



Response from the Faculty of Advocates

to the

Review of the Scottish Treasure Trove System

Introduction

1. The Faculty of Advocates is the professional body for members of the independent referral bar in Scotland. The majority of issues raised by this consultation concern the practical operation of the existing treasure trove system, on which the Faculty offers no view. In certain limited respects, however (in the context of questions 3a, 3b, 8a, 8b and 10), the consultation also raises questions of law, and the potential for reform of the law of treasure trove in Scotland. It is in those limited respects that the Faculty considers it appropriate to offer a response. The Faculty would welcome the opportunity to provide a further response in the event that there is a formal proposal to reform the law in this area.

Questions 3a & 3b: Archaeological human and animal remains; environmental samples

3a. Should the Treasure Trove system take on the role of allocating archaeological human and animal remains and environmental samples that have been excavated or found without any associated objects?

2. The Faculty is doubtful that in the present state of the law such a role would be appropriate. The Treasure Trove system is rooted in the Crown's rights under Scots common law: *Lord Advocate v University of Aberdeen* 1963 SC 533. It is clear that the Crown has no title to archaeological human remains, animal remains and environmental samples that are excavated or found without any associated portable antiquities.
3. The issue is complicated by the state of the common law on the violation of sepulchres (see *Stair Memorial Encyclopedia*, Criminal Law (2nd reissue) at paragraphs 421-426), although in any responsible archaeological dig, it appears unlikely that there would be any intention to disturb human remains that might be found, and hence the necessary *mens rea* may not exist. Reporting to the procurator fiscal or to the KLTR would be the obvious step where human remains are disturbed, particularly where no portable antiquities are found with them.
4. That there is concern today about potential commercial dealings with human remains of any age is evidenced by the correspondence sent to the Scottish Law Commission on [26 January 2023 by the Society of Antiquaries of Scotland](#). While this and related aspects of the law are not currently under review by the Commission, the Faculty considers that there is a case for clarifying the law with respect to human remains to enable the role of the Crown and the KLTR in this regard to be placed on a firm legal footing.

3b. If not, where do you consider the responsibility for this material lies?

5. We refer to the answer above. Where human remains are disturbed and disinterred in Scotland, the responsibility for them currently falls upon the person who disturbed them, the landowner and the Crown as prosecutor. In most cases, whether the disturbance was intentional or accidental, the remains would generally fall to be reinterred. Under the current law, we see no obvious role for museums.



Questions 8a & 8b: Ex gratia awards

8a. Is the principle of ex gratia awards linked to market value fair for finders and museums, and does it work well in practice?

6. The Faculty notes that the question is directed only to the interests of finders and museums. In England, Wales and Northern Ireland, under section 10 of the Treasure Act 1996 Act, a “reward” may be paid to: (a) the finder or any other person involved in the find; (b) the occupier of the land at the time of the find; and (c) any person who had an interest in the land at that time, or has had such an interest at any time since then. (Amendments made by the Coroners and Justice Act 2009 will, when brought into force, add a further category of person.) The Faculty suggests that section 10 of the 1996 Act, in so far as it permits the payment of a ‘reward’ to a variety of interested parties, goes some way towards recognising, as a matter of fairness, the different and potentially competing interests which may be involved in the finding of treasure, including, in particular, the potential impact on the property rights of a landowner or other occupier of land, in the land (as opposed to the ‘treasure’ found on it).

8b. Are there any measures concerning the method of setting of ex gratia awards that could increase confidence in the system?

7. The Faculty refers to its previous answer.

Question 10: Addressing non-reporting of finds

10. What more could be done to address deliberate non-reporting of finds and tackle dishonesty?

8. The Faculty notes that treasure is, as a matter of law, the property of the Crown; accordingly, failure to produce a find to the Crown will generally constitute theft (see *Mackenzie v Maclean* 1981 SLT (Sh Ct) 40). Finders are also under a positive obligation to disclose the finding of any abandoned property to either a police constable or the KLTR in terms of section 67 of the Civic Government (Scotland) Act 1982. Section 73 of that Act provides that the mere act of finding such property (which would include treasure) does not confer any right of ownership on the finder.
9. The Faculty considers that, at a minimum, the KLTR should aim to improve awareness of the law relating to the finding of treasure, to reduce accidental non-compliance. In appropriate circumstances, consideration might also be given to publicity regarding enforcement action taken (for example, referring the matter to the procurator fiscal) where a finder has deliberately failed to disclose treasure to the KLTR.