

# THE NATIONAL GALLERY

18 October 2006

Mark Caldon  
Cultural Property Unit  
DCMS  
2-4 Cockspur Street  
London SW1 Y 5DH

Dear Mr Caldon

## CONSULTATION ON RESTITUTION OF OBJECTS SPOILIATED IN THE NAZI-ERA

Following discussion with colleagues and our trustees on the issues raised by the above Consultation Paper I am writing in reply to Hillary Bauer's letter of 10 July. We are grateful to you for the work that has gone into Paper and for setting out the issues so clearly.

The following are the responses of the National Gallery:

1. We agree with the DCMS's provisional view that museums should have power to dispose of objects lost during 1933-45 as a result of the actions of the Nazis, their allies or collaborators. The precise definition of "allies" and "collaborators" will need to take account of the changing nature of various regimes during the period 1933-45.
2. We agree with the DCMS view that the Spoliation Advisory Panel's terms of reference, which relate to "objects lost", are too wide since ordinary loss might be covered. We also agree that there might be difficulties adequately defining "wrongfully taken", for example where an object was abandoned in flight. We consider that any reference to current human rights law would introduce an additional layer of enquiry and expense for claimants and museums in an area of law which is rapidly evolving.

In principle therefore we prefer the "involuntarily lost" formula, but the precise wording will need to exclude any possible argument that losses arising from Allied actions are covered.

3. We have no objection to separate provision being made for the Beneventan Missal.

4. A number of related questions concern the extent to which trustees should be permitted to de-accession objects at their entire discretion; whether all claims should be referred to the Spoliation Advisory Panel ("SAP"); whether any decision of the SAP should be binding; in addition should any other consent, namely that of the Charity Commission, the Attorney- General or the Secretary of State be sought for a proposed de-accessioning?

Given the small number of claims that have come before the SAP, we do not think that it would be burdensome for that body to consider every claim. In any event we think that it would be prudent for trustees to seek its opinion. We do not consider that the independence of trustees, which is an independence from Government interference, would be prejudiced by making it mandatory to consult the SAP in the circumstances envisaged.

Were the SAP to recommend that the object be returned, a museum would be under considerable moral pressure to do so. Nevertheless we consider that this should not be a legally enforceable obligation, and that trustees should retain their discretion. We do not consider that the Secretary of State should have power to direct an institution to de-accession.

If trustees return an object consequent upon a SAP recommendation to do so, we see no reason for them to seek any other consent.

The legislation proposed is concerned with enabling trustees to de-accession in such circumstances, but need not be extended to allow de-accessioning in the event of the SAP recommending against doing so.

5. Donors who have given or bequeathed objects subject to a condition prohibiting disposal would today well understand that institutions would not wish to keep spoliated objects. Legislation should provide that return in accordance with a recommendation by the SAP would be deemed not to breach a condition prohibiting disposal; nor any other condition requiring a particular object to be shown in a particular manner or place; and that such return would not vitiate any remaining part of the gift.

We note the suggestion that, besides national and other public and university museums being given power to override a condition prohibiting disposal, so might "any other independent private collection". We think these words are too wide, and that it will suffice to extend the power to the Royal Collection Trust and to the institutions listed in Appendix C of last year's DCMS Consultation Paper on the 1954 Hague Convention.

6. Should the SAP be made a statutory body? If it is to be a requirement that spoliation claims should be referred to the SAP, then some statutory framework for that body is needed.

7. Should the claimant be liable to Capital Gains Tax on the sale of a restituted object? Since the claimant will not have enjoyed the benefit of the object prior to its restitution, we think it would be inequitable to tax him/her on the total amount of any gain. Only that part of the gain accruing since the date of restitution should be liable to Capital Gains Tax.

8. Should the claimant's estate be subject to Inheritance Tax in respect of a restituted object? We consider that IHT should be payable – subject, of course, to the usual tax breaks for pre-eminent works of art. The analogous situation might be that of an inheritance which would normally be part of the inheritor's estate. However, to allow for the possibility that restitution might occur when the claimant was at an advanced age, we suggest that claimants should be permitted to effect a deed of arrangement to gift the object to some other party within a limited time after restitution.

9. A question not raised by the Consultation Paper is whether an Export Licence might be required for the export of a restituted object. Normally an object would not be referred to the Expert Adviser unless it had been in the UK for the 50 years preceding the export licence application. We suggest that no part of the period during which the object has been in the UK following its involuntary loss and prior to its restitution should count towards the 50 year period.

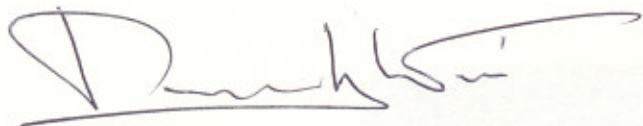
10. The question of a time limit for claims is difficult. The injustice suffered by victims of spoliation is no less after sixty years than after six. Moreover fresh information on provenance is constantly being discovered and published. On the other hand, allowing for the accumulated investment of time and effort of the institution in the object as well as the expectations of its public, there comes a point in time when the injustice in allowing a claim would outweigh the injustice in denying it. We therefore consider that, provided that the museum acquired the object in good faith and in accordance with then accepted practice, there should be a cut-off date for claims.

Inevitably whatever cut-off date is chosen will be arbitrary, but we consider that a period of ten to fifteen years from the passing of the proposed legislation should suffice.

11. Should a museum which has restituted an object be protected from later claims regarding the same object? Museums which restore an object in accordance with a recommendation by the SAP after making full disclosure to it of all relevant information should be so protected. However, such legislation alone might not protect the museum from moral opprobrium should a later claim appear justified. We suggest therefore that when the SAP is notified of a claim it should advertise it internationally. The SAP's eventual decision would also be advertised. The precise nature of the advertisement and the media to be used will need to be the subject of further consultation, as will the time limit after the SAP decision for making an alternative claim.

I hope that these comments are found helpful, but, needless to say, if any question arises, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Humphrey Wine', with a long horizontal flourish extending to the right.

Dr Humphrey Wine

Curator of 17<sup>th</sup> and 18<sup>th</sup> Century French Paintings

Direct line: 0207 747 2807

Email: [humphrey.wine@ng-london.org.uk](mailto:humphrey.wine@ng-london.org.uk)