

# The Ivory Act 2018: Legal Ramifications.



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## Will the Next Finder of a Lewis Chess Piece Discover it Worthless?

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Earlier this month, a long-lost medieval chess piece from the legendary 12<sup>th</sup> or 13<sup>th</sup> Century set of The Lewis Chessmen sold at Sotheby's auction house in London for £735,000.

The Chessman is made of walrus ivory. As such, the piece is not caught by the prohibition on dealing in ivory, as currently defined in the Ivory Act 2018 ("the Act"). Its sale, however, brings into focus the likely impact of the "...near-complete closure to the UK's domestic ivory market"<sup>1</sup> that this legislation will bring about.

The Act received Royal Assent on 18<sup>th</sup> December 2018. It is expected to come into force in late 2019, although no implementation date has yet been set.

Upon its passing, the government described the Act as introducing one of the toughest domestic bans on elephant ivory sales in the world. The legislation was widely welcomed by organisations working in international conservation who lauded the United Kingdom for taking a decisive step in tackling the devastation that the global demand for ivory has caused to the elephant population. Depressingly, the number of elephants has declined by almost a third in the last decade and it is believed that around 20,000 African Elephants are slaughtered annually<sup>2</sup>.

### 'Dealing'

The Act prohibits 'dealing' in ivory, (which includes an item made of ivory or an item that has ivory in it: s.1(5)). Ivory is currently defined as meaning ivory from the tusk or tooth of an

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<sup>1</sup> GOV.UK. (2019). *World-leading UK Ivory Bill becomes law*. [online] Available at: <https://www.gov.uk/government/news/world-leading-uk-ivory-bill-becomes-law--2> [Accessed 7 Jul. 2019].

<sup>2</sup> WWF. (2019). *African elephants*. [online] Available at: <https://www.wwf.org.uk/wildlife/african-elephants> [Accessed 7 Jul. 2019].

elephant (s.37(1)). However, this limitation of the ban to elephant ivory may yet change. In May 2019, the government opened a call for evidence in relation to the trade in ivory from species other than elephants. Possible actions following consideration of the evidence may include amending the definition of “ivory” in the Ivory Act 2018 to include ivory from other species; the legislative pathway for such expansion has already been paved by section 37(2) of the Act. Should that include, for example, the tusk of a walrus, then the next finder of one of the remaining four Lewis Chessmen may not enjoy quite so lucrative a discovery, as they may be unable to sell the item in this country, or indeed export it so as to facilitate its sale abroad.

The prohibition on ‘dealing’ not only encompasses buying, selling or hiring (s.1(2)(a)), but also offering or arranging to buy, sell or hire (s.1(2)(b)), keeping for sale or hire (s.1(2)(c)) and exporting from or importing into the United Kingdom for sale or hire (s.1(2)(d) and (e)).

A particularly significant extension of the prohibition’s ambit is contained in section 1(4)(b). This provision extends the prohibition on dealing to arranging to sell or hire, as the lender, ivory outside the United Kingdom (although not arranging to buy or hire as the borrower outside the United Kingdom). Given the global nature of the International Art Market, the ramifications of this provision could be great.

Even if the ivory that is to be sold is outside the United Kingdom, if acts are done within the United Kingdom that amount to ‘offering’ or ‘arranging to sell’ ivory<sup>3</sup>, then the prohibition would be breached. Therefore, the risks inherent for international art dealers, or indeed auction houses, who may, or whose employees may, travel through various jurisdictions whilst working on many different transactions, are significant. They would need to ensure that they don’t, for example, send or even respond to emails or indeed telephone calls whilst in the United Kingdom, concerning the sale of an item containing ivory, even where such items are part of a large collection of other non-ivory objects.

Section 12 of the Act makes it a criminal offence (a) to breach the prohibition; (b) to cause the prohibition to be breached; or (c) to facilitate a breach of the prohibition. The maximum penalty is 5 years’ imprisonment.

## **Exemptions**

The Act provides for very limited exceptions to the prohibition. In order to fall within these exceptions, not only must the item in question fit squarely within the statutory definitions, but also, either an exemption certificate has to have been issued (i.e. in the case of pre-1918 items of *outstanding artistic value and importance*) or the item must have been registered under section 10 prior to any dealing taking place.

### *Pre-1918 items of outstanding artistic value and importance (s.2)*

An item made before 1918 may be exempt from the prohibition where an exemption certificate has been issued. The secretary of state may **only** issue an exemption certificate if

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<sup>3</sup> Or indeed hire as the lender.

satisfied that (a) the item is pre-1918 and (b) that it is of “...outstandingly high artistic, cultural or historical value”<sup>4</sup> having regard to its rarity, the extent to which it is “...an important example of its type”<sup>5</sup> and any other matters that may be specified in the regulations (not yet available).

#### *Pre-1918 portrait miniatures (s.6)*

A pre-1918 portrait miniature with a surface area of no more than 320 cm<sup>2</sup> is exempt from the prohibition if registered under section 10.

#### *Pre-1947 items with low ivory content (s.7)*

An item that dates from pre-1947, is exempt where (a) the volume of ivory is less than 10% of the total volume (b) this ivory is integral to it and (c) it is registered under section 10.

#### *Pre-1975 musical instruments (s.8)*

A musical instrument comprised of ivory is exempt from the ban where it dates from before 1975 and where the volume of ivory is less than 20% of the material of which the instrument is made, so long as it is registered under section 10.

#### *Acquisition by qualifying museums (s.9)*

Dealing in ivory is exempt from the prohibition if the dealing is a sale to or a purchase or hire by a qualifying museum.

### **Registration**

It is not yet known what the cost of applying for a section 10 registration will be. It is understood that the government is currently working on a new online registration service and that there will be further public consultation during this process (e.g. in relation to the registration fee(s)).

Musicians have raised concerns about the vast bureaucratic implications of requiring registration in relation to the ivory head plates on the bows of stringed instruments, and also concerns that large swathes of the string instrument owning public are likely to be wholly unaware that to sell their bow without having registered it, is to commit a criminal offence. An online petition seeking the removal of the requirement to register bows of stringed instruments has been set up in this regard<sup>6</sup>.

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<sup>4</sup> Section 2(2)(b).

<sup>5</sup> Section 3(b).

<sup>6</sup> Petitions - UK Government and Parliament. (2019). *Petition: Exempt bows of stringed instruments from the Ivory Act registration requirement*. [online] Available at: <https://Petition.parliament.uk/petitions/237247> [Accessed 7 Jul. 2019].

## Summary

It is anticipated that the Act will come into force in late 2019, once the secondary legislation has been prepared and implemented, a guidance drawn up and the online registration service set up.

So, as things presently stand, you may still find yourself enriched should you discover one of the remaining Lewis Chess Pieces; although it is advisable that you go rummaging around your local charity shop sooner rather than later.

Likewise, if you're hoping to sell your violin bow, you may wish to get a move on, while keeping an eye out for the consultation on registration fees.

And a final word for those of you who work in the International Art Market: you would do well to be acutely aware of the breadth of the prohibition, even when the sale of the ivory item is to take place outside the United Kingdom.

*Alexandra Healy QC and Racheal Muldoon are barristers at Foundry Chambers. Foundry Chambers will be hosting a seminar on the legal ramifications of the Ivory Act 2018 on 3 October 2019. To register interest in attending please contact Angela May, [A.May@foundrychambers.com](mailto:A.May@foundrychambers.com).*