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Dear Ms Bauer

### Consultation on restitution of objects spoliated in the Nazi-era

Thank you for your letter and consultation paper dated 10 July 2006. I attach the Charity Commission's comments using the question numbers used in the paper.

### 3. The questions

**Q1 Consultees are asked if they agree with our provisional view that museums should have a power to dispose of items in their collections which were lost during the years 1933 to 1945 as a result of the actions of the Nazis, their allies or collaborators.**

A1 We agree with your provisional view. There is a moral argument here and it could reasonably be argued that the public would not want to support and fund collections that contained cultural objects gained wrongfully by the Nazis or in violation of their previous owner's human rights. This might not apply to private collections which are without our jurisdiction.

Of course the moral argument is no different in principle to any other moral claim so that a question arises as to whether there is a justification for dealing with works lost as a result of the Nazis any differently to other cases where a third party has a moral claim to a work. The Charity Commission has powers to authorise ex gratia payments by charities<sup>1</sup> and it has considered authorising claims for return of cultural items lost as a result of Nazi actions under these powers. The difficulty is that a moral claim does not override a statutory prohibition on alienation. Many of the institutions in question will have been established by statute.

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<sup>1</sup> Re Snowden [1970] Ch 700; section 27 of Charities Act 1993

It appears that what is being proposed is a procedure which will override statutory prohibitions in certain limited circumstances i.e. those involving return of items spoliated by the Nazis. We have no objection to the introduction of a power to return cultural objects in these limited circumstances subject to adequate safeguards such as the need for a positive recommendation of the Spoliation Advisory Panel (SAP).

**Q2 Consultees are asked whether:**

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

- i. to objects wrongfully taken in circumstances directly related to the actions of the Nazis, their allies or collaborators during the years 1933 to 1945 (and if so whether “wrongful taking” should be defined to include all the circumstances identified in paragraph 3.14 of the consultation paper); or**
- ii. to objects which were involuntarily lost by their owners during the period from 1933 to 1945 in circumstances arising from the actions of the Nazis, their collaborators or allies; or**
- iii. to objects lost during that period as a result of Nazi actions (or the actions of their allies or collaborators) in circumstances which would today be considered to be contrary to the human rights of the owner.**

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

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

A2 (a)i above seeks to set out all the different ways in which the objects in question might have been appropriated. As the paper says at 3.15, however prescriptive such a list might be there is always the danger that a deserving claim might not qualify because the circumstances of the loss were not a precise fit with any of the descriptions.

Our view is that (a) ii looks as though it would cover most/all possible claims. The paper makes the point that there are many different ways in which cultural items could have been said to have been improperly taken from their owners. One example is where someone in Nazi occupied Holland had to sell a work of art (for a very small sum) in order to buy food for the starving family.

The Commission has had to deal with some difficult issues in practice. In particular, deciding whether there is a moral obligation where a person purchased a work of art in good faith from a person who needed to sell it in a hurry is not straightforward.

(b). We have no comment on this question – it doesn't seem to be a matter for the Commission as it refers to a one-off provision that does not appear to affect a charity.

(c) We think it would be difficult for legislation to define the entitlement that a claimant would need to demonstrate before museums are allowed to transfer an object to the claimant. Such legislation might risk excluding a valid proof of entitlement. Surely an adequate proof of entitlement could take a large number of forms, not necessarily in the form of legal documents for instance. A Code of Practice setting out guidance for trustees would seem to allow the trustees discretion to make a decision that satisfies them while providing guidance where necessary.

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

**(a) Should the question whether a particular object is deaccessioned be left wholly to the discretion of the institution concerned?**

**(b) Should an institution be able to deaccession an object in its collection in response to a claim that has not been considered by the Spoliation Advisory panel, without reference to other authority?**

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

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

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

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

A3 Our comments on these questions are based on the assumption that most of the "institutions" in question will be charities.

In deciding whether returning a cultural object on the basis of a moral obligation is justified, it is appropriate that there should be independent scrutiny of such decisions. As previously indicated, this has usually involved the Charity Commission and/or the Attorney-General and in difficult cases the court. Where the SAP makes a recommendation, it is essentially taking a view on the moral obligation. In these circumstances it may not be necessary for the Charity Commission or the Attorney-General to be involved as this would involve unnecessary duplication with the possibility of different views on the extent of the moral obligation involved.

Accordingly, where there is a positive recommendation by the SAP, the institution itself should make the final decision as to whether to de-accession an object from its collection (independence of charities etc.). Assuming that it will be charity trustees making the decision they will be bound by the fiduciary duty of care which binds all charity trustees. The provisions of the Trustee Act 2000 defines the level of care for trustees of unincorporated charities, but these may or may not (as legislation) apply to charities governed by statute or Royal Charter. They don't apply to companies, but we have said that the general principles of charity law mean that similar duties and principles apply to trustees who are directors as well.

There appears to be no reason why, given our support for trustees to make appropriate decisions, consent from any other body should be required. Therefore, we think that that the Charity Commission's consent should not generally be required. The proposed legislation will make it legal for the trustees to agree to transfer objects out of their collections in certain circumstances only and the appropriate recommendation from SAP will enable them to use that power.

Given the comments above, we don't think that a direction from the Secretary of State would be appropriate. A charity and the government may well have different priorities and the Commission has emphasised that charities should be independent from the state.

#### **Q4 The views of consultees are sought on the following issues;**

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

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

A4 As set out in the consultation paper, there are precedents for legislation that can override trusts or conditions that govern the way that charitable property is used. The example given in the consultation paper is section 27 of the Charities Act 1993 (ex-gratia payments), although sections 13, 74 and 75 of the Act also give the Charity Commission the power to override the trusts under which charitable property is held in certain specific circumstances.

Just as the Charity Commission can authorise charity trustees to make an ex gratia payment where they consider they have a moral obligation to do so and this overrides the duty of the trustees to apply their assets in furtherance of their charitable purpose, it is reasonable for any trust provisions against alienation to be overridden by a power to restore cultural property spoliated by the Nazis where the SAP has made a positive recommendation that it is reasonable to exercise that power.

**Q5 Consultees views are invited on the question of whether the Spoliation Advisory Panel (SAP) should be transformed into a statutory body.**

A5 Our argument so far has been made with charities in mind and it is basically that charity trustees should be allowed to make appropriate decisions about de-accessioning objects in their collections where they have the power to do so and the SAP makes a positive recommendation. The role of the SAP should be advisory and assist the trustees in their decision making process. Its conclusions should not be binding on charity trustees (similar to the role of an investment advisor) but in practice trustees would be unlikely to act against that advice without good reason.

We do not have a view as to whether SAP should be a statutory body although this may assist in drafting legislation which grants a power to return cultural property where SAP make a positive recommendation.

**Q6 Pages 56 and 57.**

These questions relate to tax issues and we do not consider that these are issues on which we can give a view.

**Q7 Consultees are asked:**

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

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

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

**(ii) Twenty years after this date;**

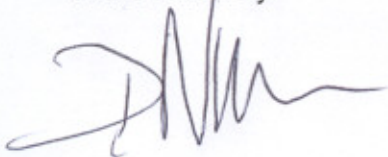
**(iii) Any other period from this date?**

A7 After looking at the arguments set out in the consultation document, our view is that the proposed power should be a permanent one. In view of the fact that not all national collections have researched and reported on items whose provenance in the relevant period is doubtful, there may be cases where information to support a claim may come to light after the power had expired.

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

A8 We agree with this statement for the reasons set out in para 3.64 of the consultation paper.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Deborah Nunn', with a long horizontal flourish extending to the right.

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