

NMDC response to DCMS consultation on strengthening the process to retain national treasures

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The National Museum Directors' Council (NMDC) represents the leaders of the UK's national collections and major regional museums. Our members are the national and major regional museums in England, Northern Ireland and Scotland, the British Library, the National Library of Scotland, the National Archives and Royal Botanic Gardens Kew. NMDC acts as an advocate on behalf of members and their collective priorities and provides them with a valuable forum for discussion and debate and an opportunity to share information and work collaboratively. While our members are funded by government, the NMDC is an independent, non-governmental organisation. For more information about NMDC and our activity see our website: www.nationalmuseums.org.uk

Introduction

1. NMDC welcomes the proposal to introduce a legally binding mechanism into the export control system for national treasure in the UK. The proposal should help to ensure that more national treasures are retained within the United Kingdom, giving the public greater access to our cultural heritage, and reducing the wastage of public money and resource on campaigns to acquire works that are subsequently withdrawn.
2. The following response covers areas only where NMDC is able to give clear examples from our members' experience, as such some of the questions have been omitted.

Potential impacts of the proposal

3. **Individuals** would hopefully be deterred from making speculative applications that they have no serious intention of completing, as such applications are a burden on the Committee, the Arts Council, museums, galleries and funders. The application for the export of William Hoare's *Portrait of Ayuba Suleiman Diollo* by the Qatari Government in 2009 resulted in the National Portrait Gallery expending significant resources in preparing for a case for funding to the Heritage Lottery Fund, Art Fund and private donors, only for the application to be withdrawn as the owners had no intention of selling.
4. The proposal may help to ensure that individuals will be more open with the committee, the Secretary of State and potential purchasers, as the legally binding option agreement includes a number of transparency provisions, such as those around provenance and condition reporting, which are not legally necessary under the current system. For example, in a case in 2014 of an export deferred Bronze Age Mirror, concerns about provenance were not shared with a public institution that eventually purchased the item.
5. The proposed option agreement also clarifies that it is the owner of the object that is entering into any agreement, which has not necessarily been the case up until this point, as agents acting on behalf of the individual have made applications. This will provide much more clarity to a potential purchaser as to the ownership of an item, and will make the process more transparent and accountable. It should also reduce the number of cases where sales are made subject to an export licence being granted, as only an object's full legal owner will be able to make an application.

6. **For museums and galleries**, the proposals will increase their ability to acquire works of national importance that have received a serious intention to purchase for the public benefit. The proposal would prevent resources being expended by public institutions on fundraising for items which then have their applications withdrawn without notice. The proposal would also clarify to public institutions and funders that fundraising campaigns should only be launched during the second deferral period, as this is when the legal agreement takes hold, giving a clear process and timescale to public institutions.
7. The proposal still allows for items to be sold and exported where there is no matching offer. The difference will be ensuring that decisions around whether to withdraw an application will be made before any public institutions or funders are committed.
8. **Funders and grant awarding bodies** would be given more certainty that resources exerted on fundraising would be well spent, and this may encourage more potential funders to consider supporting museums to retain national treasures. The introduction of the legally binding mechanism should ensure restored confidence in the system.
9. In the case of Pontormo's *Young Man in a Red Cap* a combination of an Art Fund fundraising campaign, a grant from the Heritage Lottery Fund and support from the Treasury meant that the National Gallery was able to raise the required funds within the time scale. However, with no legally binding agreement, the application was withdrawn and the funds raised were unable to be used.
10. The proposals will help retain a higher number of national treasures per year – five objects may have been saved for the public benefit successfully since 2015 under the system if legally binding offers had been introduced into the second deferral period.
11. If more certainty was introduced into the system, a larger number of museums and galleries might have been able to put forward serious expressions of interest to raise funds for items, without the fear of the item being withdrawn at the last moment. Equally, they would be able to make applications to funders with much more certainty, which would enable more support from funders to be forthcoming.
12. If more than one relevant purchaser puts forward an expression of interest by the end of the first deferral period, the proposal for the Secretary of State or another public body to enter into the option agreement is a good one, as it will still enable the item to be retained through a fair process. In practice, in most cases public institutions and funders would have discussions amongst themselves as soon as the item's export licence is deferred, which would culminate in just one institution submitting a serious intention to raise funds, and therefore the proposal would not need to be used.
13. **Introduction of a value threshold** is not a move NMDC would support. The Waverley criteria do not take into account the value of an object, and this is not a consideration for the Reviewing Committee when deciding whether an export licence is deferred. Many items valued below £100,000 would be considered an extremely significant archaeological find (such as the 8th Century Anglo-Saxon brooch that came before the committee in 2015), and there are a number of instances where items of national importance would not realise a market price of £100,000 in collections of natural science and social history, therefore defining them as not having the need to be protected at a similar level to higher value items sets a problematic precedent of a work's value defining its importance.
14. Finally, the consultation documents suggest that the introduction of the threshold would offer a proportionate response, as there is less risk for museums, galleries and funders. This assumption is incorrect. In many cases, and particularly for smaller regional museums, the risk will be similar, and the amount of time and resource to raise funds will be the same as with a higher valued object. For many museums, acquisition budgets have been

significantly reduced, and therefore to raise funds even for an item that falls below this threshold would take time and effort, and some risk.

Reducing commercial risk for the seller

15. Allowing sellers to specify a different currency would provide a fair guarantee to the seller, however this should only be enacted in cases where the seller is able to provide clear evidence that they purchased the object in a currency other than Sterling.
16. Allowing the Buyer to choose the mechanism for mitigation should give the requisite flexibility and reassurance to purchasing institutions. Ultimately, even if the first mechanism was used, the Buyer as a UK institution would likely raise funds in Sterling, including applications to funders, and would make conversions accordingly.
17. Institutions interested in purchasing an object in a currency other than sterling may need to ensure that they have bank accounts in a currency other than Sterling and will need to have developed systems to ensure correct reporting of these. Interested institutions may need to ensure there is some flexibility in the amounts raised, in order to compensate for any currency fluctuations, and have open conversations with funders when doing so, which may prove to be somewhat onerous on the purchasing institution. Institutions would need to ensure that they have insurance and other mitigation in place to avoid any ill effects from any potential currency fluctuations.

Limit on the second deferral period

18. Introducing a defined cap on the length of the second deferral period would give more certainty to potential purchasers during the whole process as to the amount of time they will have to fundraise, potentially making it more likely that objects will be acquired for the public. As it stands, a six-month second deferral period should give potential purchasers and funders the required amount of time to raise funds in all cases that have come before the committee

The draft template option agreement

19. The clauses concerning preparation of condition reports and the consequences where damage is shown to have occurred outlined seem reasonable and provide the required amount of certainty regarding condition reports for funders and potential purchasers.
20. The warranties in clause 9 will provide a strong focus for all parties to ensure that the requisite due diligence is completed prior to entering into any agreement, preventing any issues around provenance or ownership being ignored or not raised at the required time. This will hold both parties to account and provide more transparency in the system.
21. Whilst it is necessary that the clause in relation to delivery and transfer of risk is flexible, further guidance should be given to those entering into the agreement as to best practice in this regard. This best practice should outline that it is in the interests of both parties to instruct solicitors to enter into professional cross undertakings regarding the transfer of the objects and payment.
22. It is necessary that the clause in relation to storage, security and viewing arrangements remains flexible to account for the differences between objects and institutions, however best practice guidance should be given in explanatory notes (for example, around the provisions of viewing arrangements).
23. The option agreement does not seem to allow for a situation in which there may be a joint bid to purchase an item from public institutions. This has happened in a number of cases, for example the 2014/15 joint acquisition of Bartolini's *The Campbell Sisters Dancing*

A *Waltz* by The National Galleries of Scotland and the V&A. The option agreement should be amended to accommodate this possibility.

24. The drafting of the agreement seems to effectively clarify that the owner of the item must be the party entering into the agreement directly, rather than through an agent. In some historical cases, the ability of agents to enter into agreements has led to concerns around ownership, valuation and provenance, and we believe that proof of ownership should be a requirement before the export licence is applied for. The drafting of the option agreement in this way should ensure that concerns or questions about ownership are dealt with early in the process.
25. There should be some mechanism for Government to enforce the option agreement, rather than leaving it to the Buyer to ensure the Seller complies. Leaving enforcement to the Buyer may result in cases where an institution is unable to enforce their contractual rights as they do not have the funds to embark on costly legal proceedings, rendering the option agreement useless. A commitment from the Secretary of State to enforce the agreement on behalf of institutions or to provide support to institutions to do so themselves would go some way to giving certainty to Buyers that if they enter into an agreement, it will not be reneged on without consequence. One potential model for this mechanism could be based on compulsory purchase legislation, which would enable the Secretary of State to step in and take ownership of an item if a Seller broke the agreement.
26. There should be some mechanism within the proposal to transfer the option agreement, and therefore legal obligations, to an alternative purchaser in the event of an alternative with sufficient funds coming forward within the already agreed time frame. This occurred in the case of the Dali telephone which had its export licence deferred in March 2018, the initial purchaser (Brighton Museum and Art Gallery) was unable to raise funds but a matching offer was received from an alternative institution, the Scottish National Gallery of Modern Art. Without a mechanism to transfer the legal obligations, there is a risk of objects leaving the UK when a public institution has funds available to purchase.
27. To ensure that time in the second deferral period is not wasted, the 'clock' on the second deferral period should not begin until any tax incentives or *douceur* are agreed to and the option agreement has been signed.
28. In order to provide certainty to sellers that they will not have time and resources wasted by institutions making expressions of interest that are not feasible, it may be useful to require an institution to provide a fundraising plan or other guarantee prior to the second deferral period formally commencing. In many cases, this will be done internally or in order to satisfy potential funders, and therefore should not add additional bureaucracy for UK institutions.
29. In some instances, it may be in the interests of a Buyer to offer a price over and above the matching price, to cover any expenses or losses that a Seller has incurred from actively engaging with the process. We believe that this would give more incentive for a Seller to commit to the process and reflects how the system has worked in practice in some cases. This should be a negotiation between the Buyer and the Seller, and therefore may not need to be specified in the option agreement, but there should be enough flexibility to allow these negotiations to take place.

In case of any queries regarding this response or if you require any further information please contact Kathryn Simpson, Policy and Projects Manager, National Museum Directors' Council: kathryn.simpson@nationalmuseums.org.uk / 020 7942 4076. I have read and understand the 'privacy notice' for this consultation.