# HERITAGE PROTECTION FOR THE 21ST CENTURY

## Department for Culture, Media and Sport

## Response by
## The Joint Nautical Archaeology Policy Committee

**May 2007**

## Introduction

The Joint Nautical Archaeology Policy Committee (JNAPC) welcomes the opportunity to respond to the White Paper *Heritage Protection for the 21st Century*.

The JNAPC was formed in 1988 from individuals and representatives of institutions who wished to raise awareness of the United Kingdom's underwater cultural heritage and to persuade government that underwater sites of historic importance should receive no less protection than those on land. Some summary information on the JNAPC and its membership is attached in Appendices 3 & 4.

In May 1989 the JNAPC launched *Heritage at Sea* seeking better protection for our underwater cultural heritage, and followed this in 2000 with *Heritage Law at Sea*, which called for a review of the legislation affecting the protection of historic sites underwater. In 2003 the JNAPC published *An Interim Report on the Valletta Convention & Heritage Law at Sea,* which made detailed recommendations for legal and administrative changes to protect the UK's underwater cultural heritage. JNAPC has also made a considerable contribution to the DCMS Consultation Document *Protecting our Marine Historic Environment: Making the System Work Better* and has been represented on the Salvage and Reporting Working Group.

All of these reports and other documents drew attention to the deficiencies of the administrative and legislative frameworks surrounding the protection and conservation of the marine historic environment (MHE) and made recommendations to improve those frameworks and achieve comparable protection for the MHE to that enjoyed by its terrestrial counterpart. The White Paper thus represents, for the JNAPC, the culmination of a process stretching over 18 years, during which the Committee and its members, who are acknowledged national and international experts in their respective fields, have devoted considerable resources to a detailed study of the issues contained in the maritime section of the White Paper. The JNAPC is also mindful that the proposed reforms must of necessity endure for several decades. The White Paper therefore provides both stakeholders in the MHE and the Government with a rare opportunity to secure a framework for the conservation of the MHE well into the 21st century and to ensure that the United Kingdom meets its obligations under the *European Convention on the Protection of the Archaeological Heritage (Revised) 1992 (hereafter referred to as the Valletta Convention)*.

The JNAPC welcomes the Government's recognition in the White Paper that "*The marine element includes some of our most important historic assets" (White Paper, p. 43, para. 1)* There follow certain general comments concerning the proposals set out in the White Paper, as well as answers to the three specific questions posed by the White Paper.

Endorsement of Proposals

The JNAPC welcomes and endorses the proposals in the White Paper that:

a) a single system of designation replaces the separate mechanisms of listing, scheduling and designating;
b) the criterion of 'special interest' is to be adopted for all designations;
c) the definition of 'marine historic asset' will encompass a broader range of material than that which can currently be afforded protection under the Protection of Wrecks Act 1973 (PWA);
d) no age limit is to be imposed upon the designation of marine historic assets;
e) that any person will be able to apply for designation of a marine historic asset and that the process of application will be standardised and made more accessible;
f) a common terminology will be utilised in relation to the terrestrial and maritime historic environments;
g) a single register of *'Historic Buildings & Sites'* will replace the current separate lists of designations;
h) interim protection will be afforded to marine historic assets while it is determined whether the asset should be designated or not;
i) a statutory duty will be placed on the Receiver of Wreck to notify the heritage agencies when a report of the existence or recovery of a marine historic asset is made to the Receiver. For the avoidance of doubt this must include reports made under a "Commercial Confidentiality" agreement;
j) clearer and simpler designation records will be introduced;
k) flexible consent systems will be introduced;
l) public access to designated marine historic assets will be facilitated wherever possible and such access will be encouraged.

**Uncertainties & Omissions**

Inevitably, in a document such as the White Paper, dealing as it does, with complex issues in relative outline, there will be uncertainties of interpretation and lack of detail that will attract attention and comment. This can inadvertently create the impression that the document is not welcomed and is perceived as inadequate to the task. As stated above, the JNAPC welcomes much that is proposed within the White Paper and it neither wishes nor intends that the observations that follow detract from or overshadow the merits of the document, which it has acknowledged above. The JNAPC would like its remaining comments and observations to be seen in this context.

The White Paper contemplates that a number of new terms will be introduced by legislation, including 'marine historic asset', 'Heritage Asset', and 'Heritage Protection Agreement'. It is essential that such terms be defined so they do not preclude a co-ordinated system of heritage protection. Any uncertainty of interpretation in respect of such terminology could open up inconsistencies, thereby giving rise to unintended omissions in terms of heritage protection. Such omissions are best avoided by making the terminology between terrestrial and maritime systems as comparable as possible.

**Salvage issues and increased protection for marine historic assets**

The JNAPC is seriously concerned that DCMS has decided not to address the key relationship between salvage and the protection of marine historic assets (p. 47, paras 27 – 32). There continues to be greater provision for financial reward and opportunity for salvors to the detriment of marine historic assets. In particular, with no mandatory provision for reporting *discoveries*, there is reduced opportunity to protect those marine historic assets of "special interest" before salvage or recovery. This legislative review provided a rare opportunity to redress this balance, but this opportunity has not been taken.

DCMS consulted on the issue in *Protecting our Marine Historic Environment: Making the System Work Better* (March 2004) in which it said:

"the Government now wishes to address the tension which exists between salvage and historic shipwrecks" (para 106).

Specifically question 21 of the Consultation Document asked: *"How could the tension between salvage and historic shipwreck be best addressed? How could this public interest be reconciled with the concept of 'salvor in possession'? Should the UK exercise its right not to apply the 1989 Salvage Convention to maritime cultural property, which would allow it to remove the current incentives of the salvage award? What are the advantages and disadvantages of excepting marine historic assets from the law of salvage, taking account of the other measures proposed here?"*

DCMS published the analysis of responses to the Consultation Document in July 2005. On the question '*Should the UK exercise its right not to apply the 1989 Salvage Convention to maritime cultural property?'* 43% of respondents answered this question and 76% agreed that the UK should not apply salvage to maritime cultural heritage.

Following this consultation exercise, DCMS formed a Working Group on Salvage and Reporting, on which JNAPC was represented. This Working Group produced a report in June 2006, which made important recommendations to Ministers, and we would recommend that DCMS refers to its conclusions.

We believe that the absence of proposals in the White Paper for taking marine historic assets out of the salvage law regime is inconsistent with the advice that the Department has received.

The detailed reasons why marine historic assets should be taken out of the salvage law regime are set out in the JNAPC's response to the Consultation Document (see Appendix 2 below). It is particularly worth noting the following points:

- It is inappropriate that what is effectively 19th century salvage law should control the destiny of underwater cultural heritage in the 21st century (the Merchant

Shipping Act 1995 derives most of its provisions on Salvage and Wreck (i.e. Part IX of the Act) from the Merchant Shipping Act 1894).

- The Department for Transport and the Receiver of Wreck have no statutory duty to deal specifically with historic wreck. Although the JNAPC and other bodies have encouraged their involvement over the years, this is carried out on voluntary basis and could change unilaterally. DCMS are not therefore in a position to control the protection of marine historic assets, which is their responsibility.

- There is no legal requirement for finds of marine historic assets, which do not fall within the narrow and technical definition of 'wreck', to be reported to the Receiver of Wreck. Similarly, the Receiver 'of Wreck' has no statutory duty to deal with these items. This leaves a large section of marine historic assets, which DCMS says it would like to protect (p. 44, para. 4), vulnerable and outside the scope of the reporting system. The proposals in the White Paper make no attempt to address this problem.

- Given the deficiencies of the current system, it should come as no surprise to DCMS that the heritage organisations are critical of the way in which marine historic assets are protected under UK salvage and reporting laws. Contrary to the implication in para. 31 (p.47), there is plenty of evidence that the salvage regime is inappropriate for marine historic assets, not least that this is broadly accepted to be the case internationally (and has been so for many years). The fact that the International Salvage Convention 1989 makes a special reservation in respect of 'maritime cultural property' (Art. 30(1)(d)) and that the UK is far from alone in entering this reservation is itself evidence of this. While we recognise that this is a difficult and complex issue, it must be tackled if the Government is to achieve a legal framework 'fit for the 21st century'.

- Continuing reliance on the Merchant Shipping Act 1995 is in itself a serious problem. Prosecutions under the Act have been virtually impossible because there is no time limit for reporting. There are also inadequate penalties for failing to report wreck, thereby providing insufficient deterrent to comply with the law. (Recent events in respect of the SS *Napoli* highlighted clearly the inadequacy of the current law.)

- Salvage encourages recoveries, not discoveries (and the recovery of material runs counter to the archaeological principle of protection *in situ*).

- The initiative for recoveries remains with the salvor but also allows that person to acquire substantive legal (possessory) rights in the site as 'salvor in possession'.

- Once a salvor has acquired the status of 'salvor in possession' this can prevent, or at the least, impede, designation of wrecks under the Protection of Wrecks Act 1973 (as DCMS found in the case of the *Hanover*). This problem could also apply to any future legislation providing for designation of marine historic assets. For

this reason alone there is an urgent need to review the application of the salvage law regime to marine historic assets.

- Any recovery can be made regardless of good archaeological practice.

- Any recovery can be made regardless of the absence of conservation funds, thereby placing the recovered artefacts in jeopardy as the cost of conservation may exceed the market value of artefacts.

- The application of the salvage regime to historic material perpetuates the perception among members of the public that wreck diving equates with recovery and rewards for recovery, rather than with diving on a 'look but don't touch' basis.

The White Paper is said to offer "Heritage Protection – for the 21st Century" but unfortunately this is not the case for marine historic assets. DCMS states *"..we do not feel that the time is right for major change..."* in respect of salvage law in para. 31 (p.48). However, we would strongly argue that now is the only time, as the likelihood of any future heritage legislation is remote. We believe that unless this opportunity is grasped, the result will be that a very important and emerging part of our heritage will be inadequately protected for the foreseeable future.

**Reporting, recovery and disturbance**

The JNAPC is most concerned that there is no intention to require the reporting of the finding or disturbance of a marine historic asset. The case for reporting discovery, disturbance and recovery is made in the JNAPC's response to the Consultation Document also included at Appendix 1.

We would draw the attention of DCMS to Article 2(iii) of the Valletta Convention, which requires each State Party to make legal provision for, *inter alia*, "*the mandatory reporting to the competent authorities by a finder of the chance discovery of elements of the archaeological heritage and making them available for examination."* While a State may limit such a reporting obligation to precious metals (according to the Convention's Explanatory Report, pp. 7-8), the Convention does require that some provision be made for reporting of the *finding* of archaeological material. At present in the UK only the *recovery* of 'wreck' (as pointed out earlier, a very limited category of material) must be reported to the Receiver of Wreck, not its discovery.

It appears from the White Paper that there will be no legal obligation to report the *finding* of any marine historic asset, whether or not it comprises 'wreck'. This, in itself, would appear to be a breach of the UK's obligations under the Valletta Convention.

In relation to the *recovery* of archaeological material from the sea, the terms of the White Paper are extremely uncertain. In para. 32 (p. 48) the Paper notes that recoveries of '*wreck*' are presently reportable to the Receiver of Wreck. The paragraph then goes on to

state that, in essence, the Receiver will be required to inform the heritage agencies of "*reports of marine historic assets"*. It is unclear exactly what this proposal entails. This uncertainty arises from the fact that a '*marine historic asset'* will constitute a broad range of material, greater than that which comprises legal '*wreck'* under the Merchant Shipping Act 1995. Thus recovered archaeological material may consist of material which is or is not also '*wreck'* under the terms of the Merchant Shipping Act 1995. If an item is recovered from the sea which is a '*marine historic asset'* but is not legal '*wreck'*, say a Bronze Age axe head washed into the sea from a terrestrial site, will there be a duty to report the recovery to the Receiver? If the recovery is reported anyway, on a voluntary basis, is the Receiver then under a duty to report the recovery to the relevant Heritage Agency?

Alternatively, the terms of para. 32 (p. 48) could be read to mean that the Receiver will only be obliged to inform the Heritage Agencies of recoveries of a '*marine historic asset'* which also comprises '*wreck'* under the terms of the Merchant Shipping Act 1995. This could result in a range of non-wreck marine historic assets not being reported, either to the Receiver or to the relevant Heritage Agency. This confusion arises because the drafting of para. 32 (p.48) fails to take account of the difference between the meaning of the terms '*marine historic asset'* and '*wreck'*. The former term will encompass a far wider range of material than the latter. Not all cultural material recovered from the sea originates from a shipwreck. The paragraph also fails to make clear whether the recovery of a '*marine historic asset'* that is not '*wreck'* is reportable to the Receiver of Wreck. It would make little sense for the recovery of a '*marine historic asset'* that is not '*wreck'* to not be reportable to the Receiver, but to then place a mandatory statutory obligation on the Receiver to report it to the Heritage Agencies. If the recovery of a non-wreck marine historic asset is important enough to be reportable to the Heritage Agencies on every occasion, then it would seem axiomatic that it is important enough to be reportable to the Receiver. At present the White Paper appears to contemplate the position that the recovery of such an item is not compulsorily reportable to the Receiver of Wreck, but - if reported – is then compulsorily reportable by the Receiver to the Heritage Agencies. These inconsistencies and omissions are serious and could place the UK in breach of its obligations under the Valletta Convention, something that the JNAPC is confident neither the Department nor the Government would wish to countenance. They are also somewhat illogical in terms of heritage protection and management.

**Definition of marine historic asset**

While the introduction of new detailed criteria for designation of marine historic assets is appropriate, there is a concern that making such criteria statutory can lead to inflexibility. Our understanding of the significance of archaeological and historic remains can and does evolve as our understanding of the past increases. The danger is that by making such criteria statutory the difficulty of amending them in the light of increased understanding will, in time, make the criteria inflexible. Ease of amendment would be secured by making such criteria non-statutory, perhaps incorporated in a published policy guidance note. Amendment could then be simply and relatively quickly secured by the revision of such guidance as an administrative process. In any event, whether the criteria are

statutory or non-statutory, the JNAPC would urge the government to launch a consultation as to the formulation of such 'detailed' criteria.

**Role of Advisory Committee on Historic Wreck Sites (ACHWS)**

In para. 8 (p. 44) it is stated that designation will be based not just on the criterion of 'special interest' but also upon the most appropriate management regime for the site. The White Paper suggests that there will be two 'tests' for designation, i.e. eligibility under the new detailed criteria and the appropriateness of a management regime. It is unclear what is contemplated by this latter test and we request further clarification on this. It also raises the question whether the ACHWS, which advises upon designation, is an appropriate body to advise upon heritage management, including licence applications, given that its members are selected for their individual expertise, which may not necessarily encompass heritage management. The management of designated sites raises distinct issues and demands distinct skills and experience, compared to the question of whether a site should be designated in the first place. The ACHWS is well equipped to advise on designation but it would appear less suitable to advise on the management of sites.

The JNAPC is uncertain as to exactly what a "more strategic advisory role" for the ACHWS entails. It is also unclear how the ACHWS will be resourced to meet the greater strategic and advisory demands to be placed upon it. The JNAPC recommends that the remit and role of the ACHWS be reviewed and - as a component of that review - stakeholders be consulted on the future remit of the ACHWS, its composition and resourcing.

**Marine historic assets in international waters**

The JNAPC welcomes both the recent creation of the Government's inter-departmental working group on wrecks situated beyond the 12-mile territorial limit and the proposal that the ACHWS should advise the Secretary of State on these wrecks (it should be noted that all marine historic assets, not just wrecks, should be considered here). However, in this respect, there appears to be an inconsistency between the proposals advanced in the White Paper and those advanced in the Marine Bill White Paper (*A Sea Change: A Marine Bill White Paper*, March 2007, Defra). The former states that advice upon such wrecks will be taken from the ACHWS. There is no mention made of advice also being taken from English Heritage or any of the other Heritage Agencies. Conversely, the Marine Bill White Paper states that the proposed Marine Management Organisation will "look to EH for advice ..." concerning wrecks situated outside the 12-mile limit (Marine Bill White Paper, p. 145, paras. 8.124-125). No mention is made here of advice being taken from the ACHWS. In this respect, it is also pertinent to note that that Regulations for Environmental Impact Assessment and Strategic Environmental Assessment vary as to whether they require consultation with relevant heritage agencies. However, all these regulations include potential effects on sensitive heritage areas as a possible criterion for requiring environmental assessment as well as it being a standard topic for any SEA or EIA. Since these provisions may relate to offshore development anywhere out to the

limit of the UK's jurisdiction, it would be logical to ensure that the remit of the Government's heritage advisors including the ACWHS should extend out to the same limit.

There is a clear inconsistency in these proposals that undermines the Government's stance that a holistic approach across Government departments is being developed in respect of the marine historic environment. The JNAPC seeks further clarification as to exactly what the Government's proposals are in this respect, both regarding the remit of the ACWHS and the Heritage Agencies. It also recommends that in respect of such wrecks advice be taken from English Heritage or the other Heritage Agencies. In order to assume this additional function, the JNAPC assumes that English Heritage and/or the other Heritage Agencies will require additional resources to build additional capacity.

The JNAPC welcomes the statements made by the Government in both the Heritage Protection White Paper and the Marine Bill White Paper which acknowledge the need to afford protection to marine historic assets situated beyond the UK's 12-mile territorial limit. We also welcome the Government's proposals for seeking advice concerning "the protection and management" of such assets (see page 46, para. 21). However, as our Chairman's letter to David Lammy dated 6 March 2007 makes clear, we remain deeply concerned about the absence of mechanisms for achieving such protection and management. Recent events in respect of the wreck thought to be the *Merchant Royall* illustrate the current lacuna. We would therefore urge the Government to seriously reflect on this matter and look forward to exploring the possibilities with the new inter-departmental International Wrecks Committee at the earliest opportunity.

**Designation and Grading**

While the JNAPC welcomes the broad definition for 'marine historic assets' proposed in the White Paper, it is unclear whether this will encompass submerged cultural deposits and landscapes. In our view, such deposits and landscapes must be included as they are at the forefront of advances in our understanding of European pre-history and are recognised as an increasingly important historic asset. Such assets will be eligible for designation on land as sites without structures and comparable maritime sites merit equivalent protection. The JNAPC would therefore welcome confirmation that submerged cultural deposits and landscapes will be accommodated within the definition of marine historic asset.

Within the terrestrial system, Historic Assets will be designated in England by English Heritage, but marine historic assets will be designated by the Secretary of State. This is potentially confusing to end-users and introduces a disparity between terrestrial and maritime systems, which best heritage practice deems should be as comparable as possible. To achieve this, designation of marine historic assets should be determined by English Heritage, with appeals against designation being made to the Secretary of State.

The JNAPC supports the concept of voluntary management agreements for designated sites as an alternative to licensing (para. 25, p. 47) but these should be statutorily based

Heritage Partnership Agreements as described on p. 24-25. There is no need to have different terminologies or arrangements between the marine and terrestrial systems.

Unlike on land (p. 17, para. 13), it is notable that no programme to develop priorities for marine designations has been proposed, which suggests that designation decisions will be reactive, not proactive. Consideration should be given to establishing a thematic programme for designations, with appropriate resourcing.

No explanation is given in the White Paper for why it is felt that grading for marine sites is "*likely to be impractical and over-complex*". We believe that grading underwater is no more complex than for terrestrial sites and therefore reasons for this approach need to be given. The JNAPC considers that if grading is to be applied at all to buried and underwater heritage assets, marine designations could usefully be given the same grading structure as that proposed for former terrestrial scheduled sites, i.e. Grade 1. In both cases we believe that any future reduction to Grade 2 would need to be on the basis of clear evidence of relative lack of importance, not just lack of evidence.

**Role of Local Authorities**

Local authority jurisdiction and terrestrial heritage protection will extend into the maritime sphere in relation to the overlap between land and sea, i.e. the foreshore between MHWS and MLWS. The White Paper therefore implies a possible overlap in the responsibilities of local authorities and EH for consents/licences in respect of historic assets between MHWS and MLWS. This overlap applies to nationally protected sites, not local designations and needs to be resolved. One approach would be for the 'terrestrial' approach to be followed, i.e. all historic assets within local authority boundaries would be subject to Historic Asset Consent administered by local authorities with – as proposed on p. 22, para.11 – involvement from the Secretary of State and from English Heritage as appropriate. English Heritage would therefore be responsible for administering only those Historic Asset Consents that are seaward of local authority boundaries.

In respect of the terrestrial system it is proposed to facilitate more local, as opposed to national, designations by local authorities (p. 14, para. 25). It will therefore be possible for local authorities to designate sites locally on the foreshore, but not below MLWS. This raises the following questions: why is local designation not considered for the whole, rather than part, of the marine sphere, given the popularity (acknowledged in the White Paper) of local designations? How does the Department intend to give effect to local designations for marine sites in local authority jurisdiction? For example, within the provisions for marine spatial planning it may well be that such plans could and should include recognition of marine heritage identified in the course of conducting SEAs or EIAs. One of the positive benefits of marine SEAs and EIAs is the additional survey data recovered identifying sites and deposits that are to be avoided by development, and an appropriate response for long term mitigation would be to afford the more significant ones with a formal recognition in marine plans.

**Historic Environment Records**

The JNAPC welcomes the proposal that Historic Environmental Records (HERs) be placed upon a statutory footing. However, we are concerned that coastal local authorities will not be required to incorporate information on marine historic assets into HERs, but will merely be 'encouraged' to do so. Unless this process of 'encouragement' incorporates adequate resourcing, local authorities will undoubtedly resist such encouragement. Coastal and marine HERs should be statutory, resourced and parallel in form, so making them comparable to their terrestrial counterparts. Coastal local authorities should be enabled to provide a comprehensive, up-to-date local record of the marine historic environment within their HERs. It is not clear from the White Paper that this will be the case. There is no understandable reason for allowing a disparity between HERs in respect of terrestrial and maritime historic assets, indeed best practice in heritage management indicates that parity is required.

**Response to the three specific questions raised in the White Paper**

**Question 1.**
**We strongly disagree with the proposal to remove Conservation Area Consent.**

We are alarmed at the apparent assumption implicit in this proposal that Conservation Areas are somehow 'only' a local designation and so special provisions do not need to be made. There is no question that some Conservation Areas – including some maritime ports and coastal settlements – are of international, not merely national importance, and some such as Liverpool, Conway and the Cornish mining heritage are recognised in terms of their status as World Heritage Sites. Conservation Areas play a fundamental role in safeguarding the special international values of many parts of the WHSs. Many other coastal conservation areas, both urban and rural, are of undoubted national significance, and all are of special value to the local people who live and work there and are a vital part of the UK tourism industry. We would thus expect there to be particular means of ensuring that the special character of such areas are conserved and enhanced, and we cannot see how this can be achieved without a clear requirement to obtain consent for some types of works that cumulatively are capable of degrading, diminishing and even destroying the special character of such areas:

(a) The requirement to seek Conservation Area Consent signals to owners and developers the importance of the conservation area concept. Conservation Areas are now being given greater status by the creation of character appraisals.

(b) The requirement to seek consent also triggers a duty on the local planning authority (LPA) to advertise the application in the local press. This gives all members of the public a chance to comment, not just those in local groups who regularly monitor applications of all types.

**Question 2.**
**We can see a potential role for a more formal assessment and conservation planning role that lies between the full-blown SEA and EIA regulations and the much weaker provisions of existing terrestrial Planning Policy Guidance.**

We welcome new statutory guidance promoting pre-application assessment and discussion for all major planning applications. However it must be noted that such assessment and discussion will need to acknowledge the much poorer baseline of historic environment data that is available at sea, and the limits of current understanding, and that provision will need to be made for dealing with the consequent risks and the potential for discovering previously unknown sites. It is not clear, however, what the proposal to 'promote pre-application assessment' would entail. There is already a mechanism for this because in both the EIA and SEA Regulations areas of cultural heritage importance are included as a potential criterion on which an EIA or SEA can be triggered, though in practice this is very rare, and for offshore development almost all development is subject to EIA anyway. For terrestrial heritage there is already provision under PPGs 15 and 16 for encouraging pre-application assessment, although it has been sadly under-used for the built heritage. There can be circumstances where a full-blown SEA or EIA is not justified, and where something more than the typical PPG16 pre-application assessment is needed. On this basis there might be value in a provision that enabled an LPA to require a developer to submit a Strategic Environmental Assessment and Conservation Plan for full public consultation in advance of a formal planning application, without necessarily having to embark on a complete EIA or SEA if other environmental factors are not so important.

**Question 3.**
**We strongly oppose expanding the use of Certificates of Immunity as they could fetter the discretion of future decision makers.**

The key concerns arise from the poorer baseline and understanding that applies offshore, as referred to above, because it is possible that an asset might prove to be more important that at first thought. For example, if a wreck known 'anecdotally' to be a barge turns out to be a 16th century merchant ship. If Certificates of Immunity were to be used in the marine environment, such certificates will need to have a short period of validity, and the process by which they are issued will need to have a much greater degree of transparency. Applications for certificates must be advertised and decisions taken by elected representatives. It appears that this has not been considered in relation to the maritime heritage, but the potential application of Certificates of Immunity to submerged maritime heritage would potentially further entrench the problems of salvage, not resolve them.

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**Appendix 1**

JNAPC responses to Protecting our Marine Historic Environment: Making the System Work Better (March 2004*)*

**Question 19**

**Obligation to report the discovery of all marine assets**
The JNAPC agrees with the Government that it is important that new discoveries are brought to the attention of people with the necessary expertise and capacity to ensure appropriate treatment. We therefore believe that an obligation to report discovery would be an essential improvement to the system.

Arguably there is already an obligation to report the 'finding' of wreck, as opposed to its recovery, under the Merchant Shipping Act 1995, although the language is not precise and some legal commentators have questioned this interpretation. Additionally, the obligation only extends to material that constitutes legal 'wreck', as opposed to all forms of marine cultural heritage. It would therefore be appropriate to clarify the obligation to report discovery and at the same time to extend the requirement to report 'non-wreck' historic assets such as prehistoric artefacts.

Under Article 2(iii) of the Valletta Convention the UK is obliged to ensure that "the country's legal system provides for the mandatory reporting of chance discovery of elements of the archaeological heritage and the making available of them for examination". Clearly, the present provision in the Merchant Shipping Act 1995 does not satisfy this obligation, since it is not clear that discovery, as opposed to taking possession, requires reporting and the 1995 Act only applies to wreck and not all forms of marine historic assets. Consequently, in order to comply fully with the Valletta Convention the UK would be required to introduce an obligation to report the discovery of all forms of marine cultural heritage.

The advantage of reporting discoveries is that it would immediately provide involvement to the discoverer, be they divers, beachcombers or fishermen and many would appreciate interest being taken in their discovery. Involvement increases interest in the historic environment and promotes a greater desire to report. Such reporting increases all our knowledge of the historic environment.

From a practical viewpoint the aim of this obligation is to report new finds and it clearly would not be necessary for divers, fishermen or developers to report existing known sites. The JNAPC therefore proposes that in consultation with stakeholders such as the heritage agencies, developers, fishermen and the diving organisations, the local Historic Environment Records should urgently build up comprehensive records of known marine historic assets. There would then be no obligation to report items of marine historic asset on these records. This approach is also consistent with the Government's wish to improve the record of underwater sites (paragraphs 82-84) as discussed above in answer to question 14. These HERs records of marine historic asset would also satisfy the

Government's obligation under Article 2(i) of the Valletta Convention to maintain of an inventory of 'archaeological heritage'.

Unless there is an obligation in future to report finds, marine cultural heritage would be worse off than cultural heritage on land where there is already a statutory duty to report 'treasure'. Similarly in Northern Ireland there is already a requirement to report all archaeological objects including marine historic asset. If the future legislation is to cover the whole of the UK, as proposed, it should follow the example of Northern Ireland since they are unlikely to agree to be part of any new legislation if their own existing protection is reduced by there being no requirement to report.

The JNAPC foresees that there may be some comment from certain established interest groups on the practicality of reporting finds. We believe, however, that the developing responsibility and culture among sea users and divers has progressed to the point where the majority will accept this as sensible and reasonable. However, given the need to build up local Historic Environment Records it might be reasonable to introduce the obligation to report over a period of 3 to 5 years.

It is worth commenting on the parallel provided by the DCMS/HLF Portable Antiquities Scheme for the reporting of terrestrial finds and Treasure, and the situation in Scotland and Northern Ireland where all archaeological objects must be reported. It is clear from the published figures for reporting of portable antiquities and Treasure in England and Wales that the number of finds reported under the PAS scheme correlates closely with the amount of Treasure reported, and that this is strongest where a finds liaison process has been especially long-established (as in Norfolk and Suffolk). Experience with the Treasure Act and Portable Antiquities Scheme in England and Wales suggests that the *opportunity* to report locally and receive feedback, coupled with a reasonable opportunity to retain finds, are important factors in encouraging reporting.

This issue is also closely related to the Dealing in Tainted Objects Act. This now makes it more in the interest of finders to be able to demonstrate by way of a certificate or receipt that any object has been duly reported and therefore has not been acquired in breach of heritage legislation.

**Obligation to report the disturbance and recovery of all marine assets**

In paragraph 96 the Consultation Document states, *"In particular, it is important that disturbance and recovery be reported, as both can have catastrophic consequences."* The JNAPC endorses this view and believes it is very important that there should be an obligation to report both disturbance and recovery.

Reporting of recovery of 'wreck' is currently required under the Merchant Shipping Act 1995 and the extension of this obligation to all marine historic assets is important and logical.

In the JNAPC's report "The Valletta Convention & Heritage Law at Sea" (March 2003) it was proposed that a general obligation to report disturbance be introduced since considerable damage can occur to wreck site before it is brought to the attention of the Receiver of Wreck and archaeologists. This report was widely consulted on and the diving associations BSAC, PADI and SAA endorsed this particular recommendation.

In summary, the JNAPC therefore recommends that there should be an obligation to report:

- All discoveries of marine historic assets irrespective of whether disturbance or recovery occurs.
- Any disturbance to marine historic assets irrespective of whether recovery occurs.
- All recoveries of marine historic assets from below the High Water Mark.

**Who would be the appropriate agency for people to report to?**

If the historic assets were on land it would be logical to report them to one of the heritage agencies. Also the aim for the future is to make the reporting regimes on land and underwater as seamless as possible. It could be said therefore that the heritage agencies would be the most appropriate agency for people to report to.

However for marine historic assets there are two major differences, the need to separate modern wreck recoveries from historic wreck, and the need to establish ownership as this is not as clear-cut as for land finds. Both these tasks are currently undertaken by the Receiver of Wreck, an office of the Maritime & Coastguard Agency ("MCA") of the Department for Transport ("DfT"). Furthermore the relevant legislation and the remit of the Receiver of Wreck is UK wide whereas there are four separate heritage agencies.

There is also a question of infrastructure. The MCA is now the first port of call for reporting maritime incidents. These range from distress at sea and navigational safety to environmental pollution. The MCA then acts as the co-ordinating body, routing the report to the appropriate agency or organisation. The MCA has also invested considerable resources in public education campaigns promoting awareness amongst sea and foreshore users of the cultural value of historic wreck, the requirement to report its possession and 'best practice' towards it by the initial finder. In doing this it has worked closely with the diving organisations, the MoD, NAS, JNAPC and latterly English Heritage. The ROW also has use of the MCA's existing infrastructure, including its coastal vessels, for increasing awareness and enforcement on the spot. To the public, especially seabed developers, diving and trawling communities, the MCA, in the office of Receiver of Wreck, is the 'first stop shop' in reporting the discovery of cultural material and has built trust with these communities. Additionally, the MCA has established strong links with the archaeological community, museums, the diving and trawling communities. On balance the RoW has the infrastructure in place that the heritage agencies do not currently possess. However, more resources will be required to develop the reporting system, which should be integrated with NMR's and the Portable Antiquities Scheme.

The JNAPC therefore recommends that in present circumstances the Receiver of Wreck should be the portal for reporting marine historic assets and that it should then channel information to the appropriate heritage agencies as required, subject to the following:

- The Receiver of Wreck is governed by DfT policy and there is currently no statutory duty for it to deal specifically with historic assets. There would need to be a formal link, or management agreement, so that the RoW could provide this service to the heritage agencies on an outsourced basis. Satisfactory quality assurance regarding data could be built into this arrangement.

- The ROW might consider a change of name to reflect its wider remit for all marine historic assets such as 'Receiver of Wreck and Marine Heritage'.

- There should be an integrated Portable Antiquities Scheme when the scheme's long term funding has been secured. It would be beneficial for finders to be able to report finds locally to a Finds Liaison Officer, who could then notify the RoW, and this would provide seamless reporting of historic assets.

- All marine finds should be assessed by a professional archaeological conservator as part of the reporting procedure.

**Are there any other mechanisms which would improve reporting?**
The continued application of the salvage regime to marine historic assets is inappropriate and the incentive of the salvage award should be removed other than for exceptional cases. However, the concept of some payment does provide an 'incentive to honesty'. This incentive could be supplied, notwithstanding the removal of marine historic assets from the salvage regime, by providing a system of discretionary awards for reporting significant discoveries. Such awards would preferably not be based upon the market value of the find but could be based upon the cultural and archaeological significance of the find. Furthermore, such awards need not always be financial. They could consist of, say, 'good citizenship awards', which acknowledge the responsible conduct of finders in reporting their discovery of cultural material in accordance with the proposed Code of Practice. This system has been adopted by other common law jurisdictions e.g. Australia, and has been very successful.

**Appendix 2**

JNAPC responses to Protecting our Marine Historic Environment: Making the System Work Better (March 2004*)*

**Question 21**

**The tension between salvage and historic shipwrecks**

The JNAPC agrees that the Government should now address the tension that exists between salvage and historic shipwrecks. It is inappropriate that what is effectively 19th century salvage law should control the destiny of underwater cultural heritage in the 21st century (The Merchant Shipping Act 1995 derives much of its relevant clauses from the Merchant Shipping Act 1894).

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 law[1]. However, this modernisation related principally to commercial salvage. 'Voluntary' salvage, where the salvor does not act under a contractual obligation, the normal case in marine archaeology, retained most of its essential 19th century characteristics. Furthermore, the concepts of a derelict and of salvor in possession, created by 18th and 19th century case law, remained unaffected by this statutory reform. Consequently it is these concepts and the traditional elements of salvage that shape much of the legal structure surrounding historic wreck.

Continued reliance upon the salvage regime to govern the investigation and recovery of historic wreck has manifest disadvantages.

- It encourages recoveries, not discoveries.
- This difficulty is compounded by the fact that, prior to designation under the Protection of Wreck Act 1973, public access cannot be controlled, except by civil action initiated by a salvor in possession.
- Any recovery can be made regardless of good archaeological practice.
- Any recovery can be made regardless of the absence of conservation funds, thereby placing the recovered artefacts in jeopardy as the cost of conservation almost invariably exceeds the market value of artefacts.
- It leaves the initiative for recoveries with the salvor but also allows that person to acquire substantive legal (possessory) rights in the site as salvor in possession.
- The continued use of the salvage regime may equate wreck diving with recoveries, especially amongst the public.

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

Few would deny that reform is long overdue. The tension between salvage and historic shipwrecks should be addressed by the removal of marine historic assets from the ambit of the salvage regime.

**The public interest and the concept of 'salvor in possession'**

The tension between salvage and historic shipwrecks has already been reduced over recent years by education and involvement. Public interest in marine archaeology has grown rapidly and the use of the concept of salvor in possession has much diminished. This trend is continuing through education by the JNAPC, the diving organisations (BSAC, PADI, SAA), the MCA, the NAS, English Heritage, Historic Scotland, Cadw and DOENI. Involvement has also been fostered by the Hampshire & Wight Trust for Maritime Archaeology, NAS Training and NAS Scotland. The Receiver of Wreck has done much to reduce tension by creating trust with divers.

The JNAPC believes that the public interest is already in favour of protecting the marine cultural heritage rather than seeing it exploited by salvage and salvor in possession.

**Exercise of the UK's right not to apply the 1989 Salvage Convention to maritime cultural property and removing incentive of the salvage award**

The UK is entitled to remove marine cultural heritage from the ambit of the salvage regime under the reservation it entered under Article 30 of the International Convention on Salvage. The JNAPC recommends that the UK exercise its right not to apply the 1989 Salvage Convention to marine cultural property.

This inappropriateness of the salvage regime to protect archaeological interests is compounded by the retention 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 recovery[2]. 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 physical possession nor under the control of the owner or crew[3]. The concept originated as long ago as the 13th Century. 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. In short a salvor in possession has a legal right to entire and exclusive possession and control of a derelict. During the 20th Century, the courts simply extended both the concept of a derelict and of salvor in possession to embrace the remains of sunken vessels, which are worked upon by divers. Thus a diver may acquire a possessory right which is enforceable against the world, including the Crown, and which may be said to be analogous to a proprietary right in the site. This has had profound implications for marine archaeology, with the Crown being constrained in what it can achieve by designating wrecks under the Protection of Wrecks Act 1973 and even having to pay compensation in one case to the diver for such designation.

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[2] The Aquila 1 C. ROB. 38 (1798) per Sir W Scott at 40.

[3] 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.

In summary, the Government needs to address the tension between salvage and historic shipwrecks with the following reforms:

- As discussed in questions 1 and 3 above, there would be a definition of marine historic assets that encompassed all forms of underwater cultural heritage, not just wreck. This would be as inclusive as possible and would include 'any deposit that has been formed by human activity, or that reflects the effects of human activity on the environment'. It would be appropriate to use the lapse of 50 years as the default definition for marine historic assets but this could be extended to any marine cultural material less than 50 years old which was of historical, archaeological or artistic importance or potential. The definition would automatically include 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.

- The United Kingdom, under its reservation entered under Article 30 International Convention on Salvage 1989, would remove historic wreck from the ambit of the salvage regime.

- The right of any person to enter into possession of historic wreck as a salvor would be removed. Consequently, it would not be possible to become a salvor in possession of any wreck other than 'modern' wreck i.e. non-historic wreck.

- An express provision would be made which states that the law of finds does not apply to the recoveries of marine historic assets. This would prevent title vesting in a finder where any recovered marine historic asset remains unclaimed by an owner or successor in title.

- Where any recovered marine historic asset does remain unclaimed by an owner or successor in title, express provision should be made for title to vest in the Crown, but with the provision – as with Treasure – to disclaim it and return it to the finder if no owner or successor in title comes forward.

- A mechanism would need to be provided to allow a time period within which an owner might claim his or her property subsequent to recovery.

In addition the following provisions should be adopted in a new regulatory regime:

- The discovery, disturbance or recovery of any object of marine historic asset, not just wreck, would be reportable, thereby securing compliance of the UK with the Valletta Convention.

- The reporting of discovery, disturbance and recovery of all forms of marine historic assets would be mandatory though such activity would be lawful if the asset is not designated.

- The disturbance or recovery of any form of protected or listed marine historic asset (i.e. whether wreck or non-wreck) would be prohibited except when licensed under an approved research design and subject to suitable conditions.

- Future legislation should be consistent with the UNESCO Convention on the Protection of the Underwater Cultural Heritage.

Such a regime would mirror more closely that envisaged in English Heritage's initial policy document 'Taking to the Water'. Against this must be balanced the fact until such times as a marine historic asset, including historic wreck, is protected by listing, it would be liable to uncontrolled disturbance and recovery, although not salvage.

**Appendix 3**

# JOINT NAUTICAL ARCHAEOLOGY POLICY COMMITTEE

## THE JNAPC - PAST, PRESENT AND FUTURE

The JNAPC was formed in 1988 from individuals and representatives of institutions who wished to raise awareness of Britain's underwater cultural heritage and to persuade government that underwater sites of historic importance should receive no less protection than those on land.

The JNAPC launched *Heritage at Sea* in May 1989, which put forward proposals for the better protection of archaeological sites underwater. Recommendations covered improved legislation and better reporting of finds, a proposed inventory of underwater sites, the waiving of fees by the Receiver of Wreck, the encouragement of seabed operators to undertake pre-disturbance surveys, greater responsibility by the Ministry of Defence and the Foreign and Commonwealth Office for their historic wrecks, proper management by government agencies of underwater sites, and the education and the training of sports divers to respect and conserve the underwater historic environment.

Government responded to *Heritage at Sea* in its White Paper *This Common Inheritance* in December 1990 in which it was announced that the Receiver's fees would be waived, the Royal Commission on the Historical Monuments of England would be funded to prepare a Maritime Record of sites, and funding would be made available for the Nautical Archaeology Society to employ a full time training officer to develop its training programmes. Most importantly the responsibility for the administration of the 1973 Protection of Wrecks Act was also transferred from the Department of Transport, where it sat rather uncomfortably, to the then heritage ministry, the Department of the Environment. Subsequently responsibility passed to the Department of National Heritage, which has since become the Department for Culture Media and Sport.

The aim of the JNAPC has been to raise the profile of nautical archaeology in both government and diving circles and to present a consensus upon which government and other organisations can act. *Heritage at Sea* was followed up by *Still at Sea* in May 1993 which drew attention to outstanding issues, the *Code of Practice for Seabed Developers* was launched in January 1995, and an archaeological leaflet for divers, *Underwater Finds - What to Do*, was published in January 1998 in collaboration with the Sports Diving Associations BSAC, PADI and SAA. The more detailed explanatory brochure, *Underwater Finds - Guidance for Divers,* followed in May 2000 and *Wreck Diving – Don't Get Scuttled,* an educational brochure for divers, was published in October 2000.

The JNAPC continues its campaign for the education of all sea users about the importance of our nautical heritage. The JNAPC will be seeking better funding for nautical archaeology and improved legislation, a subject on which it has published initial proposals for change in *Heritage Law at Sea* in June 2000 and *An Interim Report on The Valletta Convention & Heritage Law at Sea* in 2003. The latter made detailed

recommendations for legal and administrative changes to improve protection of the UK's underwater cultural heritage.

The JNAPC has played a major role in English Heritage's review of marine archaeological legislation and in DCMS's consultation exercise *Protecting our Marine Historic Environment: Making the System Work Better*, and was represented on the DCMS Salvage Working Group reviewing potential requirements for new legislation. The JNAPC has also been working towards the ratification of the UNESCO Convention with the preparation of the *Burlington House Declaration*, which was presented to Government in 2006.

**Appendix 4**

## Joint Nautical Archaeology Policy Committee

**Members**

| | |
|---|---|
| **Chairman** | Robert Yorke |

### Organisations

| | |
|---|---|
| Association of Local Government Archaeological Officers | Paul Gilman |
| British Sub Aqua Club | Jane Maddocks |
| Council for British Archaeology | Gill Chitty |
| Hampshire & Wight Trust for Maritime Archaeology | Garry Momber |
| Institute of Conservation | |
| Institute of Field Archaeologists, Maritime Affairs Group | Julie Satchell |
| ICOMOS | Chris Dobbs |
| National Maritime Museum | Gillian Hutchinson |
| National Museums & Galleries of Wales | Mark Redknap |
| National Trust | David Thackray |
| Nautical Archaeology Society | George Lambrick |
| Professional Association of Diving Instructors | Suzanne Pleydell |
| Shipwreck Heritage Centre | Peter Marsden |
| Society for Nautical Research | Ray Sutcliffe |
| Sub Aqua Association | Stuart Bryan |
| United Kingdom Maritime Collections Strategy | Chris Dobbs |
| Wessex Archaeology | Anthony Firth |
| Wildlife and Countryside Link | Annie Smith |

| Individual representation | Affiliation |
|---|---|
| Sarah Dromgoole | University of Nottingham |
| Steve Waring | |
| Michael Williams | Wolverhampton University |

### Observers

| | |
|---|---|
| Advisory Committee on Historic Wreck Sites | Tom Hassall |
| Cadw | Sian Rees |
| Department for Culture, Media and Sport | Annabel Houghton |
| The Crown Estate | Carolyn Heeps |
| English Heritage | Ian Oxley |
| Environment Service, Northern Ireland | Ken Neill |
| Foreign and Commonwealth Office | Andrew Tate |
| Historic Scotland | Philip Robertson |
| Maritime and Coastguard Agency, Receiver of Wreck | Sophia Exelby |
| Ministry of Defence | Peter MacDonald |
| Ministry of Defence | Bob Stewart |
| Royal Commission on the Ancient and Historical Monuments of Scotland | Robert Mowat |