EXPLANATORY MEMORANDUM TO

THE TREASURE (DESIGNATION) (AMENDMENT) ORDER 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Culture, Media and Sport and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The instrument, which is made under the Treasure Act 1996 ("the Act"), amends the Treasure (Designation) Order 2002 ("the 2002 Order") to include an additional class of objects within the definition of "treasure" in the Act and exclude two classes of objects from that definition. The additional class of treasure covers metal objects which, by virtue of qualities such as rarity, provide exceptional historical, archaeological or cultural insights. The classes of objects which are excluded from the definition of treasure are those which fall under the Church of England's legal system for protecting moveable objects connected with churches, cathedrals, other places of worship and consecrated land.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales and Northern Ireland.

5. European Convention on Human Rights

5.1 The Minister for Arts and Heritage has made the following statement regarding Human Rights:

"In my view the provisions of the Treasure (Designation) (Amendment) Order 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The Act replaced the common law of treasure trove in England, Wales and Northern Ireland. Under the common law, any found gold or silver object which was deliberately hidden with the intention of recovery, and the original owner of which (or their heir) could not be identified, belonged to the Crown. The local coroner had jurisdiction to hold an inquest to decide if an object was treasure trove.

6.2 The Act introduced a definition of treasure that was primarily based on the age and material of the object, and did not depend on whether the object had been lost, abandoned or deliberately hidden. The main categories of treasure under the Act are

(i) any coin at least 300 years old when found which is either part of a find which includes two or more coins with precious metal (gold or silver) content of at least 10%, or part of a find which includes at least ten coins of any metal; and (ii) any metal object other than a coin with precious metal content of at least 10%. An object is also caught by the definition if, although it does not itself meet the criteria, it is part of the same find as another object which does, or if it would have been treasure trove if it had been found before the Act's commencement.

6.3 Under the Act, treasure is owned by the Crown when found (or by the franchisee, if there is one), subject to prior interests and rights, such as those of the object's original owner or their heir. A person who finds an object they believe to be treasure must notify the local coroner within 14 days. The coroner has the power to hold an inquest to decide whether the object is treasure for the purposes of the Act.

6.4 Objects that have been found to be treasure may be transferred by the Crown to museums. Finders and landowners are eligible to receive a reward, paid by the acquiring museum. The amount of any reward (up to the object's market value) and to whom it should be paid is determined by the Secretary of State. The Secretary of State receives advice from an independent committee, the Treasure Valuation Committee, for this purpose.

6.5 Section 2(1) of the Act gives the Secretary of State power to add to the definition of treasure any object at least 200 years old when found which belongs to a class of object designated by the Secretary of State by order for that purpose as being of outstanding historical, archaeological or cultural importance. The Secretary of State was also given power, under section 2(2), to exclude classes of object from the definition of treasure by order.

6.6 During the passage of the Act through Parliament, the government committed to make an order under section 2(2) to exclude from the definition of treasure certain objects which were subject to the Church of England's legal system of controls in relation to articles connected with cathedrals, churches, other places of worship and consecrated land (see HL Deb (26 June 1996) Vol 573 Column 927).

6.7 The power in section 2(1) of the Act has been exercised once to date, through the 2002 Order, to designate certain metal objects of prehistoric date which were not covered by the existing definition of treasure.

7. Policy background

What is being done and why?

7.1 The aim of the Act is to ensure that discoveries of important archaeological and historical artefacts are preserved for the benefit of the nation.

7.2 The Act has been very successful, and since it came into force nearly 6,000 objects have been acquired by over 220 museums across England, Wales and Northern Ireland. This includes discoveries of national importance, such as the Bronze Age gold bulla from Shropshire, the Iron Age hoard of Cauldrons from Chiseldon (Wiltshire) and the Anglo-Saxon Staffordshire Hoard.

7.3 However, the exclusion of most base metal finds, and most gold and silver finds less than 300 years old, limits the protection provided to other equally important metal finds. As a result, a number of exceptionally important archaeological discoveries have been lost to private ownership and not protected for public benefit. Museums are

only able to acquire such non-treasure finds if they are in a position to compete on the open market, often with limited time to raise finds. Examples of finds that are not currently treasure, but which are widely recognised as being exceptionally significant and where there would be a public interest in their being preserved in museum collections, include: the Roman Crosby Garrett Helmet, the Abergavenny Leopard Jug, and more recently the Ryedale Hoard from Yorkshire.

7.4 The designation of a new class of treasure, which extends to base metal objects more than 200 years old, and includes precious metal finds between 200 and 300 years old, addresses this gap in the legislation. It will be possible for museums to acquire objects, for example, that provide an exceptional insight in to the industrial history of an area, or rare base metal Roman objects, or decorative items from the late 18th and early 19th century that shed important light on the life of a particular person. It is not intended that experts examine every single find for significance, but it will allow important and significant finds to be retained where they are recognised.

7.5 It is intended that the bar for meeting this new class of treasure is high, and this is reflected in the use of the word "exceptional". The level of significance should be seen as akin to that set by the Waverley Criteria used when considering export licenses.

7.6 The Church of England, as the established church in England, has its own statutory processes for dealing with the care and disposal of moveable objects. These are set out in the Care of Cathedrals Measure 2011 and Care of Cathedrals Rules 2006, in respect of cathedrals, and the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 and Faculty Jurisdiction Rules 2015, in respect of parish churches, other places of worship, and associated consecrated land. Other faiths and Anglican congregations in England, Wales and Northern Ireland are not established and therefore moveable objects found in land belonging to them do not have any statutory protection outside the Act.

7.7 The Act brought into the definition of treasure objects associated with human burials, which previously were not treasure trove because they would not have been hidden with the intention of recovery. This highlighted the wider issue of a potential conflict of legal regimes, where both the requirements of the Act and those of ecclesiastical legislation applied to a treasure find.

7.8 The Order excludes from the definition of treasure any finds that are subject to the Church of England's legal controls, in order to avoid the potential conflict. This will also support the Church of England's aim of keeping moveable objects at their original site. The Church of England has agreed that all significant finds should be reported to the Historic Environment Record and/or the Portable Antiquities Scheme and recorded. It has also agreed that on the rare occasions where a find that would have been treasure is offered for sale, it should be offered to the national, regional or local museum first.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument does not consolidate any other instrument.

10. Consultation outcome

10.1 Since the Act came into force in 1997 the environment in which the Act operates has radically changed, with an increase in metal detecting which has led to an increase in treasure case numbers from 70 to over 1000 per year.

10.2 It has been recognised for some time that the categories of treasure in the Act and the Order do not capture the full range of finds that there is a public interest in retaining in museums. Government committed to exploring options for remedying this in 2019 when it launched a detailed and wide-ranging public consultation.

10.3 The aim of the consultation was to gather views on proposed changes to the Code of Practice and the Act, including updating and revising the Code, changes to the definition of treasure, and the future of the treasure process.

10.4 This consultation put forward a range of options for how the treasure definition could be expanded to better protect archaeological discoveries. It asked, for example, whether there could be further lists of specific objects (such as particular object types, or objects between particular dates) that could be designated as treasure, or whether a definition could be based on a value threshold.

10.5 There were 1461 responses to the public consultation from a wide range of stakeholders, including: heritage bodies, archaeologists, museums, and metal-detectorists. The response indicated that specifying particular object types would be unlikely to provide a comprehensive and adequate solution, as the issue of some important finds not being protected would likely persist. Basing the definition on a value definition was also rejected because an object's cultural or historical importance it not necessarily related to its financial value. Many responses indicated that the government should consider a 'significance' based definition, a similar approach used in the UK's other cultural property legislation, such as that relating to listed buildings and export controls. In 2020 government responded to the consultation, and committed to introducing a new class of treasure based on the significance of the find.

10.6 The proposal to remove from the definition of treasure finds which fall under the legal processes of the Church of England was included in the 2019 public consultation, with 30.9% of those who expressed a view being supportive of the proposal and 30.1% expressing disagreement. We have consulted the Church of England on this measure, and have worked with them to agree processes for dealing with such finds.

10.7 To support the development of the new class of treasure, the department commissioned research into options, looking at the impact of different ways of measuring significance. It included views from a wide range of stakeholders. This research is published here.

10.8 The department, throughout the development of this new approach, worked closely with the Treasure Registry at the British Museum, who administer the treasure process for DCMS, and the Treasure Valuation Committee, which makes recommendations to the Secretary of State on the payment of rewards.

10.9 Curators, administrators and officials from Wales and Northern Ireland were consulted on the instrument as part of a wider exercise of revising the Code of Practice under the Act and drafting guidance for the new definition.

10.10 The full response can be found here, specifically at the summary of responses to Questions 19 and 20.

11. Guidance

11.1 The statutory Code of Practice, a revised version of which is being laid before Parliament alongside the Order, contains assistance on the new class of treasure. In addition, more detailed guidance containing further information and suggested examples of significant finds, is being prepared and will be published in advance of the Order's coming into force date. The department, and the bodies which administer the Act, will deliver training and information to users in the 4-month implementation window allowed for in the Order.

11.2 The statutory Code of Practice contains assistance on the exclusion of finds that fall under the Church of England's statutory process. The Church of England will also be producing guidance for its members.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because the annual impact on business is less than £5 million (as measured by the equivalent annual net direct cost to business, EANDCB.

12.4 Summary of business impact: There will be some small familiarisation and on-going costs to the private sector (Archaeologists, Antique dealers and auctioneers and Independent museums) as well as the public sector (public sector museums and coroners). There will be a total net present cost over the appraisal period of approximately £3.8m (2020 prices). Costs to business will be familiarisation with the new definitions of treasure guidance and some loss of income to dealers and auction houses from items that are now classed as treasure. We consider that reputable dealers will already be aware of the treasure process and consequently will be making enquiries where an object could be treasure. Savings of a similar amount will be realised by museums that acquire the items now classed as treasure. It is essentially a transfer between them. The EANDCB is estimated to be £0.4m. This is below the £5m *de minimis* threshold for a full impact assessment.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is for the government to review annually the success of the new class of treasure in supporting museums acquiring significant finds. This will involve reviewing the numbers of cases, the comments and decisions of the coroners and of curators and administrators.

14.2 DCMS will also ask the Treasure Registries in England, Wales and Northern Ireland to record any cases that have been reported as treasure when it is clear they fall under the Church of England exclusion, and monitor these on an annual basis.

15. Contact

15.1 Rosie Weetch at the Department for Culture, Media and Sport. Telephone: 07547 967282 or email: rosie.weetch@dcms.gov.uk can be contacted with any queries regarding the instrument.

15.2 Helen Whitehouse, Deputy Director for Museums and Cultural Property, at the Department for Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Parkinson of Whitley Bay, Minister for Arts and Heritage at the Department for Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.