Independent Review of the Spoliation Advisory Panel

Sir Paul Jenkins KCB QC

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The Spoliation Advisory Panel

A Review by Sir Paul Jenkins KCB QC

Chapter 1

Introduction

1.1 In December 2014 I was asked by the Department for Culture, Media and Sport ('DCMS') to undertake a review of the United Kingdom's Spoliation Advisory Panel ('the Panel'). The terms of reference for the review are at Annex A.

1.2 The scoping document for the review (also at Annex A) is a helpfully detailed document, suggesting both the areas which might merit examination and some of the detailed questions which might merit consideration. It provided me with an excellent route map through the review, albeit one which I have regarded as a guide rather than a fixed path.

1.3 I undertook extensive consultation with a wide range of individuals, organisations and institutions. I am grateful to all those who took the time and care to complete online questionnaires, to write to me and to see me. In addition to those with a direct interest in, and current involvement with, the Panel itself, I am particularly grateful to the President of the Supreme Court and Chair of the Spoliation Advisory Committee, Lord Neuberger and the United Kingdom's Holocaust Envoy, Sir Andrew Burns, for their time, insights and wisdom. I am grateful to the members of the Panel not only for their time and their thoughtful responses but also for allowing me to attend part of one of their meetings; and to Sir Terry and Lady Heiser for entertaining me to lunch when I interviewed Sir Terry in Sussex.

1.4 Sir Donnell Deeny has been an invaluable source of expertise and wisdom and I am grateful that he was able to devote so much time from his busy life to help my work.

1.5 The eminence of the Panel speaks for itself but is, perhaps, epitomised by Baroness Warnock who decided recently to relinquish her appointment. I am grateful that she, nevertheless, was able to give me the benefit of her experiences. I know from various conversations that she will be much missed.

1.6 The Dutch system is different from ours but also widely admired. I was especially grateful, therefore, for time and effort devoted by Evelien Campfens, the Director of the Dutch Restitutions Committee, to producing her thoughtful contributions to my work.

1.7 In addition to the detailed scoping document, DCMS provided me with extensive background material and with support throughout the consultation stage of the review. I am grateful for all that they did. I would single out my former colleague, Gareth Evans, for the excellent and comprehensive bundles he prepared and Mark Caldon, the Secretary to the Panel for his briefing, his wisdom and for sharing his deep understanding of the work of the Panel. Above all, however, I thank Siân Sinnott who has been with me throughout the review. Not only has she provided me with excellent support, tolerating my inefficiencies and occasional diary mishaps with cheerful good humour but she has also been a great source of common sense, challenge and bright ideas. I am very grateful.

Chapter 2

Executive Summary

2.1 There is widespread praise for the approach the United Kingdom has taken to the issue of cultural property spoliated during the Nazi era and now held in public collections.

2.2 There is also widespread praise for the generality of work of the Panel since its inception. But there is also a clear sense that, after fifteen years, the time is right for a review.

2.3 In approaching this review and the work of the Panel, it is important to recognise that the law is generally of little assistance to those who seek to make claims in respect of spoliated property. The Panel is not an attempt to resurrect the law and the full, unbending panoply of legal process; nor should it be seen as such. Rather it is a unique and imaginative response to uniquely dreadful events. It is important to recognise that its remit and its procedures reflect wise pragmatism and carefully measured compromises rather than an attempt to return the law and legal process to centre stage.

Membership of the Panel

2.4 I set out in paragraphs 6.8 to 6.34 detailed analysis of the membership issues. I recommend a number of changes. Two are of particular note. First, the group of expert advisers available to the Secretary of State should be expanded. Second, the entire group of experts should no longer sit *en banc* but in smaller groups chosen on a case by case basis. This should deliver a number of benefits, including fresh insights and perspectives, the sharing of expertise between new and current members, greater resilience, including when faced with conflicts of interest, long-term stability and, perhaps, greater expedition.

2.5 The specific recommendations are as follows.

Recommendation 1:

2.6 The current mix of expertise is right and should continue.

Recommendation 2:

2.7 Panel leadership by a High Court Judge should continue.

Recommendation 3:

2.8 A degree of rolling refreshment and expansion of the Panel is now desirable.

Recommendation 4:

2.9 A second High Court Judge and additional members should be appointed.

Recommendation 5:

2.10 Current expertise should not be lost but rather shared with a new generation of members.

Recommendation 6:

2.11 Current and new members should sit, intermingled, in Panels selected on a case by case basis. Each Panel should have the full mix of expertise referred to above.

Recommendation 7:

2.12 Moving away from the presumption that all the experts should be on every Panel will enable the size of the Panels to be reduced. Retaining the present mix of six areas of expertise would suggest the minimum size of the Panels should be seven, to include the Chair. It is difficult to be too prescriptive about this and the Secretary of State will wish to consider each Panel as the claims arise. But assuming, for the future, Panels of between seven and nine members, I would suggest the pool of experts should be expanded from eleven to twenty, comprising two High Court Judges and eighteen other members.

Recommendation 8:

2.13 The two Chairs should work together jointly to advise the Secretary of State on the appropriate composition of individual Panels.

Recommendation 9:

2.14 Of the new appointments, in addition to a further High Court Judge, there should be at least one more museums and one more fine art expert.

Recommendation 10:

2.15 These apart, the remaining six should be chosen to retain the current balanced mix of expertise and to ensure sufficient representation of the devolved nations.

Recommendation 11:

2.16 The availability of alternatives should enable both claimants and institutions to feel less inhibited about seeking recusals on the grounds of conflict or perception of conflict.

Recommendation 12:

2.17 It should be recognised, however, that there comes a point where otherwise legitimate public comment by members is incompatible with continued membership.

Terms of Reference

2.18 The Panel's Terms of Reference reflect the uniqueness I refer to in paragraph 2.3. In at least two respects they also reflect the compromises I mentioned.

2.19 Claims are restricted to objects spoliated between 1933 and 1945. There is a widespread acceptance that this provides an important and helpful degree of certainty and clarity and represents a sensible compromise.

Recommendation 13:

2.20 I recommend that claims should continue to be considered by the Panel only if the loss occurred between 1 January 1933 and 31 December 1945.

2.21 On the other hand there is no requirement that the loss should be as a direct result of the actions of the Nazis or their allies. This provision attracted some lingering concern in the case of the Beneventan Missal but it is seen by many as another sensible compromise especially given the evidential difficulties which would otherwise arise.

Recommendation 14:

2.22 The Terms of Reference should not be changed to require the loss to be more closely linked to the actions of the Nazis or their allies.

Recommendation 15:

2.23 There was no concern on the part of anyone I consulted about the definition of cultural property. I recommend no change.

2.24 Notwithstanding what I say in paragraph 2.3, the Panel necessarily considers some difficult legal issues. For example they consider whether an institution has proper title to the object in question. They also have to consider whether the application is brought by the rightful claimants.

2.25 But legal issues aside, the heart of the Panel's role is to judge the moral strength of the claimant's case and any moral obligations on the institution.

2.26 In terms of the moral case, the reality has been from the outset that, if spoliation is established, the claimant's moral case is almost invariably made out. The behaviour of the

institution, whether at the time of acquisition or subsequently, has always been largely irrelevant to the end result both in terms of substantive finding and remedy.

2.27 This is unsurprising. Institutions must necessarily test the arguments about spoliation and about the claimant's links to the original owner. It would be irresponsible not to do so, given their charitable and other duties. But no institution wants a spoliated object in its collection unless with the agreement of the heirs of the original owner. So spoliation becomes the tipping point.

Recommendation 16:

2.28 I recommend that the Terms of Reference should be clarified to make it clearer that, if spoliation is established on the balance of probabilities, the conduct of the institution will generally be irrelevant. I further recommend that the Panel make it clear that they will not generally entertain arguments about an institution's behaviour.

2.29 The Terms of Reference require strict confidentiality. It is important, of course, that the Panel and the parties recognise the importance of protecting the confidentiality of the process and the privacy of claimants. But, occasionally, this blanket provision can cause difficulties. Provenance research, for example, may need to be explained to third parties (rule 13 of the Panel's Rules of Procedure provides some scope here already). The media may, somehow, be confident they know of a claim, leaving an unresponsive institution looking disingenuous.

2.30 It is also the case that institutions may wish to give some limited publicity to the outcome of a claim, for example to show how the system works and the beneficial outcomes to all involved. This may even encourage other meritorious claims.

2.31 It is important that claims are not fought out in the media but a limited change to the present position is desirable.

Recommendation 17:

2.32 Unless even this would endanger the legitimate privacy of the claimant, I recommend that an institution should be able publicly to acknowledge that a claim has been made and, subject to the same caveat, explain what has happened to an object. But, save exceptionally, no more. The Panel, the claimants and the institution should respect fully the confidentiality of the process.

2.33 Several institutions raised the issue of straightforward claims for objects of low financial worth. Accepting that there needs to be due process either to bring the 2009 Act into play or to satisfy trustees or the Charity Commission that restitution is right, they suggested something akin to a fast-track, small claims procedure.

Recommendation 18:

2.34 Although straightforward claims will become increasingly uncommon, I recommend that the Panel seek to establish a fast-track, small claims procedure.

2.35 There was widespread concern about 'appeals' or more accurately applications for reconsideration based on new evidence. Decisions on re-referrals are for the Secretary of State but the criteria applied should be publicised.

Recommendation 19:

2.36 The criteria for re-referral should be included on the refreshed website (see Recommendation 26 at paragraph 2.59).

Recommendation 20:

2.37 The future of the Holocaust (Return of Cultural Property) Act 2009 ('the 2009 Act') and of the Panel after 2019 are not issues which this review was asked to consider. Most of my interlocutors nevertheless expressed the view that both should continue. I would merely endorse the view of Sir Andrew Burns, the United Kingdom's Envoy for post-Holocaust issues, who told me "the Government needs a strategy soon".

2.38 Absent a strategy, I find it difficult to make coherent recommendations on the question I am asked about whether a deadline for submitting claims should be set.

Rules of Procedure

2.39 There was near unanimity on the question of whether the current presumption of written process was satisfactory. The consensus was that the present approach worked well. Those with experience of oral hearings including, notably, the Panel thought they added little or nothing in evidential terms.

Recommendation 21:

2.40 The opportunity for oral hearings should remain but so too should the present, strong presumption that claims will generally be disposed of on the papers.

2.41 It was suggested that the Rules might be changed to give the parties sight of reports or drafts for three reasons: to check factual matters; to comment on 'unjust' statements; and to have time to prepare a handling strategy ahead of publication.

2.42 No clear view emerged in evidence on the question of factual inaccuracies. There is little evidence that there have been problems which, given the complexity of the cases, is another indication of the excellent work of the Panel. If the Panel have a doubt, they can check it.

2.43 As to checking for 'unjust' statements, I did hear complaints that reports were thought to be unfair. It is not for me to judge whether those complaints are right. But, in this regard at least, the Panel should be like a judge. The parties should not be allowed to re-argue their case when they see the draft judgment. The process could be never-ending. If one party objects to something as unfair, does it then have to go back to the other party? The Panel are more than able to judge if, at any stage in the process, fairness requires them to give the parties an opportunity to respond to potentially unjust points.

2.44 On the other hand, there will be occasions when a decision adverse to an institution may give rise to handling and presentational difficulties. It is perfectly reasonable for them to have a short period ahead of publication to prepare.

Recommendation 22:

2.45 I recommend that the parties should not generally be given the opportunity to check for 'unjust' statements. The Panel should continue to be mindful of the duty to be fair. They should be given a reasonable time before publication - say 48 hours – to prepare a handling strategy.

Working arrangements and external relationships

2.46 I heard much evidence about the style and content of reports. There is a sense, not entirely borne out on analysis, that reports have become longer and more discursive. Careful analysis suggests that the length of reports is determined almost entirely by the complexity of the case and the arguments presented. Parties' arguments need to be dealt with properly and not brushed aside just to achieve consistently concise reports. In this context, whilst I recall my initial observation about avoiding too much legal process, basic fairness requires the parties to see how the Panel approached their arguments.

2.47 Some of the concerns centre on the reporting of arguments, critical of institutions, which are largely irrelevant to the Panel's conclusions. I hope that my recommendation (paragraph 2.28) suggesting that arguments about alleged institutional misconduct should not generally be entertained, will help in this regard.

2.48 Whilst I make no recommendation about the style and content based on what has happened to date, I do think that the possibility of more than one panel does give rise to an issue.

Recommendation 23:

2.49 I have already said how important it will be for the two panel Chairs to work together on various matters. So too on the style and content of reports. They should agree, in effect, a house style.

2.50 A related issues concerns who should draft reports. When Sir David Hirst was Chair he produced the first draft; since then the great majority of the reports have been drafted by Sir Donnell Deeny, the rest produced by one of a number of members who volunteer. Some say

this is why the style and content of the reports has changed. Some say there is a less consistent approach. I think there is very little in these observations. Those who say reports are now longer, might look at the first Beneventan report. It is lengthy, and rightly so given the complexity of the issues.

2.51 For my part, I think the reports are consistently good and well-written. I was greatly impressed by the detailed attention given by the entire Panel to drafting. The enlarged Panel will increase the number of potential drafters. I recommend no further change.

Recommendation 24:

2.52 Reports should continue to be drafted by Panel members.

2.53 The members of the Panel are pre-eminent in their fields. Therein lies the strength and the high reputation of the Panel. But therein too lies a potential problem. They have strong opinions and they voice those opinions. They practise in the field.

2.54 I heard evidence from across the range of consultees – claimants, members and institutions - that this did, or might, give rise to perceptions of bias.

2.55 There will obviously be cases where it is clear a member should stand aside on a particular claim, for example if there is too close an association with an institution at a relevant moment or because of a direct professional conflict of interest. I am quite satisfied that in such cases the Panel's procedures and the judicial wisdom of the Chair deliver appropriate recusal.

Recommendation 25:

2.56 As to perceptions of bias generated either by public comment or professional engagements, it would be counter-productive to require Panel members never to speak about, or practise in, this area. A pragmatic approach is required, albeit one that recognises there may come a point when the perception is so strong that a member should stand down either for a claim or generally. The Secretary of State and the Chairs should be vigilant in this regard.

2.57 A recurring theme amongst consultees was the need for greater transparency and better information. The current website is inadequate. Many of the processes are opaque not only to claimants but even to those institutions with considerable experience of claims. Pro bono sources of advice and support should be better identified.

2.58 It is also striking how claims, even those prepared by lawyers, are badly presented. It might help claimants and expedite cases if guidance on what should be in a claim was drawn up and made available on line.

Recommendation 26:

2.59 DCMS should work with the Panel and other key stakeholders to improve the scope and quality of information available on line.

Secretariat and relationship with the Department

2.60 Some concerns have been raised about the apparent closeness of the Panel to DCMS. This is said to be of concern either because of the Department's links to the national museum and galleries or because of the possibility they will have to fund compensation payments. The Arts Council England ('ACE') now has responsibility for many former DCMS cultural property functions. Why not the Panel too?

2.61 A few consultees thought it might be sensible, although even they accepted that the links between ACE and the non-national institutions might lead to a different problem. Most did not really see the need for change. Only one instance of alleged inappropriate contact between DCMS and an institution was forthcoming. It was many years ago and there remains a clear division of views on whether anything untoward took place. It certainly was not enough to convince me there was a problem. In any event, the arrangements within DCMS are different now and the Secretariat are completely ring-fenced from the museums team.

Recommendation 27:

2.62 It is not clear to me there is a serious problem here. In evidence I heard of only one specific, disputed problem in this context and that was from the early days of the Panel. The Arts Council have close links to many regional museums and galleries. DCMS funding for compensation is surely unlikely in the current climate. My general point about pragmatism and compromise is relevant. The additional information referred to in the preceding part of this report (Recommendation 26 at paragraph 2.59) should include an explanation of the ring-fenced place of the Secretariat within DCMS. No other changes are recommended.

Funding and resourcing

2.63 From all that I saw, it is clear that claims proceed more quickly if they are based on excellent research. But it is unrealistic to expect the Government to fund additional research in the current climate. The burden must remain on the claimants and the institutions. With institutions large and small I saw evidence of a real desire to help. But I recognise that this can be an onerous burden on our largest institutions; and so much worse for the smaller ones.

Recommendation 28:

2.64 Although I hesitate to shift the burden from Government, it would be helpful the National Museums' Directors Council could consider funding a research post.

2.65 The generosity and dedication of members is striking. They do far more than might reasonably be expected of them. They give their time for no serious financial reward. This is public service at its best and we are all fortunate that they give so much of their time so freely and enthusiastically.

Recommendation 29:

2.67 Are these rewards sufficient? Of course not. But in the current climate it would not be sensible to advocate better remuneration. I hope that the additional members I recommend will also be drawn by the work and not the remuneration.

2.68 The present system is rightly admired. It works well and requires no radical or fundamental change. I hope the changes I recommend will deal with those few areas where some improvement is possible and desirable.

Chapter 3

The Washington Principles[1]
A fair and just solution

3.1 I was the Legal Adviser to DCMS from 1992 to 1998. In that time I was involved with many of the most difficult contemporary issues concerning cultural property. International instruments (for example at UNIDROIT and in the European Union) were being developed dealing with stolen and illegally exported cultural property. But none of the instruments were retrospective. Cultural property spoliated during the Nazi era was still, to many, something to be left in the past.

3.2 The 1943 Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control and various other, immediately post-war, declarations were in the past. Title had long since passed. Claims were statute barred. Many UK institutions were legally prohibited from de-accessioning objects they owned. Whether in civil or common law jurisdictions, so called 'hard law' was, by then, largely irrelevant.

3.3 There was, however, a growing acknowledgement that the unique nature of the systematic spoliation of cultural property by the Nazis was such that it could not be left in the past just because laws were unlikely to provide redress. In 1998, forty four nations adopted the *Washington Conference Principles on Nazi-confiscated Art*. The signatory States adopted non-binding rules which were intended to achieve 'a just and fair solution'[2] to the restitution of Nazi-spoliated art. They were encouraged to develop national processes to achieve this. There have been several subsequent international declarations building on the work at the Washington Conference.

3.4 The United Kingdom's response has been the establishment of the Spoliation Advisory Panel.

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[1] For a comprehensive analysis of the topic including a detailed exploration of the journey from the Nazi era to Washington and beyond, see the excellent *Fair and Just Solutions? Alternatives to litigation in Nazi-looted art disputes: status quo and new developments.* Evelien Campfens (ed) 2015. The book also contains explanations of current national responses to Nazi spoliation and all the significant international instruments.

[2] Always, seemingly, transposed as 'fair and just'.

Chapter 4

The Spoliation Advisory Panel and the Holocaust (Return of Cultural Property) Act 2009

4.1 On 13 April 2000, the Government announced the establishment of the Spoliation Advisory Panel[3].

4.2 The Panel's "*paramount purpose shall be to achieve a solution which is fair and just both to the claimant and to the institution*"[4].

What is the Panel?

4.3 The relevant page on the Government website says[5]:

"The Panel resolves claims from people, or their heirs, who lost property during the Nazi era, which is now held in UK national collections.

The Panel is appointed by the Secretary of State. It considers both legal and non-legal obligations, such as the moral strength of the claimant's case, and whether any moral obligation rests on the holding institution."

4.4 I refer at various points in this report to some of the complexities and confusions in the published information about the Panel.

4.5 But the crux of the matter is this: through the Panel, the United Kingdom seeks to give effect to the Washington principles**.** Critically, given the inadequacies of the law, a fair and just solution is achieved primarily by examining issues of morality.

4.6 I turn to its detailed functions shortly. But first, who are they?

Who are the Panel?

4.7 Strictly speaking, a Panel is constituted by the Secretary of State on a case by case basis to consider a specific claim or claims. The document at Annex C is the standard form used to constitute a Panel and includes the standard Terms of Reference. The original Terms of Reference were drawn up after a consultation process and notified to Parliament when the Panel was first established in 2000.

4.8 The duly constituted Panel comprises a group of expert advisers established by the Secretary of State. In practice, subject to rare recusals, every Panel constituted to date has

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[3] HL Deb 13 April 2000 c62W

[4] Paragraph 14, PANEL Terms of Reference. See Annex C

[5] www.gov.uk/government/groups/spoliation-advisory-Panel

comprised all the expert advisers. For ease of reference and unless the context otherwise requires, I generally refer in this report to the Panel when I mean either a specific Panel appointed for a specific case or the Secretary of State's expert advisers in general.

4.9 The Panel (in the general sense) comprises eleven experts. With one exception, they were all appointed in 2000. The original Chair, Sir David Hirst, died in 2012. He was replaced, as Chair, by existing member Sir Donnell Deeny. Tony Baumgartner joined as a new member in 2013. The members were, until 2009, appointed and reappointed under public appointment principles. Since 2009, there has been no limitation on the length of their appointments.

4.10 The current members are listed at Annex B. The Chair is a High Court Judge. There are two other lawyers, one of whom is a Crown Court Recorder and the other is one of the United Kingdom's leading experts in cultural property law. There are Professors of Modern History, History and the Philosophy of Science, and of Humanities, the President of the Oxford Centre for Hebrew and Jewish Studies and, until very recently the pre-eminent moral philosopher and Peer, Baroness Warnock. There is a former Permanent Secretary, one museum Director and one fine art dealer.

4.11 It really is quite an exceptionally distinguished group of people.

What does it do?

4.12 What are the detailed functions of the Panel?

4.13 The functions are largely set out in the Terms of Reference (see Annex C) but essentially they are required to advise the claimant and the institution on what they consider an appropriate response to a claim. They may also advise the Secretary of State on both general and specific issues raised by that claim.

4.14 Paragraph 15 sets out what the Panel shall do. It shall:

(*a*) *make such factual and legal inquiries, (including the seeking of advice about legal matters, about cultural objects and about valuation of such objects) as the Panel consider appropriate to assess the claim as comprehensively as possible;*

(b) assess all information and material submitted by or on behalf of the claimant and the institution or any other person, or otherwise provided or known to the Panel;

(c) examine and determine the circumstances in which the claimant was deprived of the object, whether by theft, forced sale, sale at an undervalue, or otherwise;

(d) evaluate, on the balance of probability, the validity of the claimant's original title to the object, recognising the difficulties of proving such title after the destruction of the Second World War and the Holocaust and the duration of the period which has elapsed since the claimant lost possession of the object;

(e) give due weight to the moral strength of the claimant's case;

(f) evaluate, on the balance of probability, the validity of the institution's title to the object;

(g) consider whether any moral obligation rests on the institution taking into account in particular the circumstances of its acquisition of the object, and its knowledge at that juncture of the object's provenance;

(h) take account of any relevant statutory provisions, including stipulations as to the institution's objectives, and any restrictions on its power of disposal;

(i) take account of the terms of any trust instrument regulating the powers and duties of the trustees of the institution, and give appropriate weight to their fiduciary duties;

(j) where appropriate assess the current market value of the object, or its value at any other appropriate time, and shall also take into account any other relevant circumstance affecting compensation, including the value of any potential claim by the institution against a third party;

(k) formulate and submit to the claimant and to the institution its advice in a written report, giving reasons, and supply a copy of the report to the Secretary of State, and

(l) formulate and submit to the Secretary of State any advice pursuant to paragraph 7 in a written report, giving reasons, and supply a copy of the report to the claimant and the institution.

4.15 Having done all this, paragraphs 16 and 17 provide as follows:

If the Panel upholds the claim in principle, it may recommend either:

(a) the return of the object to the claimant, or

(b) the payment of compensation to the claimant, the amount being in the discretion of the Panel having regard to all relevant circumstances including the current market value, but not tied to that current market value, or

(c) an ex gratia payment to the claimant, or

(d) the display alongside the object of an account of its history and provenance during and since the Nazi era, with special reference to the claimant's interest therein; and

(e) that negotiations should be conducted with the successful claimant in order to implement such a recommendation as expeditiously as possible.

17. When advising the Secretary of State under paragraph 7(a) and/or (b), the Panel shall be free to recommend any action which they consider appropriate, and in particular may under paragraph 7(b), recommend to the Secretary of State the transfer of the object from one of the bodies named in the Holocaust (Return of Cultural Objects) Act 2009.

4.16 I deal with the 2009 Act below (paragraphs 4.26 to 4.31)

How does it do it?

4.17 In addition to its Terms of Reference, the Panel has Rules of Procedure (Annex D).

4.18 It is noteworthy that only here do we find how to make a claim. Rule 1 invites claimants who wish the Panel to consider a claim to submit it in writing to the Secretariat. The Government website makes no mention of how to make a claim, nor does it provide a link to the Rules of Procedure. The Secretariat is, however, given as the contact.

4.19 The Rules provide that the Secretary of State will then determine whether or not to appoint a Panel to consider the claim.

4.20 As I have already observed, there is a degree of complexity and confusion, of which more later. But, for example, all involved in a claim are required generally to observe strict confidentiality throughout the process. Various iterations of the confidentiality requirement are to be found in paragraphs 5 and 13 of the Rules and paragraphs 12 and 13 of the Terms of Reference.

4.21 For the moment, and trying to stick to the straightforward, the following additional procedural basics emerge from the Rules.

4.22 The claimant's written case and supporting evidence is provided to the relevant institution which has six weeks to respond.

4.23 There are opportunities for further exchanges of evidence and for the Panel to seek greater clarity.

4.24 The Panel will determine the case either on the basis of written material or with the benefit of an oral hearing. Oral hearings are very rare. There is a power to administer oaths.

4.25 Not dealt with in either the Terms of Reference or the Rules are the circumstances surrounding publication of any report. I am told that it was generally understood that the parties were given an embargoed copy of the report 24 hours before publication by the Secretary of State. This was to enable them to prepare any response. I was also, however, told that this was no longer, invariably, such a short period. I was also told that, generally, the parties are given two working days to comment on any factual mistake or unjust comment.

The Holocaust (Return of Cultural Property) Act 2009

4.26 The 2009 Act complements the work of the Panel.

4.27 Many national institutions are prevented by statute from de-accessioning some or all of the objects in their collections and to which they have good title. This meant that they could only respond to findings of the Panel advising some form of restitution by providing financial restitution. They could not return the object even if they wished to do so and even if that is what the claimant wanted. The relevant institutions are listed in section 1 of the Act.

4.28 The 2009 Act gives a way through this problem and, in simple terms, provides a mechanism for allowing an institution listed in section 1 to return an object in response to a finding by the Panel notwithstanding the statutory prohibition on de-accessioning. That mechanism is straightforward and I do not need to go into detail. Of note, however, is the fact that, by virtue of section 4(7), the 2009 Act will cease to have effect on 12 November 2019, ten years after it was passed.

4.29 There is no power by Order to extend the 2009 Act. Absent fresh primary legislation, several institutions will, once again, no longer be able to respond to Panel reports other than with financial restitution.

4.30 It is worth noting here that although the Short Title of the 2009 Act refers to the Holocaust, the Long Title does not:

An Act to confer power to return certain cultural objects on grounds relating to events occurring during the Nazi era.

4.31 I return to this in Chapter 6.

Private Collections

4.32 To complete the factual description of the Panel, what it does and how it does it, I draw attention to paragraph 6 of the Terms of Reference.

4.33 Although the primary function of the Panel is to resolve claims about cultural property held in national collections, paragraph 6 suggests that the opportunity also exists for it to advise about objects in private collections. This provision has never been used and is, rather confusingly to my mind, only mentioned in the Terms of Reference given when a Panel is constituted to advise on a claim against an institution. Nevertheless it can be assumed that, with the agreement of claimant and owner, the Panel can advise on an object in a private collection.

Chapter 5

The Review

5.1 I have already set out in the Introduction some details of my appointment. I think it is helpful to explain why, as I understand, it this review was thought appropriate at this time.

5.2 The Panel has been in operation for fifteen years and the 2009 Act for five. Absent further primary legislation, the 2009 Act will end in late 2019 but the Panel will continue unless disbanded by the Secretary of State. There will be considerable pressure to re-enact the legislation and to retain the Panel. So the end is not necessarily in sight. But, however long remains, it was considered right to review the workings of the Panel at this stage. Most public bodies are reviewed periodically. This one should be no different.

5.3 In the midst of much praise for the generality of the work of the Panel, I have heard some criticisms. These come from institutions, from claimants and from those who are otherwise disinterested in the work of the Panel. I know that some believe that some of these criticisms may have played a part in triggering this review. For my part, I have approached my work with an open mind, sharing the view of many of my interlocutors that, after fifteen years, a review is, on any view, timely.

Chapter 6

Analysis and conclusions

Introduction

6.1 I consulted widely for the purpose of this review (see Annex E). Online questionnaires were sent to, and completed by, members of the Panel, institutions, claimants, their representatives and others with a close interest in the issues. Several of those who responded to the questionnaires also wrote to me with more detailed views. I conducted eighteen interviews and attended a meeting of the Panel. I am grateful to everyone for their time and for the thought they gave to the issues under review.

6.2 On many of the issues a broad degree of consensus emerged. But not all. Inevitably some of the evidence I received was informed by a particular problem encountered by an institution or a claimant. I have tried to balance all the evidence fairly and objectively in reaching my conclusions.

6.3 Two general points emerged clearly and strongly.

6.4 First, there is widespread praise and support for the approach the United Kingdom has taken to the issue of cultural property spoliated during the Nazi era and now held in public collections.

6.5 Second, there is also widespread praise for the generality of work of the Panel since its inception. But there is also a sense that, after fifteen years, the time is right for a review.

6.6 There is also one, overarching point I should make. The law is generally of little assistance to those who seek to make claims in respect of spoliated property. The Panel is not an attempt to resurrect the law and the full, unbending panoply of legal process; nor should it be seen as such or judged as such. Rather it is a unique and imaginative response to uniquely dreadful events. It is important to recognise that its remit and its procedures reflect wise pragmatism and carefully measured compromises rather than an attempt to return the law and legal process to centre stage.

6.7 In this final part of my report, I follow broadly the questions in the scoping document which underpins my terms of reference. (Annex A).

Membership of the Panel

6.8 The current members of the Panel are at Annex B and are described further in paragraphs 4.9 and 4.10 above. Generically the composition of the Panel represents:

- Law, including art and cultural property law;
- Ethics and humanities;
- Museums' policy;
- History, including Europe during 1933-1945;
- Fine art; and
- Public administration.

6.9 There was almost universal agreement amongst my interlocutors that this mix of six areas of expertise was right in terms of skills and qualifications.

6.10 There was also agreement that it was desirable to have a High Court Judge as Chair.

6.11 Keeping the mix of expertise and the level of leadership as it is, I turn to the members themselves.

6.12 A number of factors have led me to the conclusion that there should be a degree of rolling refreshment of the membership and that, for the foreseeable future, the number of members should be increased. In future, Panels should comprise some, but not all, of the expanded membership.

6.13 What are these factors?

6.14 First, the 2009 Act complements the work of the Panel. It provides a mechanism to permit those national museums and galleries who are otherwise prevented by statute from de-accessioning objects to do so in response to a recommendation of the Panel. The 2009 Act expires in 2019. Much of the evidence I heard suggests there will be great pressure for it to be re-enacted. There is, in any event, no similar time limitation on the existence of the Panel itself. The Panel may therefore continue in existence for some considerable time. Unless and until the future of the 2009 Act is clarified, its impending end may result in an increase in claims. I return to these specific issues later but mention them here both because of the likely increase in workload and because, when considering membership, I think there is a strong case for looking to the long-term strength and stability of the Panel.

6.15 Second, current best practice in public appointments is intended to deliver refreshment both of membership and of thinking by appointments (and occasional reappointments) of no more than five years. Since 2009 appointments to the Panel have not been covered, formally at least, by the rules governing public appointments. Nor, in any event, are those rules inflexible. I heard much cogent evidence of the value of experience in this esoteric work especially given

the relatively few cases which the Panel has dealt with since its inception. In my view the benefits of refreshment and retained expertise need to be combined.

6.16 Third, in terms of composition, some asked whether three lawyers were necessary. The Chair and several members of the Panel commented on the value not just of expertise in art and cultural property law but also of a legal mindset more generally. Nevertheless I think that, with a High Court Judge chairing the Panel, two further lawyers is somewhat luxurious.

6.17 Fourth, others observed that there is only one museums' and one fine art expert, pointing out that, in the event of recusal, there would be none. Given the general agreement that the skills mix is right, this point is of concern.

6.18 Fifth, the jurisdiction of the Panel covers the whole of the United Kingdom. Amongst the present membership of the Panel there is one with close connections to each of the devolved nations. This is done deliberately against the day when claims from institutions in the devolved nations arise (there have only been claims against Scottish institutions to date). But the same concern about possible recusal arises.

6.19 Sixth, inevitably given the professional expertise, experience and profile of members, occasional conflicts of interest arise; so too perceptions of such conflicts. I bear in mind my general observation about not treating the Panel's work with all the rigours of legal process and also the great value of having such eminent Panel members. But interlocutors from across the spectrum of consultees expressed concern that there came a point when public utterances or conflicting professional engagements would undermine confidence in the work of the Panel. Both the Secretary of State and Panel chairs need to be alert to this issue.

6.20 Finally, claims take, on average, eighteen months to be dealt with. This is no criticism of the Panel but the evidence suggests it reflects several factors: the complexity of claims; the initial opaqueness and/or inadequacy of claims; the difficulties of getting the entire Panel together.

6.21 All these points taken together leads me to the following conclusions.

Recommendation 1:

6.22 The current mix of expertise is right and should continue.

Recommendation 2:

6.23 Panel leadership by a High Court Judge should continue.

Recommendation 3:

6.24 A degree of rolling refreshment and expansion of the Panel is now desirable.

Recommendation 4:

6.25 A second High Court Judge and additional members should be appointed.

Recommendation 5:

6.26 Current expertise should not be lost but rather shared with a new generation of members.

Recommendation 6:

6.27 Current and new members should sit, intermingled, in Panels selected on a case-by-case basis. Each Panel should have the full mix of expertise referred to above.

Recommendation 7:

6.28 Moving away from the presumption that all the experts should be on every Panel will enable the size of Panels to be reduced. Retaining the present mix of six areas of expertise would suggest the minimum size of Panels should be seven, to include the Chair. It is difficult to be too prescriptive about this and the Secretary of State will wish to consider each Panel as the claims arise. But assuming, for the future, Panels of between seven and nine members, I would suggest the pool of experts should be expanded from eleven to twenty, comprising two High Court Judges and eighteen other members.

Recommendation 8:

6.29 The two Chairs should work together jointly to advise the Secretary of State on the appropriate composition of individual Panels.

Recommendation 9:

6.30 Of the new appointments, in addition to a further High Court Judge, there should be at least one more museums and one more fine art expert.

Recommendation 10:

6.31 These apart, the remaining six should be chosen to retain the current balanced mix of expertise and to ensure sufficient representation of the devolved nations.

Recommendation 11:

6.32 The availability of alternatives should enable both claimants and institutions to feel less inhibited about seeking recusals on the grounds of conflict or perception of conflict.

Recommendation 12:

6.33 It should be recognised, however, that there comes a point where otherwise legitimate public comment by members is incompatible with continued membership.

6.34 Once the entire group of expert advisers no longer sit *en banc* on every claim, particular care will be needed to ensure claims with similar characteristics or from the same claimants are handled consistently. The two Chairs will need to work together, advising the Secretary of State and sharing information as necessary.

Terms of Reference

6.35 As the scoping document (Annex A) makes clear some of the questions which arise in this area of the review are fundamental to the Panel's role and work.

6.36 I received some criticism that previous changes to the Term of Reference had been made without consultation or adequate promulgation. Whatever has happened to date, I am clear that any changes of significance should be subject to formal consultation and formal promulgation. Given that the original Terms of Reference were provided to Parliament, Ministers will also wish to consider whether any changes are sufficient to merit further mention in Parliament.

6.37 The first issue I am asked to consider is the present limitation on claims to losses occurring between 1 January 1933 and 31 December 1945.

6.38 I discussed this with all my interlocutors and was struck by the overwhelming view in favour of the status quo. I tested this view with consultees, probing hypothetical 'hard' cases - for example a desperate, immediate post-war sale of flight goods. The consensus remained that there needed to be some limitations and that for sound practical and evidential reasons the current ones are sensible.

Recommendation 13:

6.39 I recommend that claims should continue to be considered by the Panel only if the loss occurred between 1 January 1933 and 31 December 1945.

6.40 I was next asked to consider if the Panel's jurisdiction should, in future, be limited to losses occurred as a direct result of the actions of the Nazis or their allies.

6.41 There was less consensus on this question. There was widespread recognition that it avoided some of the evidential difficulties which might arise if it was necessary to link the loss to the actions of the Nazis or their allies. On the other hand there was also a sense that the Washington Principles were about spoliation in the Holocaust and were not intended to cover property lost in the general chaos of war or, indeed, merely lost during the period in question.

6.42 The only relevant case to date where the Panel has acted is the Beneventan Missal, considered twice once in 2005 and again, following the enactment of the 2009 Act. The Panel recorded at the start of their first report that:

"*Although the claim has no direct Nazi connotation, we came to the conclusion at the outset, not without some hesitation, that it fell prima facie within our jurisdiction, having regard to the date of the alleged loss….*"

6.43 This was a complicated case which, even once jurisdiction was accepted, turned on a fine judgment on the balance of probabilities about when the loss occurred. But it is the lack of any direct link to the actions of the Nazis or their allies which remains of interest and some controversy.

6.44 It was pointed out to me that the Short Title of the 2009 Act refers to the Holocaust and it was suggested that Parliament must have had intended to limit its effect to objects spoliated in the Holocaust. But the Long Title makes no mention of the Holocaust. Further, by the time the 2009 Act was passed, the first Beneventan decision had been taken based on the Terms of Reference placed before Parliament in 2000. I am not sure this aspect of the debate is helpful. The better question to consider is whether, if the approach taken by the Panel in the Beneventan case is in accord with the current Terms of Reference; are those Terms of Reference sound?

6.45 For my part, I think they are. I refer to my general observation at the start of this Chapter about the pragmatism and the compromises inherent in our system. The 1933-1945 limitation is one such example; this is another. I would leave the provision as it is now.

6.46 At the risk of complicating matters, I would emphasise the scope the Panel has when considering these claims. For my part, and notwithstanding both the Beneventan decision and my preference for the status quo, I can see cases failing where the loss was too remote from the actions of the Nazis. An object accidentally lost during flight from continental Europe in 1938?

Recommendation 14:

6.47 The Terms of Reference should not be changed to require the loss to be more closely linked to the actions of the Nazis or their allies.

Recommendation 15:

6.48 There was no concern on the part of anyone I consulted about the definition of cultural property. I recommend no change.

6.49 Notwithstanding what I say at the outset, the Panel necessarily considers some difficult legal issues. For example they consider whether the institution has proper title to the object in question and they also have to consider whether the application is brought by the rightful claimants.

6.50 Nevertheless, at the heart of the United Kingdom's system are judgments about the moral strength of the claimant's case and about the moral obligations on the institution. Unsurprisingly consideration of these issues was one of the dominant elements of this review, especially in discussions.

6.51 The current provisions in the Terms of Reference – paragraphs 15 (e) for claimants and 15 (g) for institutions - are, consistent with my general observation about our pragmatic system, open to any number of different approaches. But in practice the high watermark of any claimant's moral case is always likely to be spoliation; the low water mark of an institution's position would be flagrantly neglectful provenance research at the time of acquisition by the standards prevailing at the time.

6.52 Any number of other factors might be prayed-in-aid when seeking a fair and just solution. The Dutch system is very different in key ways from ours but also widely admired (and splendidly resourced). They sometimes take into account the importance of the object to the institution's collection when weighing the moral balance. Some urge the relevance of a successful claimant's intentions: a likely sale is said to undermine their case or bolster that of the institution. Should a dealer's spoliated stock be treated differently from a family piece? Arguments abound about the behaviour of institutions at the time of acquisition and subsequently.

6.53 The United Kingdom's Panel has seen the widest range of such arguments. But they have consistently rejected any suggestion that the importance of the object to a national collection supports an institution's case. So too the argument that a successful claimant might subsequently sell the object. Although the Panel has, at times, been critical of institutions for perceived failings, little if anything has ever turned on such failings. The fact is that almost every decision turns on spoliation or not. Establishing spoliation to the requisite standard of proof almost invariably makes good the claim. All other points are deemed irrelevant.

6.54 In a way, this is unsurprising. Institutions must necessarily test the arguments about spoliation and about the claimant's links to the original owner. It would be irresponsible not to do so, given their charitable and other duties. But, generally speaking, no institution wants a spoliated object in its collection unless with the agreement of the heirs of the original owner. So spoliation becomes the tipping point.

6.55 Given that this comes through pretty clearly in the Panel's reports it is, perhaps, surprising that so many claimants nevertheless seek to pile obloquy on institutions. Are they confused by the juxtaposition of paragraphs 15 (e) and (g)? Are they encouraged by their lawyers to believe it will help their case?

6.56 Lawyers can sometimes help unravel complexity and bring clarity, although I saw evidence that this was certainly not always the case. Good lawyers presenting the claimant's arguments for spoliation and for their rights as legitimate heirs would greatly assist the Panel in the expeditious dispatch of cases. But, whether helpful or not, lawyers come at a cost not only to the claimants in terms of substantial 'success' fees but also in terms of prolonging the process and in terms of discord: institutions can hardly remain silent when faced with criticism they

deem unfair. One very distinguished and largely disinterested interlocutor put it to me that some lawyers are “astonishingly aggressive and predatory”.

6.57 I tested with many interlocutors whether an explicit shift of emphasis towards what is, in fact, the status quo might help. There was widespread acceptance, including amongst the institutions, that it would.

Recommendation 16:

6.58 I therefore recommend that the Terms of Reference should be clarified to make it clearer that, if spoliation is established on the balance of probabilities, the conduct of the institution will generally be irrelevant. I further recommend that the Panel make it clear that they will not generally entertain arguments about an institution’s behaviour.

6.59 I am conscious that institutions, their trustees, Ministers, the Charity Commission, Parliament even, may have an interest in the institution’s behaviour. Why has this gift been relinquished? Why has taxpayers’ money been spent compensating a claimant?

6.60 I tested the idea that the Panel, irrespective of the claimant, should have a role examining whether the institution undertook due diligence to the standards prevalent at the time of acquisition. There was an understandable reluctance on the part of the Chair to “become a regulator”. I was concerned that such a role might harm the relationship between the institutions and the Panel. I also think that in an egregious case the institution will be called to account in any event. I make no recommendation in this regard.

6.61 Finally, on this issue I reiterate that the Panel has great flexibility in its Terms of Reference. I recommend a shift of emphasis and a strong presumption against entertaining arguments about an institution’s behaviour. But I am not saying “never”. It will always be up to the Panel at the end of the day.

6.62 I turn next to confidentiality.

6.63 The Terms of Reference require strict confidentiality. It is important, of course that the Panel and the parties recognise the importance of protecting the confidentiality of the process and the privacy of claimants. But, occasionally, this blanket provision can cause difficulties. I heard convincing evidence that an institution conducting provenance research in response to a claim, for example, may need to be explained to third parties. (Rule 13 of the Panel’s Rules of Procedure provides some scope here already)

6.64 The media may, somehow or other, be confident they know of a claim, leaving an unresponsive institution looking disingenuous. I heard troubling evidence of this too.

6.65 Some institutions thought there was little that could be done, in reality, to constrain claimants and felt fairness should allow them to speak out too. It was also pointed out that, with the passage of time, the number of potential heirs was growing and that complete

confidentiality exacerbated the risk that the claimants presenting the claim were not the only entitled heirs.

6.66 And, of course, the Panel's reports are published.

6.67 I also heard from institutions who would wish to give some limited publicity to the outcome of a claim, for example to show how the system works and the beneficial outcomes to all involved. This may even encourage other meritorious claims.

6.68 It is important that claims are not fought out in the media but a limited change to the present position is desirable.

Recommendation 17:

6.69 Unless even this it would endanger the legitimate privacy of the claimant, I recommend that an institution should be able publicly to acknowledge that a claim has been made and, subject to the same caveat, explain what has happened to an object. But, save exceptionally, no more. The Panel, the claimants and the institution should respect fully the confidentiality of the process.

6.70 Several institutions raised the issue of straightforward claims for objects of low financial worth. Such cases will rarely attract lawyers to help claimants and the length of time taken to resolve them can be disproportionally burdensome to both the claimant and the institution. Accepting that there needs to be due process either to bring the 2009 Act into play or to satisfy trustees or the Charity Commission that restitution is right, they suggested something akin to a fast-track, small claims procedure. Some on the Panel stressed the importance of "doing a proper job" and also the pride taken in the thoroughness of reports. It was also suggested that slowness in straightforward cases was more to do with the infrequency of Panel meetings. I hope my suggested changes to the broad Panel arrangements will ameliorate this last point. As to the main suggestion, I think it has great merit.

Recommendation 18:

6.71 Although straightforward claims will become increasingly uncommon, I recommend that the Panel seek to establish a fast-track, small claims procedure.

6.72 There was widespread concern about 'appeals' or more accurately applications for reconsideration based on further evidence. Decisions on whether a claim should be referred back to the Panel are for the Secretary of State. I deal below with the need to improve the information available about all aspects of the processes under review. It should include the criteria adopted by the Secretary of State.

Recommendation 19:

6.73 The criteria for re-referral should be included on the refreshed website.

6.74 And so to the sunset clause.

6.75 I have already (paragraphs 4.26 to 4.31) referred to the 2009 Act and the fact that it will come to an end in 2019. In the scoping document I am asked to consider whether an end date should, therefore, be set for claims.

6.76 This is a difficult issue. As I have already pointed out the end of the 2009 Act would not, in itself, mean the end of the Panel. The Panel functioned, albeit sub optimally, from 2000 to 2009 without the Act. It could do so again, deprived only of the ability to make an effective recommendation that an object be returned by any of the institutions which were prevented by statute from de-accessioning.

6.77 I judge from the evidence I have heard that there will be great pressure on the Secretary of State to retain the Panel beyond 2019. I judge too that there will be similar pressure to re-enact the 2009 Act. Very few of my interlocutors argued otherwise. Several pointed out how difficult and unattractive it would be for the United Kingdom to relinquish its leadership on these issues just as a number of other countries were starting, for the first time, to take the issues seriously.

Recommendation 20:

6.78 The future of the Holocaust (Return of Cultural Property) Act 2009 ('the 2009 Act') and of the Panel after 2019 are not issues which this review was asked to consider. Most of my interlocutors nevertheless expressed the view that both should continue. I would merely endorse the view of Sir Andrew Burns, the United Kingdom's Envoy for post-Holocaust issues, who told me "the Government needs a strategy soon".

6.79 Absent a strategy, I find it difficult to make coherent recommendations on the question I am asked. If it was only a question of the 2009 Act I would agree that, with an end date looming, it would be wise to indicate an end date for the submission of claims. Precisely what that date should be has eluded me. There are several factors to consider. The average claim takes 18 months at the moment. An announcement might trigger more claims. But there would be scope for more Panels under the new arrangements I have suggested. It would be difficult if cases were just dropped when the Act expired. All of which suggest erring heavily on the side of caution. Two years?

6.80 But that view is based on the premise that it is only a question of the 2009 Act. As I have said, it is not. And announcing the end of the Panel would, I suggest trigger, legal challenge, further complicating of what might be set as an end date for the submission of claims. To reiterate: the Government needs a strategy.

Rules of Procedure

6.81 The first two questions I am asked to consider relate to the substantive processes followed by the Panel.

6.82 The Panel operates primarily on the basis of written evidence. Oral hearings are provided for under the Rules, but are rare. Is this the best way to achieve a fair and just solution?

6.83 This was one of the questions under review where there was near unanimity in the responses. The consensus, in this regard, was that the present approach worked well. Those with experience of oral hearings including, notably, the Panel thought they added little or nothing in evidential terms. I tested, as far as I could, whether they ever served an emotional value for claimants but, even on this point, there was a sense that lawyers were the only real beneficiaries.

Recommendation 21:

6.84 The opportunity for oral hearings should remain but so too should the present, strong presumption that claims will generally be disposed of on the papers.

6.85 Should the parties be allowed to comment on factual inaccuracies or unjust statements and, if so, at what point? At present, I was told, they usually have two working days to make such comments.

6.86 No strong views emerged in evidence on the question of factual inaccuracies. There is little evidence that there have been problems which, given the complexity of the cases, is another indication of the excellent work of the Panel. When I sat in on a meeting of the Panel, I saw the great thoroughness with which they approached the detailed drafting of their reports.

6.87 I sense no great need to change the procedure for factual inaccuracies. If the Panel have a doubt, they can check it. If they do feel the need to check, then it certainly should be done before the report is sent to the Minister or a publication date set.

6.88 As to checking for unjust statements, I did hear complaints that reports were thought to be unfair. It is not for me to judge whether those complaints are right. But, in this regard at least, the Panel should be like a judge. The parties should not be allowed to re-argue their case when they see the draft judgment. The process could be never-ending. If one party objects to something as unfair, does it then have to go back to the other party? The Panel are more than able to judge if, at any stage in the process, fairness requires them to give the parties an opportunity to respond to potentially unjust points. I am happy to leave these issues to the Panel.

6.89 Although not in the scoping document or the Rules of Procedure, I was told the parties were given 24 hours' notice of publication to enable them to prepare any handling issues. I was

also told that this was now a more flexible period. This is primarily a concern for the institutions who will have trustees and donors to consider. An embargoed copy for 48 hours is reasonable and enough to plan a handling strategy.

Recommendation 22:

6.90 I recommend that the parties should not generally be given the opportunity to check for 'unjust' statements. The Panel should continue to be mindful of the duty to be fair. They should be given a reasonable time before publication - say 48 hours – to prepare a handling strategy.

6.91 Finally on the Rules, I am asked if the parties should sign a confidentiality statement at the start of the process. I have already pointed out (paragraph 4.20) just how muddled the confidentiality references are in the Terms of Reference and the Rules. But I see no need for any formal confidentiality agreements. Is it likely anyone would seek actually to enforce one?

Working arrangements and external relationships

6.92 The issues I am asked to consider here relate to the style, content and drafting of the reports and to conflicts of interest. I add my own issue about the adequacy or otherwise of published information.

6.93 I heard much evidence about the style and content of reports. There is a sense, not entirely borne out on analysis, that reports have become longer and more discursive. Some point to the supposedly more concise Dutch reports. Their system is different and, whilst I have found an examination of it instructive in many ways, it does not help here. Careful analysis suggests that the length of United Kingdom reports is determined almost entirely by the complexity of the case and the arguments presented. There is a sense that, once again, lawyers are part of the problem. But also a strong sense that parties' arguments need to be dealt with properly and not brushed aside just to achieve consistently concise reports. In this context, whilst I recall my initial observation about avoiding too much legal process, basic fairness requires the parties to see how the Panel approached their arguments.

6.94 Some of the concerns centre on the reporting of arguments, critical of institutions, which are largely irrelevant to the Panel's conclusions. I hope that my recommendation (paragraph 6.58) suggesting that arguments about alleged institutional misconduct should not generally be entertained, will help in this regard.

6.95 Whilst I make no recommendation about the style and content based on what has happened to date, I do think that the possibility of more than one panel does give rise to an issue about consistency of approach.

Recommendation 23:

6.96 I have already said how important it will be for the two panel Chairs to work together on various matters. So too on the style and content of reports. They should agree, in effect, a house style.

6.97 I am also asked whether the current practice whereby members draft reports should continue or whether initial drafts should be prepared by the Secretariat.

6.98 I was told that drafting practice has changed over the years. When Sir David Hirst was Chair he produced the first draft; since then the great majority of the reports have been drafted by Sir Donnell Deeny, the rest produced by one of a number of members who volunteer. Some say this is why the style and content of the reports has changed. Some say there is a less consistent approach. I think there is very little in these observations. Those who say reports are now longer, might look at the first Beneventan report. It is lengthy, and rightly so given the complexity of the issues.

6.99 For my part, I think the reports are consistently good and well-written. I was greatly impressed by the detailed attention given by the entire Panel to drafting. The enlarged Panel will increase the number of potential drafters. I recommend no further change.

Recommendation 24:

6.100 Reports should continue to be drafted by Panel members.

6.101 I turn next to conflicts of interest.

6.102 In many ways this was one of the more difficult of the issues under review.

6.103 The members of the Panel are pre-eminent in their fields. Therein lies the strength and the high reputation of the Panel. But therein too lies the problem. They have strong opinions and they voice those opinions. They practise in their fields.

6.104 I heard evidence from across the range of consultees – claimants, members and institutions - that this did, or might, give rise to perceptions of bias.

6.105 There will obviously be cases where it is clear a member should stand aside on a particular claim, for example if there is too close an association with an institution at a relevant moment or because of a direct professional conflict of interest. I am quite satisfied that in such cases the Panel's procedures and the judicial wisdom of the Chair deliver appropriate recusal.

6.106 I was struck by evidence that institutions were nervous of seeking recusals. It is also clear that, with the current composition of the Panel, recusals could (and on at least one occasion has) disturbed the mix of expertise required.

6.107 The new arrangements for a larger group of expert advisers will help here.

6.108 When selecting Panel in the future, the Chairs and the Secretary of State should be particularly alert to perceptions of bias. They must also recognise that it may occasionally be necessary to remove a member from the group of experts permanently.

Recommendation 25:

6.109 As to perceptions of bias generated either by public comment or professional engagements, it would be counter-productive to require Panel members never to speak about, or practise in, this area. A pragmatic approach is required, albeit one that recognises there may come a point when the perception is so strong that a member should either stand down for a claim or generally. The Secretary of State and the Chairs should be vigilant in this regard.

6.110 Finally under this heading, an issue not raised in the scoping document but raised by numerous consultees: the adequacy of publicly available information.

6.111 I have already alluded to various examples of either inadequate or confusing information. There are many others. Perhaps the most glaring omission is any statement of what should be in a claim. This should be rectified. This is where the shift in emphasis to spoliation and away from institutional guilt should be flagged up. It is also where the availability of the Panel to help with disputes over objects in private collections should be signalled. At the same time the website should tell claimants how to lodge a claim. It should point them to organisations, like CLAE, which offer pro bono help. Work is needed to deal with the overlaps between the Terms of Reference and the Rules, tidying up the four references to confidentially for example. The Rules need to be available on the website.

6.112 I have to accept that the grim, unimaginative and limiting format of the Gov.uk website is a given. But, even within those constraints, a much better product is needed

Recommendation 26:

6.113 DCMS should work with the Panel and other key stakeholders to improve the scope and quality of information available on line.

<u>Secretariat and relationships with the Department</u>

6.114 Although the scoping document raises six questions, the first four are all aspects of the same point: should the Panel remain under the auspices of DCMS and should the Secretariat continue to be based in DCMS or should it move to the Arts Council England ('ACE')?

6.115 The possibility of a move to ACE is suggested for three reasons. First, there has been some suggestion that the Panel is too close to DCMS (especially as the Department provides the Secretariat) and, thus to some of the major institutions. Second, DCMS might have to fund any compensation payment to a claimant. Third, most of DCMS' other cultural property functions have moved to ACE.

6.116 I tested these propositions widely. ACE valiantly accepted that they would undertake the work if it was thought appropriate. A few consultees thought it might be sensible, although even they accepted that the links between ACE and the non-national institutions might lead to a different problem. Most did not really see the need for change. Only one instance of alleged inappropriate contact between DCMS and an institution was forthcoming. It was many years ago and there remains a clear division of views on whether anything untoward took place. It certainly was not enough to convince me there was a problem. In any event, the arrangements within DCMS are different now and the Secretariat is, in effect, ring-fenced from the museums' team.

Recommendation 27:

6.117 It is not clear to me there is a serious problem here. In evidence I heard of only one specific, disputed problem in this context and that was from the early days of the Panel. The Arts Council have close links to many regional museums and galleries. DCMS funding for compensation is surely unlikely in the current climate. My general point about pragmatism and compromise is relevant. The additional information referred to in the preceding part of this report (Recommendation 26 at paragraph 6.113) should include an explanation of the ring-fenced place of the Secretariat within DCMS. No other changes are recommended.

6.118 There was also a concern about the provision of legal advice. Should the Secretary of State and the Panel have different lawyers? I heard very little evidence on this point. There was some initial confusion about the provider of legal advice – the Treasury Solicitor. Was the link with the Treasury too close, given the cost implications of some of the claims? I spent eight years as Treasury Solicitor pointing out that the seventeenth century title was largely meaningless and the link to the Treasury had gone by the nineteenth century[6]. Leaving this point aside, there might be instances where the Secretary of State and the Panel should have separate advice. But bearing in mind my general observation about pragmatism, I am confident this can be dealt with on an ad hoc basis if it arises. No fundamental change is needed.

<u>Funding and resourcing</u>

6.119 The Panel feel that the growing workload may necessitate more research. How might this be resourced?

6.120 From all that I saw, it is clear that claims proceed more quickly if they are based on excellent research. The Dutch research capacity is invaluable. But it is unrealistic to expect the Government to match that level of research in the current climate. The burden must remain on the claimants and the institutions. With institutions large and small I saw evidence of a real desire to help. But I recognise that this can be an onerous burden on our largest institutions; and so much worse for the smaller ones.

[6] My successor has grasped this particular little nettle and is renaming the department as the Government Legal Department.

Recommendation 28:

6.121 Although I hesitate to shift the burden from Government, it would be helpful the National Museums and Directors Conference could consider funding a research post.

6.122 The members give their time for no serious financial reward. They are entitled to travel, subsistence and a daily allowance of £218. Even if, which is not the case, they all claimed all that they were entitled to, this would be extraordinarily good value. This is public service at its best and we are all fortunate that they give so much of their time so freely and enthusiastically. The high reputation of the Panel is down to them.

Recommendation 29:

6.123 Are these rewards sufficient? Of course not. But in the current climate it would not be sensible to advocate better remuneration. I hope that the additional members I recommend will also be drawn by the work and not the remuneration.

In conclusion

6.124 This seems like an appropriate note on which to conclude this report. Those who devised our system have given us something which is highly regarded internationally as a way of delivering fair and just solutions to dreadful historical wrongs. Those who now make the system work, the members, officials and the institutions themselves, all contribute to the maintenance of that high regard. I believe that the system would benefit from the few changes I recommend. But the fundamental elements are right and should be preserved and treasured.

Paul Jenkins

5 March 2015

Annex A – Terms of Reference and Scoping Document for the Review

The Review

Purpose: The purpose is to conduct a review of the Spoliation Advisory Panel.
Expected outcome of the review: The Reviewer will provide DCMS with a final report which will include a number of recommendations in response to the questions raised in the Scoping Document. In preparing the recommendations, consideration should be given to the resources available in the Department and elsewhere for taking these forward, such that they should be capable of being implemented.
Timeframe of the review: The review will continue until February 2015.

The Spoliation Advisory Panel

The Spoliation Advisory Panel (SAP) was established by Government in 2000 to advise on appropriate solutions to claims made for the return of cultural objects in the possession of UK museums and galleries that were lost during the Nazi era (1933-1945).

The Scope of the Review: Key considerations
The review will make recommendations around some of the following issues:

Membership of the Panel:
- Membership and composition of the Panel
- Appointment process
- Skills and qualifications

Working relationships and external relationships:
- Format of report
- Methods of contact
- Evidence submission

Terms of reference and rules of procedure:
- Scope of the claims
- Confidentiality
- Issues of jurisdiction
- Holocaust Act
- Evidence submission
- Reporting

Secretariat and relation with department:
- Delegation of secretariat
- Role of secretariat

Funding and resourcing:
- Resources
- Claims
- Reimbursement
- Legal support

Review of the Spoliation Advisory Panel
Scoping Document

Background and Purpose of the Review

1. The Spoliation Advisory Panel was established by Government in 2000 to offer advice to claimants and institutions on what might be an appropriate solution to take in response to a claim. The Panel is widely recognised both nationally and internationally as a leading authority on such issues and is considered by many to represent the "Gold Standard" in this line of work.

2. There is no particular model for a dispute resolution mechanism in other European countries and the systems in place reflect those countries own history, laws and procedures. Throughout Western Europe, the Dutch Restitution Committee perhaps most closely resembles that of the Spoliation Advisory Panel and the former was, to some degree, modelled on the latter. It is fair to say, however, that the various committees and bodies sit close to government.

3. The Panel has not been subject to a formal review since its creation in 2000, although the Holocaust (Return of Cultural Objects) Act 2009 changed the status of the Panel from an advisory sponsored body of DCMS to a Panel of experts from whom the Secretary of State can choose to designate a Panel to advise on a particular claim. A list of Panel Members (including short biographies), the Panel's Terms of Reference and Rules of Procedure are attached (Annexes A, B and C). The Panel is supported in its work by a Secretary, provided by DCMS, and a DCMS legal adviser.

4. During the first 10 years of the Panel's existence, it advised on an average of one claim a year. In the last 12 months, however, the Panel has seen a significant increase in new claims which combined with an ongoing appeal against an earlier decision, a claim which raises difficult jurisdictional issues and an increasing level of international interest and cooperation on these matters, makes this an opportune moment to take stock of the Panel and its work.

5. The dispute resolution mechanisms that exist in other Western European countries were discussed in a Paper produced by the Dutch Restitution Committee in 2012. An extract from the Paper, which compares the rules and procedures of the Spoliation Advisory Panel with those of European partners is at Annex D.

Project Planning

6. The Review will consider the role, membership, stewardship and resourcing of the Panel. The first stage of the process will be to identify a Project Manager to carry out the Review and to agree the formal Terms of Reference and a list of individuals/organisations who should be consulted. The outcome should be a Report to Ministers advising on what changes, if any, are appropriate to the Panel and its working arrangements, together with an implementation plan outlining how any changes should be effected and the timing of such. A list of key stakeholders from whom views might be sought on some or all of these questions and an outline Timetable for the Review is attached at Annex D.

Areas for Consideration

7. The Review will consider the following:

   (i) Membership of the Panel;
   (ii) Terms of Reference and Rules of Procedure;
   (iii) Working arrangements and external relationships;
   (iv) Secretariat and relationship with the Department; and
   (v) Funding and resourcing.

<u>Membership of the Panel</u>

Background

8. Including the Chair and Deputy Chair, there are 11 Members of the Panel. 10 of these were appointed in 2000 when the Panel was established. One member, with a legal background, was appointed in 2013. The Panel's first Chairman, Sir David Hirst, died on 31 December 2011 and the Deputy Chair at that time, Sir Donnell Deeny, was elevated to Chair shortly thereafter. Sir Donnell was appointed as Chair up until 7 July 2015, at which time his appointment would be reviewed.

9. The skills and experience represented on the Panel include the following:

   Law, including art and cultural property law
   Ethics and humanities
   Museums' policy
   History, including Europe during 1933-1945
   Fine art
   Public administration/senior civil service.

10. Any interests relating to Scotland or Northern Ireland are currently covered by two Panel Members who either reside or have a close association with those countries.

11. Panel Members are appointed by Ministers. From 2000 to 2009, the Panel was formally classified as a DCMS advisory body and appointments were subject to the public appointments principles. Panel Members were reappointed twice. In 2009, the Panel was declassified as an NDPB and a Panel of experts (to all intents and purposes the Spoliation Advisory Panel) is designated by Ministers on the advice of the Chairman and officials, to advise on particular claims.

Key considerations

12. Questions relating to Membership might include the following:

    (i) What skills, qualities and experience is it most helpful for members of the Panel to have?

    (ii) Are the interests of the devolved nations adequately covered under the current membership arrangements or does this need to be addressed through any new appointments?

    (iii) Is the current number of 11 Members about right bearing in mind that Members are occasionally conflicted and cannot always be designated to advise on particular claims?

    (iv) And subject to considerations discussed elsewhere, if Panel Members are to continue to draft reports, in the light of an increasing workload, should this affect the size of the Panel?

    (v) Are the current Members of the Panel continuing to perform effectively?

    (vi) Irrespective of those considerations, is there an argument for bringing in new people to refresh the work of the Panel and provide a fresh outlook on some of the issues?

    (vii) Whilst Panel Members are asked to declare any conflicts of interest at their time of appointment and may need to withdraw from particular claims as a result of a real or perceived conflict, are there some roles and responsibilities outside of Panel work that might make it difficult or inappropriate for people to serve on the Panel without giving the appearance of such?

Terms of Reference

13. The Panel's Terms of Reference allow it to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object during the Nazi era (1933-1945). The test, in this respect, is simply the loss of a cultural object during that period. There is no requirement that the loss should have been as a result of the actions of the Nazis or their allies or collaborators, as was the case in the claim for the return of the Beneventan Missal.

14. In exercising its functions, the Panel is required to consider legal issues relating to title to the object although it is not the role of the Panel to determine legal rights, for example as to title. The Panel's Terms of Reference also require it to take into account whether any moral obligation rests on the institution. The Panel has considered this carefully in all of its reports and has praised high standards where it has found them and been critical of institutions where it felt they could have done more. The Panel has also taken account of collecting practices at the time and has sought to tailor its advice in the light of the standards pertaining elsewhere at that time.

15. The Terms of Reference also cover issues of confidentiality and require that the Panel performs its functions and conduct its proceedings in strictest confidence. The Panel's "proceedings" include all its dealings in respect of a claim, whether written, such as in correspondence, or oral, such as at meetings and/or hearings.

16. The Holocaust (Return of Cultural Objects Act) 2009 contains a sunset clause so that the legal power to designate a Panel and other provisions end in 2019.

Key considerations

17. Questions relating to the Panel's Terms of Reference might include the following. It should be noted here that some of these questions are fundamental to the Panel's role and work and it would be unreasonable to expect a single reviewer to be able to recommend appropriate solutions. This is rather an opportunity for these issues to be considered by a wider group of people and the role of the reviewer might be to facilitate discussions on such and draw together advice:

    (i) Are the Panel's Terms of Reference and Rules of Procedure still appropriate? In particular:

    (ii) Should the Panel's jurisdiction continue to be limited to the loss of an item between 1 January 1933 and 31 December 1945? Should there be any exceptions to this, for example, where the loss of an item can be strongly linked to events that took place within that period but the actual loss occurred some time later?

(iii) Should the Panel's jurisdiction be limited to losses that occurred as a direct result of the actions of the Nazis and their allies?

(iv) Do we need a clearer definition of what constitutes a cultural object for these purposes?

(v) The issue of the moral obligations of the institution in relation to its acquisition of an object has been a key consideration in a number of cases and is something the Panel comments on. Is it worth looking at the Panel's consideration of this issue which is currently a requirement under its Terms of Reference?

(vi) Would it be helpful if Panel Members were asked to sign a confidentiality agreement at the time they are designated to advise on a particular claim? If so, what would the agreement say?

(vii) Given the sunset clause in the Holocaust (Return of Cultural Objects) Act 2009, should consideration be given now or in the near future to setting an end date for claims to be submitted in the UK, with a possible announcement of such well in advance?

<u>Rules of Procedure</u>

18. The Panel Rules of Procedure state that the Panel will dispose of a case on the basis of written submissions which are shared between the parties and the Chairman will decide how long the correspondence should be prolonged before the Panel has the evidence and information it needs. The institution is allowed 6 weeks from the date of the receipt of the claim to submit its Statement of Case. The Chairman may also decide to call an oral hearing. There have only been two occasions where this has occurred and is now rarely used given the size of undertaking and expense involved and the fact that they tend to add very little value over and above the written submissions.

19. Once the Panel's Report has been agreed by Ministers, the parties are informed of the publication date some weeks in advance. The Report is then shared with the parties 24 hours before publication (under strict embargo) to allow them to prepare their responses (they will have been notified of this procedure at the start of the process). Under current procedures, the parties are not invited to comment on the Report.

20. Any matters of procedure not prescribed by the Rules of Procedure may be decided by the Chairman.

Key considerations

21. Questions relating to the Panel's Rules of Procedure might include the following:

(i) Is the current method for determining claims, i.e. by way of written statements, the most effective method for achieving a fair and just solution?

(ii) Should more use be made of oral hearings to enable the parties to present their case in person and would this lessen the chance of any misunderstanding or factual inaccuracy to appear in the Panel's Report?

(iii) Would it be helpful to allow the parties to comment on any factual inaccuracies or unjust statements in the Panel's draft Report? If so, at what stage would it be helpful to do this, prior to the Report being approved by Ministers, or a week or so before the planned publication date?

(iv) Would it be helpful to require the parties to sign a confidentiality statement at the start of the process?

Working arrangements and external relationships

22. The Panel's reports are drafted by a Member of the Panel. The majority of the reports up until now have been drafted by the Chairman but it has become a more regular practice, of late, for the reports to be drafted by a Panel Member, as invited by the Chairman. The Secretary and legal adviser work with the Panel on this but only with regard to format, punctuation and style.

23. One of the Panel's recent reports was 15 pages in length and, as with the Panel's earlier reports, covered the historical background to the claim in some detail, which the Panel felt was necessary in order to tell the whole story. The Report also considered the legal title to the Painting, the provenance research carried out, the significance of the Painting to the institution and the claimants, issues of compensation and an appropriate remedy.

24. The length of time taken to consider a claim is variable. This may depend on the complexity of the issues involved but will also be affected by the quality of the submissions presented by the parties. If the initial submissions are poor, then this may lead to delay as the Panel submit further questions. Some claims may also require research to be carried out. Two claims which were determined by the Panel this year provide a good illustration of this. The time taken in each case, from the submission of the claim to the publication of the Panel's Report was 11 months for one and 2 years and 9 months. The average amount of time taken is something like 18 months.

25. On appointment and reappointment up until the time the Panel was declassified as a non-departmental public body in 2009, Panel Members were asked to declare any conflicts of interest, either real or perceived. Since then, by an informal arrangement, Panel Members have at the time a new claim is received and before the Secretary of State designates a Panel, declared any such interests to the Chairman who discusses them with

the Secretariat as appropriate and then reaches a decision on whether the Member in question should be a Member of the Panel for that claim. Such decisions are recorded in the minutes.

Key considerations

26. Questions relating to the Panel's working arrangements might include the following:

(i) The Panel's style and content of reports is, to some degree, guided by its Terms of Reference. However, is the content and length of the reports about right or does including a great deal of detail increase the risk of inaccuracy or does this at least widen the scope for challenge? Is it necessary, for example, to include as much historical detail which, although it makes interesting reading, may not be strictly necessary in terms of the Panel's role? It is interesting to look elsewhere in this respect. For example, the reports of the Dutch Committee, which has a very similar role to our own, are considerably shorter in length.

(ii) Is it helpful for the Chairman or a Panel Member to draft reports? Should they be more of a whole Panel initiative so that they do not result, however unwittingly, in a particular perspective being represented? If not, who else would be able and qualified to fulfil this role? Would it be helpful and appropriate for the Secretary to the Panel or other civil servant to fulfil this role?

(iii) Are the current procedures for managing conflicts of interest sufficient?

<u>Secretariat and relationship with the Department</u>

27. The Secretariat consists of two DCMS members of staff and legal advice to the Panel is provided by Treasury Solicitors. The Secretariat provide administrative support to the Panel but do not participate in the discussions on claims except on matters of fact and procedure. The Secretariat produce minutes of the meetings. The Secretariat may also be called upon from time to time to conduct research for the Panel.

28. Many of the cultural property functions that are the responsibility of the Department and Ministers have been delegated to the Arts Council. For example, the Arts Council provides a Secretariat to the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest. Ministers are advised by the Reviewing Committee and make decisions on export deferral based on the advice of the Reviewing Committee which is presented to them in a submission prepared by the Arts Council.

29. It is not entirely clear why Secretariat work on Spoliation was not delegated to the MLA at the same time as the other cultural property functions. However, this is possibly because of the MLA's and now Arts Council's strong representational role for museums

which may have been perceived to have been in conflict with administering an independent Panel which advises on claims for items in museums. Some of the delegated functions are also, arguably, more specialised in nature than spoliation work.

30. The Panel's reports are also published by the Stationery Office and laid before Parliament as unopposed returns, functions which are more easily dealt with by the Department.

31. It is worth noting that, were the Secretariat to be located elsewhere, DCMS officials would still need to advise the Secretary of State on whether to approve the Panel's recommendations. They would also need to advise on issues such as (a) whether a claim falls within the Panel's jurisdiction; (b) the designation of a Panel to advise on a claim; and (c) whether to accept the Panel's recommendation.

Key considerations

32. Questions relating to the Secretariat and the Panel's relationship with the Department might include the following:

(i) Should the Secretariat to the Panel remain within DCMS? What are the potential difficulties in it doing so and why might it be better located elsewhere?

(ii) If consideration were to be given to transferring the work to ACE, the following questions would need to be considered. Does Arts Council's strong representational and funding role for museums create a conflict of interest if they were also to have a role which would require them to administer a Panel which advises on claims for items in museums? How would the Department be satisfied that museums would not seek to take advantage of that relationship in seeking to influence the outcome of the Panel's consideration?

(iii) Any perceptions of bias of this sort could have legal and practical implications and might encourage FOI requests and even judicial review proceedings which ACE would then have to deal with. How would we respond to such requests?

(iv) The Arts Council's Acceptance-in-Lieu Panel monitors museums that have been approved under Section 136 of the Tribunals, Courts and Enforcement Act 2007 (immunity from seizure). The monitoring consists of ensuring that an approved museum continues to operate high standards of due diligence. Would this create a tension, with Arts Council also providing the Secretariat to the Panel, as the latter is required to take account of an institution's provenance research carried out at the time they acquired a spoliated item as part of their moral obligation in relation to a claim?

(v) The Panel has indicated that, given the increasing workload, it may be necessary to carry out more research. Consideration should be given, therefore, as to how this additional work may be resourced.

(vi) To avoid any perceptions of a conflict of interest, there are two DCMS legal advisers working on the business of the Reviewing Committee on the Export of Works of Art. One advises the Committee and one advises the Secretary of State and DCMS officials on policy. Should this practice be adopted in the case of the Spoliation Advisory Panel?

Funding and Resourcing

33. The only costs associated with the Panel are travel and subsistence payments and, where claimed, a daily allowance of £218 for time spent on Panel business by Panel Members. There is also a cost for the printing of the Panel's reports. The Panel give very generously of their time and many of them do not claim at all or only claim T&S.

34. Should additional funding be provided for spoliation work including the cost of providing the Panel with a researcher, assisting museums with Holocaust-related provenance research and to support an initiative led by the Commission for Looted Art in Europe to proactively search for claims.

Key considerations

35. Questions relating to the funding and resourcing of the Panel might include the following:

(i) Are the current rewards available to Panel Members sufficient?

(ii) Is the level and quality of support provided by the Department and Treasury Solicitors to the Panel sufficient?

(iii) Are there other areas where additional help and resources would be useful?

Mark Caldon
Secretary to the Panel
8 October 2014

Annex B – Spoliation Advisory Panel Membership

Spoliation Advisory Panel – Membership

- Sir Donnell Deeny QC, Member of Northern Ireland Bar Counsel (Chair)
- Professor Sir Richard Evans, Professor of Modern History at Cambridge University (Deputy Chair)
- Tony Baumgartner, Partner in a leading London law firm and Recorder of the Crown Court
- Sir Terry Heiser, Former Permanent Secretary at the DOE
- Professor Peter Jones, Director of the Institute for Advanced Studies In the Humanities, University of Edinburgh and Director of the Foundation for Advanced Studies in the Humanities
- Martin Levy, Chairman of H Blairman and Sons Ltd, Fine Art Dealers
- Peter Oppenheimer, President of the Oxford Centre for Hebrew and Jewish Studies
- Professor Norman Palmer, CBE, QC, Barrister and leading expert in cultural property law
- Anna Southall Director of National Museums and Galleries of Wales
- Professor Liba Taub, Fellow and tutor at Newnham College and Director of the Whipple Museum
- Baroness Warnock, Independent Life Peer[7]

[7] Baroness Warnock decided to resign from the Panel in February 2015 after 14 years of dedicated service.

Annex C – Spoliation Advisory Panel Constitution and Terms of Reference

Spoliation Advisory Panel
Constitution and Terms of Reference[8]

Designation of the Panel

1. The Secretary of State has established a group of expert advisers, to be convened as a Panel from time to time, to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object ("the object") during the Nazi era (1933 - 1945), where such an object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit ("the institution").

2. The Secretary of State has designated the expert advisers referred to above, to be known as the Spoliation Advisory Panel ("the Panel"), to consider the claim received from ……..on …….. for …… in the collection of ……..("the claim").

3. The Secretary of State has designated .....as Chairman of the Panel.

4. The Secretary of State has designated the Panel as the Advisory Panel for the purposes of the Holocaust (Return of Cultural Objects) Act 2009.

Resources for the Panel

5. The Secretary of State will make available such resources as he considers necessary to enable the Panel to carry out its functions, including administrative support provided by a Secretariat ("the Secretariat").

Functions of the Panel

6. The Panel shall advise the claimant and the institution on what would be appropriate action to take in response to the claim. The Panel shall also be available to advise about any claim for an item in a private collection at the joint request of the claimant and the owner.

7. In any case where the Panel considers it appropriate, it may also advise the Secretary of State

[8] Revised following enactment of the *Holocaust (Return of Cultural Objects)* Act 2009

(a) on what action should be taken in relation to general issues raised by the claim, and/or

(b) where it considers that the circumstances of the particular claim warrant it, on what action should be taken in relation to that claim.

8. In exercising its functions, while the Panel will consider legal issues relating to title to the object (see paragraph 15(d) and (f)), it will not be the function of the Panel to determine legal rights, for example as to title;

9. The Panel's proceedings are an alternative to litigation, not a process of litigation. The Panel will therefore take into account non-legal obligations, such as the moral strength of the claimant's case (paragraph 15(e)) and whether any moral obligation rests on the institution (paragraph 15(g));

10. Any recommendation made by the Panel is not intended to be legally binding on the claimant, the institution or the Secretary of State;

11. If the claimant accepts the recommendation of the Panel and that recommendation is implemented, the claimant is expected to accept the implementation in full and final settlement of his claim.

Performance of the Panel's functions

12. The Panel will perform its functions and conduct its proceedings in strictest confidence. The Panel's "proceedings" include all its dealings in respect of a claim, whether written, such as in correspondence, or oral, such as at meetings and/or hearings.

13. Subject to the leave of the Chairman, the Panel shall treat all information relating to the claim as strictly confidential and safeguard it accordingly save that (a) such information which is submitted to the Panel by a party/parties to the proceedings shall normally be provided to the other party/parties to the proceedings in question; and (b) such information may, in appropriate circumstances, including having obtained a confidentiality undertaking if necessary, be communicated to third parties. "Information relating to the claim" includes, but is not limited to: the existence of the claim; all oral and written submissions; oral evidence and transcriptions of hearings relating to the claim.

14. In performing the functions set out in paragraphs 1, 6 and 7, the Panel's paramount purpose shall be to achieve a solution which is fair and just both to the claimant and to the institution.

15. For this purpose the Panel shall:

(a) make such factual and legal inquiries, (including the seeking of advice about legal matters, about cultural objects and about valuation of such objects) as the Panel consider appropriate to assess the claim as comprehensively as possible;

(b) assess all information and material submitted by or on behalf of the claimant and the institution or any other person, or otherwise provided or known to the Panel;

(c) examine and determine the circumstances in which the claimant was deprived of the object, whether by theft, forced sale, sale at an undervalue, or otherwise;

(d) evaluate, on the balance of probability, the validity of the claimant's original title to the object, recognising the difficulties of proving such title after the destruction of the Second World War and the Holocaust and the duration of the period which has elapsed since the claimant lost possession of the object;

(e) give due weight to the moral strength of the claimant's case;

(f) evaluate, on the balance of probability, the validity of the institution's title to the object;

(g) consider whether any moral obligation rests on the institution taking into account in particular the circumstances of its acquisition of the object, and its knowledge at that juncture of the object's provenance;

(h) take account of any relevant statutory provisions, including stipulations as to the institution's objectives, and any restrictions on its power of disposal;

(i) take account of the terms of any trust instrument regulating the powers and duties of the trustees of the institution, and give appropriate weight to their fiduciary duties;

(j) where appropriate assess the current market value of the object, or its value at any other appropriate time, and shall also take into account any other relevant circumstance affecting compensation, including the value of any potential claim by the institution against a third party;

(k) formulate and submit to the claimant and to the institution its advice in a written report, giving reasons, and supply a copy of the report to the Secretary of State, and

(l) formulate and submit to the Secretary of State any advice pursuant to paragraph 7 in a written report, giving reasons, and supply a copy of the report to the claimant and the institution.

Scope of Advice

16. If the Panel upholds the claim in principle, it may recommend either:

    (a) the return of the object to the claimant, or

    (b) the payment of compensation to the claimant, the amount being in the discretion of the Panel having regard to all relevant circumstances including the current market value, but not tied to that current market value, or

    (c) an ex gratia payment to the claimant, or

    (d) the display alongside the object of an account of its history and provenance during and since the Nazi era, with special reference to the claimant's interest therein; and

    (e) that negotiations should be conducted with the successful claimant in order to implement such a recommendation as expeditiously as possible.

17. When advising the Secretary of State under paragraph 7(a) and/or (b), the Panel shall be free to recommend any action which they consider appropriate, and in particular may under paragraph 4(b), recommend to the Secretary of State the transfer of the object from one of the bodies named in the Holocaust (Return of Cultural Objects) Act 2009.

Annex D – Spoliation Advisory Panel Rules of Procedure

SPOLIATION ADVISORY PANEL
RULES OF PROCEDURE

Procedure for making and responding to a claim

1. Any claimant who wishes the Panel to consider his or her claim shall deliver such claim in writhing to the Secretariat ("the Claimant's statement of case") including copies of all witness statements and/or documentary evidence relied upon. Following designation of the Panel by the Secretary of State under para 2 of the Panel's Constitution to consider the claim, *t*he Secretariat shall forthwith send a copy of the Claimant's statement of case to the Panel and to the institution concerned, together with the accompanying witness statements and documents.

2. The Institution shall deliver its reply in writing to the Panel ("the Institution's statement of case") including copies of all witness statements and/or documentary evidence relied upon, within 6 weeks of its receipt of the Claimant, together with the accompanying witness statements and documents.

3. The Claimant and Institution may, but only subject to the leave of the Chairman:-

   (a) deliver supplementary written statements of case, and/or copies of further witness statements and/or documentary evidence to the Panel:

   (b) request further particulars of the opposite party's statement of case and where such leave is granted, may deliver the additional material to the Panel for despatch by the Panel's Secretariat to the opposite party, subject to any time limits prescribed by the Chairman.

4. The Panel may of its own motion require clarification of either party's statement of case, and /or the provision of supplementary witness statements, or documents (if available) and/or authentication of documents. The Panel may also direct the swearing of affidavits, verifying witness statements and /or authenticating any documents. Any material furnished under this rule shall be circulated to all parties.

5. Subject to the leave of the Chairman, the Claimant, the Institution and any other party which has information relating to a claim shall treat such information as strictly confidential and safe guard it accordingly. "Information relating to a claim" includes, but is not limited to, the existence of a claim, all correspondence, statements of case, witness statements, documentary evidence , all oral and written submissions, oral evidence and transcripts of hearings relating to a claim

Procedures for disposal of claims

6. The Panel may, in its discretion after consultation with the parties:-

   (a) dispose of the case, on the basis of written material furnished by the parties, or

   (b) direct an oral hearing, for which the quorum shall be 5 members of the Panel, including the Chairman.

7. Where the Panel directs an oral hearing, the Panel shall notify the parties. Such notification shall:

   (a) propose a date for the hearing, which will normally be not less than 6 weeks subsequently, and a location for =it which will normally be London;

   (b) Indicate that any request for a different date of location must be made in writing to the Panel within such reasonable time as the Panel may specify in the notification;

   (c) specify the witnesses from whom the Panel wish to hear oral evidence, and/or the issues on which the Panel wish to hear oral submissions, and

   (d) ask what languages are spoken by any claimant and by any witness giving oral evidence, and direct where appropriate the attendance of an interpreter.

8. The hearing shall be limited to one day for the Claimant and the Institution respectively, subject to an extension only if the Chairman grants leave, which must be sought in writing form him not less than 3 weeks before the hearing date.

9. Hearings will normally be conducted in private, and in English, and witnesses will normally be required to testify under oath.

10. Any party wishing to cross-examine an opposite party's witness must apply in writing to the Chairman for leave so to do not less than 3 weeks before the hearing date.

11. The Claimant and the Institution may be represented or assisted at a hearing, at their own expense, by any person or persons of their choice up to a maximum of 5, including counsel, solicitors, or representatives of a voluntary organisation.

12. The Panel will perform its functions and conduct its proceedings in strictest confidence. The Panel's "proceedings" include all its dealings in respect of a claim, whether written, such as in correspondence, or oral, such as at meetings and /or hearings.

13. Subject to the leave of the Chairman, the Panel shall treat all information relating to a claim as strictly confidential and safeguard it accordingly save that (a) such information which is submitted to the Panel by a party/parties to the proceedings shall normally be provided to the other party/parties to the proceedings in question; and (b)such information may, in appropriate circumstances, including having obtained a confidentiality undertaking if necessary, be communicated to third parties. "Information relating to a claim" includes, but is not limited to the existence of a claim, all oral and written submissions, oral evidence and transcriptions of hearings relating to a claim.

14. Any matters of procedure not prescribed by these rules shall be decided by the Chairman, who shall also have the power to extend or abridge the time limits laid down in these rules.

Administrative Procedure

15. All submissions and correspondence to the Panel should be sent to:-

The Spoliation Advisory Panel Secretariat
Cultural Property Unit
Department of Culture Media and Sport
2-4 Cockspur Street
London
SW1Y 5DH
Tel: +44 (0)20 7211 6158
e-mail: mark.caldon@culture.gov.uk

Annex E – List of Consultees

Overall, 46 consultations were requested from 33 different organisations, as well as more generally to museums through the National Museums Directors Conference and to the general public on the Spoliation Advisory Panel home page on Gov.uk.

41 responses were received from a total 24 different organisations and individuals.

Organisations that contributed to the Review

45 Aid Society
Arts Council England
Ashmolean
Birmingham Museums and Art Galleries
Bristol Museums
British Library
British Museum
Commission for Looted Art in Europe
Courtauld Institute of Art and the Samuel Courtauld Trust
Glasgow Life
National Galleries of Scotland
National Gallery
National Museums Directors' Conference
National Museums Northern Ireland
Secretary to the Panel
Spoliation Advisory Panel Chair and all Panel members
Tate Art Galleries
Victoria & Albert Museum

Individuals who contributed to the Review

Erica Bolton, Director at Bolton & Quinn
Sir Andrew Burns, United Kingdom Envoy for post-Holocaust issues
Evelien Campfens, Director of the Dutch Restitution Committee
Lord Neuberger, President of the Supreme Court and Chair of the Spoliation Advisory Committee
Jeremy Scott, Principal at Lipman Karas
Dr Charlotte Woodhead, Director BA Law with Humanities & BA Law with Social Sciences programmes, University of Warwick