

1. Legislation and policy on the protection of the archaeological heritage during road construction

Seán Kirwan



Route selection for national road schemes avoids known monuments. This complex of medieval earthworks in County Kilkenny was within the study area for a proposed N9–N10 scheme (Valerie J Keeley Ltd)

Introduction

This paper will outline the main aspects of legislation and policy on the protection of the archaeological heritage with special reference to road construction. It is not intended as a detailed account of all aspects of archaeological legislation as its focus is on matters of particular relevance to the present context. For more detail on legislation relating to the archaeological heritage readers may consult the policy document *Framework and Principles for the Protection of the Archaeological Heritage* (DAHGI 1999a) and articles by Kirwan (1998 & 1999) and MacRory & Kirwan (2001).

This paper does not, of course, constitute a legal interpretation (nor does any of the articles cited above). While reference is made to various aspects of the archaeological policies of the Minister for Arts, Heritage, Gaeltacht and the Islands, the formal statements of those policies are set out in the published policy documents cited below.

Legislative and administrative framework

The Minister for Arts, Heritage, Gaeltacht and the Islands is the national authority with responsibility for protection of the archaeological heritage. The role of the Minister is partly executive and partly advisory. The executive role is formed by the exercise of functions under the *National Monuments Acts 1930 to 1994*. The advisory role is in relation to certain bodies, including local authorities, and aims to ensure that appropriate protection is afforded to the archaeological heritage in the course of the exercise of their functions. In some cases this advisory role has a specific statutory basis. Thus, there are requirements in development control legislation that the Minister be consulted about proposed development (e.g. certain requirements in the *Planning and Development Regulations 2001* — S.I. 600 of 2001).

Dúchas the Heritage Service is an integral part of the Department of Arts, Heritage, Gaeltacht and the Islands. It carries out a range of functions under the National Monuments Acts on behalf of the Minister, including the maintenance of the statutory Record of Monuments and Places, the making of Preservation Orders and the licensing of archaeological excavations. It also carries out the advisory functions referred to above on behalf of the Minister.

The National Monuments Acts assign functions to the Director of the National Museum of Ireland in respect of finds of archaeological objects. The Acts also provide for the Minister to consult the Director of the National Museum before issuing an excavation licence. It should be noted that the role of the Director in the licensing of archaeological excavations is consultative and the statutory power to grant or refuse an excavation licence rests exclusively with the Minister. The National Museum also deals, on behalf of the Minister, with licensing the alteration and export of archaeological objects.

The *Roads Act 1993* provides the statutory basis for the National Roads Authority and its work with local authorities in the construction of the national road network. The 1993 Act gives local authorities a statutory function as roads authorities. Legislative provisions for archaeological issues within the exercise of those functions will be examined below.

Development control legislation and the archaeological legislation

The National Monuments Acts focus on the protection of identified or known archaeological monuments. But all monuments — as defined by the Acts — do not enjoy automatic protection. A monument is afforded no protection under the Acts unless one or other of the various protective mechanisms established under the Acts is applied to it. (In contrast, there is automatic protection for archaeological objects, as defined in the Acts, and wrecks over 100 years old.) Once archaeological monuments are so protected, the National Monuments Acts become directly relevant to the regulation of any proposed development affecting them. On the other hand, the statutory basis for ameliorating the impact of proposed development on as yet unidentified archaeological monuments comes primarily from development control legislation. Even for known archaeological monuments, the operation of development control legislation is essential in ensuring that archaeological implications are considered at an early stage in the planning of a development. If this is left until after development consent has been given, to be addressed instead under the National Monuments Acts, delays to development and difficulties in addressing archaeological needs may arise.

The National Monuments Acts require that archaeological excavation be done only under licence from the Minister for Arts, Heritage, Gaeltacht and the Islands. While it is possible for the Acts to be used to prevent an archaeological excavation, they cannot be used to require that such an excavation take place in the first instance. The legal requirements on developers to carry out test excavation where no known monuments exist, or to undertake archaeological monitoring of topsoil removal so as to locate previously unidentified monuments, come from the operation of development control legislation.

The importance of development control legislation in ensuring consideration of the archaeological heritage at the early stages of road projects and in protecting previously unidentified archaeological monuments at all stages is clear. Indeed, it can be said that development control legislation is, to a very large extent, the basis for the consideration, at least in the first instance, of archaeological issues in the road construction process, and not the National Monuments Acts. (This should not be taken to imply weakness in the National Monuments Acts.) Such legislation will therefore be considered first. Whatever provisions might be available under the National Monuments Acts, it is imperative that due consideration be given to archaeological concerns in the operation of the various codes which regulate development. This will help to avoid conflict between development and archaeology, conflict which is not in anyone's interest, including developers. As will be seen below, integration of archaeological concerns into the development process is a key aspect of international and national policies in the field of archaeological heritage protection.

Development control legislation and the protection of the archaeological heritage

The *Roads Act 1993* provides the statutory basis for the work of the National Roads Authority (NRA) and gives local authorities functions as roads authorities. Road construction undertaken by the NRA and by local authorities within their own area is 'exempted development' for the purposes of the *Planning and Development Act 2000* (Section 4 of the 2000 Act and Section 19 (6) of the 1993 Act). This is the same position as under earlier planning legislation. This means that road construction of the type under discussion here is outside the scope of the planning system in respect of requirements to obtain planning permission.

In view of this, the provisions of the *Planning and Development Act 2000* for protection of the archaeological heritage will not be dealt with in detail here. It is worth noting, though, that planning legislation requires local authorities to prepare development plans which set out objectives for the proper planning and development of their areas. Under the 2000 Act the inclusion in development plans of objectives for protection of the archaeological heritage has moved from a discretionary basis to a mandatory one (Section 10 (2) (c) of the 2000 Act). (This is additional to objectives for the protection of the architectural heritage by inclusion in a local authority's Record of Protected Structures, under Section 10 (2) (f) of the Act.) The setting of such objectives in one form or another was, in any event, common under the provisions of the earlier legislation. Planning legislation prohibits a local authority from engaging in development that would be a material contravention of its development plan (Section 178 of the 2000 Act). The NRA has powers to give binding directions to local authorities that supersede that prohibition

(Section 20 of the 1993 Act). Still, there is also a requirement on the NRA to have due regard to the provisions of the relevant local authority development plan (Section 22 (2) (c) of the 1993 Act). It would appear, therefore, that any objectives of a local authority development plan for the protection of the archaeological heritage — as indeed for the natural and architectural heritage — should be taken into account in the planning of national road construction.

The *Roads Act 1993* provides the statutory basis for compliance by Ireland with the EU *Environmental Impact Assessment Directive* (85/337/EEC as amended by 97/11/EC). Road construction likely to have significant environmental effects is subject to such assessment. Section 50 of the 1993 Act requires a local authority to prepare an Environmental Impact Statement (EIS) in respect of any proposed motorway or any other category of road specified in regulations made by the Minister for the Environment and Local Government. The *Roads Regulations 1994* (S.I. 119 of 1994) specify roads of four or more lanes that are 8 km long or more in a rural area, or 500 m or more in an urban area. However, in accordance with the EU directive, Section 50 also requires the preparation of an EIS in respect of any road development falling below the threshold set in the regulations but which is still likely to have significant effects on the environment. The resulting EIS must address likely significant effects, direct and indirect, on ‘material assets’ and ‘cultural heritage’, among other matters, and propose measures to avoid or remedy significant adverse effects (Section 50). The terms ‘material assets’ and ‘cultural heritage’ are not defined, but by reference to the parent EU directive it is clear that these include archaeological and architectural heritage (Annex IV to the amended directive).

Road development in respect of which an EIS has been prepared cannot proceed unless approved by An Bord Pleanála, which must consider the EIS and submissions made to it under a statutory consultation process (Section 51 of the *Roads Act 1993* as amended by the *Planning and Development Act 2000*). As part of that consultation process a copy of the EIS must be sent by the local authority to the Minister for Arts, Heritage, Gaeltacht and the Islands. The Acts also provide that the EIS may be considered in the course of local public inquiries on either proposed motorways or proposed compulsory purchase of land for road construction.

The provisions of the *Roads Act 1993* relating to Environmental Impact Assessment, where they apply, provide great scope for ensuring the integration of archaeological concerns into the road construction process from the early planning stage through to final decision making. These provisions put the Environmental Impact Assessment of road construction projects in Ireland on a primary legislative footing. They follow from measures taken in the late 1980s to implement the EU directive through regulations made under the *European Communities Act 1972*.

The introduction of the Environmental Impact Assessment into Irish law is not the sole reason for the level of attention now paid to archaeological concerns in road construction. Other major factors have been the systematic identification of archaeological monuments in each county through the archaeological survey work of the National Monuments section of Dúchas and ongoing liaison between it and local authorities over a long period. The integration of environmental impact procedures into the legal framework for road construction has undoubtedly been a key development, however, and has been of particular importance in encouraging greater levels of pre-development archaeological assessment and amelioration of impacts on previously unidentified archaeological monuments.



Aerial view of the enclosing ditches at Carrickmines Castle on the M50 South-Eastern Motorway scheme (Valerie J Keeley Ltd)



Detail of the quarried, stone-faced defensive ditch at Carrickmines Castle on the M50 South-Eastern Motorway scheme (Valerie J Keeley Ltd)

Additional to the above, the *Planning and Development Act 2000* (Section 179) provides for a system of consultation and internal decision-making for development by local authorities within their own areas. The classes of development to which this applies are specified in regulations made by the Minister for the Environment and Local Government in the *Planning and Development Regulations 2001* (S.I. 600 of 2001). They include construction or widening of a road where this would, in an urban area, be 100 m long or more or would, in any other area, be 1 km or more. Where a proposed development of a specified class would, in the opinion of the local authority, affect or be unduly close to any monument protected under the National Monuments Acts, or any site or feature of archaeological interest (regardless of its status under those Acts), then notice of the proposal must be sent to the Minister for Arts, Heritage, Gaeltacht and the Islands (Part 8 of the 2001 Regulations). This system, which follows from a similar one under earlier planning legislation, is clearly more relevant to known or identified archaeological monuments than to as yet unidentified ones. Nonetheless, it provides a legal basis for consultation with the Minister regarding the archaeological implications of road development which may not come within the scope of an Environmental Impact Assessment.

Under the *Local Government Act 2001* (Section 69, following from a similar provision in the *Local Government Act 1991*) a local authority, in the exercise of its functions under any legislation, must have regard to policies and objectives of the government or of any government minister where these are relevant. A similar duty is placed by Section 143 of the *Planning and Development Act 2000* on An Bord Pleanála in respect of its functions (which, as already noted, include the approval of road projects for which an EIS has been prepared). These provisions point to the importance in the road construction process of due regard to the archaeological policies of the Minister for Arts, Heritage, Gaeltacht and the Islands, which derive from the *European Convention on the Protection of the Archaeological Heritage 1992* (Council of Europe 1992). Of course, it must be emphasised that the national road construction programme for which the NRA is responsible represents the implementation of clear government policy as set out in the *National Development Plan 2000–2006* (NDP 2000, 12–13 & 49–61). This in turn points to the need for, and the appropriateness of, a partnership approach between those State bodies involved in protection of the archaeological heritage and those responsible for road construction.

The National Monuments Acts and road construction

Elaborating on points touched on above, the *National Monuments Acts 1930 to 1994* give the Minister for Arts, Heritage, Gaeltacht and the Islands powers to protect monuments of archaeological, architectural or historic interest. Contrary to a common misconception, there is no restriction on the date of a monument to which the Acts may apply, although in practice they have been used more extensively in regard to prehistoric and medieval monuments than later ones. The Acts use the following defined terms:

- monument — in summary, any artificial structure (for the statutory definition see Section 2 of the 1930 Act as amended by Section 11 of the 1987 Act)
- historic monument — in summary, any monument dating to before AD 1700 and

also any other monument meeting specified criteria of interest (per Section 1 of the 1987 Act)

- archaeological area — in summary, any area of archaeological interest (per Section 1 of the 1987 Act)
- national monument — in summary, any monument the preservation of which is a matter of national importance by reason of archaeological, architectural, historic or other specified interest (per Section 2 of the 1930 Act).

It must be emphasised, again, that nothing is protected simply by coming within the definition of one of the above categories. A monument is only protected under the National Monuments Acts if it has been made subject to one or other of the monument protection mechanisms established under the Acts. In other words a monument is only protected if it is:

- included in the Record of Monuments and Places (Section 12 of the 1994 amending Act)
- or included in the Register of Historic Monuments, which may also include archaeological areas (Section 5 of the 1987 amending Act)
- or made subject to a Preservation Order or Temporary Preservation Order (Section 8 of the 1930 Act and Section 4 of the 1954 amending Act)
- or is a national monument in the ownership or guardianship of the Minister or a local authority.

The Record of Monuments and Places (RMP) is the most widely applied of the above mechanisms and is of most immediate relevance to anyone involved in planning road construction. The results of the Archaeological Survey of Ireland carried out by Dúchas were included in the RMP, resulting in well over 100,000 entries. A list of monuments in the RMP, with accompanying location maps, has been issued for each county in the State, following the previous issue, from the mid 1980s, of non-statutory Sites and Monuments Records for each county (for more detail see DAHGI 1999a, 16–17 & 37–38). The RMP lists and maps are required under Section 12 of the 1994 Act to be publicly exhibited in accordance with regulations made by the Minister for Arts, Heritage, Gaeltacht and the Islands (S.I. 341 of 1994).

Notice of two months must be given to the Minister for Arts, Heritage, Gaeltacht and the Islands of any proposed works affecting a monument, place or archaeological area included in the Record of Monuments and Places or the Register of Historic Monuments. Entry on these lists provides no protection beyond that. Full protection (i.e. requirement that any interference must have the consent of the Minister) can be afforded to monuments through the making of Preservation Orders (either full or temporary orders; the latter lapse after six months). However, before such an order can be made the monument must be under threat and the Minister must be of the opinion that it meets the definition of a

‘national monument’. Preservation Orders are largely a reactive mechanism, therefore, which deal with situations where it not possible to secure the protection of a monument by other means. If development has been planned and undertaken with archaeological considerations taken into account appropriately, the making of Preservation Orders should not arise.

The Acts provide full automatic protection for all wrecks over 100 years old and for all underwater archaeological objects (Section 3 of the 1987 Act). This applies to wrecks in inland waters as well as in maritime areas and may be relevant, therefore, in the context of road construction. Finds of archaeological objects are also protected and must be reported to the Director of the National Museum of Ireland. Finds made in the course of a licensed archaeological excavation, however, are exempted from this (Section 23 of the 1930 Act as amended by Section 19 of the 1994 Act). The State is entitled to ownership of archaeological objects which have no known owner at the time of finding (Section 2 of the 1994 Act). (For the statutory definition of an archaeological object see Section 2 of the 1930 Act as amended by Section 14 of the 1994 Act.)

Again, returning to points already touched on, the *National Monuments Acts 1930* (Section 26 of the 1930 Act as amended by Section 21 of the 1994 Act) provide for the regulation of archaeological excavation. In summary, digging or excavating when carried out for the purpose of uncovering archaeological features or objects must only be done in accordance with a licence issued by the Minister. This applies to all persons, not just to archaeologists, and anywhere in the State, not just on monuments protected under the Acts. This provision complements the monument protection provisions of the Acts, therefore, and serves a different purpose. It should be noted that under this provision licences are issued to individuals for particular excavations and not as a general permission to excavate (Section 26 (2) refers to licences being issued in respect of ‘specified land’). Before Section 26 applies, digging or excavating must be for the purpose of uncovering archaeological features or objects. Because of this, a licence is not strictly required for archaeological monitoring of construction works (i.e. digging or excavating being carried out for non-archaeological reasons). However, it is the policy of the Minister to recommend that archaeologists engaged to monitor large-scale development should obtain an archaeological excavation licence. By doing so they put themselves in a better position to excavate any archaeological features which may be found with the minimum of delay to their clients, and exempt themselves from the obligation to report each find of an archaeological object (DAHGI 1999a, 29 & 1999b, 18–19).

Use of detection devices to search for archaeological objects anywhere in the State and possession of a detection device on any monument protected under the Acts also require a licence issued by the Minister for Arts, Heritage, Gaeltacht and the Islands (Section 2 of the 1987 Act as amended). Although originally introduced to stop the widespread damage being caused by use of metal detectors for treasure hunting, it may apply to some aspects of archaeological geophysical survey. However, it will only do so if the equipment being used comes within the definition of a ‘detection device’ set out in Section 2 of the 1987 Act: this requires that the device be designed or adapted for detecting or locating any metal or mineral. Also, as noted above, the provision relates to possession of a detection device on a protected monument or use of such a device anywhere to search for archaeological objects. The term ‘archaeological object’ appears to be defined in such a way as to include only moveable objects, and on that basis use of a detection device solely to search for fixed archaeological features

located outside of a protected monument would not be within the scope of the provision.

The National Monuments Acts and some related legislation are in the process of being revised and consolidated. Following a public consultation process, Heads of a Bill were prepared. The Heads (which set out the scope and aims of the proposed legislation) were approved by government in late 2001 and drafting of the Bill is now in progress. The Minister has issued a public information document with the aim of highlighting key aspects of the proposed legislation (DAHGI 2002b). A number of these are of particular relevance here. It is proposed to introduce a requirement to report discoveries of previously unidentified monuments of archaeological interest and these will be given a measure of interim protection. However, this will not apply to features uncovered in the course of licensed archaeological excavations and so need not pose difficulties for the road construction process. It is proposed to bring archaeological monitoring fully within the scope of the archaeological licensing system, at least in respect of large-scale development. This would ensure that such monitoring is done to an appropriate standard and would also ensure that delays which might otherwise arise when discoveries are made can be avoided. (This particular proposal is the subject of ongoing consideration.)

European Convention on the Protection of the Archaeological Heritage

In 1997 Ireland ratified the 1992 revised *European Convention on the Protection of the Archaeological Heritage* (Council of Europe 1992) — commonly known as the Valletta Convention. Negotiated under the auspices of the Council of Europe — which is of course an entirely separate body to the European Union — this international multilateral agreement is not an instrument of EU law and does not form part of the domestic law of the State. It does, however, place obligations on the State to be met through domestic legislation, policies and actions. Ireland ratified the Valletta Convention on the basis that existing legislation (in particular the National Monuments Acts and planning and other development control legislation) would provide the legal basis for compliance with its terms.

Articles 3 to 6 of the Convention are particularly relevant in the present context. Requirements under these articles include:

- making provision for the conservation of archaeological heritage, preferably *in situ* (Article 4)
- integrating archaeological concerns into the planning and development process (including Environmental Impact Assessment) and modifying plans with adverse effects on archaeological heritage (Article 5)
- ensuring that necessary resources are provided for archaeological work necessitated by major development schemes, from public or private sources as appropriate, and also making provision in the budgets of such schemes for pre-development studies and for publication (Article 6)
- ensuring conservation of elements of the archaeological heritage uncovered in archaeological excavations (Article 3)

- ensuring that archaeological excavations are undertaken in a scientific manner and only done by qualified, specially authorised persons (Article 3).

National policy on the protection of the archaeological heritage

The Valletta Convention provides the basis for all national policy on protection of the archaeological heritage. In 1999, in the context of furthering implementation of the Convention in Ireland, the Minister for Arts, Heritage, Gaeltacht and the Islands published two policy documents: *Framework and Principles for the Protection of the Archaeological Heritage* (DAHGI 1999a) and *Policy and Guidelines on Archaeological Excavation* (DAHGI 1999b). The first of these sets out the basic principles of national policy on the protection of the archaeological heritage and is directed, in particular, at those undertaking or authorising development. By promoting full consideration of the archaeological heritage in the development process it seeks to avoid unnecessary and damaging conflict between protection of the archaeological heritage and development. The principles set out in the document expand on those contained in the Valletta Convention and also draw on the principles of the ICOMOS (1990) *Charter on the Protection and Management of the Archaeological Heritage*. (This latter charter is neither an instrument of international law nor binding on the State, but it is recognised as a cornerstone in international thinking on heritage conservation.) Key aspects of the principles set out in the *Framework and Principles* document are as follows (and see in particular Part III of the document):

- emphasis on the non-renewable nature of the archaeological heritage and, arising from this, the need for a presumption in favour of preservation *in situ* and avoidance of impacts by development on that heritage
- the need to preserve by record if preservation *in situ* is not possible
- the importance of the fullest possible level of pre-development archaeological assessment, both in respect of known sites and as yet unidentified ones
- the need for archaeological monitoring in certain circumstances to ensure that archaeological sites, whether known or as yet unidentified, are preserved either *in situ* or by record
- acknowledgement that the costs of archaeological work necessitated by development are a legitimate part of development costs.

The *Policy and Guidelines on Archaeological Excavation* (DAHGI 1999b) follows from the general principles and policies referred to above and addresses particular issues relating to archaeological excavation. Such issues include:

- grounds on which a proposed archaeological excavation may be considered justified

- the assessment of the competence and previous record of applicants for excavation licences
- the preparation and submission by applicants of appropriate excavation strategies
- requirements regarding publication of results of archaeological excavations.

The document builds on the important initiative taken in the early 1990s to establish an interview system whereby prospective applicants for archaeological excavation licences may have their competency assessed. It envisages the development of further, more detailed guidance. A review of the excavation licensing system was recently launched with the issue of a public consultation document (DAHGI 2001a) by the archaeological licensing section of Dúchas. This in itself reflects the particular importance of excavation licensing and the need to ensure that it operates effectively and efficiently.

It can be seen that the policies of the Minister for Arts, Heritage, Gaeltacht and the Islands, following from the Valletta Convention, attach great importance to the integration of archaeological considerations in planning and development. The need for such integration, for all forms of heritage, has been given clear recognition in the government policy statement on heritage set out in the recently published *National Heritage Plan* (DAHGI 2002a, 9). In particular, this declares the following principles to have been adopted by the government:

- all sectors and actors are responsible for advancing the conservation of heritage in their respective areas
- due regard will be had to the ‘polluter pays’ principle and to the precautionary principle.

Codes of Practice

In the context of the National Development Plan, the Minister for Arts, Heritage, Gaeltacht and the Islands and the NRA agreed a *Code of Practice* (NRA & DAHGI 2000) for the conduct of archaeological work on national road schemes. The provisions of the Code and its operation are discussed by K Hanley elsewhere in this proceedings. It suffices to say here that the aim of the Code is to facilitate the objectives of the NRA under the National Development Plan while ensuring that appropriate protection is provided for the archaeological heritage. This first *Code of Practice* has provided the model for subsequent codes agreed by the Minister for Arts, Heritage, Gaeltacht and the Islands with Bord Gáis Éireann (BGE & DAHGI 2001) and with the Irish Concrete Federation (ICF & DAHGI 2001).

Conclusion

Whatever specific archaeological legislation is in place, development control legislation is, and will remain, an essential tool in securing the protection of the archaeological heritage.

This avoids conflict between legislative codes and makes provision in a planned manner for the protection of previously unidentified archaeological features which may be found during development. The existing framework of development control legislation applying to road construction not only allows but promotes the consideration of archaeological issues in the road construction process. This is in line with the State's obligation under the Valletta Convention to integrate archaeological considerations in the planning and development process. The fullest possible level of such integration is explicitly promoted in the archaeological policies of the Minister for Arts, Heritage, Gaeltacht and the Islands. The integration of heritage concerns in all sectors is a principle of government policy as a whole. It must also be fully recognised, of course, that the current road construction programme under the National Development Plan is a central aspect of government policy. The statutory framework for road construction provides for due regard for all relevant government and ministerial policies.

A partnership approach between the State agencies with responsibility for road construction and heritage protection is the appropriate way forward in seeking to achieve the best possible protection of archaeological heritage in this context. The development and implementation of an agreed *Code of Practice* is a concrete and positive outcome of this approach.