



# Care of Historic Human Remains

A Consultation on the Report of the Working Group on Human Remains

July 2004





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## Foreword

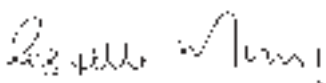
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In July 2000, the Prime Ministers of the UK and Australia met in London and made a joint declaration to increase efforts to repatriate human remains to Australian indigenous communities. In response to this, in May 2001, the then Minister for the Arts, the Rt Hon Alan Howarth CBE MP, set up the Working Group on Human Remains, which was charged to examine the current status of human remains within the collections of publicly funded Museums and Galleries in the United Kingdom, and considered the desirability and possible form of legislative change in this area.

In November 2003, the Department for Culture, Media and Sport published the Report of the Working Group on Human Remains. This consultation document summarises the Working Group's Report and invites comment on its recommendations. The Department for Culture, Media and Sport and the Welsh Assembly Government have worked closely with the Department for Health and this document also summarises the main provisions of the Human Tissue Bill in relation to museums.

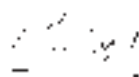
We hope that this consultation document will help us to decide a set of policy proposals which balance the need to respect the culture and wishes of indigenous communities with the need for scientific research.

We look forward to receiving your views.



Estelle Morris

Minister of State for the Arts



Alun Pugh

Minister for Culture, Welsh Language and Sport  
Welsh Assembly Government

# 1 Executive Summary

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- 1.1 The Working Group on Human Remains was established in May 2001, to examine the status of human remains in publicly-funded collections in the UK, and to consider the desirability and possible form of any legislative change in this area. It reported in November 2003. This consultation paper summarises the Report of the Working Group, and invites comments on its recommendations. This consultation document refers only to human remains, and not to other items held by museums.
- 1.2 The Working Group's full report is available in hardcopy from the Department for Culture, Media and Sport, or on the Internet at [http://www.culture.gov.uk/cultural\\_property/wg\\_human\\_remains/default.htm](http://www.culture.gov.uk/cultural_property/wg_human_remains/default.htm). This consultation aims to help us reach a set of policy proposals which recognise the special nature of human remains, and the feelings which their originating community often have towards them, and also gives due weight to their scientific importance and the public benefit that may be derived from research upon them. The Government will decide upon an appropriate way forward, and make its response, after the consultation is concluded.
- 1.3 This paper seeks views on the following, main recommendations of the Working Group on Human Remains:
- Whether the current legal provision for the holding of human remains by UK museums, and that to be made under the Human Tissue Bill, is sufficient
  - Whether the museums sector should be brought fully under the remit of the Human Tissue Authority, which will be created by the Department of Health's Human Tissue Bill
  - Whether the Government should establish a Human Remains Advisory Panel, to mediate claims for repatriation of human remains
  - What model of consent should be adopted in dealing with any claims for repatriation
- 1.4 All proposals here apply only to England, Wales and Northern Ireland. Comments are particularly requested on the ten main implementation options at chapter 10, and the associated detail on the costs of implementation. Respondents should indicate, if possible, which of these options is preferred, taking into account the costs of implementation.

- 1.5 This paper broadly follows the structure of the Working Group's report. The Working Group's recommendations are reproduced in full in Appendix 2, and comments are invited on any aspect of their recommendations. Key issues for consultation are identified in chapter 9 below, where a number of questions are raised which consultees may wish to consider. They are printed in bold type and are listed together in full in Appendix 3. The main provisions of the Human Tissue Bill are summarised at chapter 7. The questions that are asked here reflect both the Human Tissue Bill, and the Working Group recommendations.
- 1.6 The Director of the Natural History Museum submitted a statement of dissent from the main Report, which proposed alternative recommendations on a number of key issues (chapter 13 of the main report). This statement is referred to below as 'the Minority Report' and its recommendations are summarised alongside those of the Working Group. This document also examines the issues raised in that Minority Report, and asks whether the alternatives proposed in that Report are more appropriate to the proposals which form the majority conclusion.

## 2 Introduction

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- 2.1 The Working Group's terms of reference invited it to examine the current legal status of human remains in UK collections; to consider the desirability and possible form of legislative change; and to consider what principles should govern the care and safe keeping of human remains and the handling of requests for return. The terms of reference are reproduced in full in Appendix 1. Although the Working Group's terms of reference referred to England, its findings are of relevance to all museums in the UK. Legislative changes in the Human Tissue Bill now before Parliament (see chapter 7 below) will also apply to Wales and Northern Ireland. Consequently, museums in Wales and Northern Ireland are also being consulted, as any system that may be introduced in future to regulate the care, conservation and possible return of human remains in museum collections will apply to them also. This consultation does not apply to Scotland, where cultural property issues are the responsibility of the Scottish Executive.
- 2.2 The Working Group decided that 'human remains' should be understood as including
- Osteological material (whole or part skeletons, individual bones or fragments of bones, teeth);
  - Soft tissue including organs, skin, hair, nails etc (preserved in spirit or wax or dried/mummified);
  - Slide preparations of human tissue;
  - Artefacts made wholly or largely from any of the above.
  - The Working Group decided to exclude human fossils and sub-fossils from its consideration of human remains.
- 2.3 It should be noted that the term 'human remains', used here, differs from 'human tissue' used in the Department of Health Human Tissue Bill (apart from in section 52, which allows de-accessioning of human remains). While these categories can be co-terminous, the museum sector employs the term 'human remains', which is therefore used here to denote specifically *human remains in museums*. The term 'human tissue' has a connotation covering human material regardless of where held, or in what context.

2.4 The Working Group concentrated its examination on human remains obtained prior to 1948, and excluded material obtained at any date for medical purposes: the latter, and post-1948 material, comes within the purview of the Retained Organs Commission (see chapter 7 below). It considered the future of human remains as an independent matter, distinct from issues relating to the return of other material in the collections of museums (except for the special category of ‘associated objects’). The Working Group’s recommendations deal primarily with non-UK human remains, though the Working Group believe that many of the principles they have formulated and the recommendations they make apply with equal force to the care of all human remains.

### 3 Human Remains in English, Welsh and Northern Irish Museum Collections

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3.1 The Working Group commissioned a survey of historic human remains in English museums and other organisations, e.g. university research collections. A questionnaire was sent to 164 organisations thought likely to hold human remains, and analysis was carried out on 146 identifiable completed questionnaires.

3.2 The survey found that:

- a. 132 of the 146 responding collections held human remains;
- b. between them these collections housed at least 61,000 human remains;
- c. over 60% of human remains held by responding collections appear to have been excavated in the UK;
- d. 60 responding organisations held remains from overseas from the period 1500-1947;
- e. 61 responding organisations held remains from overseas which are pre-1500.

The survey report points out that these figures are likely to be an undercounting of the total of human remains held in English collections, given the difficulty of identifying all relevant institutions, and the response rate among those approached (89%).

3.3 More than two-thirds of the responding institutions had some of their collection of human remains on long-term display, but only 5% had the whole of their collection on display. Institutions store most of their human remains unused. Only nine institutions reported that the storage of human remains was in accordance with conditions agreed with the originating community.

3.4 Thirteen (22%) of the 60 institutions holding human remains from overseas (1500-1947) have received requests for the return of human remains. A total of 33 requests was reported; of these, 27 requests came from Australasian communities, and five from communities in the USA. Twenty of the 33 requests were made to three institutions: the British Museum, the Natural History Museum and the Royal College of Surgeons.

- 3.5 Of the 33 requests for return reported in the survey, seven have resulted in agreement to return; five decisions are pending; thirteen requests were refused on the grounds that they were prohibited by legislation; and eight were refused for other reasons, two specifically citing scientific significance. Other evidence suggests that a total of ten institutions in England have returned or agreed to return human remains.
- 3.6 The National Museums and Galleries of Wales, and the Council of Museums in Wales, were separately consulted about their holdings of human remains. They indicated that 12 Welsh museums have human remains in their collections. The large majority of these are archaeological finds that originate in Wales, although there are also a few examples of remains from overseas in Welsh collections. The Northern Ireland Museums Council holds no human remains. The National Galleries and Museums of Northern Ireland (MAGNI) has a few archaeological finds that originate in Northern Ireland, although it also has a few examples of remains from overseas.

## 4 The Historical Background

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- 4.1 The pattern of acquisition of the overseas human remains now in English collections was part of the development of scientific enquiry and was associated with the growth of the British Empire. The period following 1500 saw increasing interest in the comparative study of different human populations and the study of human origins. Human remains were collected locally to create teaching collections in these and related fields. Before the nineteenth century collecting tended to be sporadic, with rare or unusual specimens brought back to Britain by explorers, colonial officials, traders and others. Items were brought back for their curiosity value as well as for research.
- 4.2 Throughout the nineteenth century much larger numbers of human remains were acquired by scientists, especially in British colonies. The collections were used to demonstrate theories about human evolution and the relationship between human populations on an evolutionary scale. Collecting was also increasingly motivated by a desire to preserve mementos of what were believed to be vanishing races.
- 4.3 Human remains were acquired in a very wide range of circumstances. Some material came to Britain from museums abroad, and some collecting occurred in situations where no objection was made by local groups, usually because their cultural beliefs did not attach value to physical remains. Some remains were traded by indigenous peoples. But other material was acquired in the field by collectors in circumstances which were unethical even by the standards of the time, including duress, deceit, unlawful removal and, very occasionally, murder. Colonised peoples were often unable to prevent the removal of human remains because of the dynamics of power in colonial situations. Collecting practices were adopted which would have met with both criminal punishment and moral outrage had they been applied to the bodies and graves of white citizens.
- 4.4 The study of human remains has contributed to the advance of scientific knowledge on a broad range of topics. In medical science, collections have facilitated the development of knowledge of anatomy and biology, and of various diseases and injuries and their treatment. In anthropology and social science, human remains had by the late nineteenth century become central to the development of scientific theories about the origins of human populations, the relationships among them, evolution, culture and race. Analysis of human remains has contributed to knowledge in other areas too: to osteology; to forensic identification; to studies of the nature and physical and social effects of epidemic disease; to studies of the effects of

pollution and environmental disasters; and to demographic studies which have explored lifestyles, diet and seasonal food shortages within populations. Recent DNA studies on historical and ancient remains have begun to reveal further information about topics such as population movements and histories.

- 4.5 The collection, retention and research of human remains has occurred at the cost of great distress to some communities, particularly to overseas indigenous peoples. This is partly because of the insensitive and often criminal manner in which remains were originally acquired, without consent; but it also reflects the cultural beliefs of some communities, which entail severe consequences for both the living and the dead if bodies are inappropriately handled or are not disposed of according to cultural protocols. Some communities feel a continuing responsibility for their dead and regard those whose remains rest in museum collections as having been denied appropriate last rites. The pain and anger felt by many indigenous peoples has been exacerbated by the fact that collecting generally took place at the time of imposition of colonial rule, when European settlers asserted their superiority and indigenous communities were disempowered and largely dispossessed. As a result, regaining control of human remains has become part of a larger set of efforts towards asserting cultural vitality and self-determination.

## 5 The Present State of the Law

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- 5.1 It is a general rule of English law that there can be no property in a corpse (or in body parts or other human material). This principle has uncertain consequences for human remains held in museums and other collections. On the one hand, it could be held to prevent the enforcement of property rights in respect of human remains. On the other hand, it could be argued that if human remains are not property, museums are not prevented from disposing of them even where the museum's governing legislation prohibits disposals. But even this is not clear-cut. Moreover, the rule does not apply to artefacts which derive wholly or partly from human material, but have become something different in law by reason of the application of skill and labour.
- 5.2 Overseas case law suggests that the right to bury the remains of a deceased person may be invoked by genealogical and cultural descendants in their local courts long after the death. But it is far from clear whether these rights would be recognised in an English court in an action against a museum. There is the further question of how a right of return, even if recognised, would be reconciled with a museum statute prohibiting disposal.
- 5.3 National museums<sup>1</sup> in England are generally prohibited by law from disposing of objects which are vested in them and comprised in their collections, except where they are duplicates or are unfit to be retained, and can be disposed of without detriment to the interests of students. The National Museums and Galleries of Wales is established by Royal Charter, and so is not subject to any limitations on de-accessioning or repatriation in primary legislation. The Royal Charter already allows for de-accessioning, subject to the objects (that is, 'purposes') of the museum.
- 5.4 Local authority museums appear in general to have no statutory restraints on disposal. Some museums, such as university and independent museums, may be restrained by the purposes for which they were set up. Even where a prohibition exists there may be ways of avoiding it, but such routes are likely to be uncertain and of limited application.
- 5.5 The implications of the Human Rights Act 1998 are so far untested, but it is possible that action to contest a refusal to return human remains could be taken under several Articles of the Convention.

<sup>1</sup> The term *national museum* is used in this paper to mean a museum which is established by legislation and whose powers are set out in and governed by that legislation.

- 5.6 The Working Group concluded that the present state of the law is seriously unsatisfactory. They decided that it was contradictory; it created uncertainty on numerous points; it required museums to take an excessively legalistic approach to restitution issues, which seriously inhibited sympathetic dialogue between the parties; and perhaps most important, it blocked the exercise of discretion by many of the museums with the most important holdings of human remains. The Working Group concluded that the law needed to be changed and clarified.

## 6 Views of the Main Parties

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- 6.1 **The views of scientists.** The Working Group encountered a range of views among scientists. At one extreme was the ‘resolutely retentionist’ view: that all human remains should be retained for scientific research, and that it would be unethical to deny future opportunities for research, given the discoveries which new techniques of investigation may make possible. At the other was a clear recognition of the pain and anger felt by indigenous communities, a recognition of their legitimate interest in research proposals affecting human remains, and an acceptance that in certain circumstances the scientific value of human remains will have to take second place to the beliefs of indigenous communities about their proper treatment. The most common view appeared to be that where a clear relationship can be demonstrated in relation to recent remains, the wishes of relatives must be the over-riding consideration; but that in other cases, particularly those involving more ancient remains, a range of considerations need to be taken into account, and safeguarding the future of scientific research is itself an ethical issue which has to be addressed.
- 6.2 Stress was placed by some scientists on the importance of dialogue with communities of origin – some said that they would not carry out research without communities’ consent – and on the scope for agreement. For instance, it was suggested that human remains could be returned and placed in the control of indigenous communities, so long as they remained accessible to legitimate researchers from around the world. Another possibility thought to be worth investigation was the retention of samples by agreement when human remains were returned to communities of origin. There were some indications that attitudes among the younger generation of researchers are changing, and that there is growing recognition of the need for consent to research proposals to be obtained. But there was nevertheless clear concern about the potential loss to science, through burial or cremation, of very important research material: it was pointed out that even the loss of a small proportion of remains could destroy significant parts of the record of human diversity.
- 6.3 **The views of communities of origin.** The Working Group received the greatest volume of evidence from Australia. They were told that return of human remains is essential for the health of claimant communities. People are grieving and will continue to grieve until the spirits of their ancestors are at rest. The forced absence of the remains of ancestors damages the physical and psychological health, and indeed the social advancement, of indigenous communities. It was argued that legislation should be introduced to make it illegal for

collecting institutions in the UK to acquire and/or retain indigenous human remains and cultural items of significance; and that custody in human remains should be vested in genealogical or cultural descendants and not in museums. Communities should have the final decision on the disposal of remains, and any research to be undertaken should be subject to their consent.

- 6.4 At the same time it was observed that decisions were for individual communities to make, and there might be circumstances in which communities would consent to research. Although aboriginal communities preferred unconditional return and no research, discussions about collaborative research might be possible, and there could be worthwhile discussion of the possibility that institutions in the UK might keep some samples for research purposes. Again, there was some evidence of changing attitudes among the younger generation: it was said that some younger Maori would want research to be undertaken on human remains.
- 6.5 **The views of museums in the UK.** A range of views was expressed by museums, from willingness to return human remains where ethical considerations loom large (particularly in the case of recent remains) or the material is not of scientific importance, to more cautious attitudes stressing the potential future value of remains even where they are not currently the subject of research. There did however appear to be a general acceptance that in the case of the remains of known individuals the arguments for return are strong if requests are made by relatives or descendants.
- 6.6 The position of national museums such as the Natural History Museum is inevitably constrained by the current legal prohibition of disposals except in very limited circumstances. But beyond that, there is clear evidence of a readiness to see the issue as one involving a balancing of factors, and a recognition of the importance of dialogue and collaboration with indigenous communities.

## 7 The Human Tissue Bill

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- 7.1 The Human Tissue Bill has its origins primarily in the concerns raised by events at Bristol Royal Infirmary, the Royal Liverpool Children’s Hospital (Alder Hey) and elsewhere which came to light during 1999 – 2000. The *Kennedy* (Bristol) and *Redfern* (Liverpool) inquiries established that organs and tissue from children who had died had often been removed, stored and used without proper consent. A subsequent census by the Chief Medical Officer for England and the recent *Isaacs Report*, which focused on the retention of adult brains following coroners’ post mortems, showed that storage and use of organs and tissue without proper consent have been widespread in the past. It has become apparent that the current law in this area is neither comprehensive nor clear.
- 7.2 The purpose of the Human Tissue Bill is to provide for a consistent legislative framework for all issues relating to the taking, storage and use of human organs and tissue. It aims to strike an acceptable balance between the rights and expectations of individuals and families, and broader considerations, such as the importance of research, education, training, pathology and public health surveillance to the population as a whole. As such, it is intended to provide a framework in which essential activities can thrive with public confidence.
- 7.3 At the time of writing, the Bill is awaiting First Reading in the House of Lords. The Human Tissue Bill currently contains the following provisions:
- 7.4 **De-accessioning** Clause 52 will give the following Boards of Trustees a free-standing, permissive, power to de-accession (that is, move human remains out of their collections):
- The Board of Trustees of the Armouries
  - The Trustees of the British Museum
  - The Trustees of the Imperial War Museum
  - The Board of Governors of the Museum of London
  - The Trustees of the National Maritime Museum
  - The Board of Trustees of the National Museums and Galleries on Merseyside
  - The Trustees of the Natural History Museum
  - The Board of Trustees of the Science Museum
  - The Board of Trustees of the Victoria and Albert Museum

The power does not, however, affect any existing trusts or conditions to which the museum may be subject (Clause 52(4)). The Bill does not address the powers to de-accession of any other museums. Both these points may be considerations at question 1 below.

- 7.5 This power amounts to a discretion granted to museums allowing them to de-accession, and not a mandatory obligation imposed on them to force them to de-accession. It will enable the museums concerned to balance the interests of both science and any claimant community seeking the return of human remains in deciding upon whether or not to de-accession any particular human remains.
- 7.6 As noted above, the National Museums and Galleries of Wales are governed by Royal Charter, which permits them to de-accession; consequently, no Welsh museums are covered by this clause. When the governing statutes for the National Museums in England are amended to relax restrictions on de-accessioning, it is anticipated that the Welsh Assembly Government will consult the National Museums and Galleries of Wales about amending the more limited restrictions in the Royal Charter. This will ensure that the National Museums and Galleries of Wales has an unfettered and freely exercisable power to return human remains, should they wish to do so.
- 7.7 In Northern Ireland, the national museums are regulated by the Museums and Galleries (Northern Ireland) Order 1998. Section 5(2)(b)&(e) of the Order gives the national museums in Northern Ireland the authority to de-accession from its collections, subject to the consent of the Department of Culture, Arts and Leisure. There is no need for Northern Ireland legislation to be amended to take account of the proposed changes.
- 7.8 **Consent.** The Bill makes consent a fundamental principle underpinning the lawful storage and use of human bodies and body parts for certain purposes (Clauses 1 and 5). Schedule 1 to the Bill sets out the scheduled purposes; for example, public display of human remains is to be a scheduled purpose for which consent will normally be required. However, the Bill is at variance to the conclusions of the Working Group, insofar as it does not impose a requirement that consent be obtained retrospectively in order to authorise the continued storage and use of existing holdings (Clause 9). This means that, under the Bill, remains held by museums (or any other institutions) at the date the consent provisions are brought into force can lawfully continue to be stored and used for scheduled purposes other than anatomical examination.

- 7.9 Similarly, consent will not be required for the storage and use of human remains provided that the remains constitute, or have come from, the body of a person who died before the date on which Clause 1 comes into force and at least one hundred years have passed since the date of that person's death.
- 7.10 Consent will be required in respect of human remains acquired after the date that Clause 1 comes into effect if those remains constitute, or have come from, the body of a person who died before the date upon which Clause 1 comes into force and who has been dead for less than one hundred years. Non-consensual use of human tissue for purposes which require consent will attract a criminal penalty.
- 7.11 **Existing holdings.** Broadly, Clause 9 provides that existing holdings of human remains in museum collections, or the collections of other institutions, may lawfully continue to be stored and displayed in public without consent to use for those purposes having been obtained.
- 7.12 **Licensing regime.** The Bill will establish a Human Tissue Authority (HTA) which will regulate certain activities identified as being within its remit and issue licences in respect of those activities identified as requiring a licence (Clauses 14 and 16). After amendment at Report Stage in the House of Commons, the storage and use of human remains from people who died before the licensing provisions of the Bill come into force, and who have been dead for at least 100 years, is not within the remit of the Human Tissue Authority, or the licensing regime. This means that the museum sector remains largely outside the licensing provisions of the Bill, as most museum holdings of human remains are older than 100 years in age; however, displays of more modern remains (such as the plastinated bodies recently displayed by Professor Gunther von Hagens in the Bodyworlds Exhibition) would be subject to regulation, regardless of where they were displayed.
- 7.13 There was insufficient time after the issue of the Working Group Report and before the introduction of the Bill to consult museums on issues such as licensing. The Bill contains an Order-making power which could be used to add further activities to the remit of the authority. However, this power could not be used to bring the museums sector under the remit of the licensing authority and regulatory regime in respect of remains which are from people who have been dead for more than 100 years. This would require primary legislation. The Government has doubts about whether imposition of this statutory regime (as opposed to a Code of Practice) upon 'antique' remains within museums would be a proportionate step; you

should refer to chapter 10 for a full breakdown of the costs and benefits associated with such a move. Despite this, if the outcome of this consultation exercise is that it is necessary and appropriate for museums to be under the licensing regime created by the Human Tissue Bill, whether fully or in part, then the Government would consider bringing museums fully within the licensing regime.

- 7.14 Whilst responsibility for museums in Wales and Northern Ireland was transferred to, respectively, the National Assembly for Wales and the Northern Ireland Assembly under the devolution settlement, it is proposed that primary Ministerial responsibility for the Human Tissue Authority should rest with the Secretary of State. With this in mind, should the Government wish to bring museums in Wales and Northern Ireland within the licensing regime, this would be subject to the consent of the Welsh Authority and the Department of Culture, Arts, and Leisure, respectively.
- 7.15 Under the Human Tissue Bill, corporate bodies or individuals may be licensed to carry out an activity requiring a licence. Licences will designate a person responsible for ensuring that the conditions of the licence are carried out. The HTA will have power to delegate licensing decisions to its subsidiary bodies (see below) and itself act as an appeal body against these decisions.
- 7.16 The HTA will have a general role in informing the public and Secretary of State about issues within its remit. It will maintain a statement of general principles relating to regulated activities, and will monitor developments in the field and advise the Government as necessary. The HTA will have the power of inspection and may maintain its own inspectorate, or it may commission inspection and reporting services from other bodies in the private, public or voluntary sectors. It will have the power to charge licence and inspection fees, and will report annually to the Secretary of State for Health and to Parliament. The HTA will also be responsible for issuing statutory Codes of Practice giving practical guidance and setting standards relating to activities within its remit. Codes of Practice will usually require approval from the Secretary of State. Compliance with Codes of Practice will be taken into account in making licensing decisions.
- 7.17 A licence issued by the HTA will identify the activity that it authorises, the 'designated individual' who will be responsible for ensuring the appropriate conduct of the licensed activity, and the premises in respect of which the licence is granted. Licences may be issued subject to general conditions and/or to conditions specific to that licence.

- 7.18 The HTA will be able, through Directions, to impose requirements in relation to the conduct of licensed activities, including the records that are to be maintained and information about licensed activities that is to be submitted to the Authority. Different requirements may apply in respect of the different types of activities that are to be licensed.
- 7.19 Undertaking regulated activities without a licence will be a criminal offence. Regular inspections of licensed premises will be carried out, ensuring compliance with the relevant Codes of Practice, licence conditions and directions. The powers of the inspectorates will include powers of entry and the power to inspect or remove records.
- 7.20 **Trafficking.** In Committee, the Government undertook to review this clause in light of representations by the biotech industry. As a result of this review, at Report Stage in the House of Commons, the Government amended the trafficking clause to limit the new offence to tissue intended for transplantation.
- 7.21 **DNA analysis.** The Bill will make it a criminal offence (subject to a defence of reasonable belief) to hold human material with the intention of analysing its DNA without consent, unless the analysis is for a specified purpose (Clause 50 and Schedule 5). Consent will not be required if the DNA comes from the remains of a person who died before the date on which Clause 50 comes into force and at least 100 years have passed since the date of that person's death. Neither will it be required if the DNA forms part of an existing holding and the person who has it is not in possession of, or likely to come into possession of, information from which the individual from whose body the material has come can be identified. Thus institutions such as the Natural History Museum will not be prevented by the Bill from engaging in research projects using their collections of human remains and involving the analysis of DNA.

## 8. The Working Group's Main Conclusions

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- 8.1 The Working Group identified two fundamental responsibilities of museums which have given rise to tension in their field of enquiry and have to be reconciled:
- i. respect for the diversity of beliefs about the importance of remains of ancestors, and the way in which they should be treated;
  - ii. respect for the scientific value of human remains, for the spirit of scientific enquiry which leads institutions to hold and care for remains, and for the benefits which such enquiry may produce for humanity.
- 8.2 The Working Group felt that in addressing these responsibilities, it is very important for museums to take into account both the implications of cultural diversity and the anger and pain still felt by many communities of origin at the removal of human remains. The Working Group also pointed out that there is often a perceived disparity in influence between the indigenous voice and the scientific voice in the conduct of UK museums. Whilst acknowledging the legitimate interest of science in human remains, and the remarkable achievements of scientific research, the Working Group felt that confronting this asymmetry of influence is essential if even-handed solutions are to be achieved which claimants can regard as worthy of trust.
- 8.3 The Working Group considered that the most obvious barriers to repatriation are the present legal restrictions on the return of human remains. They felt that only if the law is reformed as a matter of urgency will national museums be able to give serious and detailed consideration to requests for return, and consider individual cases on their merits.
- 8.4 The foundation of the exercise of museums' responsibilities must be the achievement of the highest standards of care in the treatment and safe keeping of human remains. The Working Group concluded that there is a need for formal licensing and regulation of museums holding human remains to ensure that these standards are achieved and maintained. They considered that there were close parallels between the sort of regulation needed in the museum context and the provision being made for regulation in the medical context, through the then anticipated Human Tissue Bill, and that there would be great advantages if the licensing of museums could be the responsibility of one of the inspectorates which it was proposed would operate under the auspices of the Human Tissue Authority.

- 8.5 The Working Group considered that, in common with the retention and treatment of human remains by institutions within the remit of the Department of Health, the retention and treatment of human remains by museums should be based on consent. Key issues noted by the Working Group were: how to identify the person or community whose consent should be sought in a particular case; how far the requirement for consent should be extended; and how far a cultural rather than a genealogical interest in human remains should put a community in a position to give or withhold consent.
- 8.6 There was a strong view among the Working Group that, where close family or direct genealogical descendants can be identified, their views on the treatment or return of human remains should be regarded as paramount, even where they would lead to the loss of valuable material for research. A majority of the Working Group also considered that, where a given person or group has within its culture or belief system a status or responsibility comparable to that which UK institutions would recognise as conferring authority to withhold consent, the informed consent of that person or group should be a precondition of any future act in relation to the human remains in question, and that this condition should be over-riding.
- 8.7 A minority of the Working Group took the view that where close family or genealogical descendants cannot be identified, the issue should be seen as one of consultation and the need to balance a range of factors, including the age of the remains and their importance for scientific research, rather than as one of an over-riding requirement for consent.
- 8.8 The Working Group did not consider that formal legal processes are normally the best way of resolving disagreements relating to human remains. They favoured alternative dispute resolution procedures, involving the reference of issues either to a national panel of independent experts or to local panels in individual museums. They felt that the arrangements put in place for the Spoliation Advisory Panel (which hears claims for works of art stolen during the period 1933-45, and are now in UK public museums) provided pointers for the sort of arrangements needed in relation to human remains.
- 8.9 The Working Group placed great emphasis on the need for dialogue and consultation between museums and claimant communities, and on the need for a shared information base which enables consultations to take place on an equal footing. They sensed a growing climate of understanding and sensitivity among museums, medical institutions and government, and a growing readiness to listen to argument and to question past attitudes. 'We believe that parties should work on the principle that informed consensus is the desirable outcome, and should act transparently and honestly to achieve this. Such an approach has the potential to generate otherwise unachievable benefits of continuing long-term collaboration for museums, scientists, descendant communities and humanity as a whole.'

## 9 Key Recommendations

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- 9.1 The Working Group's recommendations are reproduced in full in Appendix 2. Comments are invited on any aspect of their recommendations. This section attempts to identify some key recommendations, and to pose questions in relation to them which consultees may wish to consider. These questions are listed together in full in Appendix 3.
- 9.2 **The law.** The Working Group recommended that the present legal restrictions on museums' ability to dispose of human remains should be removed, and that uniform provisions permitting disposal should be enacted for all museums, including national museums.
- 9.3 The Working Group considered whether a new provision should be mandatory, requiring museums to dispose of human remains in their collections. They concluded that such legislation may become appropriate in the light of future events, and the DCMS should keep the matter under review; but that the adoption of permissive legislation supplemented by public regulation and a credible dispute resolution procedure would be a more appropriate response to the present situation.
- 9.4 The Working Group reviewed a number of possible forms of legislative provision to give effect to a power of disposal, without recommending a particular approach. They did not recommend a statutory reversal of the current rule under which there can be no property in a dead body or in body parts (see paragraph 4.1 above).
- 9.5 The Minority Report agreed with the case for permissive legislation to enable museums to dispose of human remains, but argued that the mandatory option should be rejected for ethical rather than pragmatic reasons and should not be held out as a possibility for the future.

**Q1: The Human Tissue Bill now before Parliament includes a clause (clause 52) which will give nine specified national museums the power to transfer human remains from their collections to others. Is this change sufficient, or should legislative changes to the powers of museums in your view go further or wider? If so, what further changes would you suggest? If you are a non-national museum, do you currently lack the power to transfer human remains from your collection to others or is that power restricted in any way?**

**Q2: Do you consider that other legislative changes are needed, for instance with respect to the 'no-property' rule?**

- 9.6 **Regulation of human remains collections in museums.** The Working Group recommended that a licensing system should be introduced, with the object of regulating the holding, return, treatment, handling and disposal of human remains, in broad conformity with the Department of Health proposals for the Human Tissue Bill, as they were known at the time the Report was being drafted. The Bill itself is now before Parliament. As noted at paragraph 7.14, the Government has questions over whether the imposition of a statutory licensing regime would be a proportionate response; however, as it was an explicit and central recommendation of the Working Group Report, we are consulting upon it anyway. In responding to any of the proposals laid out below, you are also referred to the costs and benefits set out in chapter 10.
- 9.7 The Working Group said that the licensing authority should have power to grant, withhold and withdraw licences, to impose conditions on the grant of licences, to direct the disposal of, and provide for the management of human remains, and to investigate complaints. Under the Department of Health proposals, the Human Tissue Authority would be able to set and enforce standards relating to the care of remains within their remit. However, the Human Tissue Authority would not have any power to give guidelines relating to, or arbitrate in, claims for restitution. Nor does it have any power to enforce restitution.
- 9.8 The Working Group recommended that institutions should be required, as a condition of licensing, to subscribe to a code of practice on the care and management of human remains. A draft code of practice, drawn up by the Working Group, is reproduced in Appendix 4.
- 9.9 The Working Group recommended that the licensing system should be introduced as soon as possible, independently of the timing of other changes recommended in the report.
- 9.10 The Minority Report supported the proposal for the creation of a licensing authority, but suggested that the authority should not be set up until the necessary legislative changes have been made to enable those museums currently prevented from doing so to return human remains.
- 9.11 The Minority Report agreed with the proposal that the licensing authority should require compliance with a code of practice as a condition of licensing, but felt that the draft code of practice (Appendix 4) is not satisfactory. It recommended that the code should be revised along the lines set out in paragraph 6.1 of the Minority Report, among other things to place more emphasis on the need for museums to take independent and authoritative advice on proposals for research and on requests for the return of human remains.

**Q3: Do you agree that it would be useful to introduce a code of practice relating to the care and use of human remains by museums which hold them? If you consider such a code to be desirable, who should issue and enforce it? Do you have any comments on what a draft code should provide for?**

**Q4: Should museums be under the licensing regime issued by the Human Tissue Authority i.e. should all, some, or none of the activities undertaken by museums be subject to that regime? How would regulation and the cost of compliance affect your operations?**

**Q5: Do you have any views on when museums should be brought under the remit of the Human Tissue Authority and/or the licensing regime?**

- 9.12 **Consent.** The Working Group recommended that, given the importance which many communities of origin attach to human remains, no museum should retain human remains, or allow research to be done on them, where it has reason to believe that the original removal of the remains occurred without consent, and that the present retention of the remains (or any work proposed to be done on them) is without the consent of close family or direct genealogical descendants of the dead person. Museums should use their best endeavours to identify family or descendants.
- 9.13 A majority of the Working Group also took the view that in cases where no close family or descendants are identified, there should be a requirement to obtain consent from those who have within the dead person's own religion or culture a status or responsibility comparable to that of close family or direct genealogical descendants. Museums should use their best endeavours to identify such interests. *This position is referred to here as 'the majority view' on consent.*
- 9.14 A minority of the Working Group (in this instance consisting of members other than the Director of the Natural History Museum) took the view that where close family or direct descendants cannot be identified, decisions should be based on consultation, taking account of a wide range of interests, rather than on a requirement for consent. The views of parties who assert an interest in the human remains in question would be factors to be weighed alongside other considerations, including the scientific and social benefits of retention and research. *This is referred to here as 'the minority view' on consent.*

9.15 In the Minority Report, the Director of the Natural History Museum felt that the practical effect of the Working Group's majority recommendations would be to bring all research on human remains from claimant communities to a halt, and to require their mandatory return to those communities. He recommended that decisions to retain or return human remains should be taken against an ethical framework of guidelines, drawn up after consultation, and that any decision taken on this basis should itself be made after wide consultation with all concerned parties. Decisions should take into account as much information as possible about the deceased, the community of origin, the length of time since the death of the deceased, the nature of the relationship of the deceased with those claiming return, the circumstances under which the remains were obtained and the public benefit likely to be derived from their retention for research. Sir Neil also commented that the recommendation that museums should use their best endeavours to trace family, descendants and other interests was likely to be unworkable in practice, given the size of some museums' holdings and the imperfect state of knowledge of their provenance. *This view is here referred to as 'the consultative view' of consent.*

**Q6: Do you agree that the retention of human remains, and any research on them, should be subject to the consent of close family or direct genealogical descendants, where they can be identified? What would you consider reasonable steps for museums to take in order to facilitate identification?**

**Q7: Do you agree with the view of the majority of the Working Group that where no family or descendants are identified, there should be a requirement to obtain consent from those who have within the deceased person's own religion or culture a status or responsibility comparable to that of close family or direct genealogical descendants? If not, do you agree with the minority view that in these cases the issue should be seen as a matter for consultation rather than a requirement for consent? What factors are decisive or important in deciding who should have the authority to make claims for repatriation?**

**Q8: In cases where a requirement for consent is not the over-riding consideration, what factors are in your view relevant to a decision whether or not to return human remains? For instance, is the age of the remains in your view a relevant consideration?**

**Q9: Do you agree with the view expressed by the Director of the Natural History Museum, that instead of a requirement for consent, the basis of decisions in all cases should be wide consultation, taking into account as much information as possible about the deceased, the community of origin and their relationship with the deceased, and the public benefit likely to be derived from their retention and research?**

- 9.16 **Dispute resolution.** The Government is concerned to ensure that museums do not turn down, without appropriate consideration, reasonable requests for repatriation of human remains. In looking at this dispute resolution question, the Working Group recommended that issues between museums and communities of origin should be dealt with by dispute resolution methods, based on open communication and dialogue in preference to formal legal procedures. They favoured a procedure that follows the mediation model, where any negotiation takes place in a neutral forum and where both parties agree to enter into the process voluntarily and openly. They felt that the Government's response to issues raised by the Nazi spoliation of works of art provided a useful model for establishing a system for dealing with the treatment of human remains: in particular, that it would be desirable to set up a national Human Remains Advisory Panel, consisting (like the Spoliation Advisory Panel) of independent experts who could advise on cases voluntarily referred to it by the parties concerned.
- 9.17 The Working Group recommended that all museums should have in place an externally approved procedure for the determination of claims and controversies regarding the retention and treatment of human remains; and that museums should publish their criteria for the return or other special treatment of human remains. Compliance with these requirements would be monitored by the new licensing authority.
- 9.18 The Working Group recommended that a national Human Remains Advisory Panel should be established, in broad conformity with the functions and powers of the Spoliation Advisory Panel. The Panel would consist of independent experts. Reference of issues to the Panel would require the consent of both parties. The Panel's role would be advisory: its recommendations on individual cases would not be binding on the parties. The aim would be to assist the parties in their discussions and enable them to negotiate a solution to the problem without feeling that a decision had been imposed on them.

- 9.19 The Working Group recommended that the Human Remains Advisory Panel should be established as soon as reasonably possible, independently of the timing of other changes recommended in the report.
- 9.20 The Working Group recommended that it should be open to museums to establish their own local advisory panels to consider issues concerning the return or treatment of human remains. Such panels would need to have appropriate representation drawn from outside the institution in question. A museum might opt for reference of issues solely to the local panel, or it might decide to use a local panel as the front-line dispute resolution process, referring to the Human Remains Advisory Panel where an issue arose on which the parties would value independent advice. The Working Group recommended that local panel arrangements would be monitored by the new licensing authority. However, as mentioned earlier, under the Human Tissue Bill, the Human Tissue Authority would have no jurisdiction in relation to de-accessioning. Nor does the Government intend that it should do so.
- 9.21 The Working Group recommended that a statement of principles should be published to provide guidance to a possible Human Remains Advisory Panel, and to all those responsible for decisions about the future of human remains. The Working Group's draft of such a statement is reproduced in Appendix 5.
- 9.22 The Working Group recommended that the Minister for the Arts should consider offering the good offices of DCMS towards the resolution of any claim or other controversy which has not been resolved by other means. The Government has considerable reservations about this option. However, as it was a recommendation of the Working Group, we are consulting upon it.
- 9.23 The Minority Report agreed that museums should be required to conform to procedures specified by the new licensing authority for dealing with requests for return from claimant communities, and for considering proposals for use of the collections for research. But it did not support the recommendation for the creation of a national Human Remains Advisory Panel; nor did it support the recommendation that the Minister should be prepared to intervene in cases of unresolved disagreement. The Minority Report said that both proposals would tend to undermine the accountability of the governing body of the museum holding the collection, where responsibility should properly rest, and would lead to an unduly complicated system of control. The Minority Report suggested that an appropriate response would be that each licensed museum should have an ethics committee, with both lay and research representatives, to which issues would be referred for advice; but other possibilities might merit examination.

- Q10:** Do you agree that all museums holding human remains should have published procedures for dealing with claims relating to human remains? Should those procedures be subject to any approval? Should these be based on central guidance (e.g., a Code of Practice), which could be agreed with the museums community, or should museums rely on their own guidance?
- Q11:** Do you see a role for a national Human Remains Advisory Panel, to provide advice in cases of disagreement between museums and claimant communities? If so, which of the three views of consent outlined at paragraphs 9.12-9.15 should the Human Remains Advisory Panel adopt in its deliberations, and why?
- Q12:** Do you agree that it should be open to museums to establish their own local advisory panels, and to refer issues relating to human remains to those panels, either before or instead of referring them to a national Human Remains Advisory Panel? Do you consider that the relationship between local panels and the national Panel, as proposed in the Working Group's report, would be satisfactory? Do you think there is a case for requiring all museums holding human remains to establish local ethical or advisory panels? Are there other options which ought to be considered?
- Q13:** If a Human Remains Advisory Panel were established, do you think it would be used, and, if so, to what extent? Would you refer cases to it? What number of requests for return do you think might be received, either nationwide, or for particular institutions?
- Q14:** Do you agree that it would be useful to publish the statement of principles reproduced in Appendix 5 as guidance to museums and to the national Human Remains Advisory Panel? Does the draft require amendment or expansion?
- Q15:** Despite the Government's reservations (at paragraph 9.22), should the Minister for the Arts and the Minister for Culture, Welsh Language and Sport in Wales have a role in dispute resolution when other procedures have failed to secure agreement? If so, why?
- Q16:** Do you consider that other measures to resolve disagreements over the treatment or return of human remains should be explored? Should the DCMS seek to incorporate any of this in legislation?

9.24 **Sacred objects.** Following a recent Select Committee Report, the Secretary of State undertook to consider whether it would be appropriate to undertake an audit of sacred objects in UK museums. We are therefore seeking comments on this point.

**Q17: Should a survey of ‘sacred’ objects in UK museums be undertaken? If so, what, in your view, would be an appropriate definition of ‘sacred objects’? What sort of objects might the term ‘sacred objects’ encompass? What would be the resource implications of this move?**

9.25 **Information and education.** The Working Group recommended that museums and other institutions should use their best endeavours to provide reasonable access to their collections and to information about their collections. In particular, full information should be supplied to claimants and to others with an interest in human remains. Museums should devise and publish a plan for improving their information on human remains in their collection, particularly where holdings are the subject of claims.

9.26 The Working Group recommended that the DCMS should consult the Museums, Libraries and Archives Council, the Museums Association and other concerned groups to devise a plan to publish information on all relevant matters to interested parties. The same bodies should consider the need for short-term awareness programmes to familiarise museums with the contents of the Working Group’s report and its implications for future action. A central point should be established to facilitate contact and communication between museums on matters relating to human remains.

**Q18: Do you consider that the information and education programmes described at 9.25 and 9.26 would be desirable as follow-up to the report? If so, who should take on this responsibility?**

## 10. Implementation Options and Regulatory Impact

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- 10.1 This part of the consultation paper assesses the regulatory impact of a series of potential implementation options at section 10.6, below, based on the questions in the above section. It aims to inform responses to this consultation by quantifying the benefits and risks or costs associated with particular courses of action. This should further the objective of the consultation, set out in the executive summary at paragraph 1.2. In looking at this section, if you have not done so before, you should refer also to chapters 4, 5 and 6, which give a wider background to this issue.
- 10.2 As noted at paragraph 1.2, the Government has not yet decided upon an appropriate way forward. The responses to this consultation will inform its decision about what further implementation of the Working Group Report is necessary and appropriate.
- 10.3 **Risk Assessment.** The Working Group on Human Remains was set up in May 2001, in response to (in 2000) the Joint Declaration by the UK and Australian Prime Ministers, and a number of recommendations from the Culture, Media and Sport Select Committee. The Working Group identified certain failings in the current system for the holding of human remains. In relation to museum holdings of overseas indigenous remains, such failings have resulted in misunderstandings between indigenous peoples and the museums concerned, with consequent bad publicity for these museums, and damage to their international reputation. While the manner in which requests for restitution have been made has so far been fairly moderate, the Working Group noted that the risk remained that more adversarial methods might yet be used, for example, the use of legal action against museums.
- 10.4 The Working Group also noted that, in such confrontations, the claimant communities themselves experience considerable distress, with communities continuing to grieve, years after the remains were taken from them, due to their failure to put the bodies of their ancestors to rest. The Working Group suggested that these feelings of grievance have hindered the tackling of other social or cultural problems in these communities.
- 10.5 There is also some anecdotal evidence that certain custodians of large numbers of human remains are uneasy about their continued holding of these items, which have such a particular status, without any form of oversight. Some researchers may well appreciate the accountability that comes with some form of light-touch regulation (e.g., through the imposition of a Code of Practice), despite the added burdens such a regime might bring. This consultation therefore seeks to assess the desirability of bringing the museums sector under some form of regime which would govern how human remains in museums are looked after, and ensure that they are kept in a suitably respectful manner.

**Q19: Notwithstanding your answers to the earlier questions, which of the implementation options at paragraph 10.6 represents the most appropriate and proportionate way forward in terms of potential costs and likely benefits, and why?**

**10.6 Possible Implementation Options**

Option	Risk	Benefits	Costs
<p><b>Option 1:</b> Enable certain national museums to de-accession human remains through the Human Tissue Bill (HTB); leave it to the individual museums to handle claims and curate the remains as they think best.</p>	<p>That a decision by a museum not to retribute will be open to challenge through judicial review. There is also a risk that requests of claimants will not be satisfactorily dealt with;</p>	<p>This is the minimalist solution. This avoids any prospect of imposing any new burdens upon the museums sector, or damaging future scientific research. This also enables national museums to engage in meaningful debate with claimant communities, who have the reassurance that these museums are able to retribute, if that is what they wish to do.</p>	<p>There would be no additional costs arising from this option.</p>
<p><b>Option 2:</b> Enable de-accessioning through the HTB; agree with museums and issue a Code of Practice governing the holding of human remains and the handling of claims (including by a local ‘claims’ Panel) with the consultative view of consent (see paragraph 9.15) in it.</p>	<p>Compliance with a Code of Practice, issued by DCMS, which prescribes procedures for dealing with a claim, will make any decision by a museum not to retribute less vulnerable to judicial review. Equally, it would give claimants a clear set of criteria against which they could base claims for restitution, and hold museums to account for their actions. However, if not appropriately balanced, such procedures risk damaging the country’s research base by forcing the breaking up of important collections of human remains in response to claims.</p>	<p>The addition of a publicly-available Code of Practice will give museums a clear framework within which to take decisions relating to claims for restitution of remains, or care for them. This will make any decisions they take more defensible, and less vulnerable to judicial review. For claimants, it will give a clear understanding of the bases upon which decisions are taken, and allow them to tailor their claims accordingly; they will also be given some reassurance that claims will not be dismissed arbitrarily, and clear grounds for appeal to the courts if they are so. The use of the consultative view of consent within that Code of Practice will also enable a clear balancing of the interests of both science and claimant communities, with both recognised as important and worthy of equal consideration.</p>	<p>Costs would break down as follows:</p> <ul style="list-style-type: none"> <li>• Cost of setting up local claims Panel – £700-1500 per case, per institution. Only institutions that actually receive claims would need to set up such a panel. These costs would fall to the institution concerned. (It is difficult to give a total figure, as this depends on volume of cases, how long a panel takes to settle them, and how many institutions are affected, none of which can be easily predicted. On the basis of the claims so far, it is reasonable to assume around 20 further claims might be received. These claims would be spread across a number of different institutions, and the majority of claims would be to larger regional or national museums. In order to help assess the potential number of cases, it would be useful if you could particularly answer consultation question number 13, under paragraph 9.23, above.)</li> <li>• Any Code of Practice could be published by DCMS, the total cost of which might be £5000.</li> </ul> <p><b>Total cost for option 2:</b> could be in the region of £19,000 – £35,000. The majority of this cost would be spread across a limited number of larger museums. The cost would also be spread over a number of years.</p>

Option	Risk	Benefits	Costs
<p><b>Option 3:</b> Enable de-accessioning through the HTB; agree with museums and issue a Code of Practice governing the holding of human remains and the handling of claims (including by a local ‘claims’ Panel) with the consultative view of consent in it; set up a Human Remains Advisory Panel on a non-statutory basis.</p>	<p>Risks as option 2. In addition, the setting up of a Human Remains Advisory Panel may represent an unnecessary expense, as the level of usage such a Panel would get is unproven. The Panel would also be unable to compel a museum to comply with its decisions.</p>	<p>The benefits of option 3 will be the same as for option 2. In addition, the creation of a distinct, expert, and neutral forum will allow both claimants and museums to refer their case to this body (thereby off-setting some of the cost of dealing with it bilaterally, as well as avoiding possible expensive court action) and have confidence that the decision will be taken on grounds which are fair and have not been impinged by any interest the museum might have in the case.</p>	<p>Costs would break down as follows:</p> <ul style="list-style-type: none"> <li>• Costs as for option 2, plus</li> <li>• Cost of setting up Human Remain Advisory Panel: estimated at £5500/meeting, plus DCMS staff time, estimated annually at up to £60,000. Costs will vary depending on the volume of claims. However, by analogy with the Spoliation Advisory Panel, it seems reasonable to assume approximately four meetings/annum, resulting in a total annual cost of approximately £82,000.</li> </ul> <p><b>Total cost for option 3:</b> could be in the region of £101,000 – £117,000. While this is a considerably larger figure than for option 2, the increase will fall on central government, and could serve to lessen any burden on the museums themselves in dealing with claims. However, it remains to be assessed to what degree such a Panel would actually be used.</p>

Option	Risk	Benefits	Costs
<p><b>Option 4:</b> Enable de-accessioning through the HTB; bring museums fully under the remit of the Human Tissue Authority; agree with museums and issue a Code of Practice with the consultative view of consent in it</p>	<p>Risks as at option 2. Furthermore, if the licensing requirements are too onerous, museums might divest themselves of human remains in their custody rather than obtain a licence.</p>	<p>The benefits will be as for option 2. It might also provide more reassurance to claimant communities that the remains of their ancestors are being stored in a manner which is sensitive to their particular nature, and their cultural origins.</p>	<p>Costs would break down as follows:</p> <ul style="list-style-type: none"> <li>• Costs as for option 2</li> <li>• Cost of bringing all museum holdings of human remains under the remit of the Human Tissue Authority: for each institution, it is proposed that there will be an initial licensing and inspection package of roughly £2000; there will also be an annual licence and inspection charge, which might be as high as £1000, depending on the volume and nature of the institutions holdings. Assuming at least 132 institutions hold human remains, the initial cost would be £264,000, with a further £132,000 going to the Human Tissue Authority each year.</li> </ul> <p><b>Total cost for option 4:</b> Initial costs could be in the region of £283,000-£299,000; most of this burden would fall on the approximately 132 institutions which hold human remains, and which might receive claims<sup>2</sup>. After this, there would be ongoing, annual, costs of roughly £132,000, which would be subscription fees from the licensed museums to the Human Tissue Authority. Almost all of this burden, save the costs of agreeing and issuing the Code of Practice, would fall on the (at least) 132 institutions that hold human remains. The further costs involved in responding appropriately to claims would fall upon a few, larger, institutions, who have significant holdings of human remains from overseas.</p> <p>It should be noted that these figures are notional, as the Human Tissue Authority has yet to be set up. In reality, most museums would not require nearly the same level of regulation and inspection as scientific and medical facilities. Costs will inevitably be proportionate to the volume of holdings of human remains in a particular institution, and it is quite possible that the Human Tissue Authority would adopt a similar approach towards licensing and registration fees. In reality therefore, the burden on institutions is likely to be less than that suggested here.</p>

<sup>2</sup> These figures are based on the scoping survey undertaken on behalf of the Working Group, which did not cover Wales or Northern Ireland. It also only approached those English institutions thought likely to hold human remains. In reality, the estimate of 132 institutions is therefore on the conservative side.

Option	Risk	Benefits	Costs
<p><b>Option 5:</b> Enable de-accessioning through the HTB; bring museums fully under the remit of the Human Tissue Authority; agree with museums and issue a Code of Practice with the minority view of consent (see paragraph 9.14) in it.</p>	<p>Risks as at options 3 and 4. However, the minority view of consent may result in a greater loss of human remains collections in the UK (and, consequently, the ability to research upon them) through repatriation.</p>	<p>The benefits are much the same as for option 4. However, the use of the minority view of consent in any Code of Practice will give primacy to the views of claimant communities in cases where the remains are of individuals who are clearly identifiable. Where the remains are not clearly identifiable, this will view of consent recognises the clear scientific benefits that come from retention of remains, and allows for these concerns to be considered on an equal footing with the concerns of claimant communities.</p>	<p>Costs are likely to be very similar to those for option 4, as above. The different consent arrangements may result in a greater number of remains being repatriated. Where repatriation has occurred so far, the cost has been negligible, as most costs have been borne by the claimant community. This, however, does not take into account the costs arising from any loss of long-term research potential, which is difficult to quantify.</p>
<p><b>Option 6:</b> Enable de-accessioning through the HTB; bring museums fully under the remit of the Human Tissue Authority; agree with museums and issue a Code of Practice with the majority view of consent (see paragraphs 9.12-9.13) in it.</p>	<p>The risks are as option 4. However, the majority construction of consent may result in an even greater loss of human remains collections in the UK (and, consequently, the ability to research upon them) through repatriation than under option 5. The benefits follow on from option 5.</p>	<p>The benefits follow on from option 5. Additionally, the use of the majority construction of consent will reassure claimant communities that their concerns are taken seriously by the museums sector and the Government by giving primacy to those concerns over those of science. This need to ensure continued consent to hold the remains should ensure greater interaction and dialogue between claimant communities and the scientists and museums which hold remains.</p>	<p>The total costs will be as for option 4. Again, consent arrangements may result in a greater number of remains being repatriated, and are likely to do so on a scale greater than for option 5.</p>

Option	Risk	Benefits	Costs
<p><b>Option 7:</b> Enable de-accessioning through the HTB; bring museums fully under the remit of the Human Tissue Authority; agree with museums and issue a Code of Practice with the consultative view of consent in it; set up a Human Remains Advisory Panel on a non-statutory basis.</p>	<p>The risks are as at options 3 and 4.</p>	<p>The benefits are as for those at options 3 and 4.</p>	<p>The costs are as option 3, plus the cost involved in bringing the museum sector fully under the remit of the Human Tissue Authority. Total costs over the first two years could be in the region of £497,000 – £513,000. Of this, the costs involved in the licensing regime will fall directly upon the museums. The licensing regime should therefore account for roughly 80% of the total, over the first two years of its operation.</p> <p>Assuming four meetings per annum, the Human Remains Advisory Panel will account for roughly £82,000. These costs will fall entirely on central government, and might actually reduce the financial burden on museums of dealing with requests.</p> <p>Cost of setting up local claims Panel – £700-1500 per case, per institution. These costs would fall to the institution concerned. Assuming around 20 requests are received, nationwide, by different institutions, the total costs of dealing with these requests could be in the region of £14,000 – £30,000. However, the actual costs may in fact be lower if the institutions concerned choose to refer such claims to the HRAP. The cost of issuing any Code of Practice is estimated at £5000. This burden would fall directly upon central Government.</p>
<p><b>Option 8:</b> Enable de-accessioning through the HTB; bring museums fully under the remit of the Human Tissue Authority; agree with museums and issue a Code of Practice with the minority view of consent in it; set up a Human Remains Advisory Panel on a non-statutory basis.</p>	<p>The risks are as at options 3 and 5.</p>	<p>The benefits are as for option 7. However, in this case, the Code of Practice adopted would use the minority view of consent, the benefits of which are listed above, at option 5.</p>	<p>The costs are as option 7. The different consent arrangements may result in a greater number of remains being repatriated. Where repatriation has occurred so far, the cost has been negligible, as most costs have been borne by the claimant community. This, however, does not take into account the costs arising from any loss of long-term research potential, which is difficult to quantify.</p>

Option	Risk	Benefits	Costs
<p><b>Option 9:</b> Enable de-accessioning through the HTB; bring museums fully under the remit of the Human Tissue Authority; agree with museums and issue a Code of Practice with the majority construction of consent in it; set up a Human Remains Advisory Panel on a non-statutory basis.</p>	<p>Risks as options 3 and 6.</p>	<p>The benefits are as for option 8. However, the Code of Practice would in this case use the majority view of consent, which gives primacy to the views of claimant communities by requiring continued consent for the holding of remains.</p>	<p>Again, the costs would be as option 7. However, the consent arrangements may result in a greater number of remains being repatriated, and are likely to do so on a scale greater than for option 8.</p>
<p><b>Option 10:</b> Enable de-accessioning through the HTB; bring museums fully under the remit of the Human Tissue Authority; agree with museums and issue a Code of Practice with the majority construction of consent in it; set up a Human Remains Advisory Panel on a non-statutory basis; constitute Ministers as last resort where HRAP cannot achieve a resolution.</p>	<p>Risks as at option 9. Any intervention by Government in disputes over museum holdings would represent a profound shift in Government policy away from the ‘arms-length’ relationship with museums. Ministers would also be unable to enforce such a decision without taking powers through primary legislation.</p>	<p>The benefits are as for option 9. Additionally, if Ministers were constituted as an appeal of last resort, this would allow Government to take a view and, if necessary, rectify a decision in cases where the outcome has so far not taken account of the wider circumstances, or consequences. However, Ministers would be unable to enforce any such role without primary legislation..</p>	<p>Costs would be roughly equal to those stipulated for option 9. Any cost involved in giving Ministers an appeal role as an option of last resort would be bourn by central Government.</p>

**Sectors affected**

- 10.7 These proposals apply mainly to the museum sector. Museums are invariably charities (mostly registered charities, although a few, national, museums are non-registered charities). In addition, there may be some impact upon the universities, where a university has an in-house museum which has human remains in it.

**Issues of equity and fairness**

- 10.8 The proposals here recognise the fact that museums in the UK are significant repositories of human remains, where they are used for scientific, archaeological and anthropological research. The majority of these are of UK origin. However, a significant minority are the remains of overseas indigenous groups (e.g., from Maori or Aborigine groups, or from Native American peoples), some of which (although not all) were acquired without the consent of the deceased, or their communities. These remains have been the subject of representations from overseas indigenous peoples, who have experienced considerable distress at the circumstances in which the remains of their people are kept, as well as at the fact of their continued retention in the UK. These proposals recognise the particular character of human remains, and the feelings and values that people attach to them, and seek to establish how the claims of science, and the spiritual and cultural values of the originating communities, should be weighed up against each other in any eventual outcome.

**Costs for a typical museum**

- 10.9 This costing assumes option 8, given above, is implemented. The costs suggested here are those that would apply to an institution that has substantial holdings of human remains (such that they could not, and would not, reasonably divest themselves of them), which is likely to receive claims for repatriation, and is unlikely to use any proposed Human Remains Advisory Panel (and so would be resourcing an in-house claims Panel). Obviously, costs might be less for an institution that has fewer remains, and which might want to use a Human Remains Advisory Panel.

**10.10 Cost of licensing regime:**

Initial registration with HTA: approximately £2000

Subsequent annual subscription: approximately £1000

Cost of setting up and running a 'local' claims panel: £700-£1500/claim.

- 10.11 Total costs are therefore likely to be at least £3700 per institution of the type suggested above, spread over the first two years of implementation. This figure assumes that only one claim for repatriation is made; in reality, if more are received, the costs will be greater. It is not possible at this point to predict how many claims would be received by a particular institution.

**Consultation with small business: the Small Firms' Impact Test**

- 10.12 Initial soundings have shown that there are no small firms likely to be affected by the proposals. The Small Business Service have been consulted and agree that there is unlikely to be any impact on small business and at this time there is no requirement to carry out stage one of the small firms impact test. Should the formal consultation identify any as yet unidentified or unintended impacts on small firms as a result of the proposals, the position will be reviewed and the Small Business Service consulted further.

**Competition assessment**

- 10.13 We do not expect there to be any significant impact on competition as a result of these proposals. In the event that the museums sector is brought fully under the remit of the Human Tissue Authority, we envisage any consequent regulation to be light touch, and any costs imposed would be proportionate to the volume of holdings of human remains in a particular museum, and to the resources of the museum concerned.

**Enforcement and Sanction**

- 10.14 The Human Tissue Bill introduces criminal penalties for acting without appropriate consent and for carrying out licensable activities without a licence. At present, the majority of holdings of human remains in the museums sector are excluded from these provisions, and the resultant penalties, due to their age.

- 10.15 To the degree that museum holdings of human remains are within the remit of the Human Tissue Authority. The Bill provides for an appeal mechanism regarding licence decisions through the Human Tissue Authority and the expectation is that the regulatory framework will ensure that penalties are rarely resorted to. Comparison with similar legislation suggests that the introduction of penalties and appeals is likely to have a low practical impact. There have been no prosecutions under the Human Organ Transplants Act or the Anatomy Act 1984. Experience under the Human Fertilisation and Embryology Act 1990 (which established a similar regulatory structure based on consent) is that there is about one appeal every 2 years, from 120 licensed centres. There have been no prosecutions under the Human Fertilisation & Embryology Act. We therefore expect the impact of this regime upon museums to be minimal.

#### **Monitoring and review**

- 10.16 It is for the Department for Culture, Media and Sport, the Welsh Assembly Government and the Department of Culture, Arts and Leisure in Northern Ireland to ensure that the results of this consultation are implemented.
- 10.17 The Department for Culture, Media and Sport, the Welsh Assembly Government and the Department of Culture, Arts and Leisure in Northern Ireland will keep the situation concerning the keeping of human remains in UK museums under review.

#### **Consultation**

- 10.18 The Working Group on Human Remains consulted extensively before issuing their proposals. The Group had 12 members, all experts in their field. In the course of their work, the Group undertook a survey of all the relevant literature, and received submissions from 47 different individuals or organisations. Copies of all the submissions (save those where we were not able to obtain permission to reproduce them on our website) can be found at the Department for Culture, Media and Sport website, at [http://www.culture.gov.uk/cultural\\_property/wg\\_human\\_remains/default.htm](http://www.culture.gov.uk/cultural_property/wg_human_remains/default.htm).

10.19 The consultation on these proposals will last for 12 weeks. Copies of the full consultation document, including this Partial Regulatory Impact Assessment, have gone to a number of key stakeholders, including the following:

- The Department of Health
- The Department for Trade and Industry
- The National Museum Directors Conference
- Members of the Working Group on Human Remains
- The Museums Association
- CyMAL: Museums, Archives and Libraries Wales
- The Council for Museums, Libraries and Archives
- The Natural History Museum
- The British Museum
- The National Museums and Galleries of Wales
- The Leverhulme Centre for Human Evolutionary Studies
- The Australian High Commission
- The New Zealand High Commission
- The Aboriginal and Torres Strait Islander Commission
- The Foundation for Aboriginal and Islander Research Action
- The World Archaeological Congress

## Consultation arrangements

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### **Responses must be received by Friday 29th October.**

Respondents in England and Northern Ireland should reply to the Department for Culture, Media and Sport at:

By email: [Human.Remains@Culture.gsi.gov.uk](mailto:Human.Remains@Culture.gsi.gov.uk)

By post: James Dowling  
Cultural Property Unit  
Department for Culture, Media and Sport  
2-4 Cockspur Street  
London  
SW1Y 5DH  
UK

### **Respondents in Wales should reply to the Welsh Assembly Government at:**

by e-mail: [hrconsultation@wales.gsi.gov.uk](mailto:hrconsultation@wales.gsi.gov.uk)

by post: Joanne Corfield  
Museums Branch  
Directorate for Culture, Welsh Language and Sport  
Welsh Assembly Government  
Cathays Park  
Cardiff  
CF10 3NQ

The Department for Culture, Media and Sport and the National Assembly for Wales intend to publish the responses to this document. Normally, the name and address (or part of the address) of its author are published along with the response, as this gives credibility to the consultation exercise. If you do not wish to be identified as the author of your response, please state this expressly in writing to us and we will remove your name and address from the published response.

## Appendix 1 – Terms of Reference

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1. The Working Group on Human Remains in Museum Collections (HRWG) was established in May 2001 by the then Minister for the Arts, the Right Honourable Alan Howarth CBE MP, under the chairmanship of Norman Palmer, Barrister, Professor of the Law of Art and Cultural Property at University College London, chairman of the Illicit Trade Advisory Panel, chairman of the Treasure Valuation Committee, with the following terms of reference:
  - To examine the current legal status of human remains within the collections of publicly funded museums and galleries in the United Kingdom;
  - To examine the powers of museums and galleries governed by statute to de-accession, or otherwise release from their possession, human remains within their collections and to consider the desirability and possible form of legislative change in this area;
  - To consider the circumstances in which material other than, but associated with, human remains might properly be included within any proposed legislative change in respect of human remains;
  - To take advice from interested parties as necessary;
  - To consider the desirability of a statement of principles (and supporting guidance) relating to the care and safe keeping of human remains and to the handling of requests for return; if the Panel considers appropriate, to draw up the terms of such a statement and guidance;
  - To prepare a Report for the Minister for the Arts and make recommendations as to proposals which might form the basis for a consultation document (to be used for consultation under the Regulatory Reform Bill).

## Appendix 2 – The Working Group’s full recommendations and the Minority Report<sup>3</sup>

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### RECOMMENDATIONS

#### Law

##### I. General

The law as it affects the holding of human remains by museums should be changed.

##### II. Museum-governing laws

- (i) The statutes that govern national museums should be amended to empower national museums to relinquish human remains.
- (ii) Non-national museums should be given a power to relinquish human remains in so far as this does not already exist.
- (iii) The power of all museums to relinquish human remains should be made uniform, so far as this can be achieved after making due allowance for constitutional differences among museums.
- (iv) Museums that relinquish human remains in good faith, consistently with a legal power to relinquish and with the terms of their licence and code of practice, should be immune from legal liability.
- (v) Legislation providing for the mandatory return of human remains by museums should not be introduced at present. The situation should be kept under review in order to take account of future changes in domestic law and treaty obligations and other appropriate conditions.

*Note: The amendment of statutes to enable national museums to relinquish human remains is seen by the Natural History Museum as the most important recommendation in this Report. This view of the importance of the recommendation is not shared by the British Museum. The British Museum considers that the powers of the Attorney General to sanction the relinquishment of material from the collections of the Museum should be established before other avenues to relinquishment (such as statutory amendment) are explored. At the time of writing the British Museum awaits the Attorney-General’s determination as*

<sup>3</sup> These recommendations, and the Minority Report by Sir Neil Chalmers, are reproduced exactly from the Report of the Working Group on Human Remains (November 2003).

*to whether, as a charity, the Museum has the power to give effect to moral claims which the trustees wish to recognise, provided they receive the Attorney-General's sanction for their proposed course of action.*

### **III. Human remains as property**

The measures we propose shall not (save as expressly provided) affect the general legal principle that there is no property in a human body or its parts. Where any legal or natural person or group of persons currently has property in human remains under existing law, that property should be sustained.

*Note: Our recommendations are founded on the assumption that, if fully implemented, they impose sufficient rights and responsibilities in regard to human remains by other legal means to render the question of property subordinate in this context. A provision similar to this is proposed by the latest Department of Health document (September 2003) describing the ambit of the proposed Human Tissue Bill. The general legal position may vary where human skill has been applied to human remains rendering them something different from a corpse awaiting burial, or in other exceptional circumstances. A right to possession for purposes of burial may be asserted by personal representatives of the deceased person or others in exceptional circumstances.*

Museums and similar institutions that hold collections of human remains shall receive authoritative guidance as to the circumstances in which an application of human skill to human remains may cause them to become property in law.

## **Dispute resolution**

### **IV. The obligation on institutions**

(vi) All museums shall have in place, and undertake to use where appropriate, an externally approved procedure for the determination of claims and controversies regarding the retention and treatment of human remains.

*Note: It is contemplated that the licensing authority will be the appropriate agency to give external approval: see recommendations VIII–XII below ('Licensing'). Reference to the Human Remains Advisory Panel shall be an externally approved procedure for this purpose.*

(vii) Museums shall adopt approaches that enable them to respond consistently and in good faith to approaches from all genealogical and cultural descendants and affiliates concerning human remains, regardless of the origin of such remains and of the existence of relevant policies in countries of origin.

- (viii) Museums shall publish their criteria for the return or other special treatment of human remains.

*Note: Further procedural recommendations are made in the draft code of practice in Appendix 8.*

- (ix) Compliance with these requirements shall be imposed and monitored by the new licensing authority, through its power to grant licences and to sanction individual codes of practice.

**V. A national advisory panel**

- (x) There shall be a national *Human Remains Advisory Panel*, to be established by DCMS in broad conformity with the functions and powers of the *Spoliation Advisory Panel*. Draft terms of reference are published in Appendix 7.

- (xi) The Panel shall be accessible to all relevant parties with a sufficient interest in the treatment and condition of human remains held in public museum collections. Such access shall be subject to conditions.

- A reference to the Panel can occur only by common consent of the parties.
- The Panel shall have the power to make recommendations on all issues relating to the return, retention, treatment, handling, use, safekeeping and control of human remains. Its jurisdiction will extend (but will not be confined) to claims for the return of remains.
- The Panel will comprise independent experts, appointed by the Minister for the Arts, who will have no affiliation to any of the parties involved and no other personal concern with the subject matter of the claim or controversy or with the outcome of any referral.
- The Panel shall have the power to make recommendations both to the parties to the claim or other controversy, and to DCMS (for example, in regard to any proposal for legal change).
- Recommendations by the Panel will be advisory, and will not legally bind the parties or DCMS.

- (xii) The *Human Remains Advisory Panel* shall be established as soon as reasonably possible. Its establishment shall be independent of the timing of the legislative and other changes recommended elsewhere in this Report.

**VI. Institutional or local panels**

- (xiii) The following recommendations apply where a particular institution decides to establish its own 'local' advisory panel to consider issues concerning the return or other treatment of human remains (including research, conservation and display).

*Note: The consensual nature of the jurisdiction of the Human Remains Advisory Panel will leave a wide discretion to individual museums, both in determining whether to establish a local advisory panel and in delineating the role of any such panel. Local advisory panels may be appropriate where institutions are likely to be approached frequently on such issues. Institutions may wish to consider whether reference to the local panel should be a preliminary to any residual reference to the national Panel, or a substitute for reference to the national Panel.*

- (xiv) Local panels shall be bound by objective standards of independence, fairness, consistency and transparency, and shall have appropriate expert representation drawn from outside the institution. Appointments to local panels shall follow published procedures and criteria, designed to ensure that such panels are perceived as meeting the required standards.
- (xv) Where an institution intends to decline any request for a reference to the national Panel, and to adopt a local panel as the exclusive forum for individual references, this intention should be stated in its code of practice or otherwise notified to the licensing authority, which may impose particular requirements as to the objectivity, fairness, consistency and transparency of the local panel.
- (xvi) The foregoing standards shall be imposed and monitored by the licensing authority through its power to grant licences and to sanction individual codes of practice. If the licensing authority is not satisfied on any material point it may withhold or revoke a licence.

**VII. Referral to Panel: qualifying considerations**

- (xvii) No museum that is (or reasonably believes itself to be) prohibited by statute from disposing of human remains within its collections shall be required by the licensing authority or code of practice to demonstrate access to a local advisory panel for the purpose of hearing claims for the return or other relinquishment of human remains, until the prohibition has been removed or is otherwise shown not to exist.

- (xviii) Such a museum must still comply with the requirements of the licensing authority and code of practice on other matters affecting the treatment, handling, use and safekeeping of remains, including research, display and conservation.
- (xix) A continuing statutory prohibition on disposal will not prevent a museum from agreeing to refer a claim or controversy to the national Panel where it considers this appropriate.

*Note: This may be the case where the museum would find it helpful to have a recommendation from the Panel that the law be changed.*

## Regulation

### VIII. General

- (xx) A licensing system shall be introduced, with the object of regulating the holding, return, treatment, handling and disposal of human remains within all museums, in broad conformity with proposals currently being developed by the Department of Health for the proposed Human Tissue Bill.
- (xxi) Institutions shall be required, as a condition of licensing, to subscribe publicly to a code of practice on the care and management of human remains. A specimen draft of such a code is provided in Appendix 8.
- (xxii) Institutions must show a clear understanding, reflected in both policy and practice, that the holding of human remains is a privilege, to be enjoyed only where the institution observes exacting standards of respect, both for the deceased person and for those living persons who are concerned with the remains in question.
- (xxiii) Breach of the code of practice shall give rise to sanctions. These may, according to circumstances, include the loss or suspension of licence, or criminal penalties. Provision for such sanctions should be made within the legislative or other measures that establish the licensing authority.

*Note: These and the following regulatory recommendations have arisen in part from three interrelated developments affecting modern law and policy: the formulation by the Department of Health of proposals to introduce statutory regulation over the holding by medical institutions of future-acquired human tissue and organs; the emphasis by the Department of Health on the consent of the deceased or the deceased's surviving kin as a paramount factor in the legitimate retention and use of such human*

*remains by medical institutions; and the human rights guaranteed by the Human Rights Act 1998 (incorporating into domestic law the European Convention on Human Rights): see in particular the prohibition on discrimination enshrined in Article 14 of the Convention.*

#### **IX. Powers of licensing authority**

The licensing authority shall be empowered to:

- (xxiv) Grant licenses to institutions that hold human remains in accordance with the code of practice;
- (xxv) Impose conditions on the grant of licences;
- (xxvi) Withhold or withdraw licences from institutions that do not conform to the code;
- (xxvii) Withhold or withdraw licences from institutions which cannot adduce evidence to show that long-term research value or other benefit can reasonably be expected to be gained from the retention of human remains by those institutions;
- (xxviii) Direct the disposal of human remains by institutions, as a condition of licensing;
- (xxix) Direct the consolidation and rationalisation of holdings where circumstances demand, subject to the principle that no institution shall be required to take responsibility for human remains without its consent;
- (xxx) Provide for the management of unwanted human remains;
- (xxx1) Investigate complaints about the activities of licensed and unlicensed institutions;
- (xxxii) Supervise and enforce the measures by which the licensing authority is established, the conditions on which any licence is granted, the penalties imposed for breach of any of such requirements and for the holding of human remains without a licence, and the code of practice generally.

#### **X. Consequential provisions**

We make the following detailed recommendations (see also Appendix 2)

- (xxxiii) Institutions that comply with the requirement of the licensing authority shall be deemed to have lawful possession and the right to possession of human remains within their collections, sufficient to enable them to defend their interest at law and to loan the remains to other licensed institutions.

- (xxxiv) The foregoing rights shall be subject to, and without prejudice to, such superior interests and obligations as may exist in the particular case, whether by reason of any property in the remains, or of any right of personal representatives or others to have the remains delivered up for burial, or otherwise.
- (xxxv) Provisions on export control shall be clarified and, where necessary, amended to enable cross-border returns of human remains, or other responses which involve the cross-border movement of human material, where desired.

*Note: We contemplate that a museum which enjoys, by authority of its licence, the power to loan human remains to other museums will normally be authorised to loan only to another licensed museum. Equivalent assurance may need to be devised for loans to museums overseas. Such matters would ordinarily be articulated in the licence or code of practice.*

#### **XI. Accountability**

The licensing authority shall answer to the appropriate government department(s), according to the arrangements for its foundation. It shall also be subject to scrutiny by the proposed Human Remains Advisory Panel, the relevant holding museums and their professional association(s). It shall contain significant external representation.

#### **XII. Timing**

The licensing system shall be introduced as soon as reasonably possible, having regard to the fact that a transition period may be helpful to institutions which may wish to decide whether they cannot, or do not wish to, meet the standards of a licence. Its introduction shall be independent of the timing of the other changes recommended elsewhere in this Report.

#### **XIII. Consultation and dialogue**

- (xxxvi) All people concerned with this issue should use their best endeavours to establish mutual respect, understanding and appreciation. In particular, they should exercise such endeavours to identify the common values uniting different cultural systems; to turn different values into reciprocal benefits; to articulate, explore and seek ways of reconciling their own principles, commitments and concerns; and to work together to ensure that the future treatment and destination of human remains derives from agreement and co-operation rather than from confrontation or unilateral initiative.

*Note: The reference to people concerned with this issue includes claimant groups, holding institutions, scholars, indigenous communities and other interested persons. The recommendations in this section are designed to operate in conjunction with our earlier proposals regarding the institution and use of non-adversarial dispute resolution methods, including the proposed Human Remains Advisory Panel: see Recommendations IV-VII above ('Dispute Resolution').*

- (xxxvii) Institutions holding human remains shall exercise their best endeavours to consult openly and proactively with others concerned with this issue and, by means of such dialogue, seek to explore all matters of shared concern. Such matters include the identification of culturally appropriate ways of supporting and encouraging new consensual acquisitions of knowledge and of enhancing scientific access to collections in a manner compatible with the sensitive care and treatment of remains.
- (xxxviii) Institutions holding human remains shall produce, and keep under review, concrete and positive proposals for the development of open and continuing dialogue with such parties.
- (xxxix) An institution's proposals for the development of dialogue, and its progress in satisfying those proposals, shall be taken into account by the licensing authority.
- (xl) Commitment to these matters should be declared in the proposed code of practice and underpinned by the enforcement measures appropriate to that code.
- (xli) DCMS and Resource should confer with a view to funding and establishing an accessible list of contact persons and organisations to facilitate the process of consultation.

#### **XIV. Documentation and access**

- (xlii) Institutions shall exercise their best endeavours to provide reasonable access to their collections and to information about their collections.
- (xliii) Such provision shall pay full regard to the sacred/secret nature of human remains as recognised by particular cultures and religions and to the legitimate concerns of genealogical and cultural descendants of the deceased person.

*Note: We commend in this regard the guidance given in the document Guidelines for the Sharing of Information between British and Australian Institutions and Aboriginal and Torres Strait Islander People, published by ATSIC in 2002, which offers practical guidance on the authentication of requests for information and the delivery of information in a manner which avoids improper disclosure. We feel that this document offers a helpful model for such requests generally.*

(xliv) The information that an institution makes available to claimants (and to others asserting an interest through genealogical or cultural descent) shall include such information as is known to it concerning:

- The volume of human remains held,
- An inventory of the remains held,
- The source area and/or community of origin of the remains,
- The condition of such remains,
- The circumstances of acquisition,
- Whether any relevant consent was given,
- The terms and focus of any consent,
- The circumstances of such consent,
- The past experience of and response to claims,
- Details of all treatment and use of the remains (for example, research undertaken on the remains) including the results of any such treatment and use.

(xlv) Institutions shall devise and publish a plan to elucidate those holdings which were previously unknown to them, and to improve and develop their own stock of information on holdings, particularly where those holdings are (or can reasonably be expected to be) the subject of claims, whether for repatriation or otherwise.

(xlvi) The foregoing obligations should be implemented and monitored through the code of practice wherever possible.

**XV. Consent**

(xlvii) No institution shall retain, or perform any other act in relation to, human remains where it knows or has compelling reason to believe:

(a) That the original removal of the remains occurred without the consent of the deceased person or that person's close family, and

(b) That the present retention or other proposed act is without the consent of:

1. Close family or direct genealogical descendants of the deceased person; or
2. Where no such family or descendants are identified, those who have within the deceased person's own religion or culture a status or responsibility comparable to that of close family or direct genealogical descendants.

*Note: part (2) of this recommendation is a majority recommendation: see Chapter 7 paras 342-358.*

(xlviii) Institutions shall exercise their best endeavours to identify remains held in their collections, and to identify the close family or direct genealogical descendants of the deceased person.

(xlix) Where no such family or descendants are identified, institutions shall use their best endeavours to identify those who have within the deceased person's own culture a status or a responsibility comparable to that of close family or direct genealogical descendants.

*Note: recommendation (iii) is a majority recommendation: see Chapter 7 paras 342-358. We consider that museums are entitled to expect that claimant persons or groups asserting a necessary connection with the deceased person will bring forward serious evidence of the connection and of the lack of consent of the deceased person or close family of the deceased person to the original removal of the remains: see para 358. The responsibility of museums to identify relevant persons should be interpreted in that context.*

(l) Where an institution has neither knowledge nor compelling evidence of close family or direct genealogical descendants of the deceased person, or of any person or group that has within the deceased person's own culture a status or responsibility comparable to that of close family or direct genealogical descendants, the institution shall exercise its best endeavours to consult other appropriately concerned parties

whose concerns are known to the institution, and shall take full account of their wishes and concerns, before making any decision regarding the retention or treatment of the remains.

- (li) The foregoing obligations should be implemented and monitored through the code of practice wherever possible.

**XVI. Unclaimed and culturally-isolated remains**

- (lii) Institutions holding unclaimed overseas indigenous human remains shall exercise their best endeavours to consult any overseas public authority, entrusted by government with the intermediate reception and stewardship of such remains, in order to determine whether the museum shall relinquish the remains to that entity, or make other appropriate arrangements.
- (liii) Institutions shall exercise their best endeavours to determine whether the dictates of conscience and decency compel the re-interment or other relinquishment of unclaimed and culturally isolated human remains, and to respond accordingly.
- (liv) Decisions on the foregoing matters shall be recorded and available to public scrutiny,
- (lv) The foregoing obligations should be implemented and monitored through the code of practice wherever possible.

*Note: Where no existing person or group seeks to impose any restriction on the retention or other treatment of human remains, the fact that the deceased person (or the deceased person's close family) did not consent to the original removal shall not by itself ordinarily restrict the museum's liberty of action with regard to the remains.*

**XVII. Associated objects**

- (lvi) Material associated with human remains, but not consisting of human remains, shall be excluded from the proposed licensing regime and from the other Recommendations set out in this Report. This Recommendation is conditional on the implementation of those Recommendations that follow.

- (lvii) We recommend no present change in the law as it affects the holding by museums of associated objects.
- (lviii) We recommend the establishment of a separate ministerial advisory group with a mandate to consider and make recommendations on the holding by museums of sacred objects.
- (lix) The terms of reference of the proposed new group shall include associated objects as understood within this Report, and artefacts made partially, but not wholly or largely from human material, but shall not be limited to those categories. The terms of reference of the proposed new group might also include human fossils and sub-fossils.
- (lx) The new group should have a mandate comparable to that of the present group and shall consider (among other questions) the modification of statutes that prohibit (or may prohibit) museums from relinquishing sacred objects.
- (lxi) For the avoidance of doubt, the recommendations set out elsewhere in this Report apply to artefacts that consist wholly or largely of human remains.

*Note: We believe that many aspects of our recommendations regarding human remains represent good general museological practice and should apply equally to associated objects. We refer particularly in this context to the publication of information and the development of open dialogue with claimants and concerned communities. We welcome in this regard (as in others) the decision of Resource to establish a Cultural Property Advisory Unit.*

- (lxii) We recommend that, until the implementation of any reforms recommended by the proposed new advisory group, museums continue to treat issues concerning sacred objects and other artefacts that merit special treatment in accordance with the existing *Guidelines for Restitution and Repatriation*.

#### **XVIII. Display, research and storage**

- (lxiii) The treatment of human remains for purposes of display and research, and the arrangements made for their storage, shall conform to the highest professional standards. This obligation shall apply whether or not the particular remains are subject to a claim for their return or otherwise.

- (lxiv) In considering such treatment, institutions shall observe the procedures set out in Recommendations XV (i)-(iv) above ('Consent'). Among other precautions, they shall exercise their best endeavours to identify and respect the views of genealogical and cultural descendants, and to determine whether such persons have within their own culture a status or responsibility comparable to that of close family or direct genealogical descendants. In the case of any unresolved difference, institutions shall refer the matter to the appropriate advisory panel, in accordance with Recommendations IV-VIII above ('Dispute Resolution').
- (lxv) The foregoing obligations should be implemented and monitored through the code of practice wherever possible.

**XIX. Departmental review**

- (lxvi) The Minister for the Arts shall keep under review all matters relating to the holding and treatment of human remains by relevant institutions and the implementation by such institutions and other relevant entities of the Recommendations contained in this Report.
- (lxvii) In particular, the Minister shall keep under review:
- (a) The circumstances operating for and against imperative legislation compelling the relinquishment of human remains;
  - (b) The jurisdiction and operation of the *Human Remains Advisory Panel*; and
  - (c) The progress of the recommendation, made elsewhere in this Report, for a separate inquiry regarding associated and other objects (see Recommendation XVII above – Associated Objects).
- (lxviii) The Minister shall consider offering the good offices of DCMS towards the resolution of any claim or other controversy that has not been resolved by other means, and shall consider the promulgation of criteria for the offering of any such participation in the resolution of claims and controversies.

**XX. Education and support**

- (Ixix) DCMS shall (on determining to adopt these Recommendations) consult with Resource, the Museums Association and other concerned groups to devise a plan to publish information on all relevant matters to interested parties.

*Note: Relevant matters will include: the recommendations contained in this Report; the legal position both before and after their adoption; the concerns of overseas indigenous communities; the background to acquisitions and claims; the scientific importance of current holdings of human remains; modern attitudes on scientific ethics; the types of person or group who might have, within a deceased person's own culture, a status or responsibility comparable to that of close family or direct genealogical descendants; the overseas public authorities that might require to be consulted; the law on human remains and human rights; and the values of mediation and other forms of alternative dispute resolution. Individual members of the Working Group have proposed that, during the first twelve months following the publication of this Report, DCMS should direct particular attention to the provision of guidance to museums and other collections and to the immediate steps such institutions should take in order to implement and manage the recommendations. It is contemplated that part of this exercise might (subject to appropriate timing) be delegated to the Cultural Property Advice Unit.*

- (Ixx) DCMS, Resource, the Museums Association and other concerned groups shall give early consideration to the conduct of short-term awareness programmes in order to familiarise museums and other collections, and (following consultation with them) indigenous groups and relevant overseas agencies, with:
- (a) The content and implications of this Report;
  - (b) The government's response to it;
  - (c) The options and procedures that are or will become open to claimants by reason of it; and
  - (d) Any other relevant matters raised by persons, groups or institutions for whom the awareness programmes are designed.

*Note: Individual members of the Working Group have proposed that a target date of three months from publication of the Report be set for evolution of the awareness programme regarding museums and other collections, and six months for the evolution of the awareness programme regarding indigenous groups and relevant overseas agencies. It is contemplated that such programmes will include the provision of seminars, briefing papers and ad hoc advice for museums and other collections.*

- (lxxi) The Working Group welcomes in this regard the decision by Resource to establish a Cultural Property Advice Unit.

*Note: The Working Group attaches central importance to the expeditious establishment of the Cultural Property Advice Unit, to the closest possible collaboration between the Unit and DCMS in the dissemination and explanation of these recommendations, and to the provision of sufficient resources to enable those functions to be discharged.*

- (lxxii) DCMS should work with other relevant interests to establish a central point to facilitate contact and communication in regard to matters affecting human remains within museum collections.

*Note: It is contemplated that those brought into communication by this central point will include not only museums and other collections but scientists, indigenous groups and other relevant public authorities, and that one consequence of this communication will be greater dialogue and understanding among such interests. One suitable medium for this exchange may be cross-cultural seminars at which experiences and approaches can be shared in a spirit of mutual understanding.*

#### **XXI. Costs of implementation**

- (lxxiii) DCMS shall fund the national claims resolution process (the *Human Remains Advisory Panel*) and shall (with Resource) undertake primary responsibility for the production of funding for the educational and support functions referred to in Recommendations XX(i)–XX(iv).

- (lxxiv) Sponsoring Departments and Resource should work together to quantify the other resources required to implement these recommendations, and to identify appropriate sources of funding for the resultant costs to museums.

*Note: We contemplate that DCMS will produce by the end of 2004 a scheduled realisation programme. The programme will provide detailed costings and a distribution of responsibility among DCMS, Resource, museums, other collections and other relevant agencies for the implementation of these recommendations. Without sufficient additional resources many of these recommendation will, of course, be impossible to implement.*

- (lxxv) Where possible, DCMS shall estimate the time and resources needed to conduct any further necessary check of museum holdings of human remains, and shall both consult and advise overseas indigenous groups with regard to this estimate.

# The Minority Report

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## STATEMENT OF DISSENT FROM NEIL CHALMERS

### 1. Reasons for dissent

- 1.1 I support many of the main conclusions of the report. The present situation of conflict between those who hold and research human remains in museums on the one hand and claimant communities on the other is damaging and needs to be resolved. The law needs to be changed to give those museums that are currently prevented from returning human remains the discretion to do so. There needs to be a balance between the undoubted benefits to humanity that flow from medical, scientific and other research on the one hand and the wishes of those communities that are claiming remains on the other. There needs to be a licensing authority with the power to enforce high standards of care for human remains that are held in museum collections, and there need to be transparent, and publicly acceptable procedures for responding to claims for their return. There needs to be better provision of information to claimant and research communities about the human remains that are held in museum collections. There needs to be greater dialogue, and a greater willingness to work together. Significant additional resources will be needed to bring about these desirable changes.
- 1.2 However, I dissent from several of the report's recommendations in their detailed formulation, and also with significant parts of the main body of the report. My reasons for dissent fall into three main areas. First, the report and recommendations do not provide a proper balance between the public benefits deriving from medical, scientific and other research on the one hand and the wishes of claimant communities on the other. The report is slanted heavily, both in tone and in substance, in favour of the latter. Second, some of the recommendations are disproportionately complicated and cumbersome in relation to the problems that they are seeking to resolve. Third, some of the recommendations are unworkable.
- 1.3 I amplify these comments below by going through each group of recommendations from the main report in turn. Where necessary, I formulate alternative recommendations.

## 2. Commentary on recommendations I, II and III relating to the law

2.1 The report concludes that the law should be changed to give all museums the freedom to return human remains to claimant communities. I fully support this, but have two major reservations about the report's treatment of this issue. First, it recommends that return should be permissive rather than mandatory, and while I support this position, the report fails to set out the fundamental, ethically based reason for coming to this conclusion. Second, while appearing to rule out mandatory return, the report proposes measures that would effectively introduce a mandatory regime.

Taking these points in turn, paragraphs 302 to 312 of Chapter 6 give several reasons why permissive rather than mandatory return should be favoured. These are largely pragmatic and operational. No mention is made of the basic, ethical reasons that compel one to come to this conclusion. In my view, legislation in this field should be based on sound ethical reasoning and lead to a situation that is ethically more justifiable than the one that exists prior to the change in legislation.

We need to move to a situation where in every case the benefits and disbenefits of return or retention can be weighed, balancing a number of factors affecting the strength of the claim for return and a number of factors affecting the degree of public benefit that would arise from their retention, in particular for research. Such an assessment of benefits and disbenefits must be based upon a clear set of widely shared principles such as the duty to show respect for persons; the duty to be sensitive to cultural differences and the duty not to exploit the vulnerable. If such an ethically based system is put into effect I am certain that some cases will emerge where return is ethically the right course of action, and other cases where it is not, and where retention is to be chosen

It would therefore clearly be unreasonable to introduce a regime of mandatory return which would compel return even when an ethical assessment of particular cases showed it was wrong to do so.

2.2 Second, the recommendations should not hold out the prospect of mandatory return at a later date as this would undermine the fundamental principle of balance that is being sought. Nor should they allow mandatory return to be achieved through the back door. Such an outcome would be achieved as a result of recommendation (XV) that deals with the conditions of consent required from claimant communities. As I show below, this recommendation would, if implemented, introduce a regime of widespread mandatory return. This is unacceptable. It is

important, therefore, that no measures are introduced that would result in widespread mandatory return, whether through the introduction of primary or secondary legislation or by other means.

### **3. I have one further reservation with respect to recommendation II**

3.1 Recommendation II (v) may well seem desirable from a museum's point of view, but may not be enforceable in law.

3.2 In the light of the above comments I make the following recommendations in relation to the law.

3.3 *The law, as it affects the holding of human remains, should be changed in order to allow an ethically-justifiable balance to be achieved between the public benefits of medical, scientific and other research on the one hand and the wishes of claimant communities on the other.*

3.4 *In order to achieve this balance, museums that are presently prevented from returning human remains by statute or who otherwise do not have the power to return human remains should be empowered to have the discretion to return human remains.*

3.5 *Specifically, the statutes that govern national museums should be amended to give national museums the discretion to return human remains.*

3.6 Legislation providing for the mandatory return of human remains by museums should not be introduced. Nor should other measures be introduced that would, directly or indirectly, result in the mandatory return of human remains by museums.

### **4. Commentary on recommendations IV to XII and XIX on Dispute Resolution, Regulation and Departmental Review**

4.1 The report recommends an elaborate new system to regulate the holding and use of human remains by museums and to deal with disputes. This system would entail the participation of the museums themselves, a new licensing authority, a purely advisory national panel, with the additional option of local panels, and the possible intervention of the Minister for Arts. The proposed new system is excessively complicated, confuses roles, does not adequately protect the public benefits of research into human remains, and is poorly designed to deal with the issues of regulation and dispute resolution that are raised in the report. An over-burdensome new system of this nature would be difficult for either claimant communities or museums to come to grips with, and runs the risk of disenfranchising both.

- 4.2 A simpler system is required which will ensure high standards of care of human remains among museums that hold them and will give confidence to claimant communities and researchers alike that claims for return and proposals for research are being considered transparently and fairly. These two goals would be met by the creation of a human remains licensing authority. Museums would only be allowed to hold collections of human remains when licensed by the authority. Licences would only be issued when museums conformed to standards specified by the licensing authority and set out in a code of practice. This code should not be the one set out in Appendix 8, for reasons that I set out later. To be granted a licence a museum would be required to meet standards for the care of collections specified by the authority. It would be required to demonstrate that its collections were being used actively for public benefit, through medical, scientific or other research, or through the provision of information of public benefit. It would also be required to conform to procedures specified by the licensing authority for dealing with requests for return from claimant communities and for proposals for use of the collections for research and for the provision of information. The licensing authority would have both lay members and representatives of the research and museum community. It would have legal powers to issue, renew periodically and revoke licenses, and to impose sanctions directly or seek their imposition through the courts. There might be value in subsuming the licensing authority within the Human Tissue Authority (HTA) currently being proposed by the Retained Organs Commission (see for example “A proposed framework for the regulation of museums, archives and collections of human bodies, body parts, organs and tissue” issued by the Retained Organs Commission in June 2003, and “Proposals for new legislation on human organs and tissue” issued by the Department of Health in September 2003). This possibility should be explored, recognizing that particular conditions apply to museum collections of human remains, and that the public benefits arising from museum collections of human remains extend beyond the purely medical.
- 4.3 The system proposed here properly puts the accountability and responsibility for the care and use of human collections where it belongs, namely with the governing bodies of the museums that hold them, and the powers of independent enforcement where it belongs namely with the licensing authority. There is, in my view, no role for a Human Remains Advisory Panel as advocated in the report, nor, with due respect, for ministerial intervention. This is not to deny the importance of licensed museums having access to authoritative, independent advice from both the research and the claimant communities when considering a claim for return, a research proposal or the conditions of care for their collections. Such advice may be invaluable

in helping a museum to meet the standards stipulated by the licensing authority. Such advice might come from many sources, depending upon the nature of the claim. I would favour that each licensed museum should have an ethics committee with both lay and research representatives. A possible parallel exists in the NHS system of Local Research Ethics Committees. However, there are other possibilities, including an advisory service run by the museum sector itself, liaison groups set up between one or more licensed museums and representatives of claimant communities, and so on. The main driving force behind public acceptability will, however, be the power and independence of the licensing authority, and not the existence of channels of advice.

- 4.4 I am not in favour of the main report's recommendation XIX (iii), namely that the Minister shall consider offering the good offices of the DCMS towards the resolution of any claim or other controversy that has not been resolved by other means. Certainly, in the case of the national museums there is a clear and important separation between the powers of the Minister and those of the museums' governing bodies, namely their boards of trustees. The independence of these boards is set out in statute, and would risk being compromised if this recommendation were accepted.
- 4.5 I differ also from the main report's conclusion, set out in recommendation XII, that the introduction of a licensing system should be independent of the legislative and other changes recommended in the report. Those museums that are at present barred by statute from returning human remains, currently have no ability to respond to what the report has demonstrated to be overwhelmingly the most important issue for claimant communities – namely the return of remains of their ancestors. Without this freedom to return, a new licensing authority will be seen by all parties to be largely cosmetic, and its credibility will be damaged. In my view therefore, the first and urgent priority is to introduce legislative changes to give all museums the discretion to return human remains. The new licensing system should be introduced once this freedom to return has been achieved.
- 4.6 In the light of the above, I make the following recommendations in place of the report's recommendations IV to XII and XIX (iii).
- 4.7 *There should be a human remains licensing authority with powers to operate a licensing system for museums holding human remains that would enforce high standards of their care and would ensure that requests for return and proposals for research were considered by such museums in a way that was seen to be transparent, ethically consistent and fair in the eyes of research and claimant communities.*

- 4.8 *The licensing authority would have lay members and representatives from the research and museums communities. The possibility should be explored of subsuming the authority within the proposed human tissues authority.*
- 4.9 *The licensing system should be introduced as soon as practicable but not before the legislative restrictions on return that apply to some museums have been removed.*
- 4.10 *There should not be a national Human Remains Advisory Panel.*
- 4.11 The arms length relationship that currently operates between boards of trustees of national museums and government should not be compromised by involvement of ministers or officials in dispute resolution.

## **5. Commentary on Recommendations XV, XVI and XVIII (lxiv) concerning Consent and Unclaimed Remains**

- 5.1 These three recommendations, if implemented, would bring all research upon human remains from claimant communities to a halt and would result in their mandatory return to those communities. This is not acceptable, and would severely damage the public benefit derived from museum collections of human remains. These recommendations propose that consent from genealogical descendants or their community surrogates must have total priority over any other considerations irrespective of the age, or certainty of identity of the human remains in question, or the distance of relationship between the deceased and the claimants. It takes no account of the public value of research based upon the human remains. These recommendations cannot be said to strike a fair and defensible balance between the interests of claimant communities and the public benefits that arise from research. They are not based upon a framework of public ethics, and are extreme in comparison with related areas where issues of public ethics are involved, most notably in the area of the retention of human organs and tissues. Thus the proposals for new legislation on human organs and tissue issued by the Department of Health in September 2003 state that the purpose of such legislation is to “strike an acceptable balance between the rights and expectations of individuals and families, and broader considerations, such as the importance to the population as a whole of research, education, training, pathology and public health monitoring”.
- 5.2 In order to achieve such a balance it is, in my view, necessary to have a series of guidelines that would constitute an ethical framework on which to base decision-making. These should allow the strength of a claim for return to be judged against whether the identity and

geographical or community origins of the deceased is known or not, on how recently or far in the past the deceased lived, on how closely, if at all, those making the claim are related to the deceased, and on the circumstances by which the deceased came into the museum's possession. It will also need to be judged against whether the human remains that are being claimed have thus far contributed information of significant public benefit, or whether research that is being proposed is likely to do so. If such principles are applied, clear cases will emerge when the views of near relatives and close lineal descendants will override other considerations, leading to return. Conversely, there will be other cases where the public interest deriving from research into the human remains will prove to be paramount, leading to retention and further research.

- 5.3 Finally, recommendations XV and XVI recommend that museums should use their best endeavours to contact the close family or direct genealogical descendants of deceased persons, failing that their community surrogates, failing that again all other concerned parties whose concerns are known to the museum. On top of this, museums would be required to contact public authorities in all countries from which human remains in their collections derive whether or not claims are being made. Given the size of the collections of some museums, the imperfect state of knowledge of their provenance; the diversity within some communities of community representatives, and the diversity of their views; and given the many other practical difficulties of identifying and establishing effective communication with the appropriate communities and individuals, these proposals are disproportionate, unrealistic and unworkable.
- 5.4 In the light of the above I do not support recommendations XV, XVI and XVIII (ii) in their place would substitute the following recommendation.
- 5.5 *Decisions to retain or return human remains should be taken in the light of wide consultation, and take into account as much information as is possible about the deceased. This should include the identity and wishes of the deceased, the community or geographical origin of the deceased, the cultural values of the claimant community, if known, the length of time since the death of the deceased, the closeness or distance of family or community relationships of those claiming the return, the circumstances under which the remains of the deceased were obtained and the public benefit derived or to be derived by their retention and research.*

## 6. **Commentary on the Draft Code of Practice for the Treatment, Safe Keeping and Care of Collections**

6.1 The draft code of practice which appears at Appendix 8 and which is referred to in several places within the body of the report repeats many of its principal features. My reservations about the report therefore apply also to the code, which does not in my view provide an acceptable basis for adoption by a new licensing authority. The licensing authority will certainly need to develop a code and to require compliance with the code as a condition of the issuing of a licence to a museum, thereby entitling it to hold and conduct research upon human remains. Such a code must specify standards for the physical conditions of care of the collections, including their security and access arrangements. It must require a museum to show how the conditions under which the human remains are held have been informed by respect for and understanding of the people who have died and of their communities. It must also require a museum to show how these conditions are appropriate to the conservation and research needs of the research community. The code should require a museum to demonstrate that it has taken reasonable steps to ensure that any new research proposal involving human remains in its collections has been informed by authoritative and independent advice before such research is undertaken. The code should also require a museum holding human remains to comply with procedures defined by the licensing authority for handling claims for return. Such procedures would require that a museum took into account independent and authoritative advice in relation to the interests of both the research and the claimant communities. The code should also specify the standards of documentation and information provision required both for claimant communities and for general public benefit in relation to medical, scientific and other research. Finally, the code should require a museum to demonstrate that it gives adequate training to its staff that care for and research the collections, as well as to authorized visitors to the collections.

6.2 *I therefore recommend that the new licensing authority develop a code with the features outlined in the above paragraph. Compliance with this code would be mandatory for a licence holder.*

## Appendix 3 – Questions for Consultation

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- Q1:** The Human Tissue Bill now before Parliament includes a clause (clause 48) that will give nine specified national museums the power to transfer human remains from their collections to others. Is this change sufficient, or should legislative changes to the powers of museums in your view go further or wider? If so, what further changes would you suggest? If you are a non-national museum, do you currently lack the power to transfer human remains from your collection to others or is that power restricted in any way?
- Q2:** Do you consider that other legislative changes are needed, for instance with respect to the ‘no-property’ rule?
- Q3:** Do you agree that it would be useful to introduce a code of practice relating to the care and use of human remains by museums that hold them? If you consider such a code to be desirable, who should issue and enforce it? Do you have any comments on what a draft code should provide for?
- Q4:** Should museums be under the licensing regime issued by the Human Tissue Authority i.e. should all, some, or none of the activities undertaken by museums be subject to that regime? How would regulation and the cost of compliance affect your operations?
- Q5:** Do you have any views on when museums should be brought under the remit of the Human Tissue Authority and/or the licensing regime?
- Q6:** Do you agree that the retention of human remains, and any research on them, should be subject to the consent of close family or direct genealogical descendants, where they can be identified? What would you consider reasonable steps for museums to take in order to facilitate identification?
- Q7:** Do you agree with the view of the majority of the Working Group that where no family or descendants are identified, there should be a requirement to obtain consent from those who have within the deceased person’s own religion or culture a status or responsibility comparable to that of close family or direct genealogical descendants? If not, do you agree with the minority view that in these cases the issue should be seen as a matter for consultation rather than a requirement for consent? What factors are decisive or important in deciding who should have the authority to make claims for repatriation?

- Q8:** In cases where a requirement for consent is not the over-riding consideration, what factors are in your view relevant to a decision whether or not to return human remains? For instance, is the age of the remains in your view a relevant consideration?
- Q9:** Do you agree with the view expressed by the Director of the Natural History Museum, that instead of a requirement for consent, the basis of decisions in all cases should be wide consultation, taking into account as much information as possible about the deceased, the community of origin and their relationship with the deceased, and the public benefit likely to be derived from their retention and research?
- Q10:** Do you agree that all museums holding human remains should have published procedures for dealing with claims relating to human remains? Should those procedures be subject to any approval? Should these be based on central guidance (e.g., a Code of Practice), which could be agreed with the museums community, or should museums rely on their own guidance?
- Q11:** Do you see a role for a national Human Remains Advisory Panel, to provide advice in cases of disagreement between museums and claimant communities? If so, which of the three views of consent outlined at paragraphs 9.12-9.15 should the Human Remains Advisory Panel adopt in its deliberations, and why?
- Q12:** Do you agree that it should be open to museums to establish their own local advisory panels, and to refer issues relating to human remains to those panels, either before or instead of referring them to a national Human Remains Advisory Panel? Do you consider that the relationship between local panels and the national Panel, as proposed in the Working Group's report, would be satisfactory? Do you think there is a case for requiring all museums holding human remains to establish local ethical or advisory panels? Are there other options that ought to be considered?
- Q13:** If a Human Remains Advisory Panel were established, do you think it would be used, and, if so, to what extent? Would you refer cases to it? What number of requests for return do you think might be received, either nationwide, or for particular institutions?
- Q14:** Do you agree that it would be useful to publish the statement of principles reproduced in Appendix 5 as guidance to museums and to the national Human Remains Advisory Panel? Does the draft require amendment or expansion?

- Q15:** Despite the Government's reservations (at paragraph 9.22), should the Minister for the Arts and the Minister for Culture, Welsh Language and Sport in Wales have a role in dispute resolutions when other procedures have failed to secure agreement? If so, why?
- Q16:** Do you consider that other measures to resolve disagreements over the treatment or return of human remains should be explored? Should the DCMS seek to incorporate any of this in legislation?
- Q17:** Should a survey of 'sacred' objects in UK museums be undertaken? If so, what, in your view, would be an appropriate definition of 'sacred objects'? What sort of objects might the term 'sacred objects' encompass? What would be the resource implications of this move?
- Q18:** Do you consider that the information and education programmes described at 9.25 and 9.26 would be desirable as follow-up to the report? If so, who should take on this responsibility?
- Q19:** Notwithstanding your answers to the earlier questions, which of the implementation options at paragraph 10.6 represents the most appropriate and proportionate way forward in terms of potential costs and likely benefits, and why?

## Appendix 4 – Draft Code of Practice

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# DRAFT CODE OF PRACTICE FOR THE TREATMENT, CARE AND SAFE KEEPING OF HUMAN REMAINS IN ENGLISH MUSEUMS AND COLLECTIONS<sup>4</sup>

## PREFACE

This is a specimen code of practice for those museums and collections licensed by the Human Tissue Authority (HTA) to hold human remains. The code applies to museum and ‘archival collections’ of human remains acquired before 1948. The code will be finalised by the HTA only after full consultation with licensable museums and collections.

The HTA will be empowered to grant licences to institutions that hold human remains in accordance with this Code of Practice, and withhold or withdraw licences from institutions that do not conform to the Code. It will supervise the conditions on which any licence is granted, the penalties imposed for breach of any such requirements and for the holding of human remains without a licence, and the Code of Practice generally.

## 1 INTRODUCTION

- 1.1 There are tens of thousands of human remains in English museums and collections; in museums of pathology, ethnography, archaeology, anatomy, and in many university departments. They are kept by such institutions and are valued by researchers for the vital information they can provide to disciplines as diverse as medicine, archaeology and the study of human evolution.
- 1.2 These human remains include the bodies of people who lived thousands of years ago, and of those who have died within living memory. They include whole bodies, and parts of bodies as small as a single tooth or bone, or tissue samples for histological study, and artefacts made from or including body parts. Some of these remains can be identified to particular people, but most now cannot. The majority were acquired without permission, some in circumstances that society would now regard as abhorrent. Some of these remains are now claimed by genealogical or cultural descendants; many are not contested.

<sup>4</sup> This Draft Code is reproduced from Appendix 8 of the Report of the Working Group on Human Remains (November 2003).

- 1.3 All these human remains were once parts of living individuals. Museums have tended to objectify them, as this makes them easier to deal with, but many museum staff would now contend that society believes that human remains need special treatment.
- 1.4 All human remains should be kept in conditions that are dignified, respectful and accord with the highest ethical standards. The same standards of care are owed to the remains, regardless of their age, origin, or the circumstances of their arrival in the collection.
- 1.5 This code of practice is intended to help people who work for or govern museums and collections holding human remains to operate lawfully, professionally and ethically, and to ensure that they keep and treat human remains, whatever their origin, with dignity and respect. The guidelines here promote good collections management, transparency, accountability, and communication. They assume that museums, universities and other educational institutions will continue to hold human remains, as they have in the past, to enable research, public and specialist education and the better understanding of humanity.

*“You are privileged to prepare the bodies of those who have died. Treat them as though the relatives were here with you” (Sign on the wall in the staff area of a funeral parlour quoted Lucas 2000:9)*

## **2 RESPONSIBILITY, MANAGEMENT AND POLICIES**

- 2.1 Each licensed institution must adopt, publish, and undertake to use where appropriate, policies, procedures and criteria approved by the HTA to determine claims and controversies regarding the return, retention, treatment and control of human remains. Such policies and procedures must enable it to respond consistently and in good faith to approaches from genealogical and cultural descendants concerning human remains, of whatever age, origin or provenance, and should include proposals for open consultation and dialogue with all interested parties.
- 2.2 Each licensed institution must name a professionally trained and/or experienced curator who will be designated by the HTA as responsible for ensuring compliance with the relevant conditions of its licence and with this code. This person will normally have one or more of the following:
- A relevant degree or specialist knowledge appropriate to the collection
  - A recognised postgraduate qualification in museum studies

- Substantial relevant experience of the principles and practice of museum operation and management

- 2.3 Each licensed institution must also give details of the arrangements for obtaining professional conservation advice and services. Preventive and remedial conservation should be carried out or supervised by a qualified conservator trained and experienced in caring for biological materials. Freelance conservators should be drawn from the UKIC Register ([www.ukic.org.uk](http://www.ukic.org.uk)).
- 2.4 Licensed institutions should ensure that all staff involved with the care of human remains understands the institution's policies and procedures. Some staff, particularly in general museums or collections, may object to dealing with human remains.
- 2.5 Licensed institutions have access to a national Human Remains Advisory Panel (HRAP), established by the Department for Culture Media and Sport, comprised of independent experts appointed by the Minister for the Arts. The HRAP has the power to make recommendations on all issues relating to the retention, return, treatment and control of human remains. Reference to the Panel must be consensual. Its recommendations are advisory and not legally binding.
- 2.6 Licensed institutions may establish their own 'local' advisory panels to consider requests for return, research, conservation, display or other interventions in respect of human remains. This may be appropriate where institutions are likely to be approached frequently on such issues. Such panels should have access to relevant curatorial, conservation, scientific and other appropriate expert representation drawn from outside the institution. Appointments to such panels, their terms of reference, procedures and criteria must be approved by the HTA (see 2.1 above), and they must be bound by objective standards of independence, fairness, consistency and transparency.

### **3 CONSULTATION AND CONSENT**

- 3.1 Genealogical or cultural descendants, members of faith groups and scientists all have legitimate concerns related to human remains collections. Real distress is likely to be caused to some of these parties if they are not consulted over the curation, use or disposal of human remains. Any institution holding human remains has a duty to respect the wishes of the dead person, where these are known, and must use its best endeavors to consult openly and proactively with interested parties, seeking to explore all matters of shared concern. Such matters include the identification of culturally appropriate ways of supporting and encouraging new

consensual acquisitions of knowledge and of enhancing scientific access to collections in a manner compatible with the sensitive care and treatment of human remains.

3.2 Consultation can bring many benefits for the institution. These include:

- Better contextual information and provenance for human remains in the collections
- The development of more balanced policies
- A healthier relationship with the interested parties consulted, which may open up opportunities for other forms of collaboration
- A higher public profile for the museum
- A deeper understanding among staff of different perspectives on death and the dead

3.3 Licensed institutions are expected to be pro-active in seeking out and consulting those individuals or groups known or likely to have a recognized interest in the institutions care of human remains in relation to:

- The development of general policy
- The formulation of general procedures and protocols
- Making decisions authorising specific actions such as resolving claims for return and requests for research

3.4 Licensed institutions should establish clear claims consideration procedures and should publish their criteria for the return of human remains together with any policies or protocols relating to the care or treatment of human remains (see 2.1 above). Such procedures should enable them to respond consistently and in good faith to approaches from genealogical or cultural descendants, regardless of their origin and of the existence of relevant policies in countries of origin. Procedures should allow sufficient time for identification, checking of claims, and consideration of the concerns of all stakeholders, including alternative potential claimants.

3.5 Human remains in museums and archival collections fall into three broad categories, each of which is likely to involve a different level of consultation:

**A Identifiable human remains claimed by genealogical descendants or those of a comparable status**

3.6 Recent, identifiable human remains may have genealogical relatives or descendants with strong interests in their care and treatment. Institutions shall use their best endeavours to identify

remains held in their collections, and to identify and notify close family, direct genealogical relatives, and others who have within the deceased person's own culture a status or responsibility comparable to that of close family or direct genealogical descendants. Licensed institutions must obtain the written consent of genealogical relatives or descendants, or those of comparable status or responsibility, to retain, or perform any other act in relation to such human remains. Museums are entitled to expect claimant communities to take the initiative in bringing forward evidence of the necessary connection and lack of consent. Consultation may not be straightforward; family members may disagree about what they feel to be appropriate. The institution will be expected to comply with the wishes of the dead person, which, if known, must be paramount, or with the wishes of those most closely related.

## **B Human remains claimed by cultural descendants or concerned parties**

3.7 Some human remains, particularly those of non-UK origin, may have cultural descendants who – though they do not hold a status comparable to that of close family or genealogical descendants – may require to be consulted. These communities may feel a duty of care to the dead, whose remains may have been taken without community consent; they may also feel a real need to heal following such historical events and therefore desire a say in the curation and disposition of the remains of their ancestors. Licensed institutions must use their best endeavours to consult all concerned parties whose concerns are known to them, and must take full account of their wishes and concerns, before making any decision relative to the retention or treatment of the remains in question. While it is sometimes difficult to judge who is entitled to speak for a community or group, and cultural affiliation may be contested between different groups, there is now considerable experience, particularly in Australia and the USA, of how best to go about the process. Sources of advice and case studies of such claims are given in Section 12 below, along with first points of contact agreed by a number of countries and indigenous groups. The following general points (adapted from McKeown 1997): are fundamental to successful negotiation:

- Know to whom you are talking. Work with official representatives of a community
- Appoint an experienced and appropriately qualified official representative of your institution as their first point of contact
- Negotiate protocol. How will the process work? What are the official channels of communication? What do both parties expect of each other? What cross-cultural factors might need to be articulated and taken into account?

- Consult as early as you can, and consult often
- Be open about the process of negotiation
- Be patient
- Don't promise what you can't deliver
- Follow through
- Evaluate and re-evaluate
- Keep out of claimant politics. Having ensured you are dealing with an official representative of a group with a legitimate locus, continue to do so. If the claimant community is split and riven by counter-claims, insist that the community deal with such conflict itself
- Document the process

## **C Human remains unclaimed by genealogical or cultural descendants**

- 3.8 Meaningful consultation over the treatment of identified but unclaimed human remains, or of anonymous, ancient human remains without clear cultural descendants will often be impossible. But if the remains can be identified to a particular faith or community, consideration must be given to their views on appropriate care and treatment, and possible reburial or cremation. Licensed institutions must exercise their best endeavours to determine whether the dictates of conscience and decency compel such action. Institutions holding unclaimed overseas indigenous human remains must also exert their best endeavours to consult any overseas public authority charged by government with the intermediate reception and stewardship of such remains, with a view to determining whether to return the human remains to that authority, or to make other arrangements. Sources of advice and contacts are given in Section 12 below.
- 3.9 Consultation may result in different kinds of care and treatment for different people; what is respectful in one culture may be distasteful to another, and attitudes to death change within cultures over time.

## **4 ACQUISITION**

- 4.1 *Ownership and interest.* In general, and subject to significant exceptions, an institution (whether licensed or unlicensed) cannot acquire legal title to human remains, since currently under

English law, no one can own a human body (or, by extension, a part of a body). So the usual principles of acquisition that apply when a museum acquires an object cannot apply to the acquisition of human remains. The Working Group on Human Remains has determined that it is preferable to formulate the institution's holding in terms of rights and responsibilities arising otherwise than from formal ownership, recognising that museums which comply with their obligations have lawful possession, albeit subject to any superior rights. The licensed institution acquires certain responsibilities for safeguarding, consulting and enabling access to human remains transferred to it, according to a formal set of policies and protocols, in keeping with the wishes of the deceased, or their genealogical or cultural descendants (see Section 2 above).

- 4.2 *Acquisition by transfer.* This method of acquisition may apply under interim arrangements pending the full establishment of the licensing system. Transfer of human remains to a licensed institution from another licensed institution or from an unlicensed source, such as a museum that cannot or does not wish to meet the requirements of the HTA, is legitimate, although licensed institutions have a right to refuse material offered to them. The documentation recording transfer to the licensed institution should reflect this transfer of interest and responsibility as well as the source of the remains, their history, copies of related archival material, provenance information and all other relevant attendant circumstances as far as they are known.
- 4.3 *Acquisition by donation.* The acquisition procedure must include a mechanism for reliably confirming that any donation is properly authorised and documented.
- 4.4 *Acquisition by excavation.* Once buried in England or Wales, a human body is protected in law. The Burial Act 1857 makes it a criminal offence to disinter a body without lawful authority. Development of burial grounds and the disturbance of buried remains are subject to a range of legislative controls. Where ground consecrated according to the rites of the Church of England is involved, the permission of the Church must be obtained. Remains removed in the course of archaeological excavations (including those resulting from development) may be subject to a Home Office licence or directions, which may set a timeframe for any scientific research and include requirements for eventual disposal. Transfer of human remains to a licensed institution as a result of archaeological excavation, is permitted provided that the excavation and the removal of the human remains have been conducted in accordance with legal requirements and published professional standards of archaeological investigation.

Where such remains were exhumed from ground that has been consecrated or blessed, the relevant religious authorities must have been consulted and have agreed to the subsequent disposition and treatment of the human remains.

Human remains excavated outside England and Wales may likewise be transferred to a licensed institution, provided that the excavation, removal and export of the human remains have been conducted in accordance with legal requirements of the country concerned, with the consent of relevant religious authorities, and comply with published professional standards of archaeological investigation. All authorisations must be fully documented.

- 4.5 *Acquisition by purchase.* Acquisition of human remains in a way that may be tainted by commercial motivation is not legitimate, and a licensed institution must refrain absolutely from such means of acquisition, irrespective of the antiquity or remoteness of the provenance.

## 5 DISPOSAL AND RETURN

If consultation and/or other considerations lead to a decision to return or dispose of human remains, licensed institutions should proceed as follows.

### A Identifiable human remains claimed by genealogical descendants or those of a comparable status

- 5.1 The act and method of disposal must comply with the wishes of the deceased or the deceased's kin, or those who have within the deceased person's own culture a status or responsibility comparable to that of close family or direct genealogical descendants, This applies whether such wishes were specified at the time of donation, or are expressed subsequently through consultation. Respectful disposal of human remains rests on accordance with the cultural and religious beliefs of the individual, his or her family, or faith or cultural community. Where no mode of disposal is specified, the remains must be disposed of safely and respectfully, by incineration, in a sealed container, following the guidance given in *Strategic Guide to Clinical Waste Management* (NHS January 1994) and *Safe Disposal of Clinical Waste* (Health Services Advisory Committee September 1999).

**B Human remains claimed by cultural descendants or concerned parties**

- 5.2 Human remains in relation to which there exist demonstrable cultural descendants, particularly descendants of non-UK origin, may be subject to requests for return in order to dispose of those remains in a culturally appropriate way. The views and beliefs of cultural descendants on the return and disposal of human remains must be taken into account. Licensed institutions must have adopted and published and approved criteria by which such claims will be judged (see 2.1 above). Advice may be sought from the HRAP or from an approved local advisory panel.
- 5.3 Some claimants may require the return of associated objects, and of catalogue and related archival information, such as photographs, along with the remains themselves, though it may be possible for the institution to negotiate to keep copies.
- 5.4 Alternatively, consultation with cultural descendants may establish that disposal to some form of 'keeping place', either within the museum or elsewhere, would be appropriate.
- 5.5 Through consultation, the licensed institution may negotiate the right to retain small samples of tissue for future study, including samples taken from bone, on conditions agreed with the claimants. This must, however, be negotiated openly and if samples are retained, conducted with transparency and documented.
- 5.6 Once return is agreed in principle, consultation with cultural descendants should establish how it is to be achieved in practical terms. How are the remains to be packed and transported? Who is to pay for the transfer? Who will receive the remains within the community? Are there religious beliefs that need to be accommodated? Transfer arrangements must comply with the export requirements of the UK and import requirements of the receiving country and may require the authority of the local coroner for the remains to be taken out of England and Wales.

**C Human remains unclaimed by genealogical or cultural descendants**

- 5.7 Many ancient human remains, for example those disinterred as a result of rescue archaeology, have been removed on the authority of a Home Office licence. The method of ultimate disposal, after study, should have been stated clearly on the licence application, and burial (or, occasionally, cremation) of the remains will be included as a condition of the licence. If the remains can be identified to a particular faith or community, their views and beliefs on the treatment of human remains before, during and after excavation must be taken into account.

Some religious groups may object strongly to the disturbance of human remains, whether by design or not, and may not countenance making them the subject of study, demanding immediate reburial. Licensed institutions must have adopted and published and approved criteria by which such claims will be judged (see 2.1 above). Advice may be sought from the HRAP or from an approved local advisory panel.

- 5.8 Through consultation with the relevant statutory and religious authorities, reburial or respectful storage in designated, marked sites may satisfy the requirements of the law and religious or civil tradition, and need not remove the remains altogether from the purview of scientific study in the future, should cultural and legal imperatives change in the meantime.
- 5.9 Any institution wishing to dispose of human remains must be pro-active in establishing that no genealogical or cultural descendants exist who might wish to make a claim. Some countries have established, by agreement with indigenous peoples, holding institutions to identify and care for human remains and supervise return to source communities. Licensed institutions must provide the fullest possible information to any relevant groups or organisations (see Section 12 below), and allow at least six months for a response.
- 5.10 If no claim is forthcoming, the institution may dispose of such remains through transfer, by agreement, to a licensed institution, see paragraph 4.2 above, under the direction of the HTA. If no licensed institution is able to receive them, the management or disposal of the remains will be directed by the HTA.

## **6 DOCUMENTATION AND PUBLIC ACCESS TO INFORMATION**

### **Documentation in the public domain**

- 6.1 Licensed institutions must exercise their best endeavours to provide reasonable access to collections and collections information, subject to consultation with interested parties. Where institutions are subject to the provisions of the Freedom of Information Act (2001), the following should be included in the institution's publication scheme: the volume of human remains held; an inventory of the remains held; their condition; the circumstances of their acquisition; whether any relevant consent was given; the terms and focus of any consent; the circumstances of such consent; past experience of and response to claims; and details of the treatment and usage of the remains.

- 6.2 All licensed institutions must devise and publish a plan to improve and develop their documentation of human remains, especially where these are subject to claims. This information should be made publicly available in the form of a printed inventory, an accessible electronic database or online catalogue, unless consultation with relatives and descendants specifically demands otherwise.
- 6.3 The catalogue should provide clear links to related files maintained by the licensed institution, which will contain relevant correspondence, transfer and necessary licence documentation, further contextual details and key publication references. The normal presumption should be that all such information – however incomplete or disorganised – would be publicly accessible.
- 6.4 Licensed institutions holding collections of human remains from outside the UK must notify cultural descendants and/or the governments of the countries concerned, where these are actively seeking return, and keep a record that they have done so.
- 6.5 It is recommended that accession numbers are attached to human remains in such a way as to minimise the risk of loss or disassociation, but marking directly on bone or other remains is ethically undesirable, as it objectifies the remains. In complying with these responsibilities, licensed institutions must exercise their best endeavours to respect all reasonable considerations of decency, privacy, and confidentiality, and to honour the sensitivities of others about the public exposure of sacred/secret material.

**Sensitivity to controlled or restricted access**

- 6.6 The documentation on identified human remains may sometimes contain linked information about particular individuals or their families, and this sensitive personal information should normally be held securely, and always in accordance with the provisions of the current legislation affording protection to such data. Consultation will establish the extent to which disclosure of such information to the public is desirable. The institution must honour the wishes of the deceased and/or their next of kin.
- 6.7 The documentation of human remains with cultural descendants may involve very similar sensitivities and if so will likewise necessitate consultation. Institutions with such collections should consult with cultural descendants at an early stage. Where accurate documentation requires further research, for example in order to ascertain cultural and geographical provenance, it may be appropriate to involve or employ members of likely source communities in helping to research and document collections. Consultation should also establish whether

there are certain categories of information to which access should be restricted. For example, some indigenous groups may wish to restrict access to photographs of human remains. Where such sensitivities exist, and particularly in museums and institutions with general collections, it may be appropriate to keep human remains records separately from other collections information.

- 6.8 Where, as a result of consultation, it is agreed that certain information should not be made public, the reasons and criteria should be documented and made public. For instance, some museums have adopted policies that specifically preclude or restrict access to images of human remains by the media.

## **7 TREATMENT OF HUMAN REMAINS**

- 7.1 Every aspect of the treatment of human remains should be consistent with the highest professional standards. This obligation applies whether or not the remains are subject to a claim for their return or a request for special treatment.
- 7.2 Where human remains are identifiable, claimed by genealogical relatives or descendants, or by those who have within the deceased person's own culture a status or responsibility comparable to that of close family or direct genealogical descendants, and where general consent has not been obtained for methods of treatment, the consent of relatives or descendants must be obtained, in writing, for all aspects of their care and treatment under the headings in Sections 8-11 below.
- 7.3 Where human remains are claimed by cultural descendants, institutions should consult descendants on all aspects of their care and treatment under the headings in Sections 8-11 below. Wherever possible the institution should adopt practices that can reasonably be considered culturally appropriate in the circumstances.
- 7.4 Licensed institutions must have adopted and published and approved criteria by which such requests for special treatment will be judged (see 2.1 above). Advice may be sought from the HRAP or from an approved local advisory panel.
- 7.5 Decisions and the reasons for making them should be made publicly accessible, and all use of human remains recorded.

## **8 STORAGE, CARE AND PREVENTATIVE CONSERVATION**

- 8.1 The mere act of holding human remains will irrevocably result in their progressive degradation through the continuing natural processes of decay, which the licensed institution will attempt to mitigate through the application of techniques of preventative conservation. Such methods can only slow down but not arrest decay.
- 8.2 Licensed institutions should treat the human remains they keep with respect. As a starting point this will entail meeting basic standards of collections care, as outlined in *Benchmarks in Collections Care* (Re:source 2002). Human remains should be kept in suitably safe, secure, watertight premises, with stable, monitored environments, which are kept clean and regularly checked for pests, damaged and leaking storage containers and other potential threats. Appropriate health and safety regulations, such as those concerning the control of substances hazardous to health, must be complied with.
- 8.3 These basic standards may be altered or strengthened as appropriate as a result of consultation with genealogical or cultural descendants or relevant faith organisations. For example, while in some cultures darkness and privacy would be regarded as essential to the maintenance of a respectful environment for human remains, in others contact with light and the living are thought necessary. Current UK museum practice favours the use of inert packing materials, but other cultures may require traditional organic materials.
- 8.4 It may be important to give individuals a separate storage box or container, so that their remains are kept together. In general museums it may be necessary to create a separate storage area for human remains, to create conditions likely to engender respectful treatment. Alternatively consultation may result in the creation of off-site stores or 'keeping places' where care, treatment and access policy is agreed with genealogical or cultural descendants or relevant faith organisations. Everyone expected to work with human remains – security, technical, maintenance and educational staff as well as curators and conservators – should ideally be involved in framing institutional policy and procedures, and should in any case be fully trained to carry them out.

## **9 REMEDIAL CONSERVATION, RESEARCH and LEARNING PROGRAMMES**

- 9.1 All uses by the licensed institution of the human remains in their care will inevitably cause attrition whether through handling, accidental damage or intentional removal of material for study.

- 9.2 Here the concerns of descendants and those of scientists, researchers and educators are very similar. The integrity of human remains is important in many belief systems, and also crucial to future research and study. For example, handling human remains may contaminate ancient DNA with modern and limit or destroy the value of future sampling. The principle of minimum intervention should always apply, avoiding treatments that will contaminate or degrade human remains. Analytical techniques that involve the destruction of any part of the human remains entrusted to the care of the licensed institution should only be applied according to strict, published protocols and policies.
- 9.3 Some cultural groups may require that human remains are not handled except for the purpose of establishing provenance, and thereafter only with the involvement and consent of cultural descendants. Conservation practice may have to be modified as a result of such consultation.
- 9.4 Decisions on such requests should take account of all aspects of the proposed work, including the purpose of the research, where and how the work is to be carried out, the techniques – including photography – to be employed, and how it will be published.

## **10 EXHIBITION AND INTERPRETATION**

- 10.1 A museum must always have a clear interpretative purpose for any display. The ethical principles and cultural sensitivities involved in the display of human remains make such objectives all the more important. The efficacy of interpretation and the acceptability of display will be immeasurably improved through formative evaluation, which should involve careful consultation with target audiences, genealogical and cultural descendants. Learning outcomes should be identified, tested and demonstrable as well as being socially relevant, culturally acceptable and kept under review.
- 10.2 Most pathology museums are not open to the general public and display human remains only for medical students or to booked groups. Some general museums have taken the decision not to display human remains, or images of human remains, to the public. But displays of ancient, unclaimed human remains can be seen in many museums.
- 10.3 There may be many valid reasons for using human remains in displays; to educate medical practitioners, to educate lay people in science and its history, to explain burial practices, to encourage reflection, or (on occasion) to shock. Museums can be places where grief, violence, suffering and fatality can be expressed and addressed in beneficial ways.

- 10.4 Museums must always be on their guard against creating displays of human remains that function as little more than gratuitous attractions for the morbidly curious, and must refrain absolutely from profiting from such popularity.
- 10.5 Those planning displays including human remains should consider how best to prepare visitors to confront them respectfully, or to warn those who may not wish to confront them at all. Those planning to use human remains in handling sessions should also consider these issues, together with the risk of damage handling inevitably poses (see Section 9 above). Consultation with different faith groups may be appropriate. It may be necessary to consider related issues such the presentation and interpretation of nudity, sexuality and disease.
- 10.6 Display conditions, like storage conditions, should be safe, secure and watertight with stable, monitored environments, which are kept clean and regularly checked for pests, damaged and leaking storage containers and other potential threats. Appropriate health and safety regulations, such as those concerning the control of substances hazardous to health, must be complied with. Organic materials are light sensitive, and light levels should be maintained in accordance with recognised standards, with UV light excluded as far as possible. These basic standards may be altered or strengthened as a result of consultation with genealogical or cultural descendants, or relevant faith organisations.

## 11 LOANS

- 11.1 Licensed institutions may receive requests for the loan of human remains for exhibition, research or study elsewhere. It may be necessary to review systems for considering and approving such loans, and to adapt standard loan conditions, to ensure that human remains on loan for whatever purpose will be treated with the same standard of respect and level of care when off-site. At a basic level this will include checking site/ facilities reports in advance of the loan, condition reporting at agreed stages, and receipts signed by the curator and authorised staff at each venue.
- 11.2 In general, licensed museums should only loan to, and receive loans from, other licensed museums. Equivalent considerations should govern the loaning of human remains to museums located in areas where the licensing system for England and Wales does not operate.

## 12 SOURCES OF ADVICE AND FUNDING

### USA

In the United States: Under the Native American Graves Protection and Repatriation Act (NAGPRA), all federally recognized tribes should have an official NAGPRA representative who acts as the contact person for enquiries about cultural property and human remains for the tribe. For a list of these contacts:

<http://web.cast.uark.edu/other/nps/nacd/> Native American consultation database: US Native American tribal contacts for NAGPRA consultation

<http://www.cr.nps.gov/nagpra/INDEX.HTM> National NAGPRA home page, with other practical information on US repatriation

<http://www.uiowa.edu/~anthro/reburial/repatriation.htm> Dr Larry Zimmerman's home page for issues to do with repatriation and reburial; mostly U.S. but some overseas material

### Canada

A database of First Nations communities is available on the website of the Department of Indian and Northern Affairs:

<http://sdiproduct2.inac.gc.ca/FNProfiles/>

### New Zealand

[To be completed]

### Australia

[To be completed]

[Insert contact details for indigenous groups/ governments, faith groups etc]

## 13 DEFINITIONS

The term **human remains** is taken here to include:

- Osteological material (whole or part skeletons, individual bones or fragments of bones, teeth)
- Soft tissue including organs, skin, hair, nails, etc. (preserved in spirit, wax, or dried/mummified)

- Slide preparations of human tissue (for histological study)
- Artefacts that are made from or include any of the above

*Exclusions:* anatomical models and other artefacts representing human anatomy.

**Source communities or communities of origin:** communities from which human remains originated.

**indigenous peoples/indigenous communities:** following UNESCO work on the draft declaration on the rights of indigenous peoples, we define these peoples as distinct cultural groups having a historical continuity with precolonial societies that developed on their territories. These peoples may (or may not) form minority or marginalized sectors of society within larger nation-states.

**Relatives and genealogical descendants:** biological, social, and adoptive kin or family. Persons defining themselves by a demonstrable social or biological relation to the deceased, which they express as a form of kinship. The tie may be demonstrated through birth, marriage, adoption, family membership, or some other arrangement through which the parties share a close identity of a kinship kind, either within or across generations.

**Cultural descendants:** Persons of the same cultural group or who are the common descendants of an historical culture, even though they may not have or recognize family ties. Such individuals are bound together through the distinctive nature of their practices and values, which may include a name (or set of names) or language or tradition or heritage, or other common reference points. These reference points may be of variable time depth, but inheriting and practising them gives persons a common identity within the group and links current and previous generations.

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## Appendix 5 – Draft Statement of Principles<sup>5</sup>

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### Statement of principles

1. We believe it would be helpful to all concerned to have a further statement of principles which, while incorporating the essential features of the DoH consultative document, would also be specific to the museum context. In particular, these principles would provide guidance to the Human Remains Advisory Panel and to all those responsible for decisions about the future of human remains.
2. We suggest the following:

#### **(i) Unique status**

Human remains, irrespective of age, provenance or kind, occupy a unique category, distinct from all other museum objects. There is a qualitative distinction between human remains and artefacts. Human remains require special consideration and treatment.

#### **(ii) Respect and reverence**

Human remains must always be treated with respect. Responsibility for them should be regarded as a privilege. Museums owe the highest standards of care to bodies and parts of bodies within their collections, regardless of their age, origin, or the circumstances of their arrival in the collection.

#### **(iii) Full evaluation**

Where claims are made regarding human remains, a proper response requires the respondent museum to evaluate all relevant factors appropriate to its status and responsibilities. This may, according to circumstance, involve striking a balance between the concerns of a particular claimant group and the pursuit of scientific inquiry. It may also require the museum to seek to assess and consult any wider interests of humankind and to consider whether those interests are themselves best served by release or retention. A process should be established which enables decision-makers to review all relevant considerations and give all factors their due weight.

<sup>5</sup> The Draft Statement of Principles is taken from The Report of the Working Group on Human Remains (November 2003), paragraph 410.

**(iv) External reference**

The proper treatment, care and destination of human remains are in the first instance for individual museums to determine, in the light of all the evidence available. A wide range of expert external advice should be sought and taken into account. Museums should be prepared to submit their position to external evaluation. Decisions should be taken on a case-by-case basis, though with appropriate regard for consistency and precedent, and should be based on transparency and dialogue.

**(v) Consensus**

Consensus should be the aim wherever possible. This may entail the involvement of an independent mediator, who enjoys the confidence of all parties.

**(vi) Cultural competence**

Museums and other relevant agencies should manifest a cardinal concern, throughout the process of responding to requests for the return of human remains, for feelings of loss and deprivation on the part of bereaved persons and communities, for the status and responsibilities of claimants within their own community or culture, and for cultural obligations and beliefs regarding the proper and respectful disposition of the dead.

Institutions must recognise, and reflect this recognition in both policy and practice, that feelings of bereavement and responsibility pass within some cultures to each new generation of descendants, and that some communities remain outraged and distressed at the manner in which human remains were removed and handled. Institutions should be sensitive to the attitudes of different communities to funeral practices, and to the care and treatment of human remains.

**(vii) Consent**

The underpinning principle shall be one of consent. Factors to be taken into account in responding to requests for return or special treatment shall include, but may not be limited to:

- The express wishes of the deceased person, if known;
- The wishes of genealogical descendants, and wider social families, if known;
- The wishes of the cultural community of origin, if still in existence;

- The wishes of representatives of the country of origin, if exact provenance cannot be established.

In assessing these and other factors, it may be reasonable to take into account the age of the particular remains in question and, in cases where the consent of a party other than the museum is not an overriding consideration, the importance of the remains for medical and scientific research and education.

#### **(viii) Authority**

In negotiating the treatment, care or return of human remains, institutions should in principle deal with the community of origin for the particular remains. Where institutions are invited to deal with groups that claim to represent particular communities, rather than with the communities themselves, they must ensure that such groups have conducted substantial and effective dialogue with the source community and can establish a proper mandate from it.

#### **(ix) Sympathy and sensitivity**

Institutions should always use their best endeavours to show skill and sensitivity in dealing with the genealogical or cultural descendants of the deceased person. Procedures for considering claims should allow claimants adequate time and space in which to make what will sometimes be difficult decisions. Institutions should ensure that they have access to the expertise necessary to manage the complex and sensitive process involved in considering claims.

#### **(x) Candour and communication**

Full information should always be provided to those involved in claims, requests and controversies concerning human remains, in order to improve understanding, to create so far as possible an equal relationship in the approach to decisions, and to enable fully-informed decisions to be made. Such provision should, however, pay full regard to considerations of secrecy and confidence affecting human remains, and should not involve any disclosure of secret/sacred information or any other material received in confidence unless compelled by law.

#### **(xi) Rationality**

Decisions regarding human remains should be fully reasoned and manifest a rational and respectful evaluation of arguments made both by claimant groups and by those who may oppose such claims. These reasons should be published, subject to appropriate restraints.



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