An Taisce
The National Trust for Ireland

SUBMISSION BY AN TAISCE ON THE MONUMENTS AND ARCHAEOLOGICAL HERITAGE BILL 2021/2

Introduction and Background

The National Monuments Act was passed in 1930. Over the ensuing years, there have been periodical amendments made to the Act. Special reference should be made to the sterling work conducted under the auspices of Ministers Michael D. Higgins and Síle de Valera in 1987 and 1994, respectively.

All amendments to the Act were passed with one motivation, and that was to perfect, strengthen, and streamline the protection of our National Built Heritage. Indeed, so successful had these amendments been, that the Heritage protection legislation of this State reached the point of being the envy of colleagues from most other European jurisdictions. And then in 2004 another amendment appeared that, from a Heritage and Cultural perspective, undid all the good work of previous generations and cast us in legislative terms, if you'll forgive the expression, back into the Stone Age.

In 2001 the Heritage Council had published 'Archaeological Features at Risk: A Survey measuring the Recent Destruction of Ireland's Archaeological Heritage'. The survey established that 34% of the State's archaeological monuments had been destroyed since 1840, and that the destruction was continuing at an alarming rate. Land 'improvement' work bearing a large responsibility for the ongoing destruction.

Yet, despite this warning, the 2004 Amendment determined that:

(14A. -1) 'The consent of the Minister … shall not be required where the works involved are connected with an approved road development'

But! What if a totally unsuspected monument of clear archaeological and heritage importance was discovered during the course of said development? The answer provided by the Amendment was:

(14A. – 4d.) 'The Minister may, at his discretion, issue directions to the road authority concerned for the doing to such monument …'

(i) 'Preserve it' – [Comment: As would be expected in the case of an exceptional discovery].

(ii) 'Renovate or restore it' – [Comment: Same response].

(v) 'Demolish or remove it wholly or in part or to disfigure, deface, alter, or in any manner injure or interfere with it,

And the Road Authority shall comply with such directions'.

One might suggest, that it was remarkable and horrifying that these words should have ever appeared in a "Monument and Heritage Protection" Act.

It is, therefore, of great relief to find that the latter clause will be consigned by the proposed Bill to the dustbin where it belongs. We are left, however, with an enduring negative impact and legacy by the ethos created by the 2004 Amendment.

This State has never failed to promote and trade on the great history and heritage of the island. Fáilte Ireland relentlessly sells it abroad. 'Ireland's Ancient East' being one example. Tourists are encouraged to visit our ancient monuments and historic sites. And yet, as tourism has constantly grown our menu of sites to visit remains painfully static. A few simple questions: How many archaeological licences to excavate have been issued by the State in the past 20 years? Answer: Over 20,000. How many new archaeological monuments were discovered as a result? No official figures are compiled but on cursory study, approximately 75% of licenced excavations have produced archaeological remains of some description. So, approximately 15,000 new archaeological sites of varying significance have been discovered over the past two decades. But! Where are they? The truth is that most have been physically removed. Are we to believe, therefore, that practically all of them were not worth keeping? That none of the thousands of newly discovered monuments deserved nothing more than a dusty report on a shelf? That evaluation would mean that a serious financial investment in archaeological field investigation, and we're talking multi-millions here, has had the most miserable return in terms of visitor-destination-creation value for money. Clearly, we need more and more new sites of historical and/or archaeological interest to cater to an ever-growing number of visitors to our shores. Yet, while the archaeologists have been busy finding these new monuments of interest, the State has been busy facilitating their systematic removal, resting on the full support of blatantly discriminatory legislation. But what now? If, as hoped the legislation is rectified, as the current proposed Bill is designed to achieve, there would still be residual problems.

One simple question: How can it be appropriate for a minister who has granted an excavation licence on strict archaeological conditions, be the authority who can subsequently issue the destruction order for the same monument, in direct contravention of the terms of the original licence?

Surely, it should be unacceptable that the fate of a monument that is thousands of years old is subject to the decision of one minister *de-la-jour*? The current Act states that, in considering the fate of a monument, 'the minister is not restricted to archaeological considerations alone but is entitled to consider the public interest'. But

who exactly is to determine what 'the public interest' is? It is apparent from cases that have arisen to date, that the decision making, as recently practised, is firmly rooted in terms of financial considerations alone. Who can determine that the cultural and heritage aspects of an exceptional monument or historical landscape do not transcend base financial criteria?

The relevant minister will invariably be guided by political designs. The minister's officials and employees will inevitably have to service the agenda of the incumbent. They would be brave to do otherwise! Their independence is therefore stymied. It should be acknowledged, however, that there have been some very brave individuals over the years. 'Archaeology' is a broad church. There are multiple subdivisions within the discipline, as a result of the lengthy list of monument and artefact types. It would be generally accepted that the majority of the recognised leading authorities on the various elements of 'Archaeology' are to be found outside the Public Service. A look through the relevant published textbooks will make that plain. It is a nonsense not to avail of the expertise of these exert individuals when it comes to the evaluation and fate of an exceptional monument or landscape.

How can it be acceptable that there is no 'Cultural/Heritage Court of Appeal' or Cultural Ombudsman to adjudicate on the fate of disputed sites and monuments of note?

The National Monuments Advisory Council

The original 1930 Monuments Act clearly advanced the concept of having authoritative expert advice readily available to the Minister responsible for Heritage.

The **National Monuments Act** as passed in 1930 read –

[1930] 21. (1) <u>The National Monuments Advisory Council.</u>

'The Minister shall establish by order an advisory council to be called and known as the National Monuments Advisory Council (in this Act referred to as the Advisory Council) for giving advice and assistance to the Commissioners [of Public Works] on any matter arising on or relating to the carrying into execution of the provisions of this Act or any other matter affecting national monuments and the protection and preservation thereof.

21 (2) The Advisory Council shall consist of the Keeper of Antiquities in the National Museum and an officer of the Commissioners nominated for the purpose from time to time by the Minister as ex-officio members and of such number of other persons (including representatives of the following bodies, namely, the Royal Irish Academy, the Royal Society of Antiquaries of Ireland, and the Royal Institute of the Architects of Ireland) as nominated members as the Minister shall nominate to be members thereof.

21 (3) Every nominated member of the Advisory Council shall, unless he previously dies or resigns, retain his membership for three years only from the date of his nomination but shall be eligible for re-nomination.

[1954] 15. [of No. 37 of 1954] Constitution of the Advisory Council.

15 (1) The Advisory Council shall, on and after such date as the Minister may by order appoint, consist of –

(a) an officer of the Department of Education, nominated for the purpose by, the Minister for Education, and an officer of the Commissioners, nominated for the purpose by the Minister, and
(b) such number of other persons (including representatives of the following bodies, namely, the Royal Irish Academy, the Royal Society of Antiquaries of Ireland and the Royal Institute of the Architects of Ireland) as the Minister nominates to be members thereof.

15 (2) The Advisory Council shall be reconstituted after the expiration of every five years'.

In these modern times the composition of a re-activated Advisory Council should have a broader representation, but be drawn exclusively from a pool of suitably qualified independent candidates, with no conflicts of interest.

Would such an Advisory Council be of assistance to the Minister in these times? Well, the answer to that proposition would most certainly be in the affirmative in the neighbouring jurisdiction:

The **Historic Monuments Council (Northern Ireland).**

First established in 1971 under the provisions of the Historic Monuments (Northern Ireland) Act (1971). Its current authority is derived from the Historic Monuments and Archaeological Objects (N.I.) Order 1995. Historically its origins are to be found in the Ancient Monuments Advisory Council 1926-1970. It is a **statutory advisory council** which provides advice to the Department of Communities (Historic Environmental Division) – on, for example, **the conservation and preservation of monuments** in state care, **scheduling of monuments**, on **adding to or removing any monument in or from the schedule**, and **the identification of Areas of Significant Archaeological Interest in the context of development plans.**

That Historic Monuments Council is functioning perfectly well and efficiently in Northern Ireland to this day.

Having the input of an appropriately qualified Advisory Council would facilitate openness and transparency. It would create checks and balances, and ultimately confidence and trust in the system.

Opposition to the re-activation of a Monuments Advisory Council in the Republic of Ireland would bear a striking resemblance to the strident opposition generated against the formation of the Environmental Protection Agency. The subsequent work of that agency being now regarded as an essential aspect to Ireland's protection of the Environment.

THE LEGAL ASPECTS

The 2004 Amendment to the National Monuments Act, in the words of the Supreme Court, 'removed a bundle of protections' from the Act. This was made crystal clear in the decision by the Court of Appeal in relation to the 1916 Moore Street site. It was ruled that, despite the monument having been declared a National Monument, its full extent or historical landscape could only be defined by the relevant Minister. The Court concluded that, as the law stands, it was a matter of 'a purely political assessment'.

In the example of the Manse House remains discovered in recent years in Kilkenny City, the final legal impediment was that, even if the authorities accepted that the Manse House was an integral element of the Cathedral complex, a site of National importance, the Minister, under the terms of the current Act, would still have been at full liberty to order the destruction of the said Manse House. This political imperative cannot be allowed to endure unfettered.
A major loophole is that until all landowners have been legally notified of the presence of a registered archaeological site on their land, it is not possible to have effective protection of the site/monument in question. The argument that publication in national and local papers (as happened between 1995 and 1998) fulfils the legal obligation of the notification of a landowner is questionable and thus open to challenge. In other legal situations, such as the issuing of Compulsory Purchase Orders, Easements, or (in Ireland) Bird Directive Designations, the standard practice, i.e., the established precedent, requires individual notification of the landowner.

- A mere *circa* 1,000 monuments at approximately 750 sites are in the ownership or guardianship of the State (in the care of the OPW). The remaining approximately 129,000 monuments are in private ownership. Vast numbers of which are not accessible to the public. Climate change will inevitably have an adverse effect on many of these monuments, especially those that are of purely earthen

construction or located on exposed coastlines. There is also the prime concern that many of our castles and monasteries were constructed with basic mortar as a binding agent. Increased and persistent rainfall due to Climate Change will have a marked negative effect on the durability of these monuments. There cannot be any great expectation that the majority of the private owners of these monuments will take remedial action to preserve and protect them. Certainly, in cases that could involve incurring significant costs. The OPW would certainly not be in a position to take these tens of thousands of vulnerable monuments into their care. The survival of these castles, abbeys, ringforts, etc., will, therefore, require State intervention, possibly in the form of grants to those landowners with monuments at risk on their properties. How will all this work? Given the scientific reality of Climate Change, should the proposed Act not incorporate the necessary legal procedures under which these increasingly degrading monuments will be properly safeguarded and cared for?

- Since 2007, a total of 9 prosecutions have been taken by the Director of Public Prosecutions on the recommendation of *An Garda Siochána* for alleged offences under the National Monuments Acts 1930-2014. Convictions were secured in all cases, four of which related to damage to, or destruction of ring forts [Dáil P.Q. No. 310 – 7th December 2017]. Under the National Monuments (Amendment) Act 2004, a conviction carried a maximum sentence of five years in prison or a fine of up to €100,000. The two most severe punishments, to date, have been €25,000 and €20,000 fines, respectively, for the destruction of two ringforts in counties Kerry and Cork.
- Given the rate of destruction, as determined by the Heritage Council (see above), 9 prosecutions can hardly be classified as a dazzling record of National Monuments Act enforcement.
- It is difficult to understand why the Department of Heritage fails to follow-through on the destruction of a monument in the course of, for example, land 'improvement' work. Most archaeological sites would still, despite being bulldozed, retain considerable subterranean remains and legally protected archaeological material. The immediate placing of a Preservation Order on the site by the Minister would be justifiable on archaeological grounds. It would also be fully warranted given that the perpetrator of the surface damage to the monument would as a result thereby not gain an inch of ground from their premeditated act of aggrandizing vandalism. This policy, in turn, when publicised, could only discourage potential cultural vandalism and destruction at other archaeological and historic sites going into the future.
- Throughout the late 19th century and, in fact, up until the 1950s/1960s, the bog-lands of Ireland were a constant source for the discovery of archaeological objects (see NMI acquisitions). The objects in question were of wood, leather, textiles, amber, as well as metals -especially of bronze and gold. The latter being found in hoards or as single artefacts. We wouldn't have any survival of Bronze Age

and Medieval textiles without the amazing conservation properties of the bogs, especially of materials that would disappear or only survive in poor condition on dry land sites. The introduction of heavy peat-cutting machinery on the bogs reduced the flow of new discoveries to a trickle. It is standard procedure to enforce archaeological monitoring of topsoil stripping and removal on, for example, the routes of gas pipelines, motorways, and large industrial sites. It is, therefore, remarkable that peat-cutting is exempt from this necessary legally controlled monitoring procedure. In recent time, the destruction of a Bronze Age oak-built road at Maine in County Westmeath was allowed to proceed with no ongoing archaeological monitoring. The peat, including the chewed-up timbers of the Bronze Age Road were destined for rose gardens in the UK.

The proposed Bill contains 'Defences' that could be employed by a person accused of damaging or destroying a monument.

[Part 10 – Head 73] [of proposed Bill]

'Provide for appropriate defences including:

(1.) Where a person is charged with an offence under the enacted Bill relating to a failure to make a preliminary report in accordance with Head 8 ('Prescribed Monuments'), it shall be a defence for the person to show that a reasonable person could not, in all the circumstances, have been aware that the prescribed monument concerned was such a monument.
(2.) [DITTO] … 'monument to which general protection applies (not being a registered monument or a wreck one hundred or more years old).
(3.) [Archaeological objects …. found … not reported].

*Explanatory note: Where appropriate defences to certain offences are created, e.g., in relation to the offence of failing to report a find of a prescribed monument a person charged will be able to argue a defence that a reasonable person would not have recognised the monument. A similar defence will be available to a person charged with illegal works to a prescribed monument'.

Observation: Surely this is a total get-out of jail card. How could a conviction ever be achieved?

SOLUTION: Legally notify all landowners with a recognised Monument on their property that there is one located on their land! Describe its type, exact location, explain its importance, outline the penalties for interfering with the monument. Result – landowners fully informed, monuments safe.

Advances in technology have enabled the Land Registry Office to develop an electronic system that works directly with Government Departments. The legal notification would be a significant operation, but it would be a one-off. Done and dusted. Subsequent updating would be a minor ongoing operation.

The proposed Bill [Part 10 – Head 77] would 'Provide for the establishment of civil enforcement procedures in relation to contravention of the Act … issue enforcement notices requiring the remedying of contraventions of the act, subject to the right of appeal to the courts'.

Observation: Whilst this would be an innovative and welcome introduction into the legislation, it should be noted that summons awaiting issue by the Districts Courts currently stands at 80,000. Not a comforting statistic.

Measures to assist in implementing 1972 Convention Concerning Protection of World Cultural and Natural Heritage

[Part 3: Head 30 of proposed Bill]

Observation: It is commendable that the proposed Bill will assist in implementing the 1972 Convention Concerning Protection of World Cultural and Natural Heritage. This Convention was ratified by Ireland in 1991.

Minister Malcolm Noonan's statement to this Committee, made on the 27th of January (2022), noted that Objective D was to provide for the ratification of *key* international conventions in the area of Heritage protection.

But this begs the question – is this not the correct time and opportunity to implement the 1992 'Valletta' Convention? It is a valuable Heritage protection instrument and has already been adopted by Ireland.

Convention for the Protection of the Archaeological Heritage of Europe (revised) **Valletta** (1992)

[Council of Europe Treaty Series No. 143]

[This was adopted on the 16th of January 1992. It came into force on the 25th of May 1995. It was formally adopted by Ireland in 1997].

Preamble (excerpt)

- 'Acknowledging that the European archaeological heritage, which provides evidence of ancient history, is seriously threatened with destruction because of the

increasing number of major planning schemes, natural risks, clandestine or unscientific excavations and insufficient public awareness…'

Article 1 –

(3.) 'The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, movable objects, monuments of other kinds **as well as their context**, whether situated on land or under water'.

Article 2 – 'Each Party undertakes to institute, by means appropriate to the State in question, a legal system for the protection of the archaeological heritage, making provision for-

(i) The maintenance of an inventory of its archaeological heritage and the designation of **protected monuments and areas.**
(ii) The creation of **archaeological reserves**, even where there are no visible remains on the ground or under water. For the preservation of material evidence by later generations'.
(iii) 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'.

Article 4 –

'Each Party undertakes to implement measures for the physical protection of the archaeological heritage, making provision, as circumstances demand:

(i) for the acquisition or protection by other appropriate means by the authorities of areas intended to constitute **archaeological reserves;**
(ii) for the conservation and maintenance of the archaeological heritage, **preferably *in situ.***

Article 5 –

'Each Party undertakes:

(i) To seek to reconcile and combine the respective requirements of archaeological and development plans by ensuring that archaeologists participate:
(a.) In planning policies designed to ensure well-balanced strategies for the protection, conservation and enhancement of sites of archaeological interest;
(b.) In the various stages of development schemes;
(ii) to ensure that archaeologists and town and regional planners **systematically** consult one another in order to permit:
(a.) the modification of development plans likely to have adverse effects on the archaeological heritage.

(b.) the allocation of sufficient time and resources for an appropriate scientific study to be made of the site and for its findings to be published;
(iii) To ensure that environmental impact assessments and the resulting decisions involve full consideration of archaeological sites and their setting.
(iv) to make provision, when elements of the archaeological heritage have been found **during** development work, for their **conversation *in situ*** when feasible'.

- Observations:

Article 5 (i) & (ii) The 'archaeologist' referred to here should work for the National Monuments Service or the National Museum of Ireland. The archaeologists in the private sector are at the disposal of the Developer who has retained and paid for their services. They are not realistically in a position to 'rule' in favour of archaeology should a dispute, or conflict of interest arise, as this would not advance their chances of future commercial contracts. Archaeologists in the employment of development agencies should also be excluded for similar reasons. Only a National Monuments Service or National Museum of Ireland employed archaeologist, answering to the Minister for Heritage, or the Minister for Culture, is in a position to put Heritage interests first.

Article 4 (ii) & Article 5 (iv) It is clear, and logical, that **preservation *in situ*** is the ideal outcome. Unfortunately, the somewhat disingenuous term and practice of **'preservation by record'** has been overwhelmingly adopted by the archaeological licencing authorities in the Republic of Ireland as an acceptable alternative practice. If the two practices were adopted and a balance achieved, the outcome would be justifiable from the perspectives of Heritage and Development, *but* this is absolutely not the reality to date. **Practically no monuments** have been preserved *in situ* over the past 20 years. With the *carte blanche* zero approach facilitated by the 2004 Amendment to the Act in play, clearly, no monument has been safe from physical destruction.

* It is also made clear that Archaeological or Historical Landscapes must be given full recognition and legislative protection (the 'protected monuments and areas' and 'archaeological reserves' referenced in Articles 2 and 4 in 'Valletta'). The Appeals Court ruling in relation to the Moore Street site has been previously mentioned.

To take a self-apparent example, there can be no dissenting opinions as to the integrated nature of the Brú na Bóinne archaeological complex and landscape. Its UNESCO World Heritage Site accreditation recognises it as such. It would clearly be a nonsense to study, interpret, and preserve, for example, the Passage Tomb of Knowth in isolation, with no consideration or reference to its peer group of Newgrange and Dowth. The spatial placing and inter-relationship of the main

monuments and the satellite tombs is clearly of key importance to a full understanding and preservation of the landscape of the site.

The Brú na Boinne archaeological landscape is not unique. Another example is the Royal complex at Rathcroghan in County Roscommon, which is spread over many acres.

Battlefields are another important example of a Historical/Archaeological landscape. Will they be afforded protection by the proposed Act?

As stated in 'Valletta', Archaeological Landscapes must be officially recognised and accordingly afforded full legal protection.

Monuments that can be thousands of years old, and are, by their geographical and cultural affinities intrinsic elements of the very fabric of this Nation, can reasonably be defined as national resources. Ownership of national resources is vested in the Irish people by the Constitution. These cultural treasures deserve our respect and protection, even if it is against our own agents. It is time to restore the credibility of the National Monuments Act. It is time to introduce 'checks and balances' into the system. Failure to do so would be unforgivable. The broad thrust of the proposed Monuments and Archaeological Heritage Act will clearly go a long way to achieve that objective. It might be reasonable to suggest that, with adjustments and additions, it could easily achieve more.

SUMMARY:

An Taisce is proposing that:

(1.) The 'Valletta Convention' should be incorporated and implemented in the proposed legislation.
(2.) That the enhanced legal protection, and potential penalties, could be seriously offset and largely avoided by the notification of the relevant parties at the earliest opportunity, i.e., in order to prevent destruction rather than to subsequently have to prosecute.
(3.) To re-activate the Monuments Advisory Council, in order to integrate checks and balances into the proposed legislation.

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