

# COMMISSION FOR LOOTED ART IN EUROPE

10 November 2006

Mark Caldon  
Cultural Property Unit  
Department for Cultural Media & Sport  
2 - 4 Cockspur Street  
London  
SW1Y 5DH

Dear Mark

## **Consultation on Restitution of Objects Spoliated in the Nazi-Era: Response**

In response to Hillary Bauer's letter of 10 July 2006 I am pleased to enclose the Commission's response to the consultation document, and should be grateful if you would kindly acknowledge safe receipt. I very much look forward to hearing from you with news of further progress.

With kind regards

Yours sincerely



Anne Webber  
Co-chair

enc

# COMMISSION FOR LOOTED ART IN EUROPE

DCMS CONSULTATION DOCUMENT  
RESTITUTION OF OBJECTS SPOILIATED IN THE NAZI-ERA

RESPONSE OF THE  
COMMISSION FOR LOOTED ART IN EUROPE

Restitution of Objects Spoliated in the Nazi-Era

November 2006

**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.

*CLAE Response:*

Museums (which for the purposes of this Response include galleries, libraries and other public collections) should have the power to dispose of items in their collection or possession (including, for example, items on loan to a museum) which were so lost.

**Q2:** Consultees are asked whether:

- (a) the power to dispose of objects in a collection which we propose should apply:
  - (i) to objects wrongfully taken in circumstances directly related to the actions of the Nazis, their allies or collaborators during the years 1933 to 1945 (and if so whether “wrongful taking” should be defined to include all the circumstances identified in paragraph 3.14 above); or
  - (ii) to objects which were involuntarily lost by their owners during the period from 1933 to 1945 in circumstances arising from the actions of the Nazis, their collaborators or allies or;
  - (iii) to objects lost during that period as a result of Nazi actions in circumstances which would today be considered to be contrary to the human rights of the original owners.
- (b) they agree that that separate provision should be made to enable the restitution of the Beneventan Missal in addition to the general power to de-accession items lost as a result of Nazi actions which we propose;
- (c) the legislation should seek to define the entitlement which should be demonstrated by a claimant before museums are permitted to transfer objects in their collections to that claimant, or whether guidance on a claimant’s entitlement should be provided by a Code of Practice. (See paragraph 3.25).

*CLAE Response:*

(a) CLAE considers that the power to dispose of objects in a collection (or otherwise in the possession of a museum) should apply to objects wrongfully taken or involuntarily lost during the period 1933-1945 in circumstances arising from the actions of the Nazis, their collaborators

or allies. This should apply without restriction to objects in the possession of any entity or person other than the claimant.

Of the three definitions of loss suggested, CLAE favours those set out in paragraph 3.16, and the equivalent provisions suggested at the end of that paragraph over the original form of words as adopted in the Netherlands. CLAE considers that the definition proposed at paragraph 3.14 may, by its detailed definitions of loss, lead to an overly restrictive position which could shut out genuine claimants intended to be assisted by the legislation. However, as an indication of the range of possible circumstances, those particularised in 3.14 should be included in the definition, along with objects not returned to their owners in the post-war period through blocking legislation or similar; and objects which became the property of others because they could not at the relevant time be returned to the heirs.

As regards the definition of loss proposed at paragraph 3.15, this may in its practical application suffer from the inadvertent disadvantages inherent in applying the standards of a different era to historical facts

(b): CLAE does not consider that the restitution to their rightful owners of works looted should be dependent upon the identity of those who carried out the looting or otherwise acquired the works in circumstances relevant here. If the Beneventan Missal, or any other works lost in similar circumstances where there may be an evidential gap, requires separate provision to enable its/their restitution, then CLAE considers that such separate provision should be made. However, with the establishment of the Panel procedure proposed below, and with each case turning on its own facts, no separate provision should be required. Please see our response to Q3 below.

(c): Claimants will frequently (but not always) be members of the original victim's family. While this is often so, CLAE would be against any overly prescriptive definition of any legal entitlement to be demonstrated by a potential claimant because each case will turn on its own facts. It is important that the historical circumstances prevailing at the time be taken into account on each occasion. This is particularly so, for example, in view of the fact that any will as may have been made might have been destroyed or lost in the circumstances in which the victims found themselves as a result of Nazi actions, that other inheritance records may similarly have been lost or destroyed, or because there are no direct or immediate family members to inherit or make a claim because they did not survive the Nazi depredations. CLAE considers that the principles of natural justice require that no prescriptive approach be taken on this issue,

and would draw attention to the approach adopted by, for example, the Claims Resolution Tribunal which processes claims for Holocaust assets in Swiss banks in which provision is made for the broadest range of claimants to be considered, consistent with the principles of fairness and equity and the historical circumstances. Accordingly CLAE does not consider that a Code of Practice would be appropriate or of assistance.

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

- (a) Should the question whether a particular object is de-accessioned be left wholly to the discretion of the institution concerned?**
- (b) Should an institution be able to de-accession an object in its collection in response to a claim which has not been considered by the Spoliation Advisory Panel, without reference to other authority?**
- (c) Should an institution be able to reject a recommendation made by the Spoliation Advisory Panel, and if so in what circumstances?**
- (d) Should recommendations made by the Spoliation Advisory Panel be binding on the parties to a claim?**
- (e) Should the consent of the Secretary of State, the Attorney General or the Charity Commission be required before an institution is able to de-accession an object from its collection?**
- (f) Should the Secretary of State have power, subject to the approval of a draft order by Parliament, to direct an institution to de-accession an item from its collection? (Paragraph 3.39)**

***CLAE Response:***

(a) No. Save in the circumstances described at answer (b)-(d) below, CLAE does not consider it appropriate or indeed desirable for questions as to whether or not a particular object is de-accessioned be left wholly or in part to the discretion of the institution concerned.

(b)-(d) Overall, CLAE considers that the Spoliation Advisory Panel should be rendered a statutory body, satisfying the requirements of Article 6 of the European Convention of Human Rights, and its recommendations made determinative, binding and enforceable as a judgment. The current functions and performance of the Panel (including, for example, the weight to be accorded to the moral strength of a claimant's case rather than any strict application of legal analysis) should not be disturbed by this proposed increase in the ambit of the Panel's work and efficacy, but merely enhanced by it.

Claimants must be free at any time (with or without the agreement of the institution, or, in the case of a private collection, the entity or person concerned) to make their claims using the Panel process if they wish. CLAE considers that the Panel process here

envisaged should be open and available to potential claimants, museums, private collectors and any other party wishing to seek a determination of its/their claim, without restriction or requiring the agreement of or authority from any other party.

CLAE does not, however, consider that references to the Panel should be mandatory in all claims, and (as with the practice in civil litigation in England and Wales) that to the extent claimants and the institutions concerned are able to reach and effect agreement between themselves to resolve claims without availing themselves of the Panel process, then that is to be encouraged and (where required) enabled. CLAE considers that this process, mirroring as it would the way in which civil litigation is available as a method of dispute resolution of last resort, should give rise naturally to a high standard of conduct in resolving claims, ideally without the need to trouble the Panel. For the avoidance of uncertainty, however, for both museums and potential claimants against a museum and in order to ensure consistency, transparency and accountability when handling claims outside the Panel process, a Code of Practice should be established for museums. The Code of Practice should be published as part of the legislation and made available to any claimant by the museum concerned at the outset of their dealings as a guide to the procedure and standard of claims handling the claimant is entitled to expect from the institution concerned.

- (e) CLAE does not consider that it would be appropriate for the consent of the Secretary of State, the Attorney-General or the Charity Commission to be required before an institution is able to de-accession an object from its collection in any circumstances other than those already required by common law and the Charities Act 1993.
- (f) With the establishment of the process described above, CLAE does not consider it necessary or desirable for there to be any political involvement in the exercise of the statutory Spoliation Advisory Panel. Where the Panel had not been involved in the Claim, however, because the institution and the claimant concerned had managed to resolve the Claim between themselves, then the institution is to be empowered to give effect to that resolution in accordance with response 3(b)-(d).

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

- (a) **Should any provision be made to permit an institution to dispose of an object in its collection in response to a claim where that object is subject to**

any trust or other condition which expressly or impliedly prohibits disposal?

- (b) If so, should an institution be able to override all non-statutory restrictions on disposal, or should there be any exceptions? What exceptions might be made? (See paragraph 3.4.4).

*CLAE Response:*

(a) Yes, in accordance with response 3 above.

(b) Yes, should any such restrictions survive the establishment of the statutory Panel and enabling legislation (if required) referred to in response 3(b) to (f) above.

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

*CLAE Response:*

Yes. Please see responses above.

- Q6. Consultees' views are invited on the following questions:**

- (a) Should the claimant be liable to any capital gains tax payable in respect of gains made on the sale of a work of art or other object restored to the claimant by a museum or gallery?
- (b) Should the value of a work of art or other object restored to the claimant by a museum or gallery be included in the claimant's estate for the purposes of inheritance tax, or should it be treated as excluded property?
- (c) Consultees are asked whether they agree that where an item donated to an institution is transferred to a claimant in restitution, the donor of that item should not lose the benefit of any tax advantages accruing to him or her as a result of the donation?
- (d) If they agree to the proposal in (c), do they consider that an exception should be made where the donor was aware or had reason to be aware of the previous history of the item)? (paragraph 3.60)

*CLAE Response:*

- (a) CLAE considers that any tax liability falling on a successful claimant upon the restitution of or compensation for a looted work to them - simply as a result of that restitution or compensation - would be unjust. CLAE considers that the position would be best addressed by capital gains tax being chargeable only upon any subsequent sale of the restituted work by the successful claimant, taking the acquisition cost as the market value of the work upon the date of return by the institution, entity or person concerned. The situation is analogous to ESC50 for real estate, which deems the acquisition to be the

market value at the date of acquisition, and which should be incorporated into the legislation and widened to cover chattels recovered or compensated for under the definitions at response 1 and 2 above.

- (b) Where a looted work has been restored to a successful claimant it would, in the ordinary course of events, form part of that person's estate for all purposes, including for the purposes of inheritance tax. It is difficult to see why wealth derived from restitution should be treated differently from other estate assets.

There is, however, an issue in relation to the estates of original owners where his/her heirs recover a work of art and where there is a question as to whether its value has retrospectively to be included in the estate of the deceased former owner. CLAE considers that the estate of a deceased former owner of the recovered work should not be disturbed or otherwise affected by the work's subsequent recovery by successful claimants – ie: the value of the work or compensation for it should not be retrospectively added to the value of the pre-existing estate. There is a precedent dealing with this issue in FA 2006 s64 (5) which should be extended for art works recovered.

- (c)-(d) If this is an issue, then presumably it will become part of the 'douceur' or other tax negotiations in the future. The issue therefore only arises in respect of past donations/tax advantaged sales. So far as concerns past transfers to museums or other institutions, it is likely that any attempt to claw back tax benefits previously granted could be the subject of litigation by the families of those who have been party to the original transfers, which would occur as a consequence of the general problems of title. CLAE considers that any donor of a looted item should not lose the benefit of any tax advantages accruing to him or her as a result of the donation, provided always that the donor acted in absolute good faith upon and in relation to his/her acquisition and without notice of any wrongdoing.

**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? (Paragraph 3.64)

*CLAE Response:*

CLAE considers that the power to transfer items out of the collections of museums and galleries should be a permanent one and not be limited by a specified number of years. However, were there to be such a limit, it should be not less than 25 years from the date of legislation. In principle, to place any time limit upon such a power, once in force, would simply be to swap one series of limitation problems which are inappropriate in the circumstances for another. While CLAE understands the desire for the certainty to be obtained by placing a time limit upon any such power, it takes the view that the principle involved here is paramount, and if a claimant has a good claim then it must be met, whenever it is brought. There is also to be considered the fact that there are many relevant archives and records internationally which are only now becoming available and many others yet to become available which will clarify the provenance and expropriation of works of art. In addition, and of equal significance, the research of the museums and galleries in the UK into the provenance of works of art in their collections is far from complete and without an end date. On a practical level, and by way of amelioration, CLAE considers that the pool of possible claimants is naturally reducing and that the number of potential claims will follow a natural decline with the passage of time.

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

*CLAE Response:*

CLAE agrees that the institution in question should be effectively protected from any action taken by any subsequent claimant, without such protection having any effect upon any third parties (such as those anticipated in paragraph 3.64) provided the institution has exercised due care in the scrutiny of a claim. CLAE considers that this aspect would be fully and effectively addressed by and as part of the transformation of the Spoliation Advisory Panel into a statutory body in accordance with Article 6, and by the enabling legislation and Code of Practice described in the responses above.