Department for Culture, Media and Sport
Museums, Libraries and Cultural Property

Restitution of Objects Spoliated in the Nazi-Era: A Consultation Document

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INTRODUCTION

1.1. From the year 1933, when the Nazis came to power, to the end of World War II in 1945, they carried out a systematic programme for the forced transfer of works of art, and other cultural objects. They sought to strip Europe of its cultural assets and resources for German benefit, and to assert Germanic racial, economic and cultural values on all the territories they occupied. Members of the Jewish community were particular targets, though they were not the only victims. The Nazis' attack on European Jewry consisted not only of a systematic drive to murder European Jews but also measures taken to deprive Jews of their culture. As a result cultural objects previously owned by members of the Jewish community and others have been dispersed throughout Europe and beyond.

1.2. The scale of destruction and looting of historic monuments and private and national collections was recognised during the second world war to be exceptional by the standards of the time, and to require mitigation during the war, and extensive redress thereafter. This recognition led the United Kingdom to join with the other nations united against the Axis powers to issue the "Inter-allied declaration against acts of dispossession committed in territories under enemy occupation or control" on 5 January 1943. The declaration, in recognition of the systematic spoliation of occupied or controlled territory, reserved the rights of governments to declare invalid any transfers of, or dealings in property situated in territories occupied or controlled by the Axis powers, or belonging to persons resident in such territories. Following the end of the war, the need to take appropriate measures to restore looted property to its lawful owners was also recognised in resolution VI on Enemy Assets and Looted Property adopted by the United Nations Monetary and Financial Conference at Bretton Woods in 1944.

1.3. International awareness of the extent of the forced transfer of cultural assets, and the possibility that looted assets may have been acquired by museums and galleries in various countries, and still form part of national collections developed further in the 1990s. The Washington Conference on Holocaust Era Assets 1998 (at which 44 governments, including the government of the United Kingdom, and

13 non-governmental organisations took part) recorded the consensus reached by the conference on a number of non-binding principles with respect to Nazi-confiscated art. These principles highlighted the need to identify art that had been confiscated by the Nazis and not subsequently restituted, to publicise this information, and to encourage the use of alternative dispute resolution mechanisms for resolving ownership disputes. The conference recognised the need to reach a fair and just solution in such cases.

1.4. In the United Kingdom, the National Museum Directors' Conference (NMDC) established a working group in June 1998 to examine the issues surrounding the spoliation of art during the Holocaust and World War II period (1933 – 1945) and to draw up a Statement of Principles and proposed actions for member institutions, including the collation of information relating to provenance during that period of objects now held in museum collections.[1] An external advisory committee chaired by Sir David Neuberger was established to advise on the actions necessary to fulfil the Statement of Principles. The Spoliation Advisory Panel was appointed by the Secretary of State for Culture, Media and Sport in 2000 to consider any claims which may be made by anyone who had lost possession of a cultural object during the years 1933 to 1945 (the Nazi era), where that object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit.

1.5. The Spoliation Advisory Panel has now completed reports into five claims to objects held respectively by the Tate, the British Library, the Glasgow City Council (as part of the Burrell Collection), the Ashmolean Museum and the British Museum. In four cases they found that the claim was a valid one, and in two cases – a painting previously attributed to Chardin in the Burrell Collection, and a 12th century manuscript (the Beneventan Missal) held in the British Library, the Panel recommended that the object concerned should be returned to the claimant.[2] (In the fifth case, the Panel recommended that the claim be rejected).

[1] The resulting reports setting out this information can be found at http://nationalmuseums.org.uk/spoliation_reports.html

[2] See the Reports of the Spoliation Advisory Panel in respect of a Painting now in the possession of Glasgow City Council, 24 November 2004, HC 10, and in respect of a 12th century manuscript now in the possession of the British Library, 23 March 2005, HC 406, respectively at http://www.culture.gov.uk/cultural_property/spoliation_ad_panel.htm.

1.6. In each case where restitution was recommended, there were different types of legal restriction on the release of the objects concerned from the collections. The British Library is subject to statutory restrictions[3] on the disposal of items held in its collection (as are all the national collections, to a greater or lesser degree). The Glasgow City Council is bound by the agreement reached by Sir William Burrell when the Burrell Collection was gifted to its predecessors (the Council has instead agreed with the claimant that he should receive an *ex gratia* payment, instead of the restitution of the painting).

1.7. In its third report, relating to the Beneventan Missal, the Spoliation Advisory Panel recommended that legislation should be introduced to permit restitution of objects falling within the Panel's terms of reference, that is to say, cultural objects, the possession of which was lost during the Nazi era (1933 – 1945) which are now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit.

1.8. An alternative means for ensuring that restitution can be made has recently been explored by the British Museum in relation to a claim for a number of Old Master drawings in the British Museum collection. The British Museum argued that the Attorney General had the power to authorise the Trustees to transfer the drawings to the claimants on the grounds that they were under a moral obligation to make such a transfer, notwithstanding the express terms of the statute restricting the British Museum's powers of disposal. A power to authorise trustees to make payments out of charity funds where the trustees believe that the charity is under a moral obligation to make the payment was recognised in *Re Snowden*[4] in 1970. However, the court has now held that this principle does not apply where the charity concerned is prohibited by statute from disposing of items in its collection.[5] The charity remains bound by the terms of the statute. This judgment has now demonstrated that it will not be possible for cultural objects held in one of the national collections to be released from that collection and transferred to a claimant where there are statutory restrictions on this, unless the law governing the national collections is changed.[6]

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[3] Under Paragraph 11(4) of the Schedule to the British Library Act 1972.
[4] [1970] Ch. 700.
[5] *HM Attorney General v Trustees of the British Museum* [2005] EWHC 1089(Ch).
[6] The claim to these drawings was the subject of the fifth Report by the Spoliation Advisory Panel. Following the judgment in this case, the claimants reached agreement with the British Museum that they

1.9. This paper sets out our proposals for the possible implementation of the recommendation of the Spoliation Advisory Panel in England and Wales. In making them we are conscious of the limited number of claims which have been received for items in the national collections, and the even smaller number of claims where the Panel has felt it appropriate to recommend legislation (see paragraph 1.5 above). We are aware that introducing legislation on this subject may, in the light of this experience, be said to be a disproportionate reaction, and we are unable to say when it may be possible for such legislation to be introduced. This is likely to be affected by the number of claims which may be received in future for the restitution of items in the national collections. However, we consider that it is appropriate for our proposals to be submitted to public consultation now, so that it may be possible to move to introduce legislation in the event that the need for that legislation becomes clearer.

1.10. Under our proposals it would become possible for museums to transfer objects which were lost during the Nazi Era and have now become part of British collections to the heirs of their original owners. The purpose of such a power would be to allow a form of restitution to be made to those who have suffered as a result of Nazi actions, or to their heirs. The paper does not consider whether the restrictions on museums' powers to dispose of objects in their collection should be lifted in any other case. The misappropriation of cultural property carried out in the Nazi era was unique in its extent, and in its purpose. It was not carried out by leaders of the National Socialist party solely to enrich themselves (though this was often an important motivation), but formed an integral part of their attack on other races: "the Nuremberg Tribunal recognised that calculated economic devastation, including the systematic looting of property, could destroy the cultural heritage and continuity of a group and set the stage for the ultimate extermination of that group".[7]

1.11. The first section of the paper describes the restrictions on disposal of objects in museum collections in England and Wales both as set out in statute, and arising under the general law. The second section of the paper considers possible options for legislation, and seeks the views of consultees on the following issues and related questions

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should receive full value for the drawings, and that the drawings should remain in the British Museum. The Report of the Panel assessed the amount of an appropriate *ex gratia* payment to the claimants.

[7] T. Giovanni "The Holocaust and Looted Art". AAL, Vol 7(3), page 264.

- how far a power to make restitution of objects lost during the Nazi era should extend;

- who should be responsible for taking the final decision as to whether a particular object should be released from a museum collection;

- what provision, if any, should be made in relation to non-statutory restrictions on disposals from collections;

- what role the Spoliation Advisory Panel should have.

1.12. As far as Scotland is concerned, there are no statutory restrictions on disposals from collections in the governance arrangements for Scottish museums. However, where the museum is a charity, there may be restrictions on disposals from collections under Charity Law in Scotland. Any steps which might be taken to adjust Charity Law in Scotland in this regard or to over-ride under Scottish law non-statutory restrictions on disposals from collections would be a matter for the Scottish Executive and Parliament. Similarly there are no statutory restrictions on disposals from the collections of the National Museums and Galleries of Wales.

PART I: RESTRICTIONS ON THE DISPOSAL OF OBJECTS IN MUSEUM COLLECTIONS

A Statutory Restrictions on the National Collections and other museums

(a) The national collections

2.1. Each of the national collections in England is subject to different restrictions on the disposal of items within its collection (the National Museums and Galleries of Wales are governed by Royal Charter, and are not therefore subject to statutory restrictions on disposal). In most cases, the power of disposal given to the governing body of the museum or gallery[8] is very limited.[9] Section 3 (4) of the British Museum Act 1963 prohibits the Trustees from disposing of any objects vested in them otherwise than in accordance with sections 5 and 9 of that Act, or section 6 of the Museums and Galleries Act 1992. Under section 5, the British Museum may dispose of items vested in the Trustees if:

(a) the object is a duplicate of another object, or
(b) the object appears to the Trustees to have been made not earlier than the year 1850, and substantially consists of printed matter of which a copy made by photography or a process akin to photography is held by the Trustees, or
(c) in the opinion of the Trustees the object is unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students

Provided that, where the Trustees acquired the object by gift or bequest such a disposal would not be inconsistent with any condition attaching to the gift or bequest.[10]

Under section 9, and section 6 of the 1992 Act, the British Museum may transfer objects to other approved museums.

[8] Usually the Board of Trustees of the body concerned, though in the case of the Museum of London and the British Library, which have no trustees, the governing body is referred to as the Board of Governors and the British Library Board, respectively.
[9] This position can be contrasted with the wider powers given, for example, to the National Gallery of Australia. Section 9 of the National Gallery of Australia Act 1975, as amended by the National Gallery of Australia Amendment Act 2003, allows the Council of the Gallery to resolve that a work of art in its collection which is not required as part of the national collection be disposed of by sale, gift or destruction. The only UK national collections which have such wide disposal powers are the National Maritime Museum, the Imperial War Museum and the Museum of London (see paragraphs 2.9 to 2.12 below.
[10] Section 5(1).

2.2. The British Library has a similarly limited power of disposal under paragraph 11(4) of the British Library Act 1972 in relation to objects transferred to the British Library Board by section 3(1)(a) of the 1972 Act.[11] Further, under section 3(5) of that Act, property transferred to the British Library Board by section 3 is subject to any trusts or conditions which affected that property when it was vested in the trustees of the British Museum. Under paragraph 11(5) of the Schedule to the 1972 Act, the British Library may not act in a manner inconsistent with any trust or condition to which an item is subject.

2.3. The only other circumstance in which the British Museum (but not the British Library) is permitted to dispose of items in its collection is where the trustees are satisfied that the object has become useless for the purposes of the Museum by reason of damage, physical deterioration, or infestation by destructive organisms.[12] The Natural History Museum is subject to the same restrictions as the British Museum.[13]

2.4. The Board of Trustees of the Victoria & Albert Museum, the Science Museum, the Armouries and the Royal Botanic Gardens, Kew are subject to similar restrictions under the National Heritage Act 1983. Under section 6(3) of that Act, the Board of Trustees of the Victoria and Albert Museum may not dispose of an item which is vested in them and comprised in their collections unless

(a) the disposal is by way of sale, exchange or gift of an object which is a duplicate of another object the property in which is so vested and which is so comprised, or
(b) the disposal is by way of sale, exchange or gift of an object which in the Board's opinion is unsuitable for retention in their collections and can be disposed of without detriment to the interests of students or other members of the public, or
(c) the disposal is an exercise of the power conferred by section 6 of the Museums and Galleries Act 1992 [i.e. to an approved museum], or
(d) the disposal (by whatever means, including destruction) is of an object which the Board are satisfied has become useless for the purposes of their collections by reason of damage, physical deterioration, or infestation by destructive organisms.

[11] Objects subsequently acquired by the British Library are not subject to any such statutory restrictions on disposal, though they may have been donated to the British Library subject to particular restrictions.
[12] Section 5(2).
[13] See section 8(3) of the British Museum Act 1963.

2.5. The same restrictions apply to the Science Museum, the Armouries and the Royal Botanic Gardens,[14] save that the Board of Trustees of the Royal Botanic Gardens does not have the power under section 6 of the Museums and Galleries Act 1992 to transfer items in their museums to approved museums.

2.6. The National Museums and Galleries on Merseyside[15] are subjected to the same restrictions under Article 6 of the Merseyside Museums and Galleries Order 1986.[16] The Tate, the National Portrait Gallery, the National Gallery and the Wallace Collection are subject to more stringent restrictions. The Board of Trustees of the National Gallery may not dispose of any item in its collection unless by way of transfer (by sale, gift or exchange) to an approved museum.[17] The Board of Trustees of the Wallace Collection has no power to dispose of objects in the collection.[18]

2.7. The Board of Trustees of the Tate may dispose of objects where:

(a) the disposal is an exercise of the power conferred by section 6 below;[19]
(b) the disposal is of a relevant object which, in the Board's opinion, is unsuitable for retention in their collections and can be disposed of without detriment to the interests of students or other members of the public; or
(c) the disposal (by whatever means, including destruction) is of a relevant object which the Board are satisfied has become useless for the purposes of their collections by reason of damage, physical deterioration, or infestation by destructive organisms.[20]

However, this power is subject to the terms of any trust or condition which may prohibit or restrict disposal of the relevant object.

2.8. The Board of Trustees of the National Portrait Gallery may dispose of works vested in them and comprised in their collection where:

(a) the disposal is an exercise of the power conferred by section 6 below[21];

[14] Under sections 14(3), 20(3) and 27(2) of the 1983 Act respectively.
[15] The Liverpool Museum, the Museum of Liverpool Life, the Merseyside Maritime Museum, the Walker Art Gallery, the Lady Lever Art Gallery, Sudley House, [the Conservation Centre] and the World Museum Liverpool.
[16] SI 1986/226.
[17] Museums and Galleries Act 1992, section 4(3).
[18] Museums and Galleries Act 1992, section 4(6).
[19] That is, the power to transfer an item to an approved museum.
[20] Museums and Galleries Act 1992, section 4(4).
[21] That is, by a transfer to an approved museum.

(b) the disposal is by way of sale, exchange or gift of a relevant object which is a duplicate of another relevant object the property in which is so vested and which is so comprised;
(c) the disposal (by whatever means) is of a portrait and the Board are satisfied that the identification formerly accepted by them of the person portrayed has been discredited; or
(d) the disposal (by whatever means, including destruction) is of a relevant object which the Board are satisfied has become useless for the purposes of their collection by reason of damage, physical deterioration or infestation by destructive organisms.[22]

In this case, the power to dispose of useless objects (paragraph (d)) is not subject to any trusts or conditions prohibiting the disposal of the object.

2.9. In contrast, the Imperial War Museum, the National Maritime Museum and the Museum of London have greater powers to dispose of objects in their collections. The Trustees of the Imperial War Museum may:

> "exchange, sell, or otherwise dispose of any duplicate objects belonging to the Museum, and with the consent of the Secretary of State exchange, sell, or otherwise dispose of any objects belonging to the Museum which the Board consider unfit to be preserved or not to be required for the purposes thereof".[23]

It may also transfer items to approved museums.

2.10. The powers of the National Maritime Museum are similar. The Board of Trustees of the Museum may:

> "exchange, sell or otherwise dispose of any duplicate objects vested in them for the purposes of the Museum, and with the consent of the Secretary of State exchange, sell or otherwise dispose of any objects so vested which the Board consider to be not required for the purposes of the Museum."[24]

2.11. The Board also has a power to transfer items to any institution which receives monies provided by Parliament where the Board considers that item would more properly be under the control or management of that institution. The Museum's powers are however expressed to be subject to any condition attached to a gift or bequest vesting the object in the Board for the purposes of the Museum.

2.12. The Board of Governors of the Museum of London may:

[22] Museums and Galleries Act 1992, section 4(5).
[23] Imperial War Museum Act 1920, section 2(1)(c).
[24] National Maritime Museum Act 1934, section 2(3)(b).

> "sell, exchange, give away or otherwise dispose of any object vested in them and comprised in their collections if the object is a duplicate of another such object or is for any other reason not, in their opinion, required for retention in those collections".[25]

This power is however subject to any trust or condition attached to the object.

(b) Non-national collections

2.13. Some local authority museums are also subject to statutory restrictions on disposal of items in their collections under Local Acts.[26] For example, section 149 of the Greater Manchester Act 1981 requires the Manchester Council to hold "all works or other objects of art" on trust for the benefit of the citizens of Manchester. The Council is given a power to sell or exchange any works or other objects of art which may be vested in them (subject to restrictions on the application of the proceeds of sale), but they do not have the power to dispose of items in the collection for no consideration. The County of Lancashire Act 1984, section 58, gives district councils subject to that Act:

> "power to lend exchange or otherwise to part with possession (but not ownership) of any specimen, work of art or book vested in them which in the opinion of the authority is not required for exhibition or use in any museum, art gallery, library or other building of the authority".

2.14. This does not give local authorities in Lancashire a power to give away items in their collections. Such a power is given in section 58(2), but it is limited: items can be transferred by way of gift to another person who is the owner of a museum, art gallery or library where the item concerned is more suitable for exhibition or use in that museum, art gallery or library than in any council building. This provision is not restricted to transfers to institutions in Lancashire.

B Non-statutory restrictions on disposal

2.15. In addition to the statutory restrictions on the power of the national collections to dispose of objects which are owned by their governing bodies and have become part of the collections, a number of objects (both in the

[25] Museum of London Act 1965, section 5(2).
[26] The Public Libraries and Museums Act 1964 gives local authorities power to provide and maintain museums and art galleries (section 12) but does not restrict local authorities' powers of disposal of items in their collections.

national collections and in other museums and galleries) may also be subject to restrictions imposed by a condition on a gift or bequest made to the collection. Such restrictions may expressly or impliedly prohibit disposal of the object in question. As a result it may not be possible for a museum to transfer an item to a claimant even where the claim has been found to be substantiated, and the museum has a general power to dispose of items in its collection (as the second report published by the Panel illustrated).[27] This section discusses some possible non-statutory restrictions, the mechanisms already available to deal with them under the existing law, and options for further statutory provision.

2.16. Where a collection is held on charitable trusts, the trustees' powers to dispose of the items in the collection will be limited: any property subject to the trust must be applied for the purposes of the trust, as permitted by the governing document. This is unlikely to sanction disposal of items which were intended to remain part of a permanent collection.

2.17. The statutory powers of a local authority are not confined to charitable purposes, and accordingly, items in the collection of a local authority museum are not necessarily subject to charitable trusts. Where the collection originally passed to a local authority from a learned society or other charity, for example, the items comprised in the collection at that date may well be subject to special charitable trusts, but subsequent acquisitions by the authority for the purposes of its museum may not be, depending on the terms on which the item was acquired.[28]

2.18. Even if a collection is not subject to charitable trusts, the conditions under which particular items in that collection were acquired may impose restrictions on the museum's power to dispose of the item. As noted above, the Corporation of the City of Glasgow acquired the Burrell Collection subject to a Memorandum of Agreement stipulating that:

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[27] The Report of the Spoliation Advisory Panel in respect of a painting now in the possession of Glasgow City Council, 24 November 2004, HC 10 (see especially paragraphs 21 – 22).

[28] So, for example, Glasgow City Council was able to transfer title in a Lakota Ghost Dance Shirt in the collection of the Art Gallery and Museum in Kelvingrove to the Wounded Knee Survivors Association in 1999. The shirt had been donated to the Glasgow museum around 1892/3 together with a number of other items (the donor also sold some Indian objects to the museum), and it appears that no legal conditions were attached to the donation. See Memorandum from Glasgow City Council to the Select Committee on Culture, Media and Sport, April 2000, published with the minutes of evidence to that Committee in volume 2 of the Report of Cultural Property Return and Illicit Trade (HC 371-II).

> "the donees shall not be entitled on any pretext whatever to sell or donate or exchange any item or part of the Collection once it has formed part of the Collection; but the donees shall be entitled to lend temporarily to responsible bodies any article forming part of the Collection as they may think fit for exhibition in any public gallery in Great Britain".

2.19. A still life, earlier attributed to Chardin, which was the subject of the second report of the Spoliation Advisory Panel, was included in the Burrell Collection, and the Glasgow City Council (successors to the Corporation) were advised that, under Scottish law, this provision prevented them from transferring the still life to the claimant, despite the fact that the Panel upheld his claim. In consequence, that claimant received an *ex gratia* payment, not the return of the painting which he originally sought. Such a term would be similarly binding under English contractual law, with the result that a museum in England and Wales could equally be prevented from returning an item being claimed because of restrictions in the agreement under which it was originally acquired.

2.20. The statutory provisions set out in paragraphs 2.1 to 2.12 above give some of the national collections power to override trust and other non-statutory conditions in some cases (in particular where the object concerned has become useless for the purpose of the collection by reason of damage, physical deterioration or infestation by destructive organisms).[29] However, not all the national collections have this power, and if it is intended to ensure that all museums and galleries are able to transfer items out of their collections regardless of any restrictions on its disposal, whether imposed under statute or not, any new legislation would need to make some provision in relation to non-statutory restrictions on disposal (such as the requirements of a bequest).

> The Greater Manchester Act 1981 and the County of Lancashire Act 1984 ensure that the extent to which the powers of disposal conferred by each Act on local authorities may be restricted by obligations to respect any condition attached to a gift or bequest is limited to a period of 21 years (in the case of Manchester) and 35

[29] The National Portrait Gallery, the British Museum, the Royal Botanic Gardens, the Science Museum and the Victoria and Albert Museum. The British Library, the Museum of London, the National Maritime Museum, the Tate Gallery and the Merseyside Museums and Galleries have no power to override trusts and other conditions prohibiting disposal in any circumstances.

years (for Lancashire) from the date in which the object became vested in the local authority concerned.

2.21. Section 27 of the Charities Act 1993 gives the Commissioners power by order to authorise the trustees of the charity to make any application of the property of the charity (including an *ex gratia* payment or transfer) where the trustees "in all the circumstances regard themselves as being under a moral obligation to do so." This provision gives the Charity Commissioners the same power as the Attorney General (recognised in *Re Snowdon*[30]) to approve such transactions. It has been held that that power may not be used to approve the transfer of an item in a collection where that transfer is prohibited by statute, even where such a moral obligation is demonstrated.[31] However this would not preclude its use where the restriction on transfer of property was a non-statutory one, and comments made by the Vice Chancellor in *Attorney General v Trustees of the British Museum* suggest that where it has been established that items in a museum's collection were looted by the Nazis the moral obligation may well be established as well.[32]

[30] [1970] Ch 700.
[31] *Attorney-General v Trustees of the British Museum* [2005] EWHC 1089 (Ch).
[32] See paragraph 16 of the judgment.

PART II: THE OPTIONS FOR LEGISLATION

A A general approach: statutory restrictions on the national collections

3.1. The Spoliation Advisory Panel recommended in its report in relation to the Beneventan Missal that legislation should be introduced to permit the restitution of objects falling within the Panel's terms of reference. This section considers the issues relevant to such legislation, which would seek to allow objects to be de-accessioned from the national collections where the object was lost as a result of Nazi aggression, to allow restitution to be made, in spite of the statutory restrictions on disposal of items in the national collections under the current law. The possibility of extending such an approach to non-statutory restrictions, and to the non-national collections, is considered further at paragraphs 3.38 to 3.46 below.

3.2. The following questions arise:

(a) How far should any power to dispose of objects in the national collections extend?

(b) Who should take the decision to de-accession objects from the national collections?

(c) Should the role of the Spoliation Advisory Panel be recognised in legislation, and if so how?

3.3. Two possible main approaches have been considered. One possibility would be to give institutions an unfettered discretion to release objects lost as a result of Nazi aggression from their collections. Another possibility would be to give the Secretary of State a power to permit, or direct such a transfer. There are a number of options between these two extremes, which would limit the discretion given to institutions, without necessarily removing their independence in this area.

(a) How far should a power to dispose of objects from national collections extend?

3.4. As noted in the introduction, this paper only considers the return of items lost during the Nazi era. No consideration has been given to a general power to de-accession items in the national collections, and there are no proposals to legislate more widely.

Definition of loss: International Developments

3.5. Declarations made by the international fora which have considered the issues surrounding art lost in the Nazi era since the 1990s have focussed on art looted or otherwise taken directly by the Nazis. The Washington Conference principles on Nazi-confiscated art considered "art that had been confiscated by the Nazis and not subsequently restituted". The principles do not themselves define what is meant by "confiscated" in this context. It is not, for example, clear whether it would include forced sales, where the original owners received at least some value for works of art.

3.6. Following the Washington Conference, in 1999 the Parliamentary Assembly of the Council of Europe adopted resolution 1205 on looted Jewish cultural property. This stressed the importance of the restitution of looted cultural property to its original owners or their heirs (whether individuals, institutions, or communities) and called on parliaments of all member states to consider how they might facilitate the return of looted Jewish property. Again, however, the resolution refers to "looted Jewish property", without considering any other forms of appropriation.

3.7. Following the Washington Conference, a European forum was held at Vilnius in October 2000. The Declaration made by the Vilnius forum called for the implementation of the Washington Principles, and Resolution 1205 of the Parliamentary Assembly of the Council of Europe. This Declaration also focussed on the need for restitution of "looted assets".

3.8. A wider approach was adopted in the "Inter-allied Declaration against Acts of Dispossession committed in territories under enemy occupation or control" made in 1943. The Governments subscribing to the Declaration expressly reserved their rights to declare invalid:

> "any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been situate in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged to persons (including juridical persons) resident in such territories."

3.9. It was made clear that this was to apply whether such transfers took place by "open looting or plunder, or of transactions apparently legal in form, even where they purport to be voluntarily effected". The Explanatory Note stated further that "The wording of the Declaration ... covers all forms of looting to which the enemy has resorted. It applies, eg, to the stealing or forced purchase of works of art just as much as to the theft or forced transfer of bearer bonds."

Spoliation Advisory Panel's Terms of Reference

3.10. The Spoliation Advisory Panel's terms of reference refer to cases where possession of a cultural object was lost during the Nazi era (1933 – 1945). This is widely expressed. There is no requirement that the object in question was confiscated by the Nazis, that loss of possession resulted from an illegal act, or that the claimants are victims, or heirs to victims of the Holocaust. Only one of the claims which have so far been considered by the Panel would fall within the usual definition of "spoliation".[33] These claims illustrate the range of situations in which it may be appropriate for items to be restored to their original owners (or their heirs), and the fact that Nazi involvement in the original loss may have been indirect. In the first case considered by the Panel, the painting in question was sold by the claimant's mother, to an art gallery in Belgium – for an absurdly low price, to obtain money for food. In the second case, the painting was sold by a Jewish art dealer at auction. Again the sale was a legal transaction under the relevant law (though it may have been possible to argue that it was made under duress). It was a forced sale, required to meet a fictitious tax liability imposed by the Nazi authorities, but did not amount to confiscation by those authorities. In the

[33] "The action or an act of pillaging; seizure of goods or property by violent means" (Shorter Oxford English Dictionary).

third case - the loss of the Beneventan Missal - the Panel concluded that on the balance of probability that the loss had taken place within the relevant time period, but did not have evidence explaining how the loss took place. The most recent case to be considered by the Panel – relating to four drawings in the possession of the British Museum – does reflect a classic case of spoliation. The owner of the drawings, Dr Arthur Feldman was forced to leave his house in Brno with his wife by the Gestapo on 15 March 1939, the day Czechoslovakia was invaded, leaving behind his entire collection of Old Master drawings. The collection was subsequently seized by the Gestapo.

3.11. These examples demonstrate the difficulties which would result if the scope of any legislation was restricted too narrowly to objects "looted" or confiscated during the Nazi era, as in the Vilnius Forum Declaration, and the Washington Principles on Nazi-confiscated Art.[34] Works of art were lost in the Nazi era in a wide range of circumstances. In some cases, works of art were stolen by the Nazis. In other cases, laws were enacted to make confiscation of works of art held by the Jews legal. For example, in the Netherlands, a Decree of August 8, 1941 required Jews to register all assets and private property; additionally, they were to turn over to the Lippmann, Rosenthal and Co Bank (the "Liro Bank") all credits, securities, and large sums of Dutch and foreign currency. The second Liro Decree of May 21, 1942 required the Jews to declare all of their possessions, including any works of art, and to surrender any valuable objects or collections to that Bank. Equally, the owner of a work of art might have sold it under compulsion (including as a result of economic deprivation), as the first and second cases considered by the Panel illustrate.

3.12. However, if the circumstances in which de-accessioning is possible are defined in statute as broadly as in the terms of reference of the Spoliation Advisory Panel, any cultural items which were lost during the relevant years anywhere within the world by anyone could be de-accessioned, even where the loss was due entirely to the negligence of the person concerned, and not to the wrongful action of any third party. A power defined in such terms could apply not only to items lost as a result of Nazi aggression, but also to

[34] (1998). The Vilnius Forum Declaration referred only to articles "looted" during the Holocaust era. The Washington Principles referred to "art confiscated by the Nazis and not subsequently restituted".

items lost, for example, during a cruise from the United Kingdom to the United States, within the relevant time-frame.

A new definition of loss

3.13. Accordingly we consider that any legislation which creates a new power of disposal for the national collections should define the circumstances in which disposal is possible with greater particularity. This would ensure that the power to dispose of objects in one of the national collections could only be used for its intended purpose – to enable the return of objects lost by those who suffered in the Nazi era as a result of Nazi actions in response to a claim by their original owners or their heirs. The intention would be that claimants should be able to demonstrate that the original loss was due to Nazi aggression, and that in the circumstances there is a compelling moral case for the return of the object in question. It should not be possible for this power to be used to allow other objects to be removed from national collections, or for a museum to dispose of unwanted items in its collection. We have therefore considered whether it would be possible to restrict the scope of any power to dispose of objects in a collection so that it is sufficient to meet the intended purpose, but cannot be applied in other circumstances.

3.14. It would be possible for legislation to incorporate a requirement that the item in question was wrongfully taken during the relevant years in circumstances directly related to the actions of the Nazis, their allies or anyone working in collaboration or co-operation with them, or in other words that there was a causal link between the actions of the Nazis or their allies and the taking of the item concerned. However, there would be considerable difficulties in defining "wrongful taking" appropriately for these purposes. Any such concept would need to be defined to include at least:

(a) Theft in any form (including plunder or looting);

(b) Confiscation (including any form of seizure imposed by way of penalty for a fictitious legal liability, or under form of law without full compensation);

(c) Appropriation in any way contrary to law (the notion of "law" in this context would need to exclude any Nazi law whose purpose was the

persecution or deprivation of Jews or others; or it could be approached in a broader sense to allow not only for the law in force in the territory concerned, but the recognition of general principles of public policy and human rights, as laws in force in many territories occupied by Nazi forces permitted expropriation in circumstances we would consider repugnant);

(d) Forced sales, or any transaction vitiated by oppression, fraud, duress, or undue influence; [35]

(e) Sale at significantly less than the value of the object due to the vulnerability of the owner, where that vulnerability is a direct result of the actions of the Nazis, their allies or collaborators (including the establishment of systems of law or practice leading to the vulnerability in question).

3.15. There would be some danger in adopting a definition which relies on precise description of the losses which might trigger the use of the new power of disposal. However comprehensive that description is, there would be a risk that a deserving claim would not qualify, simply because the circumstances in which the loss had taken place did not fit one of the descriptions. A more general definition – such as any loss caused by Nazi actions (or the actions of their allies or collaborators) in circumstances which would be considered to be contrary to the human rights of the owner under the provisions of the European Convention on Human Rights if the loss took place by state authority today – would be another possibility. This would encompass, for example, circumstances in which the property had been taken from the owner without appropriate compensation, whether by theft or government expropriation.

3.16. An alternative solution may be provided by the approach adopted in the Netherlands. The decree establishing the Advisory Committee on Restitutionary Claims describes the claims to be considered by the

[35] Whether such a plea could be made out, and its effect on the transaction would depend on the applicable law, which would itself raise difficult issues. English law would usually apply the proper law of the contract – express provision would need to be made to apply English law to such transactions, and it is not clear that English law itself would provide a satisfactory answer. It may be necessary to provide for a statutory definition which extends the common law definition of duress.

Committee as claims to "items of cultural value of which the original owners involuntarily lost possession due to circumstances directly related to the Nazi regime".[36] Further, that Committee presumes when considering claims that all sales by members of a persecuted population group, such as the Jews, Sinti or Roma, should be considered to be forced sales, unless there is evidence to the contrary.[37] Such a definition may be more appropriate in a country which was itself occupied by the Nazis, making it clear precisely what is meant by "the Nazi regime" in this case. However, equivalent provision could be made by providing that museums would have a power of disposal of any object in their collection which had been found to have been involuntarily lost due to circumstances caused by the actions of the Nazis or their collaborators during the relevant period.

3.17. *Definition of loss - conclusion*: We have suggested three alternative definitions for the "loss" which would trigger the proposed definition for museums to transfer items out of their collections:

(a) Where the item concerned was wrongfully taken in circumstances caused by the actions of the Nazis or their allies or collaborators during the relevant period. "Wrongful taking" would be defined for these purposes to include the circumstances set out in paragraph 3.14 above);

(b) Where loss of the item concerned was caused by Nazi actions, or the actions of their allies or collaborators, in circumstances which would be considered contrary to the human rights of the owner under the European Convention on Human Rights if the loss took place today;

(c) Where the item was involuntarily lost in circumstances caused by the actions of the Nazis or their allies or collaborators in during the relevant period.

[36] Decree establishing the Advisory Committee on the Assessment of Restitution Applications made by the State Secretary for Education, Culture and Science, 16 November 2001.
[37] Letter dated 16 November 2001 from the State Secretary for Education, Culture and Science to the Speaker of the Lower House of Parliament.

3.18. In each case, it would be necessary for the claimants to demonstrate that the circumstances surrounding the loss were caused by the actions of the Nazis in the relevant period. We consider that this is essential to ensure that the use of the power to de-accession items from museum collections is limited to its intended purpose – namely to provide for a form of restitution to those who suffered as a result of Nazi actions, or the actions of their allies or collaborators, where that suffering included the loss of cultural objects or works of art.

3.19. One case considered by the Spoliation Advisory Panel would not come within this definition. The third Report of the Panel considered the loss of the Beneventan Missal. It was not possible to identify how the Missal was lost by the Metropolitan Chapter of the Cathedral City of Benevento, because no evidence was available to prove the circumstances of the loss, other than the fact that it must have taken place before the Missal was purchased in a second hand book shop in Naples in 1943. In particular, it is not possible to say that there was any Nazi involvement in the loss. Accordingly, if the power to de-accession items is to cover the Missal, it will be necessary to make separate provision for this. We have accepted the recommendations made by the Spoliation Advisory Panel in this case, and we therefore believe, for the reasons given by the Panel, that it would be appropriate to make such provision, in addition to the general power we propose. As the Panel has already considered this case, decided in favour of the claimants, and its recommendations have been accepted, many of the issues arising in relation to the general power which are discussed in the remainder of this Consultation Paper do not arise.

The claimants

3.20. In some cases, the question who is entitled to claim a particular object may present the institution concerned with some difficulty. Even if it is entirely clear that the object concerned was confiscated by the Nazis, it may be less clear who is now entitled to possession. An initial claim may be followed by claims by other institutions or individuals claiming to be entitled to the same asset. For example, multiple claims have been made in relation to a number of drawings by Dürer, originally owned by the Lubomirski family and kept in the Ossolinski Institute in Lvov in Poland, and looted during the war. After

the war, they were recovered by the American authorities, and claimed by Prince George Lubomirski on the basis that the drawings were the property of his family. The American authorities returned the drawings to the Prince. Competing claims to the drawings (which were sold by the Prince, and are now in a number of museum collections) were subsequently made by Poland on behalf of an Institution alleged to be the successor of the Institute where the drawings were originally kept and members of the Lubomirski family, and the Ukraine (on the grounds that Lvov became part of the Ukraine following the war).[38] Where multiple claims are received to a single object it can be difficult for an institution to assess which claim is valid. As the Lubomirski case demonstrates, carrying out a careful assessment of a claim which has led to an act of restitution does not mean that others with competing claims to the item will accept the conclusions of that assessment. An institution which has transferred an object out of its collection in response to a claim judged to be valid, may still need protection against any subsequent claims which may be made. This is considered further in paragraphs 3.63 to 3.65 below).

3.21. This raises the question: how is the entitlement of the claimant to the object claimed to be assessed? If a claim was brought in the courts, the claimant would be required to prove that he or she had title to the relevant object. Where the claimant is the original owner, this may not present difficulties (providing that the claimant could show he or she had in fact owned the object concerned before losing possession of it). However, in most cases, the claimant would be claiming in succession to the original owner. This would require proof that the claimant had a better title to the object than any other potential heir, and that this title had not been extinguished through the operation of any relevant limitation periods (or indeed by any other law).[39] Applying the same requirements to a new power of disposal for museums would be unduly restrictive. One of the acknowledged problems in resolving claims by victims of the Nazis to the restitution of cultural property lost during the Nazi era is that in many cases the limitation period relating to the

[38] DeAngelis and Kline "Disputed Dürers: The Lubomirski drawings and the complexities of restitution": http://www.gwu.edu/~mstd/Publications/2003/brandy%20vause.pdf

[39] Such as the decree of the Soviet Military Administration of 9 October 1945 which provided that earlier orders concerning the confiscation of assets of former members of the Nazi party should take effect as expropriation orders. This decree was effective to transfer title in a painting by Wtewael from the Duke of Saxe-Coburg-Gotha to the Land of Thuringia: *City of Gotha v Sotheby's and Cobert Finance* (9 September 1998, unreported).

claim will have expired.[40] Resolution 1205 (1999) of the Parliamentary Assembly of the Council of Europe notes that legislative change may be necessary to order to extend or remove statutory limitation periods.

3.22. One approach which could be adopted would be to provide that an institution would only be able to transfer an item out of its collection to a claimant who is able to demonstrate that he or she was the original owner of the item concerned, or that he or she would be regarded as the heir of the original in respect of that item, disregarding the effect of the expiry of any relevant limitation period. It may be necessary to consider whether a special rule should be laid down for the determination of the applicable law governing succession.[41] There may be difficulties in formulating a workable rule. However, such a principle may assist in determining who is entitled to be treated as a claimant (particularly where there is a possibility of multiple claims being received in relation to a single item). As an alternative, the legislation could provide that a transfer should only be made to a claimant who can demonstrate that he or she is entitled to receive it, without specifying how that entitlement should be proved. Further guidance could be provided to institutions receiving a claim in a Code of Practice, and it would be possible for any institution receiving a complex claim to seek the guidance of the Spoliation Advisory Panel. This would assist an institution to decide between competing claims to the same object. The case may still arise whereby an institution which has returned an object to a claimant then faces a claim from someone alleging that he had a better title to the item. This raises different issues, and is considered at paragraphs 3.63 to 3.65 below.

3.23. Imposing detailed requirements to be met by claimants may serve to limit the circumstances in which, in practice, an institution would be able to rely on the proposed power to ensure that an item is de-accessioned from its collection. They may also increase the difficulty of making a successful claim.

[40] Under English law, for example, under the Limitation Act 1939, which governed the law on limitation periods before the Limitation Act 1980 was passed, the limitation period for an action for conversion would expire six years after the cause of action accrued, unless the defendant was guilty of fraudulent concealment. This applied even where the original conversion was a theft, and the plaintiff had no way of knowing whom to sue: *R B Policies at Lloyds –v- Bulter* [1950] 1 KB 76.

[41] Under the usual rule, the validity of a transfer of a movable cultural item, and the effect of the transfer on any proprietary rights of the parties to the transfer, and the rights of those claiming under them, are governed by the law of the country where the item is at the time of the transfer. Rule 116 *Dicey and Morris* Conflict of Laws, 13th edition (2000) Edn. Page 963 and *Winkworth -v- Christie Manson and Woods Limited and anr*. [1981] Ch. 496 at 513

As the cases considered by the Spoliation Advisory Panel to date illustrate, it is extremely difficult for claimants to provide evidence of events which took place several decades ago, and any legislation would need to recognise this. In addition, even apart from the question of the available evidence, increasing the requirements which a claimant would have to meet before an item could be released from a collection would increase the risk that an equally meritorious claim would not qualify. Equally, there could be cases where the relationship between the claimant and the original owner was sufficiently close to give him or her a moral claim to an item, even though that claimant would not be recognised as a legal heir. Further, specifying the requirements with too great a precision in the Bill would increase the need for legal involvement to demonstrate that a claim satisfied these requirements.

3.24. **Q1 Consultees are asked if they agree with our provisional view that 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**

Q2 Consultees are asked whether:

(a) the power to dispose of objects in a collection which we propose should apply:

(i) to objects wrongfully taken in circumstances directly related to the actions of the Nazis, their allies or collaborators during the years 1933 to 1945 (and if so whether "wrongful taking" should be defined to include all the circumstances identified in paragraph 3.14 above); or

(ii) to objects which were involuntarily lost by their owners during the period from 1933 to 1945 in circumstances arising from the actions of the Nazis, their collaborators or allies or;

(iii) to objects lost during that period as a result of Nazi actions in circumstances which would today be

considered to be contrary to the human rights of the original owners;

(b) they agree that separate provision should be made to enable the restitution of the Beneventan Missal in addition to the general power to de-accession items lost as a result of Nazi actions which we propose;

(c) the legislation should seek to define the entitlement which should be demonstrated by a claimant before museums are permitted to transfer objects in their collections to that claimant, or whether guidance on a claimant's entitlement should be provided by a Code of Practice.

(b) Who should take the decision whether a particular object should be transferred from a museum's collection?

3.25. There are a number of possible options:

(a) the decision could be left entirely to the institution concerned;

(b) the legislation may require a recommendation by the Spoliation Advisory Panel that a particular item should be transferred to a claimant before an institution's power to release an item from its collection arises;

(c) the legislation may provide that a recommendation by the Panel that a particular item be transferred to a claimant should be determinative. In other words, the institution would no longer have any discretion in the matter. The Panel would be the deciding body;

(d) the Secretary of State could be given a power either to permit, or to direct, that an object be released from the collection of a museum or gallery;

(e) the consent of the Attorney General or the Charity Commission could be made a precondition to any transfer.

(i) A general discretion for institutions?

3.26. It would be possible to give museums and galleries a general power to transfer objects lost as a result of Nazi actions during the period 1933 to 1945 in response to a claim. This was the option followed in section 47 of the Human Tissue Act 2004, in relation to human remains. That section lists a number of institutions, and gives those institutions the power to transfer from their collection any human remains under 1,000 years old "if it appears to them to be appropriate to do so for any reason, whether or not relating to their other functions". As this illustrates, this approach gives the institutions in question discretion as to whether or not the transfer is to be made.[42]

3.27. It would similarly be possible to list those institutions, such as the national museums and galleries subject to statutory restrictions, which are felt to need a power to transfer items falling within the Panel's terms of reference out of their collection. If necessary, power could be given to the Secretary of State to add to the list by order. (However, if it was decided to remove non-statutory restrictions on de-accessioning, and that the legislation should also extend beyond identified national institutions to other public collections which are equally subject to such restrictions, reliance on a list of identified institutions may not be an appropriate vehicle).

3.28. This approach would ensure that the independence of the national collections was not compromised in any way. It would be possible to combine such a discretion with a non-statutory Code of Practice, as has been done in relation to human remains. In addition, even if no Code of Practice is agreed, the Spoliation Advisory Panel would continue to exist, to consider any claim submitted to it, and to make recommendations to the parties, and to the Secretary of State. Though its recommendations would not play a formal role in the decision as to whether an object should be transferred to a claimant, they would have an important informal role. If the Panel had recommended that an item should be restored to a claimant, an institution would come under considerable moral pressure to make the transfer. The institution could also take comfort from the fact that a claim had been

[42] The power in section 47 of the Human Tissue Act will be accompanied by a non-statutory Code of Practice which will provide some guidance on the circumstances in which it would be appropriate for an institution to make such a transfer.

investigated by the Panel, and that the Panel had reached the view that the relevant statutory requirements were satisfied in a particular case. The fact that an institution was following a recommendation of the Panel in transferring an item from its collection would assist the institution to defend its decision to make the transfer if that decision is challenged (whether in the courts or otherwise). Similarly, a claimant would have confidence that an independent body had reviewed his or her claim. At the same time, the institution would retain complete discretion as to whether it should accede to a claim for an item in its collection.

3.29. This raises the question whether it would be appropriate for the institution to be able to reject a recommendation by the Panel that a particular item should be transferred to a claimant. It may be arguable that if the Panel, having considered the submissions both of the claimants and an institution, which may wish to resist a claim for restitution (as opposed to a claim for compensation), has decided that it is appropriate for an object to be transferred to a claimant, the institution concerned should not have total discretion to decide whether or not to implement that recommendation. However, as presently constituted, the Panel can only "advise" the claimant and the institution on the appropriate action in response to a claim – and neither party has to follow that advice. If a recommendation by the Panel is made a pre-requisite for the transfer of any object from one of the national collections, the Panel will always have to be involved and consider the claim, even in cases where the museum is willing to return an object without reference to the Panel.

3.30. It would be possible to ensure a degree of transparency as to the way in which the national museums exercised any power to transfer objects out of their collections and the terms of any settlement reached with claimants by imposing a statutory requirement on institutions to publish in their annual reports information on each case in which the power had been used, setting out in detail the circumstances of the claim, and the factors which had lead the institution to accept it.

(ii) Should a recommendation by the Panel have a decisive role?

3.31. Another option would be to provide that a museum could only accede to a claim where the Spoliation Advisory Panel had recommended that a particular object should be transferred to a claimant. This would increase the pressure on institutions to accede to recommendations made by the Panel. This approach would not necessarily entail removing all discretion from an institution, which would still have the power to reject such a recommendation if it felt that it was appropriate to do so (though an institution might in practice find it hard to resist the public pressure for restitution, following a recommendation from the Panel). It would however significantly reduce the number of occasions on which the institution was able to agree to the transfer of an item out of its collection, and limit the flexibility with which an institution could approach a claim. This might be seen as a safeguard against the possibility that an institution might abuse its power to dispose of an unwanted object, or seek unreasonable compensation from a claimant as the price for agreeing to restitution of an object.[43] However, as noted above, it would mean that the Panel would need to consider the claim and come to a conclusion in each case, whether or not the institution was willing to restore an item to the owner's heirs. It would not be possible for the institution to take this decision alone. This would create difficulties if the Panel ceased to exist because no claims were received for several years.

3.32. The same problems would occur if the decision of the Panel was made determinative – so that an institution would not have any discretion to reject a recommendation from the Panel that an object should be transferred to a claimant. This would be a significant change in the role of the Panel, and we consider some of the relevant issues below.

(iii) Should the Secretary of State make the final decision?

3.33. It would be possible to give the Secretary of State the power to permit – or require – the transfer of an item out of a museum or gallery notwithstanding any statutory or other restrictions. The power could be exercisable by

[43] Though there may well be circumstances in which an institution is entitled to some compensation for restoration of an object, for example, which has significantly increased its value.

affirmative order – which would allow parliamentary scrutiny of each case being considered. The Secretary of State would need to be advised on claims – in practice it is likely that legislation following this approach would need to provide that the Secretary of State's power would only arise if the Spoliation Advisory Panel had recommended that an object be transferred out of one of the national collections.

3.34. Giving the Secretary of State a power to require the transfer of the object from an institution's collection may ensure that the final decision on any claim was taken by a party independent of any dispute over the claim. However, it could be seen as compromising the independence of the institution. In addition, it may be argued that the Secretary of State would be predisposed to favour restitution of an object rather than the payment of compensation or an *ex gratia* payment to a claimant, as any payment might need to be provided from his or her Department's budget, whereas the institution might prefer to offer payment, as opposed to losing an object in its collection.

3.35. In addition, consideration would need to be given to human rights issues. If the institution could claim rights under Article 1, Protocol 1 of the European Convention on Human Rights (the right to peaceful enjoyment of possessions), such an order might be argued by the institution to restrict its rights. It is unclear whether in fact a national institution would be able to claim any human rights as against the government. It might be argued that an institution such as the British Library is a public authority, at least in relation to its function of preserving part of the national collections. If this is the case, it is most unlikely to be able to rely on rights under the Human Rights Act in the exercise of this function.[44] However, these issues would need to be considered if it was decided to give the Secretary of State a power to require transfer.[45]

[44] "Victim" under the Human Rights Act is a person who can bring an application before the Strasbourg Court, which means, under Article 34 of the European Convention on Human Rights, a "person, non-governmental organisation or group of individuals". The Strasbourg Court has held that public law bodies performing official functions assigned to them by the law are "governmental organisations", and so unable to rely on the Convention rights. Similarly, the House of Lords in *Aston Cantlow v Wallbank* [2003], noted that public authorities cannot rely on the Convention rights.
[45] This issue would assume more importance if the legislation extended to museums and galleries generally, as it is unlikely that all could be considered to be "public authorities".

3.36. A possible alternative might be to leave institutions with discretion to transfer objects out of their collections in response to a claim, but to give the Secretary of State the power to issue statutory guidance setting out the conditions under which an institution would be expected to exercise its discretion to transfer objects out of its collection. Such guidance could include the decision-making process that institutions would be expected to follow. The final decision would be left to the institution, but the Government would be able to indicate when it might be appropriate for an item to be transferred to a claimant. Giving such guidance statutory force would be a departure from the policy up till now (as noted above, it was decided in relation to human remains that there should be a non-statutory Code of Practice, which can therefore apply to all museums, and not just those listed in the Human Tissue Act), but this is a possible option.

(iv) Should the consent of the Attorney General/Charity Commission be required?

3.37. An alternative measure which would provide some independent oversight of an institution's decision to dispose of an item in its collection would be to require an institution to obtain the consent of either the Attorney General or the Charity Commission to the disposal of an item in their collection under this power. This would only apply where the body concerned was a charity, and so subject to the jurisdiction of the Attorney General and the Charity Commission. This would in practice oblige the institution to demonstrate to the Attorney General or Commission that the requirements for the exercise of the power were satisfied. If the Panel had reported on the claim in question and recommended that an item in the relevant collection should be transferred to the claimant, such approval could be expected to be automatic. If however the Panel had not been consulted, the Attorney General or Charity Commission would be able to ensure that the institution had reasonable grounds for accepting a claim. In appropriate cases the Attorney General would be able to request an institution to seek the advice of the Panel. (We do not envisage that the requirement for such consent would serve as an alternative to the Panel).

Q3 Consultees are asked for their views on the following issues:

(a) Should the question whether a particular object is de-accessioned be left wholly to the discretion of the institution concerned?

(b) Should an institution be able to de-accession an object in its collection in response to a claim which has not been considered by the Spoliation Advisory Panel, without reference to other authority?

(c) Should an institution be able to reject a recommendation made by the Spoliation Advisory Panel, and if so in what circumstances?

(d) Should recommendations made by the Spoliation Advisory Panel be binding on the parties to a claim?

(e) Should the consent of the Secretary of State, the Attorney General or the Charity Commission be required before an institution is able to de-accession an object from its collection?

(f) Should the Secretary of State have power, subject to the approval of a draft order by Parliament, to direct an institution to de-accession an item from its collection?

C Non-Statutory Restrictions on de-accessioning

3.38. We noted above that the statutory restrictions on the powers of the national museums to dispose of objects in their collections are not the only bars to transferring objects to a claimant. In this section we consider possible approaches to non-statutory restrictions on transferring items from museum collections.

(a) Should any provision be made?

3.39. One possibility would be to make no provision in relation to non-statutory restrictions on disposal of items in an institution's collection. Where the restriction stems from the terms of the charitable trusts on which the item is held, section 27 of the Charities Act 1993 already provides some assistance for trustees wishing to transfer a "spoliated" item in their collection to a claimant (see paragraph 2.21 above). However, there would be drawbacks to this approach:

(a) This would not deal with any contractual restrictions on an institution's power to dispose of a particular item in its collection.

(b) There may be difficulties in the case of national collections where trusts and other restrictions on disposal have been given express recognition in statute. Statutes governing the national institutions have in general made any power of disposal granted to the institution subject to any trust or other condition which might restrict the disposal of a particular item.[46] The Human Tissue Act 2004 similarly respects such conditions. Section 47(4) provides that:

> The power conferred by subsection (2) does not affect any trust or condition subject to which a body to which this section applies holds anything in relation to which the power is exercisable.

(c) In *Attorney General v Trustees of the British Museum,* it was held that the *Re Snowden* jurisdiction (given statutory expression in section 27 of the Charities Act 1993) [47] does not allow the Attorney General to disregard statutory prohibitions on disposal. The governing statutes of a number of the national institutions expressly provide that the existing powers of disposal of the institution may not be exercised inconsistently with a trust or condition applying to the item. This could be considered to be a form of statutory entrenchment of the trust which would prevent the application of the rule in *Re Snowden*.[48] The position will not be clear unless express statutory provision is made for this situation.

(b) Possible statutory provision

3.40. It is unlikely to be feasible to make individual provision for each institution which might have items in its collection subject to non-statutory restrictions, and we will therefore be considering a form of general provision. There are precedents for making such provision in relation to the national collections to disregard the provisions of a trust: power is given to some national

[46] See for example, British Library Act 1972, Schedule, paragraph 11(5); Museum of London Act 1965, section 5(4); National Maritime Act 1934 section 2(3)(e), Museums and Galleries Act 1992, s. 4(4) Tate Gallery, s. 4(5) (National Portrait Gallery; British Museum Act 1963, section 5(1).
[47] Described in paragraph 1.8 and 2.21 above.
[48] See paragraph 1.8 above.

institutions to dispose of an object notwithstanding any trust or condition restricting such disposal where:

> "the object in question has become useless for the purpose of the collection by reason of damage, physical deterioration, or infestation by destructive organisms."[49]

(No such power is given to the Tate, the British Library, the Museum of London, the National Maritime Museum or the National Galleries).

3.41. Similarly, some local authority museums have been given a statutory power to dispose of items in their collection after a set period following the acquisition notwithstanding the conditions of any gift or bequest subject to which it was acquired.[50]

3.42. It would be possible to provide that, where the power to transfer an item out of the collection is triggered under our proposals, the transfer may be made notwithstanding any trust or other condition restricting disposal of that item. It would be necessary to consider how far such a power should extend. In particular, should the power to override non-statutory conditions be restricted to those collections which are publicly funded? The argument that it is not appropriate for collections supported by public funds to include looted items may not apply to a private collection which does not receive any form of public funding. The terms of reference of the Spoliation Advisory Panel provide that the Panel is to consider claims in respect of a cultural object "where such object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit". However, they go on to state that "the Panel shall also be available to advise about any claim for an item in a private collection at the joint request of the claimant and the owner".

[49] National Heritage Act 1983, applying to the Royal Botanic Gardens, Kew (s.27(3)); the Science Museum (s.14(3)), and the Victoria & Albert Museum (s.6(3)). The identical power is given to the British Museum under s.5(2) of the British Museum Act 1963.

[50] The Greater Manchester Act 1981, s.149(3)(b) provides that "the powers conferred by this subsection shall not, during the period of twenty-one years commencing on the date on which it became vested, be exercisable as respects that work of art or object in any manner inconsistent with any condition attached to the gift of bequest, except with the consent of the donor or the personal representatives or trustees of the donor." In County of Lancashire Act 1984, s.58(3)(b) the equivalent period is 35 years.

3.43. This clearly anticipates that claims may be made to items in a private collection. Items in such a collection may have been obtained under conditions which would restrict any future disposal of the item in question. It may appear strange if a claimant is unable to obtain an item looted from his family during the Nazi era because of the nature of the collection in which the item ended up. Including such collections within the scope of any statutory provision would not amount to significant government intervention in the running of private collections: the power would remain a permissive one, and it would be open to the collection to reject claims made to them. Against this, there may be less need to make such provision in relation to private collections which are not established for the public benefit. No claim against an object in a private collection has so far been referred to the Panel.

3.44. Power to override non-statutory restrictions on disposal could be applied to particular categories of museums and galleries, including all or any combination of the following:

(a) the national institutions (including for these purposes the National Museums and Galleries on Merseyside);

(b) any museum or gallery provided and maintained by a local authority under section 12 of the Public Libraries and Museums Act 1964;

(c) any museum formerly vested in one of the London Authorities, or a metropolitan city council (this category would include bodies such as the Geffrye Museum, the Horniman Public Museum, the Greater Manchester Museum of Science and Industry)

(d) the armed forces museums;

(e) university collections;

(f) museums vested in bodies such as the Historic Buildings and Monuments Commission for England (English Heritage) (including for example the Historic Houses Museums);

(g) any other independent private collection.

3.45. It may also be possible to make more general provision, by reference to collections in England which have been accredited by the Museums, Libraries and Archives Council under the Museums Accreditation Scheme (this relates to a devolved matter both for Wales and Scotland, so any action in relation to museums and galleries in Wales and Scotland would require the consent of the devolved administrations).

3.46. Any power for an institution to disregard the provisions of any trusts affecting items in its collection would need to be sufficiently circumscribed to ensure that the charitable status of the institution (where relevant) was not affected. As noted above, there are precedents for overriding the provisions of a trust (not least via section 27 of the Charities Act 1993), and, as also noted above, it would be possible to provide as an added safeguard that, in the case of a charity, the consent of the Attorney General or the Charity Commission was required.

Q4 The views of consultees are sought on the following issues:

(a) Should any provision be made to permit an institution to dispose of an object in its collection in response to a claim where that object is subject to any trust or other condition which expressly or impliedly prohibits disposal?

(b) If so, should an institution be able to override all non-statutory restrictions on disposal, or should there be any exceptions? What exceptions might be made?

D The Position of the Spoliation Advisory Panel

3.47. We consider above the role which might be played by recommendations made by the Panel. Two possibilities would be to provide that no institution should be able to transfer an object out of its collection unless the Panel had recommended that the object in question should be transferred to a claimant, or to provide that a recommendation by the Panel should be definitive. In the first option the institution would remain free to reject a recommendation made by the Panel, if it thought it appropriate to do so. In the second, the Panel would take the final decision – the institution concerned would be obliged to implement it.

(a) Human Rights Issues

3.48. Legislation which gave statutory force to a recommendation of the Panel would ensure that its recommendations could determine a claim to restitution of an object in a museum collection. Even if the Panel's recommendation is only made a precondition to the existence of a power to transfer objects out of a collection, that recommendation would be determinative in each case where the Panel recommended that the claim should be rejected. That claim could not subsequently be revived (unless express provision was made for this in the Bill). This would be a radical change from the current position, where it is made clear that the recommendations of the Panel do not determine legal rights. A transfer of any object out of a museum's collection into the ownership of the claimant would in practice involve a transfer of title in the object to the claimant. This would make it difficult to resist the conclusion that the Panel's recommendations would amount to a determination of the civil rights of the claimant, within the meaning of Article 6 of the European Convention on Human Rights.[51] It would therefore be necessary for the proceedings to satisfy the requirements of Article 6, under which everyone whose civil rights and obligations are determined is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This does not mean that the Panel itself must satisfy Article 6 requirements of independence and impartiality, and the need to be established by law, provided that its decisions are subject to a sufficient review by a body which does satisfy these criteria. In general, a right to judicial review of a decision would be considered to be sufficient.[52] However, this is dependent on a number of factors, including the subject matter of the decision appealed against, the manner in which the initial decision was arrived at, and the extent of the review which could be exercised by the court.

[51] The right to be granted title to a particular object would be regarded as a private right, and the European Court has held that it is sufficient for the application of Article 6 that the outcome of the proceedings should be decisive for private rights and obligations (*H v France* (1989) 12 EHRR 74). Indeed, it would be difficult to distinguish the consequences of a claim for the restitution of an item brought to the Panel from those of a private law dispute as to title to a particular object.
[52] See *Begum v London Borough of Tower Hamlets* (HL) 2003, though this is being challenged in *Tsfayo v UK (App no 60860/00)*.

3.49. If either of these options were adopted it would therefore be necessary to consider whether (a) additional safeguards should be built into the initial decision-making procedure, or (b) it is possible to provide claimants and institutions with an enhanced right of appeal to the High Court.

(b) Need for statutory provision for the Panel

3.50. If the recommendations of the Panel are given statutory force it may be advisable to transform the Panel into a statutory body. This would be necessary if it is decided that the Panel must comply with the requirements of Article 6 of the ECHR in its own right, as one of those requirements is that the relevant tribunal must be "established by law". This means that, at least, the tribunal concerned must be set up and given jurisdiction by law emanating from Parliament.[53] It would also be necessary if as a result of the legislation the level of continued funding required for the Panel exceeded £900,000 per annum (the current *de minimis* level).[54] However, the current case load of the Panel suggests that this is unlikely to be the case.

3.51. If it is not necessary to make the Panel a statutory body because of funding requirements or the requirements of Article 6 ECHR, the question whether greater statutory provision should be made for the Panel is primarily a question of policy. A number of factors will be relevant, including the potential caseload of the Panel. Giving the Panel a statutory status would only be justified if it appears that there will be a continuing need for its work for several years. This is difficult to gauge from the number of claims and potential claims which have been notified to the Panel.

3.52. Statutory provision for non-departmental public bodies such as the Panel can take a number of forms. In general, statutory provisions would set out in detail the basis of appointment of members of a body, provision for funding and accountability of the body and the powers to be given to it. However, more limited provision has been made in some cases (the initial provision for the Advisory Committee on Public Records is limited to a single section in the

[53] *Coeme v Belgium* (2000) ECHR 2000-VII. The Strasbourg Court has noted that the requirement that a tribunal be established by law is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament" Zand v. Austria, application no. 7360/76.

[54] Statutory authority would be required to provide a higher level of funding for any body.

Public Records Act 1958, providing that the Committee shall exist, and that its members shall be appointed by the Lord Chancellor).

Q5 Consultees' views are invited on the question whether the Spoliation Advisory Panel should be transformed into a statutory body.

E Other Issues

(a) Tax issues:

(i) the claimant

3.53. The acquisition by the claimant of a work of art from a museum may affect the claimant's tax position. He or she will have gained a significant asset. The sale of that asset would produce a capital gain, with a corresponding liability to capital gains tax. Equally, if the asset forms part of the claimant's estate at the time of his or her death, it may significantly increase the amount of inheritance tax payable on the estate.

3.54. Concessions have been granted in relation to other forms of compensation received by victims of the Holocaust. Under income tax law, compensation payments made in respect of dormant bank and building society accounts would usually be subject to income tax, as they are considered to represent interest payments. In addition, inheritance tax is potentially chargeable on any account balances in the United Kingdom at death, even if the accountholder had no other UK connection. In 2000 the Inland Revenue announced that no tax (whether income tax or death duties) will be payable on any monies paid out by banks or building societies under the "Restore UK" initiative to Holocaust victims or their beneficiaries. In 2005, the government announced that legislation would be brought forward to exempt from tax comparable compensation payments made by foreign banks to Holocaust victims or their heirs. Similarly, concessions have been made in relation to compensation payments received for wrongs suffered during the World War II era. It has been agreed that the cash value of these claims may be excluded from inheritance tax where compensation is paid in modest round-sum, or otherwise cash-limited amounts, on the grounds that "when this is received by the original victim or their surviving spouse, this almost

inevitably comes late in life when their plans for the disposal of their wealth have already been made"[55].

3.55. The same may apply where a claimant suddenly acquires a capital asset such as a work of art. In these circumstances, is it appropriate for the claimant to pay the full amount of capital gains tax which would otherwise be payable on any sale of the work of art, or for the tax payable on the claimant's estate to be increased by the amount due in respect of the work of art?

(ii) the donor

3.56. Where the item being claimed was originally donated to the institution, the position of the donor would need to be considered. For example, an item may have been accepted by a museum in lieu of tax. If that item is then disposed of by the museum pursuant to a claim for restitution, it may be argued that the benefit of the donation has been annulled, and that, in consequence, the tax liability of the donor should revive. If the donor was unaware of the previous history of the object concerned, and the donation was made in good faith, this would appear to be unjust.

3.57. To prevent this, it may be advisable for legislation to provide that transfer of the object by the museum to a claimant on the grounds that the object had been lost during the Nazi era should not affect any tax benefits accruing to the donor as a consequence of the donation (it would be possible to make an exception where the donor was aware or had reason to be aware of the previous history of the item).

3.58. A donor may have received other benefits from the institution concerned as a consequence of the donation. However, subject to the views of institutions, we do not consider it necessary for legislation to make provision either preserving or cancelling such benefits. It appears to us that this question should be left to the institution concerned to resolve.

Q6 Consultees' views are invited on the following issues:

[55] See Extra-Statutory Concession F20.

(a) Should the claimant be liable to any capital gains tax payable in respect of gains made on the sale of a work of art or other object restored to the claimant by a museum or gallery?

(b) Should the value of a work of art or other object restored to the claimant by a museum or gallery be included in the claimant's estate for the purposes of inheritance tax, or should it be treated as excluded property?

(c) Consultees are asked whether they agree that where an item donated to an institution is transferred to a claimant in restitution, the donor of that item should not lose the benefit of any tax advantages accruing to him or her as a result of the donation?

(d) If they agree to the proposal in (c), do they consider that an exception should be made where the donor was aware or had reason to be aware of the previous history of the item)?

(b) Should there be a sunset clause?

3.59. As we note in the introduction, the new power of disposal we propose for museums and galleries in this country is intended to enable them to make a form of restitution to those victims of Nazi actions, or their heirs, even where the claimant concerned would be unsuccessful in bringing legal proceedings to enforce his or her claim because of the expiry of the relevant limitation period. It is intended to be an exceptional form of redress. This raises the question for how long such a power will be necessary. Because of the nature of the Holocaust, in most cases it is not possible to provide restitution to the victims themselves: claims made to the Panel are being brought by heirs to the original owners of the property in question. Should future heirs, many generations removed from the original loss, still be able to benefit from the use of this power?

3.60. It may be argued that all claimants should now be aware of the possibility that items belonging to their family which were lost during the Nazi era may have become part of the National Collections. A significant amount of information about the objects in the national collections which are considered to have an incomplete provenance for the period in question has

now been made publicly available.[56] It may not be unreasonable to expect claimants to bring claims in relation to the property lost by their families within a set number of years from the date on which a power to transfer items out of a museum collection becomes available. The time which has passed since the end of the Nazi era is already making it difficult for claimants to provide the relevant evidence to prove their claims. The more time elapses, the harder it will become to amass sufficient evidence to decide whether a particular claim is justified or not. If museums are given a permanent power to transfer items out of their collection when the item concerned was lost during the Nazi era, it may well be necessary to decide claims made several decades from today, when the available evidence has deteriorated still further, making it impossible for the claim to be substantiated. This problem could be met by providing that any power to transfer items out of a museum's collection should only be effective for a period of, for example, ten or twenty years, after it comes into force.

3.61. However, against this, it may well be said that it is wrong in principle for items which were originally taken from their owners during the course of the Nazi era to be in our National Collections, and that this principle is not affected by the passage of time. Further, though much information is available on the internet about the provenance of items in the National Collections, the reports by national museums into items whose provenance in the relevant period is doubtful are not complete. The Statement of Principles adopted by the National Museum Directors Conference in relation to the spoliation of works of art during the Holocaust and World War II does not require such reports to be completed by a stated date. This is understandable - the resources available to museums to undertake extensive provenance research into items in their collections are inevitably limited. However it does mean that potential claimants may still reasonably be unaware of the location any objects which used to be in their families' possession. If the power to transfer items out of a museum's collections is only to be effective for a limited period of time, there will still be cases where the fact that an item was in the collection of a national collection only emerged following fresh information after the power had expired. In such a

[56] See the reports on the http://www.nationalmuseums.org.uk/spoliation_reports.html website.

case, the claimant might be offered an *ex gratia* payment, but he or she would not be able to claim the return of the object.

3.62. **Q7: Consultees are asked:**

(a) Should the limited power we propose for museums and galleries to transfer items out of their collections be a permanent one, or should it only be available for a defined number of years after it comes into force?

(b) If consultees believe that this power should not be a permanent one, which of the following periods is most appropriate:

(i) Ten years from the date on which legislation implementing it comes into force;

(ii) Twenty years after this date;

(iii) Any other period from this date?

(c) Protection from subsequent claims

3.63. We note in paragraph 3.22 above the possibility that a museum which has returned an object could then be faced with another claim by someone who claims to have had a better title to it. If the second claim could be substantiated, the museum could be faced with a claim for damages for conversion (that is, wrongful interference with the second claimant's goods). Such a claim could be defended, on the basis that any title the second claimant may have had to the object has been extinguished by the expiry of a limitation period (as will most often be the case). However, establishing such a defence may still require the museum to incur significant legal costs.

3.64. Where the museum's decision to return the object to the original claimant has been taken in good faith, following any guidance issued in relation to such claims, it does not seem appropriate that it should have to face additional expenses (the possibility of which may provide a disincentive for any museum to agree to release an object from its collection). It would be possible to guard against this by providing in any legislation introducing the new power of disposal that once an item has been released from a museum's

collection by the use of this power, the museum should not be subject to any further liability in relation to that item. Such a provision would provide some protection for the museum, but would not prevent a subsequent claimant from taking proceedings against the original claimant.

3.65. **Q8 - Consultees are asked whether they agree that a museum or gallery which has transferred an item from its collection to a claimant should be protected against any further claim in relation to that item by a subsequent claimant**.

SUMMARY OF QUESTIONS FOR CONSULTATION

Q1 Consultees are asked if they agree with our provisional view that 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

Q2 Consultees are asked whether:

(a) the power to dispose of objects in a collection which we propose should apply:

(i) to objects wrongfully taken in circumstances directly related to the actions of the Nazis, their allies or collaborators during the years 1933 to 1945 (and if so whether "wrongful taking" should be defined to include all the circumstances identified in paragraph 3.14 above); or

(ii) to objects which were involuntarily lost by their owners during the period from 1933 to 1945 in circumstances arising from the actions of the Nazis, their collaborators or allies or;

(iii) to objects lost during that period as a result of Nazi actions in circumstances which would today be considered to be contrary to the human rights of the original owners.

(b) they agree that that separate provision should be made to enable the restitution of the Beneventan Missal in addition to the general power to de-accession items lost as a result of Nazi actions which we propose;

(c) the legislation should seek to define the entitlement which should be demonstrated by a claimant before museums are permitted to transfer objects in their collections to that claimant, or whether

guidance on a claimant's entitlement should be provided by a Code of Practice. (See paragraph 3.25).

Q3 Consultees are asked for their views on the following issues:

(a) Should the question whether a particular object is de-accessioned be left wholly to the discretion of the institution concerned?

(b) Should an institution be able to de-accession an object in its collection in response to a claim which has not been considered by the Spoliation Advisory Panel, without reference to other authority?

(c) Should an institution be able to reject a recommendation made by the Spoliation Advisory Panel, and if so in what circumstances?

(d) Should recommendations made by the Spoliation Advisory Panel be binding on the parties to a claim?

(e) Should the consent of the Secretary of State, the Attorney General or the Charity Commission be required before an institution is able to de-accession an object from its collection?

(f) Should the Secretary of State have power, subject to the approval of a draft order by Parliament, to direct an institution to de-accession an item from its collection? (Paragraph 3.39)

Q4 The views of consultees are sought on the following issues:

(a) Should any provision be made to permit an institution to dispose of an object in its collection in response to a claim where that object is subject to any trust or other condition which expressly or impliedly prohibits disposal?

(b) If so, should an institution be able to override all non-statutory restrictions on disposal, or should there be any exceptions? What exceptions might be made? (See paragraph 3.48).

Q5 Consultees' views are invited on the question whether the Spoliation Advisory Panel should be transformed into a statutory body. (See paragraph 3.54).

Q6 Consultees' views are invited on the following questions:

(a) Should the claimant be liable to any capital gains tax payable in respect of gains made on the sale of a work of art or other object restored to the claimant by a museum or gallery?

(b) Should the value of a work of art or other object restored to the claimant by a museum or gallery be included in the claimant's estate for the purposes of inheritance tax, or should it be treated as excluded property?

(c) Consultees are asked whether they agree that where an item donated to an institution is transferred to a claimant in restitution, the donor of that item should not lose the benefit of any tax advantages accruing to him or her as a result of the donation?

(d) If they agree to the proposal in (c), do they consider that an exception should be made where the donor was aware or had reason to be aware of the previous history of the item)? (paragraph 3.60)

Q 7: Consultees are asked:

(a) Should the limited power we propose for museums and galleries to transfer items out of their collections be a permanent one, or should it only be available for a defined number of years after it comes into force?

(b) If consultees believe that this power should not be a permanent one, which of the following periods is most appropriate:

(i) Ten years from the date on which legislation implementing it comes into force;

(ii) Twenty years after this date;

(iii) Any other period from this date? (Paragraph 3.64)

3.2. **Q8 - Consultees are asked whether they agree that a museum or gallery which has transferred an item from its collection to a claimant should be protected against any further claim in relation to that item by a subsequent claimant**. (Paragraph 3.67)

DCMS

July 2006

PARTIAL REGULATORY IMPACT ASSESSMENT

RESTITUTION OF OBJECTS SPOLIATED IN THE NAZI-ERA

Objective:

The main purpose of the legislation would be to remove statutory barriers from museums to allow them to return items lost as a result of circumstances related to the Nazi regime from 1933 to 1945. Non statutory restrictions may also be removed. The consultation also considers the role of the Spoliation Advisory Panel and makes proposals for a decision-making process.

Background:

As a result of the forced transfer or works of art and other cultural objects by the Nazis, objects owned by members of the Jewish community and others have been widely dispersed throughout Europe and beyond. The Spoliation Advisory Panel was set up in 2000 to consider claims from anyone who had lost possession of a cultural object during the years 1933 to 1945 and where the object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit. The Panel has completed reports into five claims to objects held respectively by the Tate, the British Library, Glasgow City Council (as part of the Burrell Collection), the Ashmolean Museum and the British Museum. In four of the five cases they found that the claim was a valid one, and in two cases – a painting previously attributed to Chardin in the Burrell Collection, and a 12th century manuscript (the Beneventan Missal) held in the British Library, the Panel recommended that the object concerned should be returned to the claimant. In both these cases, there are legal restrictions on the release of the objects concerned from the collections.

In its report relating to the Beneventan Missal, the Spoliation Advisory Panel recommended that legislation should be introduced to permit restitution of objects falling within the Panel's terms of reference and this paper considers how the recommendation should be implemented. It does not consider whether the restrictions on museums' powers to dispose of objects in their collection should be lifted in any other case.

Options:

The paper considers possible options for legislation, and seeks the views of consultees on the following issues and related questions:

Option 1

Whether museums should have a power to dispose of items in their collection which were lost during the years 1933 to 1945 as a result of Nazi actions.

Option 2

How far such a power should extend and who should be responsible for taking the final decision as to whether a particular object should be released from a museum collection.

Option 3

Whether separate provision should be made to enable the restitution of the Beneventan Missal.

Option 4

What provision, if any, should be made in relation to non-statutory restrictions on disposals from collections.

Option 5

What role the Spoliation Advisory Panel should have.

Risks:

Risk	Consequence	Avoid
Do something		
1(a). Provide museums with general powers to release objects from their collections where the object was lost as a result of Nazi aggression.	Likely to increase pressure for the return of other items from museum collections which people feel were unfairly acquired.	Dealing here with a unique event that brought immense suffering to victims of the Nazis. Not undermining other claims but feel that special treatment is justified here.
1(b). Make the decision of the Spoliation Advisory Panel binding. Alternatively, give	Would be welcomed by the restitution lobby but museum trustees would see this as an infringement of	Would be hard to satisfy museums that restricting their role in the decision- making process was the

the Secretary of State or the Attorney General powers to permit, or direct such a transfer.	their role as guardians of the collections.	right thing to do. Making the whole process more transparent might help, particularly if the Panel's decision were to be binding.

Risk	Consequence	Avoid
Do nothing		
2(a). British Library unable to permanently return The Missal to Italy.	It has been agreed that, for now, the Missal will return to Italy on a long-term loan. Despite the fact that the British Library acquired the Missal in good faith, it is unfortunate that a major British national collection is unable to give back a work of art which was lost by another institution.	Conclude loan as quickly as possible.
Do something		
2(b). Provide specific powers to allow the Missal to return to Italy for good.	The Missal was not looted by the Nazis, and its return needs separate justification	Highlight the findings of the Spoliation Advisory Panel Report into the Missal.

Risk	Consequence	Avoid
Do nothing		
3(a). Make no provision for non-statutory restrictions on disposals from collections.	Contractual restrictions or cases where trusts and other restrictions on disposal have been given	

	express recognition in statute would then still provide a barrier to restitution.	
Do something		
3(b). Make general provision for non-statutory restrictions	Would remove restrictions but risk is that this would be seen as Government interference with contractual or other provisions made by donors.	Explain that this would not amount to significant government intervention. Any powers for institutions to disregard trust provisions would need careful drafting to ensure that the charitable status of the institution was not affected.

There are no risks associated with Options 4 and 5.

Costs and benefits

Sector affected	Costs	Benefits
Government, institutions and claimants.	Options 1 and 2- To date most claimants have preferred a financial settlement rather than the return of the work. Costs to museums of being able to release items from their collections is nil, though if important works are returned it could diminish the quality of the collections. Restoring items to claimants would not involve costs to Government, in contrast with the current position, where the cost of ex gratia compensation offered to claimants has to be funded by the Government. Giving Ministers or the Attorney General a power of approval would add slightly to the administrative burden in each case.	Institutions would be able to remove tainted items from their collections. Acting on a recommendation from the Panel would help the institution in defending its decision, whether in the courts or otherwise. It would also provide a safeguard against institutions abusing their power to dispose of an unwanted object or to seek unreasonable compensation.
	Option 3 – Making additional, separate provision for Beneventan Missal, no additional costs for Government. British Library are already in discussion with the Italian authorities about the conditions under	The Panel concluded that the Missal had been wrongly taken from Italy at the end of the war. Enabling a permanent return of the Missal to Italy would implement the Panel's recommendation and be good

	which the Missal can return to Italy and whether this is on the basis of a loan or permanent transfer.	for international relations.
	Option 4 - No significant costs arising.	Overrides non-statutory conditions relating to the disposal of items, thus making more items potentially capable of being returned to owners.
	Option 5 - No significant costs arising.	Will allow the Panel and the institutions to focus on cases where people have suffered as a direct result of Nazi aggression.

Equity and Fairness

The terms of reference of the Spoliation Advisory Panel allow anyone to make a claim who lost a cultural object during the Nazi era. The consultation seeks to narrow this down to people who lost cultural objects in circumstances directly related to the Nazi regime. This will be mostly, though not exclusively, Jewish families, who suffered most at the hands of the Nazis. The Holocaust was a unique event and we feel this approach is justified given the circumstances. It is vitally important to be fair and to be seen to be fair in this work.

Small Firms Impact Test

There are no implications for small businesses. Apart from Government and the national museums and galleries, the proposals only affect private individuals who may wish to make a claim.

Competition Assessment

Not relevant. As above, we are dealing with a small number of individual claimants, not markets.

Enforcement, Sanctions and Monitoring

Options 1 and 2 - The proposals will enable national museums to restitute works of art in their collections but we do not propose to force them to do so. We monitor the outcome of each case once the Panel's report is published.

Option 3 - The British Library has agreed to return the Missal to Italy, as recommended by the Panel. Legislation will enable this, and we will monitor compliance by talking to the British Library.

Option 4 - As with option 2, this seeks to bring about the same outcome but for museums with restrictions imposed by charity law or other non-statutory requirements. Not relevant in terms of enforcement.

Option 5 - DCMS as the Secretariat to the Panel will ensure that any changes to the Panel's terms of reference are enforced and that only cases which come within its remit are accepted. Similarly, for any changes in decision ratification. The Secretariat takes minutes of Panel discussions and ensures that the Panel's decisions (in which the secretariat does not participate) are made public.

Implementation and Delivery Plan

To be completed after consultation (in accordance with Cabinet Office guidelines).

Post implementation review

This will be considered once the method of implementation has been finalised.

Summary and recommendation

This consultation invites comments on proposals to remove the current statutory and other forms of restrictions to allow national museums to release spoliated works of art and other cultural objects from their collections. It also considers the remit of the Spoliation Advisory Panel, looks at whether its advice should be made binding or whether Ministers or the Attorney General should have powers to require compliance by museums.

Of the various options, we recommend that:

Option 1 – museums should be given a power to dispose of items in their collections where were lost during the years 1933 to 1945 as a result of the actions of the Nazis, their allies or collaborators.

Option 3, - separate provision should be made to enable the return of the Beneventan Missal

Options 2, 4 and 5 - we do not wish to make a specific recommendation at this stage but will take a view based on the outcome of the consultation.