

RESTITUTION OF OBJECTS SPOILIATED IN THE NAZI ERA: A CONSULTATION DOCUMENT , JULY 2006

RESPONSE BY THE NATIONAL ARCHIVES

The National Archives commends the Department for Culture, Media and Sport for the clarity of the consultation paper and welcomes the opportunity to contribute to policy development in this matter.

The National Archives, www.nationalarchives.gov.uk, is a government department; and also an executive agency of the Secretary of State for Constitutional Affairs. Its 580 staff work in Kew, in Norwich, at Admiralty Arch in central London and at the Family Records Centre in Islington. The National Archives brings together the Public Record Office, Historical Manuscripts Commission, the Office of Public Sector Information and Her Majesty's Stationery Office. See also www.opsi.gov.uk

The National Archives is at the heart of information policy – setting standards and supporting innovation in information and records management across the UK, and providing a practical framework of best practice for opening up and encouraging the re-use of public sector information. This work helps inform today's decisions and ensure that they become tomorrow's permanent record. The National Archives is also the UK government's official archive, containing 900 years of history from Domesday Book to the present, with records ranging from parchment and paper scrolls through to recently created digital files and archived websites. Increasingly, these records are being put online, making them universally accessible.

The vision of The National Archives is to:

- Lead and transform information management
- Guarantee the survival of today's information for tomorrow
- Bring history to life for everyone

In relation to this particular issue, The National Archives has considered the impact of the proposals on the archives sector – on archives and manuscripts within the national collections and elsewhere around the country. The National Archives has not itself been involved in any restitution cases considered to date.

The National Archives supports the general thrust of the proposed policy to enable restitution of items lost between 1933 and 1945 as a result of Nazi actions. This will be achieved by providing new powers for the disposal of items from specified collections. The National Archives endorses the proposal (at paragraph 3(4)) that these powers should be limited to the exceptional circumstances described in the consultation document. The National Archives does not believe that such powers should be capable of application beyond those exceptional circumstances. Answers to the specific questions follow.

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 Nazi' their allies or collaborators.

The National Archives agrees that such a power should be provided but believes that it should be defined carefully and should be restricted to the particular and exceptional circumstances described in the consultation document. The statement in paragraph 3.4 that it is not proposed to confer a general power to de-accession items in the national collections is commended.

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;**

The National Archives considers that the proposal at (iii) makes an interesting and potentially useful connection with human rights legislation. There are, of course, obvious difficulties in applying current standards and values to past events and actions. However, given that human rights can be invoked in respect of past actions, and there is already a body of human rights law, it is reasonable to make the connection.

- (b) they agree 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**

The National Archives agrees that this is by far the most practicable solution. Legislation should not be designed to cater for exceptions: to do so runs the risk of distorting the provisions.

- (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**

The National Archives agrees that a demonstrable link between the loss and Nazi actions should be required. Furthermore, when the original owner of the object is dead, the claimant should be able to show that he or she should be regarded as his or her heir. When the claimant is a government or institution such as a Museum, and the original owner no longer exists in its previous form, it should be able to show it is the prime successor.

The National Archives recognises that a variety of situations can arise and over-specific legislation could act as a constraint to the extent of undermining the policy intention. On the other hand, too general a form of words presents its own risks, for example uncertainty and disputes as to scope. A middle ground is required that would provide the necessary scope and powers but circumscribe them so as to achieve the policy intention but no more.

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?**

Yes; the precedent for this option provided by the Human Tissue Act 2004 (in relation to human remains) is persuasive, particularly if backed up by a non-statutory Code of Practice as in that Act. On the other hand, a decision to de-accession an item is one of the most significant and binding decisions that can be made by any custodian of cultural materials and for that reason some involvement, on an advisory basis, of an independent external party might be prudent. A variation of options (b) or (e) – both of which involve bodies or office-holders with relevant responsibilities - would provide that external involvement, while leaving the necessary discretion to the institution.

- (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?**

As indicated above, The National Archives believes some external involvement in a decision to de-accession an object would be preferable. Given the view expressed at Question 1, namely that restitution should be confined to the exceptional circumstances described in the consultation document, requiring the Spoliation Advisory Panel's involvement would be an additional safeguard in that respect.

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

The National Archives believes that restitution should not go ahead without the agreement of the institution concerned. For that reason an institution should be able to reject any recommendation of the Spoliation Advisory Panel that it felt unable to accept. It would, however, be reasonable to require the institution to explain why it had rejected the Spoliation Advisory Panel's recommendation, perhaps in its annual report, as proposed at paragraph 3.30.

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

As indicated in the answer to Question 3(d) The National Archives believes that recommendations of the Spoliation Advisory Panel should not be binding.

- (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?**

The National Archives believes there are merits in involving an independent external body or office-holder, as indicated at Question 3(a) above. Whether this should amount to requiring the consent of such a body is another matter. In some cases it might be appropriate – in relation to cases falling within the remit of the Charity Commission, for example. In others it might be more appropriate to involve the Attorney General on a consultative basis. Which body should be consulted– or whose consent should be sought - should depend on the status of the collection and the basis on which the object had been acquired.

- (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?**

The National Archives does not believe that an institution should be compelled to de-accession an item against its will and for this reason does not agree that the Secretary of State should have this power, even though a safeguard is provided in the form of Parliamentary scrutiny.

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?**

It seems more reasonable for a case to be decided on its merits rather than solely on the basis of the status of a particular object or collection. The National Archives agrees, therefore, that some provision of this nature should be made for disposal in contravention of trusts or other conditions but only in the exceptional circumstances described in this document. The provision should not be capable of use for disposal for any other reason, e.g. financial. Safeguards such as those suggested at Question 3(a) would be necessary; one possibility would be to require a recommendation from the Spoliation Advisory Panel.

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

If the safeguards referred to at Question 4(a) are in place, no exceptions would be required.

Q5 Consultees' views are invited on the question whether the Spoliation Advisory Panel should be transformed into a statutory body.

The National Archives notes that the Spoliation Advisory Panel currently functions satisfactorily as a non-statutory body but believes that if restitution legislation is enacted it would be appropriate to give the Panel statutory status with defined terms of reference.

Q6 Consultees' views are invited on the following issues:

- (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?**

The National Archives believes that claimants should be liable to capital gains tax in the circumstances described, on the basis that such liability would have applied to such a sale had the object in question not been spoliated.

- (b) Should the value of a work of art or other object restored to the claimants 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?**

The National Archives believes that the object should be included in the claimant's estate for the same reason as given at Question 6(a)

- (c) Consultees are asked whether they agree that were 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?

The National Archives believes that tax liability should not be revived in the event of the nation losing the asset as a consequence of a successful claim because it would penalise someone who is likely to have acted in good faith.

- (d) If they agree to the proposals 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?**

The National Archives does not believe it would be possible to establish with any certainty that a donor was aware of the previous history of an item, although it might be possible to form a view that he or she had reason to be aware. Given the likely uncertainty, making exceptions does not seem practicable.

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?**

The National Archives believes the power should be for a defined number of years only.

- (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?**

The National Archives suggests that fifteen years would be an appropriate period.

There is a suggestion at paragraph 3.61 that, after this period, an ex gratia payment might be offered in lieu of the item. While this idea would offer a tangible recognition of loss of an item, if the framework for assessing claims no longer exists, and there is therefore no opportunity for the claim to be tested by an independent body such as the Spoliation Advisory Panel, it will be difficult to decide whether such a payment should be made. There is also the issue of how the payment would be funded. For this reason The National Archives believes that any provision of this nature should be permissive not mandatory.

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.

The National Archives agrees that protection of this nature should be provided to museums and galleries that have transferred an item to a claimant. The safeguards already proposed should ensure that decisions to transfer items are well-founded.

November 2006