

Attachment A

Repatriating Tasmanian skeletal remains, 1970s - 1997

Repatriating human remains from Tasmania and Australia

The TAC's campaign for the return of ancestral skeletal material began in the 1970s. Much public pressure was brought to bear on the state government. The *Tasmanian Museum Act 1950* was amended in 1974 and 1976 to allow Trukanini's skeleton to be returned from the Tasmanian Museum where it had been since 1878. Attention then turned to the infamous Crowther collection, made up of three skeletons and 34 skulls dug up early this century from the cemetery at Oyster Cove. The TAC took legal action against the Tasmanian Museum, which, although unsuccessful, brought national and international influence to bear on the Tasmanian government. Late in December 1982 the government agreed to legislate to return the Crowther collection to the Aboriginal community.

The Museums (Aboriginal Remains) Act 1984 was passed by the state parliament in November 1984 to allow the handing over of all Tasmanian Aboriginal remains held in the two Tasmanian museums. By 1986 most Aboriginal skeletal remains held in Tasmanian museums were handed to the TAC on the community's behalf. Both museums later returned items of skeletal remains found in their collections in 1988 and 1993.

Australian museums followed suit. The Museum of Victoria, National Museum of Australia and South Australian Museum returned Aboriginal remains to Tasmania between 1986 and 1989.

Australian museums continue to return skeletal material to Tasmania as it is brought to their attention. In 1996 the National Museum returned skeletal items still in their collections, and the South Australia Museum and the Museum of Victoria each returned a lock of hair.

Repatriating human remains from the UK

The TAC then took its campaign overseas. After extensive lobbying between 1985 and 1991 our delegates succeeded in having remains returned to Tasmania and Australia. Meetings were held with some European museums to determine the extent of their collections and gauge their attitudes; however the campaign focused on the UK, and the return of skeletal remains only was the issue.

In 1991 Pitt Rivers Museum in England returned 5 skulls and the penis of a warrior pickled in a jar, all Australian. Edinburgh University returned its complete collection of 300 skulls and 4 skeletons; 11 of the skulls were Tasmanian. As well, in 1991, the Peterborough and Bradford museums (UK) returned their complete collections of Australian skeletal remains, one skull each. The Royal College of Surgeons in Dublin returned a preserved head to Tasmania but kept the rest of their collection. Edinburgh University returned 3 Tasmanian hair samples in 1997.

Repatriating human remains from Europe and Australasia

In 1997 Stockholm Museum in Sweden and Auckland Museum in New Zealand each returned one skull to TAC delegates.

No other remains have been repatriated to Tasmania by any other groups.

Attachment B

Tasmanian Aborigines

Tasmania is an island to the south of Australia. Currently it has a population of less than half a million, of whom roughly 5000 are Aborigines. When the British landed in Tasmania in 1803 an estimated 4000 Aborigines were living here.

From 1803 all Tasmania became a killing field. In 1829 the colonial government contracted George Augustus Robinson to round up the remaining Aborigines. On his travels he noted *'There is not a boat harbour along the whole line of coast but what numbers of the unfortunate natives have been shot; their bones are to be seen strewed on the ground'*.

Robinson imprisoned a couple of hundred people in camps, first at Wybalenna on Flinders Island and finally at Oyster Cove, in the south of mainland Tasmania. By 1860 only 15 of the imprisoned tribal people were left alive, and all in those camps were dead by 1876.

About a dozen Aboriginal women escaped the camps. Most of these had been captured to work for British sealers living in tiny enclaves in the Furneaux island group off the north east tip of Tasmania. There they established a cohesive and self-sufficient family based community from whom most of today's Aboriginal population descend. Two other Aboriginal women, one of them the sole survivor of Oyster Cove, married European men on the Tasmanian mainland; their families complete our community.

European collectors' acquisition of Tasmanian Aboriginal human remains

Much of the Tasmanian human remains and cultural property material in Britain comes from the private collection of George Augustus Robinson. After his death, Barnard Davis acquired the material, now widely dispersed in British museums.

Robinson persuaded Aborigines to give him the bones of their dead relatives which they carried as talismans against sickness and death. One instance was on 1 June 1838: *"[When viewing the corpse of a woman who had died that morning] I asked G Robinson [Kolebuner] for an underjaw of a native which hung suspended to his throat. He appeared reluctant to part with it and said it belonged to his wife Agnes [Mealettarner] and he would ask her consent ... I spoke to her myself. She replied 'what am I to do when I am monartyer [sick]?' I said, 'never mind, it is no use in such cases'."* The Royal College of Surgeons, London, has in recent months revealed for the first time that seven such talismans which published research had reported destroyed with other material during World War 2 are in fact still held in their collections.

Furthermore, as the people died in the camps, Robinson, who had been given the title 'Protector of the Aborigines', cut up their bodies to give to his friends, military officers and representatives of the Crown. To give a few examples of his activities: Robinson reports that on his first meeting with Governor and Lady Franklin at Wybalenna in January 1838 they *"... solicited me for curiosities, also the skull of an aboriginal'."* The Governor's secretary Captain Maconochie also asked him for a skull. The day after Mitaluraparitja died of pneumonia in February 1838 at Wybalenna, the surgeon cut off his head for Robinson to have it *"masticated"* and sent to Maconochie. Robinson later *"retained"* the cranium of Pintawtawa who died in August 1838 and sent it to Lady Franklin in February 1839.

The National History Museum also retains one of only two full skeletons of tribal

Tasmanian Aborigines known to still exist. These skeletons were among five 'obtained' from the Curator of Hobart Museum between 1870 and 1875. These skeletons, one of them whose name is known, were dug up from the graveyard at Wybalenna. The Tasmanian museums in Hobart and Launceston were both well stocked with Aboriginal remains from Wybalenna and Oyster Cove, comprising a large collection of remains dug up from the burial ground at Oyster Cove by the prestigious Dr Crowther (who later became Premier of Tasmania).

Robinson was only one of many collectors who preyed upon the people and despoiled both their habitats and their burial places. In all cases, Tasmanian materials were acquired either by coercing vulnerable and oppressed people, or by theft and looting of the dead, these behaviours deemed justified by the overriding 'right' of conquest. The only difference between those circumstances and the Holocaust situation is the nature of the materials plundered, and the type of value they were perceived to have (ie 'scientific' rather than monetary).

Tasmanian Aboriginal Centre Inc

**Submission to the Department for Culture, Media and Sport
Working Group on Human Remains**

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Tasmanian Aboriginal Centre Inc
Submission to the Department for Culture, Media and Sport
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Introduction

The Tasmanian Aboriginal Centre Inc. (TAC) is a non-profit community based organisation established in 1973 providing legal, health, educational, cultural and welfare services to Aborigines throughout Tasmania. We are incorporated pursuant to the laws of Tasmania and have received operating grant funding from both the Australian Commonwealth and Tasmanian State governments for over twenty years.

The Tasmanian Aboriginal Centre has campaigned for over 25 years on behalf of Tasmanian Aborigines to have Aboriginal human remains and cultural property returned from museums both within Australia and overseas (see Attachment A). The TAC is recognised by both national and international governments as the appropriate body to which Tasmanian Aboriginal skeletal remains and cultural property are returned for disposition. The Tasmanian Museum and Art Gallery also acknowledges our status as the appropriate body, and has given testimonials on our behalf to international museums. In 1997 we worked closely with the Australian Department of Foreign Affairs and Trade (DFAT) and Australian Embassies abroad to repatriate remains from Stockholm and to arrange meetings with museums throughout the United Kingdom and Europe. We are continuing this cooperative liason with Australian agencies such as DFAT and ATSIC (Aboriginal and Torres Strait Islander Commission) as part of the process of securing returns from Britain directly to Tasmania.

We welcome this opportunity to recommend to the Working Party on Human Remains courses of action to ensure that Aboriginal human remains in British museums are repatriated to their communities in Australia, in line with the joint commitment made by British and Australian Prime Ministers in June 2000.

Our recommendations derive generally from our perspective and experiences and relate specifically to Tasmanian Aboriginal remains. However, our involvement with other Aboriginal groups within Australia shows our views are representative of the concerns and problems faced by other Aboriginal communities and indigenous people worldwide and are relevant to the British government's policies affecting all indigenous human remains.

Recommendations:

We recommend that the British government:

1. adopt a policy for unconditional repatriation of all Aboriginal human remains to Aboriginal people,
2. implement that policy through mandatory legislation that immediately imposes a legal duty on institutions both public and private to give up remains in collections,
3. include in the definition of human remains, other human tissue, burial artefacts and significant religious and cultural objects,

4

4. return remains directly to the Aboriginal communities where requested,
5. prevent further research on human remains and religious or ceremonial objects, without prior approval from traditional owners.

Implementing the British Prime Minister's intentions

The public statement of the British Prime Minister of the willingness of his government to repatriate Aboriginal human remains to Australia is welcomed and supported. Mr Blair's statement establishes the moral basis for this Working Group's recommendations as to how such repatriation will proceed.

Assuming the Prime Minister's intentions are to be followed, we submit our views on how policy, laws and practices can accommodate the British Government's encouraging position.

We look forward to this Working Group's final report recommending the practical steps that can ensure the spirit of the Prime Minister's statement is implemented.

Part 1 Addressing the Terms of Reference of the Working Group

(a) *'To examine the current legal status of human remains within the collections of publicly funded Museums and Galleries in the United Kingdom'.*

1. Museums in the United Kingdom with Tasmanian Aboriginal human remains:

Our most recent records show that Tasmanian Aboriginal human remains are held in the following Museums within the United Kingdom. There may be more remains than we have identified, and in other museums; museums have been on the whole uncooperative in providing information about their collections until as recently as this year.

- 1.1 British Museum
- 1.2 British Museum (Natural History).
- 1.3. Royal College of Surgeons, Oodontological Museum and Historical Collection
- 1.4. Oxford University:
 - 1.4.1 Oxford University, Museum of Natural History
 - 1.4.2 Oxford University, Institute of Biological Anthropology
 - 1.4.3 Oxford University, Department of Human Anatomy & Genetics
- 1.5. Cambridge University, Duckworth Collection
- 1.6 National Museums of Scotland, Edinburgh.

Museums which may have Tasmanian Aboriginal remains are:

- 1.7. University College, London University
- 1.8. Royal College of Surgeons, Dublin

2. There is not one single human remain of a Tasmanian Aboriginal in any of the collections throughout the United Kingdom that was taken from Aboriginal people with the consent of Aboriginal people. In fact, most remains were gathered by grave robbing or through the outright slaughter of our people in the illicit trade of the period. The collections of remains of our people held in the UK are tainted with illegality and the worst forms of abuse of the right to life. For examples of how body parts came to leave the possession of Aboriginal people see our Attachment B.

3. The spirits of our dead await the return to the traditional areas of the body parts, so the traditional ceremony that takes body and spirit back to the land can take place. Until then the spirit remains in a stage of torment, lost from the human individual of which it was always a part.

4. From a legal perspective we respectfully endorse the excellent summary of the lack of property rights in the dead as outlined by the Chair of the Working Group, Professor Norman Palmer.¹ There being no property in the Aboriginal dead, institutions in the UK could not validly acquire a property right in the remains. This is unaffected by the manner in which the remains were received by the institution.

¹ Rights in Human Material Under English Law. in *World Archaeological Bulletin*. Vol 6. 1992:76-8.

5. The collections of remains held by institutions are not held as property - the institutions merely hold them in their possession. Once in the possession of institutions governed by statute, those statutes often curtail or prevent the giving up of possession.

6. Statutes such as the British Museum Act 1963, under which the British Museum exists, enable institutions to administer its possession of human remains. Where provisions of statutes do not allow for the institution to part with its collection, or severely limits its ability to do so, legislative amendment can direct the institutions to give up possession of its collection. To the extent legislative change required statute based institutions to part with Aboriginal remains, the amendment would only address the compulsory surrender of a right to administer a collection. There has been no acquisition of a private property interest. This position would be the same with a private institution not set up by statute.

(b) *'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 changes in this area.'*

7. There appears to be two express parts to this Term of Reference. The first is whether existing legislation imposes restrictions on institutions from whom remains are to be removed and the second the form of the legislative amendments needed to bring about the result. There may be a third issue implied in the reference - should legislative change properly be restricted to public bodies only when the subject matter of Aboriginal remains are also held at private institutions.

(i) Existing legislation

8. We have already pointed out that current statutes merely enable public museums to operate and, of most relevance to us, restricts their ability to return Aboriginal remains to Aboriginal people. Or at least that is often the argument relied on by some institutions.

9. In the case of private bodies they presumably are limited only by the terms of the grant of collections or their own decisions.

(ii) The form of legislation - permissive or mandatory

10. In the case of publicly funded bodies, amendments altering any restrictions on their lawful ability to surrender their collections to Aboriginal people is necessary. It would not be satisfactory to simply enable these institutions to decide one way or the other to give up their collections. The legislation must guarantee the mischief it is meant to address is in fact dealt with. Enabling museums to decide the ultimate fate of Aboriginal remains guarantees nothing.

11. By the account of many institutions there is doubt about the ability of these institutions to deaccession Aboriginal human remains to enable repatriation. On that basis it seems common ground that legislation must be introduced to deal with the issues.

12. That permissive legislation is not enough to ensure that museums will return contested material was clearly pointed out in a statement by the Department of National Heritage of the then Conservative Government of Britain in September 1996, with reference to the Parthenon marbles (cited on Parthenon Marbles web page 22/08/00 : "The Marbles belong to Britain - Conservative Party):

13. *"The British Museum is a body corporate established by statute. In law it is wholly independent of the Government. The powers of the British Museum are limited to those given in their creating statute. That statute severely limits the circumstances in which the British Museum may dispose of any object in the collection and it is quite clear that it would be illegal for the Museum to dispose of the Sculptures under the law as it is at the moment.*

It follows that primary legislation would be necessary merely to permit the Museum to return the Sculptures to Greece. In purely legal terms such permissive legislation would be possible. Fundamental problems would, however, arise if, notwithstanding such permissive legislation, the Museum were not prepared to return the Sculptures. It is clear beyond doubt

that the British Museum is the lawful owner of the Sculptures....the Museum is wholly independent of Government and any attempt at compulsion would need to be founded on further primary legislation. To be effective, such legislation would need to empower the Government to deprive the British Museum of its lawful possessions. Such confiscatory legislation would be contrary to Article 1 of the First Protocol to the European Convention on Human Rights unless the confiscation was in the public interest and unless compensation was paid. The jurisprudence of the European Court of Human Rights suggests that such compensation must bear some relation to the market value of the possessions which are confiscated.'

14. Our experience with each of those museums in the United Kingdom which hold Tasmanian Aboriginal remains is outlined in paragraphs 34 to 94. These experiences have led us to conclude that we have no confidence that any legislation which gives a discretion would result in the repatriation of Aboriginal remains from the major museums to their community of origin.

15. We believe that some major museums will argue that any legislation allowing deaccessioning of remains is '*not desirable*' (as per the Terms of Reference). If permissive legislation is nonetheless enacted, those museums will still refuse to deaccession remains, offering instead 'collaborative arrangements' whereby the community has some involvement, necessarily at a distance, in management of the material.

16. Other museums will agree to repatriate Aboriginal remains, as long as the conditions they set for the fate of the remains on return - their disposal, storage, guaranteed continued access by scientists - are first met. We understand that the Royal College of Surgeons is among a small number of museums currently making such a proposal. If these conditions are not met, permissive legislation will enable these museums also to refuse repatriation, while offering 'partnership arrangements' to Aborigines, the effect of which does not achieve the desired result.

17. Conditional returns, or collaborative arrangements which leave museums retaining remains are unacceptable to Aborigines.

18. These options do not embody the spirit of Prime Minister Blair's commitment to restore human remains to Australian Aborigines.

19. Such institutional control is at odds with the unanimous agreement of the Museums and Galleries Commission in 1991 which stated that, '*with regard to human remains, "restitution to a place or people of origin should be recognised as an acceptable method of disposal. In such cases the normal regulations governing the disposition of deaccessioned material should be waived."*' [Letter to Moira Simpson from Peter Longman, Director of the Museums and Galleries Commission; London. 7/1/1994. Cited in Simpson: 1997:53-4]

20. Offers of conditional returns completely misses the point of what repatriation of remains are all about. It is about the unconditional return of Aboriginal remains to Aboriginal people who will dispose of them as they see fit within the appropriate communities. No longer is indigenous culture the playground of scientists. This change is reflected in Australian law in the Aboriginal and Torres Strait Islanders Heritage Protection Act 1984. There must surely be no need to argue that indigenous people have different mores with relation to their dead. It is a basic human right to have one's dead treated with respect and to have the freedom to dispose

of one's own dead according to one's own tradition and practices.

21. Despite all the gloss put on conditional handovers and collaborative arrangements by museums, the bargaining power in these situations remains firmly with the museums. The onus is on the requesting community to accept the conditions imposed by the museum. In all cases the museum's control deprives Aboriginal people of their spiritual and cultural rights.

22. Indigenous groups are well aware that such dialogue where the terms for the discussion have been set by the dominant party usually fails to produce a positive result for indigenous claimant groups. In our experience it has not always been possible to engage in any dialogue, since many museums have answered our letters with extreme terseness or not at all. In the United States, the Native American Grave Protection and Repatriation Act 1990 (NAGPRA) overcomes these problems by providing enforceable, rather than voluntary legislation. NAGPRA requires museums be responsive to repatriation requests from Indian groups for narrowly defined categories of cultural items, including remains, and 'expeditiously return' these materials to the appropriate claimant. (Moira Simpson 1977:64-66;76-77)

(iii) The legislation needs to be broader than one dealing only with public bodies

23. A general law acquiring the collections on behalf of the crown for the express purpose of repatriation to Aborigines is preferred. Private bodies have no greater or more legitimate claim to the property of Aboriginal remains than do public bodies.

24. Although the terms of reference only relate to publicly funded institutions the same issues also apply to private bodies. While the terms of reference restricts the Working Group's ability to recommend how private bodies should deal with Aboriginal remains it does not prevent comment. Requiring the handing over of Aboriginal remains from one category of museums while saying nothing about another is to fail to address the underlying basis for the Working Groups' activity, namely putting an end to an abhorrent saga. Why should scientists at one museum be forced to answer to the reasonable demands of contemporary public values but not scientists elsewhere?

(iv) Should mandatory acquisition of remains and associated items be subject to compensation

25. There can be no property right in human remains. The collections of remains held by institutions are not held as property - the institutions merely hold them in their possession. Once in the possession of institutions, statutes often curtail or prevent the giving up of possession.

26. Statutes such as the British Museum Act 1963 (UK), under which the British Museum exists, enable institutions to administer its possession of human remains. Where provisions of statutes do not allow for the institution to part with its collection, or severely limits its ability to do so, legislative amendment can direct the institutions to give up possession of its collection. As the institution had only an administrative function but not a property interest, there is nothing to compensate. There would only be compulsory surrender of a right to administer a collection. There has been no acquisition of a private property interest. This position would be the same with a private institution set up under a trust or otherwise.

27. It is near impossible to see claims for financial loss being made anyway. The interest in the remains held by the institutions are scientific, not financial. The Natural History Museum has 68 million objects in its collection (Dr Chalmers evidence to Culture, Media and Sport Committee Cultural Property Enquiry.108:352). The loss of such a comparatively small amount of Aboriginal remains is not likely to adversely affect the Museum's overall collections standing.

28. Argument that the value of the Aboriginal remains is quantified by their importance to science has to be matched against the public interest in preservation of Aboriginal people's human rights to practice their spiritual and cultural beliefs. Further, there are remains of Aboriginal people still being uncovered in situ by environmental factors almost annually so that the giving up of the collections does not permanently deprive the world of Aboriginal remains.

29. The power of Trustees to sell is prohibited so no financial value can be added to any collection where any rights to it are not disposable on the open market. Given the public is paying the costs of administration of the collections, no basis exists for claims for the loss of that right.

30. There may be arguments about the validity of laws having the nature of compulsory acquisition but not providing for compensation. Even where such compensatory provisions were to be included in necessary legislation, on whose behalf would the institution claim compensation, assuming it could validly do so? The British Museum, for instance, is funded from the public purse. Of the twenty five Trustees only five are appointed by the Trustees themselves. The Queen appoints one, the Prime Minister fifteen and four are appointed by the Secretary of State.

31. The public interest is served in forcing the hand of 'unsympathetic' institutions to give back the dead to Aborigines and, as best can be done, helps repair relationships between Aborigines and scientists operating in this field. The enhancing of good relations between the governments of Britain and Australia justifies the mandatory approach to legislating.

1.3 *'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.'*

32. Any legislative change to allow the repatriation of Aboriginal human remains should cover not only body parts but also other human tissue, burial artefacts and significant religious and cultural objects.