

SCOTTISH HISTORIC ENVIRONMENT POLICY: CONSULTATION

The Marine Historic Environment

Contents

Section 1	The consultation process	5
Section 2	Introduction	9
Section 3	The legal and administrative context	11
Section 4	Proposals for Scottish Ministers' policy on the marine historic environment	14
Section 5	Proposals for new legislation to protect the marine historic environment in Scotland	16
Section 6	Implementation	19
Section 7	Contacts	21
	Notes	22
Annex A	Proposed criteria and guidance for the determination of 'National Importance' for the designation of marine historic environment assets	26
Annex B	Annex to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage	29
Annex C	Partial Regulatory Impact Assessment	37
Annex D	Equality Impact Assessment	43

Published by Historic Scotland

© Crown copyright 2008

Cover image © Simon Volpe

1. The consultation process

Introduction

- 1.1 This draft Scottish Historic Environment Policy (SHEP) paper invites views on Scottish Ministers' policies for the marine historic environment. It also sets out for consultation Scottish Ministers' proposals for new legislation to protect the marine historic environment in Scotland, following publication by the Department of Culture Media and Sport in March 2007 of a White Paper, *Heritage Protection for the 21st century* (see Note 1).

Responding to this consultation paper

- 1.2 We are inviting written responses to this consultation paper by 30 May 2008.

Please send your response to:

hs.shep@scotland.gsi.gov.uk

or

SHEP on the Marine Historic Environment
 Historic Scotland
 Room 2.9
 Longmore House
 Salisbury Place
 Edinburgh
 EH9 1SH

or

By fax to: 0131 668 8987

If you have any queries contact Christine Kelly on 0131 668 8639.

- 1.3 This consultation is available on the consultation web pages of the Historic Scotland website at www.historic-scotland.gov.uk/consultations. The consultation, and all other Scottish Government consultation exercises, can also be accessed on line from www.scotland.gov.uk/consultations. Printed copies of the consultation can be obtained from Historic Scotland's head office at the address given above. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

- 1.4 SEconsult is an e-mail system set up by the Scottish Government to alert you to new consultations. SEconsult is available at: www.scotland.gov.uk/consultations/seconsult. The system allows stakeholder individuals and organisations to register and receive a weekly e-mail containing details of all new consultations (including web addresses). SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

- 1.5 We need to know how you want us to deal with your response and, in particular, if you are happy for your response to be made public. Please complete and return the Respondent Information Form, which is either attached to this document or can be downloaded from the place you obtained this document, to ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.
- 1.6 You should be aware that Historic Scotland, as an agency of the Scottish Government, is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 and would therefore have to consider any request made to it under these Acts for information relating to responses made to this consultation exercise.

Next steps in the process

- 1.7 If you have given permission for your response to be made public (see the attached Respondent Information Form), it will be made available to the public in the Scottish Government Library by 27 June 2008 and on the Scottish Government consultation web pages by 4 July 2008. The responses will also be on our website. We will check all responses where agreement to publish has been given for any potentially defamatory material before placing them in the library or placing them on the website. You can make arrangements to view responses by contacting the Scottish Government Library on tel: 0131 244 4556. Responses can be copied and sent to you, but a charge may be made for this service.

- 1.8 Following the closing date, all responses will be analysed and considered along with any other available evidence. We aim to issue an analysis report on this consultation by 22 August 2008 and a final version of this policy as soon as possible.

Comments and complaints

- 1.9 If you have any comments about how this consultation exercise has been conducted, please send them to Christine Kelly as detailed above.
- 1.10 Consultation is an important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.
- 1.11 The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.
- 1.12 Typically, Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site and on Historic Scotland's website, enabling a wider audience to access the paper and submit their responses.
- 1.13 Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library (K Spur, Saughton House, Broomhouse Drive, Edinburgh EH11 3XD, tel: 0131 244 4556).
- 1.14 All Scottish Government consultation papers and related publications (eg, analysis of response reports) can be accessed at: Scottish Government consultations (www.scotland.gov.uk/consultations). Those related to Historic Scotland can also be found on the agency's website (www.historic-scotland.gov.uk/index/consultations).

1.15 The views and suggestions detailed in consultation responses are analysed and used as part of the decision-making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review;
- inform the development of a particular policy;
- help decisions to be made between alternative policy proposals;
- be used to finalise legislation before it is implemented.

1.16 Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns, cases and comments, which should be directed to the relevant public body.

2. Introduction

- 2.1 The *Scottish Historic Environment Policy* (SHEP) series sets out Scottish Ministers' policies for the historic environment. The SHEPs have the same authority as the Scottish Planning Policy series and other relevant Ministerial policy documents.
- 2.2 The SHEPs are a response to the review of Historic Scotland in 2004–05 which recommended that an 'Executive endorsed policy statement for the historic environment in Scotland should be developed in consultation with stakeholders...'. Historic Scotland is an executive agency of the Scottish Government and its Framework Document sets out the roles and responsibilities of Scottish Ministers and the Chief Executive, who is accountable to Ministers for the operation of the agency.
- 2.3 SHEP 1 *Scotland's Historic Environment* (see Note 2) sets out strategic policy for the historic environment. It provides the framework for more detailed Ministerial and operational policies that inform the day-to-day work of a range of organisations that have a role and interest in managing the historic environment. These include the Scottish Government, local authorities and the range of bodies that is accountable to Scottish Ministers, including Historic Scotland.
- 2.4 Other SHEPs deal in more detail with established areas of policy and are intended to bring together and explain existing policy, while providing an opportunity for public comment on a range of policy and some operational issues. Some SHEPs deal with less-developed areas of policy, such as *Gardens and Designed Landscapes*. These are intended to explore a wider range of issues and the consultation versions will often include more questions about operational matters.
- 2.5 This SHEP sets out proposals for Scottish Ministers' policy for the marine historic environment. It builds on many of the principles defined in Historic Scotland Operational Policy Paper HP6 *Conserving the Underwater Heritage* [1999] (see Note 3). This SHEP should also be considered in the context of an extensive consultation carried out in 2004–05 by the Department of Culture Media and Sport (DCMS) and the Devolved Administrations, *Protecting the Marine Historic Environment, Making the System Work Better* (see Note 4). Responses to this and extensive scoping work resulted in proposals

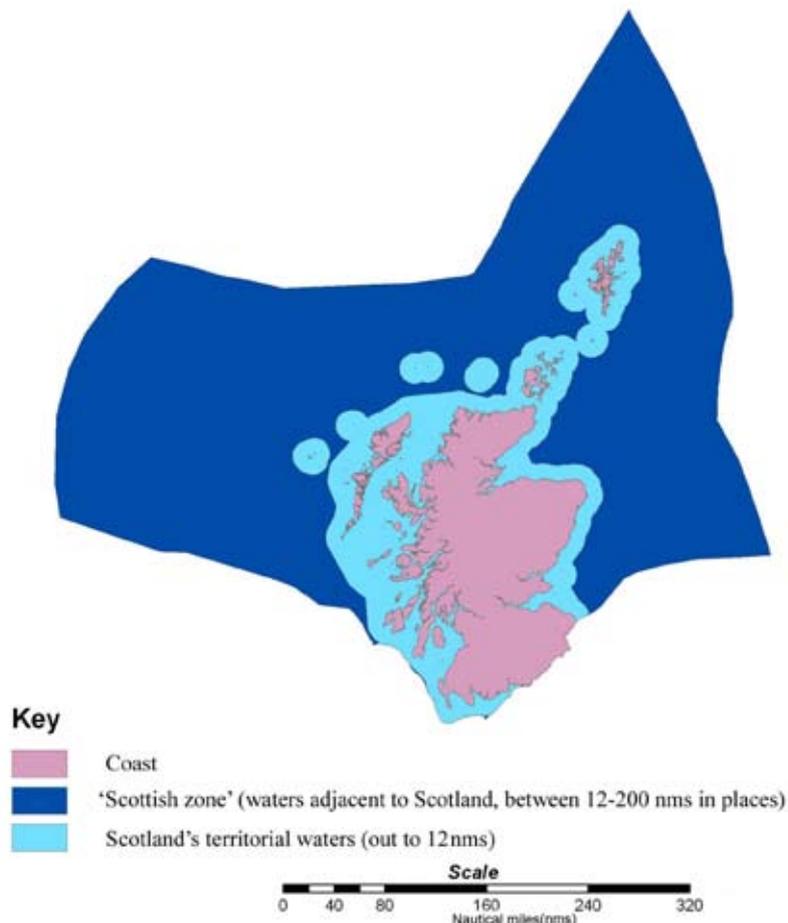
for new legislation to protect the marine historic environment as set out in March 2007 in a White Paper, *Heritage Protection for the 21st Century* (see Note 1).

Definition

- 2.6 Scotland's marine zone extends from mean high water to the limit of territorial waters (12 nautical miles or 22.2 km), encompassing tidal rivers, estuaries, and firths, as well as inshore waters close to land and waters far offshore. Throughout history, these coasts and seas have provided a source of food and energy, a means of defence from invasion, and a springboard for trade and communication between neighbouring communities and across oceans.
- 2.7 Techniques to investigate underwater sites remain in their infancy and we know less about marine historic assets than we do for those on land. However, as we begin to learn more, it is becoming clear that the seabed preserves a wealth of material evidence relating to Scotland's historical association with the sea:
- a. since the last Ice Age, the coast edge and seabed have undergone constant change which continues to this day. As a result of this state of flux, once-terrestrial sites may now be submerged; once-marine sites may now be on land. Fish-traps and crannogs in the inter-tidal zone experience cyclical inundation and exposure by tides, while lighthouses and harbours extend from dry land into the sea;
 - b. the wrecks of ships and aircraft can be found, sometimes far offshore. They are, however, part of a wider cultural landscape that may extend some way inland. In the case of shipwrecks, this might encompass the yards where they were built, the ports they served, the lighthouses they passed, and the routes they crossed.
- 2.8 Whether by direct enjoyment by visitors of the remaining wrecks of the German High Seas Fleet, scuttled in Scapa Flow in 1919, or simply by understanding that remains dating the earliest recorded human occupation of Scotland 10,000 years ago may be found at the coast edge or further offshore, it is clear that Scotland's marine historic environment has a positive contribution to make to the economic, social and cultural fabric of today's Scotland.

3 The legal and administrative context

- 3.1 The United Kingdom government is party to the European Convention on the Protection of the Archaeological Heritage (the ‘Valetta Convention’ – see Note 5). States recognise, in Article 2, that they must have a legal system for the protection of the archaeological heritage, on land and under water. Article 4 requires provision for ‘the conservation and maintenance of the archaeological heritage, preferably *in situ*’. Article 5 requires provision for the integration of the conservation of the archaeological heritage into development control processes. Article 7 requires an up-to-date inventory of sites that is made available to inform decision-making.
- 3.2 With two exceptions (see Notes 11 and 13), jurisdiction for historic environment matters in Scotland’s territorial waters out to 12 nautical miles rests with Scottish Ministers. In the ‘Scottish zone’ of waters adjacent to Scotland (between 12 and 200 nautical miles in places), such jurisdiction remains with the UK Government.



© Crown Copyright. Historic Scotland Licence No. 100017509 [2008]

- 3.3 Within Scotland's territorial waters, Scottish Ministers through Historic Scotland have discharged commitments under Article 2 of the Valletta Convention by the following UK-wide legislation: the Protection of Wrecks Act 1973 gives powers to declare historic wrecks and the sites of wrecks as protected areas; the Ancient Monuments and Archaeological Areas Act 1979 gives powers to schedule archaeological sites and monuments of national importance that are on the bed of territorial seas (see Note 6); the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 gives powers to designate historic buildings which are of special architectural or historic interest.
- 3.4 Some monuments on the foreshore and underwater are currently scheduled under the Ancient Monuments and Archaeological Areas Act 1979. This document should therefore be read in conjunction with SHEP 2 *Scheduling: protecting Scotland's nationally important monuments* and SHEP 4 on *Scheduled Monument Consent* (which will be published in the near future).
- 3.5 The scope of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 stops at the low water mark but harbours and lighthouses which are sometimes or partly below the sea can be listed. This document should therefore also be read in conjunction with the consultation versions of the SHEPs for *Listing: the identification of Scotland's special buildings* and for *Listed Building Consent*; final versions of both documents will be published during 2008.
- 3.6 In October 2007, the European Commission published an *Integrated Maritime Policy for the European Union 'the Blue Book'* (see Note 7); on 15 March 2007, the Westminster Department for Environment, Food and Rural Affairs published *Sea Change, a Marine Bill White Paper for the UK* (see Note 8). Scottish Ministers have expressed their commitment to consult on Scottish marine legislation following the recommendations of the Advisory Group on Marine and Coastal Strategy (AGMACS) (see Note 9) and have set up the Sustainable Seas Task Force, which is meeting during the consultation period for this document.

- 3.7 The Scots common law rights relating to found archaeological and historic items in Scotland (dealt with through the system of ‘Treasure Trove’) do not extend to the marine environment, except to the foreshore (see Note 10). The Merchant Shipping Act 1995 transposed the International Convention on Salvage 1989 into United Kingdom law. The Merchant Shipping Act 1995 governs the disposal of ‘wreck’ (see Note 11) while application of the concepts of ‘derelict’ and ‘salvor in possession’ (see Note 12) has arisen from case law. The Protection of Military Remains Act 1986 (see Note 13) provides powers to prevent disturbance of military remains in the sea.
- 3.8 The Crown Estate owns almost the entire seabed below Mean Low Water, much of the foreshore (the inter-tidal zone) and approximately half of the beds of estuaries and tidal rivers in the United Kingdom. As a landowner (as opposed to a regulatory planning authority) the Crown Estate grants leases, licences and consents for works and activities on the foreshore and underwater. Consents for certain seabed developments may also be required under Part II of the Food and Environment Protection Act 1985 (see Note 14), section 34 of the Coast Protection Act (see Note 15), sections 14–18 of the Harbours Act 1964 (see Note 16), and section 36 of the Electricity Act 1989 (see Note 17).
- 3.9 With the exception of marine aquaculture (see Note 18) and for certain other developments in Shetland and Orkney (see Note 19), there is no comprehensive local authority planning regime below Mean Low Water. Certain marine developments fall within the scope of the Environmental Impact Assessment (Scotland) Regulations 1999 and other sector-specific EIA regimes. Marine plans and programmes also fall within the scope of Strategic Environmental Assessment (SEA) through the provisions of the Environmental Assessment (Scotland) Act 2005.
- 3.10 The UK government abstained from voting on the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage but accepted that the Convention’s Annex represents ‘best practice for archaeology’ (see Note 20). The Joint Nautical Archaeology Policy Committee’s *Code of Practice for Seabed Development* is another example of a ‘best practice’ approach that adopts the precautionary principle in respect of seabed development (see Note 21).

4 Proposals for Scottish Ministers' policy on the marine historic environment

- 4.1 Scottish Ministers are committed to the sustainable use and management of the historic environment. This means meeting the needs of today without compromising the opportunity for future generations to understand, appreciate and benefit from the historic environment. This principle extends seamlessly to the marine historic environment.
- 4.2 Scottish Ministers wish to work towards a marine historic environment that is better-defined and recorded, safeguarded and understood, with a positive contribution to make to the economic and cultural fabric of today's Scotland.
- 4.3 Scottish Ministers aspire to a protection regime underpinned by effective legislation which can identify and safeguard Scotland's most important marine historic assets including against inadvertent or deliberate damage or destruction:
 - a. decisions to apply statutory protection to the most important marine historic assets will follow the consistent application of clear criteria, as set out in Annex A of this document;
 - b. marine historic assets from all parts of Scottish territorial waters are equally worthy of study and should be considered for designation;
 - c. designation of marine historic assets will be an ongoing process that recognises our changing state of knowledge and that every generation will have its own view of what comprises its heritage;
 - d. decisions on designation and on de-designation will be made on the basis of liaison with the key stakeholders, field assessment, and the best evidence available;
 - e. information on designated marine historic assets and on the processes involved will be made widely and easily available;
 - f. all decisions relating to designation will be explained in clear language;

- g. the ‘Rules’ laid out in the Annex to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (see Annex B) provide an accepted model of best practice for all activities regulated by statute devolved to Scottish Ministers and which are directed at the underwater cultural heritage;
 - h. beneficial stewardship should be applied to key marine historic assets *in situ* where these are threatened by degradation or complete loss. A policy of preservation by investigation should be pursued to assist the recovery of archaeological or architectural data when these sites cannot be saved;
 - i. activities directed at underwater cultural heritage will avoid the unnecessary disturbance of the wider marine environment.
- 4.4 Scottish Ministers consider the marine historic environment to be an integral part of the wider marine environment and the wider historic environment meriting appropriate consideration within planning, seabed consent licensing and environmental assessment procedures.
- 4.5 Given that many marine historic assets are out of sight, Scottish Ministers consider it all the more important to pursue a policy of inclusion, with access, information and guidance, knowledge and expertise being widely shared to enhance appreciation and enjoyment, and to deliver benefits to local communities and those further away.

Question 1:

Do you agree with Scottish Ministers’ proposed policies for the marine historic environment?

Question 2:

Is anything missing?

Question 3:

Is ‘national importance’ as defined in Annex A the appropriate criterion for designating marine historic assets?

Question 4:

Are the guidance and criteria for determining national importance set out in Annex A those which should be applied? If not, what would you suggest?

5 Proposals for new legislation to protect the marine historic environment in Scotland

- 5.1 Scottish Ministers consider that the 2004–05 consultation *Protecting the Marine Historic Environment, Making the System Work Better* and responses to it make a sound case for new legislation to facilitate the reasoned management of change, promote the good management of marine historic assets, and encourage wider public understanding of and access to the marine historic environment in Scotland.
- 5.2 New legislation is proposed for England, Wales and Northern Ireland. To simplify administrative procedures across boundaries at sea, Scottish Ministers propose to seek broadly parallel legislation, albeit tailored for Scotland's needs, embedded within proposals for a Scottish Marine Bill. The effects of this new legislation will be to:
- a. broaden the range of marine historic assets that can be designated to include vessels and aircraft, the remains of these and sites believed to be their burial locations; built structures; archaeological sites and elements of human-altered landscapes now inundated; scatters of artefacts, whether originally found on dry land or cargoes from ships; and deposits of human or animal bone;
 - b. enable designation to be made on the basis of 'national importance' as defined in Annex A (adapted from the criteria set down in SHEP 2 on Scheduling of ancient monuments – see Note 22), so that these criteria can be used for all 'archaeological sites and monuments of national importance' on land and at sea;
 - c. set out a range of operations that might affect the marine historic environment and over which the legislation would exercise control. If applied to a particular asset these operations would be unlawful unless a licence from Scottish Ministers had been obtained; if disappplied, (d) below;

- d. require documentation in a designation order of the objectives of designation and a list of operations that would be prohibited, restricted under certain conditions, or disapplied, and why these decisions had been made. The focus of disapplication would be to ensure that non-damaging seabed activities would not be unreasonably prohibited or the subject of burdensome licensing;
- e. set out mechanisms for consultation in advance of designation with owners and others with an interest in the marine historic asset; government departments with responsibility for marine management; the Maritime and Coastguard Agency; any new Marine Management Organisations that may emerge (e.g. from Marine Bills); the Crown Estate; any relevant local planning authority, port or harbour authority, fisheries management or nature conservation body;
- f. establish powers of interim protection which would enable Scottish Ministers to protect the asset and vary levels of control from the start of any consultation period until a designation decision had been made;
- g. provide for voluntary agreements with owners, others with a legal interest in the asset, and with third parties who may have a legitimate interest, for example in managing or making accessible a designated marine historic asset;
- h. establish appeal procedures against licensing decisions via public local inquiry;
- i. require means, such as publication on the successful PASTMAP website (see Note 23) and through the digital and paper products of the UK Hydrographic Office, for making designation information and guidance widely available;
- j. provide Scottish Ministers with powers to spend money on the operation of the designation and consent system, and the management of designated sites.

- 5.3 It would not be the intention of Scottish Ministers significantly to increase the number of designated marine historic assets, rather to improve the effectiveness of the legislation used. The scope of this proposed legislation would be from the Mean High Water tidal Spring mark to 12 nautical miles. Scottish Ministers would retain powers to extend terrestrial designation to a limited distance out to sea to take account of marine historic assets that cross the tidal boundary. Assets in the area of overlap could be designated by whichever legislation best met the needs and circumstances of each site.

Question 5:

Do you agree with proposals for new legislation in this area?

Question 6:

Do you have any views as to how duties in relation to the marine historic environment might be split between Historic Scotland and any Marine Management Organisation?

Question 7:

Do you consider that anything is missing? In your response, please note that matters relating to salvage are the concern of international maritime law and regulation of shipping. Such matters are reserved to the Westminster Parliament under the terms of the Scotland Act 1998.

6 Implementation

- 6.1 Scottish Ministers' policies for the marine historic environment can only be achieved by government and non-governmental organisations working closely together, and in partnership with advisory bodies, scientific institutions, the museum sector, sea-users, both commercial and for leisure, and the general public.
- 6.2 Scottish Ministers look to Historic Scotland to continue to identify which of Scotland's marine historic assets merit statutory designation (see Note 24), to maintain registers of designated historic assets and their condition, to advise on proposals for change which might affect these historic assets, and to promote wider enjoyment and understanding.
- 6.3 In the interests of sustainable development of the marine zone, Scottish Ministers welcome the steps taken by:
- a. the Royal Commission on the Ancient and Historical Monuments of Scotland and local authorities whose jurisdiction extends into the sea, to integrate information about marine historic assets within their inventories of sites and related archives;
 - b. the Crown Estate, industry and others for establishing best-practice procedures as to how the historic environment should be considered in respect of seabed development, as defined in the *JNAPC Code of Practice for Seabed Development* (see Note 21).
- 6.4 Scottish Ministers want to pursue further integration of historic environment matters within environmental assessment, marine planning and seabed consenting regimes as they develop. The intention must be to create clear boundaries, to clarify responsibilities and working methods, and to develop a system with appropriate capacity. In light of this Scottish Ministers propose to consider with local authorities their role and that of their historic environment advisors in the marine zone, in the context of the proposed Scottish Government consultations on wider marine legislation for Scotland.

Question 8:

What do you think might be the role of the local authorities and their historic environment advisors in relation to the marine historic environment and what are the key issues that need to be overcome?

Question 9:

What new mechanisms and procedures might be required to provide for the management of change in relation to planning matters in connection with Scotland's marine historic environment?

Question 10:

Given that science and recording has a major role to play in improving knowledge about sites and monuments on the seabed, how can Scottish Ministers and agencies charged with relevant responsibilities best assist in progressing knowledge about Scotland's marine historic environment?

7. Contacts

7.1 Further information on the marine historic environment can be found on Historic Scotland's website www.historic-scotland.gov.uk.

7.2 Specific queries on this paper should be directed to:

Philip Robertson
Historic Scotland
Longmore House
Salisbury Place
Edinburgh
EH9 1SH
0131 668 8843
HS.Inspectorate@scotland.gsi.gov.uk

Notes

- Note 1. The text of the White Paper *Heritage Protection for the 21st Century* is available at: www.culture.gov.uk/Reference_library/Consultations/2007_closed_consultations/hpr_whitepaper07
- Note 2. SHEP 1 is available at: www.historic-scotland.gov.uk/shep1
- Note 3. The text of *Conserving Our Underwater Heritage* is available at: www.historic-scotland.gov.uk/underwater.pdf
- Note 4. A copy of the consultation *Protecting the Marine Historic Environment, Making the System Work Better* and responses to it are available at: www.culture.gov.uk/Reference_library/Consultations/2004_closed_consultations/marine_historic
- Note 5. The text of the Valetta Convention can be consulted at: www.conventions.coe.int/Treaty/en/Treaties/Html/143.htm
- Note 6. The Ancient Monuments and Archaeological Areas Act 1979 sections 61(7) specifically mentions vehicles, vessels and aircraft in the definition of monuments.
- Note 7. The text of the European Commission's *Integrated Maritime Policy for the European Union 'the Blue Book'* is available at: ec.europa.eu/maritimeaffairs/index_en
- Note 8. The text of the Marine Bill White Paper: *A Sea Change* is available at www.defra.gov.uk/corporate/consult/marinebill-whitepaper07/index.htm
- Note 9. The text of the recommendations of the Advisory Group on Marine and Coastal Strategy (AGMACS) is available at: www.scotland.gov.uk/Publications/2007/03/08103826/0
- Note 10. For information on the system of 'Treasure Trove' see www.treasuretrovescotland.co.uk/

- Note 11. Under section 255 of the Merchant Shipping Act 1995, ‘wreck’ is defined as including ‘jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water’. Under section 236, recoveries of ‘wreck’ must be reported to the Receiver of Wreck (Maritime and Coastguard Agency). Finders who report their finds to the Receiver of Wreck have salvage rights. The Receiver of Wreck acts to settle questions of ownership and salvage.
- Note 12. 19th- and 20th-century legal precedents extended the concepts of ‘derelict’ and ‘salvor in possession’ to include the remains of sunken vessels worked by divers, thereby giving an archaeologist or salvor who manifests controls over a site the ability to acquire a possessory right enforceable against the world, including the Crown (www.english-heritage.org.uk/upload/pdf/marine_archaeology_legislation_project.pdf)
- Note 13. The Protection of Military Remains Act 1986 is administered by the Ministry of Defence. ‘Protected Places’ are the remains of any aircraft which crashed in military service, or of any vessel designated (by name, not location) which sunk or stranded in military service after 4 August 1914. ‘Controlled Sites’ are designated areas comprising the remains of a military aircraft or a vessel sunk or stranded in military service less than 200 years ago. Unlicensed diving is prohibited on Controlled Sites but a licence to dive ‘on a look but do not touch’ basis is not required for Protected Places.
- Note 14. The licensing authority for Part II of the Food and Environment Protection Act, on behalf of Scottish Ministers is currently Fisheries Research Services Marine Laboratory (FRS-ML).
- Note 15. A consent under section 34 of the Coast Protection Act 1949 is likely to be required where activities involve construction, alteration or improvement of works, removal of objects from, or deposits on the seashore below the level of mean high water springs, that may prejudice navigational safety. Consents are issued on behalf of Scottish Ministers by the Ports and Harbours branch of the Scottish Government.

- Note 16. The Harbours 1964 Act provides powers to make five types of Order, the general purpose of which is to amend existing local harbour legislation and to reduce the need for Private Acts. More specifically, Orders convey on harbour authorities the powers to undertake works, and also to manage and operate harbours in compliance with a range of rights and responsibilities. Statutory Harbour Authorities have permitted development rights within their areas of jurisdiction. However, this does not avoid requirements in relation to environmental assessments and does not over-ride legislation in respect of listed buildings or scheduled monuments.
- Note 17. Under section 36 of the Electricity Act 1989, a consent is required from the Scottish Ministers for the construction, extension or operation of a generating station of over 50MW (megawatts) in capacity, unless otherwise exempted. The Energy Consents Unit of the Scottish Government's Energy Division is responsible for considering applications and issuing consents. The provisions of Schedule 9 of this Act govern the way companies must operate in connection with the historic environment.
- Note 18. Scottish Planning Policy (SPP) 22 *Planning for Fish Farming* details Scottish Ministers' extension of statutory planning controls for marine fish farming (finfish and shellfish) to cover the marine waters defined in the Water Environment and Water Services (Scotland) Act 2003 as coastal and transitional waters, and extended to territorial waters by the Planning etc. (Scotland) Act 2006. A copy of SPP 22 is available at www.scotland.gov.uk/Publications/2007/03/29102058/0
- Note 19. For example, under the Zetland County Council (ZCC) Act 1974, Shetland Islands Council (SIC) has authority over most marine management issues out to 12 nautical miles. SIC issues works licences for most marine developments through the ZCC Act.
- Note 20. The text of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage is available at: www.unesco.org/culture/legalprotection/water/images/engconv.doc
The Annex to the Convention is attached to this SHEP as Annex B.
- Note 21. The text of the *JNAPC Code of Practice for Seabed Archaeology* is available at: www.jnapc.org.uk

- Note 22. A copy of SHEP 2 is available at www.historic-scotland.gov.uk/shep2
- Note 23. PASTMAP is available online at www.pastmap.org
- Note 24. Where designation and licensing matters under the Protection of Wrecks Act 1973 is concerned, a Memorandum of Understanding is in place between the DCMS and the Devolved Administrations which states that Historic Scotland on behalf of Scottish Ministers, will take advice from a UK-wide Advisory Committee for Historic Wreck Sites (ACHWS) and other parties.

Annex A

Proposed criteria and guidance for the determination of ‘National Importance’ for the designation of marine historic environment assets (as defined at 5.2a above)

Cultural significance

1. The first step in considering whether an asset is of national importance is to identify and understand its cultural significance. The concept of ‘cultural significance’ will apply widely and to different degrees to all of Scotland’s historic environment, and should not be confused with the establishment of ‘national importance’, which is a separate process. For an asset to be considered as being of national importance it must, first, have a particular cultural significance – artistic; archaeological; architectural; historic; traditional; aesthetic; scientific; social – for past, present or future generations. Such significance is inherent in the asset itself, its nature, setting, use, associations, meanings, records, related assets and related objects.
2. The relationship of marine historic assets to the adjacent land can be complex and variable. Some elements may have been integral parts of adjacent landmasses, now inundated. In the case of wrecks or material associated with wrecks of vessels or aircraft, some have strong and far-reaching connections; others may have a transitory association but little or no original link to the places in which they have come to rest.
3. Cultural significance of any asset, whether of national importance or more local significance, can be characterised by reference to one or more of the following; the characteristics are in three groups:
 - **Intrinsic** – those inherent in the asset;
 - **Contextual** – those relating to the asset’s place in its wider physical environment or in the body of existing knowledge; and
 - **Associative** – more subjective assessments of the associations of the asset, including with current or past aesthetic preferences.

Intrinsic characteristics

- a. The condition in which the asset has survived. ‘Condition’ includes potential survival of archaeological evidence, and goes beyond the survival of marked field characteristics;
- b. the archaeological, scientific, technological or other interest or research potential of the asset or any part of it;
- c. the original or subsequent functions of the asset and its parts;
- d. the apparent developmental sequence of the asset.

Contextual characteristics

- e. The present rarity or representativeness of all or any part of the asset, assessed against knowledge of the history and archaeology of Scotland, its seas, and their place in the wider world;
- f. the relationship of the asset to others of the same or related classes or period, or to features or other assets in the vicinity. This is particularly important where individual assets, themselves perhaps of limited immediate significance, form an important part of a widespread but varied class. The diversity of the class should be a material consideration in making individual decisions;
- g. the relationship of the asset and its parts with its wider physical environment and setting.

Associative characteristics

- h. The historical, cultural and social influences that have affected the form and fabric of the asset, and vice versa;
- i. the aesthetic attributes of the asset;
- j. its significance in the national consciousness or to people who use or have used the asset, or descendants of such people; and
- k. the associations the asset has with historical, traditional or artistic characters or events.

4. Understanding of cultural significance may change as a result of the continuing history of the asset, or in the light of new information, or changing ideas and values.

National importance

5. The primary purpose of designation of marine historic assets is the preservation of, and control of activities or works that might affect such assets, the survival of which is in the national interest.
6. The purpose and implications of designation are issues that require to be taken into consideration when assessing candidates for designation. Designation may not be the only, or the most appropriate, mechanism to secure the future of all assets, even those that may otherwise meet the criteria.
7. The particular significance needed to define the asset as of 'national' importance may be established in terms of one or more of the following:
 - a. its inherent capability or potential to make a significant addition to the understanding or appreciation of the past;
 - b. its retention of the structural, technical, decorative or other characteristics of its kind to a marked degree;
 - c. its contribution, or the contribution of its class to the wider marine historic environment and/or the wider marine environment;
 - d. the quality and extent of any documentation or association that adds to the understanding of the asset or its context;
 - e. the diminution of the potential of a particular class or classes of asset to contribute to an understanding of the past, should it be lost or damaged; and
 - f. its place in the national consciousness is a factor that may be considered in support of other factors.

Annex B

Rules concerning activities directed at underwater cultural heritage (the Annex to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage)

[The UK government abstained from voting on the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage but accepted that the Convention's Annex represents 'best practice for archaeology'.]

I General principles

Rule 1 The protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorized in a manner consistent with the protection of that heritage, and subject to that requirement may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.

Rule 2 The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.

This Rule cannot be interpreted as preventing:

- a. the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities;
- b. the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its

irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34; and is subject to the authorization of the competent authorities.

Rule 3 Activities directed at underwater cultural heritage shall not adversely affect the underwater cultural heritage more than is necessary for the objectives of the project.

Rule 4 Activities directed at underwater cultural heritage must use non-destructive techniques and survey methods in preference to recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains.

Rule 5 Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.

Rule 6 Activities directed at underwater cultural heritage shall be strictly regulated to ensure proper recording of cultural, historical and archaeological information.

Rule 7 Public access to *in situ* underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management.

Rule 8 International cooperation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals.

II Project design

Rule 9 Prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authorities for authorization and appropriate peer review.

- Rule 10* The project design shall include:
- a. an evaluation of previous or preliminary studies;
 - b. the project statement and objectives;
 - c. the methodology to be used and the techniques to be employed;
 - d. the anticipated funding;
 - e. an expected timetable for completion of the project;
 - f. the composition of the team and the qualifications, responsibilities and experience of each team member;
 - g. plans for post-fieldwork analysis and other activities;
 - h. a conservation programme for artefacts and the site in close cooperation with the competent authorities;
 - i. a site management and maintenance policy for the whole duration of the project;
 - j. a documentation programme;
 - k. a safety policy;
 - l. an environmental policy;
 - m. arrangements for collaboration with museums and other institutions, in particular scientific institutions;
 - n. report preparation;
 - o. deposition of archives, including underwater cultural heritage removed;
 - p. a programme for publication.

Rule 11 Activities directed at underwater cultural heritage shall be carried out in accordance with the project design approved by the competent authorities.

Rule 12 Where unexpected discoveries are made or circumstances change, the project design shall be reviewed and amended with the approval of the competent authorities.

Rule 13 In cases of urgency or chance discoveries, activities directed at the underwater cultural heritage, including conservation measures or activities for a period of short duration, in particular site stabilization, may be authorized in the absence of a project design in order to protect the underwater cultural heritage.

III Preliminary work

Rule 14 The preliminary work referred to in Rule 10 (a) shall include an assessment that evaluates the significance and vulnerability of the underwater cultural heritage and the surrounding natural environment to damage by the proposed project, and the potential to obtain data that would meet the project objectives.

Rule 15 The assessment shall also include background studies of available historical and archaeological evidence, the archaeological and environmental characteristics of the site, and the consequences of any potential intrusion for the long-term stability of the underwater cultural heritage affected by the activities.

IV Project objective, methodology and techniques

Rule 16 The methodology shall comply with the project objectives, and the techniques employed shall be as non-intrusive as possible.

V Funding

Rule 17 Except in cases of emergency to protect underwater cultural heritage, an adequate funding base shall be assured in advance of any activity, sufficient to complete all stages of the project design, including conservation, documentation and curation of recovered artefacts, and report preparation and dissemination.

Rule 18 The project design shall demonstrate an ability, such as by securing a bond, to fund the project through to completion.

Rule 19 The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption of anticipated funding.

VI Project duration – timetable

Rule 20 An adequate timetable shall be developed to assure in advance of any activity directed at underwater cultural heritage the completion of all stages of the project design, including conservation, documentation and curation of recovered underwater cultural heritage, as well as report preparation and dissemination.

Rule 21 The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption or termination of the project.

VII Competence and qualifications

Rule 22 Activities directed at underwater cultural heritage shall only be undertaken under the direction and control of, and in the regular presence of, a qualified underwater archaeologist with scientific competence appropriate to the project.

Rule 23 All persons on the project team shall be qualified and have demonstrated competence appropriate to their roles in the project.

VIII Conservation and site management

Rule 24 The conservation programme shall provide for the treatment of the archaeological remains during the activities directed at underwater cultural heritage, during transit and in the long term. Conservation shall be carried out in accordance with current professional standards.

Rule 25 The site management programme shall provide for the protection and management *in situ* of underwater cultural heritage, in the course of and upon termination of fieldwork. The programme shall include public information, reasonable provision for site stabilization, monitoring, and protection against interference.

IX Documentation

Rule 26 The documentation programme shall set out thorough documentation including a progress report of activities directed at underwater cultural heritage, in accordance with current professional standards of archaeological documentation.

Rule 27 Documentation shall include, at a minimum, a comprehensive record of the site, including the provenance of underwater cultural heritage moved or removed in the course of the activities directed at underwater cultural heritage, field notes, plans, drawings, sections, and photographs or recording in other media.

X Safety

Rule 28 A safety policy shall be prepared that is adequate to ensure the safety and health of the project team and third parties and that is in conformity with any applicable statutory and professional requirements.

XI Environment

Rule 29 An environmental policy shall be prepared that is adequate to ensure that the seabed and marine life are not unduly disturbed.

XII Reporting

- Rule 30* Interim and final reports shall be made available according to the timetable set out in the project design, and deposited in relevant public records.
- Rule 31* Reports shall include:
- a. an account of the objectives;
 - b. an account of the methods and techniques employed;
 - c. an account of the results achieved;
 - d. basic graphic and photographic documentation on all phases of the activity;
 - e. recommendations concerning conservation and curation of the site and of any underwater cultural heritage removed; and
 - f. recommendations for future activities.

XIII Curation of project archives

- Rule 32* Arrangements for curation of the project archives shall be agreed to before any activity commences, and shall be set out in the project design.
- Rule 33* The project archives, including any underwater cultural heritage removed and a copy of all supporting documentation shall, as far as possible, be kept together and intact as a collection in a manner that is available for professional and public access as well as for the curation of the archives. This should be done as rapidly as possible and in any case not later than ten years from the completion of the project, in so far as may be compatible with conservation of the underwater cultural heritage.
- Rule 34* The project archives shall be managed according to international professional standards, and subject to the authorization of the competent authorities.

XIV Dissemination

Rule 35 Projects shall provide for public education and popular presentation of the project results where appropriate.

Rule 36 A final synthesis of a project shall be:

- a. made public as soon as possible, having regard to the complexity of the project and the confidential or sensitive nature of the information; and
- b. deposited in relevant public records.

Annex C

Partial Regulatory Impact Assessment

1. Title of proposal

- 1.1 Scottish Historic Environment Policy: the Marine Historic Environment

2 Purpose and intended effect

2.1 Objectives

Scottish Ministers wish to develop and publish policy in relation to the marine historic environment and to take forward proposals for new legislation to protect marine historic assets on the seabed of Scotland's territorial waters (from Mean High Water and out to 12 nautical miles offshore). The intention is for new legislation to be in place in the period 2010–13.

2.2 Background

Our marine environment has a historical dimension that contributes to its quality and character. Marine historic assets are also positive contributors to the cultural, economic and social fabric of Scotland. People want to see the most important marine historic assets safeguarded and used sustainably for the benefit of current and future generations.

Scottish Ministers, through Historic Scotland, already have legislation in place to protect Scotland's most important marine historic assets. However, the existing legislative framework is widely considered ineffective and burdensome.

2.3 Rationale for government intervention

The UK is party to the European Convention on the Protection of the Archaeological Heritage – more commonly known as the 'Valetta Convention', which requires that the historic environment, on land and underwater, is protected and that change is undertaken on the basis of sound evidence. If we did not carry out these duties the UK would be in breach of its international obligations.

The case for change to legislation originates in long-held and widespread disquiet with the effectiveness of the existing legislative framework in the marine environment:

- The Protection of Wrecks Act 1973 is a UK-wide act which can only be applied to shipwrecks and the remains of these. It controls activities through a licensing regime that is considered by many to be inflexible and overly burdensome. For example, a licence from Historic Scotland is required simply to visit a historic wreck designated under the Protection of Wrecks Act 1973;
- the Ancient Monuments and Archaeological Areas Act 1979 has been applied to underwater monuments in Scotland but it has been very difficult to enforce at sea and arguably ineffective;
- the scope of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 stops at the low water mark.

Following extensive UK-wide consultation, the UK Government will take forward its Heritage Protection Bill to deliver proposals for new legislation to protect the marine historic environment in England, Wales, and Northern Ireland. If Scotland does not follow suit, Scottish Ministers through Historic Scotland will continue to apply the same legislation as at present.

To deliver parallel benefits in Scotland, and to streamline administration across boundaries at sea, Scottish Ministers propose to introduce new legislation in the Scottish Parliament. It is intended that the new legislation will repeal the application of section 1 of the Protection of Wrecks Act 1973 and effectively replace use of the Ancient Monuments and Archaeological Areas Act 1979 at sea. It will be applicable to all classes of archaeological sites and monuments that are found on Scotland's seabed. The new law will introduce a more flexible range of controls applicable as required. The focus will be on recognising the particular needs of each designated historic asset, avoiding burdensome licensing where at all possible.

The protection of the remaining seven wrecks of the German High Seas Fleet scuttled in Scapa Flow in 1919 provides a useful example of how this new legislation could help to improve effectiveness and streamline administration for regulators and stakeholders. These scheduled monuments would instead be designated under new legislation, with the effect that there would be no defence of ignorance nor doubt as to whether recovery by

divers of loose artefacts from the seabed could be challenged under the law. However, dive-boat owners would not have to apply for a licence for their visitors simply to dive on a ‘look but don’t touch basis’.

3. Consultation

In 2004–05 the Department of Culture Media and Sport (DCMS) and the Devolved Administrations carried out a public consultation, *Protecting the Marine Historic Environment, Making the System Work Better* (see Note 4). The responses to this and subsequent extensive scoping work resulted in proposals for new legislation to protect the marine historic environment as set out in a White Paper, *Heritage Protection for the 21st Century*. This SHEP consultation provides opportunities for further Scottish Government and public consultation on the proposals and how they will relate to Scotland.

4. Options

In this area of work, the Scottish Ministers have the following options available to them:

Option 1 – do nothing

If nothing is done then Scottish Ministers, through Historic Scotland, would continue to apply legislation that is widely considered ineffective and burdensome. Stakeholders with a legitimate interest in designated marine historic assets may continue to experience dissatisfaction with existing provisions. At the same time, new legislation may be expected to deliver new benefits to the historic environment and its stakeholders in England, Wales, and Northern Ireland.

Option 2 – take forward proposals for new legislation to protect the marine historic environment in Scotland.

This would mean introducing new legislation in the Scottish Parliament. Once such new legislation was in place, it would not be the intention of Scottish Ministers significantly to increase the number of designated marine historic assets, rather to improve the effectiveness of the law to safeguard Scotland’s most important marine historic assets for future generations.

In relation to the two options outlined:

- a. *risks* – there are certain risks involved in any of these options. For example, it has to be ensured that any legislation is in line with wider legislation and international obligations. The legislative framework has to be fit for purpose and it must also conform to wider Scottish Government policy;
- b. *compliance and enforcement* – as at present, responsibility for enacting and enforcing this legislation will rest with Scottish Ministers through Historic Scotland;
- c. *unintended consequences* – if the proposed legislation is itself not fit for purpose then it is possible that the intended clearer structure for the protection of the marine historic environment will not be put in place;
- d. *implementation and ownership* – Historic Scotland will be responsible for consistent and transparent implementation of this new legislation, and for developing and distributing widely, clear guidance to accompany these new provisions.

5. Costs and benefits

5.1 Sectors and groups affected

There are many diverse groups with a legitimate interest in the marine environment, including the marine historic environment. Therefore, the policies discussed in this consultation will have some relevance to a wide range of stakeholders including regulators, curators, advisory bodies, scientific institutions, the museum sector, industry, and the general public.

5.2 Analysis of costs and benefits

Do nothing option

There will be no additional costs and benefits associated with this option.

Take forward proposals for new legislation

No additional resources are needed within Historic Scotland. In Scottish Government, provision is being made for a Scottish Marine Bill. Once in place, identification of candidate sites for designation will involve field assessment, as is currently the case. The role of the non-statutory UK-wide Advisory Committee on Historic Wreck Sites, a cross-border authority under the terms of the Scotland Act 1998, will need to be considered under this new legislation.

There is no intention significantly to increase the number of designated marine historic assets (there are currently 15 wrecks below Mean Low Water that have protected status; it is possible to imagine that new legislation might double this number over ten years). It is also hoped that the ability to stipulate what controls are in place for what sites will help to minimise the regulatory burden for all concerned.

6. Small Firms Impact Test

Historic Scotland does not consider that any changes to the system coming out of this consultation will have a significant impact on small firms. Indeed, the intention is to reduce the regulatory burden as much as possible and this should save small firms money in terms of administration and effort. We would, however, welcome comments from small firms who think it may have an impact. Historic Scotland will liaise with businesses and/or their representatives if we become aware of any costs or impacts further down the line

7. Competition Assessment

Historic Scotland is not aware of any competition impact but would welcome comments from anyone who thinks there might be.

8. Enforcement, sanctions, monitoring

Decisions on licensing will continue to be made on the basis of field assessment, liaison with licensees, and informed professional judgement by Historic Scotland. There will not be any new sanctions in place different to what is applicable under the Protection of Wrecks Act 1973. Compliance will be tested in the same manner as now- that is through reporting and inspection. Historic Scotland will be responsible for undertaking a review of the effectiveness of the new legislation within three years of it coming into force.

Annex D

Equality Impact Assessment

Historic Scotland considers it may have to produce an Equality Impact Assessment for this SHEP on the marine historic environment and invites your views on this policy in that regard. We would also welcome any information which may assist us with an assessment and recognise that this assessment might mean that changes to this policy will be required as a result of the consultation. In your response it would be helpful to know what you consider the equality issues to be.

