

Ministerial Advisory Panel on the Illicit Trade in Cultural Objects

Chairman: Professor Norman Palmer

Secretary: Dr Roger Bland

PROGRESS REPORT (2001)

Part A: General

Background

1. The Illicit Trade Advisory Panel ('ITAP') was established by your predecessor as Minister for the Arts, the Rt Hon Alan Howarth CBE, on 24th May 2000. Its terms of reference were:

a) to consider the nature and extent of the illicit international trade in art and antiquities, and the extent to which the UK is involved in this;

b) to consider how most effectively, both through legislative and non-legislative means, the UK can play its part in preventing and prohibiting the illicit trade, and to advise the Government accordingly.

2. The Panel held twelve meetings and reported to the Minister on 6th December 2000. The full text of the Report (hereafter referred to as 'the Report') is attached as Appendix I. Its main proposals are summarised in paragraph 15 below.

Reception of Report and Reconstitution of Panel

3. At a Press conference on 13th December 2000, the Minister welcomed the Report and announced that the Panel had accepted his invitation to remain in existence as a standing advisory body. The function of the reconstituted body would be to monitor the implementation of the Panel's proposed reforms and to advise on developments generally.

4. At its meeting on 26th September 2001 the Panel resolved to submit a Progress Report in compliance with those terms of reference. This is the first such Report and covers the calendar year 2001 (hereafter referred to as 'the year'). The Panel approved this Report at its meeting on 10th January 2002.

5. The remainder of this Report consists of three parts. The first gives an account of the Panel's membership, meetings and sub-committees over the year. The second recounts the progress of the Panel's recommendations over the year. The third offers some general conclusions.

Part B: Meetings of the Panel and its Sub-Committees

Membership of Panel

6. The membership of the Panel remains unchanged since its original appointment. Members are listed in Appendix I.

Meetings of Panel

7. The Panel held 3 meetings during the year lasting a total of 12 hours.

Sub-Committees

8. Before the delivery of its original Report and its re-appointment, the Panel created several sub-committees with responsibility for specialist aspects. These dealt with drafting and construction, and with aspects of research. Most of them were created to assist in the preparation of the Report.

9. At its meeting on 23 March 2001 the Panel established an education sub-committee, pursuant to Recommendation 9 of its Report. This sub-committee met on one occasion during the year (on 10th May 2001).

10. At its meeting on 26th September 2001 the Panel created a further sub-committee to examine questions of export licensing, pursuant to Recommendation 4 of its Report. This was the first occasion on which membership of a sub-committee was extended to someone not a member of the Panel. The invitee, Professor Rosemary Cramp, is a member of the Reviewing Committee on the Export of Works of Art. The export licensing sub-committee met on 13th November 2001 and its Minutes and accompanying Statement are attached as Appendix II.

Representations, delegations and visits

11. At its meeting on 26 September 2001 the Panel received a delegation from the British Numismatic Trade Association, which made representations about the effect of the Panel's proposals on the UK coin trade. Having listened carefully to these representations, the Panel did not detect any compelling ground for the exemption of the coin market from its proposals.

12. The Panel received written representations from Dr Tristram Besterman (amplified in a speech at the annual meeting of the Museums Association in October 2001) that implementation of the Panel's proposals will need to be supplemented by measures to combat the illicit excavation of and commerce in fossils. The Panel accepts that in principle that there is a case for such measures and is awaiting clarification of the definition of fossil for this purpose.

13. In March 2001 the Chairman outlined the proposed new criminal offence to a conference of lawyers and law enforcement officers held by the Institute of Art and Law at

Scotland Yard. In June 2001 the Chairman addressed the Invaluable conference in London and the INTERPOL conference in Rome on the Report and the progress in implementing it. In October 2001 he addressed the annual meeting of the Museums Association in London. In the same month the Chairman and Secretary discussed these matters at a meeting of the National Museum Directors Conference and the Chairman of the NMDC has subsequently written to confirm its support for the Report.

14. In June 2001 the Chairman met Dr Marina Schneider of UNIDROIT to discuss the Report. On 11th December 2001 the Chairman and Legal Adviser, together with the Head of the Cultural Property Unit and Richard Creasy of Treasury Solicitors, met in London with Dr Lyndel Prott (UNESCO) and Professor P Gerstenblith (USA) to explain aspects of UK accession to UNESCO. Dr Andrea Rascher (Switzerland) and Ms Maria Koroupas (USA) participated by telephone.

Part C: Progress of the Recommendations

Summary of recommendations

15. The principal recommendations of the Panel were:

- i) *UNESCO Convention* - we advise that the other measures referred to in this Report satisfy the UNESCO Convention and that the UK should therefore accede to it. Accession will not have retroactive effect.
- ii) *Criminal offence* - we propose that, to the extent it is not covered by existing criminal law, it be a criminal offence dishonestly to import, deal in or be in possession of any cultural object, knowing or believing that the object was stolen, or illegally excavated, or removed from any monument or wreck contrary to local law.
- iii) *Law enforcement agencies* - we recommend that the proposed criminal offence, whilst not necessitating the introduction of any new system for the general inspection of imported goods, be fortified by appropriate powers of search, detention and seizure on the part of the enforcement authorities and that those authorities be given additional resources to enable them to discharge these powers effectively. We also recommend that art theft should become a reportable offence and that there should be an art and antiques unit with a national remit. We also recommend that consideration be given to ways of expediting the existing procedures under the Police (Property) Act 1897, as amended.

iv) *Export control* - we propose that, in the case of objects imported into the UK within the last 50 years for which an individual export licence is sought, the same checks would be carried out as are currently made for objects that have been imported from another EU state. Implementation of this proposal will require additional resources both for the Export Licensing Unit (ELU) of the DCMS and for the expert advisers and we recommend that the ELU be expanded as necessary. We believe that an increase of the order of four members of staff will be needed. We also believe that two of the appointments should have expertise in the particular fields identified for enquiry. We further recommend that the Reviewing Committee on the Export of Works of Art exert direct supervision over the monitoring of the movement of those cultural objects which have recently entered the UK after their illegal exportation from an overseas country, by the formation of an appropriate sub-committee.

v) *Database of legislation* - we recommend the institution of a comprehensive and universally accessible database of international legislative information. The database should be run as a service available to all who transact in cultural objects. It should seek to record information about past as well as present laws and about judicial decisions construing those laws. It should, like other modern law databases, be updated daily.

vi) *Database of unlawfully removed cultural objects* - we propose the institution of a specialist national database of unlawfully removed cultural objects. The database would cover cultural objects unlawfully removed from any place in the world, whether in the UK or overseas. Access to the proposed database should be prescribed with carefully regulated and restricted levels of access by means of a system of security codes. Differential levels of access could, for example, be extended to police forces, public authorities, commercial entities and private individuals.

16. Further recommendations included the provision of substantial funding, organisational and other improvements affecting the operational aspects of law enforcement, the evolution of a universal set of ethical guidelines and a campaign of education.

Implementation of Reforms: the UNESCO Convention

17. Shortly before Christmas 2000, the DCMS gave thought to the legislative gearing of the proposed criminal offence. It invited the Chairman and Kevin Chamberlain, who was appointed to provide legal advice to DCMS and in relation to questions raised by the Panel, to consider whether accession to UNESCO was viable without new primary legislation. In response, they produced a paper on existing legal measures, which concluded that in relation to the law of England and Wales such accession was possible. A further paper, reaching similar conclusions in

respect of Scottish law was delivered at the invitation of the Chairman by Professor David Carey Miller of the University of Aberdeen. Its conclusions have also been confirmed by the Scottish Executive. These papers are annexed to the second of the three papers referred to in paragraph 22 below.

18. The former Minister for the Arts announced to Parliament on 13th March 2001 that the Government had decided to accept the Panel's recommendation that the United Kingdom accede to the UNESCO Convention.

19. The Panel's support for accession to UNESCO was conditioned on three reservations:

(a) the UK interprets the terms 'cultural property' as confined to those objects listed in the Annex to the EU Regulation and Directive;

(b) as between EC members states, the UK shall apply the relevant EC legislation to the extent that that legislation covers matters to which the Convention applies; and

(c) the UK interprets Article 7(b)(ii) to the effect that it may continue to apply its existing rules on limitation to claims made under this Article for the recovery and return of cultural objects.

20. It was implicit in the Minister's acceptance of the main Recommendation that UK accession would be subject to those reservations.

21. At a meeting with the Chairman of the Panel on 9th July you affirmed the Department's commitment to accession, expressing the wish that it be finalised as soon as possible. Subject to normal formalities (including consultation under the devolution provisions) such accession is contemplated for the early part of 2002.

22. Kevin Chamberlain, in consultation with the Chairman and government legal advisers, has prepared three documents in support of accession (Appendices III, IV and V). They are an Explanatory Memorandum, an article-by-article comparison between the current state of UK law and the commitments exacted by UNESCO, and a special analysis of Article 9. The last document responds to inquiries from overseas countries about the proposed method of implementation of Article 9. It awaits submission to other Government Departments, which process is not expected to delay implementation of the Convention.

23. At the meeting of the export licensing sub-committee on 13th November 2001, the Secretariat advised of the new staffing arrangements for implementation of the Report. The

Report itself had recommended that the Department employ up to four additional members of staff (of whom two should be specialists) to carry out closer supervision of export licences. The Head of the Cultural Property Unit advised:

a) the implementation of the Report was, from May 2002, to be one of the two responsibilities of Dr David Gaimster, who had been newly appointed to the Cultural Property Unit from the British Museum;

(b) that Dr Gaimster would be assisted by Mark Greenwood, who would be transferring to the Unit, and by a further new appointment, that of Laura Dance, whose responsibilities would be divided equally between Treasure and export licensing.

The new criminal offence:

23. The proposed new criminal offence stands alone among the main recommendations of the Panel in requiring primary legislation. The Panel believes that this initiative has powerful symbolic and dissuasive value. While not essential to accession to UNESCO, it ranks alongside the proposed databases as second only to UNESCO in general importance. It reflects in part the position of the Select Committee on Culture, Media and Sport (Seventh Report) though with substantial differences.

24. Much of the early part of 2001 was spent in securing the support of other Departments and agencies to the introduction and content of the proposed new offence and in consulting generally. These consultations necessarily led to modification of the original proposal. The final version is now expressed in a paper written by the Legal Adviser and attached as Appendix VI. The Chairman and Legal Adviser were fortunate to have advice from Professor Sir John Smith CBE QC, a distinguished authority on criminal law, and Nicholas Bamforth of the Queens College Oxford, its honorary adviser on human rights.

25. Special meetings were held with Her Majesty's Customs and Excise in April 2001 and at the Panel meeting on 5th July 2001. The Chairman's research assistant Luke Harris wrote a paper on prosecution of customs offences to guide the discussion. Following these and other consultations, HMCE agreed both to the general proposal and to a particular extension of its powers in the manner set out in Appendix V. Its support is founded on the understanding that the primary agency for prosecution of the new offence will be the police and not HMCE.

26. In response to a request by the Lord Chancellor's Department, the Chairman and the Secretary produced information on the likely volume and cost of prosecutions and associated matters, derived in part from previous experience of the handling offence under sections 22 and 24 Theft Act 1968, as exemplified by the decision in *R v Tokely-Parry*. At one point it appeared that the LCD would seek an undertaking from DCMS that DCMS would bear certain costs of

prosecution, but that appears no longer to be the case. In response to a request from LCD, the Chairman's research assistant assembled a collection of cases illustrating prosecution under the relevant provisions of the Theft Act, which was sent to LCD.

27. At your meeting with the Chairman on 9th July you expressed continued support for the criminal offence and the wish that it be implemented as soon as the Parliamentary timetable permitted. At the same meeting you accepted that enactment of the offence was unlikely to precede accession to the UNESCO Convention, and that its non-enactment should not impede, the UK's accession to UNESCO. You subsequently (on 24th September 2001) wrote to the Home Secretary requesting his support for its inclusion in the forthcoming Criminal Justice Bill and received a positive response.

28. Regrettably the Bill was lost following the events of 11th September 2001 and the need to expedite new legislation on anti-terrorism. The Home Secretary has since advised (on 17th December 2001) that, while he continues to support the measure in principle, he does not propose to introduce a conventional Criminal Justice Bill during the next session of Parliament (2002-2003) and thus to legislate for the new criminal offence. The Secretary to the Panel is exploring the use of other legislative vehicles for the measure.

Export licensing

29. The Panel recommended two broad changes within this field, both of which would use existing machinery and neither of which would require legislation. They were:

- (a) the general use of the export licensing system to retard the outward movement from the UK of cultural objects unlawfully removed from countries of location, and
- (b) the inclusion by the Reviewing Committee on the Export of Works of Art (hereafter 'ERC') of questions affecting the illicit removal and export of such objects as proper matters within their field of supervision.

30. These recommendations have assumed greater significance following the temporary loss of the criminal offence. Aside from the two new proposed databases (as to which see paragraphs 36-8 below) the export proposals are now the principal new, immediate and non-statutory means by which the UK can demonstrate its commitment to the suppression of the illicit trade. Their importance is accentuated by the fact that, in contrast to the position in some other jurisdictions, the Panel recommended against import controls.

31. On 1st May 2001 the Chairman, together with Lord Renfrew and Maurice Davies, attended a meeting of the ERC and invited them to consider lending their support in the manner

proposed to the suppression of the illicit trade. The Chairman was later advised that the supervening Quinquennial Review would inhibit consideration of these matters by ERC until the New Year.

32. In recognition of the importance of this matter and of the relative exigency of the situation, the Panel proceeded (at its meeting on 26th September 2001) to establish its own export licensing sub-committee and to co-opt Professor Rosemary Cramp from the ERC (see paragraph 10 above). This step was taken with the approval of the Head of the Cultural Property Unit. A Statement agreed by the sub-committee at its first meeting on 13th November 2001 is attached (Appendix II). It will be seen that the sub-committee proceeds on the following policy assumption, for which it invites confirmation by DCMS:

“ We proceed on the assumption that, on accession to the UNESCO Convention, the policy of the Government is that, in considering any application for an export licence:

(a) the Export Licensing Unit shall seek to identify and take account of any unlawful removal (including illicit excavation) of the object from the UK, or, where different, from the country in which it was located immediately before it was in the UK, and

(b) the Export Licensing Unit shall take account of any evidence of unlawful removal (including illicit excavation) of the object from a third country in which the object was located before the country of its last location.”

33. The action proposed by the sub-committee was endorsed by the Panel at its meeting on 10th January 2002.

34. While noting that the new staffing arrangements for implementation of the Report (see para 23 above) do not correspond exactly with the terms of its original Recommendation 4, the Panel recognises they go some way towards achieving them.

Databases

Unlawfully removed cultural objects

35. Responsibility for taking forward the proposed database for unlawfully removed cultural objects rests with the Home Office. The possibility of such a database was already under consideration by a Home Office committee under the chairmanship of Charles Clarke MP when the Panel reported in December 2000. That committee reached no formal conclusion and following the General Election it was disbanded. At the request of the Chairman you wrote to the new Minister John Denham MP in July 2001 expressing the wish that the matter be pursued.

36. The question has now been considered by the Police Information Technology Organisation which on 14th November 2001 produced a report entitled National Cultural Property Database: Analysis of Options (hereafter 'the PITO Report'). That Report (distribution of which is restricted) was forwarded to the Chairman of the Panel on 12th December 2001 and has yet to be examined by the Panel. Owing to its recent arrival, the Chairman and other members of the Panel have yet to discuss it with the principal author, Superintendent Kevin Dobson (as resolved by the Panel at its meeting on 26th September 2001).

Overseas laws

37. The DCMS has agreed to fund a consultancy to establish the state of existing knowledge in other organisations and institutions, the likely cost of setting up and maintaining such a database and the likely candidates who could undertake the work

Part D: Some Conclusions

38. The Panel believes that, in establishing the Panel and accepting its main proposals, the Government has shown a serious commitment to the suppression of the illicit trade. It commends particularly the decision to accede to the UNESCO Convention. It accepts, moreover, that accession to UNESCO is possible on existing legal provision and that no further primary legislation is essential. It regrets the temporary setback to the new criminal offence but accepts that this is a product of unforeseeable circumstance. It notes the movement towards UNESCO in other countries, notably Switzerland, Japan and Belgium.

39. That said, the Panel is concerned about the presentation of the UK position. If a substantial period elapses between accession and the adoption of the Panel's other main proposals, there is a risk that this will be interpreted (both within and beyond the UK) as an exercise in heel-dragging, or as a desire to enjoy the benefits of UNESCO without any of the burdens. It would be unfortunate if the substantial goodwill generated by the announcement that the UK is to accede to UNESCO were to be dissipated by later inaction, or if the lead given by the UK Government to other countries were to become tarnished by a perception that form usurps substance.

40. Information retrieval is perhaps the field in which progress has been least satisfactory and in which the reasons for delay are least persuasive. Certainly the justification for inaction appears less compelling here than in the case of the criminal offence. In this context, the Panel holds strongly to the view:

(a) that the viability and authority of the proposed criminal offence, of the UK's accession to UNESCO, of the new export licensing measures and of the campaign of education designed to accompany these reforms all rest heavily on the accessibility of the required information; and

(b) that as instruments for the suppression of crime and the enforcement of public laws the databases should, at least in the initial phases, be publicly funded.

41. The Panel records its profound indebtedness to Dr Bland, Secretary to the Panel since its inception, whose industry, judgment and guidance have contributed immeasurably to its deliberations and progress.

ITAP
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APPENDIX I: ILLICIT TRADE ADVISORY PANEL
Membership

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APPENDIX II
DRAFT STATEMENT AGREED BY THE EXPORT LICENSING SUBCOMMITTEE

General statement of Government policy

We proceed on the assumption that, on accession to the UNESCO Convention, the policy of the Government is that, in considering any application for an export licence, the Export Licensing Unit shall seek to identify and take account of any unlawful removal (including illicit excavation) of the object from the UK or, where different, from the country in which it was located immediately before it was in the UK and the Export Licensing Unit shall take account of any evidence of unlawful removal (including illicit excavation) from a third country in which the object was located before the country of its last location.

Terms of reference of the Subcommittee

In the light of the UK Government's forthcoming accession to the 1970 UNESCO Convention, the role of the Export Licensing Subcommittee would be:

- (a) to advise from time to time on types of cultural property currently subject to looting and therefore needing extra checks on provenance before export licences are granted;
- (b) to monitor the illegal unlicensed outflow of archaeological material from the UK, including material offered for sale on the Internet;
- (c) to review the system of, and instructions given to, expert advisers; the provenance requirements of Open Individual Export Licences in cases of permanent export; the contribution which the Subcommittee should make to the Export Licensing Unit's revision of the Guidance to Exporters, and consideration of the criteria which could be directed towards the constraint of the export of illicitly removed cultural objects and any consequent implications for individual export licences; the relationship between due diligence and existing codes of practice and to advise what action should be taken if the staff of the Export Licensing Unit or expert advisers have any suspicions about the provenance of an object;
- (d) to advise on the due diligence that should be required from applicants;
- (e) to advise on declarations about provenance and due diligence that should be made by applicants, particularly whether it should continue to be voluntary whether to declare recent exports and imports;
- (f) to receive reports from the Export Licensing Unit on progress towards (i) the redesigning of the export licence form so as to make the requirements for statements

about provenance clearer and (ii) enabling export licence applications to be made electronically;

(g) to advise on the extent to which expert advisers should investigate or comment on matters of provenance for different categories of material;

(h) to monitor the impact, problems and benefits of the 'limited importance' exemption and to advise on the criteria that should be applied to judge whether items of 'limited importance' are legally on the market;

(i) to advise what action should be taken if the staff of the Export Licensing Unit or expert advisers have any suspicions about the provenance of an object; and

(j) to consider whether some of the information collected during the export licensing process could be made available for the benefit of scholarship and particularly for the recording of portable antiquities found in England and Wales, without compromising legitimate considerations of confidentiality, and to advise on the most useful ways of presenting a statistical report on the export of cultural property from the UK in the annual report and the volume and detailed categories of items licensed for export.

In settling and pursuing these Terms of Reference, the Sub-Committee is mindful of four principal considerations:

(a) the central role which any revised system of export supervision will play in the UK's implementation of the UNESCO Convention;

(b) the critical relevance of the Illicit Trade Panel's proposed new databases (on unlawfully removed cultural objects and overseas laws for the protection of cultural objects) to the operation of any revised system:

(c) the necessity to maintain proper conditions for the licit UK trade in cultural objects and to avoid initiatives which unacceptably impede the legitimate market or other beneficial forms of cultural exchange;

(d) the wide spectrum of forms which an unlawful removal can take, the variant degrees of impropriety which may attach to such forms, and the consequent need for the authorities to adopt a graduated and flexible approach, scaled to the severity and impact of removal.