



Prescription and Title to Moveable Property (Scotland) Bill
Response from the Scottish Council of Jewish Communities

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The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland. SCoJeC advances public understanding about the Jewish religion, culture and community, by providing information and assistance to educational, health, and welfare organisations, representing the Jewish community in Scotland to Government and other statutory and official bodies, and liaising with Ministers, MSPs, Churches, Trades Unions, and others on matters affecting the Jewish community. SCoJeC also provides a support network for the smaller communities and individuals and families who live outwith any Jewish community, and assists organisations within the Scottish Jewish community to comply with various regulatory requirements. SCoJeC also promotes dialogue and understanding between the Jewish community and other communities in Scotland, and works in partnership with other organisations and stakeholders to promote equality, good relations, and understanding among community groups.

In preparing this response we have consulted widely among members of the Scottish Jewish community, and among relevant experts, and expert organisations, including Anne Webber (co-chair of the Commission for Looted Art in Europe), the Association of Jewish Refugees, the Ben Uri Gallery, the Wiener Library, Yad Vashem, the Claims Conference, and Baroness Ruth Deech.

1. Should a period of positive prescription for corporeal moveables be introduced? Please give reasons.

Yes No

Our concern is only with the principle that the legislation may irrevocably prevent heirs from recovering items that were spoliated, or transferred by forced sales and under duress, particularly during the Holocaust era. That aside, we do not have a view on the introduction of a positive prescription for the generality of corporeal moveables. However, if this is introduced, we urge that an exception must be made for objects that have been spoliated or subject to forced transfer. Although the time periods mentioned in the proposed legislation may seem long, they are inadequate as a response to the very extreme circumstances of the Nazi expropriations and genocide, since knowledge of the fate of such objects may not come to light for many decades.

Please see our response to Q.3 for further explanation.

**2. Is a 20 year period suitable for positive prescription for corporeal moveables?
Please give reasons.**

Yes No

Our concern is only with the principle that the legislation may irrevocably prevent heirs from recovering items that were spoliated, or transferred by forced sales and under duress, particularly during the Holocaust era. That aside, we do not have a view on a time period for positive prescription for the generality of corporeal moveables. However, if this is introduced, an exception must be made for objects that have been spoliated or subject to forced transfer. Although 20 years may seem long, it is inadequate as a response to the very extreme circumstances of the Nazi expropriations and genocide, since knowledge of the fate of such objects and their location may not come to light for many decades.

Please see our response to Q.3 for further explanation.

3. Are any further provisions on prescription needed in this proposed Bill to reflect that objects might have been looted during the Nazi period or during other periods in history when injustice occurred as a consequence of the rule of law not being applied properly? If so what provisions are needed?

Yes No

a) Legal ownership

We welcome the Scottish Government's assurance that it "*has no intention, through this proposed Bill, of changing arrangements already in place for the restitution of objects spoliated in the Nazi era.*" but are concerned that the draft Bill would frustrate this objective, since, if enacted, museums and galleries could use it to assert ownership of relevant objects, and defeat claims from the original owner or his or her heirs by refusing to refer cases to the Spoliation Advisory Panel.

As described in the consultation paper (para. 2.02), the effect of the current negative prescription is that "*after 20 years, if the owner has not possessed an item ... it becomes the property of the Crown*". This means that although "*the possessor to all intents and purposes becomes the owner by default at this point*", the possessor is "*not legally*" the owner, so that the original owners or their heirs have the possibility of claiming restitution. Our concern with this proposed legislation is that it would irrevocably foreclose on this possibility and thereby entrench one of the consequences of the Holocaust.

If the draft Bill were to be enacted, after 20 (or 50, or 60) years (or such alternative periods as may be substituted) the possessor would become the legal owner of the item concerned. This difference is material. At present there is an option for the Government to intervene on behalf of the Crown if a museum or gallery refuses either to enter into discussion about an item that has been in its possession for more than the relevant period but which is subsequently claimed to have been spoliated or transferred by forced sale and under duress, or, to refer a dispute to the Spoliation Advisory Panel in order to facilitate appropriate consideration of the provenance and moral ownership.

We are unaware whether such intervention has ever taken place, but even if it has not, the possibility that it could is of itself a spur to museums and galleries to enter into discussion, and to refer relevant cases to the Spoliation Advisory Panel.

However, under the terms of the draft Bill, this intervention would no longer be possible under any circumstances, and the original owners of an object or their heirs would have no recourse in perpetuity if the museum or gallery chose simply to assert its ownership, no matter how conclusive the evidence that the item in question had been looted.

b) Timescales

As we have stated elsewhere in this response, although the timescales (20, 50, and 60 years) may seem long, it must be borne in mind that although the Holocaust ended 70 years ago, significant numbers of claims for restitution of looted objects are still being made. However, under the terms of the draft Bill, a museum, gallery, or individual that unknowingly became possessed of a spoliated object, by whatever means, shortly after World War 2 would already have secure title.

When one considers the impact and aftermath of the Holocaust, the destruction, disruption, and relocation of communities as well as of individuals, it is not surprising that claims for restitution of property are only now being put forward. (Indeed analogously, some Holocaust survivors have only found other surviving family members within the last few years¹; if it has taken so many decades for people who have been searching for one another to be reunited, how much longer and more difficult must be the search for spoliated objects that may have been out of the public eye in an archive or private collection.) It would be entirely unreasonable if Holocaust survivors or their heirs were to be prevented from submitting a claim for restitution of a spoliated object, or one transferred by forced sale and under duress, simply because they have only become aware of the object’s continued existence and location after the expiration of 20, 50, or 60 years.

4. Should time outwith Scotland be counted toward the total time period needed for positive prescription for corporeal moveable property? Please explain your answer.

Yes No

Our concern is only with the principle that the legislation may irrevocably prevent heirs from recovering items that were spoliated, or transferred by forced sales and under duress, particularly during the Holocaust era. That aside, we do not have a view on whether time outwith Scotland should be counted toward the total time period for positive prescription for the generality of corporeal moveables. However, if this is introduced, we urge that an exception must be made for objects that have been spoliated or subject to forced transfer.

¹ For example, cousins Moniek Garber and Moniek (Moshe) Porat each believed that none of their relatives had survived the Holocaust, but were reunited after 67 years, http://www.scojec.org/news/2008/08v_yom_hashoah/yom_hashoah.html. Similarly, brother and sister, Simon Glasberg and Hilda Shelik each believed the other had been killed in the Holocaust, but they were reunited in 2006 <http://www.ynetnews.com/articles/0,7340,L-3305554,00.html>

It is frequently the case that the original owner of spoliated objects, or those transferred by forced sales and under duress, or his or her heirs, are unaware that an object has survived or where it may be located until it is exhibited locally. If time outwith Scotland were to be counted toward the total time period for an applicable positive prescription, the 20 years might be completed before they have any opportunity to assert ownership.

Please see our response to Q.3 for further explanation.

5. Should the proposed 3 year transition period be used? Please give reasons for your answer.

Yes No

Our concern is only with the principle that the legislation may irrevocably prevent heirs from recovering items that were looted, spoliated, or transferred by forced sales and under duress, particularly during the Holocaust era. That aside, we do not have a view on the proposed three-year transition period for the generality of corporeal moveables. However, if this is introduced, we urge that an exception must be made for objects that have been spoliated or subject to forced transfer. When one considers that under the very extreme circumstances of genocide, knowledge of the fate and location of such objects may not come to light for many decades, 23 years is hardly longer, and no less inadequate than 20 years.

Please see our response to Q.3 for further explanation.

6a. Should holders of lent or deposited property acquire ownership after 50 years?

Yes No

Our concern is only with the principle that the legislation may irrevocably prevent heirs from recovering items that were spoliated, or transferred by forced sales and under duress, particularly during the Holocaust era. That aside, we do not have a view on whether holders of lent or deposited property should acquire ownership after 50 years for the generality of corporeal moveables. However, if this is introduced, we urge that an exception must be made for objects that have been spoliated or subject to forced transfer.

As the consultation paper points out (para 2.27) there may be occasions “*the item is deposited or lent without the knowledge of the owner – for example, by a thief – where this rule might make it easier for museums to gain ownership of items at the expense of the owner.*” This is particularly the case for objects spoliated, or transferred by forced sales and under duress, during the Holocaust era, and although 50 years may seem long it is not when one considers that under circumstances of genocide, knowledge of the fate and location of such objects may not come to light for many decades.

Please see our response to Q.3 for further explanation.

6b. Should there be a special rule here for cultural items and, if so, how should “cultural items” be defined?

Yes No

Holocaust survivors and their heirs may, for emotional or other reasons, wish to

recover objects that would not by any definition fall into the category of “cultural items”, and we would not, therefore, support the introduction of a special rule for cultural items in relation to objects spoliated, or transferred by forced sales and under duress, during the Holocaust era.

7. Do you believe that the protections – time period, expectation of diligence in tracing owners etc. are sufficient? If not, what would you like to see introduced?

Yes No

In our view, the protections are not sufficient, particularly in the case of goods spoliated, or transferred by forced sales and under duress, during the Holocaust era.

a) Time periods

As stated in our responses to earlier questions, we do not regard the proposed (or indeed any) time periods as sufficient, since, although these may seem long they no specified period is adequate in the very extreme circumstances of genocide, since knowledge of the fate of such objects may not come to light for many decades.

Please see our response to Q.3 for more information.

b) Diligence

Although, as noted in the consultation paper (para.2.27) “*modern museum practice would ensure the provenance of an item that was being loaned to the collection would be thoroughly checked*”, many items were acquired before this became common practice, and indeed it is still not required by law. In a recent case, for example, concerning a painting by John Constable, the Tate appealed a finding of the Spoliation Advisory Panel which had concluded that “*the moral strength of the claimants’ case and the moral obligation on the Tate warranted a recommendation that the painting should be returned by the Tate to the claimants.*” The appeal was based on the discovery of an export licence, dated 1946, for the painting. However, following further research by both the Tate and the Spoliation Advisory Panel, the latter concluded that “*no links had been discovered between [the original owner] and the names on the export licence,*” and that, “*on the balance of probabilities, [the original owner] had not recovered the painting after it was looted and that the export licence was sought by persons who were either ignorant of its pre-1944 provenance or, knowing it, were sufficiently confident that the [provenance] ... would not in all likelihood be identified ... by the procedures then in force*”²

This example illustrates that museums and galleries should not be able to rely on lower levels of diligence that were accepted in earlier years to retain spoliated

² Supplementary Report of the Spoliation Advisory Panel in respect of an oil Painting by John Constable 'Beaching a Boat, Brighton' (DCMS, 15/09/2015)

Press Release:

<https://www.gov.uk/government/publications/supplementary-report-of-the-spoliation-advisory-panel-in-respect-of-an-oil-painting-by-john-constable-beaching-a-boat-brighton>

Report:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/459383/51137_HC_43_9_Constable_Report_ACCESSIBLE.pdf

objects, or those transferred by forced sales and under duress, and we urge that this Bill should not provide an excuse or comfort to any that may seek to do so.

It is also noteworthy that in this case, the finding of the Spoliation Advisory Panel related to “*the moral strength of the claimants’ case and the moral obligation on the Tate*” rather than to their legal obligations. That distinction leaves open the possibility that if this legislation were enacted, a gallery or museum (and even more likely a private collector) could obstinately refuse to enter into any discussion about restitution, no matter how strong the original owner’s moral claim. Legislation should not leave it to public opinion to determine such matters, particularly as any such case would inevitably attract negative media comment, and so could damage the reputation of the country.

Furthermore, although, as mentioned in Annexes B and C of the consultation paper, there are a number of online registers in which owners can register items that have been stolen or looted, and prospective purchasers can carry out a search to check whether an item has been registered as stolen, such information concerns only a fraction of the objects spoliated, or transferred by forced sales and under duress, during the Holocaust era. Museums and galleries should not, therefore, rely absolutely on the absence of any particular item from these lists, and the original owners of such works, and their heirs, should not be prevented from submitting a claim simply because the relevant item has not been listed on any of these websites. Many original owners and their heirs may have spent many years unsuccessfully seeking their spoliated property; they may have presumed that an object that had been spoliated or transferred by forced sales and under duress during the Holocaust era had long been destroyed during the war, and it is evident that, under circumstances of genocide, knowledge of the fate of such objects may not come to light for many decades.

8. Should the proposals in the draft Bill on how a finder may acquire abandoned property be enacted? Please give reasons for your answer.

Yes No

Our concern is only with the principle that the legislation may irrevocably prevent heirs from recovering items that were spoliated, or transferred by forced sales and under duress, during the Holocaust era. That aside, we do not have a view on the enactment of the proposals on how a finder may acquire abandoned property for the generality of moveable property. However, if this is introduced, we urge that if this is introduced, an exception should be made for objects that have been spoliated or subject to forced transfer. As stated in the consultation paper (para. 2.34) “*it is difficult for a finder to differentiate between lost and abandoned property*”, and this is even more the case under circumstances of genocide when knowledge of the fate of such objects may not come to light for many decades.

9. Do you have any comments on the Impact Assessments?

Yes No

We are not satisfied with the conclusion in Annex C (Equality Impact Assessment) that the impact on people of a particular “religion and belief” is mitigated by

“safeguards in the Bill such as the time periods proposed and the requirements to act in good faith and without negligence.” As we have detailed above, these are not sufficient to protect the rights of the original owners of objects spoliated, or transferred by forced sales and under duress, during the Holocaust era, and their heirs. On the contrary, since the original owners and their heirs would no longer be able to appeal to the Crown to intervene on their behalf, the Bill would place them in an even less advantageous position than they find themselves at present.

In any event the supposed “mitigation” is entirely general, and so does not address the fact that the people affected are predominantly of a particular religion; the failure to mitigate that disadvantage means that these proposals are therefore indirectly discriminatory.

10. Do you have any other comments?

a) General

As the national representative body of the Scottish Jewish Community our response naturally focuses on the aspect of the proposed legislation that is of direct concern to members of our Community, namely the restitution of property that was stolen, expropriated, sold or transferred under duress, etc during the Holocaust era beginning with the seizure of power by the Nazis in 1933, followed by the passing of the Nuremberg Laws in 1935. Given the very unique circumstances, claims for restitution of such property should not be subject to any restriction such as an arbitrary time-bar, as this would, in effect, entrench one aspect of the Holocaust in perpetuity.

As a matter of simple justice, it is important that legislation recognises the extreme circumstances of genocide and, in particular, the uniqueness of the Holocaust in both its scale and its state-sponsored administrative efficiency, both of which have the consequence of diminishing the likelihood that their families are even aware of the circumstances in which the primary victims lived before the Holocaust. The imposition of any limitation on claims is therefore inappropriate to these unique circumstances.

b) Principle

We are, however, uneasy about legislation that enables theft or reset to be cured by the passage of time, even when subsequent transfers have been made in good faith, as discussed in para 2.04, example 4 of the consultation paper. We would, therefore, prefer a recognition that, in such circumstances, the original owner does retain some form of moral title to the object in question, and that there remains an obligation on anyone who has benefitted from the theft, or their estates, to make some restitution to the rightful owners or their heirs. In cases in which it is adjudged that the object itself should not be returned, information about provenance should be included in exhibition labels, catalogue entries, etc, as relevant. The matter is obviously more difficult in the case of private collections, but there should be a mandatory condition that full information about provenance must be provided to any potential buyer or other recipient of the object.

c) International agreements

We are concerned that, despite the intention of the Scottish Government, as expressed in paras. 2.09–2.15 of the consultation paper, the draft Bill would be

detrimental to those who lost items during the Holocaust era by spoliation or by forced sales and under duress. Since, of course, the consultation paper has no legal standing, a court would not be able to take notice of the Scottish Government's intention, and the possessor of such an object could take comfort from the fact that this Bill, if enacted in its current format, conferred secure legal ownership. We therefore urge the Scottish Government to make explicit in legislation its commitment to the 1998 Washington Conference Principles on Nazi-Confiscated Art³, and the 2009 Terezin Declaration⁴, both of which have been endorsed by the UK, by amending the draft Bill to include a specific exclusion for items spoliated, or transferred by forced sales and under duress during the Holocaust era, thus ensuring that relevant cases will be referred to the Spoliation Advisory Panel for their consideration and recommendation.

³ <http://www.state.gov/p/eur/rt/hlcst/122038.htm>

⁴ http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf