



Department for  
Digital, Culture,  
Media & Sport

# **Strengthening the Process for Retaining National Treasures**

Public Consultation

**December 2018**  
**Department for Digital, Culture, Media and Sport**

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## Summary

<b>Topic of this consultation</b>	<ul style="list-style-type: none"> <li>• We are seeking views on our proposal to strengthen the export control system for cultural objects judged to be ‘national treasures’. We propose to introduce a system that would legally oblige export licence applicants to honour their commitment to accept a matching offer from a UK purchaser to purchase the object. This would take place when a decision on the export licence application for that object had been deferred, in order to enable such an offer to be made.</li> <li>• We are seeking views on, and requesting evidence to show, the impacts of the proposed introduction of this legally binding mechanism. A draft of the template option agreement which we propose would be used for this purpose accompanies this proposal and we are keen to understand potential impacts on export licence applicants, the art market, public institutions (such as museums and galleries), and funding organisations.</li> </ul>
<b>Scope of this consultation</b>	<p>This consultation aims to seek views on proposed measures to introduce a legally binding mechanism into the final stage of the export control process for cultural objects that are judged to be of ‘national treasure’ status and where a decision on a licence application to export the object outside of the UK has been deferred in order to provide an opportunity to keep it in the UK.</p>
<b>Geographical scope</b>	<p>The proposal would extend and apply to export of cultural goods from the UK, including Scotland, Wales and Northern Ireland.</p>
<b>To</b>	<p>This consultation has particular relevance to:</p> <ul style="list-style-type: none"> <li>• Individuals and businesses who export or may wish to export objects of national treasure quality;</li> <li>• Associations representing individuals and businesses who have exported or may wish to export objects of national treasure quality;</li> <li>• Individuals and businesses working within the UK art market;</li> <li>• Organisations which fund the acquisition of national treasures for public institutions;</li> <li>• Public institutions such as museums and galleries;</li> <li>• Individuals and organisations with an interest in the administration of the export control process.</li> </ul>
<b>Body responsible for the consultation</b>	<p>This consultation is being carried out by the Department for Digital, Culture, Media and Sport (DCMS) on behalf of the UK government.</p>
<b>Duration</b>	<p>Consultation starts: <b>15th December 2018</b></p> <p>Consultation ends: <b>Midnight on 24th February 2019</b></p>
<b>Enquiries</b>	<p>During the consultation, if you have any enquiries, please contact: <a href="mailto:nationaltreasuresconsultation@culture.gov.uk">nationaltreasuresconsultation@culture.gov.uk</a></p>

<p><b>Disclosure of Responses</b></p>	<p>The Department for Digital, Culture, Media and Sport (DCMS) controls the information you provide in your answers. Information is being collected and processed by DCMS for research purposes to inform any changes to guidance on export controls. All information will be processed in compliance with the Data Protection Act 2018 and General Data Protection Regulation. For further information about how your personal data will be processed, please see the 'Privacy Notice' at <b>Annex C</b>.</p> <p>In terms of the responses you provide to the questions in this consultation (but not personal information), DCMS may publish findings from the research. If we do so, we will ensure that neither you nor the organisation you represent are identifiable, and any responses used to illustrate findings are anonymised. Your anonymised consultation responses (but not personal information) may be shared with our professional advisers when analysing responses. Your information will not be shared with any other third parties. It will be retained for 10 years for analysis and reporting after which it will be destroyed (for information regarding how long your personal data will be retained for, please see the 'Privacy Notice' at <b>Annex C</b>).</p> <p>Under the current Data Protection Act 2018 and the GDPR regime, you have certain rights to access your personal data and have it corrected or erased, and you can object to us processing your personal data at any time (as outlined in the 'Privacy Notice' at <b>Annex C</b>). However, once you have submitted your response to the consultation you will not be able to withdraw your answers to consultation questions from the analysis stage (i.e. it is only your personal data that you can withdraw at this stage, not your answers to consultation questions).</p>
<p><b>How to respond to the consultation</b></p>	<p>Please send your responses to the questions outlined in the consultation document to <a href="mailto:nationaltreasuresconsultation@culture.gov.uk">nationaltreasuresconsultation@culture.gov.uk</a></p> <p>It is not necessary to respond to all the questions; you are welcome to provide answers only to those issues of most interest or relevance to you, but please make clear which questions you are responding to.</p> <p>Mandatory information to be collected as part of the consultation includes:</p> <ul style="list-style-type: none"> <li>- Name (first name and surname)</li> <li>- Email address</li> <li>- Whether you are responding as an individual or on behalf of an organisation (and if an organisation, please include the name of this organisation)</li> <li>- Confirmation that you have read and understood the Privacy</li> </ul>

	<p>Notice at <b>Annex C</b>. Please add the following text to your response to demonstrate this <b>‘I have read and understood the ‘Privacy Notice’ for this consultation.</b></p> <p>Please include the above information in your consultation response. Failure to include all the above information in your consultation response will render the response invalid, in which case your consultation response may not be considered.</p> <p>We may wish to contact you in order to discuss your response in more detail. Please state on your consultation response that you are happy to be contacted (if you agree to be contacted, we will use the email address you include on your consultation response).</p> <p>Hard copies of the consultation will only be made available on request. Please contact <a href="mailto:nationaltreasuresconsultation@culture.gov.uk">nationaltreasuresconsultation@culture.gov.uk</a> for further information.</p>
<p><b>After the consultation</b></p>	<p>The Government will consider all responses and publish a response document in due course, but will not respond to comments on an individual basis. Your responses will be used to consider whether guidance documents should be amended to introduce a legally binding mechanism into the export control system for cultural objects.</p>
<p><b>Compliance with Consultation Principles</b></p>	<p>This consultation is in line with the government’s Consultation Principles. This can be found at <a href="https://www.gov.uk/government/publications/consultation-principles-guidance">https://www.gov.uk/government/publications/consultation-principles-guidance</a></p>

## PART ONE: Context

### Current Rules

At the Department for Digital, Culture, Media and Sport, we are responsible for protecting and promoting the UK’s cultural and artistic heritage.

The UK is home to a wide variety of exceptional cultural objects: our ‘national treasures’, which enrich the culture, heritage and scholarship of audiences today and will do so for future generations.

Central to this are our world class museums, archives and galleries. The UK is also proud to host one of the world’s largest art markets, with its long tradition of expertise and position as a hub for global trade.

We are able to retain many of these amazing objects thanks to the export control system which provides a safety-net: the application for a licence to export provides an opportunity to save our most significant cultural objects from leaving the UK.

The current export control system for cultural objects originates from the 1950s and has always sought to strike a balance, as fairly as possible, between the various interests concerned in any application for an export licence: the protection of our national treasures; the rights of the owner; the exporter; the position of the UK's world class museums; and the reputation of the UK as a successful international art market.

However, the integrity of the system has been tested in recent years by instances of owners not honouring their commitment to accept a matching offer from a public institution. There have been a number of cases where licence applications have been withdrawn once a public institution has raised funds to acquire a national treasure. This deprives UK institutions of an opportunity to enrich the UK's public collections and causes public institutions and funding bodies to waste time, effort and fundraising credibility by raising the necessary funds only to have their offer rejected.

We propose to introduce a legally binding mechanism - often referred to as a 'binding offers' mechanism - so that owners of cultural objects found to be national treasures, who have confirmed that they are prepared to sell to a museum or gallery or relevant private purchaser at an agreed fair market price, are legally bound to follow through on their commitment to do so.

Any changes to the current process which may be introduced following this consultation will be included in the [Statutory Guidance](#) issued by the Secretary of State for Digital, Culture, Media and Sport (Secretary of State) and available on the website of the Arts Council of England (the Arts Council).

#### How the export control process currently works

Anyone wishing to export certain cultural objects from the UK requires a licence to permit them to do so. Objects of cultural interest which exceed the specified financial and age thresholds (see Tables 2 and 3 in the [Guidance to Exporters](#)) require an individual licence to export, and so an application must be made to the Arts Council. Where the object has been in the UK for 50 years or longer, as part of that process, the cultural object is assessed by an expert adviser against criteria called the 'Waverley criteria'. The expert adviser may object to the granting of a licence if they believe the item meets one or more of the criteria, in which case it is referred to the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (RCEWA).

The Waverley criteria are used to decide whether an object should be considered a national treasure on the basis that the object's departure from the UK would be a misfortune. The three Waverley criteria are as follows:

- History - Is it closely connected with our history and national life?

- Aesthetics - Is it of outstanding aesthetic importance?
- Scholarship - Is it of outstanding significance for the study of some particular branch of art, learning or history?

The RCEWA is an independent body which advises the Secretary of State on whether a cultural object that is the subject of an application for an export licence is a national treasure in the context of the Waverley criteria.

If the RCEWA concludes the object is a national treasure, it recommends to the Secretary of State that the decision on issuing a licence should be deferred for a period of time. The Secretary of State can defer the decision for a certain period of time ('a deferral period') to allow a purchaser to seek to acquire the object and keep it in the UK; this would usually be a UK museum or gallery but may also be a private individual or company who will keep the object in the UK.

If an appropriate purchaser wishes to acquire the object, they must put forward a 'matching offer' (an offer at least equal to the fair market price for the object, determined by the Secretary of State having considered the RCEWA's recommendation) during the deferral period. An appropriate purchaser in this context refers to either a UK public institution or a private individual or company who will keep the object in the UK with a commitment to ensure reasonable public access, satisfactory conservation and security arrangements for the object. Before the deferral period begins, the owner (or the licence applicant on behalf of the owner where relevant) is asked to confirm verbally and in writing that they are prepared to accept a 'matching offer' should one be put forward. This commitment is not legally binding.

The deferral period is usually split into two periods. During the first period, interested parties may submit a serious expression of interest in purchasing the object. If there are no expressions of interest from appropriate purchasers, a licence to export will usually be issued. If there is a serious expression of interest from an appropriate purchaser, the applicant is again asked to confirm whether the owner is willing to sell the item if a matching offer is made. If the owner is not willing to accept, the licence application will usually be refused. If the applicant confirms that the owner will accept a matching offer, a second period will commence and the interested party has until the end of that period to raise the funds to purchase the item. If funds are not raised, an export licence will usually be issued.

The owner's confirmation that they are prepared to accept an offer is not, in the current system, legally binding on them. If funds are raised and a matching offer made, the owner is not legally obliged to accept the offer and may refuse it. The question as to whether they would be prepared to accept a matching offer is asked of the owner, or their representative, at several stages in the process: before, during and after the RCEWA hearing, including upon the receipt of a serious expression of interest.

## **Why is the government consulting?**

Following instances where the process was deemed to fail, ministers asked for an independent assessment of the effectiveness of the export control process for national treasures. This was carried out by Nigel Carrington (Vice Chancellor of the University of the Arts London), and included interviews with key stakeholders.

Acting on the resulting recommendations, the government wishes to consider the introduction of a legally binding mechanism into the process, to ensure owners honour their commitment to accept a matching offer to purchase the object.

The process has remained largely unchanged since the 1950s. The system still involves a 'gentleman's agreement', with the expectation that the owner will honour their commitment to accept a matching offer (even though they are not legally bound to do so). Over the years there have been a number of instances where an owner or their representative has made the commitment to sell in order to continue with the process, but have not honoured this commitment, either by withdrawing the application once an offer is made or by refusing to accept the offer.

The problem is that public institutions may spend large amounts of time and money running intensive and sometimes high profile fundraising campaigns, only to have an owner refuse to sell at the end of the process. Market values of many exceptional items have increased dramatically over recent years and institutions are increasingly reliant upon philanthropy to purchase. Owners not honouring their promise to sell undermines the ability of acquiring institutions to do this successfully; goodwill is in finite supply. The result is that fewer national treasures are saved for the public benefit.

The proposal to introduce a legally binding mechanism into the export control process would therefore formalise the current non-binding agreement by legally requiring owners to accept a matching offer if they have agreed to do so.

## **Proposal and Consultation Process**

The purpose of this consultation is to:

- Seek views on and request evidence to demonstrate the potential impacts of the proposed introduction of a legally binding mechanism on export licence applicants, the art market, public institutions (such as museums and galleries), and funding organisations.
- Seek views on the draft template option agreement that accompanies this proposal.



## **PART TWO: The Proposal**

### **What are we proposing?**

We are proposing to introduce a legally binding mechanism into the export control system for national treasures in the UK.

Under this mechanism, the owner would retain the ability to withdraw their application for an export licence up to the end of the first deferral period. However, at the beginning of the second deferral period the owner would be required to enter into an 'option agreement', which would give an interested party an option (a contractual right) to purchase the object. The option agreement would be a binding contract. This would result in the owner being obliged to sell the object to an interested purchaser if the purchaser has sufficient funds available at the end of the second deferral period to make the matching offer, and therefore exercised its option to purchase under the agreement.

The option agreement would be applicable in the case of a serious expression of interest made by an appropriate purchaser, meaning a purchaser which is either a UK public institution or a private purchaser who will keep the object in the UK with a commitment to ensure reasonable public access, satisfactory conservation and security arrangements for the object. It would not be applicable in the case of a private purchaser who does not meet these conditions, because offers by such purchasers are not taken into account in deciding whether or not to grant a licence. If more than one appropriate purchaser puts forward a matching offer, one possible approach could be to provide for the Secretary of State or another public body to enter into the option agreement with a view to assigning it to an appropriate purchaser during the second deferral period (further detail can be found at **Annex A**).

We propose that this legally binding mechanism should be subject to a minimum value threshold which would mean that export deferred objects of a value equal to or below £100,000 would not be subject to the requirement to enter into the option agreement. Introducing a value threshold allows for a proportionate application of the binding offers approach, given there is less risk for public institutions and funding bodies to raise sufficient funds for objects with a lower value.

The form of the option agreement would be specified by means of a template included in the Statutory Guidance issued by the Secretary of State. The owner and potential purchaser would not generally be permitted to amend the terms of the option agreement except where this is expressly provided for in the template agreement.

### **Potential impacts of the proposal**

**Q1) Do you agree with the proposal to introduce a legally binding mechanism into the export control system for national treasures in the UK?**

**Q2) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect individuals applying for a licence to export a cultural object? Please provide evidence to support these views.**

**Q3) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect public institutions such as museums and galleries? Please provide evidence to support these views.**

**Q4) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect the UK art market? Please provide evidence to support these views.**

**Q5) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect organisations that fund public art acquisitions? Please provide evidence to support these views.**

**Q6) Do you have any evidence to show what effect the introduction of a legally binding mechanism into the export control system would have on the number of national treasures retained in the UK per year?**

**Q7) Do you have any views on an appropriate process for applying the option agreement where more than one relevant purchaser puts forward an expression of interest by the end of the first deferral period? Please provide evidence to support these views.**

**Q8) Do you have any views on the proposal to introduce a value threshold which would mean that export deferred items with a value equal to or below £100,000 would not be subject to the 'binding offers' system? Do you have any views on setting this value threshold at £100,000? Please provide evidence to support these views.**

### **Reducing commercial risk for the Seller**

#### Proposal to allow the Seller to choose currency in which the option is priced

We have considered ways to reduce commercial risk for the Seller (the owner of the cultural object, as referred to in the draft template option agreement) entering into the option agreement. One such risk could be the impact on the Seller of exchange rate fluctuations between the date on which the fair market value is determined and the date on which the sale under the option agreement becomes final. We therefore propose to introduce a

mechanism to mitigate this risk; the draft option agreement (at **Schedule 1, Part B**) allows for either of two alternative methods to be used to achieve this.

The first method is to specify the consideration (the purchase price) in a currency other than sterling. The second method is to specify the consideration in another currency, but for it to be converted into sterling by reference to the exchange rate on the last business day before the day on which the sale of the object takes place. We propose that the Seller will be eligible for this arrangement if they can prove they bought the object in a currency other than sterling; the pricing of the object would then also be in that currency. The Buyer (the purchaser of the cultural object, as referred to in the option agreement) should be able to choose between the two alternative methods.

We welcome views on the potential impact of this proposed approach. During the first deferral period, it is for the owner to insure against currency fluctuations.

Equally, parties intending to purchase objects under this process (i.e. potential Buyers) would be encouraged to consider taking appropriate measures to protect themselves against currency fluctuations during the second deferral period.

**Q9) Do you have any views on the impact of the proposal to allow Sellers who purchased the cultural object in a currency other than sterling to require the purchase price to be specified in (or by reference to) that currency? Please provide evidence to support these views.**

**Q10) Do you have any views on the impact of the proposal to allow Buyers to choose the mechanism by which exchange rate fluctuations are mitigated under the option agreement? Please provide evidence to support these views.**

**Q11) What are the practicalities involved for interested institutions purchasing an object in a currency other than sterling?**

Limit on the length of the second deferral period

Limiting the length of the second deferral period to six months, except in very special circumstances, would be another useful mechanism for protecting the rights of owners and reducing the commercial risk. We would therefore welcome views on what the potential impact of this proposal might be.

**Q12) Do you have any views on the impact of the proposal to cap the length of the second deferral period? Please provide evidence to support these views.**

**Details of how the legally binding mechanism would work**

Following early conversations with stakeholders who requested as much detail as possible about the proposal to be able to respond effectively to potential changes to the export control

process, we have included a draft template option agreement for comment. This can be found [here](#). If, following consideration of the responses to this consultation, government decides to proceed with introducing a legally binding mechanism into the export control system for cultural objects by means of an option agreement, we propose that a template option agreement substantially in the form of the draft accompanying this consultation would be included in the Statutory Guidance. The Statutory Guidance issued by the Secretary of State and Guidance for Exporters published by the Arts Council would be amended accordingly to reflect this (see further below).

#### The draft template option agreement

There are a number of specific aspects of the proposed template option agreement on which we would be particularly interested in respondents' views; these issues are outlined in the questions below. Further detail on the technical points in relation to these questions and the draft template option agreement more generally can be found in **Annex A**.

**Q13) Do you have any views on the clauses in the option agreement concerning the preparation of condition reports and the consequences where damage is shown to have occurred, and the impact of those provisions on the process and parties (see clauses 2 and 8)?**

**Q14) Do you have any views on whether the warranties set out in clause 9 of the option agreement (and repeated in clause 4 of the form of Transfer Deed at Annex 2 to the option agreement) are sufficient?**

**Q15) Do you have any views on the approach of allowing for the parties to agree, on a case by case basis, the provisions in relation to delivery and transfer of risk (see clause 8.3.3)?**

**Q16) Do you have any views on the approach of allowing for the parties to agree, on a case by case basis, the provisions in relation to storage, security and viewing arrangements during the Option Period (see clause 5.2)?**

**Q17) Do you have any other comments about the drafting of the option agreement, in addition to the points covered in questions [13 to 16]?**

#### **The current legislative base**

There are currently two licensing regimes in place for the export of cultural goods from the UK: one under UK legislation which applies to exports to any foreign destination and the other under EU Regulations for objects travelling outside the EU. Although licences are often required under both regimes for objects intended for export outside the EU, the UK system

has been adapted so that exporters usually only need to obtain one specific individual export licence (which may cover more than one object).

At present both licensing systems are administered by the Arts Council. Information and guidance about the current legislative base is given in the Arts Council's [Procedures and Guidance for Exporters](#) and [the Statutory Guidance on the criteria to be taken into consideration when making a decision about whether or not to grant an export licence](#). This guidance will be updated to reflect any changes due to the UK's departure from the EU.

### **Implementation of the proposed changes**

Implementation of the proposed introduction of this legally binding mechanism would be carried out by amending the current Statutory Guidance. Under section 9 of the Export Control Act 2002, the Secretary of State may give guidance about any matter relating to the exercise of his export licensing powers under a control order made under that Act, and must give guidance about the general principles to be followed in exercising his licensing powers. The Secretary of State is required to have regard to any guidance so issued when exercising those powers.

The Statutory Guidance currently in place under section 9 sets out the process which is followed to determine whether an object for which a licence application has been made is potentially a national treasure, and to provide an opportunity to keep the object in the UK. In order to implement the introduction of a legally binding mechanism, we would amend the Statutory Guidance to make it clear that, where an appropriate purchaser has communicated a serious expression of interest in making an offer to purchase, the owner will then be required to enter into an option agreement prior to the second deferral period. The second deferral period would not begin unless and until the owner had entered into an option agreement in the form of the template included in the Statutory Guidance.

If the owner refused to enter into the option agreement (or was unable to do so because they could not confirm the matters covered by the warranties in the template option agreement - for example, if they were aware of an encumbrance affecting the object), they would normally be refused a licence. Similarly, once the option agreement has been entered into, if the sale of the object does not ultimately complete, the application for a licence would normally be refused. However, if the transaction does not proceed because the Buyer cannot raise sufficient funds (and therefore does not exercise an option) or revokes its exercise of the option pursuant to clause 8.1.2 of the option agreement (which applies where damage to the object is identified by the Second Condition Report), then a licence will usually be granted (unless another appropriate purchaser comes forward with a matching offer - see immediately below).

If the Buyer chooses not to exercise the option (for instance, because they are unable to raise the necessary funds), but another appropriate purchaser (with sufficient funds) steps forward with a matching offer to purchase the object, the Seller will not be compelled to sell to the new purchaser (as the option agreement cannot generally be assigned - see,

however, 'Assignment of the Option Agreement' in **Annex A**). However, if the Seller refuses this later offer, an export licence will normally be refused.

**Q18) Do you have any views on the scenarios outlined above detailing circumstances in which an export licence would or would not be granted? Please provide evidence to support these views.**

#### Enforcement

The usual civil legal remedies would be available to enforce the option agreement should the owner not comply with their legal obligation to deliver the object to the purchaser. The draft option agreement includes at clause 20 an acknowledgement by the parties that damages alone would not provide an adequate remedy in circumstances where the owner failed to comply with their key obligations under the agreement, such as to deliver the object to the Buyer, and that an order requiring the Seller to perform their contractual obligation would be appropriate.

No changes to legislation are therefore required to implement this proposal. We would also wish to monitor the effectiveness of any changes to the system and review them after three years.

**Q19) Do you have any other comments about the proposed introduction of a legally binding mechanism into the export control system for cultural objects?**

### **PART THREE: Summary of consultation questions**

Before we make a final decision on this matter, we want to fully understand the potential beneficial and adverse impacts on individuals, businesses, public institutions, and any other interested parties. We particularly welcome views on the scale of any impact and whether you consider any action is required to mitigate any adverse impacts or if there are additional actions that could be taken to increase beneficial impacts.

We welcome your responses to the questions highlighted throughout the document; please send these to [nationaltreasuresconsultation@culture.gov.uk](mailto:nationaltreasuresconsultation@culture.gov.uk)

A summary of all consultation questions is provided below:

**Q1) Do you agree with the proposal to introduce a legally binding mechanism into the export control system for national treasures in the UK?**

**Q2) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect individuals applying for a licence to export a cultural object? Please provide evidence to support these views.**

**Q3) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect public institutions such as museums and galleries? Please provide evidence to support these views.**

**Q4) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect the UK art market? Please provide evidence to support these views.**

**Q5) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect organisations that fund public art acquisitions? Please provide evidence to support these views.**

**Q6) Do you have any evidence to show what effect the introduction of a legally binding mechanism into the export control system would have on the number of national treasures retained in the UK per year?**

**Q7) Do you have any views on an appropriate process for applying the option agreement where more than one relevant purchaser puts forward an expression of interest by the end of the first deferral period? Please provide evidence to support these views.**

**Q8) Do you have any views on the proposal to introduce a value threshold which would mean that export deferred items with a value equal to or below £100,000 would not be subject to the 'binding offers' system? Do you have any views on setting this value threshold at £100,000? Please provide evidence to support these views.**

**Q9) Do you have any views on the impact of the proposal to allow Sellers who purchased the cultural object in a currency other than sterling to require the purchase price to be specified in (or by reference to) that currency? Please provide evidence to support these views.**

**Q10) Do you have any views on the impact of the proposal to allow Buyers to choose the mechanism by which exchange rate fluctuations are mitigated under the option agreement? Please provide evidence to support these views.**

**Q11) What are the practicalities involved for interested institutions purchasing an object in a currency other than sterling?**

**Q12) Do you have any views on the impact of the proposal to cap the length of the second deferral period? Please provide evidence to support these views.**

**Q13) Do you have any views on the clauses in the option agreement concerning the preparation of condition reports and the consequences where damage is shown to have occurred, and the impact of those provisions on the process and parties (see clauses 2 and 8)?**

**Q14) Do you have any views on whether the warranties set out in clause 9 of the option agreement (and repeated in clause 4 of the form of Transfer Deed at Annex 2 to the option agreement) are sufficient?**

**Q15) Do you have any views on the approach of allowing for the parties to agree, on a case by case basis, the provisions in relation to delivery and transfer of risk (see clause 8.3.3)?**

**Q16) Do you have any views on the approach of allowing for the parties to agree, on a case by case basis, the provisions in relation to storage, security and viewing arrangements during the Option Period (see clause 5.2)?**

**Q17) Do you have any other comments about the drafting of the option agreement, in addition to the points covered in questions [13 to 16]?**

**Q18) Do you have any views on the scenarios outlined above detailing circumstances in which an export licence would or would not be granted? Please provide evidence to support these views.**

**Q19) Do you have any other comments about the proposed introduction of a legally binding mechanism into the export control system for cultural objects?**



## **ANNEX A: Commentary on the Draft Option Agreement**

Condition reports - Clause 2 of the draft option agreement provides for the potential purchaser (referred to in the agreement as “the Buyer”) to prepare a condition report in relation to the cultural object before the option agreement is signed by the parties. If the owner of the object (“the Seller”) objects to the report, the parties must jointly instruct an independent third party to prepare a further report. If the parties are unable to agree on the identity of the independent third party, the agreement provides for the President of the Law Society of England and Wales to nominate a suitable third party.

Clause 8 provides for a further condition report to be prepared by the Buyer after exercising the option, but before completion of the sale. If the report shows that the object has sustained damage since the first condition report was prepared, then a reduction will be made to the purchase price for the object, determined by an independent third party agreed by the Buyer and Seller (or nominated by the President of the Law Society). Alternatively, where the object has sustained damage, the Buyer can revoke their exercise of the option, either immediately or when the price reduction has been determined.

Warranties - Clause 9 of the draft agreement requires the Seller to give warranties in relation to various matters, including their authority to enter into the agreement, their ownership of the cultural object, and that they are not aware of any charge, pledge or other encumbrance affecting their right and title to the object.

Risk and delivery mechanisms - Clause 8.3.3 provides for the parties to agree between them, prior to entering the option agreement, the process for delivery of the object to the Buyer on completion of the sale, and the point at which risk passes to the Buyer.

Assignment of the Option Agreement - Neither party will normally be able to assign the option agreement to another party (see clause 12). However, special provision may be needed for cases where more than one appropriate purchaser puts forward an expression of interest by the end of the first deferral period.

In such 'multiple purchaser' cases, one possible approach could be to provide for the Secretary of State or another public body to enter into the option agreement with a view to assigning it to an appropriate purchaser during the second deferral period.

In those circumstances, only potential purchasers who put forward a serious expression of interest (which had been communicated to the owner) before the option agreement was signed, would be eligible to take assignment of the option agreement. The cost of the First Condition Report would probably be required to be borne jointly by all of the potential purchasers.

In such a multiple purchaser case, the Secretary of State or the public body which had entered the option agreement would need to specify a date prior to the end of the option period by which potential purchasers would be required to confirm whether they had raised

the necessary funding and wished to proceed with the purchase. If more than one potential purchaser confirmed that to be the case, the Seller would be given the opportunity to choose to whom the option agreement should be assigned. However, if the Seller did not express a preference within the necessary time frame, a decision would be made by the Secretary of State (or other public body which had entered into the option agreement).

Requirements regarding care and storage of the object - Clause 5.2 requires the Seller and the Buyer to agree, when the Option Agreement is being signed, the terms that will apply to the storage of the object during the Option Period. The approach will depend on the nature of the object and the circumstances at the time. In many instances, objects may be packed and stored, in the Seller's name, at an art repository which has been agreed by the Seller and Buyer. Alternatively, the object may be retained by the Seller and the only stipulation might be that there must be a climate controlled, secure space.

Confidentiality - Clause 10 requires both the Buyer and the Seller to keep the terms of the option agreement confidential, subject to exceptions specified in that clause (for instance, the Buyer may disclose the existence of the agreement, the purchase price and the length of the option period to its potential funders for the purpose of raising funds to purchase the object). Under the current export deferral process, the identity of the owner of the cultural object considered to be a national treasure would not usually be disclosed beyond those immediately involved in the process, and clause 10 will maintain that approach.

## ANNEX B: Glossary

- **A national treasure** - a cultural object judged to be of outstanding national importance to the United Kingdom. An object must meet one or more of the Waverley criteria to be deemed a national treasure.
- **The Waverley criteria** - The Waverley criteria are used to decide whether an object should be considered a national treasure on the basis that the object's departure from the UK would be a misfortune (see page 6 for further detail).
- **The Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (RCEWA)** - The RCEWA is an independent body which advises the Secretary of State on whether a cultural object that is the subject of an application for an export licence is a national treasure in the context of the Waverley criteria.
- **Expert adviser** - usually a director, senior keeper or curator in a national museum or gallery who can object to the granting of an export licence by scrutinising, against the Waverley criteria, whether the object is of national importance. If an expert adviser objects to the granting of a licence, the licence application is referred to the RCEWA.
- **The Arts Council** - The Arts Council of England (the Arts Council) is an executive non-departmental public body, sponsored by the Department for Digital, Culture, Media and Sport. The operation of the export control regime for cultural goods is the responsibility of the Export Licensing Unit (ELU) within the Arts Council.
- **Deferral period** - If the RCEWA concludes the object is a national treasure, it recommends to the Secretary of State that the decision on issuing a licence should be deferred for a period of time. The Secretary of State can defer the decision for a certain period of time ('a deferral period') to allow a purchaser to seek to acquire the object and keep it in the UK.
- **Legally binding mechanism (or a 'binding offer')** - The method by which an owner of a national treasure, who has entered the export deferral process, is legally required to accept a matching offer for the object to be purchased (if they have agreed to accept such an offer).
- **Option agreement** - the legally binding agreement to be entered into between the owner of the cultural object and the potential purchaser (or, if multiple matching offers are received, between the owner and potentially the Secretary of State or another public body) at the end of the first deferral period. Under the option agreement the potential purchaser will have a contractual right (but not an obligation) to buy the cultural object from the owner at the fair market price, by serving a notice in writing before the end of the option period (the second deferral period).

- **Buyer** - the potential purchaser of the cultural object (whether a UK public institution or private appropriate purchaser), in their capacity as a party to the option agreement; or, in cases where there are multiple potential purchasers, potentially the Secretary of State or another public body, in their capacity as a party to the option agreement (for the purpose of assigning the agreement to a potential purchaser prior to exercise of the option).
- **Seller** - the owner of the cultural object (and usually the licence applicant), in their capacity as a party to the option agreement.
- **Owner** - the legal owner of the cultural object to which the export licence application relates.
- **Appropriate purchaser** - a UK public institution, or an individual or company who will keep the object in the UK with a commitment to ensure reasonable public access, satisfactory conservation and security arrangements for the object.

## **ANNEX C - Privacy Notice**

The following is to explain your rights and give you the information you are entitled to under the Data Protection Act 2018 and the General Data Protection Regulation (“the Data Protection Legislation”).

Note that this section only refers to your personal data (your name, address and anything that could be used to identify you personally) not the content of your response to the consultation.

### **1. The identity of the data controller and contact details of our Data Protection Officer**

The Department for Digital, Culture, Media and Sport (“the department”) is the data controller. The Data Protection Officer can be contacted at [dcmsdataprotection@culture.gov.uk](mailto:dcmsdataprotection@culture.gov.uk). You can find out more here: <https://www.gov.uk/government/organisations/department-for-digital-culture-media-sport/about/personal-information-charter>

### **2. Why we are collecting your personal data**

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes.

### **3. Our legal basis for processing your personal data**

The Data Protection Legislation states that, as a government department, the department may process personal data as necessary for the effective performance of a task carried out in the public interest. i.e. a consultation.

### **4. With whom we will be sharing your personal data**

We will not share the personal data obtained through this consultation outside of the department. Anonymised copies of responses may be published after the consultation closing date on the Department’s website: [www.gov.uk/dcms](http://www.gov.uk/dcms).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

### **5. For how long we will keep your personal data, or criteria used to determine the retention period.**

Your personal data will be held for two years after the consultation is closed (for information regarding how long your personal data will be retained for, please see the **Disclosure of Responses** on page 4). This is so that the department is able to contact you regarding the result of the consultation following analysis of the responses.

#### **6. Your rights, e.g. access, rectification, erasure**

The data we are collecting is your personal data, and you have considerable say over what happens to it.

You have the right:

- to see what data we have about you
- to ask us to stop using your data, but keep it on record
- to have all or some of your data deleted or corrected
- to lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at <https://ico.org.uk/>, or telephone 0303 123 1113. ICO, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF.

**7. Your personal data will not be sent overseas.**

**8. Your personal data will not be used for any automated decision making.**

**9. Your personal data will be stored in a secure government IT system.**

**Please confirm that you have read and understood this statement and agree with its terms when you sending your consultation response to DCMS.**

**If you have any queries about this Privacy Notice, please contact [dcmsdataprotection@culture.gov.uk](mailto:dcmsdataprotection@culture.gov.uk) or if you have any queries about the consultation in general, please contact [nationaltreasuresconsultation@culture.gov.uk](mailto:nationaltreasuresconsultation@culture.gov.uk)**