased the level of consultation between the Receiver of Wreck and archaeologists, this improvement has no basis in law, is largely due to the personal initiative of the present incumbent and could be reversed in future years. Consequently, JNAPC recommends that the Receiver be

required formally to communicate with appropriate archaeological authorities in relation to historic wreck. It may be advisable to introduce a statutory duty on the Receiver to this effect. It is envisaged that the appropriate archaeological authorities would include RCAHMW, RCAHMS, local government archaeological officers, English Heritage, Historic Scotland, Cadw and DOE (Northern Ireland).

3.2 Formalise consultation between the Secretary of State and local and national curatorial authorities

Problem

With the exception of designations under the Protection of Wrecks Act 1973, the Secretary of State is not required to seek advice from appropriate bodies in respect of decisions affecting underwater cultural heritage.

Solution

The Secretary of State should enter into a formal arrangement for consultation with appropriate archaeological authorities.

Explanation

Although in most cases the Secretary of State is obliged to seek advice before designating protected wrecks under the 1973 Act, there is no requirement for advice to be sought in respect of many other decisions which affect marine archaeology, such as responses to proposals for marine development. In the absence of advice, the Secretary of State might consent unintentionally to activities that cause underwater cultural heritage to be destroyed or damaged. The JNAPC recommends that this deficiency is removed by the introduction of formal channels for consultation between the Secretary of State and appropriate archaeological authorities.

3.3 Formalise consultation with the Secretary of State in all consent procedures applicable to works and activities affecting the seabed.

Problem

The authorities which provide licences for various seabed activities are not obliged to seek advice before consenting to proposals which may cause harm to the underwater cultural heritage.

Solution

The sectoral consent procedure applicable to each activity affecting the seabed should require the licensing authority to consult the Secretary of State (and thereby the appropriate archaeological authorities) prior to providing consent.

Explanation

In contrast to activities on land which are subject to general regulation under the Town and Country Planning Acts, activities at sea are regulated by a range of sectoral (process-specific) consent procedures. Whereas archaeology receives systematic attention as a material consideration under the Town and Country Planning Acts, there is no equivalent protection under the various sectoral consent procedures. Consequently, the JNAPC

recommends that each sectoral consent procedure applicable to activities affecting the seabed provides for consultation with the Secretary of State. Once consulted, the Secretary of State would be obliged to seek advice from appropriate persons and agencies under the preceding recommendation.

3.4 Require organisations with statutory powers to adhere to best practice in respect of underwater cultural heritage

Problem

Various works are carried out at the coast by organisations using statutory powers. Such agencies are under little or no obligation to adhere to best practice in respect of assessing and mitigating the impact of works upon underwater cultural heritage.

Solution

The Government should review the extent of works carried out under statutory powers in the coastal zone, ascertain the measures which some agencies employ to ensure best practice and take steps to ensure that best practice is adopted by all agencies.

Explanation

This document has suggested ways in which existing planning and sectoral consent procedures may be amended to afford greater consideration to archaeological material at the coast which may be affected by development. However, various forms of development fall outside the scope of such procedures because the activity is exempt from planning control or because the agency has statutory powers which override general planning and sectoral consent procedures. While some agencies have adopted voluntary codes of practice such as the JNAPC Code of Practice for Seabed Developers, which commit them to the pursuit of best practice in respect of archaeological material, others have made no such commitment and are bound by no more than an often ill defined responsibility towards some forms of archaeological material. The adherence to best practice by some but not others means that there is not a level playing field in respect of the cost of environmental protection.

The JNAPC accepts that activities undertaken in an emergency in the interests of health, safety and the protection of property should fall outside the terms of this proposal.

3.5 Establish Marine Sites and Monuments Records on a statutory basis

Problem

The absence of formal support for Sites and Monuments Records could lead to these records being abandoned, even though they play an increasingly vital role in protecting, understanding and promoting underwater cultural heritage.

Solution

Statutory support for local authority Sites and Monuments Records should include their marine component.

Explanation

In its Consultation Document "Protecting Our Heritage"³⁰⁸, the Government expressed its intention to establish local authority Sites and Monuments Records on a statutory basis. In seeking to ensure equivalent treatment for marine sites, JNAPC recommends that the statutory duty upon local authorities to maintain Sites and Monuments Records includes sites and monuments on the foreshore and seabed. A commitment should also be made to allocating sufficient resources for local authorities to respond to requests for information and advice. However, a discretionary power should be available to restrict the dissemination of details that might lead to inappropriate pressure on sites.

3.6 Formalise consultation between Government departments prior to the salvage or sale of government owned vessels

Problem

Government departments such as the Ministry of Defence and the Foreign and Commonwealth Office do not always consult with the Secretary of State prior to entering into contracts for sale or salvage of government owned vessels, wherever they are situated.

Solution

The Government should review procedures for dealing with the salvage or disposal of government owned vessels which may be of historical interest.

Explanation

Although the Government has stated its intention that government departments, such as the Ministry of Defence and the Foreign and Commonwealth Office, should consult the Secretary of State prior to entering into contracts for the sale or salvage of military and government owned vessels of historical or archaeological importance, such consultation has not always taken place. The JNAPC recommends that government departments are placed under a formal obligation to carry out such consultation. It is not intended that these proposals should affect the operation of existing legislation such as the Protection of Military Remains Act 1986.

Part 4 Miscellaneous

4.1 Extend licensing procedures to the removal of human remains found underwater

Problem

Human remains found on underwater sites are not subject to the rigorous licensing procedure which applies on land.

Solution

Procedures relating to the treatment of human remains should be extended to underwater sites.

³⁰⁸ (May 1996) Department of National Heritage and the Welsh Office, DNHJ0098NJ.

Explanation

Human remains are a relatively common component of sites of archaeological interest. In England and Wales it is necessary to seek a licence from the Home Office for the removal of human remains discovered in archaeological contexts on land under the Burial Act 1857, and equivalent provisions apply in Scotland and Northern Ireland. Such licences are normally granted subject to conditions, which provide that disturbance is carried out with due care and attention to decency, that the remains be examined by a suitably qualified person, and that the remains are then stored or reburied in an appropriate place. It appears that human remains found on wreck sites fall outside the terms of current procedures, hence a licence is not required and there is no control over the treatment of such remains. Consequently, the JNAPC believes that the scope of procedures relating to the treatment of human remains on land should be extended to bring human remains discovered in archaeological contexts underwater within the terms of the existing licensing procedure.

4.2 Provide for the confiscation of equipment used in diving or salvage operations as a sanction in offences relating to underwater cultural heritage**Problem**

Where important underwater sites are damaged the existing criminal sanctions do not reflect the seriousness of the damage done to the public interest.

Solution

The range and appropriateness of the available sanctions for the protection of the underwater cultural heritage should be reviewed.

Explanation

Confiscation of equipment as a sanction would bring penalties for illicit diving or salvage activity on historic wrecks into line with the Protection of Military Remains Act 1986 and with proven approaches to penalising certain poaching offences which are already applicable to divers in fresh water.

4.3 Provide for expenditure on non-scheduled monuments at sea under the Ancient Monuments and Archaeological Areas Act 1979**Problem**

The 1979 Act precludes expenditure upon non-scheduled monuments at sea.

Solution

Include statutory provision for expenditure on non-scheduled monuments at sea in the 1979 Act.

Explanation

Whereas expenditure under ss. 17 & 21 Ancient Monuments and Archaeological Areas Act 1979 may be made on both scheduled and non-scheduled monuments on land, s. 53 precludes expenditure upon non-scheduled monuments at sea. Thus, at sea expenditure is

only permitted upon scheduled monuments. The JNAPC recommends that this constraint upon expenditure be removed by amendment of s.53.

JNAPC
February 2000

Appendix I

Joint Nautical Archaeology Policy Committee

Chairman: Robert Yorke

Members

Association of Local Government Archaeological Officers, Maritime Committee - David Tomalin
 British Sub Aqua Club - Michael Palmer
 Council for British Archaeology - Valerie Fenwick
 Hampshire & Wight Trust. for Maritime Archaeology - Garry Momber
 ICOMOS - Alan Aberg
 Institute of Field Archaeologists, Maritime Affairs Group - Anthony Firth
 National Maritime Museum - Gillian Hutchinson
 National Museum of Wales - Mark Redknap
 National Trust - Rob Woodside
 Nautical Archaeology Society - Chris Brandon
 Nautical Archaeology Society, Training - Chris Underwood
 Professional Association of Diving Instructors - Suzanne Pleydell
 Society for Nautical Research - Peter Marsden
 Sub Aqua Association - Stuart Bryan
 UK Institute for Conservation
 Barrie Andrian - University of Edinburgh, Department of Archaeology
 Sarah Dromgoole - Senior Lecturer in Law, University of Leicester
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Annex C: Interim Report on The Valletta Convention & Heritage Law at Sea

The Valletta Convention & Heritage Law at Sea

The legal framework for marine archaeology in the United Kingdom

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Introduction

This interim report is a summary of the deliberations to date of the Joint Nautical Archaeological Policy Committee (JNAPC) concerning the present legal framework surrounding the protection of the underwater cultural heritage. Some two years have now passed since the publication of the JNAPC's report, *Heritage Law at Sea*³⁰⁹. During that time there have been significant developments relating to underwater cultural heritage in the United Kingdom.

In the Spring of 2001 the Receiver of Wreck from the Maritime and Coastguard Agency held an amnesty for unreported wreck recoveries, which was extremely successful and resulted in many unreported finds of wreck being declared and the educational message being widely disseminated of the necessity to report all future recoveries³¹⁰. In parallel to this the Ministry of Defence, following an extensive public consultation exercise³¹¹, activated, for the first time in relation to shipwrecks, the Protection of Military Remains Act 1986³¹². This resulted in the designation of 21 wrecks under the Act and a rolling programme to review the status of all other maritime military remains in United Kingdom waters. It is understood that this programme will eventually result in all maritime military remains being designated under the Act. Additionally, Historic Scotland scheduled several wrecks of the scuttled German High Seas Fleet in Scapa Flow as monuments under the Ancient Monuments and Archaeological Areas Act 1979³¹³. This marked the first utilisation of that legislation to protect underwater cultural heritage anywhere in the United Kingdom and Historic Scotland intends further scheduling of wrecked vessels³¹⁴. The recreational diving organisations also launched an educational initiative, *Respect Our Wrecks*, which emphasised the best practice in wreck diving of leaving shipwrecks undisturbed in situ, while the Nautical Archaeology Society (NAS) launched its Diving with a Purpose initiative, which includes the Adopt a Wreck scheme. These widely supported initiatives³¹⁵ emphasise non-intrusive wreck diving and actively promote avocational marine archaeological activity, as well as fulfilling government's commitment to promote responsible public access to the underwater cultural heritage³¹⁶. All the above have fostered an appreciation amongst recreational divers of the non-

³⁰⁹ Joint Nautical Archaeological Policy Committee, *'Heritage Law at Sea'* (2000) School of Legal Studies: University of Wolverhampton.

³¹⁰ *'Wreck Amnesty, Final Report, 23rd. January – 24th. April 2001'* (2002) Maritime and Coastguard Agency, CD Rom.

³¹¹ "Military Maritime Graves and The Protection of Military Remains Act 1986: A Consultation Document" (February 2001) Ministry of Defence, Whitehall, London.

³¹² "Military Maritime Graves and the Protection of Military Remains Act 1986: Consultation Report" (November 2001) Ministry of Defence, Whitehall, London.

³¹³ The Ancient Monuments & Archaeological Areas Act 1979 does not apply in Northern Ireland.

³¹⁴ CADW scheduled the wreck of the *Louisa* in December 2001 but the vessel is now part of the reclaimed area of the Cardiff Bay project.

³¹⁵ British Sub Aqua Club, Professional Association of Diving Instructors, Sub-Aqua Association, JNAPC, Maritime and Coastguard Agency, Ministry of Defence Police, Department for Culture, Media and Sport, English Heritage, CADW, Historic Scotland, Environment and Heritage Agency, Nautical Archaeology Society, and the National Trust.

³¹⁶ "broaden access and appreciation of the heritage". English Heritage's mission statement. 2003.

renewable nature of the underwater cultural heritage and have collectively effected a cultural change in attitude towards that heritage.

Against this background legal innovations have also occurred, with the responsibility for underwater cultural heritage in England being transferred to English Heritage³¹⁷ and the United Kingdom ratifying the *Valletta Convention*³¹⁸. Individually each of these developments would have been significant, but taken together they can truly be said to have transformed the social, economic and political environment surrounding the underwater cultural heritage. Accordingly, notwithstanding the short time elapsed since the publication of *Heritage Law at Sea* and the fact that the United Kingdom is unlikely to ratify the *UNESCO Convention On The Protection of the Underwater Cultural Heritage*³¹⁹, the JNAPC felt it was appropriate to review the legal structure surrounding the underwater cultural heritage. Since the United Kingdom's obligations to the archaeological heritage are now governed by the *Valletta Convention*, that instrument must form the template against which any assessment of the United Kingdom's legislative structure is made. This report assesses what amendments the United Kingdom should implement in order to comply with the *Valletta Convention*. The issues identified in this report are relevant to the commitment from the Department for Culture, Media and Sport in *Force for our Future*³²⁰, to conduct a review of marine archaeology legislation in order to ensure that it can meet present day requirements. They are also intended to form the basis for further substantive research and deliberation.

³¹⁷ Under the National Heritage Act 2002.

³¹⁸ The United Kingdom ratified on 21st September 2000 and the Convention came into force in the United Kingdom on 21st March 2001. The full text of the Convention is available at <http://convention.coe.int/Treaty/en/Treaties/Word/143.doc>

³¹⁹ Hereafter 'the UNESCO Convention'. Although the United Kingdom is unlikely to ratify the Convention in the foreseeable future, it has stated broad acceptance of the Convention's basic tenets including the Annex, while disagreeing with certain specific provisions, in particular, those relating to Sovereign Immunity and 'blanket protection'; see further '*UNESCO Convention on Underwater Cultural Heritage: Explanation of Vote*' Foreign and Commonwealth Office: Whitehall (2001); '*Taking to the Water*' English Heritage (2002) para. 7.3, which makes reference to the Convention and states that there is broad support for virtually all of its provisions.

³²⁰ '*Force for our Future: The Future of the Historic Environment*'. Department for Culture, Media and Sport. (2000) Para. 4.38; also available on-line at www.english-heritage.org.uk/discovery/heritage-review

Executive Summary

1. In order to comply fully with the articles of the *Valletta Convention*, the United Kingdom will be required to make amendments to the legal and procedural framework surrounding the management of the underwater cultural heritage. This interim report concludes that the following recommendations, most of which will require the introduction of new legislation, should be implemented as soon as possible:

- 1.1 The scope of the Protection of Wrecks Act 1973 should be extended to include aircraft and vehicles.
- 1.2 Local Authority Sites and Monuments Records should be a statutory requirement and in coastal authorities should include a maritime component.
- 1.3 Sites recorded on Maritime Sites and Monuments Records should be verified *in-situ*.
- 1.4 A general obligation to report disturbances to historic wreck should be introduced.
- 1.5 The transparency of procedures for designation and licensing should be improved.
- 1.6 Activities which cause disturbance in areas designated under the Protection of Wrecks Act 1973 should be regulated.
- 1.7 Licensing procedures for the removal of human remains should be extended to those found underwater.
- 1.8 Support for educational and museum initiatives to develop public awareness of the value of the archaeological heritage should be continued.
- 1.9 The Ministry of Defence should be prepared to licence appropriate intrusive activities under the Protection of Military Remains Act 1986 where a sound archaeological case can be made for granting a licence.
- 1.10 Provision should be made in the Protection of Wrecks Act 1973 and the Ancient Monuments and Archaeological Areas Act 1979 for the confiscation of equipment used in diving or salvage operations as a sanction in offences relating to underwater cultural heritage, on a similar basis to that provided for in the Protection of Military Remains Act 1986.
- 1.11 Consultation between the Receiver of Wreck and local and national curatorial authorities should be formalised.

- 1.12 Consultation between the relevant Secretary of State and local and national curatorial authorities should be formalised.
- 1.13 Consultation with the relevant Secretary of State in all consent procedures applicable to works and activities affecting the seabed should be formalised.
- 1.14 Consultation between Government departments and heritage agencies prior to the salvage or sale of government owned vessels should be formalised.

2. This interim report has also identified issues where further research is required to determine what specific amendments are needed to the United Kingdom's legal framework relating to underwater cultural heritage legislation to ensure compliance with the *Valletta Convention*. These are:

- 2.1 That Part II of the Ancient Monuments and Archaeological Areas Act 1979 (relating to areas of archaeological importance) should be reviewed, with a view to applying it below the Low Water Mark.
- 2.2 That in the event that the planning regime is extended to below low water, archaeology should be made a material consideration.
- 2.3 That a unified consent procedure should be created for offshore activities.
- 2.4 That the definition of a monument in the Ancient Monuments and Archaeological Areas Act 1979 should be amended to achieve conformity with the definition of archaeological heritage in the *Valletta Convention*.
- 2.5 That the definition of 'wreck' material, which must be reported under the Merchant Shipping Act 1995, should be amended thereby extending the Receiver of Wreck's jurisdiction.
- 2.6 That continued support and encouragement should be given to the Maritime and Coastguard Agency's policy for the Receiver of Wreck to deal with all finds irrespective of their context.
- 2.7 That the remit of the Portable Antiquities scheme should be extended to include maritime finds.
- 2.8 That an alternative mandatory reporting scheme should be introduced in the longer term, which would become the prime legislation relating to the reporting of antiquities.
- 2.9 That the problem of salvors acquiring possessory rights to maritime cultural property, especially in relation to sites designated under the Protection of

Wrecks Act 1973 or scheduled under the Ancient Monuments and Archaeological Areas Act 1979 should be addressed.

- 2.10 That maritime cultural property should be removed from the salvage regime, while continuing to provide an incentive to honesty.
- 2.11 That a general obligation to report disturbances to maritime archaeological remains should be introduced.
- 2.12 That a Code of Practice should be introduced in relation to authorisation and supervision of maritime archaeological activities.
- 2.13 That legislation requiring a form of authorisation for the use of metal detectors, or other detection equipment, where these are specifically directed at the underwater cultural heritage, should be introduced.
- 2.14 That the publishing of publicly accessible Annual Reports in respect of each of the protected wreck sites should be made a statutory obligation.
- 2.15 That a statutory duty should be placed upon all Government departments, agencies, statutory authorities and undertakers to protect and conserve the underwater cultural heritage when discharging their statutory functions.

The JNAPC recommends that such research should be undertaken as a matter of urgency.

3. In the interim, however, a number of recommendations could be given immediate effect, as they will not require the introduction of new legislation. These are:

- 3.1 That more scheduling of monuments underwater occurs under the Ancient Monuments and Archaeological Areas Act 1979. This report has identified that Act as the single piece of legislation with most relevance to the *Valletta Convention*. Many of the requirements of the *Valletta Convention* are met by the Ancient Monuments and Archaeological Areas Act 1979, but only if the sites are scheduled.
- 3.2 That the United Kingdom should expressly adopt the principles of the Annex to the *UNESCO Convention* as a framework for future policy.
- 3.3 That Annual Reports made in respect of wrecks designated under the Protection of Wrecks Act 1973 should be published and relevant information be made publicly accessible.
- 3.4 That the Advisory Committee on Historic Wreck Sites continues to promote public access to suitable designated sites wherever possible.

- 3.5 That a wider educational process should be undertaken within the judiciary, police, maritime regulatory agencies and sea-users to raise awareness of the significance of criminal activities in respect of underwater cultural heritage.
- 3.6 That a Code of Practice governing activities directed at underwater cultural heritage should be endorsed as ‘best practice’ by the Heritage Agencies, the professional and the avocational archaeological communities. This Code would reflect the provisions of the *Valletta Convention* and the Annex to the *UNESCO Convention*.
- 3.7 That the financial resources available to all Government departments and the heritage agencies responsible for maritime archaeology should be reviewed as a matter of urgency to enable them to comply with the provisions and spirit of the *Valletta Convention*.

Background

The United Kingdom's legislation relating to underwater cultural heritage was created piecemeal to deal with specific situations or sites, for example 'Ancient Monuments' or 'Wrecks'. Consequently, within the United Kingdom authorisation of archaeological activity is limited to activities on specific sites covered by legislation such as consent procedures under the Protection of Wrecks Act 1973, the Ancient Monuments and Archaeological Areas Act 1979 and the Protection of Military Remains Act 1986. Furthermore, rather than encouraging preservation in situ as a first principle, the legislation does nothing to remove the financial incentive for the recovery of the underwater cultural heritage. In contrast it is recognised that both the *Valletta* and *UNESCO Conventions* provide a broad ethical approach, based on best practice, relating to the management of all archaeological sites, not just those sites covered by specific heritage legislation. The provisions of these *Conventions* also reflect the changes in archaeological standards and practices that have evolved in the last two decades, particularly in relation to the principle that wherever possible cultural heritage is best preserved in situ for the benefit of future generations.

One of the more intractable difficulties facing any reform of the legal framework is in reconciling these differing approaches, while securing the United Kingdom's compliance with the *Valletta Convention* in respect of underwater cultural heritage.

This report proceeds by examining each of the provisions of the *Valletta Convention* and identifying issues which, in the opinion of the JNAPC, require further consideration or amendment, either to secure the United Kingdom's compliance with the *Convention* or to provide more effective protection for the underwater cultural heritage.

Substance and analysis of the Valletta Convention

1.1 Valletta: Article 1

This article provides a broad definition of the ‘archaeological heritage’, which encompasses more than simply specific wrecks, monuments and military remains currently protected under the United Kingdom’s maritime heritage legislation.

1.2 Attention is drawn to the recommendation in *Heritage Law At Sea*:

That the scope of the Protection of Wrecks Act 1973 be extended to include aircraft and vehicles³²¹.

1.3 Recommendation

In order to secure compliance with the broad definition of ‘archaeological heritage’ in Article 1 further consideration should be given to:

- (i) Amending the definition of a monument in the Ancient Monuments and Archaeological Areas Act 1979. This recommendation is consistent with the Council for British Archaeology’s³²² proposal that “ ... the definition of ‘ancient monument’ should be extended to include ‘any deposit that has been formed by past human activity, or that reflects the effects of such activity on the environment.’”³²³.
- (ii) Extending the scope of the Protection of Wrecks Act 1973 to include aircraft and vehicles.

2.1 Valletta: Article 2

This requires signatory States to make provision for the maintenance of an inventory of ‘archaeological heritage’ as defined under Article 1 and for the designation of protected monuments and areas.

2.2 Recommendation

The JNAPC recommends that the Ancient Monuments and Archaeological Areas Act 1979 should be applied to sites below the low water mark using similar criteria to the scheduling of sites on land and that designations under the Protection of Wrecks Act 1973 should continue where appropriate.

³²¹ *Heritage Law at Sea. Part 2: Protection of Wrecks Act 1973*

³²² *CBA*

³²³ ‘*Valletta Convention: A Summary of the CBA Position*’ British Archaeology, No.62 (December 2001) pp. 43-42; see also ‘*The Valletta Convention – Full Position*’ British Archaeology at http://www.britarch.ac.uk/valletta/valletta_final_cba_fullhtml

2.3 Valletta: Article 2i

Each State's legal system must provide for the maintenance of an inventory and the designation of protected monuments and areas.

2.4 Attention is drawn to the recommendation in *Heritage Law At Sea*:

That Maritime Sites and Monuments Records be established on a statutory basis ³²⁴.

2.5 Recommendation

There is a need for the accuracy of Historic Environments Records to be verified in-situ. Consideration should also be given to extending the Record to encompass vessels out to the limit of the United Kingdom's jurisdiction, in waters of United Kingdom dependencies and United Kingdom vessels in international waters.

2.6 Valletta: Article 2ii

Each State's legal system must provide for the creation of 'archaeological reserves' for the preservation of material evidence to be studied by later generations.

2.7 Comment

Currently it could be argued that these are imposed by the restrictions created by designations under the Protection of Wrecks Act 1973 and Protection of Military Remains Act 1986 and scheduling under the Ancient Monuments and Archaeological Areas Act 1979. However, these only relate to small localised areas around these protected sites.

2.8 Recommendation

Consideration should be given to reviewing Part II of the Ancient Monuments and Archaeological Areas Act 1979, with a view to applying it below the low water mark to 'areas and processes to which the stringencies of monument control cannot extend'³²⁵.

2.9 Valletta: Article 2iii

Each State's legal system must provide for the mandatory reporting of the chance discovery of elements of the archaeological heritage and the making available of them for examination.

2.10 Comment

The Explanatory Report on the *Valletta Convention* states that, "A State ... may only require mandatory reporting of finds of precious materials, or on already listed sites"³²⁶.

³²⁴ *Heritage Law at Sea Part 3: Consultation, Advice and Information*

³²⁵ 'Valletta Convention: A Summary of the CBA Position' British Archaeology, No.62 (December 2001) pp. 43-42; see also 'The Valletta Convention – Full Position' British Archaeology at http://www.britarch.ac.uk/valletta/valletta_final_cba_fullhtml

Currently, mandatory reporting of underwater sites is restricted to the ‘finding or taking possession of wreck’ under the Merchant Shipping Act 1995. In one respect this provision exceeds the requirement in Article 2 iii, because all wreck material must be reported if taken into possession irrespective as to whether it consists of precious materials. Therefore in this respect the United Kingdom’s current provision exceeds that required by the *Valletta Convention*. However there is no requirement to report maritime cultural heritage finds which do not constitute *wreck* under the Merchant Shipping Act 1995³²⁷. It should also be noted that it is unclear whether the Merchant Shipping Act 1995 applies to harbours, which are areas of high archaeological potential.

2.11 Attention is drawn to the following recommendation in *Heritage Law At Sea*:

A general obligation to report disturbances to historic wreck should be introduced³²⁸. Notification to the Receiver of Wreck is currently only required if wreck is recovered and as a result considerable damage can occur to a wreck site before it is brought to the attention of archaeologists.

2.12 Recommendation

Further consideration should be given to:

- (i) Extending the definition of ‘wreck’ material (which must be reported under the Merchant Shipping Act 1995) to include all finds below low water covered by the definition of archaeological heritage in the *Valletta Convention*³²⁹ and to extending the Receiver’s jurisdiction to include harbours if they are not currently covered by the Merchant Shipping Act 1995.
- (ii) Continuing to support and encourage the Maritime and Coastguard Agency’s policy for the Receiver of Wreck to deal with all finds irrespective of their context.
- (iii) Extending the remit of the officers of the Portable Antiquities scheme to include maritime finds, their work being complementary to the role of the Receiver of Wreck, whose office would continue to deal with reports from below the Low Water Mark.
- (iv) Introducing an alternative mandatory reporting scheme in the longer term, which would become the prime legislation relating to the reporting of antiquities both on land and underwater.

³²⁶ *European Convention on the Protection of the Archaeological Heritage (revised) (ETS no. 143) Explanatory Report* p.7. The full text of the Explanatory Report is available at <http://convention.coe.int/Treaty/en/Treaties/Word/143.doc>

³²⁷ There is no full definition of wreck, but it is defined as including *flotsam, jetsam, derelict & lagan*. Section 255 (1).

³²⁸ *Heritage Law at Sea Part 1: Merchant Shipping Act*.

³²⁹ Further consideration should also be given to the Receiver of Wreck’s view that this already happens on a voluntary basis.

- (v) Addressing the problem that can arise in the current situation where individuals can claim to be Salvor in Possession in relation to sites designated under the Protection of Wrecks Act 1973 or scheduled under the Ancient Monuments and Archaeological Areas Act 1979. As Salvor in Possession an individual may acquire possessory rights, which are akin to proprietary rights and could be protected under the European Convention on Human Rights. These proprietary rights will, in the absence of pecuniary compensation, act as a constraint upon the actions of the heritage agencies. This is a complex issue, which raises difficult issues of law and policy. It will require further consideration and debate.
- (i) Removing the ability of a salvor to acquire possessory rights to maritime cultural property.
- (ii) Similarly, consideration should be given to removing maritime cultural property from the salvage regime, while continuing to provide an incentive to honesty³³⁰.
- (iii) That a general obligation to report disturbances to maritime archaeological remains be introduced³³¹.

3.1 **Valletta: Article 3**

This requires the application of procedures for the authorisation and supervision of excavation and other intrusive archaeological activities to protect the 'archaeological heritage' through ensuring that appropriate research techniques and conservation measures are adopted by suitably qualified, specially authorised persons.

3.2 **Comment**

This provision is perhaps one of the most difficult to interpret, since it is arguable that it encompasses an extremely wide range of possibilities, ranging from a requirement to licence all archaeological activities, whereby persons need professional archaeological qualifications in all circumstances, to simply a requirement for deemed qualification and authorisation through compliance with a Code of Practice upon completion of an avocational qualification such as those courses offered by the Nautical Archaeology

³³⁰ The United Kingdom has entered a reservation under Article 30 of the Salvage Convention 1989, which would enable it to remove cultural material from the salvage regime. However the issue remains open as to what regime should then be provided to deal with it.

³³¹ This would go beyond the recommendation in *Heritage Law at Sea*, which recommended that disturbance to only historic wreck be introduced.

Society.³³² This range of possibilities is considered below in relation to the specific provisions of Article 3i a, b & ii.

3.3 Valletta: Article 3i a & b

Each State undertakes to apply procedures for the authorisation and supervision of excavation and other archaeological activities, so as to prevent illicit excavations or removals and so that appropriate methodology is applied to archaeological excavations and prospecting.

3.4 Comment

The CBA does not envisage that ‘blanket protection’ will be applied to terrestrial sites in the United Kingdom. Presumably, parity of policy should be exercised in relation to maritime sites. Currently, in relation to specifically selected sites there are procedures to control activities under the Protection of Wrecks Act 1973, Ancient Monuments and Archaeological Areas Act 1979 and Protection of Military Remains Act 1986, which can require both authorisation and supervision by a competent person. Otherwise, there is no requirement for archaeological authorisation or supervision, although archaeological activity may require consent under other regulatory schemes or proprietary rights. However, archaeological considerations may not be material in determining any application for such consents.

3.5 Attention is drawn to the following recommendations in *Heritage Law At Sea*:

That the transparency of procedures for designation and licensing be improved³³³.

That activities which cause disturbance in restricted areas be prohibited³³⁴.

That licensing procedures for the removal of human remains be extended to those found underwater³³⁵.

3.6 Recommendation

This article raises important issues that require more specific consideration. In particular the introduction of a Code of Practice should be considered. Adherence to the Code would act as a deemed authorisation, except where specific authorisation was required.

3.7 Valletta: Article 3ii

This Article requires that excavations and other potentially destructive techniques should only be carried out by qualified, specially authorised persons.

3.8 Comment

The CBA Position Paper on the *Valletta Convention* notes that: “unlike terrestrial archaeology, the majority of underwater archaeology is undertaken outside any

³³² *Calling the Curators: The Danger of Lists*. The Archaeologist. No.46 IFA. Autumn 2002.

³³³ *Heritage Law at Sea Part 2: Protection of Wrecks Act / Licensing*

³³⁴ *Heritage Law at Sea Part 2: Protection of Wrecks Act / Licensing*

³³⁵ *Heritage Law at Sea Part 4: Miscellaneous / Licensing*

authorisation process.”³³⁶. There is a requirement for a procedure to establish competency before any permission is granted for an excavation or other intrusive activity on an archaeological site. Such a requirement currently only operates in the United Kingdom in relation to specific sites³³⁷. Again the interpretation of this provision is difficult, in that it encompasses a wide range of possibilities from a requirement for a professional archaeological qualification to merely a requirement for avocational training or even explicit adherence to a Code of Practice that involves peer review of project proposals and personnel. However, it is important to emphasise that the *Explanatory Report* states that in relation to *Article 3ii* “ This does not mean to say that members of the public cannot be engaged on excavations. It means that they must be under the control of a qualified person who is responsible for the excavation.”³³⁸.

3.9 Attention is drawn to the following recommendations in *Heritage Law At Sea*: High standards of archaeological investigation and management should be promoted³³⁹.

Organisations with statutory powers should be required to adhere to best practice in respect of underwater cultural heritage³⁴⁰

3.10 Recommendation

The JNAPC is of the opinion that this requirement should be met by a system based upon a combination of demonstrable practical experience and theoretical knowledge of the principles of such techniques. A register of accepted qualifications and courses should also be created.³⁴¹ The appropriate level required for particular circumstances should be a matter of further research and consultation.

The JNAPC also proposes that the principles of the Annex to the *UNESCO Convention* should be adopted as a Code of Practice by all stakeholders engaged in activities on all maritime archaeological sites³⁴². This would require further education of all maritime stakeholders and the JNAPC suggests that the sports diving associations could play a major role in this process.

³³⁶ ‘*Valletta Convention: A Summary of the CBA Position*’ British Archaeology, No.62 (December 2001) pp. 43-42; see also ‘*The Valletta Convention – Full Position*’ British Archaeology at http://www.britarch.ac.uk/valletta/valletta_final_cba_fullhtml

³³⁷ See further para. 3.2 above.

³³⁸ *European Convention on the Protection of the Archaeological Heritage (revised) (ETS no. 143)* *Explanatory Report* p.9. The full text of the Explanatory Report is available at <http://convention.coe.int/Treaty/en/Treaties/Word/143.doc>

³³⁹ *Heritage Law at Sea Part 2: Protection of Wrecks Act 1973*. Note also the commitment to this in ‘*Taking to the Water*’ (EH 2002). Adoption of the UNESCO Annex, even on a policy basis, would provide a template.

³⁴⁰ *Heritage Law at Sea Part3: Consultation, Advice and Information*.

³⁴¹ *Calling the Curators: The Danger of Lists*. The Archaeologist. No.46 IFA. Autumn 2002.

³⁴² The principles could be incorporated into a Code of Practice, as envisaged in para. 3.6 above.

3.11 Valletta: Article 3 iii

This requires the State to subject to specific prior authorisation, whenever foreseen by the domestic law of the State, the use of metal detectors and any other detection equipment or process for archaeological investigation.

3.12 Comment

In relation to the maritime environment this is the most difficult provision to interpret and requires substantial further consideration. Taken at its broadest the use of any equipment that could detect the presence of archaeological remains would need authorisation. However, in a maritime context, such equipment is routinely used for marine navigational and survey purposes, thereby making the presence of such equipment on a vessel perfectly legitimate.

3.13 Recommendation

Consideration could be given to introducing legislation requiring a form of authorisation for the use of metal detectors, or other detection equipment, where these are specifically directed at the underwater cultural heritage.

4.1 Valletta: Article 4

4.2 Valletta: Article 4.iii

This concerns the public provision of resources to acquire and conserve sites and monuments and to maintain properly curated conservation, archive and finds repositories.

4.3 Attention is drawn to the following recommendations in *Heritage Law At Sea*:

The Crown's right of ownership of unclaimed wreck should be extended to that recovered beyond territorial waters³⁴³.

A power for the Crown to re-purchase rights to wreck should be introduced³⁴⁴

Environmental degradation of protected wrecks should be reduced³⁴⁵.

Explicit management strategies for protected wrecks should be prepared³⁴⁶.

Long-term support for a diving team of professional archaeologists should be provided³⁴⁷.

³⁴³ *Heritage Law at Sea* Part 2: Merchant Shipping Act 1995. This would reverse the decision in *The Lusitania* [1986] 1 Lloyd's Rep. 132 to the effect that title to wreck covered in international waters and landed in the United Kingdom, which remains unclaimed by an owner, reverts to the salvor.

³⁴⁴ *Heritage Law at Sea* Part 2: Merchant Shipping Act 1995.

³⁴⁵ *Heritage Law at Sea* Part 2: Protection of Wrecks Act 1973.

³⁴⁶ *Heritage Law at Sea* Part 2: Protection of Wrecks Act 1973. Note the commitment to this in *Taking to the Water* (EH 2002).

5.1 Valletta: Article 5

This is concerned with integrating archaeology into the planning regime.

5.2 Recommendation

In stating its position with regard to the *Valletta Convention*, the CBA³⁴⁸ has recognised the value of the principles of the current planning guidance contained within PPG15, 16 and 20 and has recommended their increased use. Furthermore, it is suggested that the planning regime should be extended below the Low Water Mark, out to the limit of the United Kingdom's territorial waters. In light of the ongoing ODPM/DFT *Review of Planning*³⁴⁹ the JNAPC recommends in the strongest terms that, should this occur, archaeology should be made a material consideration. In any event particular attention should also be paid to the creation of a unified consent procedure³⁵⁰ for development below the Low Water Mark, in which archaeology should be expressly made a material consideration, as identified in *Safeguarding our Seas*³⁵¹.

6.1 Valletta: Article 6

Each State has undertaken to provide for public financial support for archaeological research and to increase the material resources for rescue archaeology by covering the costs, either from the private or public sectors, of any related archaeological operations, of preliminary archaeological study, and the collection and dissemination of scientific information.

6.2 Comment

In *Heritage Law At Sea* it was recommended that responsibility for underwater cultural heritage in England be transferred from the Department for Culture, Media and Sport to English Heritage and that funding be provided for the investigation and management of protected wrecks³⁵². This has now been achieved in principle by the National Heritage

³⁴⁷ *Heritage Law at Sea Part 2: Protection of Wrecks Act 1973*. Note the commitment to this in *Taking to the Water* (EH 2002).

³⁴⁸ 'Valletta Convention: A Summary of the CBA Position' British Archaeology, No.62 (December 2001) pp. 43-42; see also 'The Valletta Convention – Full Position' British Archaeology at http://www.britarch.ac.uk/valletta/valletta_final_cba_fullhtml

³⁴⁹ Office of the Deputy Prime Minister and Department for Transport.

³⁵⁰ Some progress has been made towards establishing a less complicated consent procedure by the creation of the *Marine Consents and Environment Unit*. DEFRA/DFT at <http://www.mceu.gov.uk>

³⁵¹ DEFRA 2002.

³⁵² *Heritage Law at Sea Part 2: Protection of Wrecks Act 1973*. paras. 2.2 & 2.11.

Act 2002, although the resources that have been transferred by the Department for Culture, Media and Sport to English Heritage are inadequate for the management of underwater cultural heritage and to implement fully the provisions of the *Valletta Convention*.

6.3 Recommendation

That the resources available to the heritage agencies for maritime archaeology should be reviewed as a matter of urgency.

In the light of the requirement in the *Valletta Convention* that the financing of rescue archaeology is a component of development schemes, further consideration is given to:

- (i) extending the planning regime below the Low Water Mark, out to the limit of United Kingdom's jurisdiction, as recommended in para. 5.2 above.
- (ii) the creation of a unified consent procedure, in which archaeology should be expressly made a material consideration, as identified in *Safeguarding our Seas*³⁵³ and as recommended in para. 5.2 above.
- (iii) introducing a statutory duty upon all Government departments, agencies, statutory authorities and undertakers to protect and conserve the underwater cultural heritage when discharging their statutory functions.

7.1 Valletta: Articles 7 and 8

These articles are important in promoting the case for better publication and dissemination of information. For instance, they require preliminary summary publication of the results of excavations (Article 7).

7.2 Comment

Article 7, in conjunction with Articles 3 and 5, should be used to impose stronger requirements on excavators to publish.

7.3 Attention is drawn to the following recommendation in *Heritage Law At Sea*:

Annual Reports should be published in respect each of the protected wreck sites and relevant information should be made publicly accessible³⁵⁴.

7.4 Recommendation

That the above recommendation in *Heritage Law at Sea* be made a statutory obligation.

³⁵³ DEFRA 2002.

³⁵⁴ *Heritage Law at Sea* Part 2: Protection of Wrecks Act 1973 para. 2.3

8.1 Valletta: Article 9

8.2 Valletta: Article 9.i

This requires the State to conduct educational actions to develop awareness in public opinion of the value of the archaeological heritage in terms of understanding the past and of threats to it.

8.3 Comment

Government and the heritage agencies have already made funding available for diver training and education for the past twelve years and as a result the general public and the diving community are now more aware of the value of maritime archaeology than at any time in the past. The success of the NAS Training Programme and its associated Diving with a Purpose and Adopt a Wreck projects have initiated a cultural change in attitudes toward the underwater cultural heritage. Nevertheless, support for such educational initiatives should continue in order to ensure the United Kingdom's compliance with Article 9i.

8.4 Recommendation

- (i) Consideration should be given to increasing the resources available for public education in relation to all aspects of the maritime heritage.
- (ii) Support for such educational initiatives should continue in order to ensure the United Kingdom's compliance with Article 9i.

8.5 Valletta: Article 9.ii

This requires the State to promote public access and displays of archaeological heritage.

8.6 Comment

In relation to the Ancient Monuments and Archaeological Areas 1979 Act scheduled sites are accessible to the public. Sites designated under the Protection of Wrecks Act 1973 are not accessible to the public, unless a visitor licence is granted to named individuals. In relation to the Protection of Military Remains Act 1986 public access is freely available to the exterior of wrecks, which are designated as Protected Places, but is not available to sites designated as Controlled Sites, except by licence to named individuals.

8.7 Recommendation

- (i) Increasing the number of designations under the Ancient Monuments and Archaeological Areas Act 1979 could extend the principle of 'look but do not touch' and need not restrict access, unless a site was deemed to be fragile.

- (ii) In relation to the Protection of Wrecks Act 1973, the policy of the Advisory Committee on Historic Wrecks Sites has moved towards the granting of visitor licences and diver trails. Any subsequent management strategy should include extending the visitor schemes already established on suitably robust wrecks designated under the Protection of Wrecks Act 1973.
- (iii) The Ministry of Defence should be prepared to licence appropriate invasive activities where a sound archaeological case can be made for granting a licence. In relation to wrecks designated as Controlled Sites no public access is available but again a licence should be granted for appropriate archaeological activities and the Ministry of Defence is legally obliged to consider each case on its merits.

9.1 Valletta: Articles 10 and 11

These relate to the control of illicit trade in antiquities.

9.2 Comment

This trade is also subject to the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership in Cultural Property 1970*, which the United Kingdom has ratified. Section 245(1) Merchant Shipping Act 1995 is also of relevance. This makes it an offence to take wreck from within United Kingdom tidal waters to a foreign port for sale. In relation to interference with protected or scheduled underwater sites, experience has shown that the police and other State agencies do not always regard this as a serious matter, mainly due to an ignorance of the law or the evidentiary difficulties confronting prosecution. An exception to this has been the proactive efforts of the Maritime and Coastguard Agency.

9.3 Recommendation

A wider educational process should be undertaken within the judiciary, police, maritime regulatory agencies and sea-users to raise awareness of the significance of criminal activities in respect of underwater cultural heritage.

9.4 The following recommendations in *Heritage Law at Sea* would improve the protection of the UCH, thereby assisting the implementation of *Valletta Convention*:

- (i) Provision should be made for the confiscation of equipment used in diving or salvage operations as a sanction in offences relating to underwater cultural heritage, on a similar basis to that provided for in the Protection of Military Remains Act 1986³⁵⁵.

³⁵⁵ *Heritage Law at Sea* Part 4:Miscellaneous para. 4.2

- (ii) Formalise consultation between the Receiver of Wreck and local and national curatorial authorities³⁵⁶.
- (iii) Formalise consultation between the relevant Secretary of State and local and national curatorial authorities³⁵⁷.
- (iv) Formalise consultation with the Secretary of State in all consent procedures applicable to works and activities affecting the seabed³⁵⁸.
- (v) Formalise consultation between Government departments and heritage agencies prior to the salvage or sale of government owned vessels³⁵⁹.

³⁵⁶ *Heritage Law at Sea Part 3: Consultation, Advice and Information* para. 3.1.

³⁵⁷ *Heritage Law at Sea Part 3: Consultation, Advice and Information* para. 3.2

³⁵⁸ *Heritage Law at Sea Part 3: Consultation, Advice and Information* para. 3.3

³⁵⁹ *Heritage Law at Sea Part 3: Consultation, Advice and Information* para. 3.6

Conclusion

It is accepted that some of the proposals for change made in *Heritage Law at Sea* have been addressed since its publication in 2000, but many of the issues raised in that report remain to be addressed. More importantly, it should be emphasised that the adoption of the *Valletta Convention* by the United Kingdom has added a further imperative for amendment to the legal framework surrounding the underwater cultural heritage. The debate has now moved considerably beyond the issues raised in *Heritage Law at Sea*. This progression is underlined by the fact that even if all the proposals made in *Heritage Law at Sea* were implemented this would still not fully satisfy the United Kingdom's obligations under the *Valletta Convention*.

This report has identified those areas that require further substantial research and deliberation to determine what amendments are needed to the United Kingdom's legal framework relating to underwater cultural heritage legislation to ensure that it meets fully its obligations under the *Valletta Convention*.

The JNAPC recommends that such research should be undertaken as a matter of urgency. The objective should be that any legislative reforms enjoy a high degree of consensus within the marine constituency.

Appendix

Members of the Joint Nautical Archaeology Policy Committee

Chairman

Robert Yorke

Organisations

| | |
|---|------------------------------------|
| Association of Local Government Archaeological Officers | Paul Gilman |
| British Sub-Aqua Club | Jane Maddocks |
| Council for British Archaeology | George Lambrick, Alex Hunt |
| Hampshire & Wight Trust for Maritime Archaeology | Garry Momber |
| Institute of Field Archaeologists | David Parham |
| ICOMOS | Christopher Dobbs |
| National Maritime Museum | Gillian Hutchison |
| National Museum & Galleries of Wales | Mark Redknap |
| National Trust | Rob Woodside |
| Nautical Archaeology Society | Lucy Blue |
| Nautical Archaeology Society / Training | Chris Underwood & Amanda Bowens |
| Professional Association of Diving Instructors | Suzanne Pleydell |
| Shipwreck Heritage Centre | Peter Marsden |
| Society for Nautical Research | Alan Aberg |
| Sub-Aqua Association | Stuart Bryan |
| UK Institute for Conservation | Amanda Sutherland |
| Wessex Archaeology | Antony Firth |

Individual representation Affiliations

| | |
|------------------|---|
| Sarah Dromgoole | University of Leicester |
| Valerie Fenwick | previously CBA |
| David Tomalin | previously County Archaeologist, Isle of Wight |
| Michael Williams | University of Wolverhampton |

Observers

| | |
|---|-----------------|
| Archaeological Diving Unit | Martin Dean |
| CADW | Sian Rees |
| English Heritage | Ian Oxley |
| English Heritage | Steve Waring |
| Environment Service, Northern Ireland | Brian Williams |
| Historic Scotland | Olwyn Owen |
| Maritime and Coastguard Agency, Receiver of Wreck | Sophia Exelby |
| Ministry of Defence | Peter MacDonald |
| Royal Commission on the Ancient and Historical Monuments of Scotland | Robert Mowat |

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Marine Archaeology Legislation Project

Part 3: Reforming the Structure: An Outline of the Options

Part 3: Reforming the Structure: An Outline of the Options

Introduction

This part identifies and examines the options available for reform of the existing legislative framework surrounding marine archaeology. The objective of such reform would be to create a revised, feasible and effective designation and control system for underwater cultural heritage, which is fit for purpose and supports the ‘A Force For Our Future’ policy framework to protect and sustain the historic environment as a whole rather than its constituent parts.

This examination commences by outlining the designation and control systems surrounding marine archaeology in some comparable Common Law jurisdictions, which operate upon legal principles and traditions inherited from English Common Law. It then identifies the principles that would guide and shape any legislative reform in the United Kingdom. Finally, it presents four broad options for reform of the existing legislative structure in the United Kingdom.

Law & Practice in Comparable Common Law Jurisdictions

Introduction

In order to provide a point of comparison with the legal structure applicable to maritime archaeology in the United Kingdom, and the proposal considered in Part 3 of this report, this section will consider the legal framework applicable to maritime archaeology primarily in Australia, South Africa, the Republic of Ireland and Bermuda, although a number of other States may be referred to where applicable. These States are considered as they have both a common law tradition and have legislation and experience in the protection of underwater cultural heritage. It is not intended that this section provide a comprehensive account of the legal structure pertaining to maritime archaeology in each of these jurisdictions, but will address those issues which relate to the legal consideration of the United Kingdom scheme considered in this Part as a direct source of comparison. Rather than deal with each jurisdiction separately, this section will consider the issues raised in Parts 1 and 3 of this report thematically.

Underwater Cultural Heritage and Salvage Law

As identified in Part 1 of this report, a central characteristic of the existing legal structure applicable to historic wreck in the United Kingdom is the continued reliance on the law of salvage to govern recovery of wreck. Options 2 and 3 in Part 3 of this Report proposes, to a various degree, the non application of salvage law to historic shipwreck. Such a development is consistent with the development of a protection regime in both Australia, South Africa, the Republic of Ireland and to a certain extent, in Bermuda and the United States, the State with most active historic shipwreck salvage industry.

Given its colonial history, Australia has much in common with the legal structure of the United Kingdom and shares the same legislation first applied to underwater cultural heritage: the *Merchant Shipping Act 1894*. After Federation in 1901, this legislation was replaced by the *Navigation Act 1912*, which though more appropriate to Australian conditions in many respects, simply repeated the provision of the *Merchant Shipping Act 1894* in relation to wreck and salvage. It continues to provide for a legal regime applicable to wrecks, including the appointment of a *Receiver of Wreck*, to whom all recoveries are reported, and who is responsible for returning the wreck to its owner and rewarding the salvor for his efforts. Unclaimed wreck is vested in the Crown and may be sold and an award made to the salvor. However, unlike the United Kingdom, this regime is no longer a principal characteristic of the regime applicable to maritime archaeology in Australia as the pertinent sections of the *Navigation Act 1912*³⁶⁰ are made inapplicable to historic wreck as defined by the *Historic Shipwrecks Act 1976*. Thus, no person has a right to enter into possession of an historic wreck, and cannot therefore be recognised as a salvor in possession. No salvage award is obtainable, and the statutory protection regime replaces salvage in its entirety. It is this inapplicability of salvage law to underwater cultural heritage which most distinguishes the Australian regime to that of the United Kingdom.

³⁶⁰ Section 295A and 295B *Navigation Act 1912*.

A similar situation exists in South Africa and the Republic of Ireland. In South Africa the British system for the regulation of shipwrecks, as exemplified in the *Merchant Shipping Act 1894*, was the basis for the salvage of wreck during colonial times, and continues to influence the modern system in the form of the South African *Customs and Excise Act 1996*³⁶¹ and the *Wreck and Salvage Act 1996*³⁶². The *Customs and Excise Act 1996* in fact provides for a system of regulation similar to that applied in the United Kingdom *Merchant Shipping Act 1995*, in that it provides for a Controller who performs similar function to that of the Receiver of Wreck; such as receiving reports of recoveries, taking such recoveries into their possession and determining ownership and salvage issues, including the possible sale of the recovered property. However, salvage activity off the South African coast is more tightly regulated as a permit is required for the search of a wreck or the search for a wreck, and conditions may be attached to such activities, including the use of remote sensing devices. The *Wreck and Salvage Act 1996* applies only to the removal of wreck that poses a danger or obstructions, and it is expressly stated that this Act will not derogate from the *National Monuments Act 1969*, now replaced by the *National Resources Heritage Act 1999*. The former Act, amended in 1979 to include historic shipwrecks, was the first to provide any protection to historic shipwrecks and provided for a permit system for the recovery of any wreck older than 50 years. This legislation did not remove historic wreck completely from the salvage regime, but it did remove the right of a salvor to be recognised as salvor in possession. However, salvors continued to be required to obtain a salvage licence from Customs and Excise. Before a permit would be issued to recover material, a salvor was first required to enter into an agreement with a public museum to act as a partner in an recovery operation before a recovery permit was issued by the National Monuments Council. The permit made the salvage operation subject to a number of archaeological requirements, and recovered material was to be deposited with the Museum for conservation and until the splitting up of the recoveries was arranged. The salvor and the museum were to split any items recovered from the wreck, with the museum having first choice of the objects recovered, then the salvor. Practise in South Africa, however, rarely followed this regulatory structure, and though transgressions were known, little action was ever taken due either to a lack of evidence or the potential costs involved in undertaking legal action. No prosecution were ever undertaken under this legislation³⁶³. Much of the recovery for historic shipwrecks was therefore undertaken clandestinely or if in accordance with the regulations, the salvors dominated the relationship with the Museums, who were ill-equipped to conserve material recovered, and often did not have experienced maritime archaeologists to supervise recovery. The *National Heritage Resources Act 1999* improves this system by granting the South African Heritage Resources Agency (SAHRA) a very wide discretion in determining terms under which a permit will be issued. The current policy is not to issue permits to any salvor in which a splitting of material is proposed, thus, the old system of splitting the recovered material no longer exists. Effectively this has done away with salvage in South African waters, as a salvor

³⁶¹ Act No. 91 of 1996.

³⁶² Act No. 94 of 1996.

³⁶³ Bruno Wertz, 'South African shipwrecks and salvage: the need for improved management' (1993) 22 *International Journal of Nautical Archaeology*, 237 at 240.

can simply not obtain a permit to undertake any recovery on any wreck over 60 years unless the object is purely for scientific purposes.

In the Republic of Ireland, under the *National Monuments Act 1987*³⁶⁴, it is an offence to dive on, damage, or generally interfere with any wreck over 100 years old or any archaeological object. Underwater Heritage Orders are automatically issued for any wrecks over 100 years, which further restricts any activity directed at such wrecks and effectively removes them from the ambit of the salvage regime. While it is theoretically possible for a salvor to obtain a licence to salvage with a wreck protected by an Underwater Heritage Order for commercial gain, existing policy guidance would make this extremely unlikely.

Given the importance of the salvage industry and the continued role salvage law plays in relation to recovery of historic shipwreck in the United States, it is appropriate to consider briefly the United States legal structure in this regard. How historic shipwrecks are dealt with is a complex mix of Federal and State jurisdictions. In cases where individual States regulate activities directed at historic shipwrecks, huge discrepancies exist between States practice. Texas, for example, has a well developed preservation regime which excludes the application of salvage law, while Florida has an active salvage community, though this salvage is relatively closely regulated³⁶⁵.

While salvage law principles applied in the US and the United Kingdom are basically similar, the application and administration of salvage law to the recovery of historic shipwreck differs markedly. Federal admiralty courts³⁶⁶ have assumed jurisdiction and applied salvage law to a variety of circumstances, including such items as aeroplanes, fishing nets adrift at sea, floating logs, money found on a floating corpse³⁶⁷ and even slaves, considered cargo aboard a capsized vessel.³⁶⁸ Wrecked vessels, irrespective of the length of time they have been wrecked, are considered maritime property, and susceptible to salvage law. However, increasingly Federal and State heritage agencies have viewed the application of traditional salvage law to the recovery of underwater cultural heritage

³⁶⁴ S.3(4).

³⁶⁵ Given the vast array of different State practises, and the limited scope of this section of the report, only the Federal legislation and the place of salvage will be considered, as this may provide a basis for some comparison with the place of salvage law in the United Kingdom. Because the day to day administration of shipwrecks is conducted by States, this section cannot offer any comparisons to that of the United Kingdom.

³⁶⁶ According to Article III, Section 2 of the United States Constitution, the Federal Courts have exclusive admiralty jurisdiction, which includes salvage of wrecked vessels. See for example, *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F. 2d 1059, 1063-1064; *Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540, 548 (S.D.Fla.1982). *North Pacific S.Co. v. Hall Bros. Co.*, 249 U.S 119 (1919); *The George W.Elder*, 206 F.268 (9th Cir. 1913). However, in *Set v. Unidentified, Wrecked and Abandoned Vessel* 941 F.2d 525, 531 (7th Cir. 1991) the court considered it a close question whether abandoned shipwreck litigation was ever "properly, firmly within the scope of admiralty jurisdiction." See S.L. McLaughlin, 'Roots, Relics and Recovery: What went wrong with the Abandoned Shipwreck Act of 1987' (1995) 19 *Columbia-VLA Journal of Law and the Arts*, 161.

³⁶⁷ *Broere v. Two Thousand One Hundred and Thirty Three Dollars*, 72 F.Supp. 115, 1947 AMC 1523

³⁶⁸ The rescue of barges, dry docks and rafts have not been considered to be the class of property to which salvage law will apply. See *Cope v. Vallete Dry Dock Co.*, 119 U.S 625 (1887).

as inappropriate in that it fails to protect its archaeological and historical integrity. Federal and State Governments have therefore attempted to either regulate the salvage law as it applies to the recovery of underwater cultural heritage, or replace salvage law with a unique regulatory system of recovery. The ability of the Federal government or State government to apply these laws is restricted, however, by the sanctity of private ownership enshrined in the US Constitution and which forms the basis for the US legal system. However, with regard to abandoned historic wreck, it was recognised that salvage law could be made inapplicable. The Act was stated to be a preservationist measure; not only as a means of protecting the integrity of the vessels themselves, but also the surrounding areas, which were often affected by salvage operations³⁶⁹. The premise of the *Abandoned Shipwreck Act 1987* is that traditional admiralty law of salvage and finds was inappropriate and insufficient to protect historic wreck. “Congress feared that shipwreck salvors were akin to plunderers, and that maritime law could not save the ships from ruin.”³⁷⁰ Salvage law and the law of finds was therefore made inapplicable to those shipwrecks falling within the remit of the *Abandoned Shipwreck Act 1987*³⁷¹. It was presumed that the State was in the best position to recover and conserve historic artefacts, and that salvors would not be able to do so to the same exacting standards. The Federal Government also wished to avoid any associated expenses and ensured that it would have no role in the management of shipwrecks in State waters. The *Abandoned Shipwreck Act 1987* therefore passed title to States without the States having to comply with any duties, such as having in place appropriate preservation and management legislation. This has led to the discrepancies that exist with regard to State practice today. The State, and not the Federal Government, would therefore manage historic shipwrecks in State’s waters through either its courts or its administrative agencies.

Clearly the major shortcoming of the *Abandoned Shipwreck Act 1987* is that it applies only to abandoned vessels, and cannot be applied to shipwreck still owned, either by the original owner or subsequent title holders, or more commonly by insurance companies under the principle of subrogation. The *Abandoned Shipwreck Act 1987* only concerns the recovery of underwater cultural heritage situated within a State’s territorial waters, currently 3nm. As the *Abandoned Shipwreck Act 1987* only concerns abandoned vessels, all other vessels within this territory will be susceptible to the application of traditional salvage law, as will any vessel, abandoned or not, situated either beyond the 3nm in the US territorial waters, or in any other maritime zone, including international waters. Salvage law therefore can be regarded as the basis upon which most activities directed at underwater cultural heritage are governed. This is made worse by the failure of the legislation to define the term abandoned, which is therefore determined according to the traditional maritime law. The intent of the *Abandoned Shipwreck Act 1987* was to remove the application of salvage law to abandoned historic wreck in State waters, which was resented by the Federal Admiralty courts as a reduction of their jurisdiction. The debate over the application of salvage law to historic wreck was therefore coloured by a

³⁶⁹ H.R 1195, 96th Congress 1st Sess. (1979)

³⁷⁰ S.L McLaughlin, ‘Roots, Relics and Recovery: What went wrong with the Abandoned Shipwreck Act of 1987’ (1995) 19 *Columbia-VLA Journal of Law and the Arts*, 159.

³⁷¹ 43 U.S.C Section 2106(a) states that “the law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 6 of this Act applies.”

jurisdictional wrangle between Congress and the Federal Admiralty Courts³⁷², which has led to further uncertainty regarding the constitutionality of the *Abandoned Shipwreck Act 1987*³⁷³.

Similarly, in Bermuda the removal of shipwrecks of historical interest from the salvage regime hinges upon the concept of abandonment by owners. The *Historic Wrecks Act 2001* defines a “wreck” or “historic wreck” abandoned for at least 50 years by its owner, which is not “... at the relevant time being processed for salvage or sale ... “ under Bermudan salvage legislation. Wreck includes any item derived or associated with a shipwreck. The removal of historic shipwreck from the ambit of the salvage regime is further evidence an emerging trend in the common law jurisdictions studied here. However, no definition of ‘process’ or ‘abandonment’ is provided, so presumably this is a question of fact and degree in any particular case and the difficulties of establishing abandonment which have bedevilled the *Abandoned Shipwreck Act 1987* may arise in respect of the *Historic Wrecks Act 2001*.

Statutory regimes applicable to underwater cultural heritage

In Australia, the Commonwealth *Historic Shipwrecks Act 1976* is the most important legislation applicable activities directed at shipwrecks in Australian waters³⁷⁴. Because of Australia’s federal political structure, this Commonwealth legislation applies beyond the 3nm limit, but the States have agreed to apply it to the State territorial waters within 3nm.³⁷⁵ A State may, however, request that this Commonwealth legislation no longer apply to these waters if it so desires. The Commonwealth legislation does not apply to underwater cultural heritage within the limits of the State, and all the State have proclaimed legislation which in various ways concerns underwater cultural heritage in their jurisdiction³⁷⁶.

The Act is administered by the Commonwealth Department of Environment and Heritage, and underpins the National Historic Shipwreck program, which sets out uniform common objectives and guidelines. These uniform objectives are addressed at the State and Territory level, and many of the powers under the Act are delegated to the various State and Territory agencies that implement the program. The annual budget allocation from this Department to the States and Territories was Aus\$330,000 in 2000/2001, a decline from Aus\$460,000 in 1999/2000. Each State and Territory

³⁷² *California and State Lands Commission v. Deep Sea Research, Inc* (The Brother Jonathan).

³⁷³ See *Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the SB “Lady Elgin”* “ 941 F.2d 525 (7th Cir. 1991)

³⁷⁴ See Bill Jeffrey and Viv Moran, ‘Going Down?: The foundering of the National Historic Shipwreck Program’ (2001) 25 *The Bulletin of the Institute for Maritime Archaeology* 121.

³⁷⁵ While Australia has an extensive coastline, the number of wrecks along this relatively newly discovered land, by European standards, numbers only about 6500. However, the number of underwater cultural heritage sites in Australian waters that do not derive from shipwrecks or European exploration and habitation, but derive from the aboriginal community may be considerable. See Shipwreck Database, at <http://www.ea.gov.au/heritage/lists/shipwrecks.html> (accessed 9 June 2003).

³⁷⁶ State legislation applicable to underwater cultural heritage is as follows: South Australia - *Historic Shipwreck Act 1981*, No. 76 of 1981; Victoria - *Heritage Act 1995*; Tasmania - *Historic Cultural Heritage Act 1995*; New South Wales - *Heritage Act 1977*; and Queensland - *Heritage Act 1992* and *Cultural Record (Landscape Queensland and Queensland Estate) Act 1987*.

Government also provides funding for the program, which includes funding for that aspect of the State's program that applies to historic shipwrecks within the State's waters.

In Bermuda the introduction of legislation to protect historic shipwreck is even more recent. The *Historic Shipwreck Act 2001* has introduced a new statutory regime for regulating the management of abandoned shipwrecks over 50 years old and 'marine heritage sites'. These sites are areas which are not known to contain a wreck but may contain 'historical artefacts', which are items of wreck associated with a wreck over 50 years old. The Act establishes a 'Historic Wrecks Authority' (HWA) and the office of 'Custodian of Historic Wrecks' (CHW). The HWA is an advisory body, charged with advising the relevant Minister on matters relating to the management of historic wrecks and marine heritage sites and the CHW on public access to historic wrecks and the issuing of licences in respect thereof. The CHW is charged, inter alia, with classifying all known wrecks over 50 years old, which have been abandoned for at least 50 years by their owners and which are not "... at the relevant time being processed for salvage or sale ... " under Bermudan salvage legislation. Such classification then determines the extent of public access.

The management and protection of cultural heritage in South Africa was considerably updated in 1999 with the passing of the *National Heritage Resources Act 1999* and the creation of the South African Heritage Resources Agency (SAHRA). By including the regulation of underwater cultural heritage within a general heritage Act, the South African legislation differs markedly to that of the United Kingdom, Australia and Bermuda in that there is no specific legislation pertaining only to historic shipwreck. The inclusion of the protection regime for underwater cultural heritage in a general heritage Act has the advantage of dealing with both underwater and territorial cultural heritage in a manner which ensures that there is a seamless protection regime over all cultural heritage within South African territory, and one set of policy objectives are applied. The disadvantage is that any differences are minimised, which can be counter-productive in addressing the peculiar problems associated with underwater cultural heritage.

This characteristic of legislation encompassing all forms of cultural heritage, both terrestrial and marine, shipwreck and non-shipwreck, is also evident in the Republic of Ireland's legislation. The present structure of this regulatory regime is a direct result of litigation resulting from discoveries of wrecks from the Spanish Armada by recreational divers in the 1980's³⁷⁷. Duchas (the Irish Heritage Service) is responsible for advising the relevant Minister on the application of the heritage legislation, managing the national monuments in the care of the State, carrying out the national survey and advising development control authorities. The National Museum of Ireland (NMI) is responsible for licensing the export of archaeological objects under the *National Cultural Institutions Act 1997* and the licensing of excavations under the National Monuments Acts 1930 - 1994. The Director of the NMI is also responsible for receiving notifications of unclaimed wreck under the *Merchant Shipping (Salvage & Wreck) Act 1993* and its retention if it is of archaeological interest. The system of regulation of activities directed

³⁷⁷ See further King and Chapman v. The Owners and all Persons claiming an Interest in the Sailing Vessels La Lavia, Juliana and Santa Maria de la Vision (High Court of Ireland) Unreported 26 July 1994.

at the heritage is based upon the precautionary principle of non destructive investigation wherever possible, with preservation in situ preferred to preservation by excavation, recording and conservation. Policy guidance dictates that archaeological assessment, monitoring and excavation may only be carried out by suitably qualified professional archaeologists, although this does not preclude the involvement of avocational persons under appropriate supervision. Interestingly, the regulatory regime also extends to possession of archaeological objects, not just their recovery. No person is allowed unauthorised possession of an archaeological object found after 1994 or unauthorised possession of such an object found between 1930 and 1994³⁷⁸.

Notable elements of these statutory regimes

Defining the heritage resource

Option 3 of this Report considers the drafting of a definition of ‘*marine cultural heritage*’ and ‘*marine heritage asset*’, the latter being more fully utilised if a system of blanket protection for the former is not adopted. Both Australia and South Africa have opted for a system of blanket protection, that effectively implements the precautionary principle and ensures that all underwater cultural heritage is preserved in situ until such time as a determination is made to recover.

The Australian legislation defines ‘historic wreck’ as “remains of ships situated in Australian water, or waters above the continental shelf of Australia, adjacent to the coast and at least 75 years old”.³⁷⁹ Originally, the Act applied only to specific wrecks designated as historic wrecks, and in some cases was used in order to protect commercially valuable wrecks from salvage activities. The Act was amended in 1985 to apply a blanket designation to all shipwreck that has sunk over 75 years ago, effectively removing these shipwrecks from the salvage provision of the *Navigation Act 1912*.

The second principal characteristic of the United Kingdom legislation identified in Part 1 of this Report as being detrimental to the underwater cultural heritage is the omission from the legal structure of a satisfactory mechanism for protecting archaeology which is not derived from shipwrecks. The Australian legislation suffers from the same disability as it applies only to shipwrecks and related relics and not to other cultural heritage such as submerged sites, of either European or Aboriginal origin. Neither does this legislation apply to historic aircraft, nor is it likely to apply to amphibious vehicles³⁸⁰.

Shipwrecks that sank less than 75 years ago may be protected by specific designation³⁸¹, determined by consideration to guidelines which prescribe criteria for the determination

³⁷⁸ S.4(1) National Monuments Act 1994. The significance of 1930 stems from the National Monuments Act 1930. This provision does not apply to possession for the purpose of reporting a find or possession under a licensed excavation.

³⁷⁹ Section 4 *Historic Shipwreck Act 1976*.

³⁸⁰ For example, the Catalina aircraft wreck off Darwin. See S. Jung, ‘Archaeological investigation of the Catalina wreck sites in East Arm, Darwin Harbour’ (1996) 20 *The Bulletin of the Australian Institute for Maritime Archaeology* 23. See also Jeremy Green, ‘Management of maritime archaeology under Australian legislation’ (1995) 19 *The Bulletin of the Australian Institute for Maritime Archaeology*, 33, at 39.

³⁸¹ s.5.

of the significance of the object³⁸². Given the 75 period, this is, however quite rare. For example, in New South Wales, of the 1393 protected wrecks only one is less than 75 years old, the *Commodore*, that sank in 1931 and is therefore close to falling within the blanket protection period³⁸³.

A very similar system is applied in Bermuda. As the title of the *Historic Shipwreck Act 2001* indicates, the legislation is concerned solely with the protection of shipwrecks or material derived there from. As noted above, wrecks over 50 years old may be classified as historic. However, the comprehensiveness of this provision is limited to some extent by the fact that it must have been abandoned by its owner for that period of time and is not being processed for salvage at the relevant time.

Conversely, in South Africa and Ireland a more holistic view of cultural heritage is taken. South Africa includes in the protection of ‘archaeological’ material are wrecks, being any vessel or aircraft, or part thereof, and any cargo, debris or artefact associated therewith, which is older than 60 years or which SAHRA considers to be worthy of conservation³⁸⁴. However, unlike Australia, the South African legislation provides for protection of all underwater cultural heritage, and not just historic wreck. Other possible underwater cultural heritage is included within the broader terms relating to settlements, rock art and other archaeological and palaeontological material³⁸⁵.

A similarly wide view of cultural heritage is taken by legislation in the Republic of Ireland. ‘Wreck’ is widely defined by the *National Monuments Act 1987*, encompassing a wrecked vessel, any part of it or any object derived from it³⁸⁶. Non wreck material of archaeological interest falls within the definition of ‘archaeological object’ in the *National Monuments Act 1930* (as amended)³⁸⁷. This includes any chattel, whether manufactured or not, having a value greater than its intrinsic value, including its artistic value, due to association with an historical event and any ancient human, animal or plant remains. While this very wide definition would not encompass submerged pre-historic landscapes per se, human, animal and plant remains therein would fall within the regulatory regime.

Significance

A guiding principle underpinning the Options outlined in Part 3 of this Report is the need for a ‘robust and respected mechanism for determining that is worthy of protection. Such a significance requirement would distinguish ‘*marine cultural heritage*’ from ‘*marine heritage assets*’.

³⁸² Graeme Henderson (ed). *Guidelines for the management of Australia’s Shipwrecks* (1994).

³⁸³ David Nutley, NSW Heritage Office, personnel communication (on file with author).

³⁸⁴ s.2(ii). This applies to shipwrecks whether on land or in South African internal waters, territorial waters, or cultural maritime zone, which extends to 24nm from the baseline as defined in the *Maritime Zones Act* No. 15 of 1994.

³⁸⁵ s.2.

³⁸⁶ s.1.

³⁸⁷ s.1.

Significance in the Australian context is a management function, and is not used to distinguish levels of protection. The *Historic Shipwrecks Act 1976* applies blanket protection to all shipwrecks and related artefacts in Australian waters that have been submerged for longer than 75 years³⁸⁸. This blanket protection is, however, of recent origin, being an amendment to the legislation which took effect from 1 April 1993³⁸⁹. Prior to that, the legislation only applied to sites determined to be significant and specifically nominated as a protected site³⁹⁰. Such an approach had originally been taken as it was believed that to apply blanket protection would involve too great an administrative burden on the relevant State department. However, the process of considering each new find for significance and possible protection created considerable administrative difficulties and time-delays, often to the detriment of the site that required protection. While there has been a significant increase in statutory responsibilities for the Commonwealth and State Heritage agencies, there was no corresponding increase in funding for the program. However, there is some suggestion that the system of blanket protection has been more successful in streamlining the associated administrative load.³⁹¹ The South African legislative structure is similar in this respect.

Both Bermuda and the Republic of Ireland employ blanket protection to their marine cultural heritage, although the former only protects such marine cultural heritage as is abandoned by its owner, whereas all marine cultural heritage over a stated age qualifies for protection in the latter State, irrespective of ownership. In both countries significance then partly determines the management function. In Bermuda wrecks qualifying as historic wrecks are classified by the CHW into ‘open’ or ‘restricted wrecks’. The former can be dived recreationally on a non intrusive basis, while the latter may only be dived recreationally with authorisation. Although no criteria for determining such classifications are expressed in the *Historic Shipwreck Act 2001*, significance must be a material consideration in reaching a classification. Significance will also, presumably, be relevant in determining other management strategies, e.g. preservation in situ or the authorisation of intrusive activities.

In the Republic of Ireland sites of historical, archaeological or artistic importance may be protected by an Underwater Heritage Order under the *National Monuments Act 1987*³⁹². Nominally, therefore, significance determines whether protection is afforded. In practice there is a policy of ‘blanket’ protection, in that authorisation is needed to dive upon or

³⁸⁸ s.4.

³⁸⁹ The declaration of blanket protection had the effect of increasing the number of sites subject to the Act from 156 to over 5000. See Bill Jeffrey, ‘Australia’ in Sarah Dromgoole, *Legal Protection of the Underwater Cultural heritage: National and International Perspectives* (1999) Kluwer Law International at 13.

³⁹⁰ Following the declaration of blanket protection, an amnesty was instituted for people to come forward with information about finds and recovered artefacts. This was necessary to allow people to report finds found before the amendment of the legislation, and to prevent such claims arising in the future as after the enactment of the legislation all finds would have had to have been reported. This was highly successful with 25000 artefacts reported as well as a number of new sites. See further Green, above n 20 at 39.

³⁹¹ Graeme Henderson, ‘Significance assessment or blanket protection?’ (2001) 30(1) *International Journal of Nautical Archaeology*, 3. See also Green above n 20 at 39.

³⁹² s.3(1).

interfere with any wreck over 100 years old³⁹³ and all such wrecks are made subject to an Order, while certain wrecks sunk before that period may be protected if they are considered significant. The most famous example of this is that of the *ss. Lusitania*, sunk on 7 May 1915 by the German submarine *U-20*³⁹⁴. Whether sites containing non shipwreck material are protected is a matter of significance, but the prohibition on unauthorised possession of archaeological objects, noted above, appears to confer a high degree of protection in itself.

Reporting of discoveries and rewards

While Option 2 in Part 3 of this Report proposes the mandatory reporting of any disturbance to marine archaeological remains, Option 3 proposes wider mandatory reporting to include all discoveries, not only disturbances. This latter proposal would reflect the system applicable in both Australian, South Africa and the Republic of Ireland. It is also proposed in Option 3 that an incentive to honesty could be provided by the provision of financial rewards for finds, a system similarly reflected in the Australian legislation, though largely unutilised.

The Australian *Historic Shipwrecks Act 1976* requires that the finder of an historic shipwreck site report the find to the Minister as soon as is practicable³⁹⁵. A failure to do so is an offence subject to a fine³⁹⁶. A defence is provided, being that the person being prosecuted reasonably believed that such a notice was given to the Minister by another person³⁹⁷. Clearly enforcing such a provision is extremely difficult. The Act therefore provides for the Minister to reward a finder to a maximum of Aus\$50,000 for the reporting of a site that is protected under the Act³⁹⁸. While this is clearly to encourage compliance with the Act, in part this was originally designed to compensate a finder for the loss of the ability to salvage the wreck³⁹⁹. Such a reward is not ‘as of right’ and takes into account the heritage value of the finds and not simply its financial value. The reward itself need not, therefore be financial, and the Minister may reward the finder by awarding a plaque or medallion commemorating the find, model or replica of the vessel or relic, or an actual award of an historic relic. The Minister may also offer a reward for the reporting of a particular find, which may be used to encourage the search for particular known wrecks⁴⁰⁰. The finder program has been subject to much debate and criticism. The director of the South Australian program has declared that the Act should not “be rewarding people with trinkets and silver. ...new site discoveries can be done on a co-operative basis with the community providing rewards of a different kind.”⁴⁰¹ It has

³⁹³ S.3(4).

³⁹⁴ There was heavy loss of life, especially among neutral U.S. citizens and the sinking is credited with advancing America’s entry into the First World war. The wreck lies 11.9nm from the Irish coast and is the subject of an Underwater Heritage Order.

³⁹⁵ s.17.

³⁹⁶ s.17(2).

³⁹⁷ Ibid.

³⁹⁸ s.18.

³⁹⁹ Jeffery above, n 27 at 8.

⁴⁰⁰ This has never occurred in New South Wales. David Nutley, NSW Heritage Office, personnel communication (on file with author).

⁴⁰¹ Jeffery above n 27 at 15.

also been argued that rewards are inappropriate and that people should not be rewarded for obeying the law.⁴⁰² In 1992, the delegates of the Minister in each State declared that rewards should no longer be seen as a reimbursement or compensation relating to costs or to the value of recovered material or the find, but rather as a recognition of public spirited efforts in locating and notifying authorities of historic wrecks⁴⁰³. The issues of rewards has been particularly contentious in Western Australia, as the State legislation differs in some respect to the Commonwealth legislation and actively promotes rewards⁴⁰⁴. Queensland, Victoria and South Australia have also, in the past rewarded finders⁴⁰⁵. However, in New South Wales, a monetary reward has never been paid, and current policy is never to do so. Rather, plaques have been awarded in a number of cases⁴⁰⁶.

The South Africa, Bermudan and Irish legislation also require finders to report finds. In South Africa reports are made to SAHRA⁴⁰⁷. Failure to do so amounts to an offence punishable by a fine and/or imprisonment⁴⁰⁸. While the system does not allow for rewards to finders, it does provide that finders could participate in the recovery of such material and possibly take a share of this material. However, current SAHRA practise is not to issue permits for any recovery where the recoverer is seeking a share in the recovered material.

In Bermuda reporting of previously unreported wreck has long been mandatory under the *Wreck and Salvage Act 1959*⁴⁰⁹. Where the report relates to historic wreck or artefact there from a discretionary ‘good faith honorarium’ may be paid and the name and location of the wreck is entered on a ‘register of finders’ established by the *Historic Wrecks Act 2001*⁴¹⁰. In determining whether such a payment is made regard must be taken of the circumstances in which the reported material was found and “... of the national interest, specifically the need to preserve, protect and safeguard Bermuda’s underwater cultural heritage.”⁴¹¹. This appears to give a wide discretion in determining both the advisability of paying a reward for finding and the quantum. In particular, reference to the circumstances of the find permit the conduct of the finder to be taken into account, in terms of whether the find was accidental or the result of persistent effort and

⁴⁰² Jeremy Green, ‘Management of maritime archaeology under Australian legislation’ (1995) 19 *The Bulletin of the Australian Institute for Maritime Archaeology*, 33

⁴⁰³ Green, above n 20 at 36.

⁴⁰⁴ A contentious issues in Western Australia related to the initial refusal to reward the finder of the Dutch VOC wrecks as they occurred prior to the enactment of the State or Commonwealth legislation. Recently, however, after a recommendation from a Government Select Committee, the finders of the *Batavia* were rewarded Aus\$25,000 each. See Green, above n 20 at 37. The highest award ever made was of Aus\$32,000 for the finder of the bullion ship *Rapid* in Western Australia.

⁴⁰⁵ The finder of the *HMS Pandora* off the Queensland coast were awarded Aus\$10,000, while the finder of the *William Salthouse* off the Victorian Coast were awarded Aus\$2000, while the finder of the *SS Admelia* in South Australia were awarded AUS\$2500. Max Jeffreys, *Australian Shipwrecks: Murder, Mayhen, Fire and Storm* (1999).

⁴⁰⁶ David Nutley, NSW Heritage Office, personnel communication (on file with author).

⁴⁰⁷ s.35(3)

⁴⁰⁸ s.51910(e).

⁴⁰⁹ s.9.

⁴¹⁰ s.11(1) & (2).

⁴¹¹ s.11(2)

research and their conduct subsequent to discovery, e.g. whether report was made promptly without physical intrusion⁴¹².

By way of contrast, no reward is paid in the Republic of Ireland for mandatory reporting of finds of underwater cultural heritage. Under the *National Monuments Act 1987* any find of an archaeological object lying in, on or under the seabed or of a wreck over 100 years old must be reported within 96 hours⁴¹³. Reports of such wreck are made to the Minister for Arts & Heritage, while reports of archaeological objects are made to the Director of the NMI. Sales or purchases of archaeological objects found in the Republic after 1930 must also be reported to the Director under the *National Monuments Act 1930*. In this manner a record of the location of archaeological objects in private ownership can be maintained.

Regulation of activities directed at underwater cultural heritage

Clearly the regulation and management of the underwater cultural heritage will be dependant on the administrative structure in each jurisdiction. However, similarities with aspects of the existing regulatory system in the United Kingdom and improvement to this system advocated in Option 2 and 3 of this Report, with that of Australia and South Africa are evident. Certainly in Australia, the regulation of activities directed at historic shipwrecks is similar to that applicable to protected wrecks in the United Kingdom in that the method of control is through licensing. Public access is allowed and encouraged. However, a permit is needed to do more than view the site and artefacts. It is an offence punishable by either or both a fine and imprisonment to interfere with, destroy, damage, dispose of or to remove, an historic shipwreck or associated relic⁴¹⁴. Public access may be denied by the establishment of a protected zone around the site. This protected zone may be 200 hectares around the site⁴¹⁵, which restricts certain activities, including entry if necessary, without a permit.⁴¹⁶

Similarly, in South Africa, the regulations to accompany the legislation provides for the condition for the issuance of a permit, and includes provision for the proper division of any recovered objects between the salvor and the museum⁴¹⁷. However, since the State is granted ownership of all this material, salvors will have no proprietary rights until such time as they are vested in the salvor pursuant to an agreement contained in a permit. It is offence to damage, destroy, excavate, alter or disturb a wreck site without such a permit.

Permits for the investigation of historic wrecks, and the recovery of any material, may be issued to museums, universities, archaeologists and other members of the public, subject to strict archaeological requirements being imposed, which include the need for prior historical research being conducted to identify the wreck, as well as detailed reporting requirements, recovery techniques to be used, provision for conservation etc. Prior to

⁴¹² Any award paid is stated to be without prejudice.

⁴¹³ s.3(6).

⁴¹⁴ s.13.

⁴¹⁵ s.7.

⁴¹⁶ s.14.

⁴¹⁷ *National Heritage Resources Act 1999* (25/1999) Regulations, R.548 of 2000.

searching for a wreck site, a wreck licence issued by Customs and Excise continues to be a prerequisite for the issues or a permit from SAHRA. SAHRA's policy is to only issue permits for projects that can demonstrate a strong research component, and a clear commitment to archaeological practice. Similar to the system that applied prior to 1999, each project must have a museum partner, which will provide archaeological advice and guidance, and which will act as a repository for recovered material. As such any proposed project would have to be worked through thoroughly with an appropriate museum. Ordinarily a pre-disturbance survey will be issued prior to the issuing of an excavation permit. The latter is not necessarily a consequence of the former. The Act gives SAHRA a very wide discretion in determining terms under which a permit will be issued. Thus, the old system of splitting the recovered material no longer exists, and the current policy is not to issue permits to any salvor in which a splitting of material is proposed. Effectively this has done away with salvage in South African waters, as a salvor can simply not obtain a permit to undertake any recovery on any wreck over 60 years unless the object is purely for scientific purposes. This change in policy has also been implemented with a view to ratification of the UNESCO Convention on the Protection of the Underwater Cultural Heritage.

A similar legislative, administrative and policy structure surrounds regulation of activities directed at underwater cultural heritage in both Bermuda and the Republic of Ireland. Both countries can be said to have a more demanding licensing system than the United Kingdom, in that both systems, like South Africa, clearly envisage a high level of competence be demonstrable before any activity is authorised and such authorisation will only occur where a beneficial archaeological objective can be demonstrated.

Under Bermuda's *Historic Shipwreck Act 2001* it is an offence, punishable by a \$25,000 fine or one year's imprisonment or both to interfere with, disturb or remove anything or possess any wreck material without authorisation⁴¹⁸. Lesser penalties are imposed for unauthorised wilful access to a restricted wreck, which is not accompanied by interference⁴¹⁹, or for breach of a licence⁴²⁰. The prohibition against possession without authorisation removes the possibility of any would be salvor entering into possession. Moreover, the prohibition extends beyond the marine environment by prohibiting any unauthorised dealing in such material. Thus, any subsequent activity in respect of illegally recovered wreck is caught by the provision. Authorisation for these prohibited activities is by way of licence, granted by the CHW, on the advice of the HWA⁴²¹. A licence may authorise:

- A pre-disturbance survey, using hand tools only and non invasive techniques with minimal disturbance⁴²².
- Research, including recovery and removal, subject to stated conditions in respect of scientific methods, approval of an archaeological plan, regular

⁴¹⁸ S.7(1), (2). Provision is also made in s9(5) for forfeiture of material illegally recovered.

⁴¹⁹ A \$5,000 fine or 1 year's imprisonment or both under s.9(3).

⁴²⁰ A \$10,000 or 1 year's imprisonment under s.9(1).

⁴²¹ s.4(1) & s.8.

⁴²² s.8(1)(a).

reporting and monitoring, previous experience and expertise of personnel and publication⁴²³.

- The carrying out of work subject to conditions⁴²⁴.

This licensing regime gives considerable latitude to the CHW in terms of what conditions may be imposed and places an emphasis upon appropriate archaeological methodology, expertise and experience. This emphasis is reinforced by the fact that in considering an application for a licence the HWA must consider:

- Whether an institutional applicant is ‘bona fide’
- Whether an individual applicant is ‘fit and proper’ to carry out the activity.
- In either case whether the resources, expertise, experience and affiliation with any maritime or archaeological organisation is present and appropriate for the work to be completed competently and in compliance with any conditions⁴²⁵.

Additionally each application must be accompanied by a statement relating to measures for protection of the wreck or site, objectives, methodology, qualifications and experience of personnel, conservation, documentation and deposit of records⁴²⁶. It is perhaps worthy of note that no prescribed standard of qualification and expertise is set. These matters are judged in relation to the proposed activity and thus any debate about avocational or professional status is avoided. Refusal of a licence is subject to a right of appeal to the Minister, including the “... full opportunity ...” to make representations⁴²⁷.

Activities directed at the underwater cultural heritage are also subject to regulation in the Republic of Ireland through a system of licensing. However, there is a far greater degree of ‘blanket’ exclusion of public access to the heritage. Under the *National Monuments Act 1987* it is an offence, without a licence, to dive on, damage or interfere with *any* archaeological object or a wreck over 100 years old⁴²⁸, irrespective of whether it is the subject of an Underwater Heritage Order. This means that the more common policy of permitting public access to more robust sites on a ‘look but do not touch’ basis is displaced by one of access to all sites only by express permission in writing, irrespective of significance. The Act also regulates the possession and use of detection devices, which are defined as a device designed or adapted for detecting or locating any metal or mineral, not including a camera⁴²⁹. It is an offence to use or be in possession of such a device in an area restricted under an Underwater Heritage Order or in any other place if it is used for the purpose of searching for archaeological objects⁴³⁰. Authorisation for such use or possession can be obtained from the Minister of Arts & Heritage⁴³¹. Established policy is not to grant such authorisation except to suitably qualified archaeologists or

⁴²³ s.8(1)(b).

⁴²⁴ s.8(1)(c).

⁴²⁵ s.8(2).

⁴²⁶ s.8(3).

⁴²⁷ s.8(8).

⁴²⁸ S.3(4) & (6).

⁴²⁹ s.2(8).

⁴³⁰ S.2(8).

⁴³¹ S.2(2), (3).

persons working under their supervision. Users are then required to conform to best archaeological practice.

Ownership

Both Options 2 and 3 in Part 3 of this Report recognise the difficulties in applying such a system to wreck with identifiable owners and the requirement to adhere to the *European Convention on Human Rights*. With regard to abandoned wrecks, it is proposed that these clearly be vested in the Crown. Such issues of ownership are also dealt with in the Australian legislation. The *Historic Shipwrecks Act 1976* does not automatically vest ownership of an historic shipwreck or relic in the Commonwealth or States, but allows for such vesting if this is necessary for protection.⁴³² The Minister may vest ownership in any entity appropriate for protection, including private individuals, corporation, charitable entity or State or Commonwealth agency. The vesting of such ownership is free of any charges or other encumbrances, and as such there is a need to provide for possible compensation to an owner. The Act therefore specifically refers to the acquisition of property on just terms clause of the Commonwealth Constitution⁴³³. The amount of compensation can either be agreed between the owner and the Commonwealth, or determined by a Federal or State court to which an owner can bring an action for compensation.

Private or corporate ownership of historic shipwrecks and artefacts in Australia is therefore possible. Certainly, in relation to those artefacts recovered prior to the enactment of the *Historic Shipwrecks Act 1976*, private ownership or possession continues to exist since the legislation does not apply retrospectively. However, since all such artefacts require registration, the trade in these artefacts is regulated. With regard to artefacts recovered before the enactment of the legislation, the ownership of these artefacts would have been determined according to the *Navigation Act 1912*. If the finder did not deliver their finds to the Receiver of Wreck, they will not have obtained ownership and will merely be possessors thereof. The same applies in the case of artefacts, particularly coins, recovered from the Dutch VOC wrecks off Western Australia, since the Dutch Government retained ownership of the VOC assets after its demise, which was passed to Australia under the terms of the Agreement between the Netherlands and Australia concerning old Dutch shipwrecks⁴³⁴. Possession of these coins and other VOC artefacts is therefore legal and they may be bought and sold, subject to registration and notification to the Minister⁴³⁵.

The Act requires that notification of the possession of any relevant article be given to the Minister within 30 days of obtaining possession⁴³⁶. The Act gives the Minister further power to ascertain the location of artefacts, in particular by requiring a previous possessor

⁴³² s. 20.

⁴³³ s. 21, which refers to section 51(xxxi) of the Commonwealth Constitution 1901.

⁴³⁴ The agreement is contained as a Schedule to the *Historic Shipwrecks Act 1976*. See further G. Bolton, 'ANCODS – Australian Netherlands Committee on Old Dutch Shipwrecks' in *Paper from the First Southern Hemisphere Conference on Maritime Archaeology* (1977).

⁴³⁵ See further <http://www.ea.gov.au/heritage/awh/shipwrecks/coins.html> (accessed 19 May 2003)

⁴³⁶ s.9.

to identify to whom the artefacts were transferred⁴³⁷. Further, the Minister can give directions to the possessor of the artefact to deliver it to a person or place for the purposes of protection, reassembly of a collection or for exhibition⁴³⁸. While such directions do not deprive an owner of actual ownership, they certainly limit the extent to which the owner can freely deal with this property. However, it does allow for continued ownership, and as long as the Minister is informed of transfers of ownership, and the Register of Historic Artefacts is updated, a trade in historic artefacts does exist. In part, these provisions were intended to allow researchers to locate and reassemble collections for study. This, however, has rarely occurred since the adoption of the Act⁴³⁹.

In Bermuda under the *Historic Wrecks Act 2001* ownership of historic wreck is vested in the Crown⁴⁴⁰ but since such is, by definition, abandoned by its owner for at least 50 years since is simply a statutory statement of the prevailing common law position. Wreck which is over 50 years old but is not abandoned by its owner remains outside the provisions of the Act and thus protection. This may prove to be a significant limitation on the Act, in that in the absence of any definition of abandonment the courts may resolve that abandonment cannot be deemed to have occurred where technology at the time of loss prevented the owner from locating and recovering the wreck. This would mean that any presumption of abandonment could only arise 50 years after rediscovery. This interpretation, while restrictive, would be entirely in line with the common law courts reluctance to imply abandonment of proprietary rights merely by inactivity and effluxion of time.

A similar approach is taken in the Republic of Ireland. Under the *National Monuments (Amendment) Act 1994* ownership of archaeological objects, which have no known owner at the time of finding, vests in the State. Of all the countries considered in this comparison, only the Republic of Ireland is a signatory to the *European Convention on Human Rights*⁴⁴¹. This Convention undoubtedly constrains the extent to which the State may compulsorily acquire title to cultural material, especially in the absence of compensation.

The South African legislation, however, is somewhat different, in that the legislation clearly vests all archaeological material, which includes shipwrecks over 60 years old, in the State. While clearly abandoned shipwrecks become State property⁴⁴², the Act does not specifically deal with the issues of prior ownership being extinguished by this assertion of State ownership. However, there is a presumption that due compensation may be payable to owners or insurers under principles enshrined in the South African Constitution.

⁴³⁷ s.10.

⁴³⁸ s.11.

⁴³⁹ Jeffery above n 27 at 15.

⁴⁴⁰ s.10.

⁴⁴¹ The Republic's accession to this Convention is mandatory for membership of the European Union.

⁴⁴² s. 35(2).

Not only is it an offence to damage, destroy, excavate, alter or disturb a wreck site, but it is also an offence to trade in, sell for private gain, export or attempt to export any shipwreck material without a permit⁴⁴³. As such, the legislation provides, in a similar way to that of Australia, for registration and permits for the trade of existing 'heritage objects'⁴⁴⁴. SAHRA may declare any objects to be heritage objects, and require notification of any sale or disposal of heritage objects⁴⁴⁵ and that no such objects be exported without a permit⁴⁴⁶. This applies to material lawfully recovered prior to the enactment of legislation. For example, the continuing recovery of material from the wreck of the *Grosvenor* is governed by an agreement entered into prior to the enactment of the *National Heritage Resources Act 1999*. As such, the agreement allows for a split in material, and the salvors will, subject to a permit, be allowed to trade in these items.

Enforcement

While State and Federal police are empowered to enforce the *Historic Shipwrecks Act 1976*, inspectors appointed under the Act may be other governmental officials, such as parks and wildlife personnel, fisheries officers and marine safety compliance personnel. Inspectors have wide ranging powers, including boarding a vessel⁴⁴⁷, search and seizure of vessels⁴⁴⁸ and equipment and power of arrest⁴⁴⁹.

There is active enforcement of these provisions, and divers have been prosecuted in South Australia, Victoria and Queensland for contraventions of the Act⁴⁵⁰. For example, the Victorian Water Police and Victorian Search and Rescue Squad have taken an active role in enforcing the Act. In 1992, for example, recreational divers were successfully prosecuted under the Act after artefacts from ten local wrecks were found in their homes after a search under a search warrant⁴⁵¹. Fishing vessels that have entered a protection zone have also been prosecuted, and fishing catches confiscated⁴⁵².

Due to the recent nature of the legislation in Bermuda there is as yet little data by which the effectiveness of enforcement can be judged. By way of contrast, the Republic of Ireland has had its quite extensive regulatory regime in place for some time. However, little information on enforcement has entered the public domain and an assessment of effectiveness has not been possible..

⁴⁴³ s.35(4)

⁴⁴⁴ s.32(1).

⁴⁴⁵ s.32(12).

⁴⁴⁶ s.32(19). For a recent discussion of the illicit export from South Africa of gold coins from the wreck of the *Dodington*, see Craig Forrest and John Gribble, 'The illicit movement of underwater cultural heritage: The case of the *Dodington* coins' *International Journal of Cultural Property*, (2002) 11(2) 267.

⁴⁴⁷ s.23.

⁴⁴⁸ s.25.

⁴⁴⁹ s.24.

⁴⁵⁰ Jeffrey, above n 27 at 11.

⁴⁵¹ Amanda Douglas, 'Policing under water' (March 1994) *Police Life*, 18.

⁴⁵² Jeffrey, above n 27 at 11.

Shipwreck database

Both Options 2 and 3 of Part 3 of this report proposes that records of the underwater cultural heritage resource be put on a statutory basis. This proposal is consistent with the basis in Australia for the National Shipwreck Database. The *Historic Shipwrecks Act 1976* specifically requires the establishment of a shipwreck database to which the public is to have access. Currently the database contains a record of over 6500⁴⁵³. Of these, 5000 are protected sites and there are 11 protected zones. A separate register for historic relics recovered from historic shipwrecks is being developed. Given that the Act protects historic relics that have been recovered and in private or public possession continue to be subject to the protective mechanism of the Act, this database will be of the utmost importance in the ability to reassemble the collection from a particular site.

Under the *Historic Wrecks Act 2001* Bermuda is compiling a national database of both public and private collections⁴⁵⁴, as part of the National Collection, which is designed to display that country's underwater cultural heritage. This database may be accessible to the public under certain conditions and may contain a virtual image of any cultural material recovered from a wreck site⁴⁵⁵.

The South African Heritage Resource Agency's responsibilities not only include the drafting of national guidelines for the management of all cultural recourses, but also require the identification and recording of the National Estate⁴⁵⁶, which therefore includes the identification of all underwater cultural heritage. SAHRA is in the process of constructing a wreck database which currently lists more than 2300 shipping casualties in South African waters since 1500AD. It has also recently been awarded R4.2 million from the South African Lottery fund to start a national shipwreck survey, which will include public awareness raising and encourage public involvement in archaeology.

Shortcomings of the regulatory system

The Australian legislation has a number of shortcomings, some in common with the United Kingdom and Bermudan legislative structure. The most important of which is the narrow focus of the legislation to historic shipwrecks, rather than all underwater cultural heritage⁴⁵⁷. Given the blanket declaration in 1993, the focus of the National Historic Shipwreck Program has shifted and there is a perceived need to address more adequately questions of management of the resource rather than pursuing issues related to site reporting and the locating of recovered artefacts. Particular recommendations include the necessity of establishing a National Historic Shipwreck Advisory Committee and a reconsideration of the selection criteria for protection⁴⁵⁸. It is therefore not surprising that calls for amendment to the *Historic Shipwreck Act 1996* have emerged in Australia in recent times and the Department of Environment and Heritage has recently proposed a

⁴⁵³ Jeffrey & Moran, above n 14 at 121.

⁴⁵⁴ s.12.

⁴⁵⁵ s.12(2)(c).

⁴⁵⁶ s.13.

⁴⁵⁷ For a detailed consideration of a definition of underwater cultural heritage, see Craig Forrest, 'Defining underwater cultural heritage' (2002) 31(1) *International Journal of Nautical Archaeology*, 3.

⁴⁵⁸ Jeffery above n 27 at 14.

review of the Historic Shipwreck Program which might include a reconsideration of the legislation. This is also in part due to Australia's consideration of ratifying the UNESCO Convention on the Protection of the Underwater Cultural Heritage⁴⁵⁹.

As to the South African legislative system, the *National Heritage Resources Act 1999* certainly provides for a closely monitored permit based regime for the search for and recovery of historic shipwreck. While SAHRA, and immediately prior to its creation, the National Monuments Council, have more recently shown a willingness to undertake legal action for infringements of the heritage legislation⁴⁶⁰, it is somewhat doubtful whether the resources exist to adequately police this system and require strict compliance with the regulations. However, SAHRA is undertaking an public education and awareness program as a mechanism for respecting this regime.

By far the most comprehensive regulatory regime appears to be that of the Republic of Ireland, where the preservation of cultural heritage has clearly been afforded a relatively high legislative priority. It is certainly true that country's legislative framework has a significant degree of compliance with the requirements of the *Valletta Convention*.

⁴⁵⁹ See Jeffery and Moran, above n 14.

⁴⁶⁰ For example, in the repatriation of the *Dodington* coins and in action taken against the salvors of the propeller from the *Sybille*.

Preamble: Guiding Principles for Reform

Before considering the various options for reform it is important to identify those principles that should underpin any reforms. Since these principles would form a foundation for any legislative framework surrounding marine archaeology, there is an imperative for them to be reflected in all the options for reform that are advanced. The emphasis on a particular value and the overall balance between them will be a matter of variation from option to option, as well as a function of the resources available from time to time. Nevertheless, irrespective of the particular reforms pursued, any legislative framework should incorporate, to some degree, an element of the following principles:

- **Affording Protection**

The existing level of protection for the underwater cultural heritage should be maintained and enhanced to encompass all forms of maritime archaeological heritage. This protection should function, at least initially, on the precautionary principle with preservation in situ as the preferred first option. Protection would be conferred by a comprehensive legislative structure providing an effective level of regulation and sanction to deter ‘asset stripping’ of the underwater cultural heritage. Central to the public credibility and the effectiveness of any regulatory framework is enforceability. The chosen system must command public respect. However, it also needs to be recognised that a regulatory framework provides only a statutory minimum of protection, to be used as a last resort. Further protection comes only by the absorption and acceptance of the cultural value of the heritage by the community generally.

- **Significance**

There must be a robust and respected mechanism for determining what is worthy of protection. Recognised expertise, clear criteria and the reasons for the individual determination must be clearly communicated to the public. To this end an unambiguous statement of significance will need to be made to the community.

- **Inclusivity**

Persuading ‘stakeholders’ (in reality the community) to understand and accept the value of protecting and maintaining the underwater cultural heritage can only be achieved by making that protective process inclusive. This is especially true in relation to the decision making process, so that a sense of legitimacy, cultural ‘ownership’ and thereby support is inculcated in the community.

- **Accessibility**

Arguably an adjunct of inclusivity, the process of protection for and appreciation of the underwater cultural heritage must be accessible to all members of the community, notwithstanding widely differing backgrounds of educational, cultural and vocational achievement. This accessibility can be facilitated by:

- the availability of recognition upon discovery of the underwater cultural heritage;
- ease of access to participating agencies;

- involvement in the decision making process;
- if appropriate, participation in the protection of that heritage and dissemination of information relating to it.

Stakeholders should feel that their interest and participation is both respected and valued. Little will be achieved in terms of protecting the underwater cultural heritage if the community perceives that participation, whether active or passive, is the exclusive preserve of professionals, the academic community and special interest groups. The extent to which the process engages with and informs stakeholders and facilitates enjoyment and appreciation of the underwater cultural heritage is a precursor to the long term sustainability of that heritage. The importance of this principle and the extent to which the present regime has failed to foster accessibility is underlined by the fact that a survey, conducted in association with this review, aimed at collecting stakeholders' experiences of designations under the *Protection of Wrecks Act 1973*, found that 33% of respondents would not apply to have a wreck site designated for fear of exclusion from the site⁴⁶¹.

- **Transparency and Accountability**

There will need to be sufficient transparency if a sense of legitimacy and of community 'ownership' in the process of protection of the underwater cultural heritage is to be fostered. Legitimacy can never be conferred upon a regulatory system where powers can be exercised without explanation or accountability. Those charged with administering the process will need to be accountable, both to the individual stakeholders and the general community. To a certain degree transparency will also be necessary to ensure the United Kingdom meets its obligations under the *European Convention on Human Rights*. The whole decision making process must be open to review and challenge, if it is to command broad public support by engaging with and motivating citizens and property owners from diverse cultural and educational backgrounds.

- **Public Education**

Similarly legitimacy, community 'ownership' and an appreciation of the cultural value of the underwater heritage can only be conferred upon the process if a sufficiently robust educational process is undertaken to complement statutory protection.

- **Respect for Citizen's Rights**

A proportionate balance must be achieved between protecting the underwater cultural heritage in the public interest and respecting the proprietary, possessory and economic rights of individual citizens. This will be required to ensure the United Kingdom meets its obligations under the *European Convention on Human Rights*.

⁴⁶¹ University of Wolverhampton & NAS Training 'Protection of Wrecks Act 1973 Survey' (2003).

- **Proportionality of Resources and Benefits**

The process of protecting the underwater cultural heritage must be proportional in that the benefits it delivers are proportional to the costs incurred by both the community and any individual. In particular the process must not lead to excessive resource demands upon either public or private resources.

- **Sustainability**

As well as affording protection to the underwater cultural heritage the legislative framework must not unduly restrict the economic development of the locality and preferably should contribute towards the social, environmental and economic agenda at a local and national level. Marine cultural heritage has the capacity to add a 'premium value', both onshore and offshore, to regional and coastal economies. The example of Scapa Flow, where much of the local economy is built around marine heritage tourism, demonstrates that local stewardship of marine cultural heritage, made possible by an appropriate national legislative structure, can bring substantial benefits to local communities.

- **Flexibility and Comprehensiveness**

Without prejudice to the protection afforded, the legislative framework must have sufficient flexibility to confer upon those administering it a discretion to adopt different management strategies to encompass different situations. The framework must also be comprehensive enough to encompass all forms of underwater cultural heritage.

- **Certainty**

The legislative framework and its administration must provide sufficient certainty so that all stakeholders can order their affairs and conduct themselves in an appropriate manner, thereby avoiding litigation. It is not good regulatory practice to impose constraints and / or criminal sanctions that leave stakeholders uncertain about the effects or parameters of that regulation.

- **Durability**

The legislative framework must be capable of enduring for up to 30 years without fundamental revision⁴⁶².

⁴⁶² If past experience is a guide, the two principal legislative provisions having been enacted 30 and 24 years ago.

Options for the Future

Option 1: Maintaining the Status Quo

The existing regulatory regime relating to marine archaeology is essentially a 19th. century system, with a series of statutory amendments, some of an intended temporary nature, added in the final quarter of the 20th. century. It was "... created piecemeal to deal with specific situations or sites"⁴⁶³. The deficiencies of this piecemeal regulatory regime have been well catalogued, both in Part 1 of this review and elsewhere, as have the extensive proposals for reform promulgated since the 1980's. The conclusions of Part 1 of this review and the body of literature which has built up in relation to these deficiencies would now appear to make an overwhelming case for some degree of reform to this antiquated patchwork regime. The documented deficiencies in the present regulatory structure are manifold. Moreover, such is the extent of these deficiencies, it is clear that the present regulatory regime has lost the confidence and respect of stakeholders. The survey of stakeholders, conducted in association with this review, revealed that the current system is overwhelmingly perceived as unsatisfactory⁴⁶⁴. More pressingly, it is likely that in respect of the legislation relating to marine archaeology the United Kingdom is failing to meet its obligations under both the *European Convention on Human Rights* and the *Valletta Convention*. This alone should establish the imperative for reform.

In conclusion it would appear that maintaining the status quo of the present system is no longer realistically an option. If effective protection and management of the underwater cultural heritage is to be achieved it is important that the system is revised, perhaps radically, utilising the Guiding Principles set out above. In the options outlined below varying degrees of reform are discussed. Although the various possibilities for reform are grouped into 'options', for ease of assimilation, they are not entirely mutually exclusive and to a degree elements from the different 'options' could be combined. All of these options will require additional resourcing, to a greater or lesser degree. None of them can be described as 'resource neutral'. However, marine archaeology has, since its inception, suffered from an unfavourable disparity in resources compared to its terrestrial counterpart. Any increase in resources for marine archaeology would not place it in a more favourable position than its terrestrial counterpart, it would simply be a recognition of the need to address this historical imbalance and provide a degree of equality of resource between the two.

⁴⁶³ Joint Nautical Archaeology Policy Committee, 'An Interim Report on The Valletta Convention & Heritage Law at Sea' (2003): University of Wolverhampton.

⁴⁶⁴ University of Wolverhampton & NAS Training 'Protection of Wrecks Act 1973 Survey' (2003). A mere 22% of respondents believed that designation under the 1973 Act had had a positive effect on the site they were involved with.

Option 2: Fine Tuning the Existing System: Limited Structural Reform

This minimalist approach to reform would continue to build upon the existing legislative structure. The *Merchant Shipping Act 1995* would continue to govern all recoveries of wreck made and the principles of salvage would continue to apply. Specific protection would be afforded by designation under the *Protection of Wrecks Act 1973* or the *Protection of Protection of Military Remains Act 1986* or by scheduling under the *Ancient Monuments and Archaeological Areas Act 1979*. Such legislative amendments as were made would be restricted to remedying those deficiencies that have been identified in *Heritage Law at Sea*⁴⁶⁵ and the *Interim Report on The Valletta Convention & Heritage Law at Sea The legal framework for marine archaeology in the United Kingdom*⁴⁶⁶. In addition certain further amendments could be undertaken to remedy some of the deficiencies identified in Part 1 of this review, thereby securing an additional degree of compliance with both the *European Convention on Human Rights* and the *Valletta Convention*.

In outline the following reforms could be undertaken:

A: Implement the Reforms Identified in *Heritage Law at Sea*⁴⁶⁷

- Introduce a general obligation to report disturbances to historic wreck, which for this purpose would be defined as wreck which appears to have been submerged for 100 years or more⁴⁶⁸. This elapsed period would be rather longer than that chosen in many comparable jurisdictions, which tends more towards a 75 or 50 year period. Given that a 50 year period would now encompass heritage from the Second World War, this may be thought to be a more suitable delineation.
- Extend the Crown's right of ownership of unclaimed wreck to that recovered beyond territorial waters⁴⁶⁹.
- Promote high standards of archaeological investigation and management by incorporating professionally-recognised standards of investigation and management within the procedures used in designating protected wrecks and licensing activities within restricted areas⁴⁷⁰.
- Prohibiting activities which cause disturbance in areas restricted under the *Protection of Wrecks Act 1973*⁴⁷¹.
- Extending the scope of the *Protection of Wrecks Act 1973* to include aircraft and vehicles⁴⁷².

⁴⁶⁵ Joint Nautical Archaeology Policy Committee, 'Heritage Law at Sea' (2000): University of Wolverhampton.

⁴⁶⁶ Joint Nautical Archaeology Policy Committee, 'An Interim Report on The Valletta Convention & Heritage Law at Sea' (2003): University of Wolverhampton. Hereafter referred to as 'The Interim Report'.

⁴⁶⁷ For an explanation of the specific deficiency that each proposal is intended to address see Part 2 of this review and the Annex thereto.

⁴⁶⁸ HLAS para. 1.1

⁴⁶⁹ HLAS para. 1.3.

⁴⁷⁰ HLAS para.2.5.

⁴⁷¹ HLAS para. 2.6.

- Formalising consultation between the Receiver of Wreck and local and national curatorial authorities⁴⁷³.
- Establishing the Marine Sites and Monuments Records on a statutory basis.
- Extending licensing procedures to the removal of human remains found underwater, since these are not subject to the rigorous licensing procedure which applies on land⁴⁷⁴.
- Extending the range and appropriateness of the available sanctions in respect of offences relating to underwater cultural heritage⁴⁷⁵.

B: Implement the Reforms Identified in the Interim Report⁴⁷⁶

- Local Authority Sites and Monuments Records should be a statutory requirement and in coastal authorities should include a maritime component⁴⁷⁷.
- Sites recorded on Maritime Sites and Monuments Records should be verified in-situ⁴⁷⁸.
- A general obligation to report disturbances to historic wreck should be introduced⁴⁷⁹.
- The Ministry of Defence should be prepared to licence appropriate intrusive activities under the Protection of Military Remains Act 1986 where a sound archaeological case can be made for granting a licence⁴⁸⁰.
- Provision should be made in the Protection of Wrecks Act 1973 and the Ancient Monuments and Archaeological Areas Act 1979 for the confiscation of equipment used in diving or salvage operations as a sanction in offences relating to underwater cultural heritage, on a similar basis to that provided for in the Protection of Military Remains Act 1986⁴⁸¹.
- Consultation between the Receiver of Wreck and local and national curatorial authorities should be formalised⁴⁸².
- Consultation between the relevant Secretary of State and local and national curatorial authorities should be formalised⁴⁸³.
- Consultation between Government departments and heritage agencies prior to the salvage or sale of government owned vessels should be formalised⁴⁸⁴.

⁴⁷² HLAS para.2.10.

⁴⁷³ HLAS para.3.1.

⁴⁷⁴ HLAS para. 4.1.

⁴⁷⁵ HLAS para.4.2.

⁴⁷⁶ Where a similar recommendation was made in Heritage Law at Sea and is included in paragraph ‘A’ above it has not been included here. For an explanation of the specific deficiency that each proposal is intended to address see Part 2 of this review and the Annex thereto.

⁴⁷⁷ Para. 2.1-2.5. Also recommended in HLAS.

⁴⁷⁸ Para. 2.5.

⁴⁷⁹ Para. 2.9-2.12. Also recommended in HLAS.

⁴⁸⁰ Para. 8.5-8.7.

⁴⁸¹ Para. 9.4. Also recommended in HLAS.

⁴⁸² Para. 9.4. Also recommended in HLAS.

⁴⁸³ Para. 9.4. Also recommended in HLAS.

⁴⁸⁴ Para. 9.4. Also recommended in HLAS.

- That the definition of a monument in the Ancient Monuments and Archaeological Areas Act 1979 should be amended to achieve conformity with the definition of archaeological heritage in the *Valletta Convention*⁴⁸⁵.
- That the problem of salvors acquiring possessory rights to maritime cultural property, especially in relation to sites designated under the *Protection of Wrecks Act 1973* or scheduled under the *Ancient Monuments and Archaeological Areas Act 1979* should be addressed⁴⁸⁶.
- That a general obligation to report disturbances to maritime archaeological remains, e.g. submerged landscapes, should be introduced⁴⁸⁷. This would go beyond the recommendation in *Heritage Law at Sea*, which recommended that disturbance to only historic wreck be introduced.
- That a Code of Practice should be introduced in relation to authorisation and supervision of maritime archaeological activities⁴⁸⁸.
- That legislation requiring a form of authorisation for the use of metal detectors, or other detection equipment, where these are specifically directed at the underwater cultural heritage, should be introduced⁴⁸⁹.

C: Remove the right of any person to enter into possession of wrecks of historical interest as a salvor.

In Part 1 of this review it was concluded that the ability of persons to acquire possessory rights in wrecks as a salvor could act as a legal constraint upon the management of the archaeological heritage. Such possessory rights are analogous to proprietary rights and almost certainly constitute a ‘possession’ within the meaning of *Article 1* of the *First Protocol* to the *European Convention on Human Rights*, thereby opening up the possibility of compensation having to be paid for their deprivation. Express provision could be made to the effect that a person could not acquire possessory rights as a salvor in wrecks where a stated period of time has elapsed since the loss. Typically varying periods between 50 – 100 years have been utilised by other Common Law jurisdictions for the purpose of delineating wrecks of historical interest⁴⁹⁰.

This would remove the possibility of compensation having to be paid to a Salvor in Possession if the salvage of a wreck of the requisite age was subsequently restrained by the need to preserve it. However, it is important to note that this would not remove the possibility of compensation having to be paid entirely, since restraining the recovery of the wreck may impose a disproportionate burden upon the rights of owners and others with proprietary or economic rights⁴⁹¹ that amount to a ‘possession’ within the meaning

⁴⁸⁵ Para.1.1-1.3.

⁴⁸⁶ Para. 2.12.

⁴⁸⁷ Para. 2.12.

⁴⁸⁸ Para. 3.1-3.6.

⁴⁸⁹ Para. 3.11-3.13.

⁴⁹⁰ In the Republic of Ireland any wreck over 100 years old is protected (s. 3(4) National Monuments Act 1987); In Australia any wreck over 75 years old is protected (Historic Shipwrecks Act 1976, as amended).

⁴⁹¹ As opposed to a person with possessory rights as a salvor.

of *Article 1* of the *First Protocol to the European Convention on Human Rights*⁴⁹². It is also important to note that the removal of the principle of *Salvor in Possession* in relation to certain wrecks could not take effect retrospectively. Consequently, those salvors who have already acquired possessory rights in such wrecks will, subject to continued compliance with the legal requirements attaching to a salvor in possession, retain such rights.

D: Amend S.230(1) Merchant Shipping Act 1995 to remove the liability of any of Her Majesty's ships, their cargo or equipment to civil salvage.

Under the *Article 4 International Convention on Salvage 1989* State vessels⁴⁹³ are exempt from the provisions of the Convention, unless the State decides otherwise. In practice this means that the MOD invariably negotiates a specific contractual agreement for recovery of Crown vessels or equipment. However, in respect of United Kingdom waters, *s.230(1) Merchant Shipping Act 1995* states that the law relating to civil salvage shall apply to services in assisting any of Her Majesty's ships. The provision is subject to a number of exceptions⁴⁹⁴ but, in general, salvage claims may be brought against the Crown in respect of warships, sunken or otherwise⁴⁹⁵, located in United Kingdom waters. This means that salvors, whether commercial or simply recreational divers, are free to initiate recovery of any material from the wrecks of Crown vessels in United Kingdom waters and that, provided such recoveries are notified to the Receiver of Wreck, such activity will constitute legitimate salvage. This inclusion of such naval shipwrecks within the salvage regime has the consequence that freedom to commence salvage is given to the commercial and recreational diving communities, unless a constraint is imposed by use of various statutory mechanisms⁴⁹⁶, including the *Protection of Military Remains Act 1986*. Such salvors may also acquire possessory rights in such naval wrecks.

This concession by the Crown was made in the 19th century, when shipwreck was more common and salvage was not predominantly a commercial concern⁴⁹⁷. Today, given the size, complexity and value of Crown vessels it is extremely unlikely that the wreck of any modern vessel of Her Majesty would be subject to voluntary (i.e. non-contractual) salvage. Commercial salvors would undoubtedly be engaged and such salvors invariably insist upon an express contractual agreement. The provision has therefore outlived its original purpose, which was to encourage the voluntary recovery of Her Majesty's wrecked maritime property. However, the effect of it remaining on the Statute book is that naval wrecks, many of them of historical interest, remain vulnerable to voluntary salvage by (mainly) recreational divers. Indeed, if a 50 year qualifying period were taken

⁴⁹² See further Part 1.

⁴⁹³ I.e. a vessel owned or operated by a State with a non-commercial cargo.

⁴⁹⁴ The Receiver of Wreck cannot obtain a valuation, detain the property nor sell it under ss. 225, 226 and 227 respectively.

⁴⁹⁵ Since s.230 expressly refers to 'ships', it would appear that all wrecks of military aircraft remain outside the salvage regime, unless the government otherwise expressly consents.

⁴⁹⁶ E.g. by use of the *Protection of Wrecks Act 1973*, the *Ancient Monuments and Archaeological Areas Act 1979*; see further 'Legal Protection of the Underwater cultural heritage' Dromgoole, S. (ed.) *Kluwer Law International* (1999) chp.12

⁴⁹⁷ Originally s.557 *Merchant Shipping Act 1894*.

to denote that a wreck is of historical interest then virtually all naval wrecks in United Kingdom waters would be of historical interest but liable to salvage and possession by salvors⁴⁹⁸.

Amendment of *s.230(1)* could remove this liability of Crown vessels in United Kingdom waters to salvage. More proactive pursuit of the MOD's intended 'rolling programme' of designations of 'Protected Places' under the *Protection of Military Remains Act 1986* could then provide a criminal sanction for physical interference with military remains, while preserving recreational access on a 'look but do not touch' basis.

In summary, the effect of these changes would be to remove the currently liability of wrecks of Her Majesty's ships in United Kingdom waters to salvage. The ability of a salvor to acquire possessory rights in such wrecks could also be removed, preferably by express provision.

E: Secure compliance with the *European Convention on Human Rights* by improving transparency of decision making and introducing provision for compensation

1. Article 6 of the Convention requires certain procedural standards in the determination of civil or criminal matters. In Part 1 of this review the potential impact of this Article on the decision making process in respect of the Protection of Wrecks Act 1973, the Ancient Monuments and Archaeological Areas Act 1979 and the Protection of Military Remains Act 1986 was considered. While it is impossible to state categorically that these Acts do not conform to the requirements of Article 6, it seems possible that the Protection of Wrecks Act 1973 and the other two Acts do not comply in part.

Consequently, it was recommended that consideration be given to amending existing legislation by including:

- the provision for consultation prior to designation or scheduling, which would, inter alia, encompass the circumstances of those individuals adversely affected by such proposed designation or scheduling;
- the provision of a statement of reasons for the proposed designation or scheduling;
- the provision of an opportunity to make representations in respect of the proposed designation or scheduling, such representations not being restricted to the merits of the proposed designation or scheduling;
- the provision of a statement of reasons for a designation or scheduling;
- the provision of an opportunity to appeal against the merits of a designation or scheduling to a person specifically appointed to hear such appeals;
- the provision of a statement of reasons for a refusal of such an appeal;
- the provision of a statement of reasons for a refusal of a licence (under the *Protection of Wrecks Act 1973* or the *Protection of Military Remains Act 1986*) or

⁴⁹⁸ With the exception of those designated under the Protection of Military Remains Act 1986.

- a refusal of scheduled monument consent (under the *Ancient Monuments and Archaeological Areas Act 1979*);
- the provision of an opportunity to appeal against the merits of a refusal of such a licence or consent to a person specifically appointed to hear such appeals;
- the provision of a statement of reasons for a refusal of such an appeal;
- the continued availability of judicial review of the legality of such administrative decisions;

2. *Article 1* of the *First Protocol* to the Convention provides for an individual's peaceful enjoyment of 'possessions' and protection against deprivation in the public interest, where this results in a disproportionate burden falling upon an individual. Even where such deprivation is in the public interest it must not impose a disproportionate burden upon such an individual. In assessing the proportionality of the burden imposed on the individual the court will have regard to whether compensation is available.

In the light of the potential impact of *Article 1* of the *First Protocol* to the Convention on the regulatory regime in respect of marine archaeology, consideration could be given to amending existing legislation by including:

- a provision for compensation or for the continued availability of compensation in circumstances where designation or scheduling would result in a disproportionate burden falling upon individuals;
- a provision for compensation or for the continued availability of compensation in circumstances where a refusal of a licence (under the *Protection of Wrecks Act 1973* or the *Protection of Military Remains Act 1986*) or a refusal of scheduled monument consent (under the *Ancient Monuments and Archaeological Areas Act 1979*) would result in a disproportionate burden falling upon individuals;

Option 3: A New System Within Existing Jurisdiction

This could go beyond simply addressing the deficiencies identified in the present legislative structure relating to the underwater cultural heritage. A new legislative structure could be formulated, based upon the principles outlined in the Preamble to this Part of the Review, which would replace the existing provisions of the *Protection of Wrecks Act 1973* and the *Ancient Monuments and Archaeological Areas Act 1979*, while amending the provisions and administration of the *Protection of Military Remains Act 1986* and the *Merchant Shipping Act 1995* in relation to the underwater cultural heritage. This would secure greater compliance with the United Kingdom's obligations under the *Valletta Convention*, something that the preceding options would not achieve.

In so far as it is possible, a new legislative structure would reflect a 'seamless approach' between terrestrial and marine archaeology. However, the law itself lacks a 'seamless' approach between the terrestrial and the marine contexts. Consequently, while there should preferably be a 'seamless' approach in terms of the investigation and management of *national heritage assets* it must be recognised that legally a 'seamless' approach cannot be totally achieved. This is because there is no unified body of law relating to both land and sea, even today. On land the law is provided by the Common Law and Statute law. Below the Low Water Mark the law is provided by Admiralty Law and Statute law. Although Statute law has introduced many amendments to both Common and Admiralty Law, it has left many of their original provisions and principles intact. In the 1870's the administration of Common and Admiralty Law was unified in a single court structure⁴⁹⁹, so that both County and High courts now have both Common Law and Admiralty Law jurisdiction. However, the two substantive bodies of law were not unified and remain separate to this day. As a result there remain substantial differences between them, in terms of criminal offences, property rights and public rights. Since there is no 'seamless' body of law in terms of the terrestrial and maritime, it is not possible to achieve a completely seamless legal approach. Consequently, a distinction must be drawn in defining both *marine cultural heritage* and *marine heritage assets*, to distinguish the terrestrial from the marine, and in terms of the controls placed upon terrestrial and marine cultural sites. Nevertheless, in terms of the management of the underwater cultural heritage, the same principles and values should apply.

It is not intended that this Review should draft in detail proposals for amending legislation. Moreover, time constraints have precluded the formulation of more than an outline of the main constituents of a new structure. Nevertheless, it has been possible to identify what could be the more prominent components of such a structure. Consideration should be given to incorporating the following components into any fundamental revision of the existing system. Alternatively, if a less radical approach was favoured some of these components could be incorporated into amendments to the existing structure.

⁴⁹⁹ Under the Judicature Acts 1873-1875.

A: Defining the Heritage Resource

1. There would be a definition of ‘*marine cultural heritage*’.

In keeping with the United Kingdom’s obligations under the *Valletta Convention* to protect the widely defined archaeological heritage⁵⁰⁰, this would encompass all forms of marine archaeological heritage and not just wrecks. To this end the definition should encompass any remains which can presently be designated under the *Protection of Wrecks Act 1973* or the *Protection of Military Remains Act 1986* or be scheduled under the *Ancient Monuments and Archaeological Areas Act 1979*. Additionally, the definition should also include such elements of the archaeological heritage as are encompassed by the Council of British Archaeology’s proposals for amending the present definition of a scheduled monument⁵⁰¹. This would, for example, enable a submerged landscape to fall within the definition of *marine cultural heritage*. In formulating this definition consideration could be given to utilising the definition of ‘Underwater Cultural Heritage’ in the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*⁵⁰², which itself is influenced by the definition of the archaeological heritage in the *European Convention on the Protection of the Archaeological Heritage 1969*⁵⁰³. Both Conventions utilise in their definitions the concept of all ‘traces’ of mankind or human existence from the past, thereby ensuring a very wide definition is achieved which encompasses all forms of cultural heritage. The objective would be to encompass within the definition of *marine cultural heritage* any object, structure or trace thereof or area of archaeological importance or potential situated completely or partly below the High Water Mark

2. This definition of *marine cultural heritage* should also specifically include ‘*historic wreck*’.

- *Historic wreck* would encompass all material which presently constitutes ‘wreck’ for the purposes of *Part IX Merchant Shipping Act 1995*⁵⁰⁴. *Historic wreck*

⁵⁰⁰ Elements of the archaeological heritage are defined Article 1 of the Convention as “... all remains and objects and any other traces of mankind from past epochs:

- i. the preservation and study of which help to retrace the history of mankind and its relation with the natural environment;
- ii. for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information and;
- iii. which are located in any area within the jurisdiction of the Parties. ...”.

The archaeological heritage is also stated to include “... structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water.”.

⁵⁰¹ See further the discussion of the Ancient Monuments and Archaeological Areas Act 1979 in Part 1.

⁵⁰² See further O’Keefe, P. J. ‘A Commentary on the UNESCO Convention on Underwater Cultural Heritage’ Institute of Art & Law (2002): Leicester.

⁵⁰³ European Treaty Series No.66. This was the predecessor to the current Valletta Convention.

⁵⁰⁴ Defined as “includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water.” (s.255(1)). In *Sir Henry Constable's Case* (1601) 5 Co. Rep. 106a Jetsam was defined as goods cast into the sea to lighten an endangered ship, the ship later sinking; Flotsam as goods left floating after a ship sinks and Lagan as goods cast into the sea with a buoy attached to mark their location for later recovery. A derelict is a vessel abandoned at sea by the master and crew, without hope of recovery (*The Aquila* 1 C. ROB. 38 (1798) per Sir W Scott at 40).

would be defined as any wreck where more than a stated period of time had elapsed since its loss. Varying periods have been utilised in other jurisdictions or in Conventions, varying between 50 – 100 years,⁵⁰⁵. For the reasons discussed in Option 2 A, this could tend towards the 50 year period.

- At present the Receiver of Wreck has an administrative policy of treating wreck where 100 years or more have elapsed since the loss as historic, while recognising that particular vessels or aircraft may also be of historic interest notwithstanding that a shorter period since their loss may have elapsed⁵⁰⁶. A similar flexibility exists in respect of the *Protection of Wrecks Act 1973* and the *Ancient Monuments and Archaeological Areas Act 1979*, in that a wreck of any age may be either designated or scheduled.
- This flexibility needs to be retained in respect of *historic wreck*. Accordingly, where the Secretary of State or a heritage agency List a wreck⁵⁰⁷ as a *marine heritage asset* then that wreck shall be deemed to be a *historic wreck* and an element of *marine cultural heritage*, notwithstanding that a lesser period of time may have elapsed since its loss than that stated in the definition of *historic wreck*.

Consequently, *historic wreck* would take two forms:

- Any wreck where more than a stated period of time had elapsed since its loss.
- Any wreck judged as being of such historical, archaeological or artistic importance as to warrant listing as a *marine heritage asset*.

3. There would be a definition of a ‘*marine heritage asset*’.

- This would be such *marine cultural heritage* as is Listed by the Secretary of State or a heritage agency⁵⁰⁸ on a statutory List as being of historical, archaeological or artistic importance or potential.
- The concept of a *marine heritage asset* would encompass all forms of *marine cultural heritage*, as defined in 1 and 2 above.
- To this end any *marine cultural heritage* which can presently be designated under the *Protection of Wrecks Act 1973* or the *Protection of Military Remains Act 1986* or scheduled under the *Ancient Monuments and Archaeological Areas Act 1979*

⁵⁰⁵ In the Republic of Ireland any wreck over 100 years old is protected (s. 3(4) National Monuments Act 1987); In Australia any wreck over 75 years old is protected (Historic Shipwrecks Act 1976, as amended).

⁵⁰⁶ Certain Second World War vessels or aircraft would undoubtedly be regarded as ‘historic’, by reason of their rarity or association with persons or events.

⁵⁰⁷ See para. 3 below for an explanation of Listing.

⁵⁰⁸ Consideration could be given to the listing of such assets being undertaken by English Heritage, with a power of determining appeals being given to the Secretary of State.

could be listed as a *marine heritage asset*⁵⁰⁹ on account of its historical, archaeological or artistic importance or potential.

- Additionally, a *marine heritage asset* would include such listed elements of the archaeological heritage as encompassed by the Council of British Archaeology's proposals for amending the present definition of a scheduled monument⁵¹⁰. This would, for example, enable a submerged landscape to be listed as a *marine heritage asset*, if it were of sufficient historical or archaeological importance or potential⁵¹¹.
- Consequently, a listed *marine heritage asset* could comprise the site of an object or an area of *marine cultural heritage* considered to be of historical, archaeological or artistic importance or potential.
- The present non – statutory criteria, which are used for designations under the *Protection of Wrecks Act 1973* and scheduling under the *Ancient Monuments and Archaeological Areas Act 1979* should be amended to reflect the ability to list areas of historical or archaeological importance or potential.

⁵⁰⁹ Since any discovery of marine cultural heritage or recovery of any object below the High Water Mark would be reportable to the Receiver it is proposed that a *marine heritage asset* would be any such asset listed below the High Water Mark.

⁵¹⁰ See further the discussion of the Ancient Monuments and Archaeological Areas Act 1979 in Part 1.

⁵¹¹ It is difficult to see how an marine 'area' could be of 'artistic' importance.

B : Reporting of Discoveries / Disturbance / Recoveries

1. The following could be subject to mandatory reporting:

- All discoveries of *marine cultural heritage*, irrespective of whether disturbance or recovery occurs.

At present it is unclear whether the finding of wreck, as opposed to finding and taking possession of it, is reportable⁵¹². In respect of cultural heritage that is not legally 'wreck', e.g. finds from submerged land surfaces, there is no obligation to report its discovery nor indeed its recovery. The introduction of a requirement to report the discovery of *marine cultural heritage* would fulfil an obligation under the Valletta Convention⁵¹³, which arguably the United Kingdom does not presently comply with. It would also enable further investigation to be made and, if appropriate, protective measures taken. While it is true that this measure would leave the finder to initially evaluate whether an object constituted *marine cultural heritage*, it is felt that it may well be administratively impracticable to require all discoveries of objects underwater to be reported. Moreover, the measure could be supplemented by a strong educational message that if in doubt as to the nature of the find the finder should report⁵¹⁴. However, the option does remain to make either the discovery of just *marine cultural heritage* or all discoveries of objects underwater reportable.

- Any disturbance to *marine cultural heritage*, irrespective of whether recovery occurs.

At present where disturbance to a wreck occurs, but the finder does not take possession, e.g. by recovering it, there is arguably no obligation to report this disturbance to the Receiver. In respect of cultural heritage which is not legally 'wreck' there is no obligation to report disturbance whatsoever⁵¹⁵. Thus cultural material dredged or trawled up or uncovered during works does not have to be reported, unless as a requirement of a consent procedure. A general obligation to report such disturbance, short of recovery, to all forms of *marine cultural heritage* would enable more efficient monitoring of the state of that heritage. Again, this measure would leave the finder to initially evaluate whether an object constituted *marine cultural heritage*. However, it is felt that it may well be both legally and administratively impracticable to require all disturbance of material underwater to be reported. Even an act such as a recreational craft putting down an anchor overnight onto the seabed would physically cause disturbance to the seabed that

⁵¹² See further Part 1.

⁵¹³ Article 2iii.

⁵¹⁴ The policy of the Receiver of Wreck has been to advise finders that they should report all recoveries of potential wreck, leaving the determination as to whether it is legally wreck or not to the Receiver. To this end a strong educational message has been directed at sea-users.

⁵¹⁵ Though disturbance of the seabed may require consent under other statutory regulatory regimes e.g. the Coastal Protection Act 1949, the Crown Estate Act 1961 and the Food and Environment Act 1985.

legally may be difficult to differentiate from more substantial disturbance. Moreover, the measure could be supplemented by a strong educational message that if in doubt as to the nature of the material disturbed the finder should report⁵¹⁶.

- All recoveries of *marine cultural heritage* from below the High Water Mark.

At present only recoveries of material that legally constitutes ‘wreck’ need be reported. In respect of cultural heritage that is not legally ‘wreck’, there is no obligation to report its recovery. This makes it difficult for the United Kingdom to fulfil its obligation under the *Valletta Convention* to protect the wider archaeological heritage, as defined by that Convention. It can also be unclear whether a recovered object is legally ‘wreck’ or not. This is especially true in the inter-tidal zone. Furthermore, it is unclear at present whether the Receiver’s jurisdiction runs to harbours. By making the recovery of all forms of *marine cultural heritage* from below the High Water Mark reportable it will ensure that such recoveries are brought to the attention of a responsible authority and that appropriate protection can be afforded to the entire archaeological heritage, rather than simply wreck. While it is true that this measure would leave the finder to initially evaluate whether an object constituted *marine cultural heritage*, it is felt that it may well be administratively impracticable to require all recoveries of objects underwater to be reported. Moreover, the measure could be supplemented by a strong educational message that if in doubt as to the nature of the find the finder should report⁵¹⁷. However, the option does remain to make the recovery of all objects below the High water Mark reportable.

- Failure to report would be a criminal offence attracting the same sanctions as an offence under *s.236 Merchant Shipping Act 1995*⁵¹⁸. In addition a court would have discretion to confiscate any equipment used in the commission of an offence, as currently provided for in the *Protection of Military Remains Act 1986*.

⁵¹⁶ The policy of the Receiver of Wreck has been to advise finders that they should report all recoveries of potential wreck, leaving the determination as to whether it is legally wreck or not to the Receiver. To this end a strong educational message has been directed at sea-users.

⁵¹⁷ The policy of the Receiver of Wreck has been to advise finders that they should report all recoveries of potential wreck, leaving the determination as to whether it is legally wreck or not to the Receiver. To this end a strong educational message has been directed at sea-users.

⁵¹⁸ Fine not exceeding Level 4 and twice the value of the recovered wreck or forfeit of the salvage claim.

C: Salvage / Possession / Entitlement / Prohibition of Disturbance & Recovery

1. As was noted in Part 1 of this review, many in the archaeological community feel that the application of the salvage regime to wrecks which are of archaeological or historical interest is inappropriate. In particular it is felt that it emphasises the pecuniary, as opposed to the cultural, value of archaeological or historical material recovered from shipwrecks. It is also felt to encourage inappropriate disturbance of historical wrecks, by rewarding recoveries, rather than discoveries. There is also considerable unease felt in respect of the ability of salvors to acquire possessory rights in wrecks of cultural interest, these rights then being potentially protected under the *European Convention on Human Rights* against disproportionate interference by the Crown⁵¹⁹.

These concerns could be addressed by:

- The United Kingdom, under its reservation entered under *Article 30 International Convention on Salvage 1989*, removing *historic wreck* from the ambit of the salvage regime⁵²⁰.
- Removing the right of any person to enter into possession of a *historic wreck* as a salvor.

Arguably, it is implicit that if *historic wreck* were to be removed from the ambit of the salvage regime, then so would be the right as a salvor to acquire possession of *historic wreck*. The possessory rights of a salvor are an adjunct to salvage and if that process were removed in relation to certain wrecks so, arguably, are associated mechanisms. However, it may be thought desirable to put the matter beyond doubt and thus contention, by making express provision to this effect. Consequently, it would not be possible to become a salvor in possession of any wreck other than a ‘modern’ wreck. This would remove the possibility of compensation having to be paid if the salvage of the *historic wreck* was subsequently restrained by the need to preserve it. However, it is important to note that this would not remove the possibility of compensation having to be paid entirely, since restraining the recovery of the wreck may impose a disproportionate burden upon the rights of owners and others with proprietary or economic rights (as opposed to possessory rights of a salvor) within the meaning of the *European Convention on Human Rights*⁵²¹. It is also important to note that the removal of the principle of Salvor in Possession in relation to *historic wreck* could not take effect retrospectively. Consequently, those salvors who have already acquired possessory rights in such wrecks will, subject to the satisfaction of the legal requirements attaching to that status, retain such rights.

⁵¹⁹ See further discussion of Salvor in Possession and the European Convention of Human Rights in Part 1.

⁵²⁰ This would remove any wreck lost before a stated period or any wreck listed as a marine heritage asset from the ambit of the salvage regime. However, as seen above, the recovery of any object of *marine cultural heritage* would remain reportable.

⁵²¹ See further Part 1.

- Amending *S.230(1) Merchant Shipping Act 1995* to remove the liability of any of Her Majesty's ships, their cargo or equipment to civil salvage.

As explained in Option 2 above salvage claims may be brought against the Crown in respect of Her Majesty's ships, their cargo or equipment, sunken or otherwise⁵²², located in United Kingdom waters. This means that salvors, whether commercial or simply recreational divers, are free to initiate recovery of any material from the wrecks of Crown vessels in United Kingdom waters and that, provided such recoveries are notified to the Receiver of Wreck, such activity will constitute legitimate salvage. This inclusion of such naval shipwrecks within the salvage regime has the consequence that freedom to commence salvage is given to the commercial and recreational diving communities, unless a constraint is imposed by use of various statutory mechanisms⁵²³, including the *Protection of Military Remains Act 1986*. Such naval wrecks are an historical resource, indeed, if a 50 year qualifying period were to be selected for *historic wreck*, virtually all these wrecks would be classified as *historic wreck* and therefore *marine cultural heritage*.

Amendment of *s.230(1)* could remove this liability of Crown vessels in United Kingdom waters to salvage. More proactive pursuit of the MOD's intended 'rolling programme' of designations of 'Protected Places' under the *Protection of Military Remains Act 1986* could then provide a criminal sanction for physical interference with military remains, while preserving recreational access on a 'look but do not touch' basis.

In summary, the effect of these changes would be to remove those elements of *marine cultural heritage* that are currently liable to salvage i.e. *historic wrecks* from the salvage regime. Any of Her Majesty's ships that have been or may in the future be wrecked in United Kingdom waters would also be removed from the salvage regime. The ability of a salvor to acquire possessory rights in such wrecks would also be removed.

2. While the removal of Her Majesty's ships and *historic wreck* from the salvage regime would confer a degree of protection upon such cultural heritage, it would not, of itself, confer protection against disturbance or recovery of them. It would not make such disturbance or recovery illegal per se. It would simply mean that salvage could not be claimed for such recovery. Such disturbance or recovery could be made reportable, as discussed above, but it would not necessarily be illegal. Three potential disadvantages stem from this position:

- Such disturbance or recovery is destructive of the archaeological context.

⁵²² Since s.230 expressly refers to 'ships', it would appear that all wrecks of military aircraft remain outside the salvage regime, unless the government otherwise expressly consents.

⁵²³ E.g. by use of the Protection of Wrecks Act 1973, the Ancient Monuments and Archaeological Areas Act 1979; see further 'Legal Protection of the Underwater cultural heritage' Dromgoole, S. (ed.) Kluwer Law International (1999) chp.12

- Generally, there is no funding available for conservation of cultural material recovered voluntarily, unless it is funded from the proceeds of salvage. If *historic wreck* were to be removed from the salvage regime then little or no funding would be available. It may be considered inappropriate to permit unrestrained recovery of *historic wreck* when no funding for conservation of it is available.
- In the absence of the application of salvage, where recovery did occur it is arguable that the law of finds might apply if no owner came forward. This could result in the person recovering the *historic wreck* acquiring title to it in preference to the Crown. This would be regarded as an undesirable result by the archaeological community.
- Such a position would fail to protect *historic wreck* according to the precautionary principle, which favours preservation in situ as the preferred option.

A number of observations can be made in relation to this situation:

- An express provision could be made which states that the law of finds does not apply to recoveries of *marine cultural heritage*⁵²⁴.
- Express provision could be made for title to recoveries of *marine cultural heritage* to vest in the Crown where no owner claims it, thereby avoiding the application of the law of finds.
- A prohibition against unauthorised recovery of *historic wreck* could be imposed.
- There would seem little point in protecting *historic wreck* from recovery if other forms of *marine cultural heritage* could be randomly recovered. This would suggest that consideration should be given to prohibiting unauthorised recovery of all forms of *marine cultural heritage* and not just *historic wreck*.
- Furthermore, there would seem to be little point in protecting either *historic wreck* or other forms of *marine cultural heritage* from recovery if their disturbance would diminish or destroy their cultural value. This, in turn, would seem to suggest that a prohibition against unauthorised disturbance of all forms of *marine cultural heritage*, including *historic wreck*, should be considered. In this context it is interesting to note that the Republic of Ireland prohibits the finder of an archaeological object from removing or interfering with it unless there is reasonable cause to believe this is necessary for preservation or its safety⁵²⁵.
- If this regulatory regime were adopted it could be an offence to do any of the following in relation to *marine cultural heritage*⁵²⁶ without authorisation:

⁵²⁴ The definition of which would include historic wreck.

⁵²⁵ S.23(1) National Monuments Act 1930.

⁵²⁶ The definition of which would include historic wreck.

- to tamper with or unearth;
 - to damage;
 - to remove;
 - to carry out any works;
 - to use any metal detector or other remote sensing equipment for the purpose of locating or identifying *marine cultural heritage*;
 - to deposit on the seabed any material or object which partly or wholly obliterates or obstructs access to *marine cultural heritage*;
 - to cause or permit any person to do any of these things⁵²⁷
- If such a regime were adopted provision would need to be made for authorisation of the disturbance and / or recovery of *marine cultural heritage* where this was necessary in the public interest e.g. to facilitate development
 - Provision would need also to be made for owners or persons deriving title under them to recover their property where unauthorised recovery of *marine cultural heritage* is prohibited. The costs of the recovery would be the responsibility of the owner. Where recovery is not authorised or the costs of recovery are increased by the need to conduct the recovery in an appropriate archaeological manner this must not place a disproportionate burden on the individual. If it does compensation may be payable.
 - A mechanism would need to be provided to allow an owner to claim his or her property subsequent to recovery. Again, costs of the recovery would be the responsibility of the owner.
 - A mechanism would need to be provided for the payment of compensation or authorisation of disturbance or recovery of *marine cultural heritage* by persons who have a 'possession' recognised by the *European Convention on Human Rights*, in circumstances where refusal of that authorisation would place a disproportionate burden on the applicant e.g. wreck removal to facilitate development.

These measures would be extremely comprehensive and undoubtedly would secure in many respects the United Kingdom's compliance with the *Valletta Convention*. However, such a wide regulatory regime may have adverse implication in terms of the following principles:

- Significance.
Such protection would provide 'blanket' protection for *marine cultural heritage* without regard to significance.
- Proportionality of resources and benefits.

⁵²⁷ There would need to be a saving for maritime emergencies and for statutory undertakers and others acting under a statutory duty in an emergency. However, statutory undertakers should be under a statutory duty to mitigate damage to marine cultural heritage.

Such protection would be more resource intensive, in that potentially many routine activities would require authorisation. Such authorisation could be 'deemed' by reference to conditions set out in secondary legislation, in a similar manner to deemed consent under Development Orders in the Town & Country Planning system. However, a degree of administrative resourcing will still be required. In relation to a lack of significance, such blanket protection may be seen as delivering benefits that are not proportionate to the benefits delivered to society as a whole.

- Sustainability in terms of the social, environmental and economic agenda at both local and national level.
Such wide regulation may be regarded as adversely affecting speed of decision making and imposing an unsustainable cost in terms of economic and social activity.
- Certainty of conduct.
Disturbance and / or recovery can take place inadvertently and the imposition of criminal sanctions in such cases may be seen as inappropriate. If this is the case careful drafting of the relevant statutory provisions would be required.
- Flexibility of management.
Such a wide ranging regulatory regime could be unwieldy to manage.

D: Significance - An Alternative

1. Alternative and more selective approaches could be adopted, which would provide more adherence to the principle of significance. They may also be regarded as being more proportional in terms of benefits and costs, as well as more flexible and sustainable.

The fundamental components of an alternative regulatory regime to that outlined in the previous section, based upon the concept of significance, would be:

- Mandatory reporting of discovery, disturbance and recovery of all forms of *marine cultural heritage*. This would enable *marine cultural heritage* of significance to be listed as a *marine heritage asset* upon receipt of such reports.
- Removal of the right of any person to enter into possession of a *historic wreck* as a salvor. This would ensure that in relation to *historic wreck* it would not be possible for any person to acquire possessory rights as a salvor in possession.
- Amendment of *S.230(1) Merchant Shipping Act 1995* to remove the liability of any of Her Majesty's ships, their cargo or equipment lying in United Kingdom territorial waters to civil salvage. This would restore the Sovereign Immunity from civil salvage of such vessels and items in United Kingdom territorial waters and place them on the same footing as Her Majesty's ships, their cargo or equipment located beyond United Kingdom territorial waters.

2. Applicability of the salvage regime to *historic wreck* that is **not** listed as being of significance as a *marine heritage asset* could then be retained. This would be achieved by the removal by the United Kingdom from the ambit of the salvage regime of only such *historic wreck* that is listed as being of significance as a *marine heritage asset*. This would be in accordance with the reservation entered by the United Kingdom under *Article 30 International Convention on Salvage 1989*. As an adjunct the disturbance or recovery of any *marine cultural heritage* which is listed as a *marine heritage asset* would be prohibited.

Thus *marine cultural heritage* that is **not** listed as a *marine heritage asset* could be disturbed and recovered, although such disturbance would be subject to mandatory reporting. Where the recovered *marine cultural heritage* consisted of *historic wreck* which is **not** listed as being of significance as a *marine heritage asset*, it would continue to be subject to salvage and be administered according to the current provisions of the *Merchant Shipping Act 1995* and the Receiver's current policy on historic wreck.

Consequently, only such *historic wrecks* that are listed as *marine heritage assets* would be immune from salvage and their disturbance prohibited. Where recovery from a site listed as a *marine heritage asset* was authorised then, in the absence of the application of salvage, it is again arguable that the law of finds might apply if no owner came forward. This could result in the person recovering the *marine cultural heritage* acquiring title to it in preference to the Crown. This would be regarded by the archaeological community as

an undesirable result. It should be expressly stated that the law of finds does not apply to recoveries from sites listed as *marine heritage assets*, even when authorised, and that, where no owner comes forward, title will vest in the Crown.

Provision would also need to be made to authorise owners or their successors in title to recover their property where it is listed as a *marine heritage asset*. The costs of the recovery would be the responsibility of the owner. Where recovery is not authorised or the costs of recovery are increased by the need to conduct the recovery in an appropriate archaeological manner, this must not place a disproportionate burden on the individual. If it does, compensation might be payable.

A mechanism would also be needed to provide for an owner to claim his or her property subsequent to recovery. Again, costs of the recovery would be the responsibility of the owner. Where the costs of recovery were increased by the need to conduct the recovery in an appropriate archaeological manner this must not place a disproportionate burden on the individual. If it does compensation may be payable.

Under such a regulatory regime *historic wreck* would again be a component of *marine cultural heritage*. However, until such time as an *historic wreck* is listed as a *marine heritage asset*, due to its being of historical, archaeological or artistic importance or potential, it would be liable to salvage and ultimately disposal under the *Merchant Shipping Act 1995* in accordance with the Receiver's policy on historic wreck. Since discovery (or disturbance or recovery) of *historic wreck* would be reportable, it could be assessed for significance and thus listing upon discovery. The application of the principle of significance would result in only some *historic wreck* being listed as a *marine heritage asset*. If listed, as a *marine heritage asset*, the *historic wreck* in question would cease to fall within the ambit of the salvage regime and would be subject to statutory protection. However, it should be noted that this could not be applied retrospectively, so as to deprive a salvor of an award in respect of recoveries made prior to listing.

Such a regime would mirror that envisaged in English Heritage's initial policy document 'Taking to the Water', where it was suggested that the salvage regime was inappropriate for sites of special significance⁵²⁸. It would also be compatible with the recommendation, made in respect of terrestrial recoveries of 'Treasure' under the *Treasure Act 1996*, that rewards should not be paid to archaeologists and persons involved in archaeological investigation, irrespective of professional or avocational status⁵²⁹. It would also accord more closely with the principle of significance. As a result fewer sites would be listed as *marine heritage assets*. This would require less intensity of resources and would deliver more proportionality between resource and benefit. Since there would be fewer sites there is likely to be greater sustainability in terms of the social, environmental and economic agenda at both local and national level. Also fewer sites would mean less demands upon management, which may mean more flexibility could be achieved.

⁵²⁸ 'Taking to the Water' English Heritage (2002) para. 8.12.

⁵²⁹ See further Review of the Treasure Act Paintin, E.M. *Art Antiquity and Law* (2001) 6(4) pp. 345-387 paras. 106, 152 & 156.

Against this must be balanced the fact that until such time as *marine cultural heritage*, including *historic wreck*, was listed a *marine cultural asset*, it would be liable to disturbance, recovery and, if it constituted wreck, subsequent salvage claims. This vulnerability could be mitigated to some extent by a mechanism for temporary protection while the *marine cultural heritage* was investigated, its significance assessed and possible listing considered. However, the effectiveness of this mechanism would be dependant upon prompt reporting of discovery and / or disturbance and much damage to *marine cultural heritage* could accord between discovery and reporting⁵³⁰.

3. While this alternative discussed would protect from disturbance *historic wreck* which is listed as a *marine heritage asset*, it would not protect from disturbance *historic wreck* which is **not** listed as a *marine heritage asset*. Since the salvage regime would continue to be applicable to such *historic wreck* that is not listed as a *marine heritage asset*, there would be an incentive to disturb it in order to make recoveries on a speculative basis. As an alternative, a further degree of protection might be conferred upon *historic wreck* which is not listed as a *marine heritage asset* by removing the financial incentive for its disturbance and recovery. This would be achieved by removal by the United Kingdom, under its reservation entered under *Article 30 International Convention on Salvage 1989*, of all *marine cultural heritage* from the ambit of the salvage regime. Thus, all wreck falling within the definition of *marine cultural heritage* would be immune from salvage, not just that listed as a *marine heritage asset*. This would encompass all wreck where a stated period had elapsed since its loss, e.g. 50 years, or which, although lost more recently, was listed as a *marine heritage asset*. Such a solution would not confer complete protection, since there would be no prohibition on the disturbance of *historic wreck* that is not listed as a *marine heritage asset*. At best, all one could say is that the financial incentives for such disturbance would be removed and any disturbance and/or recovery would be reportable. This alternative would therefore form a half way house between ‘blanket’ protection outlined in Section C above and removing from the salvage regime only such *historic wreck* as is listed as a *marine heritage asset*.

If either of the alternatives discussed here were to be adopted, then again it should be expressly provided that the law of finds would not apply in lieu of salvage. Moreover, in the absence of the salvage regime there would need to be certain mechanisms put in place to fill the legal void left by its removal. These relate principally to providing mechanisms for reporting of recoveries, for owners or their successors in title to claim their property if it were recovered and to contract for its recovery and for unclaimed recovered material to vest in the Crown. At present these mechanisms are provided by the salvage regime. These aspects are discussed more fully in Section E immediately below.

4. However, it should be recognised that neither of these alternatives would fully comply with the *Valletta Convention* and would only partly mirror the regulatory framework adopted by most comparable Common Law jurisdictions, as outlined in the

⁵³⁰ This limitation could only be addressed by a blanket prohibition of disturbance of *marine cultural heritage* per se, irrespective of its significance and the removal of all forms of *historic wreck* from the salvage regime, as discussed in Section C above.

commencement of this Part. Nor would either protect from disturbance *marine cultural heritage* that is not derived from wreck and which is not listed as a *marine heritage asset*. Only the adoption of a 'blanket' prohibition against disturbance of any *marine cultural heritage* without authorisation, as outlined in Section C above, would achieve this and secure full compliance with the *Valletta Convention*.

E: Removal of Salvage – Filling the Void

1. Two possibilities for the removal of the salvage regime have been identified above⁵³¹.

Salvage could be removed in respect of:

- All *historic wreck*, this being defined by way of a stipulated period having elapsed since its loss.
- Only sites of significant *historic wreck* which are listed as *marine heritage assets*

2. Irrespective of which option is pursued, it is essential that the legal vacuum left by the removal of the salvage regime is filled. Failure to do so may result in the law of finds applying in lieu of the law of salvage. This could, in appropriate circumstances, give the finder title to recovered cultural material if no owner comes forward. Any new regime will also have to ensure that the United Kingdom meet its obligations under the *European Convention on Human Rights*⁵³² by providing mechanisms to protect proprietary and others rights recognised by that Convention. To achieve these objectives it will be necessary, where salvage rights are removed:

- To provide a mechanism for authorising owners or persons deriving title under them to either recover their property or, in appropriate circumstances, receive compensation in lieu of authorisation.
- Where recoveries are made other than by owners or persons deriving title under them, to provide a mechanism for reuniting those owners or persons with their recovered property, in a similar manner to that currently provided by the *Merchant Shipping Act 1995*.
- Where owners or persons deriving title under them are reunited with their property following authorised recovery to provide a mechanism for rewarding the recovery by a payment for the service of recovery. This payment, which will be the responsibility of the person claiming title to the property, can be on an agreed basis between the claimant and those providing the services. It would not be an agreement or payment for ‘salvage’ services.
- To provide that the law of finds shall not apply to recoveries.
- To provide for title to vest in the Crown should no person claim recovered material within a stipulated period from its recovery.

3. In removing salvage rights it may be recognised that the existing salvage regime does provide an ‘incentive to honesty’, by providing monetary awards. It is feared that the removal of this incentive would, against a market of rising values for antiquities, encourage illicit recoveries and trading. Additionally, this ‘incentive to honesty’ is credited with the reporting of several significant marine archaeological sites and the removal of any possibility of pecuniary awards could result in a decline in reporting of

⁵³¹ All wreck falling outside the definition of *historic wreck* would continue to be administered by the Receiver of Wreck according to the provisions of the *Merchant Shipping Act 1995*.

⁵³² For a discussion of these obligations see Part 1.

discoveries and / or recoveries of cultural material. It is noteworthy that many jurisdictions, in removing cultural material from the salvage regime, have retained an element of financial reward⁵³³. The salvage regime also enjoys the confidence of many stakeholders and provides a proven system for reuniting owners with their property. The latter characteristic is especially important in the light of the United Kingdom's obligations under the *European Convention on Human Rights*.

Consequently, consideration should be given to incorporating some or all of the following principles into any new regulatory in respect of *marine cultural heritage* where entitlement to salvage is removed:

- An 'incentive to honesty' in terms of reporting discoveries of all forms of *marine cultural heritage* could be provided by means of a financial reward.
- Such financial incentives should be discretionary and not 'as of right'.
- These discretionary rewards (finders' fees) could be based upon the cultural significance of the discovery and the appropriateness in archaeological terms of the finder's conduct, rather than the pecuniary value of material. In this manner the criterion for the reward is shifted from rewards based on the market value of the material and its successful recovery to rewarding appropriate conduct. This shift is important, as experience with the *Treasure Act 1996* in the terrestrial context has shown that museums are having great difficulty in assembling the funds to acquire treasure finds, especially as such finds are unpredictable and therefore difficult to budget for⁵³⁴. A Code of Conduct for finders could be promulgated, which would set out 'best practice' for finders. Adherence to the Code could be a criterion in setting the quantum of any discretionary award.
- Although salvage payments are only made in respect of recoveries of wreck it seems incongruous if awards were only paid for reports of discoveries of previously unknown *historic wreck* and not for all forms of *marine cultural heritage*. For this reason it may be advisable to consider extending the power to make discretionary payments in respect of reported discoveries of previously unknown *marine cultural heritage* and not just previously unknown *historic wreck*.

It would be a matter of policy for the Secretary of State, in consultation with the relevant Heritage Agency, to resolve:

- The criteria for a discretionary payment⁵³⁵.
- The quantum of the payment⁵³⁶.
- The frequency with which such awards would be made.

⁵³³ E.g. France, Australia and Holland.

⁵³⁴ See further Review of the Treasure Act Paintin, E.M. *Art Antiquity and Law* (2001) 6(4) para. 133.

⁵³⁵ Included in the criteria could be the archaeological appropriateness of the finder's conduct and to this end consideration could be given to publishing a Code of Practice for finders. Adherence to the Code could then be a criterion in exercising the discretionary to make an award and at what level.

⁵³⁶ By way of illustration of the quantum of awards finders were awarded \$A 32,000 for the wreck of the bullion ship *Rapid*, \$A10,000 for *HMS Pandora* and \$A2,000 for the wreck of the *William Salthouse*. See further 'Australian Shipwrecks Murder Mayhem Fire & Storm' Jeffreys, M. (1999) *New Holland* (Australia): NSW Appendix 1.

Occasionally, the cultural significance of a site does not become apparent until some time after its discovery and / or designation. In such circumstances consideration might be given to the payment of a discretionary award retrospectively or the payment of a further award if one was made at the time of discovery.

It is important that the process of making such discretionary awards is as inclusive and transparent as possible. The criteria should be comprehensive and display clarity. Applicants could be invited to make representations in support of an award and a reasoned statement should be published in respect of any determination and quantum. This statement should be put into the public domain. This will encourage inclusivity and aid consistency in decision making. Stakeholder confidence in the process may be increased by the involvement of a broad based advisory committee consisting of stakeholder representatives. The advantages of establishing such an advisory committee are discussed further in Section **J5** post. It is recognised that the payment of ‘finders’ fees’ will require an additional level of public resourcing for the heritage compared to the present position⁵³⁷. However, the availability of this discretion would continue to provide an ‘incentive to honesty’, which has been deemed to be an essential element in protecting the underwater cultural heritage and would also foster a sense of inclusiveness. Additionally, unlike salvage, recovery would not be a pre-requisite so disturbance, which is often detrimental in heritage terms, would not be rewarded. Finally, as an alternative to a discretionary award finder’s could be encouraged to waive consideration for a discretionary award in return for appropriate recognition as finder(s) of the *marine cultural heritage* in question. Although this possibility may seem naively altruistic the Receiver of Wreck’s experience is that finders are sometimes content to waive salvage rights in return for continuing public recognition where material is put on display. Such a policy has been suggested in a terrestrial context in respect of ‘Treasure’⁵³⁸ and there is every reason to pursue it in a marine context.

F: Reporting – The Administrative Mechanisms

1. Under the options set out above some or all the following could be made reportable, depending upon the particular regime enacted:

- Discoveries of *marine cultural heritage*.
- Disturbance to listed *marine heritage assets* or *marine cultural heritage*.
- Recoveries of *marine cultural heritage*.

In addition mechanisms for tracing owners of recovered material, administering salvage awards and / or discretionary payments would need to be administered, depending upon the particular regime enacted.

2. In terms of the administration of reports of activity in respect of *marine cultural heritage* there would appear to be an option as to whom reports should be made and by

⁵³⁷ It is envisaged that where a finder’s fee is paid by the Crown but where an owner or other person is subsequently reunited with their property that fee would be recoverable against the owner as a civil debt..

⁵³⁸ See further Review of the Treasure Act Paintin, E.M. *Art Antiquity and Law* (2001) 6(4) para. 155.

whom they should be administered⁵³⁹. At present there is no generic local authority jurisdiction beyond the Low Water Mark. Various harbour authorities have jurisdiction for a stated area beyond that Mark, mainly upon a statutory basis, but they have no responsibility other than in respect of the functioning of the harbour in question. Under the *Merchant Shipping Act 1995* all recoveries of wreck landed within the United Kingdom have to be reported to the Receiver of Wreck. In practice the Receiver often receives reports of non shipwreck material recovered and as administrative ‘best practice’ liaises closely with heritage agencies, local authorities and local and national museums.

Until such time as there is some extension of jurisdiction of local or regional authorities beyond the Low Water Mark it would appear that the only possibilities for statutory responsibility for initial reports of discoveries, disturbance or recovery of *marine cultural heritage* is either the Receiver of Wreck or the relevant heritage agency (English Heritage). In the case of the latter a regional structure does exist. However, it seems likely that additional resources in terms of staff, staff training and administrative support would be required. Again, depending upon the particular regime enacted, staff could require training in respect of:

- The award and calculation of salvage awards (if salvage is retained in respect of *historic wreck* which is not listed as a *marine heritage asset* and not administered by the Receiver).
- The award and calculation of discretionary payments (either if salvage is removed in respect of all *historic wreck* or just *historic wreck* listed as a *marine heritage asset*).
- The mechanisms for tracing owners of recovered *marine cultural heritage*.
- Negotiating an appropriate amount for the services of recovery etc.

Such an administrative system would achieve a degree of symmetry with terrestrial reporting but at present resource levels it may be the case that heritage agencies lack critical mass, expertise and adequate resources to assume this additional function. This potential arrangement may prove to be resource intensive compared to extending the present administrative structure for marine reporting through the Receiver of Wreck. This issue cannot be taken lightly, as experience with the *Treasure Act 1996* has shown that the increase in reporting facilitated by the Act has led to a severe shortfall in trained staff, with the result that a significant delay in processing finds has accrued⁵⁴⁰. Consequently, it is difficult to understate the resource implications involved. Furthermore, ‘differential reporting’ in terms of reports relating to non-historic wreck being made to the Receiver of Wreck and all other reports being made to a heritage agency does require the person reporting to correctly identify whether the material in question is *marine cultural heritage* or not, something which many members of the public lack the expertise to do. At the very least, an educational campaign to inform stakeholders of the changes and the nature of *marine cultural heritage* likely to be encountered would seem advisable.

⁵³⁹ All reports of recoveries of wreck falling outside the definition of *historic wreck* would continue to be administered by the Receiver of Wreck according to the provisions of the *Merchant Shipping Act 1995*.

⁵⁴⁰ See further Review of the Treasure Act Paintin, E.M. *Art Antiquity and Law* (2001) 6(4) paras. 167 & 168.

Conversely, by making the Receiver the initial recipient of all reports a ‘one stop shop’⁵⁴¹ for the public is provided, which makes the system more accessible to the public, and the stakeholder is relieved of the decision as to the possible archaeological significance of the activity in respect of *marine cultural heritage*. Additionally, the Receiver’s office already has the administrative and legal expertise and technical resources for much of this administration, together with experience of liaising in respect of cultural material. Finally, the extensive public education campaign, which has been carried out for the last decade to educate the public to report to the Receiver of Wreck anything thought to be of significance, could also be continued and built upon.

There is no significant legal impediment to either option being adopted and ultimately the question is not one of legal merit but of administrative convenience, efficiency, public education and, not least, resources⁵⁴².

⁵⁴¹ Consideration could be given to amending the title of the office of Receiver of Wreck, to better reflect the wider nature of the obligation to report. The title ‘Maritime Receiver’ has been suggested.

⁵⁴² See also Section K post.

G: Listing ‘marine heritage assets’

1. A *marine heritage asset* would be defined as any *marine cultural heritage* situated completely or partly below the High Water Mark which due to its historical, archaeological or artistic importance or potential is listed by a heritage agency or the Secretary of State on a national list of terrestrial and marine heritage assets.

- This definition should ensure that any object, site or area which can presently be designated under the *Protection of Wrecks Act 1973* or the *Protection of Military Remains Act 1986*⁵⁴³ or scheduled under the *Ancient Monuments and Archaeological Areas Act 1979* could be listed as a *marine heritage asset*.
- Additionally, the definition should ensure that such elements of the archaeological heritage as encompassed by the Council of British Archaeology’s proposals for amending the present definition of a scheduled monument are included. This would, for example, enable a submerged landscape to be listed as a *marine heritage asset*.
- Consequently, a listed *marine heritage asset* could comprise the site of an object or an area of seabed or foreshore.
- By having a single regime for all sites of cultural significance the present plethora of designations, schedulings and listings would be removed. Periodic review of the list would be a statutory obligation of the heritage agency and removal from the list should be possible.

2. To be listed the *marine cultural heritage* would need to be of sufficient importance. The *Protection of Wrecks Act 1973* uses the qualification that to be designated the wreck or objects associated with it must be of ‘*historical, archaeological or artistic importance*’. These terms are not defined. To be scheduled under the *Ancient Monuments and Archaeological Areas Act 1979* the monument must be of ‘*national importance*’. This term is undefined. However, the same non-statutory criteria are used to provide a yardstick for both Acts⁵⁴⁴.

- The term ‘*historical, archaeological or artistic importance*’ would appear to better describe the nature of what is being listed as a *marine heritage asset* than the term ‘*national importance*’. However, it seems advisable that a precautionary approach is taken to listing and that protection could be conferred where there is evidence of archaeological potential, without it having to be immediately established. For this reason evidence of archaeological potential, if it indicates the possibility of significant remains, should be sufficient to warrant listing.

⁵⁴³ Military Remains which are so recent as to fall outside the definition of *underwater marine cultural heritage* would continue to be administered under the Protection of Military Remains Act 1986.

⁵⁴⁴ See further Advisory Committee on Historic Wreck Sites, Report for years 1999 and 2000 Department for Culture, Media and Sport March 2002 Annexe E pp.40-41.

- Whether a specific element of *marine cultural heritage* is of sufficient *historical, archaeological or artistic importance* to warrant being listed should continue to be judged against stated criteria.
- These criteria could continue to be non-statutory, as this would facilitate amendment in the light of experience and advances in historical and archaeological knowledge.
- Included within these criteria should be an assessment as to whether listing would in practice achieve protection, as is currently the case under the non-statutory criteria promulgated by the Ministry of Defence for designation under the *Protection of Military Remains Act 1986*. Ineffectiveness of protection will quickly devalue the ‘currency’ of listing and it may be better where protection cannot be secured that the object or area is investigated and recorded rather than listed.
- It is important to the principles of inclusivity, accessibility and significance that these criteria are made available to stakeholders in a manner that makes them readily comprehensible.
- Similarly, in the interests of the principles of transparency and accountability it is important that the applicability of these criteria to each listing made is clearly explained to all stakeholders. To achieve this, consideration could be given to a statutory requirement that a ‘*statement of significance*’ is made in respect of each listing. The listing could also identify the regulatory controls relevant to the specific asset. This information could also form a component of a *statutory management plan* for each listed *marine heritage asset*.
- It is important in terms of the principle of certainty that each listing is delineated precisely, preferably both by reference to co-ordinates and to a scaled chart based representation and that the statutory controls applicable to each specific listing are articulated in terms which make clear exactly what activities are prohibited.
- Consideration could be given to removing the designation of those remains currently protected under the *Protection of Military Remains Act 1986* which are of cultural significance and placing them on the list of *marine heritage assets*, with responsibility for their administration transferred to the relevant heritage agency.

H: The Process of Listing ‘marine heritage assets’

1. At present the process of designating under the *Protection of Wrecks Act 1973* and the *Protection of Military Remains Act 1986* and scheduling under the *Ancient Monuments and Archaeological Areas Act 1979* lacks the character of transparency, accessibility, accountability, inclusivity and (perhaps most worrying of all) respect for citizens’ rights. As has been noted in Part 1 it is uncertain whether the present process complies with the requirements of the *European Convention on Human Rights*⁵⁴⁵. If an appreciation of the significance and value of heritage assets is to be embedded into the community considerable attention needs to be paid to the process of listing to ensure that such compliance is achieved and that the values of transparency, accessibility, accountability and inclusivity are successfully incorporated into that process.

2. In the interests of inclusivity and accessibility consideration for listing could be initiated by application by stakeholders as well as on the initiative of a heritage agency. Where an application to list is made by a stakeholder there should be a provision making compensation available where a vexatious or frivolous application is made and loss results, in a similar manner to those provisions contained in the *Land Registration Act 1925*⁵⁴⁶ in respect of an application for an entry on the Land Register. Determinations as to listing would be made by the relevant heritage agency, after consultation with government departments, other agencies and other interested parties. There should be a list of ‘statutory’ consultees but policy guidance should encourage as wide a consultation as possible, particularly within the local community. It is important that persons with an economic interest that could potentially be adversely affected are consulted and that consultation is not restricted to those with proprietary or possessory interests.

3. Consideration could be given to including some or even all of the following:

- the provision of a statement of reasons for the proposed designation or scheduling;
- the provision of consultation prior to the determination of the proposed listing;
- the provision of an opportunity to make representations in respect of the proposed listing, such representations not being restricted to the merits of the proposed designation or scheduling;
- a power for the Secretary of state to ‘call in’ particularly complex determinations and appoint a person to hear representations and reach a determination;
- the provision of a statement of reasons for the determination to list or not to list. If it is determined that listing should occur this would also form part of the *statement of significance*;
- the provision of an opportunity to appeal against the merits of a listing to a person specifically appointed to hear such appeals;
- the provision of a statement of reasons for a refusal of such an appeal;

⁵⁴⁵ In particular relation to Article 6 and Article 1 of the First Protocol.

⁵⁴⁶ S.56(3).

- the provision of compensation where listing results in a disproportionate burden falling upon any individual(s);
- the continued availability of judicial review of the legality of such administrative decisions;

4. The provision of compensation would be required to ensure compliance, in the appropriate circumstances, with *Article 1 of the First Protocol to the European Convention on Human Rights*. To a greater extent it would mirror the present availability of compensation for refusal of scheduled monument consent under the *Ancient Monuments and Archaeological Areas Act 1979*. However, in recognition of the fact that a disproportionate burden may be imposed upon an individual by the imposition of restraints from the date of listing, rather than from the date of refusal of permission for prohibited activities, consideration could be given to the availability of compensation for listing per se, where this imposes a disproportionate burden. As with existing compensatory provisions, it is not the frequency with which they are used that is at issue but simply their availability when required. It is quite conceivable that resort to compensation will be rare.

5. A significant number of administrative mechanisms have been identified for possible inclusion in this listing process. It may not be considered necessary to adopt all of them. However, in determining the extent to which these administrative mechanisms are adopted it should be remembered that they are designed to satisfy a number of the guiding principles set out at the beginning of this Part of the Review. Their use, to a greater or lesser extent, should ensure that the process evidences inclusivity, transparency, accountability and accessibility. In turn this will evidence sufficient impartiality to adequately discharge the Crown's obligation to respect of citizen's rights. If this imperative is achieved the process will also exhibit durability and proportionality of resource, in that any challenge in the courts becomes less likely, thereby avoiding potentially considerable expenditure of resource. In turn this will allow the system to endure without further amendment being forced upon it by incompatibility with human rights legislation. To date, in the case of *Bryan v. United Kingdom*⁵⁴⁷, the United Kingdom has successfully weathered the issues posed by *Article 6 European Convention on Human Rights*. However, it was perhaps fortunate that in that case the issue centred around a land use enforcement notice, a component of land use regulation that is characterised by a fairly elaborate process, with rigorously prescribed administrative procedures and the use of independent third parties to hear administrative appeals. The closer a system of listing can come to incorporating such characteristics, the more likely it is to endure.

⁵⁴⁷ (1995) 21 E.H.R.R. 342.

I: Regulating & Managing Marine Heritage Assets

1. There should be powers of management and expenditure in respect of marine heritage assets which are equivalent to those presently contained in the *Ancient Monuments and Archaeological Areas Act 1979* and the *National Heritage Act 2002*.

2. In respect of each *marine heritage asset* there could be a statutory duty to compile a *statutory management plan*.

3. The *statutory management plan* could:

- Contain the *statement of significance* in respect of the asset.
- Identify the regulatory controls relevant to the asset. These controls could be selected from a statutory ‘menu’ and in particular would clearly identify what activities were prohibited.
- Contain an explicit management strategy for the asset.
- Identify any proposals to monitor and/or reduce environmental degradation of the asset.
- Identify any proposals for investigation and management of the asset.
- Identify any proposals for conservation of any material recovered from the site of the asset and the deposition of conservation records.
- Contain details of any agreements relating to the listed asset e.g. management or guardianship agreements.
- Identify any proprietary, possessory or economic interests in the listed asset⁵⁴⁸.
- State any restrictions on public access and what, if any, conditions such access is subject to. Consideration could be given to devising a statutory code for access that would apply unless otherwise stated.

4. There could be a statutory duty to publish a periodic report in respect of each marine heritage asset. The reporting period for each specific asset could be identified in the *statutory management plan* and could vary depending upon differing circumstances, such as the significance of the asset, physical condition, perceived threat etc. This report could review, inter alia, whether the objectives set in the *statutory management plan* and its associated management strategy were being met and whether the listing should be maintained.

5. In keeping with the principles of inclusivity, public education and sustainability and in order to discharge the United Kingdom’s obligation under *Articles 7 & 9 Valletta Convention* there could be a statutory duty to promote the publication and dissemination of information relating to the site and its investigation.

⁵⁴⁸ There would be a need to identify any interest which could amount to a ‘possession’ within Article 1 to the First Protocol European Convention on Human Rights. Such interests go beyond the proprietary and possessory rights traditionally recognised by English law.

6. In keeping with the principles of inclusivity, accessibility and sustainability and in order to discharge the United Kingdom's obligation under *Article 9 Valletta Convention* there could be a statutory duty to promote such public access to a marine heritage asset as would be compatible with its conservation. Alongside this duty there could be a statutory presumption in favour of public access, with restrictions or a prohibition on access being imposed only where it would be necessary for the conservation of an individual asset.

7. Such an approach would allow a statutory 'menu' of regulatory controls to be created, with the *statutory management plan* for each asset identifying the particular regulatory controls applicable to that specific asset. Certain, basic controls would undoubtedly be applicable to all *marine heritage assets*, with others only being imposed where appropriate. This approach to varying levels of regulatory activity has an echo in the regulatory mechanisms adopted under the *Protection of Military Remains Act 1986*, where for certain wrecks access is permitted subject to non interference, whereas for others unauthorised access is prohibited and a potential visitor can only ascertain the level of regulation by inquiry⁵⁴⁹.

It is also important to note that the nature of such regulatory controls will partly depend upon whether protection has been extended to all *marine cultural heritage*, as discussed in section C2 above. If it has, then it would already be an offence to do any of the following in relation to any *marine cultural heritage*, including listed *marine heritage assets*, without authorisation:

- to tamper with or unearth;
- to damage;
- to remove;
- to carry out any works;
- to use any metal detector or other remote sensing equipment for the purpose of locating or identifying *marine cultural heritage*. The *Valletta Convention* requires that the use of “ ... metal detectors and any other detection equipment or process ...” be subject to prior authorisation “ ... in cases foreseen by domestic law ...” when used for “ ... archaeological investigation.”⁵⁵⁰. Arguably, this requirement could be met by prohibiting the unauthorised use of detection equipment only within areas listed as having special significance. However, it is interesting to note that the Republic of Ireland has prohibited unauthorised use of detection equipment in any place location if it is used “ ... for the purpose of searching for archaeological objects.”⁵⁵¹. This gives a wide interpretation to the obligation under the *Valletta Convention* by conferring protection on all underwater cultural heritage⁵⁵².

⁵⁴⁹ Although a Code of Practice has not been prepared guidance notes in relation to remains designated under the Act are being prepared for publication.

⁵⁵⁰ Article 3iii.

⁵⁵¹ SS2(1) National Monuments Act 1987.

⁵⁵² Within designated areas unauthorised *possession*, as opposed to use, of detection equipment is prohibited (s.2(1) National Monuments Act 1987). However, as sonic detection equipment (sonar) is

- to deposit on the seabed any material or object which partly or wholly obliterates or obstructs access to *marine cultural heritage*;
- to cause or permit any person to do any of these things⁵⁵³;

However, if protection has **not** been extended to all *marine cultural heritage* and the salvage regime is retained in respect of *historic wreck* which is **not** listed as a *marine heritage asset*, as discussed in section **D1** above, then it would be necessary to prohibit such unauthorised activities in relation only to anything listed as a *marine heritage asset*.

Irrespective of which regulatory regime is adopted consideration could be given to regulating the following in relation to listed *marine heritage assets*:

- Any operation if carried out for the purpose of recording details of a listed *marine heritage asset*⁵⁵⁴;
- The provision of public access.
The public would appear to enjoy a right to swim in tidal waters, unless specifically prohibited⁵⁵⁵. On the basis that the courts would equate swimming with underwater diving, it would appear that the public enjoy a right to access scheduled monuments in tidal waters, unless specifically prohibited. In the interest of the principle of accessibility there could be a presumption of public access⁵⁵⁶, whilst recognising that it will need to be regulated to varying degrees, depending upon the circumstances of each individual listed asset and, in some cases, perhaps excluded altogether⁵⁵⁷. This presumption could be complimented by the imposition of a statutory duty on the relevant heritage agency and the Secretary of State to promote public access to *marine heritage assets* and the dissemination of information relating thereto. This would also secure compliance with *Article 9i & ii Valletta Convention*⁵⁵⁸. Where a *marine heritage asset* consisted of military remains then it could be administered under heritage legislation but unauthorised access could be prohibited on the same basis as it would be for a ‘Controlled Site’ under the Protection of Military Remains Act 1986.

routinely for navigation safety, even by small recreational craft, this provision may cause difficulties in interpretation and implementation.

⁵⁵³ There would need to be a saving for maritime emergencies and for statutory undertakers and others acting under a statutory duty in an emergency.

⁵⁵⁴ Prohibited operations should not be limited to ‘diving or salvage operation’, as is currently the case under the Protection of Wrecks Act 1973 and the Protection of Military Remains Act 1986, as the use of a remotely operated vehicle (ROV) for investigation and recording alone is arguably neither a diving or salvage operation.

⁵⁵⁵ Decided law provides no assistance on the question of whether there is a right to bathe in the sea. Since it is not expressly prohibited then, on the Common Law basis that that which is not expressly or impliedly prohibited is lawful, it would appear to be a residual right. It is probable that the public right of navigation is restricted to craft and does not extend to persons swimming.

⁵⁵⁶ A statutory power to charge for such access could also be considered.

⁵⁵⁷ The extent to which public access is facilitated and the conditions, if any, it is subject to should form part of the periodic review of the management strategy for the site.

⁵⁵⁸ Which require a Party to promote public access and awareness of archaeological heritage.

8. The Secretary of State and the relevant heritage agency would be under a statutory duty to preserve any listed *marine heritage asset* and to manage it. However, it must be recognised that the marine environment is considerably harsher than the terrestrial one and can be potentially far more unstable. It can also be very corrosive of remains, although not necessarily so⁵⁵⁹. Any duty to preserve a listed *marine heritage asset* would need to be qualified by a limitation to the effect that that duty extends only as far as is practicable or reasonable.

It is anticipated that powers of management would be broadly comparable to those existing powers under the *Ancient Monuments and Archaeological Areas Act 1979* and the *National Heritage Act 2002*. In particular they should mirror those powers currently available to terrestrial monuments under the *Ancient Monuments and Archaeological Areas Act 1979*. Although monuments can be scheduled underwater under the *Ancient Monuments and Archaeological Areas Act 1979*, perusal of the Act strongly indicates that many of the associated management powers cannot be, since they appear to be applicable only to the terrestrial context. Clearly, in any new legislation this discrepancy needs to be addressed.

In any event, when formulating such powers, specific consideration should be given to providing a statutory power for the Secretary of State or the relevant heritage agency to:

- Acquire title to a *marine heritage asset* by gift, purchase or compulsory purchase in order to secure its preservation. At present only the Secretary of State may compulsorily acquire a monument, after consultation with English Heritage. English Heritage or a local authority⁵⁶⁰, as well as the Secretary of State may acquire a monument by agreement or gift. It would be more flexible if the power of compulsory purchase were to be extended to English Heritage. In the absence of any extension of local authority jurisdiction a local authority could not acquire a *marine heritage asset*.

A number of specific issues arise in the context of acquisition of title to *marine heritage assets*, which do not arise in a terrestrial context:

- The existing power to acquire land compulsorily under the *Ancient Monuments and Archaeological Areas Act 1979* cannot be exercised in relation to Crown land. Presumably a similar limitation would be incorporated into any new legislation. Since title to the territorial seabed is *prima facie* vested in the Crown any *marine heritage asset* which comprises an area of seabed, as opposed to an object thereon or therein, is likely to comprise Crown land for this purpose and could only be acquired by agreement with the Crown Estate.

⁵⁵⁹ Organic material and even metal can survive for considerable periods of time where conditions are stable and anaerobic. However, remains lying on or near the surface of the seabed are likely to continually decay.

⁵⁶⁰ Provided it is within the authority's jurisdiction.

- The power of acquisition is predicated on the basis that ownership is either known or likely to be ascertainable. While this is true in a terrestrial context, it is far less likely to be the case in a marine context. In relation to the seabed itself Crown title can be presumed but the same is not true of objects on or within it e.g. wrecks. The *Merchant Shipping Act 1995* provides a mechanism for ascertaining ownership of ‘wreck’ but only when it has been recovered. While there are mechanisms for compulsory acquisition where ownership is unknown, it would be advantageous for a number of reasons if a generic mechanism for determining ownership of objects in situ in the marine environment were introduced. This is discussed in more detail in section J below⁵⁶¹.
- Enter into a Guardianship agreement in order to secure the preservation of a *marine heritage asset*. Guardianship leaves title (ownership) to the property intact but gives wide powers for the preservation and investigation of the monument. This may only be done with the consent of the owner, so again a mechanism for determining ownership of a *marine heritage asset* in situ would be advantageous.
- Enter into a management agreement in respect of a *marine heritage asset*. Such agreements are far more frequently used and give the Secretary of State or English Heritage or a local authority full management and control without recourse to the exercise of more formal and expensive statutory powers. Again, the consent of the owner is required, so a mechanism for determining ownership of a *marine heritage asset* in situ is required.
- Transfer ownership, guardianship or responsibility for a management agreement. At present ownership or guardianship can be transferred by the Secretary of State, English Heritage or a local authority between themselves. An ability to transfer to registered charities, such as local archaeological trusts could usefully be considered.

Finally, these powers have been considered in relation to that *marine cultural heritage* which is of such significance that it has been listed as a *marine heritage asset*. There is some merit in considering making such powers available to *marine cultural heritage* which is not so significant as to be listed as a *marine heritage asset*. This would be comparable to the present situation where comparable powers are exercisable in respect of monuments which of ‘public interest’ but lack the significance to be scheduled. This may facilitate stewardship on a local level.

⁵⁶¹ The current provisions relating to acquisition of ownership, guardianship and management agreements, if replicated in new legislation, will need to be ‘marinised’, since aspects of them are plainly not applicable to underwater cultural heritage e.g. registration of local land charges.

J: Miscellaneous Provisions

1. It is beyond the function of this review to catalogue every statutory duty or power that will be necessary to implement and administer protection for *marine cultural heritage*. Such duties or powers are already in place under existing legislation and have only been referred to here where they are considered to be of specific importance. Presumably existing duties and powers of management under the *Ancient Monuments and Archaeological Areas Act 1979*, the *Protection of Military Remains Act 1986* and the *National Heritage Act 2002* will be replicated in any new legislation, together with such amendments as have been specifically referred to this review.

2. However, there are some provisions that either do not exist or are of such importance that it is felt necessary to make specific reference to them.

3. Consideration should be given to including the following *powers* in any amended regulatory regime⁵⁶²:

- A power to resolve issues of title to *marine cultural heritage*⁵⁶³ without the necessity of having to recover it first.

At present, issues of title for wrecks can only be resolved administratively under the *Merchant Shipping Act 1995* when wreck is recovered. Alternatively, a declaration from the courts can be sought in respect of any object, wreck or otherwise but this is potentially time consuming, expensive and uncertain in outcome. This has created problems in respect of underwater cultural heritage. Firstly, for archaeological material comprising wreck this is especially inappropriate, since it is often best preserved in situ, but to determine title conclusively under the *Merchant Shipping Act 1995*, without the cost of litigation, it must be recovered. Secondly, the inability of archaeological organisations to establish title to underwater cultural heritage has meant that funds from public bodies, charities and European Union sources cannot be used to further conservation or recovery of such a wreck. The most prominent example of this has been the submarine *Resurgam*, the world's second oldest surviving submarine, sunk in 1887. A charitable trust has been established to conserve and possibly recover this unique vessel but it cannot receive public funding or grant aid because the vessel was in the private ownership of its builder when it sank and thus remains private property. Public funding cannot be given unless ownership is resolved, but ownership cannot be resolved until it is recovered, which cannot be done unless funding is made available.

There may be merit in providing an administrative mechanism for determining title to *marine cultural heritage* while it remains in situ. In outline such a mechanism would function by the publication of a statutory notice. Persons wishing to assert title could then have a stated period to claim ownership. If title

⁵⁶² The power would be vested in the Secretary of State and the relevant heritage agency.

⁵⁶³ I.e. not just in relation to listed *marine heritage assets*.

cannot be substantiated then it would vest in the Crown, in a similar manner to existing provisions under the *Merchant Shipping Act 1995*. Such a mechanism would mobilise ownership as a management tool, without having to resort to litigation or disturbance.

Any such administrative mechanism would have to comply with the requirements of *Article 6 European Convention on Human Rights* by providing opportunities for impartial determination by means of administrative review and judicial scrutiny of decision making.

- A power to confer temporary protection upon *marine cultural heritage* which is being considered for listing as a *marine heritage asset*.

If prohibition against disturbance of any *marine cultural heritage* is introduced, as discussed in Section C above, then immediate protection would be conferred on all *marine cultural heritage* from the date the legislation comes into force.

However, if no such general prohibition is introduced, as considered in Section D above, then a mechanism may be advisable for protecting *marine cultural heritage* which is being considered for listing as a *marine heritage asset*. Otherwise an unscrupulous owner, salvor, developer or statutory undertaker could immediately disturb such *marine cultural heritage* with a view to defeating the objective of listing. Such conduct, although fortunately rare, has been experienced in a terrestrial context with the listing of buildings or the imposition of Tree Preservation Orders.

Such temporary protection would have to be promulgated by way of advertisement of a statutory notice and, where it is known, service of a notice on interested parties. In the light of the decision in *Oerlemans v. Netherlands*⁵⁶⁴ the imposition of such temporary protection would need to be subject to impartial scrutiny, although presumably this requirement could be satisfied by prompt determination as to whether listing should occur and the review mechanisms in that decision making process. A compensation provision would need to be available to cater for those (hopefully) rare circumstances where imposition of the temporary protection led to a disproportionate burden being placed on an individual as a result of such temporary protection. However, if determination of the listing were prompt it is less likely that the court would conclude any burden was disproportionate, as the State is given the benefit of a wide margin of discretion where it can be demonstrated that officials acted in good faith in the public interest⁵⁶⁵.

- A statutory power to enter and determine whether any *marine cultural heritage* is present, its nature, state of preservation and recording it.

⁵⁶⁴ (1991) 15 E.H.R.R. 561. See further the discussion of Article 6 ECHR in Part 1.

⁵⁶⁵ The so called 'margin of appreciation'. See further the discussion of Article 1 of the First Protocol to the ECHR in Part 1.

In a marine context a heritage agency has the benefit of public access in the sense that a person has a right to swim, unless this is lawfully restricted in some way. However, such access probably cannot be used for other purposes e.g. investigation, anymore than one may shoot on private land by standing on a public right of way and firing. Moreover, in places such public access is restricted e.g. foreshore, harbours etc. Consequently, a specific power of entry and investigation should be conferred on a heritage agency, together with a power to temporarily take custody of any *marine cultural heritage* for the purposes of identifying, investigating and preserving it. The power of entry could also expressly encompass entry upon a wreck, notwithstanding that a salvor is in possession, for the purpose of determining the probable age of the wreck. This is important where a stated period since loss is used to determine whether a wreck constitutes *historic wreck* or not⁵⁶⁶.

In respect of a listed *marine heritage asset* the relevant heritage agency should enjoy comparable powers of entry to those currently available under the *Ancient Monuments and Archaeological Areas Act 1979*.

- A power to conserve on a temporary basis *marine cultural heritage* and to recover the costs thereof from any person subsequently claiming or acquiring title.

At present there are no funds available to conserve underwater cultural heritage. In relation to wreck this can sometimes be funded on the basis that the costs can be reimbursed from a subsequent salvage award. However, this is not always possible, since no award may be forthcoming. For non wreck material it is inapplicable. If a prohibition is placed on the disturbance and / or recovery of *marine cultural heritage* then relatively little should be recovered, other than inadvertent recovery⁵⁶⁷. If no such prohibition is implemented then a discretionary power to conserve marine cultural heritage will be useful where *marine cultural heritage* of significance is recovered but no salvage award is likely to be made or is inapplicable because the material is not wreck.

This discretionary power should also encompass material recovered without authorisation from listed *marine heritage asset* but the relevant heritage agency should have a power to recover the costs of conservation as a civil debt from the persons making the unauthorised recovery⁵⁶⁸.

4. Consideration should be given to imposing the following *duties* upon the Secretary of State and the relevant heritage agency in any amended regulatory regime⁵⁶⁹:

⁵⁶⁶ Although the ability to enter into possession of a wreck may be removed for wrecks of a certain age, it is possible that a salvor may enter into possession of a wreck which is alleged to be 'younger'. It is advisable that a power of entry exists in order to determine whether such a wreck is historic wreck or not.

⁵⁶⁷ E.g. by trawling.

⁵⁶⁸ This would be in addition to any criminal sanctions a court may impose.

⁵⁶⁹ The duty would be placed on the Secretary of State and the relevant heritage agency.

- A duty to promote public education and access in relation to *marine cultural heritage*⁵⁷⁰. This is a requirement under the *Valletta Convention*⁵⁷¹ and this duty would secure compliance with that objective, at least in relation to marine heritage.
- A duty to establish marine historical environmental records on a statutory basis.

At present the National Maritime Record (NMR) is maintained under Royal Warrant. However, the Sites and Monuments Record (SMR) is maintained by local authorities on a non statutory basis. As a result the absence of formal support for Sites and Monuments Records could lead to these records being abandoned, even though they play an increasingly vital role in protecting, understanding and promoting underwater cultural heritage. This lack of formal support can also result in inadequate resources being available for responses to be made to requests for information and advice. In its Consultation Document *Protecting Our Heritage*⁵⁷², the Government expressed its intention to establish local authority Sites and Monuments Records on a statutory basis, but this has yet to be achieved. Statutory support for local authority Sites and Monuments Records should include their marine component. Under the *Valletta Convention* a Party is required to make and bring up to date surveys, inventories and maps of archaeological sites within its jurisdiction and disseminate that information⁵⁷³. Establishing marine historical environmental records on a statutory basis would secure compliance with that obligation.

- A duty to fund research into and conservation of the *marine cultural heritage*. The *Valletta Convention* requires States to fund research into and conservation of the archaeological heritage⁵⁷⁴ and this duty would secure compliance with that objective, at least in relation to marine heritage. Such a duty would encompass an obligation to formulate a *National Research Plan* as a framework for research into *marine cultural heritage*.

5. A broad based stakeholder advisory committee should be retained and established on a statutory basis.

The Advisory Committee on Historic Wreck Sites (ACHWS) is a non statutory advisory committee set up to advise on the designation of wrecks and the granting of licences under the *Protection of Wrecks Act 1973*, as well as considering reports from licensees and the diving contractor on the progress made annually under such licences. The membership of the committee is drawn from a wide range of stakeholders, the majority of whom have relevant professional expertise. The Advisory Committee is perceived as

⁵⁷⁰ This would be in addition to a similar duty in respect of listed marine heritage assets. Such a duty may be subsumed with a duty to promote public education and access in relation to the heritage generally.

⁵⁷¹ Article 9i & ii.

⁵⁷² (May 1996) Department of National Heritage and the Welsh Office, DNHJ0098NJ.

⁵⁷³ Article 7.

⁵⁷⁴ Article 6i & ii.

enabling stakeholders to participate in the decision making process and, using professional expertise, to inform that process.

The functions of such a committee could be:

- To advise on the award and quantum of discretionary awards for discoveries.
- To advise on the significance of sites for listing.
- To advise on applications to carry out authorised activities.
- To advise on the formulation and administration of policy.
- To advise on public education and access in relation to *marine cultural heritage*.
- Possibly to act as a review body in terms of administrative decision making, thereby securing impartial transparency in relation to such decision making.

The perceived advantages of such an advisory body are:

- It expresses inclusiveness.
- It provides transparency to and accountability in respect of administrative decision making.
- It provides a formal channel of communication between stakeholders and the relevant heritage agency, as well as providing an informal interface between these constituencies.
- It communicates with and informs stakeholders, e.g. by publishing an annual report.
- It is seen as adding legitimacy to the administrative decision making process.

6. There are a number of amendments relating to the *Merchant Shipping Act 1995* which are not directly concerned with heritage. However, they have a potential indirect effect in that they would influence whether a matter was dealt with as ‘modern’ wreck or as *marine cultural heritage*. For that reason they are dealt with here, although both the Maritime & Coastguard Agency and the Department of Transport are already appraised of them and are actively considering amendments to existing legislation. These matters are:

- Provision of a Time Limit for Reporting under *s.236 Merchant Shipping Act 1995* and any legislation introduced in relation to *marine cultural heritage*

Whatever administrative mechanism is adopted for reporting discovery, disturbance or recovery of *marine cultural heritage* it is important a time limit is established both for such reports and for reporting recoveries of wreck which is continued to be administered under the *Merchant Shipping Act 1995*. Prompt reporting enables a differentiation to be made in respect of modern or *marine cultural heritage*, a distinction the person reporting may be unaware of or mistaken about. Furthermore, a time limit is important for the purposes of establishing a criminal offence of failure to report.

Any potential prosecution faces difficulty where there is no stipulated time limit for reporting. Additionally this may cause a further difficulty in relation to prosecutions under the *Theft Act 1968* for retention of *marine cultural heritage* or

wreck recovered but not reported. To sustain such a prosecution it must be established that the defendant intended to permanently deprive the owner of the material. Failure to report impliedly evidences such an intention, whereas submission of a report suggests the opposite.

- Provision of effective sanctions for failure to report.

At present a breach of s.236 is a summary offence punishable by a fine at Level 4, which does not always reflect the gravity of the offence in cultural terms. There is also some doubt as to whether it is a continuing offence or subject to a limitation period of 3 years and that clarification is being sought. Given that some wreck recovered can be of either a very high monetary or historical value, or both, and may easily be recovered and transported, the balance of sanction against potential gain is extremely low in some cases. In such cases it cannot be said to fairly reflect either the potential gain to the offender nor the potential damage to the nation's cultural heritage. It is true that an offender is also liable to forfeit any claim to salvage and is liable to pay twice the value of the unreported wreck to the person entitled to it. This is an useful, additional sanction which should be retained, but even this sanction is not a satisfactory one where the wreck in question is of high cultural but low monetary value.

Accordingly, it would be advantageous to make non compliance with s.236 and any other reporting obligations introduced in respect of *marine cultural heritage* a continuing offence of either summary or indictable jurisdiction, with an option for a custodial sentence. In addition, the discretionary sanction of confiscation of equipment used in commission of the offence would be an extremely powerful deterrent⁵⁷⁵.

- Provision for an offence of providing false information in a report.

At present there is no specific offence of providing false information in a report to the Receiver of Wreck under the *Merchant Shipping Act 1995*. If amending legislation is introduced removing certain material from the ambit of the salvage regime there may be a strong incentive to supply false information, with a view to having the material administered as modern wreck rather than *marine cultural heritage*. Whichever administrative mechanism is selected for reports relating to *marine cultural heritage* there should be a specific offence of providing false information under both the *Merchant Shipping Act 1995* and legislation relating to *marine cultural heritage*.

- *Section 2 Protection of Wrecks Act 1973* could be incorporated into the *Merchant Shipping Act 1995*.

⁵⁷⁵ Confiscation of equipment used in the offence is provided for in the Protection of Military Remains Act 1986.

This section permits the Secretary of State to designate a area around a wreck which is considered to be dangerous to life or property and should be protected from unauthorised interference. At present two vessels have been so designated, by reason of their cargo of munitions. The objective of the section is to protect life and property, not the heritage and the provision would sit more comfortably in merchant shipping legislation.

7. Consideration should be given to rationalising those wrecks that would be classified as *historic wreck* and are also designated under the *Protection of Military Remains Act 1986* as ‘*Protected Places*’ or ‘*Controlled Sites*’. The *Protection of Military Remains Act 1986* potentially applies to a significant proportion of the United Kingdom’s maritime heritage and it is arguably incongruous for it to be administered by a non heritage Department of State. Moreover, the Act’s potential as an instrument of heritage management is severely compromised because:

- It is essentially reactive and protective against human activity rather than proactive.
- The criteria for designation are not exclusive and it is unclear what considerations they fully encompass.
- There is no provision for expenditure upon archaeological investigation and management of designated sites, for mitigation of accidental disturbance or environmental degradation, formulation of a management strategy for each site or for publication of archaeological investigations.
- The Act lacks provision for transparency and impartiality and is unlikely to comply with the requirements of *Article 6 European Convention on Human Rights*.
- The Act lacks provision for compensation and therefore is unlikely to comply with *Article 1 First Protocol European Convention on Human Rights*. At first sight this may seem to be unlikely to prove a significant problem, as the Crown is the owner of military remains and is also designating them. However, in previous decades military remains have been sold off for salvage. Moreover, as discussed in Part 1 of this review, designation can affect rights other than those derived from absolute ownership. Consequently, the imposition of a disproportionate burden, although rare, could not be ruled out and legislation should make provision for dealing with this contingency, however remote.

K: Consent for Procedures for Marine Cultural Heritage and Listed Marine Heritage Assets

1. Irrespective of whether prohibition against disturbance and / or recovery is extended to all *marine cultural heritage* or just to listed *marine heritage assets* a mechanism for providing consent for prohibited activities will be needed.

2. The procedure for determining applications for consent should be as accessible as possible. In relation to *marine cultural heritage* or listed *marine heritage assets* there is sometimes a requirement that a number of different consents are obtained under various

Acts⁵⁷⁶. The rule against delegation of decision making without express authority to do so unfortunately means that it is not possible for a single agency to determine an application for consent on behalf of other public bodies⁵⁷⁷. This means that each public body must reach a determination in relation to its own statutory requirements. However, there would be merit in having a single composite administrative procedure for applications, which would avoid the necessity of making an individual application in respect of each statutory consent that is required. This would in effect amount to a 'one stop' application, which could then be circulated to each government department or agency for determination in respect of their own regulatory responsibilities. This composite application would facilitate stakeholder accessibility and avoid myriad applications having to be made in respect of activities that require different but simultaneous consents.

3. The procedure for determining applications for consent should be as transparent, impartial and inclusive as possible. In particular it will need to satisfy the requirements of *Article 6 European Convention on Human Rights*. To this end consideration should be given to including in the procedure:

- the provision of consultation prior to the determination of the application for consent;
- the provision of an opportunity to make representations in respect of the application for consent;
- a power for the Secretary of state to 'call in' particularly complex determinations and appoint a person to hear representations and reach a determination;
- the provision of a statement of reasons for the determination to grant or refuse consent or grant it subject to conditions;
- the provision of an opportunity to appeal to a person specifically appointed to hear such appeals against refusal of consent or the imposition of conditions;
- the provision of a statement of reasons for a refusal of such an appeal;
- the continued availability of judicial review of the legality of such administrative decisions;

4. Any regulatory procedure established will also need to provide:

- A mechanism for authorising owners or persons deriving title under them to either recover their property or receive compensation, in circumstances where refusal of authorisation would impose a disproportionate burden upon such persons.
- A mechanism for reuniting such owners or persons with their recovered property, in a similar manner to that currently provided by the *Merchant Shipping Act 1995*, in circumstances where recoveries are made other than by owners or persons deriving title under them,

⁵⁷⁶ E.g. the Coastal Protection Act 1949, the Crown Estate Act 1961 and the Food and Environment Act 1985.

⁵⁷⁷ Generally speaking a public body cannot delegate a decision making power unless it is expressly authorised to do so. Neither may it effectively do so by allowing the objection of another body to determine the application without considering the application on all its merits. See further 'Constitutional and Administrative law' de Smith, S.A. (1978) 3rd. ed. Penguin Books: Middlesex.

- A mechanism for payment for the service of recovery where owners or persons deriving title under them are reunited with their property. This payment, which will be the responsibility of the person claiming title to the property, would not be a payment for ‘salvage’ services, but for work done on a normal contractual basis.
- A mechanism for authorising disturbance or recovery by other persons. This mechanism will also need to provide for compensation where such persons are entitled to a ‘possession’ within the meaning of *Article 1 First Protocol European Convention on Human Rights* and refusal of authorisation would impose a disproportionate burden⁵⁷⁸

5. In respect of recovered *marine cultural heritage* from a listed *marine heritage assets* it should be provided that:

- The law of finds shall not apply to recoveries.
- Title will vest in the Crown should no person claim recovered material within a stipulated period from its recovery.

The administration of mechanisms for determining title to property and legibility for compensation should rest with the public body charged with receiving reports of discovery, disturbance or recoveries of *marine cultural heritage* or listed *marine heritage assets*, as appropriate. This issue was discussed in Section F above. In any event it is presumed that the application for consent would be made to the relevant heritage agency and determined by them unless called in by the Secretary of State.

6. In relation to the granting of consent the difference in practice between licences granted under the *Protection of Wrecks Act 1973* and scheduled monument consent under the *Ancient Monuments and Archaeological Areas Act 1979* should be noted. Licences under the former Act are administratively divided into ‘types’, which broadly classify the activity which can be carried on, e.g. ‘visitors’, ‘survey’, ‘surface recovery’ and ‘excavation’. These categories are described in guidance⁵⁷⁹ but are not defined. This has led to difficulties of interpretation as to whether a particular activity falls within one category of licence or another. Under the latter Act the consent is granted for specified activities and this approach appears superior, in that the activity for which consent is granted can be precisely described, as opposed to attempting to place it within predetermined categories.

⁵⁷⁸ As discussed in Part 1.

⁵⁷⁹ ‘Protected Historic Wrecks Guidance Notes for Divers and Archaeologists’ Dean, M. (et. al.) (2000) University of St. Andrews.

Option 4: Changing Jurisdictions: New Scenarios

The options identified above are based upon the existing statutory functions and jurisdictions, albeit with some amendments to facilitate a new framework. However, it is possible that a more radical legislative structure could be formulated, based on new statutory functions and / or extended jurisdictions. Such outcomes are partly dependent upon the outcome of ongoing reviews⁵⁸⁰ and this makes it premature to consider such innovations in more than outline. As a result it is only possible to broadly identify and outline three principal innovations.

A: Establishing the Portable Antiquities Scheme and the Sites and Monuments Record on a Statutory Basis

1. The Portable Antiquities Scheme is a non statutory scheme designed to complement the *Treasure Act 1996*. Only ‘treasure’, as defined by the Act, is subject to mandatory reporting. The Portable Antiquities Scheme is a voluntary scheme of reporting for all objects found by the public. Any ‘Treasure’ reported is dealt with under the provisions of the *Treasure Act 1996* and all over objects under the Portable Antiquities Scheme. From April 2003 the scheme has expanded from five pilot regions of England and Wales to cover the whole of both countries. There will be 36 ‘Finds Liaison Officers’ based at regional museums and archaeological services, together with four supporting finds specialists and a central support team of five persons. The scheme records finds and passes these details to the Sites and Monuments Record, which is a non statutory historical environment record kept by local authorities, as well making details available to the public on a web site. In practice the Finds Liaison Officers have also played a significant part in ensuring that finds of ‘treasure’ are identified as such and making the scheme of the *Treasure Act 1996* accessible to the public⁵⁸¹.

Both the Sites and Monuments Record and the Portable Antiquities Scheme are non statutory. This has two substantial disadvantages. Firstly, since there is no statutory duty to maintain the Sites and Monuments Record local authorities are not required to resource the Record. While there are some notable exceptions many do not resource it adequately. In particular there can be inadequate resources to respond to inquiries from the public and developers and other public bodies⁵⁸². It has been recommended that local authorities be placed under a statutory duty to maintain the Sites and Monuments Record⁵⁸³. Secondly, the Portable Antiquities Scheme is presently funded by the Heritage Lottery Funding, but funding beyond April 2006 is uncertain. The government is looking at the possibility of

⁵⁸⁰ Principally the Review of development in Coastal Waters by DOT/ODPM and the Marine Stewardship Consultation by DEFRA.

⁵⁸¹ See further Review of the Treasure Act Paintin, E.M. *Art Antiquity and Law* (2001) 6(4) pp. 345-387.

⁵⁸² See further Joint Nautical Archaeology Policy Committee, ‘Heritage Law at Sea’ (2000): University of Wolverhampton para. 3.5.

⁵⁸³ See further ‘Review of the Treasure Act’ Paintin, E.M. *Art Antiquity and Law* (2001) 6(4) pp. 345-387; Joint Nautical Archaeology Policy Committee, ‘Heritage Law at Sea’ (2000): University of Wolverhampton para. 3.5; Joint Nautical Archaeology Policy Committee, ‘An Interim Report on The Valletta Convention & Heritage Law at Sea’ (2003): University of Wolverhampton.

funding the scheme to secure its long term sustainability and this may involve placing it on a statutory basis.

2. If the Portable Antiquities Scheme was established on a statutory basis then the possibility of discovery, disturbance or recovery of *marine cultural heritage* could become part of that scheme. If this was accompanied by the placing of the Sites and Monuments Record on a statutory basis, then an unified and comprehensive data base of cultural heritage situated in England and Wales could be established. This would afford a ‘seamless’ approach to reporting and recording cultural heritage, whether terrestrial or maritime.

3. There remains the issue of to whom discovery, disturbance or recovery of *marine cultural heritage* would be reportable. In a maritime context it is not simply an issue of recording. Complex issues of title can arise, which have no equivalent on land because relativity of title means that the landowner or the finder can usually assert title in the absence of an owner. If maritime finds were administered through regional Finds Liaison Officers this may have resource implications in terms of expertise, training, administrative and technological support and critical mass. Given the rather unsatisfactory experience to date with terrestrial reporting and provision of resources under the *Treasure Act 1996* it is difficult to understate the resource implications involved⁵⁸⁴. There may be less resource implications in making a restyled ‘Maritime Receiver’ the single Finds Liaison Officer for all *marine cultural heritage*, thereby making use of established expertise and administrative systems. In this capacity the Receiver would act as a ‘distribution point’, distinguishing reports of modern wreck from those of *marine cultural heritage* and passing the latter into the Portable Antiquities Scheme, in a comparable way to that which Finds Liaison Officers currently do for ‘Treasure’. This may well be a ‘risk averse’ strategy. It would also have the advantage of keeping a ‘one stop shop’ for maritime finds to facilitate public accessibility. There is no significant legal impediment to either option being adopted and ultimately the question is not one of legal merit but of administrative convenience, efficiency, public education and, not least, resources⁵⁸⁵.

B: Extending Local / Regional Authority Jurisdiction

1. Currently the possibility of extending local authority jurisdiction beyond the Low Water Mark, possibly out to the limit of territorial jurisdiction is either being discussed or under review. The possibility of establishing regional authorities is also under consideration and conceivably their jurisdiction could extend below Low Water. No definitive conclusions in these matters have been reached. It does not seem feasible that either course of action would be adopted for reason of heritage management alone, since the resource implications may well be important. The main catalyst for such changes appears to be the possibility of extending the Town & Country Planning system out to encompass coastal waters and enable more holistic management of the foreshore and

⁵⁸⁴ See further Review of the Treasure Act Paintin, E.M. *Art Antiquity and Law* (2001) 6(4) paras. 167 & 168.

⁵⁸⁵ See also Sections E & K above.

such coastal waters. If such a development occurs, notwithstanding the resource implications, this may provide an opportunity for local or regional authorities to assume a degree of heritage management functions. This could be combined with establishing the Portable Antiquities Scheme and the Sites and Monuments Record on a Statutory Basis, as discussed above.

2. If local or regional authority jurisdiction is established over coastal waters then such authorities could form a sub-tier of heritage management. This could involve management of listed *marine heritage assets* which do not raise difficult issues of management. Additionally, there could be ‘local’ listing of *marine cultural heritage* for areas or sites which are important in terms of local heritage and economy but are not of national or international significance. Such sites could be regulated by use of local authority bye laws.

C: Extending Heritage Jurisdiction

1. At present English Heritage has a statutory power to advise on heritage located beyond the United Kingdom’s jurisdiction. However, it may only exercise its functions in respect of England’s territorial jurisdiction. Heritage may be located beyond territorial waters and for some purposes, e.g. mineral resources, the United Kingdom exercises jurisdiction out to the continental shelf.

To some extent heritage matters are already regulated beyond territorial waters in that military remains located in international waters can be designated under the *Protection of Military Remains Act 1986*. This adds an extra territorial jurisdiction to the Act but only regulates the actions of British nationals and flagged vessels. Whether military remains are of historical interest is a criterion in determining designation and to that extent it can be said there is regulation of the heritage beyond territorial waters. The *Valletta Convention* definition of archaeological heritage includes any such heritage “... located in any area within the jurisdiction of the Parties.”⁵⁸⁶ and each Party undertakes to institute measures for the protection of that heritage⁵⁸⁷. The United Kingdom has therefore undertaken an obligation to protect the archaeological heritage in those areas in which it exercises jurisdiction. However, the term ‘jurisdiction’ would have to be interpreted with regard to the norms of international law and it is unlikely to be interpreted to mean that the United Kingdom is required to exercise jurisdiction over the activities of persons and flagged vessels of all nationalities in respect of the archaeological heritage beyond territorial waters out to the continental shelf merely because it exercises control for limited, specified purposes beyond territorial waters. Moreover, any attempt to exercise such universal jurisdiction raises complex issues of international law, not least in relation to the United Nations Convention on the Law of the Sea.

What would be possible would be to extend the functions, duties and powers of the Secretary of State and the relevant heritage agency beyond territorial waters for the purpose of regulating the activities of British nationals and flagged vessels in respect of

⁵⁸⁶ Article 1.

⁵⁸⁷ Article 2.

the archaeological heritage, in a similar manner to that in the *Protection of Military Remains Act 1986*. This would mean that *marine cultural heritage* could be protected and / or listed as a *marine heritage asset* and that protection would be binding on British nationals and flagged vessels. This would be an extension of domestic jurisdiction that would not offend against the norms of international law.

Marine Archaeology Legislation Project

Part 4: Review of Development Consent Procedures and the Marine Cultural Heritage

Development Consent Issues

Introductory Issues

This Part sets out to consider the consent regimes applied, and issues arising from them, in relation to ‘development’ and related operations in the marine environment which have the potential to adversely affect marine heritage. As will be seen, a variety of regulators impose a variety of controls in a way that is not altogether clear or easy to follow. This piecemeal approach, cutting across several Departments of State and with the involvement of many statutory regulators does not, it is submitted, represent the best practicable option for the protection of marine heritage in a holistic manner.

Further, the concept of Environmental Impact Assessment (EIA) is considered. Significant effects on the environment are required to be considered as part of the process of granting development consent or planning permission, and EIA also operates outside and alongside that process in certain sectors, such as agriculture which itself is outside of normal land-based planning regulation. The impetus behind the majority of EIA originates from obligations placed upon the United Kingdom by the European Community, and over time, the principles have crystallised and become a readily understood part of the development consent process for most developers. However, member states have the opportunity to apply thresholds and require that formal assessment of the environmental effects of certain projects be undertaken, even if not explicitly required by EC law.

From the marine heritage perspective, requirements exist at international law for consideration to be given to the impacts of development or related courses of action in situations where there might be significant effects on a heritage site. The extent to which this requirement formally exists in relation to the sector specific controls that have been provided for in the marine context is explored, the regimes explained and their inconsistencies highlighted. It may well be that at a formal and transparent level, the United Kingdom has some way to go to ensure that its international obligations are being met in this regard. That the technique is useful can be seen in the way in which it has succeeded in the terrestrial environment, and a broadening of its reach into the marine heritage context as a matter of course alongside the ‘traditional’ environmental considerations should probably be considered as a matter for action.

Additionally, consideration is paid to the development of the more coherent range of controls that have been applied to protect the marine environment. While the environmental regimes clearly have different and broader purposes underpinning them, they offer a reasonable comparison having developed from piecemeal and low-priority concerns to being amongst the primary considerations taken into account in relation to development and pollution control issues. With sustainability the mantra to which most if not all environmental protection regulation draws its purpose, the concept should be applied more systematically in marine heritage evaluation. Heritage assets are themselves suitable to be considered in such a context, as their non-sustainable use or

exploitation (including their loss) means that they are gone forever. Some of the benefits of a protected marine environment would clearly offer ancillary protection to heritage, while others, might actually place limitations on operations that might be carried out, or proposed in respect of heritage sites. Both of these aspects are considered and set in a heritage context.

Finally some conclusions are drawn in relation to:

- i the breadth and effectiveness of the many sectoral controls that exist at present;
- ii the extent to which environmental controls might provide a guide for the future shape of marine heritage controls;
- iii the content of other policies and practices, such as formal environmental assessments, which include marine heritage as a fundamental concern, ranking alongside other significant environmental effects.

A : Planning and Development Consent Issues – General Concepts

On land, planning controls apply limitations on development to offer protection to archaeological and other cultural heritage. The procedures for obtaining development consent are set out in general planning legislation⁵⁸⁸, and the authorities tasked with granting such consents⁵⁸⁹ are required to take into account all material considerations which apply to that development. Heritage and environmental impacts would necessarily be taken into account when making a development decision, although the relative weight they are given in the overall process can be difficult to predict. Some legal provisions may interrupt or even displace any presumption there might be in favour of planning consent; may lead to a refusal of development consent; or may prevent development unless significant mitigation or even compensatory measures are undertaken.

With regard to development in the marine environment, particularly beyond the low-water mark, the issue is complex and not easy to navigate. The commonly understood concept of planning control does not apply and so many consent regimes apply which would seem to have evolved along with the issues that they regulate. There is little that appears to be strategic and/or integrated, despite the concerns of developers, regulators, statutory and non-statutory organisations and others with an interest in this area. Against this backdrop it is unsurprising that it has traditionally been difficult to establish an effectively protective regime that is sufficient in its breadth and its accessibility.

1. Contemporary Critique

Many of the problems that confront the protection of marine archaeology can be compared with the position in relation to the protection of the environment prior to the recognition that such considerations should become a formal part of the planning process⁵⁹⁰. The historical-built, or man-made, environment forms a distinct cultural marker which itself can be subject to similar concepts of sustainability⁵⁹¹ that underpin contemporary environmental law. It could be argued that such considerations should be applied in a similar way so that the protection of the natural environment informs the content of policy and practice. Despite the tangible improvements to conservation and the quality of the natural environment that have been secured through effective environmental regulation, criticism persists in relation to certain inadequacies still to be

⁵⁸⁸ Primarily, but not limited to, the Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act 1991): note that the system is due for further root and branch change as a result of the Planning and Compulsory Purchase Bill currently before Parliament.

⁵⁸⁹ Subject to certain permitted development rights, such as the GDPO, and the fact that certain developments, especially those in the marine environment, fall outside of the 'normal' planning system.

⁵⁹⁰ Recent decades have witnessed a burgeoning of environmental regulation, as a greater understanding of the issues involved in pollution control and species protection have crystallised into policy and legislative imperatives.

⁵⁹¹ See eg *Protecting our Historic Environment: Making the System Work Better*, Department of Culture Media and Sport, July 2003.

overcome, particularly in relation to development consent and more particularly in relation to development in a marine context.

The Royal Commission on Environmental Pollution (RCEP)⁵⁹² recently put forward the criticism that the current system is not delivering fully effective environmental protection and perhaps the ‘spin-off benefits’ to the man-made environment (including the protection of archaeology and cultural heritage). Having considered that the coastal development is regulated by a ‘complex web of policies’,⁵⁹³ the RCEP noted that evidence given before them complained that arrangements were fragmented and facilitated gaps in regulatory coverage. This appears to be compounded by the fact that the Crown Estate owned foreshore, and its related ownership of the majority of the land below the low water mark out to the territorial limit, is not subject to the planning system, although as will be shown below is not completely unregulated.

The RCEP recommended in that connection, that planning protection be extended below the high water mark and to the sea bed⁵⁹⁴. The RCEP’s reasoning was based on the idea that, in relation to the regulation of marine development, there should be a strong presumption in favour of environmental protection in a way that is not demonstrated at present. In a similar vein, the All-Party Parliamentary Archaeology Group recently commented that development in the marine and coastal environment is subject to systems and procedures that protect and manage coastal and underwater cultural heritage⁵⁹⁵. In that connection the Group favours the adoption of a better legislative framework for marine archaeology reflecting the planning principles adopted on land for heritage issues.

Marine spatial planning was explicitly considered by the Joint Wildlife, Countryside and Environment Links forum, in a recent discussion paper⁵⁹⁶. The report considered that, in order for the Government’s broad aspirations for the enhancement and protection of the marine environment, expressed in *Safeguarding our Seas*, to be met a strategic plan-led approach was necessary. This would be necessary as a means to ‘...identify and permit appropriate and compatible developments and to protect and enhance important environmental and social assets from inappropriate development’. Indeed within *Safeguarding our Seas*, DEFRA commits the government to exploring the role of applying spatial planning⁵⁹⁷ in a marine environment context, and the document also refers to integrated management and a simplification of the regulatory system affecting the marine environment.

⁵⁹² See eg - Royal Commission on Environmental Pollution 23rd Report Environmental Planning, Cm 5459, 2002, HMSO.

⁵⁹³ Ibid, para. 9.59.

⁵⁹⁴ Ibid, para. 9.62.

⁵⁹⁵ *The Current State of Archaeology in the United Kingdom*, First report of the All-Parliamentary Archaeology Group, January 2003, HMSO paragraph 89.

⁵⁹⁶ *Marine Spatial Planning for the UNITED KINGDOM*, Joint Wildlife, Countryside and Environment Links discussion paper, November 2002.

⁵⁹⁷ *Safeguarding our Seas: A Strategy for the Conservation and Sustainable development of the Marine Environment*, DEFRA, 2002, HMSO, Paragraph 1.22

As will be examined in the sections below, there is a growing amount of regulation of the marine environment, often inspired by the requirements of international law to which the United Kingdom is a party, or EC law with which the United Kingdom is obliged to conform.

2. General Coastal Planning

There is certain movement towards treating the coastal areas of Britain in a more integrated, or holistic, manner through concepts such as integrated coastal zone management (ICZM). At EC level, the marine environment is being considered seriously, and ICZM was proposed by the European Commission in 2000 as a concept to be rolled out across the member states⁵⁹⁸. Further, the 6th Environment Action Programme⁵⁹⁹ specifies the development of a thematic strategy for the protection and conservation of the marine environment as a whole. Clearly such a strategy will take account of marine and coastal development. The Commission has highlighted the need for a more integrated approach to policy-making, that at present is sector-based⁶⁰⁰, that will take account of the many and varied pressures placed on the marine environment.

In the United Kingdom ICZM has been described and promoted by DEFRA⁶⁰¹. It reflects that '*integrated coastal management typically involves a partnership of local authorities, statutory agencies, local conservation bodies, businesses and recreational groups who, together, produce a joint action plan for a particular stretch of coast*'⁶⁰². The concept is applied to cultural heritage with DEFRA recognising the significance of underwater archaeology and historic wrecks⁶⁰³.

A more recent consultation document in relation to shoreline management plans (SMPs), concerned with flood and coastal defence works, issued by DEFRA has cemented the view of the importance in the future of ICZMs, stating that SMPs should feed into the planning process to inform wider strategic planning and that in time they '*may provide a strong baseline for the future development of integrated coastal zone management plans*'⁶⁰⁴. The emphasis at the present time is on the future use of the ICZM system and with the consequent uncertainty as to the detail of the shape and impact of such policy development, the impact cannot easily be second-guessed, although views were sought

⁵⁹⁸ Commission of the European Communities (2000) *Proposal for a European Parliament and Council Recommendation concerning the implementation of Integrated Coastal Zone Management in Europe*. Brussels COM (2000) 545 final; also see Communication from the Commission to the Council and the European Parliament on *Integrated Coastal Zone Management: a strategy for Europe*. Brussels COM (2000) 547 final; and, most recently, Report to the EU ICZM Expert Group *Measuring Sustainable Development on the Coast*, available at www.europa.eu.int/comm/environment

⁵⁹⁹ 'Environment 2010: our future, our choice, COM (01) 0031.

⁶⁰⁰ Communication from the Commission to the Council and the European Parliament: Towards a strategy to protect and conserve the marine environment, COM (2002) 539 final, 2.10.2002, Brussels. Available from www.europa.eu.int/comm/environment

⁶⁰¹ See note 10, *Safeguarding Our Seas*, generally Chapter 3.

⁶⁰² *ibid*, at 3.8.

⁶⁰³ *ibid* at 3.18.

⁶⁰⁴ *Procedural Guidance for Production of Shoreline Management Plans*, interim guidance (consultation version), DEFRA, May 2003 at paragraph 1.2.3.

on the development of a new stakeholder group in the recent *Seas of Change* consultation⁶⁰⁵. If, the policy development as proposed does come into existence, then it could be a means to integrate marine heritage concerns in a more coherent manner than is currently evident.

3. Specific Protection for Heritage

Aspects of this section have been considered in Part 1 of the review, and thus an overview only will be provided here in relation to the way in which the changed regime fits into overall planning considerations.

Planning law provision for ancient monuments/areas of archaeological importance is subject to the scheme set in place by the Ancient Monuments and Archaeological Areas Act 1979 (the 1979 Act)⁶⁰⁶ and is not overly complex despite the statutory involvement of a variety of parties in the decision making process as consultees or with other input. The term ‘monument’ itself is defined widely⁶⁰⁷ in the 1979 Act to include:

- any building structure or work, whether above or below the surface of the land, and any cave or excavation;
- any site comprising the remains of any such building, structure or work or of any cave or excavation;
- and any site comprising, or comprising the remains of, any vehicle, vessel, aircraft or other moveable structure or part thereof which neither constitutes nor forms part of any work which is a monument within paragraph (a) above.

The breadth of this definition, will enable the 1979 Act to offer some protection to wrecks within territorial waters. This is of particular resonance given competences granted to English Heritage extending their protective role to the limit of the United Kingdom’s territorial sea, the detail of which is discussed in the following section.

There is a difference in terms of the protection between *scheduled monuments* and *ancient monuments*. The former category, by virtue of the 1979 Act requires the Secretary of State to compile and maintain a schedule of monuments (hence a scheduled monument is one that appears on the schedule). A site (etc.) may only be included on the schedule if it appears to Secretary of State to be of national importance. This function has been passed on to English Heritage now. The term ‘ancient monument’ is the subject of a wider definition. It includes all scheduled monuments but also ‘*any other monument which in the opinion of the Secretary of State is of public interest by reason of the historic, architectural, traditional, artistic or archaeological interest attached to it*’⁶⁰⁸.

⁶⁰⁵ *Seas of Change: the Government’s consultation paper to help deliver our vision for the marine environment*, DEFRA, November 2002, para’s 3.9-3.14.

⁶⁰⁶ For a good general overview see Moore, V – *A Practical Approach to Planning Law*, 8th Ed., 2002 OUP, Ch. 20.

⁶⁰⁷ s.61(7) of the 1979 Act.

⁶⁰⁸ Section 61(12)

Scheduled Monuments - offences

An offence is committed under s.2 in circumstances where a person executes or causes or permits to be executed prescribed works to a scheduled monument without having first obtained 'scheduled monument consent' for the works. 'Works' are defined to include demolition, destruction or damage (to a scheduled monument); removing or repairing a scheduled monument or any part of it; altering or adding to it; flooding or tipping operations on land in on or under which there is a scheduled monument.

Section 3 of the 1979 Act allows for the grant of scheduled monument consent for the execution of works of any class or description and specified delegated legislation⁶⁰⁹ in the order. Scheduled monument consent is able to be conditional in much the same way as conditions are imposed through planning control and a variety of other permitting regimes. A provision is also made in section 5 for the Secretary of State to enter a site and execute works at his/her own cost if they are urgently necessary for the preservation of an ancient monument.

Ancient Monuments

Additional powers apply for the compulsorily acquisition of any ancient monument for the purpose of securing its preservation. The Secretary of State may also obtain them by agreement, or even by gift. Alternatively, s.12 permits the Secretary of State to be declared guardian of an ancient monument. This equates to a duty to maintain and if necessary to exercise control and management powers, although ownership is not affected.

4. Other General Planning Considerations

A minor, ancillary, option could be seen in the potential to use the development plan system to protect heritage. As opposed to considering the effect of any proposed development at the individual project stage, it might be the case that a LPA will include what it intends in relation to scheduled or ancient monuments in its structure plan. If that were the case, then the procedures set in place by the Directive on Strategic Environmental Assessment (SEA) explored further below might come into play. Further, any effects of development on a scheduled monument might well constitute a material consideration to be taken into account when determining any application for planning permission. However, as the planning system is not adequately applicable beyond the low water mark, these considerations will often arise outside of the context of formal planning.

Guidance in relation to heritage is provided through the system of planning policy guidance notes (PPGs). However, PPG's 15 and 16, concerned with planning and the historic environment, and archaeology and planning respectively are currently under review, and its future shape and thus application is therefore uncertain. The former is of little use in the marine context. Indeed, criticism has been levelled at the fact that there

⁶⁰⁹ Ancient Monuments (Class Consents) Order 1994, SI 1994/1381

appears to be an insufficient input into the revision process by DCMS⁶¹⁰, and, further, a global criticism that the non statutory nature of PPGs overall has the effect of ‘*patchy*’ implementation.

5. National Heritage Act 2002 – provisions

The *National Heritage Act 2002* makes further provision in relation to the functions of the Historic Buildings and Monuments Commission for England (English Heritage) and for related purposes. The 2002 Act in particular, as will be elaborated in more detail below, provides for a far greater involvement, to a greater extent and with a greater content than has existed previously. As with any legislative development, there must be an element of caution: duties in the main give way to discretionary powers, without any commitment to provide funding. This aspect was seized upon by the All-Party Parliamentary Archaeology Group⁶¹¹ who stated that ‘*the management of England’s marine cultural heritage passed from DCMS to English Heritage but the Government did not transfer adequate resources to English Heritage to enable it adequately to fulfil its responsibilities*’. The following sections below explain the relevant aspects of the 2002 Act and consider their potential for addressing some of the apparent shortcomings.

New Functions in respect of Underwater Archaeology

Section 1 of the 2002 Act provides for a series of changes that indicate an enhanced protection potential for underwater archaeology. The provisions amend the *National Heritage Act 1983* in two ways: first, by amending the meaning of ancient monument to include ‘*any site comprising or comprising the remains of, any vehicle, vessel, aircraft or other movable structure or part thereof*’⁶¹²; and second, by the extension of the reference to ancient monuments to encompass those ‘*...in, on and under the seabed within the seaward limits of the United Kingdom territorial waters adjacent to England*’⁶¹³.

English Heritage gained additional responsibilities for a series of administrative functions in relation to underwater archaeology, including a new role in relation to wrecks protected under the *Protection of Wrecks Act 1973* under s.3 of the 2002 Act. The combined effect of these provisions is that there is a coming together of archaeological regimes in the terrestrial and marine environments.

Assistance In Relation To Protected Wrecks

This important amendment adds a new s.33C to the 1983 Act. Essentially, provision is made for financial support towards the cost of the operations described below in relation to protected wrecks⁶¹⁴. English Heritage is empowered to defray or contribute to the costs of: any survey, excavation or other investigation of any protected wreck; the

⁶¹⁰ Op Cit, note 8 at para. 13. The report also notes that there is ‘an evident lack of co-ordination between Government departments in the field of archaeology’.

⁶¹¹ Ibid, paragraph 88.

⁶¹² S. 1(2) of the National Heritage Act 2002 amending s.33(8) of the National Heritage Act 1983

⁶¹³ S. 1(3) of the National Heritage Act 2002 adding s.33(9) to the National Heritage Act 1983

⁶¹⁴ Defined in s.33C(2) as any site comprising the remains of any vessel (part thereof) which is protected under s.1 of the Protection of Wrecks Act 1973, and is in on or under the seabed within the seaward limits of the United Kingdom territorial waters adjacent to England.

removal in whole or in part or any protected wreck for the purpose of repairing it; and, the preservation and maintenance of any protected wreck. The removal, in particular, might be considered an important option within any assessment, environmental or otherwise, of any potential development which might affect an area or site where a protected wreck is located. An example here could be seen in the current plans to improve navigational facilities in the Solent in order that new generation aircraft carriers might use Portsmouth harbour. The proposed dredging that will be necessary will seriously affect the site of the remains of the Mary Rose. The wreck has been partially moved, and the powers contained in the 2002 Act might assist in securing the funding to remove more, or all, of what is left prior to the dredging works.

There is also a wide definition of maintenance which includes the repairing the wreck or protecting it from decay or injury. It is anticipated that any such maintenance project would necessitate some form of cost benefit analysis; however, there is no guidance provided in the 2002 Act as to considerations to be made in this regard. While the provisions are undoubtedly welcome, there is not a duty *per se* to actually apply funds in this circumstance, although the potential exists for more surveying and monitoring to take place which might offer significant benefits to protected wrecks. Indeed English Heritage has confirmed that it has been offered additional, albeit limited, funding to undertake its extra duties, but the point is made that the funding is sufficient only for English Heritage to carry out its additional functions in relation to the 1973 Act. The point is made that additional responsibilities bring with them the potential for incurring '*considerable additional costs*' and thus matching impact with aspiration will continue to be dependent on the funding environment⁶¹⁵.

⁶¹⁵ Roberts, P, Trow, S - *Taking to the Water: English Heritage's initial policy for the management of maritime archaeology in England*, English Heritage, 2002, at page iii.

B: Sectoral versus Planned Approaches to Offshore Development

A series of consent procedures, specific to different sectors and/or uses of the sea bed, serve to make a complex picture which contributes to a real sense that there is a lack of coherence in policy and strategy relating to the marine environment. Notwithstanding the potential of ICZM, the sectoral approach has been the subject of contemporary criticism from a number of quarters, including, in 2002, the RCEP as referred to above, as well as the Wildlife, Countryside and Environment Links forum. The latter organisation recommended in a discussion paper on marine spatial planning that the current approach, best described as sectoral, would benefit from change to adopt a similar, plan-led approach as that adopted on land since the coming into force of the overhaul of the United Kingdom's Town and Country Planning system introduced by the Planning and Compensation Act 1991⁶¹⁶. This conclusion was reached as a result of the fact that no overall strategic vision exists in relation to marine spatial planning resulting in a 'lack of certainty for marine developers and users'⁶¹⁷. In this connection, the forum includes the protection and management of underwater cultural heritage as a key ingredient of a marine planning system.

As will be further explained in the following sections, law changes have had to be made in order that United Kingdom law is fully in accordance with international and EC obligations, and a recent flurry of policy initiatives both spatially and sectorally have placed the existing shortcomings into sharp relief, highlighting the fragmented nature of the applicable regulation.

1. Sectoral Controls

As indicated there are a series of specific controls that adhere to specific works and industrial sectors. Within this section, the development control procedures will be audited and evaluated in terms of their potential to offer a coherent means of marine development controls. The principal legislative provisions are seen in the following Acts of Parliament.

- *Coast Protection Act 1949* (navigational safety of works)
- *Electricity Act 1989* (electricity generation including wind farms)
- *Food and Environmental Protection Act 1985* (construction, coastal defences, disposal of waste and burial at sea)
- *Harbours Act 1964* (and related local harbour legislation)

⁶¹⁶ 'as development and activity increases in the marine environment, the sectoral approach is no longer an option. A plan-led system is now essential'. Wildlife, Countryside and Environment Links, *Discussion paper on marine spatial planning*, 2002.

⁶¹⁷ Ibid.

- *Transport and General Works Act 1992* (alternative route for works)

The purpose and principal controls in relation to these, and supplementary, provisions will be examined in more detail in the following sections.

2. *Coast Protection Act 1949* (navigational safety of works)

The primary aspect of the Act to consider is in relation to section 34. This imposes a permitting regime upon any works, which subject to the grant of a consent by the Secretary of State for Transport, would otherwise be illegal if they cause or are likely to result in an obstruction or danger to navigation. The minister may request details of the proposal before consent is granted, and in order to inform the decision and is empowered to consult persons who might be affected. Section 35 contains operations which are exempt from s.34, and, importantly in the marine heritage context, includes ministerial approved coast protection works, dredging operations, including the deposit of dredged materials and the construction, improvement or alteration of works more than 50 feet under the surface of the water for the purpose of winning minerals. Conservancy authorities are exempted if undertaking work which they are empowered to do in relation to the removal of vessels which are sunk or stranded, and may cause obstruction or danger to navigation.

3. *Electricity Act 1989* (electricity generation including wind farms)

The Act, amongst other things, requires at s.36 that developers obtain a consent from the Secretary of State for Trade and Industry should they propose the construction, operation or extension of an electricity generating station above a permitted capacity. For offshore wind and water generating stations in territorial waters, this limit is set at 1MW⁶¹⁸. It is the stated policy of the DTI to require that a full EIA takes place for any offshore wind farms and as outlined in the section below, this may necessitate a full consideration of the impacts on marine heritage concerns.

4. *Food and Environment Protection Act 1985*

The marine environment has traditionally been used as a repository for the unregulated dumping of waste and other materials, seemingly viewed as an inexhaustible resource for such practice. Since the 1970's specific legal instruments, ranging from world-wide and regional Conventions to state sponsored legislation, have been adopted to regulate and in some circumstances absolutely prohibit such practices. The majority of these instruments have been directed towards the protection of the environment, although further provisions exist in relation to, for example, the ability to safely navigate waters.

From the perspective of marine archaeology, it is clear that the disposal of materials in the marine environment could potentially adversely affect the existence or value⁶¹⁹ of such cultural assets in both the short and long term. Pollution and other safety

⁶¹⁸ *The Future Offshore*, Op cit, at para7.2

⁶¹⁹ Even for example at the level of recreational use.

considerations will have an impact, as will any potential physical effects in the sinking of large objects in areas where such assets are located. The *Food and Environmental Protection Act 1985*, as amended, attempts to regulate certain activities, and such regulation could provide ancillary benefits for the protection of marine archaeology.

The Licensing Regime

Part II of *Food and Environment Protection Act 1985* applies a licensing regime to activities involving the deposit of substances and articles in the sea or under the sea-bed. As a party to International Conventions⁶²⁰ restricting sea dumping, the United Kingdom has been required to change its law to fully reflect those obligations. The licensing regime applies to a variety of means and methods resulting in such deposit⁶²¹ and is not limited to the behaviour of United Kingdom individuals provided that it is within United Kingdom waters⁶²². It also applies to the deposit of substances or articles from British vessels (etc) anywhere. The Act also requires a licence to be granted for the scuttling of vessels; the loading of a vessel, aircraft, hovercraft, marine structure or floating container or vehicle with substances or articles for deposit in the sea or under the sea bed; and the towing or propelling from the United Kingdom of a vessel for scuttling anywhere at sea, in and beyond United Kingdom waters.

There are some exceptions, for example pipelines in the sea are excluded from the definition of marine structure⁶²³ and section 7 *Food and Environmental Protection Act 1985* provides for statutory instruments to be made which may specify certain operations which will not require a licence in order to proceed⁶²⁴. There is no statutory definition of the terms substances or articles, other than in relation to vessels (etc.) which are defined in s. 24, possibly to avoid the need for determining exhaustively what is or is not subject to control. International law in the area, to which the United Kingdom is a party, is constructed around a series of lists, contained in Annexes, which reflect, broadly, the danger, persistence and toxicity of the materials listed within them. The stringency of control placed on the deposit of any of the substances will correlate to the Annex in which it is contained, and the range would apply from an absolute prohibition to a basic licence requirement from the territorial state. It is noted however, that the definition

⁶²⁰ See for example, the Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (1972, Cmnd. 4984); and the London Convention for the Prevention of Marine Pollution for the Dumping of Wastes or other Matter (1972, Cmnd. 5169). For a fuller explanation of these and other, related Conventions, eg OSPAR, see for example, Birnie and Boyle, *International Law and the Environment* (2nd. Edition), 2002, Oxford University.

⁶²¹ Section 5(a) Food and Environment Protection Act 1985.

⁶²² Defined in s24(1) as 'any part of the sea within the seaward limits of United Kingdom Territorial Waters'. A reference to 'United Kingdom controlled waters' was introduced to the provisions in the Act by s.146 of the Environmental Protection Act 1990, which itself is defined to mean 'any part of the sea within the limits of an area designated under the provisions s.1(7) of the Continental Shelf Act 1964'.

⁶²³ By virtue of s.24(1) FEPA 1985.

⁶²⁴ See for example the Deposits in the Sea (Exemptions) Order 1985, SI 1985/1699; there is also a requirement for the licensing authority to keep registers which should be able to be accessed by the public for free imposed by the Deposits in the Sea (Public registers of information) Regulations 1996, SI 1996/1427.

would include certain objects placed on or in the sea floor⁶²⁵. The majority of the licences have been issued to cover the disposal of waste materials, which includes marine dredging spoils, and it is anticipated that this will continue.

Licence Determination

The licensing authorities, defined in *Food and Environmental Protection Act 1985* as the ministers responsible for fisheries, are required to take account of a number of factors in their determination as to whether or not to issue a licence. Included amongst these factors, which are primarily concerned with the protection of the environment, marine living resources and human health, is a duty to have regard to the need to 'prevent interference with legitimate uses of the sea' as well as other matters that they may consider relevant⁶²⁶. 'Legitimate uses of the sea' is not itself defined, however, the Oslo Convention lists⁶²⁷ some general considerations which use the phrase in conjunction with a variety of other uses including recreation and areas of scientific importance.

As with the majority of licensing regimes there are provisions enabling the licensing authority to include provisions within the licence as are necessary to prevent any harm to the marine environment, human health or other legitimate uses of the sea. Additionally, the licensing authority retains the right to vary or revoke a licence should they take a view that it is necessary on the basis of changes in circumstances within the marine environment; increased scientific knowledge related to that; or for matters that appear relevant to the authority.

There is no explicit mention of archaeology or cultural heritage in the *Food and Environmental Protection Act 1985*. However, in terms of the duty to consider 'legitimate use' and/or other matters, it is arguable that this duty could extend to the impact upon archaeology or cultural heritage.

Offences under Part II

Offences are committed under the *Food and Environmental Protection Act 1985* in the following circumstances⁶²⁸: where a person does anything for which a licence is needed in a way that is not in accordance with the licence or causes or permits any other person to do any such thing except in pursuance of and in accordance with the provisions of a licence; and if a person deliberately or recklessly makes a false statement or neglects to mention a material particular for the purpose of procuring a licence or purporting to carry out any duty imposed by the licence⁶²⁹.

Defences under Part II

A defence of necessity applies where the operation was undertaken in order to ensure the safety of a vessel (etc), or for the purpose of saving life. A further requirement that the

⁶²⁵ The *Encyclopaedia of Environmental Law*, loose leaf, Sweet and Maxwell, at D15-013, gives the example of footings on or under the sea-bed 'save where these are the subject of an exemption under s.7'.

⁶²⁶ Section 8 FEPA 1985

⁶²⁷ note 32 above, Annex III

⁶²⁸ Section 9 provides the offences and a number of statutory defences. A further defence of due diligence is provided for in s.22 FEPA 1985.

⁶²⁹ Section 9(1), 9(2) FEPA 1985.

relevant Minister is informed of the nature, location and circumstances of the operation, as well as the substances or articles involved. Unsurprisingly, this defence will not apply if it is determined by a court that the operation was not necessary, in the terms above, was not a reasonable step to take, or that the necessity of the operation only arose due to the fault of the defendant. A further defence applies to a person charged with a failure to act otherwise than in accordance with a licence outside of United Kingdom waters, provided that the operation was undertaken pursuant to a licence issued by a State party to the relevant Conventions⁶³⁰. Not a great deal is known in terms of enforcement under the *Food and Environmental Protection Act 1985*, although one commentator has observed that '[e]nforcement under the Act has largely been concerned with ensuring that only licensed waste has been dumped. Infractions of a minor nature tend to have resulted in formal warning letters; more serious matters, taking into account the nature and gravity of the offence and the persons involved, may result in revocation of licences and/or prosecution'⁶³¹.

Additionally, Ministers are empowered⁶³² to undertake any remedial action necessary to further the purposes of the legislation, including the prevention of interference with legitimate uses of the sea, in circumstances where what has been done has been done without a licence or if done in a manner not in accordance with a licence. A cost-recovery mechanism is provided for should the person involved be convicted of an offence which made the remedial action necessary.

5. Harbours Act 1964 (and related local harbour legislation)

The Act was amended by the *Transport and General Works Act 1992* as explained below. Schedule 3 of the *Transport and General Works Act 1992* has extended the scope of Harbour Orders to include recreational harbours as well as commercial ones. The amendments also make provision for byelaws relating to nature conservation to be applied. This in some way reflects the duty to environmentally assess certain marina developments, but actually goes further with a positive power granted to harbour authorities. The Act controls the construction and further development of harbours, as well as the construction of projects within harbour authority areas of control which could interfere with navigational rights.

Environmental assessment is provided for in the Act, as large scale projects will require mandatory EIA in line with the Directive and regulations, as set out below. A particularly useful provision is contained in s.48, which provides that harbour authorities should consider issues of archaeology in a wider concept of the environment when considering undertaking any development in furtherance of its functions.

6. Transport and General Works Act 1992 (alternative route for works)

The Act provides an alternative method for gaining consent to site an offshore energy generating installation. Section 3 enables a developer to apply to the Secretary of State

⁶³⁰ see n.32

⁶³¹ Hughes (et al), *Environmental Law*, (4th Edition), 2002, Butterworths, p. 639.

⁶³² Section 10 FEPA 1985

for Trade and Industry to make an order relating to the construction or other works which may interfere with the rights of navigation in waters within or adjacent to England and Wales, as far as the limit of the territorial sea. The order can contain a provision to the effect of the extinguishment of public rights of navigation over water, and provides a statutory defence to claims of public nuisance. Clearly, this might restrict general access to heritage sites, and the likelihood that the majority of such generating stations will be not far off the coast could have implications for marine cultural heritage. As noted above, the Act amends the *Harbours Act 1964*.

C: Environmental issues to be considered in offshore developments

For any development which is likely to have significant effects on the environment some type of formal assessment process related to those effects should be undertaken. While there exist specific assessment and evaluative processes that are required to be undertaken prior to certain developments, there is also the wider concept of environmental impact assessment to consider in terms of the ability to offer a formal consultative process taking account of any likely significant effects of the project.

1. Environmental Impact Assessment

Environmental impact assessment (EIA) has been described as ‘*a technique for the systematic compilation of a project’s environmental effects, and the presentation of results in a way which enables the importance of the predicted results, and the scope for modifying or mitigating them, to be properly evaluated by the relevant decision-making body before a planning application decision is taken*’⁶³³.

Directive 85/337/EEC⁶³⁴, as amended by 97/11/EC (the EIA Directive) provides that certain projects, categories of which are specified in the Annexes to the EIA Directive, must be subject to an assessment of their environmental effects, which is either mandatory or discretionary depending on the class of project.

Implementation in the United Kingdom has been achieved in the main through the normal processes of the town and country planning system. However, the Directive requires the EIA process to be undertaken for a significant number of activities that currently are outside the planning system due to its non-applicability to the marine environment. For example, harbour works, off-shore mineral extraction, pipelines and electricity and pipeline works are dealt with by way of different, issue specific, legislation and delegated legislation. The majority of these measures issued to regulate EIA in specialist sectors have been made under the powers granted under the European Communities Act 1972⁶³⁵. EIA has had a statutory footing since the Planning and Compensation Act 1991 inserted s.71A into the T&CPA 1990: one effect is to enable the Secretary of State to make regulations for projects that are beyond those specified in the Directive⁶³⁶. Currently, the Directive is implemented for generic purposes in England and Wales by the Town and Country Planning (Environmental Impact Assessment) (England

⁶³³ Moore, V, *A Practical Approach To Planning Law*, 8th Ed., 2002 OUP, p.254

⁶³⁴ Directive on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175/40).

⁶³⁵ s. 2(2) of the European Communities Act 1972, for example harbour works.

⁶³⁶ This was done in relation to wind generators and coastal protection works which were both added to Schedule 2 in 1994. Subsequently, the principal regulation was amended and now these form part of the list of projects in Sched. 2, which will require an assessment on the basis of their ‘significant environmental effect’

and Wales) Regulations 1999 (the Regulations)⁶³⁷. The Regulations replicate the Directive in its entirety. The Regulations specify the circumstances in which EIA is to be undertaken, and applies both mandatory and discretionary EIA dependent upon the project involved as will be explained below.

Schedule 1 Projects

The Regulations provide for EIA by two principal means, depending upon the type of development involved. The first, constituted in the list of operations specified in Schedule 1 to the Regulations, applies mandatory EIA to any of the projects listed within it. Those projects are by definition the largest, potentially most environmentally damaging, and resource intensive. They include major infrastructure projects such as airport, motorways, energy production and large-scale industrial activity⁶³⁸.

Schedule 2 Projects

The position in relation to projects listed in Schedule 2 is slightly different and requires that it should be likely that there should be ‘significant effects’ on the environment as a result of the nature, size or location of the project. Member states are entitled to establish thresholds and other criteria to determine whether or not a project is likely to have significant effects and therefore whether that project should then require an EIA or not. Case law from the European Court of Justice⁶³⁹ has confirmed that member states are indeed able to set such thresholds, however, these thresholds must be realistic and not made artificially high so that all projects in a particular class would fall short of them⁶⁴⁰. Within Sched. 2, the developments which may be subject to EIA are described under broad categories, and the applicable thresholds and criteria matched to them. Of course, the basic requirement for determining significant effect remains, despite the criteria, and this determination is coloured by the definitions and explanations contained in Sched. 3.

Schedule 2 Projects with a General/Potential Application in the Marine Environment

As well as the sector-specific EIA provisions which take effect in the marine environment, there are development categories with a more general character in Sched. 2. Of these, as set out below in outline, most would be limited to the immediate coastline in their effect.

⁶³⁷ SI 1999/293, see also DETR Circular 2/99 *Environmental Impact Assessment* for guidance on the Regulations.

⁶³⁸ Regulation 4(1) that makes it a mandatory requirement. In a marine context this is limited: Sched 1 paragraphs 8(b) (trading ports); 14 (extraction of oil or natural gas); 16 (pipelines).

⁶³⁹ See especially, Case C-72/95 *Aannemersbedrijf PK Kraajeveld BV and Others v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403 (the so-called ‘Dutch Dykes’ case)

⁶⁴⁰ The Secretary of State retains a residual power to direct that a Sched. 2 development must be an EIA development even if it falls short of the threshold criteria.

Table 1: Schedule 2, paragraph 2 provides for the following:

| Column 1 | Column 2 |
|--|---|
| <i>Description of development</i> | <i>Applicable thresholds and criteria</i> |
| The Carrying out of Development to provide any of the following - | |
| 1. Agriculture and aquaculture... ... (e) reclamation of land from the sea | All development |
| 10. Infrastructure Projects... ... (g) construction of harbours and port installations including fishing harbours (unless included in Schedule 1)... | The area of the Works includes 1 hectare |
| ... (m) coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dykes, moles, jetties and other sea defence works, excluding the maintenance and reconstruction of such works... | All development |
| 12. Tourism and Leisure... ...Marinas | The area of the enclosed water surface exceeds 1000 square metres |

Schedule 3: Selection Criteria for Screening Schedule 2 Development

Contained in Sched. 3 are criteria to inform the determination as to whether a Sched. 2 project is required to be subject to EIA. Three criteria are referred to, those being: the characteristics of the development⁶⁴¹; the location of the development⁶⁴²; and the characteristics of any potential impact that the development might have.

Interestingly, from a marine environment perspective, the location aspect takes account of the absorption capacity of specifically named areas. Within the list are included wetlands, coastal zones and areas protected under EC conservation law. Running slightly tangentially to the area-specific designations, is the provision⁶⁴³ to include areas where environmental quality standards in EC legislation have been exceeded within the consideration. Such quality standards⁶⁴⁴ do include some in the marine, particularly coastal, environment and could thus provide a further means by which to attempt to

⁶⁴¹ Sched. 3 paragraph 1, which would take account of, *inter alia*: the size and cumulative effect of the development; use of natural resources; production of waste pollution and nuisances; and the risk of accidents.

⁶⁴² Sched. 3, paragraph 2, essentially concerned with the environmental sensitivity of the geographical area.

⁶⁴³ Sched. 3, paragraph 2(c)(5).

⁶⁴⁴ For example Directive 76/160 on the quality of bathing water (OJ 1976 L 31/1).

secure formal EIA of a proposed development. In that regard the call in *Heritage Law at Sea*⁶⁴⁵ for measures to reduce the environmental degradation of protected wrecks could be partially served, although there should be a clearer application to all heritage issues.

2. Sensitive Areas

Any Schedule 2 development which is proposed in a so-called ‘sensitive area’ is not subject to comparison against the threshold or other indicative criteria in order to determine whether it should be subject to EIA. Any such project will require EIA because of its location, and therefore be deemed to be likely to have significant effects. The definition of sensitive areas⁶⁴⁶ includes, amongst others: SSSIs⁶⁴⁷; National Parks; the Broads; World Heritage Sites; scheduled monuments⁶⁴⁸; and ‘European Sites’⁶⁴⁹, a term which essentially refers to Special Areas of Conservation and Special Protection Areas, both of which will be examined in greater detail below.

The inclusion of scheduled monuments attracts a greater significance as a result of the extension of English Heritage’s powers up to the 12nm limit. A clear problem exists however in relation to the assessment needed to be undertaken, and the need to ensure that there is sufficient understanding of what heritage might exist in the area and whether it should be included on the list. If included, English Heritage would presumably be able to apply conditions to any ‘scheduled monument consent’ that might be granted, and would be a statutory consultee for any EIA. A more limiting factor however, would relate to the quality of the environmental (to include heritage) information gathered: a long standing criticism of the whole EIA system. Recent research has stated that, ‘*in the United Kingdom it is for the competent authority [650] to decide the best means of ensuring that the environmental information is adequate and fit for purpose*’⁶⁵¹. The system in the United Kingdom has frequently been the subject of challenge in relation to the non-consideration of appropriate mitigating and/or remedial measures proposed in EIAs⁶⁵².

Statements of intention from, for example the offshore wind⁶⁵³ and marine aggregates industries⁶⁵⁴, that EIA will be undertaken in relation to their activities are fortified by the

⁶⁴⁵ Joint Nautical Archaeology Policy Committee, *Heritage Law at Sea: Proposals for change*, (2000) University of Wolverhampton, paragraph 2.7.

⁶⁴⁶ Op cit, n49 Regulation 2(1).

⁶⁴⁷ Sites of Special Scientific Interest (see s.28 Wildlife and Countryside Act 1981, as amended by the Countryside and Rights of Way Act 2000).

⁶⁴⁸ within the meaning of the Ancient Monuments and Archaeological Areas Act 1979.

⁶⁴⁹ as defined by Reg 10 of the Conservation (Natural Habitats, etc) Regulations 1994, SI 1994/2716 (as amended).

⁶⁵⁰ Which may vary in the marine environment, depending on the issue involved.

⁶⁵¹ COM (2003) 334 Final Report from the Commission to the European parliament and the Council on the Application and Effectiveness of the EIA Directive, *How successful are the Member states in implementing the EIA Directive*, Brussels, 23.06.2003, para.3.4.3.

⁶⁵² Most recently for example, in *R (on the application of PPG 11 Ltd) v Dorset CC and another* [2003] EWHC 1311.

⁶⁵³ *The Future Offshore: A Strategic Framework for the Offshore Wind Industry*, Department of Trade and Industry, November 2002, HMSO.

provision of certain sector-specific EIA requirements through secondary legislation. However, in order for any EIA process to offer protection in the marine archaeological context, it is important that there exists good data in relation to the presence of sites which may be suffer significant effects.

3. Sector-Specific EIA with Application in a Marine Context

As stated above, there are other regulations that apply EIA to certain sectors quite explicitly. In most cases the application of specific controls is necessary by virtue of the fact that the ‘normal’ planning system does not regulate them, although the EIA Directive requires that they be subject to EIA. The most common method of implementation is by the insertion of EIA into existing consent or licensing procedures⁶⁵⁵. The schemes that have been established are not exactly the same, for example there are different agencies operating different consent procedures. However, the result, in terms of the implementation of the EIA Directive, means that for each project, the specified range of environmental effects should be considered.

The following measures have been adopted within their specific sectors and a short overview consideration will be given for each:

- **Transport and Works (Assessment of Environmental Effects) Regulations 1995**⁶⁵⁶

The Regulations, in amending the *Transport and Works Act 1992*, require the Secretary of State (for Transport) to comply with the EIA Directive. The amendment is made by the addition of a new subsection⁶⁵⁷ which imposes a duty on the Secretary of State to take an environmental statement into account, and confirm that s/he has done so, before the making or refusal of orders applied for or proposed under the Act. In the marine context this would be in relation to works that interfere with rights of navigation. A further statutory instrument⁶⁵⁸ specifies the required detail of the environmental statement that needs to be taken into account, which includes a description of impact of the likely significant effects on ‘the cultural heritage’⁶⁵⁹.

- **Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations**⁶⁶⁰

Here the Regulations require that new licences granted under the Petroleum Act 1998 should ensure the carrying-out of an EIA in relation to proposals for development pursuant to the licence. Regulation 5 proscribes the granting of a consent under a licence without there first having been consideration of an environmental statement. Additionally, the representatives of ‘any environmental authority’ to which a copy of

⁶⁵⁴ The draft MMG guidance note 2 recognises that the EIA take account of, *inter alia*, archaeological sites (paragraph 26) and also that the extraction of minerals from marine dredging is within the list of operations for which EIA is required on the basis of any likely significant effects.

⁶⁵⁵ Encyclopaedia of Environmental Law, Sweet and Maxwell, London, 2002, Volume 1, A56/5.

⁶⁵⁶ SI 1995/1541 and 1998 SI 1998/2226 (amends the Transport & Works Act 1992).

⁶⁵⁷ Section 14(3A) Transport and Works Act 1992.

⁶⁵⁸ Transport and Works (Applications and Objections Procedure) Rules 1992 SI 1992/2902.

⁶⁵⁹ Schedule 1, paragraph 1(c)

⁶⁶⁰ SI1999/360.

the environmental statement was sent, and any public views expressed, should also be taken into account⁶⁶¹. 'Environmental authority' is defined widely in the Regulations to mean any person on whom environmental responsibilities are conferred by or under any enactment aside from the Regulations⁶⁶², and would indicate that English Heritage should be involved in the process. The duty to undertake EIA applies to explorative drilling activities; the 'getting'⁶⁶³ of petroleum; the construction of pipelines; and the use, in limited circumstances of a mobile installation.

- **Environmental Impact Assessment (Fish Farming in Marine Waters) Regulations 1999⁶⁶⁴**

The Regulations apply to implement the EIA Directive so far as it relates to marine fish farms⁶⁶⁵. Any application to the 'relevant authorities'⁶⁶⁶ to develop a fish farm which is in a 'sensitive area'⁶⁶⁷ or of a prescribed size should be made subject to the process. The relevant authorities may take a view not to undertake an EIA. This view must be based upon consultation with a list of persons and bodies listed in Schedule 3. Should the relevant authorities determine that an EIA should take place, that same list of persons or bodies are required to be consulted. English Heritage is not included amongst the statutory consultees, although there is a provision that the relevant authorities may consult other bodies or persons as they consider appropriate⁶⁶⁸.

- **Harbour Works (Environmental Impact Assessment) Regulations 1999⁶⁶⁹**

These Regulations implement the EIA Directive in respect of certain harbour works. Except for applications relating to harbour works made prior to 1st February 2000, Part II of these Regulations replaces predecessor regulations made in 1989 and 1996. As well as other modifications and amendments, the main amendments in order to incorporate the requirements of the EIA Directive are as follows, and are incorporated within Schedule 3. The Secretary of State is required to take into account the selection criteria, which could include the impact upon marine cultural heritage, when deciding whether a project which appears to him to fall within Annex II to the Directive constitutes a "relevant project" as defined and an environmental assessment is therefore required.

The environmental statement to be supplied on an application for a harbour revision order must contain an outline of the main alternatives studied by the applicant and an indication of the main reasons for his choice, taking into account the environmental effects (paragraph 8(2)).

⁶⁶¹ Ibid, Reg. 5(4)

⁶⁶² ibid, Reg 3(1)

⁶⁶³ Defined widely in Reg. 3.

⁶⁶⁴ SI 1999/367.

⁶⁶⁵ and revoke the Environmental Assessment (Salmon Farming in Marine Waters) Regulations 1998.

⁶⁶⁶ The Crown Estate Commissioners, or the authorities in the Shetland or Orkney Islands as applicable.

⁶⁶⁷ Defined similarly to 'sensitive areas'.

⁶⁶⁸ Above, n.23, Reg. 9(1)

⁶⁶⁹ SI1999/3445 (inter alia – makes changes to part 1 the Harbours Act 1964).

- **Offshore Petroleum Activities (Conservation of Habitat) Regulations⁶⁷⁰**

Since a High Court decision⁶⁷¹ held that the government was wrong only to apply the Habitats Directive to the 12 nautical mile territorial limit, a series of Regulations has been passed or proposed. In essence, and as will be explored more fully below, ‘appropriate assessments’ are required before licences, consents or approvals are granted under the Petroleum Act 1998. Should any adverse effects be identified within a site the restrictions applicable within the Habitats Directive⁶⁷² will apply. The Regulations provide that the protection offered under the Habitats Directive are to the extent of the United Kingdom’s continental shelf outside of territorial waters. The Habitats Directive itself is clear in that its provisions should apply to within the ‘...European territory of the member states...’⁶⁷³. Unfortunately, at present, this would not extend protection to marine cultural heritage.

- **The Electricity Works (Environmental Impact Assessment) Regulations 2000⁶⁷⁴**

The Regulations apply EIA to electricity generating projects, which will include offshore wind farms, in conformity with the requirements of the EIA Directive. They revoke previous statutory instruments in this sector. The Regulations apply to applications to construct, extend or operate a power station⁶⁷⁵ made under the Electricity Act 1989. Development requiring EIA is set out in Regulations 3 and 4 as well as supplementary information contained in Regulation 2(1) and Schedules 1 and 2. A prohibition is placed on any such development which has not had all environmental information⁶⁷⁶ taken into account by the Secretary of State for Trade and Industry.

Schedules 1 and 2 detail the circumstances for which EIA should be undertaken, and set limits in conjunction with the Annexes to the EIA Directive. In particular, the concept of ‘sensitive areas’, as above, is applied. There is also provision for EIA to be required to be applied in circumstances where the Secretary of State determines it may be likely to have significant effects on the environment. Schedule 3 considers locational issues and includes ‘landscapes of historical, cultural and archaeological significance’⁶⁷⁷. Schedule 4 outlines the requirements of the environmental statement, which, as in all EIA cases should contain a description of the aspects of the environment likely to be significantly affected by the development, including, *inter alia*, architectural and archaeological heritage; and description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

⁶⁷⁰ SI 2001/1754

⁶⁷¹ *R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [2000] Env. LR 221

⁶⁷² Mainly seen in art. 6 – note also that the Birds Directive also comes into play.

⁶⁷³ Article 2, Habitats Directive.

⁶⁷⁴ SI 2000/1927

⁶⁷⁵ as provided for in s36 of the Electricity Act 1989; provision is also made for EIA to be applied for above ground electricity lines, s.37 Electricity Act 1989.

⁶⁷⁶ ‘environmental information is defined in Reg. 2.

⁶⁷⁷ Schedule 3 para 2(ix)

Clearly, offshore wind farms could have an impact on maritime heritage sites, a point recognised in the Department of Trade and Industry's strategic framework for the offshore wind industry⁶⁷⁸. Marine archaeology is considered at section 5.9 and the document states that 'it is important that developers take account of such interests at an early stage in the planning for a wind farm by consulting [the relevant heritage body]'. It is noteworthy however, that the heritage bodies are omitted from the definition of 'consultative bodies' in Regulation 2(1) who should provide input to the EIA process. This is a clear omission, possibly due to English Heritage's enhanced role offshore coming subsequent to the Regulations, which will hopefully be formalised elsewhere or by amendment. Perhaps also this will overcome the criticism that EIA has not had much of an impact on the protection of the historic environment, as heritage issues are not a priority in the list of matters to be considered⁶⁷⁹.

4. International requirements as regards EIA

The Valetta Convention⁶⁸⁰ (the Convention) has as its aim '*the protection of archaeological heritage as a source of the and as an instrument for historical and scientific study*'. A broad definition of archaeological heritage extends to include '*...moveable objects, monuments of other kinds...whether situated on land or under water*'⁶⁸¹. The preamble to the Convention considers the important role that town and planning operations can play in the protection of archaeological heritage, and acknowledges that there is a serious risk of deterioration due to major infrastructural works. Commentators have observed that the Convention represents an important contribution to the protection of underwater cultural property⁶⁸² as it includes all areas within the jurisdiction of the parties. It is noted that some states restrict their protection of wrecks to the limits of the territorial sea, as is the case with the limit placed on English Heritage which would deal with the majority of United Kingdom protected wrecks, whereas others extend their influence to the extent of the continental shelf.

Also specified, is the need to create reserves and other means necessary to secure the protection of sites or artefacts, as discussed elsewhere in this report. From a development consent perspective, Article 5 of the Convention represents an important step in securing a proper consideration of archaeological heritage issues. State Parties are required to ensure adequate input by archaeologists in the development of strategies that will ensure the protection of conservation and enhancement of sites of archaeological interest in order to bring together the demands of development and archaeology⁶⁸³. Implicit in this undertaking by State Parties is the concept of adequate planning weight being given to

⁶⁷⁸ Future Offshore, A Strategic Framework for the Offshore Wind Industry, DTI, November 2002, HMSO.

⁶⁷⁹ See further, Shelbourne, C, *Public development projects and the historic built environment – comparing the English and American approach*, [2003] JPL 678 at page 687.

⁶⁸⁰ European Convention on the Protection of the Archaeological Heritage (Revised), Valetta 16.I.1992

⁶⁸¹ Article 1.

⁶⁸² Strati, A, *The Protection Of Underwater Cultural Heritage: An Emerging Objective Of The Contemporary Law Of The Sea*, 1995, Kluwer Law International, page 81.

⁶⁸³ In this connection see, for example, *Taking to the Water*, Op Cit.

issues of archaeological importance⁶⁸⁴. Otherwise, the Article requires a thorough embedding of archaeology considerations into the planning process, to the extent that development plans might require amendment on archaeological grounds, and that sufficient time and resources be devoted to ensuring that adequate scientific studies can be undertaken.

Most importantly perhaps, in terms of a binding obligation, would be the obligation that EIAs and the decisions that they underpin involve ‘*full consideration of archaeological sites and their settings*’. The importance of this provision can be seen in the fact that there is a clear requirement that such EIAs should take place in the marine environment; and, further, when read in conjunction with the requirements in the EIA Directive, failure to do so could result in an imperfect EIA seemingly in breach of international and EC law obligations.

5. Strategic Environmental Assessment

From July 2004, EC member states are required to conduct a strategic environmental assessment (SEA) as a consequence of Directive 2001//42/EC⁶⁸⁵. Part of the preamble to the Directive recognises the importance of the consideration of the transboundary effects of plans on the environment, and also considers that SEA will benefit undertakings by providing a more consistent framework in which to operate. The Directive provides at Annex 1 for formal consideration of the likely significant effects⁶⁸⁶ on the environment, which is given a broad definition and includes, specifically, ‘*cultural heritage including architectural and archaeological heritage*’. This undoubtedly assists in protecting, or at least formally considering, underwater heritage, and a failure to do so could result in judicial review proceedings or, ultimately, enforcement action for failure to fulfil obligations under a Directive before the European Court of Justice as provide for by article 226 of the EC Treaty.

The difference between SEA and the requirements of the EIA Directive can be seen at the point at which the assessment is to take place. As yet there is no precise definition of the term although some have been offered. For example the DTI has adopted the following definition in its strategy for offshore wind power ‘*the formal systematic process of evaluating the effects of a proposed policy, plan or programme or its alternatives, including the written report on the findings of that evaluation, and using the findings in publicly accountable decision making*’⁶⁸⁷.

⁶⁸⁴ For a view on the extent of that penetration see for example, Petchey, M & Collcutt, S, *When to Evaluate? The Provision of Sufficient Archaeological information in Planning*, [2002] JPL 529. At page 532 the authors make the point that ‘...as a relative newcomer to the list of material considerations in planning, archaeology is often perceived, ab initio, as having less weight than other issues, by developers and planners and even to some extent by some Inspectors’.

⁶⁸⁵ Directive 2001//42/EC on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197/30).

⁶⁸⁶ To include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects (Annex 1).

⁶⁸⁷ *The Future Offshore*, op cit., at 6.1 see ch. 6 generally

In terms of advantages of this new approach the Royal Commission on Environmental Pollution stated in 2002 that '*[a]ssessing individual projects helps to identify and mitigate environmental damage but the full value of environmental assessment is not realised until it is also applied to proposed policies, plans or programmes*'.⁶⁸⁸

Environmental assessment at project level is generally limited to the direct impacts on a small site '*...further limitations of [project level] EIA relate to difficulties in dealing with synergistic effects and ...impacts*'.⁶⁸⁹ Further reflections on the SEA system have been made by the Wildlife Countryside and Environment Links forum. The forum indicated that a marine spatial plan should be subject to SEA which should include a full ecological and archaeological assessment. It notes that the DTI is well versed in the production of SEAs, but also laments the fact that those that have been produced have themselves been sector-specific and as a result do not consider cumulative effects on the marine environment. It argues that the adoption of a marine spatial plan, subject to SEA, would have the benefit of considering cross-sectoral policies in the whole.

Clearly SEA is going to have an impact in the development of strategic planning. If a definite marine spatial plan is adequately considered, whether or not developed in line with the concept of ICZM, it is likely that an SEA would be required, and as alluded to above, a failure to undertake the process correctly will lead to the possibility of litigation to remedy the defect.

⁶⁸⁸ Royal Commission on Environmental Pollution 23rd Report Environmental Planning, Cm 5459, 2002, HMSO, para. 7.39.

⁶⁸⁹ Ibid, para 7.40.

D - Protection of Marine Wildlife Habitats

International, European and domestic laws all exert some control on the extent to which activities in the marine environment may be regulated. Recent decades have recognised the damage occasioned to marine ecosystems by unregulated abuse of the oceans. A considerable amount of work by international bodies, reflecting the transboundary nature of marine pollution, has created a more favourable future. Both the European Commission⁶⁹⁰ and DEFRA⁶⁹¹ have recently issued policy documents relating to the protection of the marine environment as a whole, and other United Kingdom government departments have considered the marine environment in other sectoral issues such as energy⁶⁹² and transport⁶⁹³.

A majority of the existing regulation is sector-specific as highlighted in the preceding sections. Contemporary thinking seems however to favour more integrated regulation that draws on planning concepts and assessments of potential environmental damage as a preliminary step to inform whatever action/development that might take place.

Beyond formal environmental assessments, as required at project or strategic levels, as discussed above, assessments are required before any development or interference with marine areas subject to certain protective designations under the Habitats and Birds Directives. Amendments to the Birds Directive, occasioned by the Habitats Directive accord effectively the same protection to the areas designated as either special areas of conservation (SAC)⁶⁹⁴ or special protection areas (SPA)⁶⁹⁵. Within areas designated as either SACs or SPAs, any project to be undertaken with the potential to affect them in any way must be the subject of prior ‘appropriate’ assessment⁶⁹⁶. The Directive prohibits authorisation of any such project if the integrity of the site is threatened, subject however, to a determination that there are ‘...imperative reasons of overriding public interest’⁶⁹⁷. This exception has been the subject of numerous interpretative cases before the European Court of Justice, and recent opinions of the Commission have given an insight into the considerations required by the competent authorities of the member states⁶⁹⁸.

Since the decision in *R v Secretary of State for the Department of Trade and Industry, ex parte Greenpeace Ltd.*⁶⁹⁹, SACs, established by virtue of the Habitats Directive, should

⁶⁹⁰ COM (2002) 539 Final - Communication from the Commission to the Council and the European Parliament, *Towards a strategy to protect and conserve the marine environment*, Brussels, 02.10.2002.

⁶⁹¹ *Safeguarding our Seas, A Strategy for the Conservation and Sustainable Development of our Marine Environment*, DEFRA, 2002, HMSO.

⁶⁹² *Seas of Change*, op cit.

⁶⁹³ *Towards a strategy to protect and conserve the marine environment*, op cit.

⁶⁹⁴ Habitats Directive, art. 3.

⁶⁹⁵ Birds Directive, art. 4.

⁶⁹⁶ Habitats Directive art. 6(1).

⁶⁹⁷ Habitats Directive, art. 6(4).

⁶⁹⁸ See for example Commission Press release, IP/03/573, 25 April 2003, Brussels, and eg Lowther, J, *Natura 2000: Recent developments in the Commission and courts*, [2203] Env. Liability p.148

⁶⁹⁹ (QBD) 5 November 1999, see *ENDS Report 299* (December 1999, page 54)

extend to the limit of the United Kingdom's continental shelf, and will also be applied in cases of EIA and in relation to the protective SPA designation established by the Birds Directive⁷⁰⁰. The European Commission will also put pressure on member states to do the same, stating in its proposed marine environment strategy that it intends to pursue full implementation of the Birds and Habitats Directives in the marine environment to the extent of the EEZ's of the member states⁷⁰¹.

1. Recent Developments

Amendments to the current law concerning conservation measures relating to Marine Wildlife Habitats (MWH) issued by DEFRA⁷⁰² have been proposed in order to put into effect the decision of the High Court in the *Greenpeace* case. As a result of the case, the Government has prepared Regulations⁷⁰³ (OMC Regulations) to apply both the Habitats and Birds Directives to the offshore marine environment. However, the consultation has come too late to prevent the Commission from referring the United Kingdom to the European Court of Justice for its failure to implement the Habitats Directive properly⁷⁰⁴ in breach of its EC Treaty obligations.

Briefly, *Greenpeace's* challenge was against the award of oil and gas exploration licences within the United Kingdom's Continental Shelf and Exclusive Fishing Zone (EFZ)⁷⁰⁵. The Government's view at the time was that it was in conformity with its EC obligations by applying the 1994 Regulations to the extent of United Kingdom territorial waters. The High Court determined that the 1994 Regulations should apply to the extent of the United Kingdom's Continental Shelf and that as currently constituted neither the 1994 Regulations nor the new regulations are a complete and lawful implementation of the Habitats Directive.

A major consideration within the reasoning was the multifarious 'other' controls that are imposed to the extent of the United Kingdom's Continental Shelf by international, EC and domestic law. The EIA Directive for example is applied by the United Kingdom beyond territorial waters, and UNCLOS further applies provisions relating to marine pollution within and beyond territorial waters. The EC Treaty itself specifies the rights of Member States over economic activities on the continental shelf. It was further noted that *Food and Environment Protection Act 1985*, as discussed above, applies beyond territorial waters since the amendments made by the *Environmental Protection Act 1990*. Additionally, in order to be effective, the nature of the marine environment and

⁷⁰⁰ Op Cit. n.2, see also Glen Plant, *Offshore wind energy development in the context of international and EC law*, Environmental Law and Management, ELM 15[2003]2 91-105, at p. 100.

⁷⁰¹ Op cit. n.57 at paragraph 80.

⁷⁰² Consultation on Offshore Marine Conservation (Natural Habitats etc) Regulations 2003, August 2003, DEFRA; see also *ENDS Report 343* (August 2003, page 48)

⁷⁰³ Consultation on The Offshore Marine Conservation (Natural Habitats &c.) Regulations, August 2003, available at www.defra.gov.uk/corporate/consult/default.asp

⁷⁰⁴ See Commission Press Release IP/03/1109 'Wild Birds and Habitats Directives: Commission pursues enforcement action against eight member states'. See also *ENDS Report 343, Marine wildlife habitats to gain protection after Greenpeace victory*, August 2003, p.48

⁷⁰⁵ The United Kingdom has not declared an EEZ, but has declared an EFZ

ecosystems dependent upon it required that the Regulations' provisions should apply to the farthest limit of influence permitted by international law.

The OMC Regulations are currently subject to consultation and DEFRA anticipates that they will be laid before Parliament before the end of 2003. The Government intends to apply the OMC Regulations to cover the obligations in the Birds Directive as well, on the reasoning that the obligations contained in that Directive are similar⁷⁰⁶ in scope and application to those under the Habitats Directive, even though the judgment in *Greenpeace* applied only to the latter. In effect, the OMC Regulations apply the obligations in the Directives in the marine environment, which they define⁷⁰⁷ as 'in relation to the seabed and subsoil, and to any installation exploring or exploiting the natural resources thereof, any area designated in accordance with section 1(7) of the *Continental Shelf Act 1964*; or in relation to the waters superjacent to the seabed, any area to which British fishery limits extend in accordance with section 1 of the *Fisheries Limits Act 1976*. The current application of the 1994 Regulations is limited to the United Kingdom's territorial seas up to 12nm from the baseline.

At the same time as the OMC Regulations were being drafted, the Government commissioned the JNCC to collate data so that offshore SACs and SPAs could be identified⁷⁰⁸. The control of activities from the 12nm to 200nm limits is not a matter that falls within the responsibility of the devolved assemblies⁷⁰⁹, and has been considered from the United Kingdom perspective by the JNCC as the Government's advisor on the selection of sites for classification under the Directives.

Clearly there is no explicit reference to the protection of underwater archaeology/marine heritage as the OMC Regulations draw their purpose from conservation and the need to protect habitat, although there are issues to consider arising from the change. Two principal considerations for example would be: first, as discussed above, the ancillary benefits to any site containing archaeological interest (of whatever description) within an SAC/SPA; second, the limits that such a designation might place upon anything that might be done, or might be proposed, in relation to that site if there was any suggestion that there could be an effect on the integrity of the SAC/SPA.

2. Appropriate Assessment in the Marine Archaeology Context

Should any work be proposed which might have a significant effect on a site declared under one of the protective designations, an 'appropriate assessment' would be required, taking into account any implications for the conservation objectives for the site. Large-scale investigation or excavation of a marine site, particularly if there is any risk of pollution such as through the release of any environmentally hazardous cargo or any bunker spillage, could require an assessment. There is little if any clear guidance in this area to determine the principles and practices to be adopted, particularly, as the law is currently constituted, if the site/wreck falls outside United Kingdom territorial waters.

⁷⁰⁶ Note 110 above, paragraph 5.

⁷⁰⁷ Ibid. paragraph 1.

⁷⁰⁸ The report is available at www.jncc.gov.uk/Publications/JNCC325/intor325.htm

⁷⁰⁹ Ibid. paragraph 1.2

Additionally, it is not explicit as to who would need to be involved in any consultative exercise to determine the effects. The duty expressed in Regulation 11 (Duty to compile and maintain register of European offshore marine sites) will at least permit heritage bodies to come to terms with any obstacles that might be placed in their way if proposing, for example, to undertake any work on a site as envisaged under the amendments made to the *Protection of Wrecks Act 1973* by the *National Heritage Act 2002*.

In the alternative, the duty could be mirrored in that a wider list of marine archaeological sites could be statutorily maintained, such that any overlap between sites could be identified and processes developed towards more effective regulation able to serve the interests of both natural and archaeological concerns. The All-Party Parliamentary Group⁷¹⁰ has offered the recommendation that the new statutory status for sites and monuments records should include coastal and marine records, having commented that there has only been a '*limited archaeological survey of marine and coastal areas*'.

As the complexity of the application of certain environmental requirements within the international, EC and domestic matrices are being brought into line to form a coherent regime applied in a distinct area, inconsistencies are being removed from the law. The question is therefore raised as to the utility of adopting a similar approach to matters of archaeology in the marine environment. The changes made by the *National Heritage Act 2002* extend the powers of English Heritage to the territorial limit. However, as heritage considerations form a distinct and unique part in a process of planning which must, by its very nature adopt and practice clear environmental objectives, it is not too much of a step into the dark to expect some consistency. Indeed, in the context of the *Greenpeace* case, the submission was made that 'given the express linkage between the environmental impact assessment Directives and the Habitats Directive, differences in their geographical scope would be absurd'⁷¹¹. Despite the strength of that submission, there is a relevant point.

⁷¹⁰ Op cit., paragraph 96

⁷¹¹ Page 7, source WESTLAW, www.westlaw.co.United Kingdom (Ref. 1999 WL 1048293)

E - Other Environmental Limitations

Other environmental legislation offers an insight into different forms of procedure which, feeding into the consent processes, attempt to take account of the potential environmental effects of the operation (the term is used loosely) in relation to issues such as the damaging effects of pollution. In terms of any potential use in relation to underwater archaeology/cultural heritage, a wider definition of the environment than is currently used may be necessary. Clearly the majority of environmental protection legislation does not have the protection of heritage as its rationale, but the effects of pollution on sites might enable some input into the process of permitting, authorising or consenting to certain practices.

As was noted above, the environmental degradation of heritage sites is a factor that was felt was not adequately served in the current legislative framework, and although there is little by way of explicit application to such sites, there are measures that would have application, albeit rather tangentially. The *Pollution Prevention and Control Act 1999* for example regulates large scale industrial pollution in a similar way to its predecessor regime provided for in Part I of the *Environmental Protection Act 1990*. The *Pollution Prevention and Control Act 1999* is essentially a framework statute conferring powers on Ministers to make regulations to fulfil the aims of the statute. Section 3 concerns the prevention of pollution after an accident involving an offshore installation, and empowers the Secretary of State for the Environment to make regulations under the pollution prevention sections of the *Merchant Shipping Act 1995*. There is a duty to consult widely for the purposes of making any regulations, and that includes ‘*such other bodies or persons as he may consider appropriate*’⁷¹². This could, perhaps should, involve heritage bodies, and the potential exists to lobby for a better protection of sites from any such pollution. The term ‘offshore installation’ applies to structures or other ‘things’ with the exclusion of ships located to the extent of the United Kingdom’s continental shelf, perhaps once more suggesting that there should be a more considered approach in the setting of boundary limits for the purposes of regulation.

Additionally, the definition of the term ‘controlled waters’ in section 104 of the *Water Resources Act 1991* includes coastal waters, and thus any pollution that occurs in controlled waters may be prosecuted by the Environment Agency. The Agency are also the regulatory body granting discharge consents, to permit matter to enter controlled waters, thus the effect of marine pollutants on underwater heritage could be a factor to consider when granting a consent.

⁷¹² S. 3(4)(b).

F - Potential parallels to be drawn between environmental protection measures and potential utility for archaeology/cultural heritage protection

As well as obvious prior permitting regimes such as environmental assessment and SEA which would require formal consideration of developments significantly affecting underwater cultural heritage, the potential extension of the planning system to the 12 nautical mile limit will be useful. It would seem to promote the concept of joined-up regulation, or integrated planning. The fact that English Heritage has gained competence to that boundary, effectively an extension of their role which is part of the terrestrial planning regime, indicates that the planning regime itself might usefully be extended to give further meaning to that role. But should this process go further? The point has been made above however that if certain designations, which are going to require some form of protection within the EEZ and to the limits of the continental shelf, are applied it must follow that they should also be brought within the process. It is likely in relation to SEA that this will have to be considered: it is not difficult to envisage that, given the focus on transboundary effects of plans and programmes, that this will need to be considered, although the potential resource implications are likely to be great.

A cross-cutting measure which could be adopted would be to include the heritage environment in all descriptions of the 'environment' where there is a need to environmentally assess the impact of a project. This is already in effect as regards terrestrial development, but as is demonstrated by the above review of sector-specific EIA controls, there are inconsistencies in the coverage given to heritage issue. Additionally, the inconsistency seen in the fact that English Heritage and other heritage bodies are not explicitly referred to as consultative bodies needs to be overcome. As seen, there are catch-all provisions that the relevant authority take account of the representations of other bodies as it sees fit, but this somewhat ad hoc arrangement should be formalised to ensure a consistency in application of principles and a greater status accorded to the views of the heritage bodies. It is difficult to see how, as presently constituted, the regime in place is sufficient to enable the United Kingdom to sufficiently fulfil its obligations under the Valetta Convention for example.

Spin-off, or ancillary, benefits/detriments should also not be overlooked. Clearly any restriction on activities which will have detrimental environmental effects might be a restriction that provides a knock on benefit for certain underwater heritage. Of course, investigation or work undertaken in relation to certain artefacts might itself be something that cannot demonstrate its worth in terms of an appropriate assessment of a marine SAC, and thus might be made more difficult.

Until relatively recently, environmental concerns had always been regarded as minority interests. In pushing the agenda for the protection of the environment, there should be no reason why issues of the man-made environment/cultural heritage issues should not be considered, especially as there is an expressed need to consider the effect of developments upon them within the framework of EIA, as has been considered.

Application of EIA and the creation of Natura 2000 SACs in the marine environment should contribute to overall protection and a shift in the (still) widely held perception that the marine environment is limitless and immune to pollution and over exploitation in any form.

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