New approaches to enforcing protection of archaeological heritage in Ireland: the Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023

Seán Kirwan

*Senior Archaeologist, National Monuments Service, Ireland**

Introduction

This article aims to outline two key aspects of new legislation[1] in Ireland for the protection of archaeological and related heritage. Firstly, it discusses the move to give archaeological sites and (potentially) related immovable heritage a measure of automatic legal protection (that is, without need for site-specific designations arising from specific administrative decisions), so moving substantially away from the long-standing distinction in existing legislation between monuments on the one hand and movable heritage in the form of archaeological objects (as well as historic wrecks) on the other. Secondly, it will note the availability within the new legislative scheme, for the first time within the legislation dealing specifically with archaeological and related heritage, of a civil enforcement system running alongside the criminal law model of enforcement. The policy aims underlying these legislative developments are considered.

An important background to the issues under consideration here is the nature of the Irish landscape, preserving as it does over 130,000 known above-ground archaeological monuments of a range of classes, including prehistoric and medieval settlements, ritual and defensive sites and structures in a variety of forms, including earthworks and stone or masonry structures. That is only to look at sites dating broadly to before AD 1700,[2] and the likelihood of unknown archaeological sites existing, whether above or below ground, must also be considered.[3] In such a context, the need to establish a comprehensive and effective system for protecting this heritage would seem clear, especially if one considers the non-renewable nature of the archaeological resource; an archaeological site removed without proper recording is not only physically removed from the landscape, but the knowledge of the past which might have been obtained through scientific investigation is irretrievably lost. However, as will be argued below, despite legislation being put in place at an early date, this has until recently not truly provided such a system, though the impact of that has (it will also be noted) been extensively mitigated through reliance on what might be called indirect protection through a range of development control codes.

The existing law

To provide a context, it is first of all necessary to review in outline the existing legislation. The focus in doing so will be on the systems of monument protection under the National Monuments Acts 1930 to 2014,[4] which can be contrasted with those for archaeological objects and historic wrecks. The system of protection for architectural

* The views expressed in this article do not necessarily reflect those of the National Monuments Service (NMS). The author would like to thank NMS colleagues for their help in researching the article, in particular that of Pauline Gleeson in relation to the work of the NMS Protection Unit.

1 The Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023.

2 For current data on numbers of known archaeological sites and current practice as to recording criteria see information on the Archaeological Survey of Ireland as maintained by the National Monuments Service – www.archaeology.ie ; for a general review of the work of the Archaeological Survey of Ireland see Claire Breen and Jean Farrelly (eds) *Surveying our Heritage, The National Monuments Service: Marking 50 years of the Archaeological Survey of Ireland* (Dublin: Rathdown Press 2013).

3 Office of the Planning Regulator and Department of Housing, Local Government and Heritage *Archaeology in the Planning Process, Planning Leaflet 13* (Dublin: Office of the Planning Regulator, January 2021) at 3; C Manning and Department of Environment, Heritage and Local Government *Irish Field Monuments* (Dublin: Stationery Office, no date as published, 2004 online pdf) at 22.

4 The principal Act is the National Monuments Act 1930, with substantive amendment and extension under the National Monuments (Amendment) Act 1954, the National Monuments (Amendment) Act 1987, the National Monuments (Amendment) Act 1994, the National Cultural Institutions Act 1997 and the National Monuments (Amendment) Act 2004, and a minor amendment under the Local Government Reform Act 2014. References to the Commissioners of Public Works in the Acts must be read in the light of transfer of functions provisions set out in section 4 of the 2004 Act.

heritage operating under Part IV of the Planning and Development Act 2000 lies outside the scope of this article, though it may be noted that it is based on designation of particular structures and areas by way of administrative decision within the powers provided under that legislation (though of course the civil enforcement system generally available under the 2000 Act[5] applies in that context as much as to any other aspect of planning control). It is also important to note here that, contrary to what may often be a misconception, there is no formal restriction in legal terms of the National Monuments Acts to pre-AD 1700 sites and structures or of Part IV of the 2000 Act to structures of a later date.[6] As a matter of administrative practice, the focus in implementing the National Monuments Acts has, it is true, been on sites of the prehistoric and medieval periods, but multiple examples could be cited of later structures which have been protected under those Acts.[7]

The 19th-century systems of monument protection inherited by the state at its foundation in 1922 (the Irish Church Act 1869[8] and the Ancient Monuments Protection Acts 1882 to 1910)[9] established limited schemes, focused on the maintenance and protection of select groups of national monuments (in the case of the 1869 Act)[10] and ancient monuments (the 1882 Act) in public ownership or guardianship. On that basis, it may be said that the introduction under the National Monuments Act 1930 of the system of preservation orders which could be made in respect of national monuments in danger[11] (regardless of ownership of the land and without necessarily triggering a requirement for state maintenance of the monument unless a further decision to take into guardianship was made) was a significant step forward, albeit largely just a belated updating of the Irish legislation based on the UK Ancient Monuments Consolidation and Amendment Act 1913[12] which, though enacted when Ireland was part of the United Kingdom, had not applied to Ireland. However, it remained, and remains, a limited provision, for two reasons: firstly, as already noted, through the requirement that the monument in question be in danger – thus making the system entirely reactive; and secondly, it can only be used in relation to monuments meeting the definition of 'national monument'. While the definition of 'monument' is very broad, the core of the definition of 'national monument' is that the preservation of the monument in question should be a matter of national importance by reason of one or more of specified criteria of interest (archaeological, architectural, historical, artistic or traditional).[13] While the qualifying interest criteria are wide, 'national importance' arguably significantly narrows the overall applicability of the term, though the available case law has not provided much clarification as to how far.[14]

The reasons for such a narrow, reactive approach may relate to adherence to an available UK model and (based on the Oireachtas record)[15] concerns that a more extensive scheme would not meet with public support. In any event, the 1930 scheme for archaeological objects (that is, any chattels meeting criteria of interest set out in the 1930 Act, subject to some exclusions) was based on automatic protection, with a duty to report new finds (nothing

5 Planning and Development Act 2000, Part VIII.

6 See definitions of 'monument' and 'national monument', National Monuments Act 1930, section 2, as amended (in regard to 'monument') by National Monuments (Amendment) Act 1987, section 11. The definition of 'historic monument' for the purposes of the Register of Historic Monuments as established under the 1987 Act does contain reference to AD 1700, but only to the effect that any monument earlier than that date is deemed to come within the definition of historic monument, without excluding later monuments from potentially meeting the definition; see National Monuments (Amendment) Act 1987, section 1. Similarly, the references to 'prehistoric' in the definition of 'historic monument' under the 1987 Act and in the underlying definition of 'monument' (1930 Act, section 2) clearly leave scope for later structures to come within those definitions.

7 The 18th-century Casino Marino in Dublin and the 18th-century houses at nos 14 to 17 Moore Street in Dublin are both national monuments in Ministerial ownership under the 1930 Act, with the latter also being subject to a preservation order made under section 8 of the1930 Act (information from National Monuments Service).

8 Irish Church Act 1869 (32 & 33 Vict. c. 42).

9 Ancient Monuments Protection Act 1882 (45 & 46 Vict. c. 73); Ancient Monuments Protection (Ireland) Act 1892 (55 & 56 Vict. c. 46); Ancient Monuments Protection Act 1910 (1 Geo. V c. 3). For an overview of this legislation and the 1869 Act, see R Cochrane 'Notes on the "Ancient Monuments Protection (Ireland) Act, 1892", and the previous legislation connected therewith' (1892) *The Journal of the Royal Society of Antiquaries of Ireland*, fifth series, vol 2, no 4, at 411.

10 Irish Church Act 1869, section 25(1).

11 National Monuments Act 1930, section 8, as amended by National Monuments (Amendment) Act 1954, section 3.

12 Ancient Monuments Consolidation and Amendment Act 1913 (3 & 4 Geo. V c. 32), section 6.

13 National Monuments Act 1930, section 2.

14 Main cases where the definition has been considered are *Tormey v Commissioners for Public Works* [1993] ILRM 703 (decision from 1969 reported formally in 1993); *O'Callaghan v Commissioners of Public Works in Ireland* [1985] ILRM 364; *The Attorney General (at the relation of Frank McGarry and Others) v Sligo County Council* [1991] 1 IR 99; *Dunne v Dun Laoghaire-Rathdown County Council* [2003] 1 IR 567; *Moore v Minister for Arts, Heritage and the Gaeltacht* [2018] IECA 28; [2018] 3 IR 265.

15 Dáil Éireann, Debate on Second Stage of the National Monuments Bill 1929, Thursday 24 October 1929, Vol. 32, no 2, statement by Parliamentary Secretary to the Minister for Finance; https://www.oireachtas.ie/en/debates/debate/dail/1929-10-24/16.

equivalent was provided in relation to monuments) and a blanket prohibition on alteration of such objects without licence.[16] It is worth noting that the distinction should not be seen anachronistically as based on such objects being state-owned when lacking a known owner at time of discovery, as this principle only became established following *Webb v Ireland*[17] and the statute law enacted in its wake.[18]

When the Oireachtas came to legislate for the protection of historic wrecks in 1987, the model adopted was similar to that for archaeological objects; automatic protection for all wrecks 100 or more years old with an obligation to report discoveries (though an option for specific designation was also provided).[19] In contrast, the structural issues identified above in regard to the statutory scheme for monument protection were never addressed within the framework of the National Monuments Acts. Mechanisms for monument protection introduced under amending Acts of 1954, 1987 and 1994, while applicable to a wider range of monuments than only one meeting the test to be a national monument, remained reliant on site-specific designation and, moreover, only provide limited temporary protection with no regulatory control over proposed work once the limited specified time periods have run[20] (other than where a preservation order is made, which of course necessitates meeting the tests for making such an order). No provision was introduced for any automatic protection of new discoveries.

A limited exception to this could be argued to have arisen from case law relating to local authority development in the late 1970s[21] and again in the early 2000s[22] which highlighted that the requirement for consent for works to a national monument in local authority ownership is not stated in the legislation to be limited to cases where the local authority intentionally acquired the national monument.[23] The legal impact of this was limited by the 2004 amending Act in relation to major road schemes approved under relevant roads legislation: such works were made broadly exempt from licensing and consent requirements under the National Monuments Acts, though subject to the requirement that the archaeological work carried out as part of the scheme, which would be specified following the EIA process, be carried out in accordance with direction from the Minister under the National Monuments Acts.[24] Nevertheless, the increased awareness of the scope of the legislation did support increased levels of regulation under the National Monuments Acts of local authority works to monuments in their ownership which could reasonably be considered to meet the definition of 'national monument'.[25] On the other hand, recent case law[26] has removed the possibility (considered to have existed based on a decision from the 1970s)[27] that the High Court could declare a monument to be a national monument, thus limiting the power to enforce through civil proceedings this aspect of the regulatory scheme. The amending legislation of 2004 had, it should be noted, introduced a scheme requiring reporting of new discoveries of national monuments made in the course of major road schemes.[28] However, while this should be noted as the first attempt to introduce requirements to report newly found monuments, the underlying uncertainty as to what is a national monument remained unresolved; and, as noted, recent case law removed the only civil law mechanism for conclusive findings that a monument is a national monument, leaving aside administrative decisions under the National Monuments Acts in which a view is formed as to national monument status.

In addition to the specific provisions of the Planning and Development Act 2000 dealing with architectural heritage (as noted above, not covered in this article) the 2000 Act requires local authority development plans (which set

16 National Monuments Act 1930, sections 2 (definition of archaeological object), 23 (duty to report finds) and 25 (prohibition of alteration without licence), later amended by National Monuments (Amendment) Act 1987, section 23 and National Monuments (Amendment) Act 1994, sections 14, 19 and 20 without altering the key structures of the legislative scheme as outlined.

17 *Webb v Ireland* [1988] IR 353.

18 National Monuments (Amendment) Act 1994, section 2.

19 National Monuments (Amendment) Act 1987, section 3.

20 National Monuments (Amendment) Act 1954, section 8 (repealed by section 26 National Monuments (Amendment) Act 1987); National Monuments (Amendment) Act 1987, section 5; National Monuments (Amendment) Act 1994, section 12.

21 *Martin v Dublin Corporation* (High Court, Hamilton J, 30 June 1978), for which no written report appears to survive – see *Moore v Minister for Arts, Heritage and the Gaeltacht* [2018] IECA 28; [2018] 3 IR 265, at 275.

22 *Dunne v Dun Laoghaire-Rathdown County Council*, Note 14 above.

23 National Monuments Act 1930, section 14, subsequently amended by section 5 of the National Monuments (Amendment) Act 2004.

24 ibid, section 14A as inserted by section 5 of the National Monuments (Amendment) Act 2004.

25 Information from National Monuments Service.

26 *Moore v Minister for Arts, Heritage and the Gaeltacht*, Note 21 above.

27 Note 21 above.

28 National Monuments Act 1930, section 14A (in particular subsections (3) and (4), as inserted by section 5 of the National Monuments (Amendment) Act 2004.

the framework for permissible development within their functional areas) to set objectives for the protection of the archaeological heritage, and also make provision for the possibility of attachment of archaeological conditions to grants of planning permission.[29] As will be seen, the 2000 Act is also relevant to issues relating to protection of sites designated under the National Monuments Acts through reference to those Acts being included in provisions of secondary legislation made under the 2000 Act. But much more fundamentally, it can be said that, over the last 30 years and arising from the setting of broad archaeological objectives in local authority development plans and the follow on from that in terms of particular planning decisions, the 2000 Act and its predecessor legislation[30] (supported by other development control legislation[31] and the implementation in Ireland of the EIA Directive)[32] was an engine powering an upsurge in archaeological work, including pre-development archaeological assessment to identify impacts on known and previously unidentified archaeological sites and the mitigation of unavoidable impacts through archaeological excavation.[33]

In addition to the systems of site-based protection outlined above, the National Monuments Act 1930 also established a licensing system for archaeological excavation (in summary, for any digging or excavating for archaeological purposes).[34]

The enforcement regime established by the National Monuments Acts 1930 to 2014 is a criminal law system. In that regard, it may be noted that the Oireachtas has considered the key offences established under the Acts to be serious, providing for the option of trial on indictment with significant penalties on conviction.[35] No civil enforcement system analogous to that under planning law[36] is provided for. Following conviction for an offence contrary to section 14 of the 1930 Act, the convicted person may be ordered by the court to pay the cost of repairs.[37] However, this is relevant to only a small proportion of monuments protected under the Acts, given that section 14 relates only to national monuments subject to preservation orders or temporary preservation orders or which are in the ownership or guardianship of the Minister for the purposes of the Acts or a local authority.[38] Damage to a monument protected under the systems requiring notice of proposed works (where no notice had been given or works were carried out without consent within the notice period, thus resulting in the commission of an offence)[39] could, in addition to prosecution, also lead to the making of a preservation order, although there is no express requirement for that option to be considered in such circumstances; and of course the criteria for making such an order would have to be met.[40] However, the making of such an order does not impose any requirement on an owner (not being the Minister under the Acts or a local authority)[41] to carry out any repairs or other maintenance works.

29 Planning and Development Act 2000, section 10(2)(c) and Fifth Schedule, paragraph 21.

30 Local Government (Planning and Development) Acts 1963 to 1999.

31 For example, the Roads Act 1993.

32 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment OJ L 26, 28 January 2012, pp. 1–21, as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment OJ L 124, 25 April 2014, pp. 1–18.

33 The growth in numbers of licensed archaeological excavations, including large numbers of pre-development test excavations to identify whether archaeological features are present, can be seen by examining the summary accounts of licensed archaeological excavations available at https://excavations.ie, the online database of excavation reports.

34 National Monuments Act 1930, section 26 as amended by the National Monuments (Amendment) Act 1987 section 16 and the National Monuments (Amendment) Act 1994 section 21.

35 National Monuments Act 1930, section 14(5) as amended by the National Monuments (Amendment) Act 2004, section 5; National Monuments Act 1930, section 26 as amended by the National Monuments (Amendment) Act 1987, section 17; National Monuments Act 1930, section 23 as amended by the National Monuments (Amendment) Act 1994, section 19; National Monuments Act 1930, section 25 as amended by the National Monuments (Amendment) Act 1987, section 17; National Monuments (Amendment) Act 1987, sections 2, 3, 5 and 23; National Monuments (Amendment) Act 1994, sections 12 and 13. It can be seen from the amendments made under section 17 of the 1987 Act and in regard to the new offences created under that Act that there was a significant strengthening of severity in penalties from that time on.

36 Planning and Development Act 2000, Part VIII.

37 National Monuments Act 1930, section 14(6) as amended by the National Monuments (Amendment) Act 2004, section 5.

38 National Monuments Act 1930, section 14(1) as amended by the National Monuments (Amendment) Act 2004, section 5.

39 National Monuments (Amendment) Act 1987, section 5 and National Monuments (Amendment) Act 1994, sections 12 and 13.

40 National Monuments Act 1930, section 8 as amended by the National Monuments (Amendment) Act 1954, section 3. See also the system of temporary preservation orders established under section 4 of the 1954 Act.

41 Section 12 of the National Monuments Act 1930 requires the Minister or a local authority to maintain a national monument of which it is owner or guardian.

Issues arising in enforcing the existing law: two key aspects

Following from the overview above of the existing legislation, two key issues will be looked at in some more detail, both of which will then be linked to what is especially significant in the new legislation. The first is the experience in relation to the Record of Monuments and Places[42] established under section 12 of the National Monuments (Amendment) Act 1994. The second is the experience in relation to the regulation of archaeological excavation under section 26 of the National Monuments Act 1930.

The increasing pace of state-funded archaeological surveys in the 1980s and early 1990s[43] drew attention to the lack of legal protection for the vast majority of archaeological sites identified. The National Monuments (Amendment) Act 1987 provided for the establishment of the Register of Historic Monuments. While this system was not dissimilar to a pre-existing system for listing national and other monuments under the 1954 Act,[44] the use of the term 'historic monument' (defined more widely than 'national monument')[45] was likely intended to ease the criteria for applying protection. Given that, the Register under the 1987 Act had the potential to be widely and proactively applied. However, that did not happen; as matters stand there are around 5000 monuments entered in the Register,[46] in other words, only a small proportion of the total of known archaeological sites. A likely practical and resourcing difficulty encountered was the requirement in the 1987 Act to serve an individual notice to specific landowners of entry in the Register.[47] That this was so is evidenced by the approach taken in the 1994 Act. While the level of protection afforded to entries in the Record was similar to that for entries in the Register (in line with the discussion above, a requirement to give notice of proposed work), the procedure for notice of entry differed. Notice of the content of the Record was to be by way of publicly available sets of lists and maps for each county in the state, with notice of the availability of these given through newspaper notices.[48] The retention on the statute book of the provisions establishing the Register of Historic Monuments may have indicated that the Record was intended as a temporary measure, with entries to transition to the Register over time as resources permitted. However, not only did that not happen, but the Record itself remained effectively fixed in its first edition, put in place across the state over a period of years in the late 1990s.[49] The lack of a flexible mechanism under the 1994 Act for adding or deleting entries to the Record without a complete reissue of the lists and maps for a particular county may have contributed to this. Perhaps also, the moves to make available online the data collected through archaeological surveys and the increasing reliance on the online data by planning authorities and other development control bodies may have diminished in the minds of many the distinction between simply making data available and applying formal legal protection under the National Monuments Acts.[50]

Whatever the validity of the preceding point, it would be fair to say that the resources of the National Monuments Service (the Departmental unit tasked with implementing the relevant Minister's monument protection functions under relevant legislation) were, from the 1990s onwards, very largely focused on dealing with the increasing number of planning application being referred to the Minister on heritage grounds as required under the Planning Regulations. This focus was crucial of itself and was key in ensuring that archaeological heritage was protected in the course of economic expansion during the period. It also, at least in administrative if not strict legal terms, harmonised the potential overlap between work affecting a monument being dealt with by the National Monuments Service both under the heading of a referred planning application[51] and a notice under section 12 of the 1994 Act.

Nevertheless, there remained the issue of damage to archaeological sites arising from activities not within the

42 The title 'Record of Monuments and Places' is not set out as such in section 12 of the 1994 Act; the section refers to the Minister (originally the Commissioners of Public Works) establishing 'a record of monuments and places …'. The title as used here is, however, well established in usage.

43 See Breen and Farrelly, Note 2 above.

44 National Monuments (Amendment) Act 1954, section 8, repealed by the National Monuments (Amendment) Act 1987, section 26.

45 See the 1987 Act, section 1 for definition of 'historic monument' and the 1930 Act, section 2 for definition of 'national monument'.

46 Information from National Monuments Service.

47 National Monuments (Amendment) Act 1987, section 5(7) and (9).

48 National Monuments (Amendment) Act 1994, section 12(2) and Statutory Instrument No 341/1994, National Monuments (Exhibition of Record of Monuments) Regulations 1994.

49 The lists and maps as issued for each county in the state in the late 1990s are available on the National Monuments Service website, www.archaeology.ie.

50 See mapping of known archaeological sites available on website of the National Monuments Service, www.archaeology.ie.

51 See Statutory Instrument No 600/2001, Planning and Development Regulations 2001, Article 28 for requirements on planning authorities to send notice to prescribed bodies of planning applications which may impact on archaeological sites.

scope of the Planning Act 2000 or other development control legislation, or in any event carried out without having gone through such systems. Recognition of this reality and the need for a response is evidenced by the establishment in 2005 of a unit within the National Monuments Service tasked specifically with addressing cases of damage to monuments arising outside the planning system or other development control systems. This work stream continues to be embedded in National Monuments Service, dealing with approximately 200 cases a year over the last five years, although it should be emphasised that this total is made up for the most part of less serious cases, and includes damage arising from natural factors as well as human interventions.[52]

However, in line with what was noted at the outset, the loss (or even extensive removal without recording) of any archaeological site can represent an irretrievable loss of cultural and scientific knowledge as well as loss of an element of the cultural character of a landscape. A particular archaeological site may be an example of a recurrent class or type, for example the earthen enclosures of the early medieval period in Ireland known as ringforts. But each will have its particular characteristics and unique story to tell. Illegal removal of such a site merits a serious response, and in three cases in the late 2000s and early 2010s of serious damage (in the course of agricultural works) to ringforts included in the Record of Monuments and Places prosecutions on indictment in the Circuit Court led to convictions and imposition of significant monetary penalties. None of the three cases went to appeal at higher level: one had seen a guilty plea at an early stage and in a second an initial not guilty plea was changed to a guilty plea in the course of trial.[53] While this may from one perspective be seen as reflecting robustness of the legislation (the 1994 Act) and strength of the evidence in the particular cases, it also left the legislation without detailed consideration and interpretation from the higher courts which might have addressed more clearly and comprehensively questions relating to whether the offence is one of strict liability or (insofar as applicable, and the author is not expressing a view that any is applicable) the mental elements of the offence, such as level of knowledge or intention and what might constitute proof of these. Exploring these issues in detail, and their implications for subsequent enforcement action, is outside the scope of this article, and the author does not wish, in particular, to engage in discussion of any cases currently under consideration. It may be sufficient for present purposes to note that the run of prosecutions on indictment in the early 2010s appears not to have set a recurrent pattern.

Nevertheless, as the law stands (pending the commencement of new provisions referred to below), referral of a case for formal criminal investigation and possible prosecution remains the only legally effective avenue under the National Monuments Acts for dealing with such cases, other than the making of a preservation order (with the limitations applicable to that as noted earlier). Agreements for repair or remediation of damage made by National Monuments Service with a landowner, even if useful in such cases, are not enforceable under the Acts. Lack of enforceability is also a problem which affects such an approach in the case of less serious damage, thus creating a situation in such cases where the state is left with taking no formal action or taking the criminal prosecution route.

The introduction from 2011 of three systems for protecting archaeological sites additional to the National Monuments Acts (although in two of the three at least linked to the status of sites under the Acts) should be noted.

Firstly, the Planning and Development Regulations were amended to exclude planning permission exemption under the Regulations in respect of certain works carried out in respect of an archaeological monument included in the Record of Monuments and Places other than where authorised under the National Monuments Acts.[54] The implication of this is that where such works are carried out without planning permission they would be subject to the enforcement regime under the Planning and Development Act 2000, both civil and criminal. No national data on the extent to which this provision has been relied on appears to be available. A problem here may be the lack of archaeological expertise within most planning authorities.

52 Information from National Monuments Service.

53 Information from National Monuments Service. The three cases were heard in Waterford, Tralee and Cork Circuit Courts in 2011 to 2012, with sentencing in Waterford Circuit Court in February 2012, Tralee Circuit Court in March 2012 and Cork Circuit Court in November 2012. While reported contemporaneously in the media, no law reports exist in relation to them given that, as noted, no appeal was taken to the Court of Appeal. See also, more generally on prosecutions, information provided in response to Parliamentary Questions in Dáil Éireann Debate Thursday 7 December 2017, available at https://www.oireachtas.ie/en/debates/question/2017-12-07/310/ and Dáil Éireann Debate Wednesday 10 April 2019, available at https://www.oireachtas.ie/en/debates/question/2019-04-10/218/.

54 Statutory Instrument No 600 of 2001, Planning and Development Regulations 2001, Article 9(1)(a)(viiA) as inserted by Article 5 of Statutory Instrument No 454 of 2011 Planning and Development (Amendment) (No 2) Regulations 2011.

A related provision of the Regulations in place since its original version provides a similar exclusion of exemption for archaeological sites generally, provided their protection is an objective of a development plan.[55] This leaves the door open for enforcement in relation to a wider category of sites, but still requires the scope to be set in the relevant development plan.

Secondly, regulations made under the European Communities Act 1972 to transpose the EIA Directive[56] in relation to certain agricultural works provide for mandatory EIA screening for such works where they are likely to damage a monument protected under the National Monuments Acts, with the possibility of a follow-on need to modify the proposed works or not proceed with them. Provision is included for prohibition orders to be made, on a civil as opposed to criminal basis.[57] Again, no data appears available on the extent to which this enforcement system has been deployed.

Thirdly, monuments subject to legal protection (if not archaeological sites generally) are subject to a regime of environmental cross-compliance for EU-funded farm payments, with the potential for significant financial penalties where damage occurs.[58] This, however, appears more in the nature of an administrative penalty rather than a civil enforcement system providing for the prohibition of work or the carrying out of repair or remediation of damage.

Apart from the dependency of these systems on the status of sites under the National Monuments Acts, based on the analysis above none of them can be said (so far at least) to clearly fill the absence under the Acts of a civil enforcement system as a supplement to criminal prosecution. Nor, given their linkage (express or implied) to protection under the National Monuments Acts (or at least to the provisions of a development plan in the case of the exclusion from exemption from planning permission requirements), do they address (at least with any certainty) the issue of newly discovered archaeological sites not yet protected under the National Monuments Acts. The extensive work (already alluded to) done over many years to integrate archaeological considerations into the planning process extended to making provision for pre-development assessment of larger-scale developments or monitoring of such developments in the course of construction to detect hitherto unknown archaeological sites which may be uncovered.[59] This, however, leaves unaddressed cases of previously unknown archaeological sites which come to light in the course of works where such arrangements are not in place, whether because such works are outside the planning system or because no archaeological conditions attach to a relevant grant of planning permission because the development did not impact a known site or was not of larger scale. Anomalously, any archaeological objects or wrecks over 100 years old which are so found will be automatically protected,[60] but not structures or features not falling within those categories.

Turning to the experience of regulating archaeological excavation, the context of the introduction of a licensing regime for such excavation under section 26 of the 1930 Act was a small number of research projects carried out largely by university-based scholars, some amateur work and some work relating to the conservation of national monuments in the care of the state or the investigation of new discoveries reported to the National Museum of Ireland.[61] That remained the position for decades. This changed radically as protection of archaeological heritage was integrated into the planning and development process from the late 1980s on, with the growth of a commercial archaeological sector, comprising a mix of sole practitioners and consultancy services, providing pre-development

55 Statutory Instrument No 600 of 2001, Planning and Development Regulations 2001, Article 9(1)(a)(vii).

56 Note 32 above.

57 Statutory Instrument No 456 of 2011, European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011, Articles 2 , 3(2), 4, 5, 6, 7, 8(1)(d) and 8(6), as amended or affected in terms of overall operation by Statutory Instrument No 142 of 2013, European Communities (Environmental Impact Assessment) (Agriculture) (Amendment) Regulations 2013 and Statutory Instrument No 407 of 2017 European Communities (Environmental Impact Assessment) (Agriculture) (Amendment) Regulations 2017.

58 See generally: https://www.gov.ie/en/publication/246da-cross-compliance/#good-agricultural-and-environmental-condition-gaec and Department of Agriculture, Food and the Marine, *Explanatory Handbook for Cross Compliance Requirements* (Department of Agriculture, Food and the Marine, August 2016) at 8 and 53, available at above webpage; restriction to legally protected monuments indicated by European Commission 'Direct payments 2015–2020, decisions taken by Member States: state of play as at June 2016, Information Note' at page 29, Table A.8 'Member States' choices for landscape features', entry for Ireland, available at: https://agriculture.ec.europa.eu/document/download/a561caa3-8290-4c50-a40e-de2cb53ca3a0_en?filename=simplementation-decisions-ms-2016_en.pdf.

59 The need for this, as well as the wider need to protect archaeological heritage in the development process, was formally reflected in governmental (or at least ministerial) policy, albeit non-statutory, in 1999; see Government of Ireland/Department of Arts, Heritage, Gaeltacht and the Islands *Framework and Principles for the Protection of the Archaeological Heritage* (Dublin: Stationery Office 1999) at 23 to 32.

60 Note 16 above.

61 The issue of amateur work was referred to expressly in the Dáil debate on the proposed legislation: see Note 15 above. See Note 33 above for online data from which the changing nature of archaeological excavation in Ireland in recent decades can be seen.

assessment and archaeological excavation services to commercial and other clients. It may, however, be noted that notwithstanding that the reference to 'person' in section 26 of the 1930 Act would include corporate bodies and unincorporated bodies given the provisions of the Interpretation Act 2005,[62] the practice has remained that individual archaeologists apply for and are granted licences under section 26. Apart from the apparent power to revoke a licence generally available to licensing authorities under the Interpretation Act 2005,[63] the legislation governing licensing of archaeological excavation has remained without any express civil enforcement powers, thus leaving criminal prosecution the only applicable statutory enforcement mechanism under the National Monuments Acts. The difficulties and inappropriateness of this hardly need detailed discussion, especially in relation to dealing with cases which may arise from inexperience or problems securing funding from clients or in terms of dealing with a matter such as securing the submission of a report on the licensed work, where the key to success may be as simple as getting a licensee to accept that they must reorder work priorities to complete the report. The problem is compounded by the absence of any express provision in section 26 of the 1930 Act to authorise the taking into account of compliance or non-compliance by the applicant with the conditions of licences previously held by them.

The example of failure to submit reports on licensed archaeological excavation is particularly important; no matter how good the fieldwork phase of an archaeological excavation may be, if no scientific report on it is prepared and made available, then it is as if the site was destroyed without recording other than to the extent that a report might at some point be prepared from a surviving excavation archive. However, the non-submission of reports in contravention of licence conditions would have been one of the most apparent problem areas in archaeological practice over the last couple of decades. An initiative taken by the National Monuments Service to address this prospectively (that is, to seek to prevent further accumulation of a backlog of reports not submitted) was the inclusion from 2017 onwards of a standard licence condition whereby licensees are required to accept that the failure by them to comply with a licence condition on the licence granted would be grounds for refusal of any further licence until the non-compliance was remedied.[64] This has subsequently been relied on by the National Monuments Service to work with licensees to secure submission of reports, with a flexible approach under which revised timescales for submission are agreed. This would, however, benefit from a clear statutory basis, but nevertheless is illustrative of how a civil law approach may in practical terms more readily resolve issues in a useful way than a criminal law approach.

Given that most archaeological excavation in Ireland now arises from archaeological conditions imposed on grants of planning permission under the Planning and Development Act 2000 (or similarly through other development control legislation), the question arises of enforcement of standards relating to archaeological excavation through the planning system, including (and perhaps most particularly) the submission of reports: many, if not most, such planning conditions will require submission of a report on the archaeological excavation required to be carried out under the grant of planning permission, separate to the requirements in that regard arising under the licence issued under section 26 of the National Monuments Act 1930. The two statutory codes have overlapping remits in this regard. The grant of planning permission binds the developer. The licence to archaeologically excavate (assuming it has been issued to a specific archaeologist engaged by the developer or employed by an archaeological consultancy engaged by the developer) binds that archaeologist. The developer has no direct obligations arising from section 26 of the 1930 Act, but will (or at least should) have contractual obligations with the archaeologist who obtained the section 26 licence (or the archaeological consultancy employing that archaeologist). While the archaeologist or archaeological consultancy might be reluctant to take proceedings against a client which has failed to fund the writing up of a report, a planning authority would separately be able to consider planning enforcement proceedings against the developer whatever the reason for the failure to prepare and submit a report (assuming the planning permission required such submission). However, there appear to be limited, if any, examples of this actually happening. Again, the reasons for this may at least partly due to the widespread absence of archaeological expertise within planning authorities.

62 Section 18(c).

63 Section 22(3), read with the definition of 'statutory instrument' in section 2.

64 The condition referred to appears in the current version of the form in use for applications under section 26 of the National Monuments Act 1930 (Form NMS 1-2019) as Condition 15 of standard conditions appended to the application form. See the website of National Monuments Service: www.archaeology.ie.

Key developments under the new legislation

The Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023 is not as yet fully commenced (although significant aspects of it have been commenced).[65] In particular, as of the time of writing, Part 2 (which contains the provisions relating to protection of monuments) and Part 6 (which contains the provisions making archaeological excavation and other related activities subject to a requirement for a licence) have not been commenced. Part 7 (setting out licence application and decision procedures common to all works and activities requiring a licence under the Act) and Chapter 7 of Part 10 (dealing with the civil enforcement system) have been commenced, but operate only in relation to the substantive provisions which are in operation. Therefore, the practical effect of the measures contained in the legislation to remedy the problems identified above cannot yet be assessed. However, work is underway to enable further commencement, including the drafting of the necessary regulations to enable the new system of automatic protection for certain monuments to come into operation (see further below). The commencement of the new Act in full will bring about the complete repeal of the National Monuments Acts 1930 to 2014.[66]

A complete description of the 2023 Act is well beyond the scope of this article. The focus here is on the key aspects of the new legislation mentioned at the start of this article, namely the introduction of a system of automatic legal protection for archaeological (and potentially other) sites and the introduction of a new civil enforcement system, and to consider these in the context of the key issues noted in the discussion of the experience of enforcing the existing legislation. However, the new automatic protection system sits within a wider scheme which includes a new Register of Monuments, which is also relevant to addressing key issues with the existing legislation. So also is the new licensing system under the Act of 2023, so both are also touched upon.

Regarding the new systems for protection of monuments, key to understanding the scheme is the underlying term 'relevant thing', which is wide in scope.[67] 'Relevant things' of 'relevant interest' (which covers a range of cultural heritage interests, including archaeological interest)[68] may be entered in the Register of Monuments (potentially with a surrounding area which legally forms part of the entry) in accordance with criteria set out in the Act. Such entries become 'registered monuments'.[69] Clear procedures are set out for regular updating of the Register.[70] Express provision is made for pre-entry consultation, either by means of general notices to the public or specific notice to owners, with the latter required where the higher of the two available levels of protection is proposed to be assigned. This distinction follows through into the post-entry notice procedures.[71] In contrast to the existing legislation, provision is made for interim protection while consultation is ongoing.[72] The default level of protection for entries in the Register (subject to some exceptions) is 'general protection'.[73] A higher level can be applied, subject to meeting stated criteria, and is known as 'special protection'.[74] In both cases, works (as defined) at or in the immediate surroundings of the monument require a licence other than where, in the case of a general protection monument, a notice procedure in relation to the works has been complied with (this exception from the licensing requirement is not available in the case of a special protection monument).[75] Even where the notice procedure is availed of in place of a licence application, the relevant Minister can impose conditions on the notified works, similar to conditions which might be imposed on a grant of a licence.[76] The latter is a substantial strengthening of the law in comparison to the notice procedures currently operating in respect of entries in the Register of Historic Monuments and the Record of Monuments and Places,[77] and the approach that a licence requirement exists as a starting point in call cases may be seen as strengthening of the principles underlying the system.

While the assignment of special protection does require a relevant thing meeting additional criteria to those for

65 See Statutory Instrument No 252 of 2024, Historic and Archaeological Heritage and Miscellaneous Provisions Act (Commencement) Order 2024 and Statutory Instrument No 663 of 2024 Historic and Archaeological Heritage and Miscellaneous Provisions Act (Commencement) (No 2) Order 2024.

66 Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023, section 7 ('the 2023 Act').

67 ibid, section 2.

68 ibid,

69 ibid, sections 14 and 2.

70 ibid, sections 17, 19(1)(c) and (9) and 23(1)(a)(iii).

71 ibid, sections 22 and 23 in regard to pre-entry consultation and section 19 in regard to post-entry notification (in particular subsection (6) of section 19).

72 ibid, sections 22(3) and 23(3).

73 ibid, sections 21 and 27.

74 ibid, section 20.

75 ibid, sections 25, 26, 27 and 30.

76 ibid, section 28.

77 National Monuments (Amendment) Act 1987, section 5, and National Monuments (Amendment) Act 1994, section 12.

initial inclusion in the Register, it is also clear that there is no national importance test,[78] in contrast to the existing system of preservation orders (see above). Therefore, the assignment of special protection will be able to be deployed more easily in response to threats or damage, so strengthening enforcement and protection capacity. It should also be noted that (again in contrast to the existing preservation order system) there is no requirement for a relevant thing to be in danger before special protection is assigned,[79] so there will be scope to use the special protection system proactively, thus (at least potentially) heading off threats before they emerge.

In addition to the new Register (and potentially in advance of its establishment) the relevant Minister will have power to prescribe (that is, set out regulations made under the Act) classes of relevant things of archaeological or other 'relevant interest' to be 'prescribed monuments' for the purposes of the Act.[80] New discoveries of particular examples of any such class of prescribed monument will be required to be reported.[81] General protection will apply automatically to prescribed monuments, without need for entry in the Register of Monuments (prescribed monuments situated underwater will be automatically subject to special protection).[82] As has already been noted, this is a key change from existing law, namely the establishment for the first time in a comprehensive manner of a system of automatic protection for immovable archaeological heritage wherever situated.

Detailed consideration of the mental element of the offences of carrying out works contrary to the requirements of general or special protection is beyond the scope of this paper. However, some reference to this issue is relevant for the purposes of demonstrating that the introduction of a civil enforcement procedure (to which we will turn shortly) is in no way intended to remove the criminal prosecution model. Whereas a defence is provided in relation to prescribed monuments that a reasonable person would not, in all the circumstances, have been aware that the monument was a monument to which general protection applies, this falls away once such monument becomes a registered monument.[83] Moreover, insofar as an express statement is contained in the Act regarding the mental element, it is to the effect that it shall not be necessary for the prosecution to prove that a defendant knew that that the relevant thing in question was a registered monument or prescribed monument, and presumptions are also established in relation to knowledge that a relevant thing of relevant interest was such.[84] It is also made clear that the relevant Minister and other regulatory bodies under the Act may, in their own name, prosecute offences under the Act summarily (that is, not just prosecute purely summary offences under the Acts).[85] The context for the introduction of the civil enforcement system to be considered below is not, therefore, one of abandonment of the criminal law option, indeed the contrary; provisions are included which are clearly aimed at strengthening the scope for prosecution in appropriate cases.

The licensing system established under the 2023 Act seeks to move away from standalone systems for each activity made subject to regulation, which is in contrast to the current legislation (although the 2004 Act had somewhat simplified the system).[86] With the exception of licences to alter archaeological objects or licences for activities regulated under bye-laws made in respect of sites actively managed under the Act, the licensing authority for all licensable activities will be the Minister under the Act.[87] Furthermore, it is made clear that one application to the Minister will, subject to exceptions, suffice to cover several proposed categories of licensable activity as will any licence granted.[88] What is key here, however, is that the shared provisions for all licence applications as set out in the Act make detailed provision in relation to information applicants may be required to submit, and this includes information about previous compliance.[89] Furthermore, clear provision is made that such information is to be taken into account in deciding on applications.[90] This will provide a much more robust basis for the current approach referred to earlier regarding compliance by holders of

78 The 2023 Act, section 20(3).
79 ibid.
80 ibid, section 12; see section 48(5) for the possibility for the system of prescribed monuments to operate in advance of the establishment of the Register of Monuments.
81 ibid, section 13.
82 ibid, sections 21(b) and 135.
83 ibid, section 186.
84 ibid, section 175(11), (12), (13) and (18)(a).
85 ibid, section 209.
86 The National Monuments Act 1930, section 14(4) (as amended by section 5 of the National Monuments (Amendment) Act 2004) provides that where a consent has been issued for works under section 14, then (subject to some exceptions) no further licence or consent is needed under the National Monuments Acts. However, subject to that, the licensing and consent systems for archaeological excavation (section 26 of the 1930 Act), use or possession of detection devices (section 2 of the 1987 Act) and diving on or interference with wrecks protected under the Act (section 3 of the 1987 Act) remain distinct.
87 The 2023 Act, section 149(1), definition of 'licensing authority'.
88 ibid, sections 149(2) and 151(1).
89 ibid, section 150(2).
90 ibid, section 151(3(a).

licences for archaeological excavation to submit reports as a condition of such licences, and for the extension of this kind of approach.

Where a licence application is received by a licensing authority under the Act and the authority considers that carrying out the activity in question would be so much under the control of another person apart from the applicant as to warrant that other person being the licensee or a co-licensee with the original applicant, the licensing authority may refuse the application.[91] While this is not restricted to applications for archaeological excavation, one of its immediate uses would be to address the difficulties noted earlier regarding applications from individual archaeologists who are either engaged directly by a developer or employed by an archaeological consultancy engaged by a developer. Another provision which clearly arises from the experience of regulation of commercial archaeology is the power to require lodgement of bonds as security against satisfactory completion of licensed work.[92] Express powers are also provided to licensing authorities to revoke or suspend licences, subject to fair procedures.[93]

From the above, it is already evident that the 2023 Act, while maintaining the criminal law option, seeks to ensure that there are a range of administrative actions available to regulatory authorities under the Act to respond to non-compliance with provisions of the Act or licences issued under it, and also to reduce risk of such non-compliance arising in the first instance. To this must be added reference to the civil enforcement system provided for in Chapter 7 of Part 10. This is structured around a power conferred on 'relevant authorities' (in summary, the various bodies conferred with powers under the Act) to issue enforcement notices where they believe there has been a contravention of the Act in the sphere of the Act for which they are responsible.[94] A relevant authority may, if necessary, follow this up with an application to the 'relevant court' (the Circuit Court or High Court depending on the seriousness of the contravention) for an order requiring compliance with the enforcement notice.[95] This is balanced by the right of a person in receipt of such a notice to apply to the relevant court for cancellation of the notice.[96] There is also power for relevant authorities to apply for an injunction where matters are urgent.[97] Enforcement notices will include direction to the person receiving the notice in regard to remedying the contravention of the Act, and specific possible measures in that regard are set out, though without prejudice to the wider scope of the provision. These include actions such as repair and archaeological excavation.[98] It is expressly provided that the standard of proof in relation to any proceedings in relation to the enforcement notice system will be on the balance of probabilities (that is, the civil standard).[99]

The scope of the system extends to cases of non-compliance with licence conditions as well as failure to obtain a licence,[100] so is clearly relevant to (for example) non-compliance by professional practitioners such as archaeologists just as much as to (for example) removal of an archaeological site in the course of agricultural works. Also, the system appears to capture licences or consents issued under the National Monuments Acts 1930 to 2014, given the reference to 'old authorisations',[101] so enabling the civil enforcement scheme to be applied to such licences or consents where not complied with.

Concluding comments

Whatever the underlying reasons may be, legislative developments through several amendments to the National Monuments Act 1930 struggled to put in place a scheme for the protection of the immovable archaeological heritage which matched that put in place from the start for movable archaeological heritage. The disparity in approaches between the two was evident from the outset. Possibly less evident in 1930 was that a purely criminal law enforcement system might not meet all the needs which would arise over time, partly because no one could have envisaged in the 1930s the path that professional archaeological practice in Ireland would take in the latter decades of the 20th century. That being said, the need for a step change in terms of the scope of monument protection could be argued to have been clear for some time, as the wealth of field monuments in and under the Irish landscape came to be better understood, bringing with it the challenge of trying to integrate this ever-increasing data into protection systems based solely on designation. The example of the automatic protection afforded to all wrecks over 100 years old in the 1987 Act might perhaps have prompted earlier consideration of

91 ibid, section 151(7).
92 ibid, section 151(4)(e)(ii).
93 ibid, section 154.
94 ibid, sections 193 and 195.
95 ibid, sections 194 and 195(6).
96 ibid, section 196.
97 ibid, section 197.
98 ibid, section 195(2) and (7).
99 ibid, section 198.
100 ibid, section 195(1), 193 (definition of 'relevant provision') and section 2 (definitions of 'new authorisation' and 'old authorisation').
101 ibid.

the question of a similar scheme for monuments. Also, the need to put in place a modern legislative basis for the regulation of professional archaeological activities which impact physically on archaeological heritage (in particular archaeological excavation) has long been clear.

The 2023 Act is clearly intended to address both the need for an improved scheme for protecting archaeological and other cultural heritage sites and the need for better regulation of activities such as archaeological excavation. It will not be a panacea. The non-renewable nature of the archaeological heritage, as noted at several points, may militate against it being so. Rebuilding a demolished masonry structure, itself never a substitute for the original, may be a worthwhile response. But the removal of an earthwork monument without proper recording cannot really be addressed by repair or replacement; the latter simply does not address the loss of complex layers of stratigraphy containing information about the past. The ongoing resourcing of the implementation of the new Act may well prove a long-term challenge. Nevertheless, a strong legal framework has, it is submitted, been achieved.