

# IMMUNITY FROM SEIZURE: GUIDANCE TO MUSEUMS AND GALLERIES ON COMPLETING THE DCMS QUESTIONNAIRE

## Introduction

DCMS Guidance issued in 2005 entitled *Combating Illicit Trade: Due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material* states:

Museums should acquire and borrow items only if they are legally and ethically sound. They should reject an item if there is any suspicion about it, or about the circumstances surrounding it, after undertaking due diligence. Documentary evidence, or if that is unavailable an affidavit, is necessary to prove the ethical status of a major item. Museums should acquire or borrow items only if they are certain they have not been illegally excavated or illegally exported since 1970.

The purpose of the questionnaire is to enable the expert advisers and DCMS to form an assessment that a museum or gallery has demonstrated that its procedures for undertaking due diligence are robust, comply with international standards and specifically with the DCMS Guidance referred to above. This is an essential prerequisite for a museum or gallery to obtain approved status under Part 6, Section 136 of the Tribunals, Courts and Enforcement Act 2007. It is therefore important that a museum or gallery seeking approved status complete the questionnaire as accurately and fully as possible and supplies all the documentation necessary to support its case. Failure to do so is likely to delay the application being considered or to be rejected.

Where an application is being made with a view to immunity being sought for a future exhibition, it is important that the application is made in ample time to enable the expert advisers to consider the application and for any queries arising from the application to be dealt with before a recommendation can be put to Ministers.

This Guidance is intended to assist a museum or gallery to complete the questionnaire by indicating the information that a museum or gallery should be seeking to provide under each section.

## Your details

The person who would have overall responsibility for assuring the provenance and ownership of an object would normally be the director of the organisation but in the case of a larger organisation could be another person having ultimate responsibility for due diligence, provided he/she is of sufficient seniority. By signing the questionnaire the director, or person having ultimate responsibility for due diligence, assumes responsibility for the accuracy of the answers given in the questionnaire. In addition to providing the contact details of the director/person responsible for due diligence, the organisation may provide the contact details of anyone having day to day responsibility for the application to whom any queries may be addressed.

## **Compliance with national and international standards**

In addition to answering “yes” or “no”, organisations should provide details of where their policy on the subject can be found and whether it is published on the organisation’s website. The date when the policy was adopted should also be indicated. The organisation should also provide details of how its staff, third parties, such as lenders, and members of the public are made aware of the organisation’s policy on the subject.

## **Due diligence procedures**

**Question 3.1:** The lender should provide full details of the provenance of the object to be borrowed supported by documentary evidence. Where such documentary evidence is lacking, or where there are gaps in provenance, an organisation will need to make further enquiries. Further enquiries are also required if there is any suspicion that an object has been illegally excavated or exported, or originates from an area of conflict such as Afghanistan, Iraq, Syria or Israel.

**Question 3.2:** This question extends not just to checking that the lender is the legal owner of the object to be borrowed but also that there are no legal constraints on the lender making the loan, such as any statutory constraints or conditions imposed by the trustees of the lending institution. Extra vigilance may be required where the lender is a private collector with an unknown reputation. Please specify what documentary evidence you would require (e.g. sales receipts), what independent enquiries into ownership you would make, and what research resources you would consult. In what circumstances would you consider corroborating any evidence provided by an affidavit sworn before a lawyer.

**Question 3.3:** Although particular attention needs to be paid to these dates research on provenance should not be restricted to these dates.

**Question 3.4:** Please refer to Part 3 (Basic Principles) of the DCMS Guidance as to the significance of the 1970 threshold. Where an object originating in a third country has been exported from that country after 1970 proof should be obtained (e.g. a copy of the export licence) that the object was legally exported. In the case of an object exported prior to 1970 there should be no grounds for suspecting that the object was illegally excavated or illegally exported.

**Question 3.5:** Due diligence should be exercised. All reasonable steps should be taken to seek the information to fill in the gaps in provenance (See Part 6 of the DCMS Guidance). These include examining the object as to clues of its origin or history (e.g. old labels), consulting auction catalogues, obtaining sales receipts, researching the archives of auction houses and art dealers, consulting catalogues raisonnés, consulting experts familiar with the work of the artist or the object in question, obtaining details of previous exhibitions where the object has been exhibited, consulting databases of stolen art etc. Particular care needs to be exercised where the object is of a kind that is notoriously looted or originates from an area of

conflict. The results of the due diligence undertaken should be recorded and filed in the archives of the organisation.

**Question 3.6:** If after the exercise of due diligence serious doubts remain regarding an object's provenance then the organisation should not proceed with the loan. However there may be cases where the gaps in provenance are not considered sufficiently serious as to warrant not proceeding with the loan. This may be because the lender has given a plausible explanation for the gaps in provenance or the object is of a minor nature as defined in Part 7 of the DCMS Guidance. In that event the organisation should, after taking advice from experts, including legal advice if necessary, perform a risk assessment<sup>1</sup>. If after taking these steps it is concluded that the risk of any claim against the organisation or adverse publicity is sufficiently low as to be ignored then it may proceed with the loan. The steps taken and the reasons for going ahead with the loan (or for deciding not to go ahead) should be recorded and filed in the archives of the organisation.

**Question 3.7:** This is not simply a yes/no answer. Using a database is only one element in the process and not the only recourse

### **Record keeping**

Due diligence checks should be retained in the archives of the organisation. They should be kept for a sufficiently long period of time to ensure that they will not be required for future reference, for example as evidence in legal proceedings, or to assist another institution in making enquiries concerning the provenance of an item that had passed through the organisation's hands. If kept in electronic form only suitable back-up procedures should be in place in the event of a computer failure.

### **Loans-in agreement**

The loans-in agreement should contain all the provisions listed in this part in a form that is legally binding.

### **Expertise**

**Question 6.1:** This would normally be the person having day-to-day responsibility for due diligence. In addition to giving their position within the organisation please indicate his/her qualifications and experience.

**Question 6.2:** Please specify both internal and external sources of specialist advice and guidance.

**Question 6.3:** Please indicate who has had training within your organisation and the content of the training. Does it include guidance on Part 6 of the Tribunals, Courts and Enforcement

---

<sup>1</sup> In assessing any risk of a claim it should be borne in mind that although the grant of approved status confers immunity from seizure, it does not confer immunity from suit. Consequently an organisation could still find itself at risk of claims for damages for the tort of conversion. Nor is it acceptable to go ahead with a loan in the expectation that putting an object on display in a public exhibition may elicit information about an object's provenance.

Act 2007 and the Regulations made under the Act? Do new recruits receive training as a matter of course? Are there periodic refresher courses? Is the training in-house or are external trainers used?

**Question 6.4:** This would normally be the director of the organisation but in a larger organisation the function may be performed by another person at sufficiently senior level.

## **Documentation**

**Standard “loans-in” agreement:** See comments above.

**Ethical loans or due diligence policy:** This document should set out the policy of the organisation on this matter. It should reflect and implement the statement in the DCMS Guidance quoted in the Introduction to this paper. The document would normally be the place where the policy on compliance with national and international standards would be found.

**Due diligence checklist for loans:** This should contain the following information in addition to a description of the object:

Date acquired by lender

From whom it was acquired by the lender

Record of history of ownership from date of discovery/excavation or creation

Record of ownership between 1933 and 1945 (if applicable)

In cases where the item was out of the country of origin (but not in the UK) before 1970, evidence that its export from the country of origin or any intermediate country before that date was in line with the regulations of the country from which it was exported

Where applicable, evidence that the item was in its country of origin after 1970 and was legally exported in accordance with the regulations of that country.

All documentary evidence to support the foregoing should be included, together with any further checks made by the borrowing organisation.

**Due diligence/risk assessment questionnaire:** This document, which is separate from the due diligence checklist, should be completed in the event that there are gaps in provenance, or acceptable documentary evidence cannot be provided, or there are doubts about its ethical status. Its purpose is to enable an informed decision to be taken by the organisation as to whether or not to go ahead with the loan of the item. The following are some examples (by no means exhaustive) of the questions that need to be considered:

Is the owner or agent of the owner known and trustworthy?

Is there any reason to suspect that the object was illegally exported from its country of origin?

Is there anything about the place of origin of the object that leads one to suspect that it was stolen or illegally exported?

Is there anything about the appearance of the object that gives rise to suspicion?

Has the object been publically exhibited at any time? If so give dates when exhibited and where?

Has the owner provided a sworn affidavit before a lawyer supporting his/her account of provenance?

Have the Art Loss Register and/or other international stolen art databases been consulted?

Taking into account the answers to the questions raised, the borrowing organisation should proceed to carry out a risk assessment, i.e. an assessment of the risk of any third party claiming ownership of the item or information coming to light regarding the ethical status of the item. The results of the risk assessment should be recorded. Based on this a decision should then be taken as to whether or not to proceed with the loan. If there remain doubts about the provenance or ethical status of the object then the loan should not proceed. The decision and the reasons for it should be recorded.

**Evidence of a provenance research case recently undertaken:** This, together with the report on the due diligence checks and processes undertaken in relation to a recent exhibition involving works from abroad referred to below, are intended to demonstrate the organisation's ability to apply its due diligence procedures to concrete cases. They are an important step in the process of obtaining approved status. It should be noted that the evidence of a provenance research case is not confined to a case involving the loan of an object from abroad, it could include a loan from the UK or a permanent acquisition whether from the UK or abroad. In order to form a proper assessment of the organisation's due diligence procedures the case study should ideally be one which presented some challenges, such as gaps in provenance, requiring a due diligence risk assessment to be undertaken. If desired the organisation may provide more than one case study. Each case study should include complete documentation, including correspondence between the borrowing institution and the lender/donor/vendor and documentary evidence of the research undertaken. Copies of the completed due diligence checklist and due diligence/risk assessment questionnaire should also be included.

**Report on the due diligence checks and processes undertaken in relation to a recent exhibition involving works from abroad:** This document differs from the evidence of a provenance research case recently undertaken above in that the latter required detailed documentation showing how your documentation has applied due diligence in a particular case study, whereas what is needed here is a more general report on a particular exhibition. The report should contain details of the items borrowed, including details of the provenance of each, plus a report on the steps taken to verify the accounts of the provenance of each item as supplied by the lender where necessary. The report should also cover any cases where there were gaps in the provenance, or any other problems, and the steps taken to resolve them. The report should include any decision to proceed or not to proceed with the loan of any item and the reasons for such decision. In the event that no recent exhibition involving works from abroad is available then it would be acceptable for a report to be presented for a future exhibition for which approved status is required, or for a recent exhibition not involving works from abroad.

## **Signature**

As mentioned above the Director or person having ultimate responsibility for due diligence signing the questionnaire takes responsibility for the accuracy of the information provided in the answers in the questionnaire. Signature of the questionnaire should not be a case of the director or person having ultimate responsibility for due diligence "rubber stamping" the

work of a junior colleague but whoever signs the document should have thoroughly familiarised himself/herself with the application.