

HERITAGE LAW AT SEA



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JOINT NAUTICAL
ARCHAEOLOGY
P O L I C Y
COMMITTEE

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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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
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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*¹, 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.

¹ [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 State² 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

² 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.

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 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.