



department for  
culture, media  
and sport

## SUMMARY OF THE RESPONSES TO THE CONSULTATION PAPER:

### **Restitution of Objects Spoliated in the Nazi-Era**

The Department for Culture Media and Sport (DCMS) held a consultation on whether the current statutory and other legal restrictions which prevent national museums from de-accessioning works of art in their collections, should be lifted to allow restitution of objects which were lost during the Nazi era. The consultation took place from 10 July to 10 November 2006.

We are appreciative of the eighteen responses received from organisations and individuals.

**Question 1 asked whether museums should have a power to dispose of items in their collections which were lost during the years 1933 to 1945 as a result of the actions of the Nazis, their allies or collaborators.**

It was noted that there is a moral argument in favour of this. One respondent commented that the public would not want to support and fund collections that contain cultural objects wrongfully taken by the Nazis or in violation of their previous owner's human rights. However, a contrary view was expressed by one respondent who felt that restitution would simply impoverish national collections without providing an effective response to the evils of the Nazi era.

Other respondents agreed that there should be a power for museums to dispose of items in their collections – but not that it should be limited in the way proposed. It was noted by 2 respondents that the justification for treating objects lost during the Nazi era differently from objects lost in other circumstances is not clear. One organisation felt that it was wrong to make yet another special restitution case for Nazi spoliation and not to include, for example, works of art looted by the Bolsheviks. However, the majority of respondents agreed that powers should be given to museums to meet these claims.

**Question 2 asked what objects the power of disposal should extend to, suggesting three different definitions of loss during the Nazi era. Respondents were also asked whether separate provision should be made for the Beneventan Missal and whether legislation should seek to define the entitlement which should be demonstrated by a claimant before museums are permitted to transfer objects out of their collection.**

A majority of respondents who chose one of the suggested definitions preferred the definition given in (a)(ii), noting that it was not overly restrictive (in contrast to the first option suggested). The third option was not widely favoured – it was noted that it would be anachronistic to judge losses incurred in the Nazi era by the human rights standards of today. Rather, they should be judged by the standards of the time such as the Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control ("the London Declaration"), January 5, 1943.

Concern was expressed about the difficulties claimants might face in being required to prove a causal connection between the loss of the work of art and the actions of the Nazis, their allies or collaborators. It was felt that this might in some cases lead to injustice. Some respondents felt that the power could not justifiably be limited to objects lost during the Nazi era, but should be extended so that claims to objects lost in other circumstances with as much moral validity could be satisfied. It was suggested that, rather than piecemeal legislation to deal with specific cases, the appropriate way to deal with the problem would be to re-write the current anti-deaccessioning clauses in statutes governing museums. In contrast, others were concerned that the power should be strictly limited to losses suffered because of Nazi actions.

On the question of the Beneventan Missal, opinion was divided. Most respondents were content for separate provision to be made in relation to the Missal. It was noted that it would be wrong to include the Missal in a general power as this would imply that the legislation covered the return of all cultural objects lost, during the Nazi era. However, others felt that the restitution of looted objects should not rest upon the identity of those involved in the wrongful taking and that making this a criterion, would be unfair to claimants. One respondent commented that it would be wrong for a museum to be exempt from liability under such powers simply because an act of spoliation had been carried out by a British soldier or official, as opposed to the Nazis, their agents or collaborators.

Some respondents felt that including a general definition of entitlement in legislation might be helpful (though there was concern that such a definition should not be over-prescriptive). However the majority of respondents felt that a Code of Practice would allow more flexibility and be more practicable. It was felt that it would be wrong to define entitlement in the legislation as each claimant needs to be considered on their own standing and each claim on its own particular facts.

**Question 3 sought views on the decision-making process and the role of the museums, the Spoliation Advisory Panel, the Charity Commission and Government.**

Most museums felt that the decision whether or not an item should be deaccessioned should ultimately be left to the discretion of the trustees. Some museums referred to the precedent of the Human Tissue Act 2004, and it was noted that, as trustees have a statutory duty to care for the collections in their care, it is appropriate and consistent with legal principles that questions on whether or not to deaccession individual items should be left to museums. However, most other respondents felt that this would not be appropriate. It was noted that leaving the decisions to museums would lead to inconsistencies of approach.

Opinion was evenly divided as to whether museums should be able to de-accession an item in response to a claim which has not been considered by the Spoliation Advisory panel. It was felt that the Spoliation Advisory Panel was a valuable source of advice, and that both claimants and

institutions would benefit from the availability of an independent assessment of claims. Some respondents felt that a requirement to consult the Panel would assist trustees seeking to make the decision on deaccession, and provide protection if the decision was challenged. It was also suggested that it is appropriate for decisions to deaccession items to be subject to independent scrutiny. Another point of view was that where institutions and claimants were capable of resolving claims without resort to the Panel process, this should be encouraged.

The general view was that the Panel's advice should not be binding and that the considerable moral pressure to act in accordance with that advice would ensure that museums and claimants acted in accordance with its recommendations. It was noted that making the Panel's decisions legally binding could lead to legal challenges of its decisions, making the process of resolving claims slower, more legalistic, and more expensive. However, one respondent suggested that the current functions and performance of the panel would be enhanced if its recommendations were binding and enforceable as a judgment.

The majority of respondents who replied to the question whether the consent of the Secretary of State, the Attorney General or the Charity Commission should be required before an institution is able to de-accession an object felt this was not appropriate except (as some noted) where this is already required under the common law and the Charities Act 1993. Another respondent felt that there might be some merits to involving an independent body or office holder (which might vary according to the collection concerned) in the decision. Strong opposition was expressed to the suggestion that the Secretary of State might be given power to direct an institution to de-accession an item from its collection.

**Question 4 sought views on whether museums should be able to restitution objects from their collections in response to a claim where the object is subject to any trust or other condition which prohibits disposal and if those restrictions should be capable of being overridden.**

Most respondents felt that museums should have this power. It was noted that it was unreasonable that the restitution of looted property should be restricted because of the type or status of a particular object or collection, and that there are precedents for legislation which can override trusts or conditions governing the way in which charitable property is used. Some respondents expressed the view that this power should be limited to national or public collections. Concern was expressed that such a power should be permissive, rather than mandatory (it was noted that in some cases payment of compensation rather than restitution of the work concerned might better serve justice). The scope for interference with private property rights was also noted.

**Question 5 sought views on whether the Spoliation Advisory Panel should be transformed into a statutory body.**

Most respondents expressed the view that the Spoliation Advisory Panel should not be made into a statutory body. In forming this view, respondents were mindful of the fact that the Panel has only received a small number of claims. They felt that the Panel is fully effective in its current role and the creation of a new body to determine civil rights would invite legal challenge to the Panel's decisions. One respondent suggested that a guidance document could be produced which would help explain the process, promote the advantages of referring claims to the Panel, and encourage the parties to accept its recommendations.

**Question 6 sought views on the appropriate tax treatment of restituted property.**

Opinions were fairly mixed on these issues. Most respondents expressing a view in relation to capital gains tax felt that claimants should be liable to capital gains tax in relation to restituted assets. Some respondents thought it fair that, as restituted items are no longer available to the public, claimants should be liable to pay capital gains tax, particularly where an item is sold relatively quickly after transfer, and that the item should be treated no differently from other moveable chattels of the same class or type for the purposes of taxation. Two respondents felt that the claimant should only be liable to pay tax on the increase in value of the asset following its restitution, suggesting therefore that the 'acquisition cost' should be taken as the market value of the work upon the date of return to the claimant. One respondent argued that there should be a window of, say, 24 months after restitution in which a work of art could be sold without any liability for capital gains tax.

The majority of respondents expressing a view in relation to inheritance tax thought that the value of the restituted item should be included in the claimant's estate for the purposes of inheritance tax in the same way as any other asset. However, two respondents expressed concern at the implications if an asset was restituted to the claimant shortly before his or her death. It was felt that it would be harsh justice if the item had to be sold or returned to a public collection in order to cover inheritance tax. One respondent suggested that assets transferred to a claimant from a public collection within a fixed number of years before death should be tax exempt. Another suggested that claimants should be permitted to effect a deed of arrangement to gift the object to some other party within a limited time after restitution.

Consultees were asked if they agreed that donors should not forgo any tax benefits accruing to them, and whether an exception should be made if the donor was aware of the history of the item which had been restituted. Most respondents accepted that the initial position should be that the donor would not lose any tax benefits. Though the principle that a donor who was aware of the tainted history of the item was generally accepted, it was felt that it would be very difficult to prove that a donor was aware of any wrong doing regarding the acquisition of a work of art and that any judgements made in this regard could only be subjective. One respondent suggested that removing tax advantages from a donor would only be justified if the donor could be shown to be culpable for the object's spoliation or the concealment of that spoliation.

**Question 7 sought views on whether the proposed power should be a permanent one or time-limited.**

A large majority of respondents felt that the power should be time-limited. Suggestions for the appropriate period ranged from 6 to 25 years. Two respondents suggested that the relevant period should run from the date of publication of the fact that an item had doubtful provenance. One respondent suggested that the power could be tied in to the life of the Spoliation Advisory Panel and that, if no claims came before it for a number of years, the Panel could be wound up after a reasonable period of public notice.

**Question 8 sought views on whether museums which had restituted a work of art to a claimant should be protected against any further claims for that item.**

There was unanimous agreement that museums should be protected against subsequent claims. One respondent suggested that the legislation should allow a museum to inform a subsequent claimant of the identity of the first claimant. Another respondent pointed out that legislation alone might not protect museums from moral criticism and blame, should a later claim appear justified.

### Conclusion

The consultation produced a strong overall message that museums do not wish to retain works of art looted by the Nazis in their collections and that removing the statutory restrictions that stop museums from deaccessioning those works would be beneficial to all. Most respondents felt that a definition of 'wrongful taking' should be included in legislation but recognised that arriving at a satisfactory definition would not be easy. Opinion was divided on whether a separate provision should be made to enable the restitution of the Beneventan Missal to Italy. Most respondents felt that decision-making powers should remain with museum trustees who would continue to be advised by the Spoliation Advisory Panel. They also felt that the legislation should include a 'sunset' clause.

The Department will consider the outcome of the consultation very carefully in developing its further proposals, which will need to be considered against the competing demands for other legislation to be introduced by the Department. As mentioned in paragraph 1.9 of the consultation document, in presenting these proposals, given the very limited number of claims which have been received for items in the national collections, and the even smaller number of claims (two) where the Panel has felt it appropriate to recommend legislation, the Department is unable to say when it may be possible for such legislation to be introduced.

DCMS

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