Consultation paper on draft regulations for the publication by museums and galleries of information for the purposes of immunity from seizure under Part 6 of the Tribunals, Courts and Enforcement Act 2007

Response of the Scottish Council of Jewish Communties

Paragraph 18

a. **Is the content of draft regulation 3 sufficiently detailed to allow potential claimants to identify works of art which they believe may have been stolen, looted or otherwise unlawfully disposed of? If not, what else could usefully be added?**

As it stands, regulation 3 is not sufficiently detailed to enable works of art to be identified by potential claimants, and the following clauses should be amended:

(3)(f): We do not see any purpose in limiting the provision of a photograph to works of art that are acknowledged to have changed hands during the Nazi era. In fact, the draft regulation perversely creates an incentive to provide false information, since it would be in the interests of someone who has acquired works of art illegally, to state that they were acquired prior to 1932.

(4)(a): Published information should not be restricted to the identity of the current owner, since it may be a previous owner who acquired the item unlawfully. It should be noted, that even if the current owner has acquired a work of art in good faith, it may, if unlawfully procured by a previous owner, still be subject to restitution.

(4)(c): A mere declaration that "*the borrowing institution possesses a complete history of its ownership*" does not serve the purpose of the regulations, and institutions should, therefore, be required to publish the full provenance.

b. **Bearing in mind (a) above, would regulation 3 place an unreasonable burden on museums and galleries and would they discourage genuinely benevolent foreign lenders from being prepared to send their art treasures to the UK on loan for public exhibition? If so, which sections are likely to cause the most difficulty, and why?**

We hear the concerns expressed by museums and galleries, that foreign lenders have become increasingly reluctant to lend cultural objects to the UK in the absence of immunity from seizure legislation. We are, however, concerned at the Government response, for example, to the Hermitage's recent refusal to lend works to the RA without a guarantee of immunity. Ministerial statements that the Immunity from Seizure legislation will be fast-tracked in order to prevent "*cultural kidnapping*" send a clear message that the priority is to bring works of art to the UK, rather than to do justice. This should not be the case; cultural dialogue is important, but so is morality, and we share the view of Lord Janner, who said "*If it is stolen art, I do not want them to bring it here.*" (Hansard, House of Lords, 29 November 2006), and of Stewart Stevenson MSP, who stated "*We should not want such works here if they are a matter of debate*." (Official Report, Scottish Parliament, 31 January 2007).

We therefore urge that the secondary legislation should not be rushed forward, but that adequate time should be allowed to ensure the introduction of a compulsory, and legally enforceable due diligence procedure, that is regularly monitored to ensure compliance. This would protect the interests of victims of theft, and we do not believe that it would unduly discourage genuinely benevolent foreign lenders.

c. **Will publishing the information referred to in regulation 3 on websites have security implications? If so, is there any better way of achieving the same result without compromising security (including the security requirements of the GIS)?**

Since institutions regularly publicise works of art that are included in exhibitions in order to attract visitors, the additional publicity is unlikely to be such as to compromise their security either whilst on display in the UK or after having been returned to a lending institution.

The security of private individuals is adequately addressed by the provision in 3(2)(b), which permits a lender to nominate an agent whose name and contact details will be published in lieu of his own.

d. **Would the requirement for inclusion (in information on the website) of a photograph of the object to be borrowed be reasonable, given possible copyright restrictions on publishing photographs on a website and what, if any, suitable arrangements might be available to comply with such restrictions?**

The inclusion of a photograph, in addition to the information listed in regulation 3, is essential, since the work's title may have been changed. Furthermore, the original owners of stolen works of art, and their descendents, may not know the title or artist of works that had been in the family for many years, or that they had only known as a child, or from a photograph.

The permission of the potential lender would address most copyright issues, and, since the object of the potential lender is to facilitate public exhibition of the relevant work of art, it is not probable that they would object to a photograph being made available for this purpose – unless they had something to hide. Indeed their refusal to grant permission should be taken as prima facie grounds for suspicion.

However, to allay concerns, photographs published online and in hard copy could be watermarked so as to make them unsuitable for other purposes, whilst still permitting identification by a potential claimant.

e. **Is it necessary for photographs to be provided other than for items created before 1946 and acquired after 1932 (which dates have been chosen so as to include transactions in the Nazi era generally recognized to have lasted from 1933-45)?**

Photographs should always be provided, for the reasons given above. There appears to be no good reason to limit this requirement to items which it is known changed hands during the Nazi era.

f. Which of the following options should apply regarding the timing of the publication of information in regulation 2?

- **i Publish two months ahead of the opening of the exhibition?**
- **ii Publish two months ahead of the opening of the exhibition or one month ahead of importation, whichever is the earlier? (This option is included in the current draft as a 'middle way', but the Department is prepared to consider view on the matter and reassess this if appropriate).**
- **iii Publish three months ahead of the opening or one month ahead of importation, whichever is the earlier? (It should be noted here that a three month period ties in with a requirement under the Government Indemnity Scheme, which is that non-national museums are required to apply for GIS cover at least three months in advance of the start of the exhibition.)**

Since the Act confers immunity from the date of importation, the exhibition opening date is immaterial. None of the above options provides for a minimum publication period of longer than one month before importation, and this is not adequate to ensure that all relevant parties have the opportunity to learn of the proposed importation, especially if they do not have internet access (see "Publication" below).

We therefore urge that information should be published at least two months ahead of importation, that the information should be kept on the borrower's website at least until the work of art leaves the country, and that there should also be a permanent central archive of such information.

(In any event regulation 2 as drafted requires only one month's notice. We trust this is merely an oversight; the words "whichever is earlier" should be added if it is to implement (ii) above.)

Paragraph 19

Under Section 134(9) of the Act, information may be provided on request to someone who has a claim to an object and provides details of the circumstances giving rise to the claim. Regulation 5 of the draft regulations sets out a possible model for such disclosure. Consultees are asked to:

a. State whether they regard the information set out in regulation 5 to be sufficient or insufficient for the purpose of ensuring that the legitimate interests of potential claimants are not unduly prejudiced?

b. If the information in regulation 5 is regarded as insufficient, to state what additional information should be provided and why?

i) It is unclear whether "*a description in writing of the enquiries made by the relevant institution into the provenance and ownership history of the object*" (regulation 5(c)) requires the full provenance to be released to a claimant, or simply a narrative account of the research undertaken by the borrowing institution, together with a statement of the effect that it possesses a complete history of the work of art's ownership as required by regulation 3(c). That interpretation would clearly frustrate the purpose of the regulations, so, in order to facilitate the investigation of claims, the regulation should be redrafted so as unambiguously to require that the full provenance be released.

ii) We are concerned that under regulation 5 decisions as to whether there is a "*plausible case … that there is a valid legal claim*" rest solely with the borrowing institution. We are advised that the term "*a plausible case*" has no meaning in law, and are concerned that it is too vague, and likely to be decided on the basis of subjective opinion rather than defined criteria. Since this may result in conflicts of interest for the borrowing institution, we emphasise that the regulations must provide for oversight by, and appeal to, an independent body, with relevant expertise.

iii) Furthermore, since the relevant information may in any case be obtainable, as the consultation paper recognises, through a Freedom of Information request, there is no good reason why the information set out in regulation 5 should not be made available on request. The notoriously slow response to Freedom of Information requests has the effect of merely delaying the inevitable publication, and so is contrary to the interests of justice.

At very least, since potential claimants may not have the knowledge or ability to request the relevant information, organisations whose object is to protect the rights of groups such as Holocaust survivors, must also have the right to request and receive information under regulation 5.

Although the Act denies access to the UK courts, it should not prevent, or make it more difficult, for a claimant to pursue a case in the country in which the work of art is normally kept, or in which the lender resides, especially when, in any other circumstances, UK law would support the recovery of stolen items, and their return to the rightful owner.

Other comments

i) Reasons for a potential claim

We regret that the primary legislation made no distinction between claims for works of art that have been stolen, or are otherwise connected with a criminal investigation, and those that may potentially be seized in pursuance of an unconnected civil claim. An amendment to clause 135(3) is clearly beyond the remit of these regulations (though we would welcome the introduction of an additional, amending, SI). However, the regulations must be such as to reinforce the rights of those victims of crime, to whom the Act has denied the fundamental right of access to court. We do not, in the words of Lord Janner, believe that exhibitions should be mounted at the expense of "*removing, from people who have already had mercy, justice and decency removed from their lives, the potential right to their property*" (Hansard, House of Lords, 29 November 2006). In particular, we are concerned that, by rushing to fast-track this legislation in response to threats by the Hermitage to withhold previously promised loans, the Government appears to prioritise cultural exchange over justice for the victims of crime.

ii) Works of art in public collections

We take issue with the statement in the consultation paper that "[the Government] *would not expect problems to arise in connection with the many objects that are borrowed from long established public collections*". The fact that works of art from such collections may have dubious provenance is a matter of fact, not of speculation, and some countries have taken steps to address this issue. (See, for example, the Art Database of the National Fund of the Republic of Austria for Victims of National Socialism (http://www.kunstrestitution.at/frontend/content/show.php?id=6 (English version at http://www.artrestitution.at/frontend/content/show.php?id=379) which advises "*Here you can find information on art and cultural objects located today in museums and collections of the Republic of Austria or of the City of Vienna today, which might have been, according to latest provenance research, seized under the National Socialist regime*.")

iii) Queries about individual works of art

It should be axiomatic that if an institution were to borrow an item about which there can be shown to be suspicions as to provenance or otherwise, that fact must itself cast doubt on the adequacy of their due diligence. We therefore note and welcome the statement in paragraph 5 of the consultation document that "*Where a query is raised about an object, this would not automatically remove protection against seizure*," with the implication that, albeit not automatically, the protection could be removed. That will clearly be a matter for the UK courts, so it would be a matter of concern if a disputed item could be removed from their jurisdiction before such a case is decided, since that would obviously defeat the purpose of the requirement for due diligence. Legislation should, therefore, explicitly provide for this eventuality.

iv) Publication of information (Regulation 2)

We note that it is proposed that institutions will be required to publish information about cultural objects that they propose to borrow from abroad on their websites, and to inform the Museums, Libraries and Archives Council. (The regulations do not require the Museums, Libraries and Archives Council to publish that information on its website, as suggested in paragraph 6 of the consultation paper, and this oversight should be corrected.)

However, many people still do not have internet access, and internet use falls off sharply after the age of 55 and among people who have retired. Only 31% of retired people use the internet, compared with 81% of those in work and 97% of students (Oxford Internet Survey, July 2007). This is precisely the age group from whom works of art may have been stolen during the Nazi period, i.e. precisely the group to which due diligence information must be made available. It is, therefore, vital, in the interests of justice, that relevant organisations also have the right to access information on their behalf under these regulations.

We also urge that, in addition to web publication, interested organisations and individuals should be able to register with the Museums, Libraries and Archives Council, to receive hard copies of all information published on the web, perhaps in the form of a monthly bulletin. We appreciate that this would have cost implications, but there is no point in a provision that merely pretends to make information available; information must be published in formats that render it accessible to all relevant parties.

v) Non-publication of information

We note with concern and regret that "*it is not proposed, nor … [thought] appropriate or necessary*" that information should be published if an institution decides, after research, not to borrow particular works of art. The effect of this will be to penalise victims, by making it harder for them to obtain information that is, in any case, at least potentially in the public domain by means of a Freedom of Information request. This is contrary to the spirit of the regulations, which, the consultation paper advises, is to "*help people who may have a claim to cultural objects which have been stolen, looted or otherwise unlawfully appropriated, to identify such objects*". We therefore urge that institutions should be obliged to publish the results of all research, not only research relating to works of art that it has been agreed they should borrow.

v) Independence of decision-making

It is a basic principle of Natural Justice that no-one should adjudicate his own case, and we are therefore concerned that neither the Act nor the draft regulations propose that decisions should be made by an independent body. This is vital, particularly in the light of the subjectivity of the standard of 'plausibility' in regulation 5, to ensure that approved institutions do not merely pay lip-service to the legislation. Justice must both be done and be seen to be done, but the lack of any reference in the regulations to an independent body leaves the entire process open to criticism. There must be, as an absolute minimum, a provision for appeal to an independent body against decisions not to release information under regulation 5.

vi) Monitoring

We agree that "*Compliance with the Due Diligence Guidance will be a crucial part of the approval process for immunity from seizure*", and are, therefore, concerned that the regulations do not make provision for monitoring compliance. The Act states (136(2)) that approval of institutions must have regard to their compliance with the guidance, and (136(3)) that approval may be withdrawn if the institution's procedures are inadequate, or it has failed to comply with regulations. The regulations do not, however, provide any means by which that compliance may be gauged.

This is a major omission, and is all the more crucial, since we understand that the current Guidance is more frequently honoured in the breach than the observance. Without a legally enforceable monitoring procedure, it matters little how good the letter of the regulations is, since it is probable that they may be ignored with impunity when institutions find it convenient so to do, particularly as the draft regulations leave too much to the discretion of the borrower, while at the same time actually creating a perverse disincentive for lenders to comply. (What would be the rational way to act if you were only required to return items that you yourself admitted to having stolen?!)

An independent monitoring body is, therefore, vital, to ensure that approved institutions comply with the legislation, to advise Ministers about the withdrawal of approval from institutions that do not comply, and (particularly if approved institutions are permitted to adjudicate claims against themselves) to act as a court of appeal if an institution decides not to release information to a potential claimant, or his agent, under regulation 5.

It must be evident beyond doubt that as well as being "*prepared to go the extra mile*" to maintain cultural dialogue (as James Purnell has recently been quoted as saying in reference to these regulations), the Government is also prepared to go the extra mile to ensure justice for those who have been the victims, and who, even many years later, remain dispossessed of works of art that were stolen from them.

Note: The Scottish Council of Jewish Communities is the representative body of all the Jewish communities in Scotland comprising Glasgow, Edinburgh, Aberdeen and Dundee as well as the more loosely linked groups of the Jewish Network of Argyll and the Highlands, and of students studying in Scottish Universities and Colleges.

In preparing this response we have consulted widely among members of the Scottish Jewish community.