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**The sustainability of local authority museums  
a legislative anomaly working in a conflicting policy framework?**

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The sustainability of local authority museums:  
a legislative anomaly working in a conflicting  
policy framework?

## **Abstract**

In this thesis I have attempted to analyse the effectiveness of the legislative and policy framework in relation to the museums operated by local authorities in England. In particular, I have focused on whether this framework is suitable or sustainable for the long term provision of such museums. Particular regard is given to acquisition and disposal of cultural property from these museums, including the areas of object mobility and repatriation of artefacts.

Chapter one sets out the working assumptions that this thesis rests upon. The second chapter appraises the modern context within which local authority museums operate. Chapter three assesses the historical development of museums and how this has affected the legal framework. In the fourth chapter, the focus is upon the problems of permanent acquisition of artefacts. Chapter five re-examines the controversial area of disposal of objects from museums and the repatriation of spoliated artefacts and human remains. The sixth chapter reviews how developments in art mobility have benefited local authority museums. The final chapter draws together the findings and assesses whether council museums are viable in the future under the current legislative and policy framework.

The thesis concludes that while improvements could be made to the legislation, it is unlikely to happen. It would be more effective to make such changes through the policy issued by the Arts Council and the Museums Association. Such changes also could bridge the divergence between law, policy and practice.

A variety of primary and secondary sources were used throughout this thesis. Due to the fact that this is a specialized and globalized area many

of the sources can be found on the Internet and in international journals. However, the core of this dissertation rest upon statutes, case law, government commissioned reports, local authority committee reports, national and local policy documents, and books.

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## Dedication

I dedicate this thesis to my Grandparents, Dick and Molly Gates and Peter and Olive Porter. I would not have embarked on such a journey without the support and inspiration you gave me, encouraging my natural curiosity from such a young age. I only wish that you could be here to see it.

## Acknowledgements

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Thanks to those who widened my horizons and sparked thoughts. In particular, Susan Hughes of the Museums, Libraries and Archives Council and Vanessa Trevelyan, President of the Museums Association – I am extremely grateful to the expertise you shared with me and I hope this thesis will be of continued use to the museums sector. Thanks also go to Hugo Swire MP, Bernard O'Conner, Peter and Vivienne Tobutt.

Finally, I must thank my sister, April Gates, for being there when I needed her most.

The opinions expressed herein are the views of the author and do not necessarily reflect the stance of those acknowledged. Any errors or omissions are the author's own.

## **Chapter one: a public service? The argument for museums.**

### **Why look at local authority museums?**

Local authority museums are part of the Victorian municipal legacy. Nestled away in shire county towns and in the hubbub of modern cities, they often are forgotten in the wake of the high profile national museums or more glamorous university museum neighbours. However, local authority museums quietly have been providing a repository for local history with their hidden treasures without major change for the past 150 years<sup>1</sup>. With different legislative requirements to national museums but with a similar policy framework, local authority museums provide an interesting area of study<sup>2</sup>. They frequently contain collections which are on a par with those in the national museums but have suffered a certain amount of neglect both as visitor attractions and academic study. This thesis aims to start redressing this inequality for, if local authority museums are to be sustainable in the 21st Century, does the legal and policy framework give the right conditions for this to happen? This thesis is founded on the working hypothesis that local authority museums work within a legal and policy framework which provides conflicting instructions. This divergence prevents them from operating effectively. Therefore changes need to be made to ensure that local authorities continue to provide museum services which are legally and financially viable whilst meeting articulated aspirations of public museums. The legislative anomalies will be examined through the prism of art mobility and acquisition and disposal of artefacts from museums.

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<sup>1</sup> According to Ian Lawley, local authority museums made up 40% of those museums which were registered in 2003. This figure included only those facilities which were owned and directly run by the local authorities and did not cover those which were grant aided or received in kind support (2003, p75).

<sup>2</sup> This thesis is confined to a study of the law and policy relating to local authority museums in England, though cases and examples are drawn from both the United Kingdom and internationally.

# **Theoretical assumptions: the argument for museums**

## **The purpose of museums**

What is a museum? In a way it is like asking, what is a bank or what is a teacup? One might answer that it is self-evident what a bank or a teacup does, but that answer belies the changes in banking services and practices or in tea drinking habits which have happened over time. The *Concise Oxford Dictionary* defines a museum as, “a building used for storing and exhibiting objects of historical, scientific, or cultural interest,” and explains that it has a Latin origin, ultimately from the Greek *mouseion* meaning “seat of the Muses,” (Thompson 1995, p896). The Muses being, for those not classically inclined, goddesses who inspired the production of works in the field of the creative arts. This definition, whilst accurate, also is lacking, for it does not truly explain the purpose and function of a museum. Conjuring concepts of the museum as a seat of inspiration, the definition then places itself firmly in the mundane and confines itself to ‘bricks and mortar’.

This question, essentially what do museums do and what function do they serve, is essential to this thesis. For if it was established in the introduction to this examination that museums serve no purpose; then this paper is redundant. Of course, it is not, but ascertaining purpose is not a simple exercise. As a starting point, there is no single definition of a museum used universally across the sector. To determine what a museum is, it is important to review both contemporary organisational definitions and historical policy statements of museum purpose alongside any legal definitions in English law.

## **A statutory meaning?**

The *Public Libraries and Museums Act 1964* does not provide a definition of a museum or gallery. Limited statutory definitions of a museum can be found in earlier pieces of local authority legislation. In *s.15 Public Libraries Act 1892* it is noted that they provide 'specimens of art and science' which is reflected in earlier iterations of this legislation. *S.4 Museums and Gymnasiums Act 1891* permits an authority to, "...provide and maintain museums for the reception of local antiquities or other objects of interest." Therefore, from the early legislators' perspective the purpose of a museum is around their collections and later legislators took the definition and purpose of a local authority museum at least to be universally understood. This can be compared to national museum legislation whereby, under *s.2 Museums and Galleries Act 1992*, the purposes of the National Gallery, Tate Gallery, National Portrait Gallery and Wallace Collection are set out. These are to conserve and add to the collections (with the exception of the Wallace Collection), exhibit to the public, allow study and research of the objects, and general promotion of their particular area of expertise with the public. This gives the national museums and galleries a clear mandate as to their function and purpose which has not been granted to local authority museums.

## **Government Commission Papers and Policy Statements**

Early reports such as the *Royal Commission on National Museums and Galleries* in 1929 and the *Review of Provincial Museums and Galleries* in 1963 did not question the existence of museums. To mis-quote the American Declaration of Independence, the authors expected their audience to, "...hold these truths to be self-evident..." It was in 1973 that the *Provincial Museums and Galleries* report devoted a chapter to the role

of specifically provincial museums<sup>3</sup> and their functions. The report set out the investigating committee's belief that,

*"Museums can capture and preserve the standards and values of civilisation, can demonstrate man's achievements in art and science, and his failures. The best of what is past may give insight into what will be most valuable in the future. When standards are being questioned and the pace of change quickens, museums perform an essential role as a point of reference and a place where the values of the past and present may be preserved and reflected upon. They have a responsibility to acquire and safeguard evidence and records."*

In addition, several other roles were identified for museums. As society diversified<sup>4</sup>, museums had a place to assuage ignorance. As change intensified, museums could provide context and meaning. As people visited, museums could educate and inspire people on paths of learning. Finally, the authors thought that the original role of the older local authority and university museums of presenting the opportunity of specialised research along with its dissemination remained, *"one of the essential aims of the principal museums."* (1973, p8)

The report set out four objectives for provincial museums. First, they should collect, look after and research items detailing the culture, history and natural history, primarily of their given area. Secondly, they should make their collections available to the public. Thirdly, they should develop activities to deliver the four aims. Finally, they should have the appropriate expertise for their collections. Underlying all the aims was the collection (1973, p9). The authors also explored the idea of universal access. Within 50 miles of everyone and 25 miles of the majority of people there should be public access to a significant collection in the arts (both fine and applied), natural sciences, industry and technology, and artefacts (archaeology, antiquities, ethnology and social history).

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<sup>3</sup> Provincial museums included local authority, university and private museums.

<sup>4</sup> In this context the authors were considering increased urbanisation and divorce from the rural actuality underpinning this lifestyle.

## A united vision

*Treasures in Trust* was the first policy statement which covered the entire museum sector: national, university, local authority and independent. It set out four 'guiding principles' which the Government believed formed the foundations of museums. The first of which stated, "...the fundamental purpose of a museum is to acquire, conserve, study and present collections." (1996, p5) It went on to set out what the Government saw as the collective characteristics of a museum. Beyond the concept of museum collections being "inalienable object" the list was more procedural rather than documenting what the intrinsic purpose of a museum towards the end of the 20<sup>th</sup> century was (1996, p6). In fact, the first guiding principle probably would not have seemed alien to our Victorian forefathers.

The executive summary for the 2005 publication *The Value of Museums* provides definitions in the footnotes but it is a definition of scope rather than of purpose<sup>5</sup>. According to this summary, museums do many things. Repositories of knowledge, teachers, part of the creative industries, tourist magnets, engines of regeneration, contributors to the economy, ability to touch individual lives, help people understand their place in the world, and connecting people to past, present and future (2005, p6). With all this schizophrenic activity, what they do not seem to be expected to do is get objects, look after them, understand them; and then explain them to the wider public.

The collections themselves come under scrutiny. Whilst accepting that they reflect the past, the report questions whether museums manifest the

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<sup>5</sup> "This document uses the term 'museums' to substitute for museums and galleries. It focuses on those museums (and galleries) that have collections, buildings and staff, and whose purpose is to make those collections accessible to the public. It is written to reflect the position of museums in England, whether funded by central government or local government, as well as university museums and independent museums." (DCMS 2005, p6)

present with the diversity of modern communities? What this document demonstrates is that in less than ten years, the fundamental purpose of museums, as seen by government, changed fundamentally following a change in political ideology. A shift so seismic, that, at its heart, the aim was to change the elemental intentions of a museum.

The sequel, published a year later, *Understanding the Future: Priorities for England's Museums*, stepped back slightly from the brave new world. It began with a Museums Association (MA) definition of a museum:

*"Museums enable people to explore collections for inspiration, learning and enjoyment. They are institutions that collect, safeguard and make accessible artefacts and specimens, which they hold in trust for society."* (2006, p6)

It was an interesting choice by the Government to rely on the explanation of a trade association rather than one from its own non-departmental public body or by generating one itself as to what is the essence of a museum. The change in tone was reflected throughout the document, from the statement that the Department for Culture, Media and Sport (DCMS), *"welcomes the resurgence of the core mission of museums in public education and formal and informal learning,"* (2006, p6) through to the statement that, *"a museum is defined by its collection. It provides the bedrock on which everything else is built,"* (2006, p15). Less brave new world and more indication of successful lobbying? And yet, the legacy of the 'Cool Britannia' purpose lived on through the tentacles of government until the recent change of government and overriding emergency of mission.

## Differing organisational notions of a museum

### The international dimension

The International Council of Museums (ICOM), an international non-governmental organisation representing museums, defines a museum thus,

*"A museum is a non-profit making, permanent institution in the service of society and of its development, and open to the public, which acquires, conserves, researches, communicates and exhibits, for purposes of study, education and enjoyment, material evidence of people and their environment. (...)" (Article 3, Section 1, ICOM Statutes, 2008)*

If you review the seven previous definitions of a museum which date back to ICOM's founding in 1946, changes of emphasis can be seen. Museums as non-profit making institutions appear only from the 1974 version onwards. This idea of purpose is interesting as it limits providers of museums to public authorities, charities and social enterprise companies and excludes museums at places like Sandringham House and Holkham Hall, as well as the houses and their contents which fit the other criteria of a museum as they are run privately as part of an estate for profit, though in reality it is less a commercial enterprise and more an exercise in sustainability.

Prior to making the alteration in the 2004 statutes, a discussion exploring the issues was held through a number of articles published in ICOM News. The first principle under question was the relationship between a museum and its collection. Is a collection which is functioning as a museum but does not acquire not a museum? Under this criterion, the Wallace Collection with its constrictions on acquisition and disposal would not be classed as a museum. The question posed by the author<sup>6</sup> was whether museums were in existence *"to collect or to inform"* to which he believed the answer was inform and which the author thought would

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<sup>6</sup> Paul Donahue, Chair of CIMUSET and Executive Director Museum Services of Canada Science and Technology Museum Corporation (Donahue 2004, p4).



require an amendment to the definition to make 'acquires, conserves, researches' optional. This change was not made.

Non-profit making was less contentious in the respect that its basic concept for a museum was sound. Where non-profit making was queried was in its application (Bloch 2004, p4-5). Could museums run services to generate income to offset running costs, for example a café, and what happens in the unlikely event that they make a surplus? The question was assessed from the position of American law which curtailed the advantageous tax regime to associated enterprises, the examples given were that you could not run a stand-alone restaurant elsewhere or sell fridges in your museum shop. Whether this stands in English law is beyond the scope of this thesis. The surplus question was more universally applied as surpluses in non-profit making enterprises should be ploughed back into the museum.

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) devotes a page of its website to the question – what is a museum? (2011) UNESCO uses the ICOM definition of a museum as its starting point but it goes on to state that the principal purpose of a museum is, *"is to safeguard and preserve the heritage as a whole."* Secondary to this is a museums' scientific role in researching an artefact's context along with the educational remit to communicate knowledge to the public. The final element of a museum's purpose is that of an agent of social change through the, *"endogenous development of social communities whose testimonies it conserves while lending a voice to their cultural aspirations."* This goes far beyond the concept of a museum when they were first established in great numbers in the 19<sup>th</sup> century.

## **A national perspective**

For the Museums Libraries and Archives Council (MLA) *Accreditation Standard*, the definition of a museum is to meet the MA 1998 definition of a museum,

*“Museums enable people to explore collections for inspiration, learning and enjoyment. They are institutions that collect, safeguard and make accessible artefacts and specimens, which they hold in trust for society.”*

This version has not been changed with the 2008 reiteration of the MA's definition of a museum. The MLA specifically excludes a number of organisations which fall within the criteria of ICOM, as iterated in previous versions of a definition of a museum. These exclusions include, *“science centres and planetaria, natural and archaeological sites, historical and industrial buildings and sites, and heritage centres, not having associated permanent collections.”* In appendix 1 to the *Accreditation Standard*, the terms used in the MA's definition are explained. Interestingly, the MLA interpret the phrase 'hold in trust' to mean that the museum has to be non-profit making, which the phrase clearly does not stipulate,

*“Hold in trust for society reflects the current thinking that museums provide a service to society by holding collections in trust and ensuring that they remain within the public domain. It also implies that a museum should not be a profit-distributing organisation.”*

This highlights the issues in reaching a common definition of purpose of a museum as meanings are read into phrases that are not there. From a common law legal perspective it poses a difficulty in how museums are interpreting the legislation as it stands.

The Museums Association defines a museum in the 2008 version of the *Code of Ethics* as,

*“Museums enable people to explore collections for inspiration, learning and enjoyment. They are institutions that collect, safeguard and make accessible artefacts and specimens, which they hold in trust for society.”*

This definition, as articulated in the latest version of the Code of Ethics (2008, p8), includes galleries within the term museum and is covers subsidiary companies that a museum may have established. Notably, in comparison to the ICOM definition, the MA does not require a museum to be non-profit making but places an emphasis on the collections which should be *'held on trust for society.'*

In 2007, the Museums Journal<sup>7</sup> brought together eight significant figures in the museum world to deliberate on what museums were for in a piece entitled *'Value Judgement'*. Understandably, in such a discursive piece, it started with a statement and ended with a consensus but did not provide a conclusive definition of museum purpose. At its heart, Maurice Davies of the MA thought that museums were all about people viewing exhibits and learning from them. He considered that everything else around it was window dressing, including research.

The differing opinions of leading museum organisations makes it difficult to establish a common sense of purpose for museums. That is understandable given cultural differences and differing organisational purpose. Given that this thesis is concerned with local authority museums within England, the definition, in the absence of a legal one, should be that of the DCMS which, in its last iteration, was that museums make collections of things accessible to the public. However, it could be argued that this definition is the least stable of all those recounted as it is based on political direction and policy rather than a consensus from within the museum sector. Now there has been a change of government will the emphasis move away from accessibility and participation towards conservation and visitor numbers? Is the museum sector truly objective enough to establish a coherent view on what a museum is for? Possibly not. Therefore, what can be taken from these disparate views as a concerted purpose for museums

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<sup>7</sup> One of the two journals published by the Museums Association for members.

which can be applied throughout this thesis? That museums are for the public and that they contain collections which should be accessible to people for their education and enjoyment. Upon this basis, this thesis will assess whether local authority museums are able to deliver this purpose in a sustainable way in the future.

## **The public benefit of museums**

Why has society created museums and why are they funded and regulated in the way that they are? Museums are born from society and their financial and regulatory frameworks should reflect the expectations of the people which they reflect at any given point of time. Whilst the urge to collect or hoard can be seen back into antiquity, publicly accessible museums are a more modern phenomenon. The development of national museums in Britain started during the Age of Enlightenment in the 18<sup>th</sup> century; the legislation extending the opportunity of museums to populations outside of London through local authorities post-date the *Reform Act 1832*.

The debate recorded in Hansard when the Museums of Art bill was brought before the House of Commons gives an interesting insight into the motivations for allowing local authorities to support museum services from the Borough Rate. The provision of museums was linked to the earlier establishment of Schools of Art as the Committee who originally proposed these schools linked the schools to access to fine art material. The lack of provision of fine art material was seen by William Ewart<sup>8</sup> as an omission that

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<sup>8</sup> William Ewart (1798-1869) was a radical Liberal MP who represented a number of seats between 1828 and 1841 after which he became the Member for Dumfries until his retirement from Parliament in 1868. He became a champion of the museum and library legislation sitting on the 1836 select committee which proposed museums in manufacturing towns and supporting three museums and libraries bills through the House of Commons in 1845, 1850 and 1855. In 1866 on the introduction of an amendment bill to the *1855 Public Libraries Act* William Ewart Gladstone, then Leader of the House of Commons and Chancellor of the Exchequer and William Ewart's father's godson, stated that Ewart was, "*associated with many achievements of public utility, but with this act of legislation [of 1850], I think, he may feel assured that his name will be associated not only during his life, but after he is gone.*" (Oxford Dictionary of National Biography, 2011).

this Bill sought to redress. However, members were not advocating a wholesale documentation and presentation of the past, but of access to art, including sculpture, from antiquity to modern times. This availability of artistic material was not simply the originals, but cast copies, as had been popularised by the aristocracy during their Grand Tours of Europe, were seen as being eminently acceptable.

A secondary consideration which was brought to the fore by many participants in the debate was the education and betterment of the working classes. In particular, a couple of members noted that existing venues, such as the British Museum, were not accessible to the working classes owing to their opening hours and a proposal for Sunday opening was made. Other comments noted the positive influence such establishments would have on the working classes by encouraging them to forsake the pub for art. Sir Robert Peel's<sup>9</sup> contribution to the debate was to urge caution against giving local authorities a wide power to levy taxation to found museums when such powers would be required as part of the Parliamentary legislative programme for improving the ventilation and 'salubrity' of houses within the authority's care. As the bill was primarily aimed at the manufacturing towns which had been enfranchised through the *Reform Act 1832*, Peel entreated those who had made their fortunes through manufacturing to use their beneficence for the capital foundation of museums. Interestingly, given the modern propensity for funding capital projects and reducing revenue, Peel sought to secure the lasting security of these foundations through local taxation for ongoing revenue requirements.

This debate and the *Museums Act 1845* reflected the political situation in the 19<sup>th</sup> century. Service delivery was at a local level through local

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<sup>9</sup> Prime Minister at the time of the legislation, supporter of the *Municipal Corporations Act 1835* upon which this bill rested and trustee of the British Museum.

government and a number of local boards<sup>10</sup>, therefore, museum provision would be at a local level also. In fact, at this point in the 19<sup>th</sup> century only the British Museum and the National Gallery had been founded with a national remit. The initial legislation was drawn tightly to ensure only limited numbers of museums could be founded owing to the concerns about the financial implications on the public purse<sup>11</sup>. But it is a mark of growth and development at that time that the legislation had to be amended twice more in ten years to extend the provisions to smaller municipal units. It also is notable that the legislation in respect of local authority provision of museums always has been permissive, allowing but not requiring local authorities to provide museums, and that it pre-dates the drive for mass education of the populace.

## **The changing function of museums**

The modern purpose of museums has been debated in a number of academic articles<sup>12</sup>. It could be argued that the traditional concept of a museum – a building within which artefacts reside for people to view is outdated and that museums are about outreach work, handling collections and online presence. This misses the point. These are just tools in accessibility; they do not make the museum itself defunct. Practicality underlies this. You cannot take the entire contents of a museum out to mass numbers of people every day; it is effective if large numbers travel to one location where the exhibits are housed. Certain objects because of their rarity, size, weight or fragility do not lend themselves to being transported, let alone handled, and often require a controlled environment which is not transportable. This is where the museum can still play its part in making the unusual available. As for the educational purpose of a

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<sup>10</sup> Discussed in more detail in chapter three. The situation was not resolved until the end of the 19<sup>th</sup> century.

<sup>11</sup> For historical context, this legislation was passing through Parliament during a period which saw a potato famine in Ireland and the repeal of the Corn Law which precipitated a schism in the Conservative Party which Peel led.

<sup>12</sup> Such as Donahue 2004 or Jordanova 1989.

museum, this has been judged from the number of school visitors being registered under the Best Value Performance Indicator BV170c<sup>13</sup>. Historical knowledge remains popular with adults and essential for children up to the age of fourteen at the end of Key Stage 3.

The position in relation to local authority museums has changed little since their introduction in 1845. They rely on public donations, they are provided through a discretionary power and the public finance of them is questioned. So why should modern local authorities continue to provide museums if their original purpose, linked to schools of design, has been separated from them and there are successful publicly funded national museums?

### **Why should there be local authority museums?**

There are several reasons which support continued local authority provision of museum services. Firstly, the public sector is there to provide essential services and those services which should be provided but cannot be provided by the private sector. Competition-size swimming pools, which are un-economic to run, and museums are perfect examples of services which often cannot be provided by the private sector. In the private sector, history is in competition with a wide range of 'attractions' which means that visitor expectations are different than with a traditional museum and a wide commercial appeal is required. The House on the Hill Toy Museum in Essex is a privately run family firm which has diversified into media and consultancy work. Historic houses such as Sandringham House, Holkham Hall, and Beaulieu include a separate motor museum on site, but with the exception of Beaulieu the attraction is the house and gardens, not the museum and the sustainability is based on the whole estate portfolio rather than a single visitor attraction. The Jorvik Centre is a good example

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<sup>13</sup> See chapter two. This measure ceased to be collected in reporting year 2008/09.

of an attraction-based historical site but it is run by the York Archaeological Trust who can still be the recipients of public funding such as Heritage Lottery Funding<sup>14</sup> which further supports the premise that even successful tourist destinations in the heritage field need public subsidy to continue.

This justification can be taken beyond the national level as a result of distribution and context. The national museums are excellent institutions, but are primarily centred in London and remove art and artefacts from their context. Objects in a national museum are contained there for their pure aesthetic value and / or their rarity with their historical context being of secondary importance<sup>15</sup>. Local authority delivery of museums can ensure that pieces are displayed in their locality where the historical story as well as the artistic merit can be valued. This can engage the public, as was seen with the controversial case of Seahenge. The decision was made to remove Seahenge from the beach at Holme-next-the-Sea in Norfolk for preservation through conservation in Peterborough and Portsmouth, but this took Seahenge away from its context. It is now at the nearest museum to Holme, the Lynn Museum at King's Lynn which is 17 miles away, in a gallery which replicates the North Sea vista of Holme beach<sup>16</sup>.

That is not to say that local authority museums should collect only within their geographic area. Many local authority museums have inherited wide ranging collections with specialisations in many different areas which have been driven by the donors to the museum. St Edmundsbury Borough Council's 1920s and 1930s costume collection and the eclectic Cullum collection are good examples of local collectors donating very personal collections to the local museum which do not have the local links of some of the other collections within their museums. Such

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<sup>14</sup> Other examples are Bede's World and the Museum of East Anglian Life, both registered charities.

<sup>15</sup> Examples of this include the Elgin Marbles and the Mildenhall Treasure at the British Museum.

<sup>16</sup> It is beyond the scope of this thesis to discuss the cultural rights and wrongs of removing ancient monuments from their external context for display in museums in a controlled environment to prevent physical deterioration.



collections bring a depth and quality to local museums which means they can maintain an equality of access to superior collections which cannot be provided solely by the national museums owing to their locations.

There is an economic argument for continuing with local authority museums. Economic development had formed a significant part of the changes proposed through Labour's Sub-National Review<sup>17</sup>. With the demise of the Regional Development Agencies and the creation of Local Economic Partnerships between the private sector and local government in the wake of the recession economic development is becoming increasingly important area of work for local authorities. From an investment perspective, culture, and specifically history and the built and landscaped environment play an important role in driving economic growth as companies start or relocate somewhere that is economically competitive from a business costs perspective, well-connected and provides its employees with a nice place to live and bring up a family. This is where a local authority's portfolio of services can prove attractive. Good examples of historic towns with successful local authority museums and a vibrant economy are Winchester, Bury St Edmunds, and Brighton. As Tony Travers 2006 report demonstrates, the larger regional museums<sup>18</sup> are making a significant impact in their areas. An example in the report highlighted visitor numbers of the museum service against visitor numbers for the local football club. Surprisingly, Newcastle United received 985,040 visitors in 2004/05 but Tyne & Wear museums had 1,673,917 attendees. Though it must be noted that this is one football ground against a number of museums.

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<sup>17</sup> Whereby the Regional Spatial Strategy and Regional Economic Strategy were to be merged and local authorities were to have additional economic development duties complementing that of the Regional Development Agencies.

<sup>18</sup> Birmingham Museums and Art Gallery, Bristol Museums, Galleries and Archives, Hampshire County Council, Leicester City Museums Service, Norfolk Museums and Archaeology Service, Sheffield Galleries and Museums Trust, and Tyne & Wear Museums.

The alternative economic argument for museums is often not discussed. The buildings and the exhibits themselves have a commercial as well as a cultural value. The reluctance to allow museum assets on a balance sheet is understandable. Even in 1845, Sir W. James accused the corporations who were altered by the *Municipal Corporations Act* of selling off both valuable works of art and corporation silver by auction (Hansard 1845, p385) and repenting ten years later. But these collections are part of the cultural and public inheritance and should be used for public benefit be it through use or access.

## **Theoretical framework**

This thesis rests on the principles that museums have public benefit and that local authorities should be supporting museums for the reasons outlined above. In order to evaluate whether this can continue in the future, this thesis will consider the historical development of law and policy in respect of local authority museums, assess the current legal and policy framework, compare provisions for local authorities with their nationally funded counterparts, and it will focus in particular on the issues of acquisition and disposal to illuminate the issues that local authority museums face in order to continue. This paper will conclude with an assessment of whether the law and current policy position needs amendment to provide for sustainable museums in the future. Throughout the thesis, consideration will be made of whether law and policy differs and if so do the provisions conflict or complement. Comments will be made where practice does not meet the provision of policy. Thought will be directed at whether the law or the policy aspects need to change in the future and if so, how it should change.

## **Concluding thoughts**

This thesis does not seek to establish the provision of local authority museums as it takes as part of the given assumptions that local authorities can and should be providing museums, especially to meet the requirements of place-shaping under the theoretical resurgence of local authority museums. Their public benefit is beyond question and their public service is beyond quantification. The heart of the issue is whether this public benefit and public service can continue into the 21<sup>st</sup> century when local authorities are placed under increasing pressure. This requires an assessment of both the legal and policy framework to see if they are separately or together fit for purpose.

This means posing difficult questions as to the fundamental assumptions underlying the provision of museum services. Is it in the public's best interest to engage with an historic object by having access to it, even if that access will eventually destroy it? Or should the public engage in a virtual or a hermetically sealed environment which protects the artefact from human touch and more rapid destruction? Should these pieces be traded to provide an acquisition fund to ensure that a museum can purchase new pieces for its core collection, or is the relationship with the public such that museums are considered custodians for the time being of a piece which is working through its natural life cycle? Should local authorities be directly providing museum services or should they be outsourcing those services to other, different, legal entities and if so, what impact does that have on its legal obligations in relation to its collection? This thesis seeks to set out the opportunities and pitfalls our local authority museums are facing and assess whether the legal and policy framework within which they work is robust enough to allow them to meet their obligations, and if not, what changes could be made.

## **Chapter 2: 'in museums we trust'. The policy context for the modern local authority museum**

*'To put it bluntly, most people do not really care for museums...they have not hitherto played a sufficiently important part in the life of the community to make ordinary folk realise what they can do...The museum should be one of the best recognised forms of public service and should attract the enthusiastic support of the community.'*<sup>19</sup>

### **What is the policy context?**

Policy is an amorphous word. It expands and contracts to suit the situation. It operates at a macro and micro level and as such can refer to the grand plans of a government but also as to whether or not a museum charges for entry. The Oxford English Dictionary describes policy thus, "...a course or principle of action adopted or proposed by government, party, business or individual etc..." (1995, p1057). Neither the law nor local authority museums operate in a vacuum, policy or otherwise. The museums are part of wider public organisations which have a diverse portfolio of responsibilities competing for funding. They are affected by policies devised at a local, national and sometimes international level by government, professional bodies, and their council paymasters. The law equally is not immune. Statutes often are created through policy promises of government or policy is used to supplement legislative provisions. All these facets of policy pressure on local authority museums will be reviewed in this chapter as it is clear that, whatever its source and level, the effect of policy on museums undoubtedly is significant.

This chapter will be investigating and outlining that it is not merely museum-led adopted policy and government museum policy that acts as

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<sup>19</sup> Department for Education and Science (1973, p73) quoting Sir Henry Miers in his 1928 report for the Carnegie Trust (p80).

a driver for museum behaviour. In fact, for local authority museums, the wider local government policy context may have an equal, if not greater, effect on the local authority museums which have to work within these additional constraints. The implications of local government policy can create additional burdens on a service, distracting attention away from the core demands of operating a museum. From performance indicators to the impact of government spending policy, this chapter will show how modern local authority museums have been caught between generic requirements and professional expectations, restricting their ability to innovate and generate the results that the measures and policies are allegedly there to produce – well attended, cost-effective, and community-focused local museums.

## **Great Expectations**

Policy can be seen as a vicious circle – where does one start? Different organisations can be exerting pressure on more than one element of the circle itself. However, without the anticipation of change or the belief that one can engender transformation, a subject turns into a sleepy backwater of contented righteousness. No alteration is required because the approach works and is agreed on by all, therefore no need to lobby for change. Where improvements can be made, membership organisations form to generate those improvements on behalf of their members and the wider sector it represents, such also is the underlying principle of trades unions for individuals. The museum world is no different and its reach is international.

## International Council of Museums

ICOM was founded in 1946 and is a non-governmental organisation which has formal relations with the United Nations Educational, Scientific and Cultural Organisation. It is the international membership based organisation for museums and museum professionals. The ICOM Code of Ethics sets the minimum standard for members and identifies their minimum expectations for all museums and museum professionals. The Code of Ethics was last revised in 2004. ICOM states that its purpose is to provide,

*“a means of professional self-regulation in a key area of public provision where legislation at a national level is variable and far from consistent. It sets minimum standards of conduct and performance to which museum professional staff throughout the world may reasonably aspire as well as providing a statement of reasonable public expectation from the museum profession.”*

The organisation by its nature also covers many different legal jurisdictions and systems. ICOM's documents are written in French and translated into other languages. The Code of Ethics is quite detailed and goes beyond articulating universal principles. Members of ICOM are taken to uphold the Code of Ethics as part of their membership. Therefore, any council or local authority museum officer who chose to be a member of ICOM would be required to act within the terms of the Code of Ethics.

The Code of Ethics sets out the proposition that museums hold collections *'in trust for the benefit of society.'* Specifically, members are told that:

*“Museums have the duty to acquire, preserve and promote their collections as a contribution to safeguarding the natural, cultural and scientific heritage. Their collections are a significant public inheritance, have a special position in law and are protected by international legislation. Inherent in this public trust is the notion of stewardship that includes rightful ownership, permanence, documentation, accessibility and responsible disposal.”*

However, only certain museum collections have a special position in law in this country and the extent they are protected by international legislation is in respect of their illegal trade rather than enforcing the view that it is inalienable public cultural property. Significantly, the ICOM *Code of Ethics*, whilst of a similar philosophical origin, is significantly different to common views held by United Kingdom museum professionals and it is doubtful whether councils consider them relevant when there is a strong national policy framework. It professes to be a minimum standard and encourages national policy to be developed. In reality it diverges from the principles of the combined English policy framework and appears to be more stringent in some areas and laxer in others.

## **Museums Association**

The MA is the influential museum industry body for both individuals and institutions. It was set up by a small group of museums in 1889 and remains an independent membership-based organisation, funded by its members. It is the oldest museums association in the world, formed to support the development of museums and set industry standards for their operation, and as such it pre-dated by forty years government policy intervention. The expectations that are placed on local authorities by this organisation are more significant than those of ICOM. Their position within the museum community is such that their influence and approbation can extend to museums whether or not they are members of the organisation<sup>20</sup>.

The MA's view on museum actions is based around the principle that they are, and are expected to be by the general public, permanent

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<sup>20</sup> The MA website states, "One of the many roles of the Museums Association is to set and monitor standards of behaviour within the museum community. Museums and their collections are within the 'public realm' and the public have a right to expect that museums in the United Kingdom and those that work in them act with integrity, honesty and fairness." (MA 2007a). Whilst it can discipline its members only for breaches of the MA *Code of Ethics*, it has also commented on the actions of local authorities who are not members of its association, holding them to the same standard as their members (MA 2006, p5).

repositories of artefacts (MA 2007, section 2A). The MA itself has recognised that it has been, “...accused of handing down advice from an ivory tower and not always taking into account the realities under which museums operate...” (MA 2005, p49). As such, the disposal guidelines were reviewed in 2007 and the ethics guidelines in 2008. The MA has visibly shifted over the past five years in its response to challenges faced by museums but whether this is enough or too much is open to debate. The MA’s dual role as both a trade association and setting standards for the sector can lead to accusations that there is an unacceptable conflict of interests. However, the MA has outlasted two consecutive government organisations working under four different names and will be greeting a third public institution from October 2011.

The MA *Code of Ethics* states that it, “...defines standards that are often higher than those required by law,” (2002, p4, and 2008a, p5). Appreciating the limitation on the implementation of the Code, it states that it should be incorporated into both employment and business contracts to make it legally enforceable. The Code states that, “...the spirit of the code is as important as the letter...” (2002, p5, and 2008, p6). Incorporating an, admittedly well-drafted, policy document into a legal contract is fraught with difficulty. Policy rarely is drafted with the intention that it will be legally enforceable<sup>21</sup>, and one of its strengths is that it permits the expression of concepts that are beyond the literal as contained in our common law system. These ideas do not translate easily into non-discriminatory employment contracts<sup>22</sup>.

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<sup>21</sup> Planning Policy Statements and the Planning Policy Guidance they replaced are one of the exceptions.

<sup>22</sup> For instance, you could not insist that an employee was a member of the MA, neither could you hold an MA member to a different standard to someone doing the same job through the inclusion of the *Code of Ethics* in their employment contract.



## **NMDC, GLLAM, MDA....**

Many MA members also participate in other museum groupings. The National Museum Director's Conference (NMDC) was established in 1929 to facilitate joint working between the national museums. This membership has gradually been extended to include four significant local museums, the Ashmolean, Glasgow Museums, Tyne and Wear Museums, and Birmingham Museums and Art Gallery. Two of these are local authority museums, and another a nationally funded local authority museum. The NMDC lobbies on behalf of these museums and produces 'think pieces' on emerging museum issues, such as *Too Much Stuff*, the 2003 paper on disposal of artefacts from museums (NMDC 2003). The corresponding organisation for local authority museums is the Group for Large Local Authority Museums (GLLAM). However, their profile has been lower in recent years and their web presence is non-existent. The Collections Trust was formerly the Museum Documentation Association and originated as part of the MA. It is now a not-for-profit charitable group which provides advice on a wide range of topics affecting collections, including acquisition, disposal and legal issues.

## **Andrew Carnegie's legacy**

The Carnegie Trust is a not-for-profit foundation founded in 1913 undertaking research into matters of public policy. Museums always have been a specialist research area for the Trust. Two of the earliest investigations into provincial museums were made on behalf of the Trust by Sir Henry Miers in 1928 and Sir Frank Markham in 1938 but were not successful in influencing government policy on museums.

Sir Henry Miers' report made a number of proposals. In particular he recommended that museums should be established in towns with a satisfactory population, unless one was easily available in a neighbouring authority; that provincial museums should have narrow and precise acquisition policies, and that one museum in each county should become the County Museum which also would form the organisational point for loans. Additionally, he wanted the national museums to work more closely with the provincial museums and for the MA to be strengthened (1928, pp80-1). This latter point was acted upon by the Carnegie Trust who awarded the Association £500 which enabled it to establish an office and post of paid secretary for the first time (Standing Commission on Museums and Galleries 1963, p4).

Ten years' later, Sir Frank Markham, who had helped Sir Henry in the previous investigation, produced another comprehensive report. He was concerned that out of 750 museums in operation, he considered that 250 had concerning financial positions and further 250 were in a precarious financial state. He thought that those 250 needed radical reorganisation or closure with museums opening on average of one every three weeks (1938, pp165-6). His proposals included a recommendation that towns with populations of more than 30,000 should have a quality museum and that museums in smaller settlements should either be incorporated into larger services or closed down (p172&166). He also believed that the range of local museums should be limited and should make provision for roving exhibitions (p169). Whilst the report did not engender action by the Government of the day, it became the standard work within the museum profession on how to operate a museum according to the Paymaster General's Committee in 1973 (Department of Education and Science 1973).

## **A changing political vision for public services? The golden thread from Major to Cameron.**

Government vision for museums does not operate in a policy void. Beyond the lobbying of the aforementioned specialist organisations, each government has an over-arching political philosophy and practical approach to achieving its aims which sets the framework within which the strategic direction for any given sector or service is developed. Sometimes, this means that the sector is left alone given more pressing issues in other public services. Local government is not one of those areas. Museums have found themselves embroiled both in wider public sector theoretical transformations or specific demands for local government change. Over the last twenty years, it has appeared that the one thing that is constant is change, driven from the top.

### **The Citizens' Charter**

1990 brought the end of Thatcherism and introduced a new style of politics. John Major led a Conservative government faced with a recession and a major economic crisis. His political philosophy was encapsulated in the phrase 'back to basics' and his idea of a 'Citizens Charter' to make the public sector more accountable and improve performance. This concept had a huge political legacy as it was taken forward in a different form by the subsequent, Labour, government. However, it also heralded the introduction of competition and private sector provision of public services through compulsory competitive tendering which took Thatcher's privatisation agenda into areas of the public sector which had remained untouched during the 1980s. Whilst this did not reach museum services at the time, the principles behind this alternative view of service provision would inform museum development over the next twenty years.

## The 'Golden Thread'

The Third Way is a political philosophy developed to bridge unconstrained conservative capitalism and the socialist command society. It crosses the political divide – Harold McMillan wrote a book entitled *The Middle Way* back in 1938. It could be described as the free market with a social conscience and, for Tony Blair, involved an increased role for the state to bring about fairness in society. To achieve this apparent shift in political philosophy, which in fact owed a debt to the political development under Major, a mechanism was developed to turn policy into action. The overall policy objectives that the Labour government set were manifested in all the constituent parts of government through targets contained in Public Service Agreements (PSA) and Departmental Strategic Objectives (DSOs). Each department had a set of targets which influenced the targets that were set further down the government structure.

As part of the funding agreement between the DCMS and the MLA, for instance, there was an agreed set of performance targets<sup>23</sup> which were designed to aid the DCMS meet its own PSA targets<sup>24</sup> and its DSOs<sup>25</sup>. Such a process also was used directly with local government by the Department for Communities and Local Government (CLG) through the Local Area Agreements (LAAs) which were negotiated between central and local government. Targets in the LAAs were drawn from a 'national indicator set' designed to meet CLG, DCMS and other sponsor department's PSA targets.

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<sup>23</sup> The 'indicators of progress' from the DCMS / MLA funding agreement 2008-2011 included restructuring the MLA, increasing visitor numbers at hub museums, increasing the number of school-age children visiting hub museums, and delivering the cultural Olympiad project 'Stories of the World' through national and regional museums (MLA 2009).

<sup>24</sup> DCMS led on one PSA target within Government and contributed to five others. PSA22 required the DCMS to, "Deliver a successful Olympic Games and Paralympic Games with a sustainable legacy and get more children and young people taking part in high quality PE and sport." The DCMS also contributed to PSA1 raising the productivity of the economy, PSA12 improving the health and well-being of young people, PSA14 increasing the number of young people on the road to success, PSA15 eliminating discrimination, PSA20 increasing the housing supply, and PSA21 building cohesive, empowered and active communities (DCMS 2010a).

<sup>25</sup> DCMS' DSOs were to encourage widespread enjoyment of culture, media and sport; support talent and excellence in culture, media and sport; realise the economic benefits of the department's sectors; and to deliver the Olympic and Paralympic Games and legacy (DCMS 2010a).

It was supposed to provide a 'golden thread' of delivery ensuring that government pledges were translated to operational action. Whilst in theory this appeared to be a simple and unified way of ensuring all targets and objectives are the same across the system, what it engendered was a target-led philosophy. Owing to the vast nature of government, as the targets were distilled down through the system, what seemed at the top level to be a simple objective could be translated into something different on the ground.

## **The Big Society**

The 2010 election was closely fought and made it difficult to predict the outcome. Comprehensive manifestos were produced by each of the three parties. The incumbent Labour Party mentioned museums several times in their manifesto. They promised operational autonomy for major museums (Labour Party 2010, p7:2) which meant managerial and economic independence (p7:4). They wanted children to benefit from five hours of cultural provision per week, including visits to local museums (p7:3). A review of the Conservative and Liberal Democrat manifestos demonstrated the closeness of the two parties on many fundamental issues. However, the Conservative election manifesto mentioned the word 'museum' only once – highlighting the development of the Imperial War Museum North in Manchester as part of its regeneration (Conservative Party 2010, p100). The Liberal Democrat election manifesto also contained only one reference to museums – a commitment to maintain the free entry policy to the national museums and to make the Government art collection more publically available (Liberal Democrats 2010, p45). Museums are not something that will win you an election. The result was the first hung parliament since 1974 and a Conservative-Liberal Democrat coalition. Museums were not mentioned in the initial *Coalition Agreement* published five days after the election. Their *Programme for Government*

confirmed the Liberal Democrat manifesto pledge to maintain free entry to national museums and additionally promised to give greater freedoms to these directly funded organisations (Coalition 2010b, p14).

The Big Society is the foundation political philosophy of the current Prime Minister, David Cameron. The concept of the Big Society is that people do not automatically turn to Government to solve problems but feel that they can address both personal and community issues themselves. It is collective endeavour and local solutions for local problems. According to David Cameron, to achieve the Big Society it requires social action, from volunteering to philanthropy, and is achieved partially through transparency, giving people the information to be able to take informed action (Cameron 2010). The Big Society both taps into nostalgia, harking back to the so-called 'Dunkirk Spirit' whilst bringing it firmly into the information age as it relies on public access to information about their local area and how to engage with official structures and permissions.

CLG has described the Big Society as a huge cultural shift on the part of citizens as they are not to expect Government to do everything. Dr Bert Provan from CLG<sup>26</sup> described the essence of the philosophy thus: localism is the ethos, decentralisation is the method and the Big Society is what is trying to be achieved. CLG has identified six actions towards achieving the Big Society. These actions are underpinning the approaches to providing public services within the new constraints on public sector spending. The first role is for government to remove bureaucratic burdens and for the public to identify them. The next priority is to empower people to take action to provide support for their communities. Making public bodies and services transparent provide the information to people so that they are able to participate in the next action of strengthening democratic

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<sup>26</sup> In a presentation at the East of England Hub Museum Partnership Day at the Fitzwilliam Museum on 18 October 2010.

accountability. A crucial element for many discretionary services is the commitment allowing local people to control public spending. The final element of the package is the drive to diversify supply of services, be that in the private, volunteer or social enterprise sector.

## **Philanthropy**

The Coalition government is trying to encourage philanthropy to engender sustainability in the cultural sector. The *Giving Green* and *White* papers made a number of suggestions in engaging people to part with not only their money, but their time and expertise<sup>27</sup>. The most significant announcement has been the Endowment Fund which is hoping to match fund private donations to help cultural organisations, including museums, build endowment funds similar to those in the United States to generate an income which can support ongoing revenue costs (DCMS 2011b). Most high profile fundraising for museums in the United Kingdom are for more glamorous capital projects such as purchases or new building projects rather than towards the longer term viability of these museums. Will the American model work when councils are not just considering the revenue costs of services but the capital costs of maintaining, often older, buildings? Richard Morrison in the *Times* painted a bleak picture which, so far, has not come to pass (2011, p3).

## **Political change or continuity?**

When compiled into a brief account of the past twenty years, it is clear how each successive government, despite political persuasion, has drawn on the legacy of its predecessor. The concepts behind John Major's Citizens' Charter were taken forward through New Labour's Best Value

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<sup>27</sup> Also building on a report by Neil MacGregor, Director of the British Museum, for the Secretary of State for Culture, Media and Sport on the use of endowments for DCMS funded museums (2010).

programme amongst others. The Big Society owes a lot to the philosophical basis of the Third Way which was promulgated, though not invented, by New Labour. However, this theoretical continuity has not resulted in stability but has been marked by change. Partly through the political rose tinted glasses interpretation of particular ideas, and partly because of events. Whatever plans the Conservative and Liberal Democrat Parties may have developed in their period of opposition have had to be reviewed in the light of the global financial crisis and then the coalition agreement to govern developed in the wake of a hung Parliament. The politicians promise freedom for local authorities to provide local services meeting local priorities, just as their Victorian predecessors did; the test will be how they exercise that freedom if it arrives.

## **The government vision for museums: from the jazz age to the information age**

### **Equitable distribution of national treasures?**

In the 1920s a Royal Commission was formed to review the national museums and galleries producing an interim report in 1928 and final reports in 1929 and 1930<sup>28</sup>. Though not articulating of government policy, the Commission provided advice to the government and referenced Sir Henry Miers recent work for the Carnegie Trust<sup>29</sup>. The consequences of the Great Depression of 1929 were incorporated within the terms of reference, with the Commission being asked how to limit expenditure during the current financial climate and whether to propose a general system of admission

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<sup>28</sup> This covered museums and galleries in Scotland, the Public Records Office, the London Museum, and the Royal Botanic Gardens in Kew in addition to museums which continue to be or form part of national museums and galleries (Royal Commission 1929, p4).

<sup>29</sup> Royal Commissions are ad hoc government advisory committees. They are used to review and report on non-party political topics, or to consider a subject in a non-party political manner; though some would argue that they can divert attention away from problematic areas by being seen to do something. Most Royal Commissions are time-limited with the expectation of a report at the end.



fees. It also considered whether the museums and galleries were, “*the most advantageous distribution and display of the National Treasures,*” and whether bequests from benefactors need to be modified to permit their being matched with the most suitable museum or gallery (1929, p4).

The report looked into the connections between the national and local museums. The first report noted that, “[*t*here is no united and dynamic connection between the national and provincial institutions,” (1929, p11). This was something that the Commission wanted to change as it was thought that this would prevent museums satisfying their main purpose as an “*instrument of education*” (1929, p24). Even in the 1920s a disparity in quality of local authority museum services was being noted by the Commission. The report recommended that there should be an affiliation scheme between national museums and galleries and the more significant provincial museums to facilitate semi-permanent loans, provision of advice and exchange of staff (1929, p30). The Commissioners were not keen that the national museums be brought within formal state control as happened on the Continent. However, they recommended that a Standing Commission was formed to provide co-ordination and advice across the wide range of organisations falling within the Royal Commission’s purview (1929, p70). Known from 1931 as The Standing Commission on Museums and Galleries it was renamed in 1981 as the Museums and Galleries Commission (MGC) and was the predecessor organisation to the MLA.

## **Cinderella services**

The first government department to seriously investigate museum policy and operation was the Treasury. In 1960 the Treasury invited the Standing Commission on Museums and Galleries to investigate the position of provincial museums and galleries. The Commission reported in 1963, the

year before the last major piece of local authority museum legislation. The Commission was asked, "...to ascertain the scope, nature and significance of the local collections, the manner in which they are organised, the resources available to them and the possibilities of their further development on a basis of regional co-operation." Approximately half of the museums falling within the purview of the review were local authority museums (1963, p2). It was the first post-war review of local museums and it noted the toll that the Second World War had extracted on these organisations as a number had been unable to re-open fifteen years later.

The report built on the work of the Royal Commission and the two reports for the Carnegie Trust from before the war. Miers' Carnegie paper and the Royal Commission report had encouraged development in all museums and galleries during the 1930s. However, Markham's 1938 report noted that the expansion of local authority and regimental museums had been coupled with failure owing to lack of financial provision. It also documented the widespread pruning of collections to ensure a local focus. This supports evidence found by the author during the research for this PhD of lax or particular curatorial decisions, particularly prior to the 1960s (1963, p5). The Financial Secretary to the Treasury in his speech relating to the Government's hopes for this investigation, called the provincial museums as the "*Cinderella group*." It paints an interesting impression of the perception of the services in the early Sixties in comparison to their position today. Some would argue that the appellation applies equally today as it did then.

The Commission concluded that the collections held in the provinces were a "*great national heritage*". They made three overarching recommendations. Firstly, that local authorities should join up the council and voluntary museums in their area to develop a plan for improvements. Secondly, that the Government match local funding to set up schemes to

help poorer museums, and finally that the Government should make capital grants for development (1963, p71). They thought that the Government should focus its support on those museums which were not performing their primary purpose within a town. However, recommendations are not adopted policy and a 1973 report by the Department for Education and Science<sup>30</sup> noted that hardly any of the proposals from major reports on museums and galleries over the past 50 years<sup>31</sup> had been realised and that similar recommendations had been made by each report (1973, p4 and 60)<sup>32</sup>. Underlying the general points was one main issue – resources. The Committee felt that the local museums were under resourced for what was expected of them.

## Recognition

Nearly 150 years after the first local authority museum legislation was passed, the Department for National Heritage was created by John Major in 1992. This continued until 1997 when it was replaced by Tony Blair's 'Cool Britannia' branded DCMS. This wider remit has been continued by the Coalition government with small alterations to ministerial portfolio. The Department for National Heritage provided a co-ordinated representation for arts and heritage matters within Government, as prior to its creation, the responsibilities for cultural matters had resided among a number of different

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<sup>30</sup> The report focused on council museums and coincided with the first major restructuring of local government for a century. The Committee, appointed by the Paymaster General, was chaired by C W Wright, Deputy Secretary at the Department, and included the then Director of Birmingham City Museums and Galleries, Dennis Farr; the Director of the Victoria and Albert Museum (V&A), John Pope-Hennessy; and the Director of the British Museum, the educationalist John Wolfenden. The report noted in its first paragraph that, "Local authorities are always faced with increasing demands for expenditure for major services and the requirements of museums and their collections are generally regarded as a low priority," and the Committee concluded that many museums in the sector had been suffering from neglect. The authors of the report were hopeful that local government reorganisation would be a catalyst for better quality services.

<sup>31</sup> Namely, the 1919 *Commission on Adult Education Interim Report on Libraries and Museums*, the 1928 and 1938 Carnegie Trust reports, the Royal Commission reports of 1929 and 1930, and the 1963 report by the Standing Commission on Museums and Galleries.

<sup>32</sup> The Committee recorded that none of Sir Henry Miers particular proposals from his 1928 report had been implemented. Sir Frank Markham's 1938 report lacked an official response and the Committee noted that they were replicating many of his criticisms. The 1963 Standing Commission on Museums and Galleries report was more successful in enabling match funding grants and an increase in the Purchase Grant Fund budget (1973, pp75-6).

government departments. The Department undertook the first major review of museum strategic policy since the Royal Commission, the result of which was the 1996 publication of the first government policy statement on museums: *Treasures in Trust*.

Its aim was to improve museums and as such, *Treasures in Trust* was very much a product of the political philosophy of the time. It made twenty-four recommendations of which two were directed specifically at local authority museums. It encouraged local authorities to deliberate the merits of instituting museums as charitable trusts and to work with other organisations to provide services (1996, p2). Another recommendation was to identify pre-eminent collections in non-national museums. It also promised an investigation into the legal status of museum collections. One of the objectives of the report was to ensure the longer term viability of museums. However, the primary purpose of the report, as set out in paragraph 1.2 was to improve standards (1996, p1). By setting out the key characteristics for a museum and the fundamental aims of a museum John Major's government was translating the concept of citizens' charter into a museum policy statement (1996, pp5&6). However, the result of *Treasures in Trust* was implementation of a number of recommendations, the legacy of which can still be seen in museums.

### **A new Re:source**

A new government in 1997 resulted in *A New Cultural Framework* the following year which was to set the direction for museums for the next eight years. The *Framework* gave two levels of strategic direction to the sector. The first was the over-arching themes for the whole department, "...access, excellence and innovation, education and the creative industries." For the museum sector, one of its main impacts was the creation of the Museums,

Libraries and Archives Council from the MGC<sup>33</sup> and the Library and Information Commission, also incorporating archives. The move was not universally supported at the consultation stage, and the sector gained the second highest number of responses to the arts. The proposed expansion of responsibility to cover the national museums found support with the MGC, the MA, and the National Arts Collection Fund (Art Fund) amongst others, but not, unsurprisingly, the National Museums Directors' Conference (NMDC). The other concept which was introduced by this policy statement, but would not be fully realised until 2001, was free entry to national museums.

## **21<sup>st</sup> century boy**

In 2000 Chris Smith, the then Secretary of State for Culture, Media and Sport, formed a Regional Museums Task Force to investigate the specific issues relating to provincial museums. This related to a wider government policy of regionalisation which aimed ultimately to create regional government to replicate the devolution to Scotland, Wales and Northern Ireland in England<sup>34</sup>. The government was responding to a number of articles and speeches by prominent specialists in the field about the underfunding of particularly the larger museums in each region such as was found in Birmingham, Manchester and Oxford. A specific concern was the lack of major quality exhibitions. It was noted that the investment of Heritage Lottery Fund (HLF) grants in museum buildings had addressed some of the capital issues faced by museums as documented by previous reports but there remained concerns that museums had too many artefacts not on display.

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<sup>33</sup> Formerly the Standing Commission on Museums and Galleries created following the Royal Commission reports of 1929 and 1930.

<sup>34</sup> This policy ultimately was unsuccessful following a referendum in the North East on creating an elected regional assembly in 2004.

The report considered that, “[t]oo many people who work for museums regard their main task as being to preserve their collections for some unspecified, indeterminate future.” This was contrasted with an inability to continue collecting owing to the removal of acquisition budgets. The Task Force thought that museums in the 21<sup>st</sup> century would have five objectives. First and foremost, museums would be about education. They also would promote social inclusion, be a factor in economic regeneration, to acquire and explain their collections, and provide first-rate principal services<sup>35</sup>. This report would form the basis for the Renaissance in the Regions programme, the major government intervention in local museums over the past ten years.

### **Public benefit: the times they are a-changin’**

DCMS began developing its vision for museums in the 21<sup>st</sup> century. The three-stage process involved identifying the key issues in the museums sector today (DCMS, 2005), identifying what the museum sector could do for society (DCMS, 2006), and finally an action plan which was due in 2007/08<sup>36</sup>. *Understanding the Future: Museums and 21<sup>st</sup> Century Life – the Value of Museums* was the first publication to be issued from the *Understanding the Future* programme. It was published as a consultation paper on how museums should develop in the 21<sup>st</sup> century. At its heart was the concept that museums, regardless of their funding, were part of that wider public realm over which the people have ownership and the Government merely acts as trustee, in its widest sense (DCMS 2005, p6). The report identified many challenges currently facing museums. These included changing public expectations, changing cultural identities of local communities, economic restraints on collecting, and the ability of

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<sup>35</sup> Extract of Chapter 1 *A cause for concern: Our major regional museums and galleries from Renaissance in the Regions: a new vision for England’s museums* as reported in the Renaissance Review Advisory Group (2009, pp5-7).

<sup>36</sup> This final element became caught amongst other political priorities and was not produced before Labour lost power at the 2010 General Election.

museums to deliver the Government's wider agenda. In particular, it was recognised that the evolution of museum funding and governance had caused fragmentation (DCMS 2005, p8).

Interestingly, the definition of the concept of public benefit is challenged in this paper. It posed the theory that originally public benefit was defined with the terms of protecting and preserving the collections for future generations (DCMS 2005, p11). However, it considered that this had been altered by modern ideas on inclusiveness and the development of rights and responsibilities, though to what the paper did not conclude (DCMS 2005, p12). This potentially provided more levels of uncertainty for the sector as the erosion of the basic *raison d'être* of museums meant that it was more difficult to make the case for them at a local authority level.

### **Museums as a tool for social change**

The second of the three proposed publications, *Understanding the Future: Priorities for England's Museums*, was published in October 2006. It set out the DCMS's priorities for museums for the next ten years. It began with the MA definition of a museum which reinforced the concept that collections are held '*in trust for society*' (DCMS 2006, p6). The initial DCMS research documented the return of the museum as a learning environment. There was an emphasis on life-long learning, harking back to the founding purposes of many museums, the role of the museum within the academic community and education with schools. Museums also were seen as a tool to promote community cohesion, helping to build up a patchwork of cohesive stories which could tell the stories of the current island population.

The continuation of collecting was seen as essential for the 21<sup>st</sup> century. Without contemporary collecting, it was thought that museum

collections would recede into insignificance. Tied to this were the financial constraints on collecting and the issues around disposal of parts of collections. This was before the question of what should we be collecting was addressed. This is illustrative of the continuing difficulties in defining museums and also highlights how museums are subject to the changing agenda in Government.

*“Questions of ownership and use are connected. Within the context of limited resources and broader public benefit, museums’ collections and acquisitions while remaining in the direct ownership of the individual institutions, could also be viewed as contributing to the nation’s ‘public collection’ as a single resource under the custodianship of many individual museum. This would not effect the direct ownership of particular collections, but would encourage their wider use and sharing of expertise.” (DCMS 2005, p15).*

This quote raised a number of questions. Was it envisaged that an artefact could be disposed of if it was part of a wider public collection by the institution that owns it legally? Should the public decide what they want to keep and what they want to dispose of from the collection? Should smaller local authority museums be able to levy admittance charges if their collections are, like the nationals, part of a wider public collection? How are objects which are bequeathed with terms and conditions attached to be treated as part of the wider public collection and what about those potential bequests in the future where the donor may still wish to have an element of control over the bequeathed item? The failure to publish the third report in the trilogy means that the questions above remain unanswered, though in abeyance following the election of the Coalition government.



## The pursuit of excellence

The *Leading Museums* vision and action plan was published in July 2009. It built on the report resulting from the independent review of Renaissance and the two parts of DCMS' *Understanding the Future*. It proposed to put, "people at the heart of museums, and museums at the heart of communities." The concept it was built around was that, "museums should be less about keeping collections, and more about sharing them." One of the MLA's objectives was to see effective sharing between national and local museums, a wish that extended back to some of the earliest museum reports in the 1920s<sup>37</sup>. The report had ten actions. Demonstrating a change, however, was the first action to encourage funding to follow excellence rather than supporting museums to raise standards (MLA 2009, p9). This followed wider governmental emphasis on excellence, for example the assessment system for local government, based on the McMaster report into excellence in the arts. Other actions were to progress Renaissance and accreditation. Action four focused on collections management and sustainable collecting in the future – one of the topics of the Royal Commission report back in 1929. This was to cover acquisition and disposal along with dispersal and loans (2009b, p10). The final action, ten, was ensure that museums were governed and financed for the future (2009, p13).

A Leading Museums group was formed to monitor progress against the ten actions. It was formed of a cross-section of museums specialists. In 2010 they made their first report but also made five recommendations to the MLA Board. In respect of funding excellence, the group thought that more work was required into defining excellence within a museum context (2010c, p1). With the future of Renaissance unclear at the point of reporting, there was little that could be commented upon except that the

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<sup>37</sup> Also action five in the plan (MLA 2009, p11).

programme needed to be prepared for transition. They noted that the MLA was on target to publish the revised standard for accreditation by winter 2010/11. In respect of collections, the group recorded the press attention on disposals at Wedgewood, Truro and in Southampton<sup>38</sup> and wanted alternative models published as best practice (2010c, p3). In their recommendations to the MLA board, the group recognised the unprecedented cuts that were anticipated within the sector and recommended that effective governance models for museums were therefore essential. They warned, however, that museum failures were unavoidable (2010d, p2).

## **The new austerity**

Unsurprisingly, in the first sixteen months of government, the Coalition has not published a definitive policy statement on museums. However, the published departmental *Business Plan 2011-2015* and the so-called 'bonfire of the quangos' has had repercussions for the national museums and galleries, the MLA, and the Renaissance in the Regions programme. The *Business Plan* sets out the Coalition's vision for the cultural sector, including museums. Following on from their political philosophy of devolving power and responsibility to the lowest level, the DCMS is looking for sector-led improvements with a focus on economic benefits, given the economic position of the country. It is clear in the vision that government considers its role is to address market failures but that the focus in financially constrained times is "world-class cultural institutions." The Coalition also wants to foster a new wave of philanthropy (DCMS 2010b, p1). Specifically in relation to museums, preserving museum collections and continuing free entry to the national museums and galleries are the priority (DCMS 2010b, p3).

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<sup>38</sup> See chapter five.

The business plan encapsulates two major shifts in museum policy. Firstly, that the DCMS will cease to fund museums which should be funded by local communities after financial year 2014/15 (DCMS 2010b, p4). Most of the affected museums have been funded previously by local authorities<sup>39</sup>. The second significant shift in policy reiterated in the business plan is the abolition of the MLA which essentially has survived changes, mergers and rebranding since its inception in 1931 as the Standing Commission on Museums and Galleries (2010b, p17)<sup>40</sup>. Its core functions are being transferred to the Arts Council from October 2011<sup>41</sup>. An additional commitment supporting the philanthropy theme is to agree a basis with national museums so they can set up charitable trusts to handle donations and private income. A difficulty DCMS organisations, such as the national museums and galleries and English Heritage, have is that donations have gone to the Treasury and have been placed in the government investment portfolio. Once at the Treasury it has proved difficult to retrieve money but there is a commitment in the business plan to transfer the accumulated reserves of the museums to new trusts by March 2015 (2010b, p11). Local government also has problems with Treasury financial rules and could look at developments forthcoming in this area.

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<sup>39</sup> This affects the Geffrye Museum (originally set up by London County Council), Horniman Museum and Gardens (had been in the care of London County Council and later the Greater London Authority), the Museum of Science and Industry Manchester (previously funded by Greater Manchester Council), National Coalmining Museum for England (originally funded by West Yorkshire and South Yorkshire Metropolitan County Councils, Wakefield and Kirklees Metropolitan District Councils), People's History Museum (funded in second incarnation by Greater Manchester authorities), Tyne and Wear Archives and Museums (a joint local authority service with DCMS support), and the Design Museum (grew out of the V&A). The National Football Museum already had gone into partnership with Manchester City Council to secure its future.

<sup>40</sup> The MLA was previously known as RE:SOURCE. It was restructured in 2009 from a federation of quasi-independent regional organisations with an overarching national organisation into a single non-departmental public body with regional presence. Until October 2011 it is the strategic policy body for the sector, issuing guidance, providing a lead on national, and setting the standards for the sector through the accreditation scheme for museums and the designation scheme for non-national collections.

<sup>41</sup> In particular Renaissance in the Regions, Accreditation, Designation, and the Acceptance in Lieu scheme (DCMS 2010c).

## **MLA: a lasting legacy?**

### **Renaissance in the Regions**

Renaissance developed from the report of the aforementioned Regional Museums Task Force. *Renaissance in the Regions: a new vision for England's museums* was published in 2001 and recommended that there should be a long-term sustainable future for museums, a national policy for museums, and the development of local museums<sup>42</sup>. Known both as Renaissance in the Regions and Renaissance, this initiative has had specific central Government funding since 2002. There have been two key aspects to the scheme: regional museum hubs and supporting designated collections. The regional museum hubs were chosen in 2004 by a panel of industry leaders. There were approximately four or five hubs in each region and these hubs received Renaissance funding to develop as a centre of excellence within their area. Small and medium size museums could benefit from the Museum Development Fund and the Subject Specialist Networks. The funding originally was made available to bridge the gap between the public's expectations of museums and their funding bodies' ability to fund them alongside fulfilling their educational role (MLA, 2008a).

Renaissance was reviewed independently in 2009. The panel consisted of a cross-section of museum specialists including national museum, local authority museum, Museums Association, and MLA representation. It concluded that, "*Renaissance is the UK government's most important intervention in English non-national museums since the Museums Act of 1845,*" (Renaissance Review Advisory Group 2009, p9). The report noted that there were a number of caveats to assessing the success of the Renaissance programme which was due to invest approximately £300 million in local museums in England by March 2011. There was little

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<sup>42</sup> As reported in the Renaissance Review Advisory Group report (2009, p21).

financial reporting for the first few years of the initiative, no annual review, and no structure for reporting against results (2009, p8). More importantly, the Group stated that, *"[i]t has not been possible to provide a solid assessment of Renaissance's overall outcomes on basis of the documentation available, or to compare the position of museums at the end of 2007/8 with that before Renaissance in the Regions."*

The Review Group asserted that the Renaissance programme had assisted in halting the decline of local museums. However, they thought that the museums had been too introspective on their accepted financial woes and had to become more focused on what they did rather than how much it cost (2009, p13). Interestingly, like all the reports preceding it on museums, it referred to the fragmented, underfunded sector and a need to improve the relationships between national and non-national museums. It made twenty-four main recommendations, with sub-recommendations, including a commitment from DCMS to Renaissance beyond the March 2011 end date, the revision of the aims for Renaissance and the dismantling of the hub museums (2009, pp13-5). The MLA response took on board most of the recommendations at the time, but the main one, about continued funding, was in the gift of the government at the point of an impending election and Comprehensive Spending Review in 2010.

Ed Vaizey, Minister of State for Culture, Communications and Creative Industries, announced the continuation of Renaissance at the Museums Association conference in October 2010 prior to the announcement of the Comprehensive Spending Review. He paid tribute to Chris Smith for instituting the Renaissance programme during the Labour government and noted the work of the Review Group. Mr Vaizey remarked that he believed that Renaissance had improved education services and collection management. He announced a move from hub museums in each region to a small number of core museums, the development of a challenge fund

open to all provincial museums and put the focus on “*improvement and innovation*” (Vaizey 2010).

This has been translated by the Arts Council into four grant funding programmes, the first of which was opened for applications in September 2011. The Major Grants fund is open to larger accredited provincial museums with designated collections and a minimum footfall of 150,000 people per annum. The investment, which should deliver long-term change and provide leadership, will range between £500,000 and £2 million per annum for three years. Consortia of museums in England can apply or individual institutions. Also announced is the Strategic Support Fund to bridge development gaps, and the Museum Development Fund for smaller local museums who are not in receipt of the other two funding streams (Arts Council 2011a).

Whilst it is clear that Renaissance has been praised by many in the sector, where the £300 million has gone is less apparent. Unlike the earlier HLF projects which provided capital support for developing museums, it is hard to see from the 2009 report how provincial museums beyond the hub museums have benefited directly from the money available given the lack of evidence. The Arts Council has an opportunity to make a difference with the new funding streams. Even with the 15% reduction in funding, the Renaissance budget for 2012 to 2015 totals some £43.6 million. However, if the loose objectives applied to the major grants initiative are indicative across the whole programme, and this fund will account for nearly half of the investment over three years, it may be difficult to assess whether improvements have been made in particular areas of concern. What will be interesting to see will be the profile of the applicants to this first tranche funding. It is hard to predict whether consortia or single-organisation applications will dominate. In the local authority sector the question will be, given the requirement for financial stability, whether it is outsourced trusts or

in-house services which are making the applications. It is not difficult to envisage the attractiveness in obtaining the grant funding by trusts in order to use it as leverage to secure continued local authority funding, demonstrating more 'bang' for the proverbial 'buck'.

## **Accreditation**

The MLA currently runs an accreditation scheme<sup>43</sup> for museums which is not compulsory. This accreditation attaches to the museum, not the local authority and there have been instances of authorities which have both accredited and non-accredited museums<sup>44</sup> owing to technicalities which prevent one institution becoming accredited. This accreditation is essential for museums to attain because participation in the scheme, a more comprehensive scheme than its registration predecessor, is necessary for museums who wish to operate in the sector with other organisations. For example, major grant funding streams for museums, such as HLF, are now accessible only if the museum is accredited<sup>45</sup>. Linking the accreditation scheme with the major funding streams is a lever to ensure that museums seek accreditation, as it is not compulsory. The result of this is a standard level of practice across the sector and increased internal documentation for museums based on these standards, not in itself a bad thing, including the creation of acquisition and disposal policies. However, the implications of what a local authority is signing up to, or the expertise to draft flexible and meaningful policies and documentation is not always available, with authorities relying on the standard forms provided by the MLA. The

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<sup>43</sup> Formerly there was a registration scheme. The accreditation scheme set higher standards for museums (MLA 2004). The two schemes went through a transition period shortly after accreditation's inception, with registered museums moving to being accredited only when invited to by the MLA (MLA 2007). The scheme has been closed to new entrants pending the new accreditation scheme being launched by the Arts Council in October 2011.

<sup>44</sup> Such as St Edmundsbury Borough Council where Moyses's Hall Museum was registered but West Stow Anglo-Saxon Village and Country Park where there were outstanding legal issues relating to the governance of the site was not (Tobutt 2005). Subsequently, both achieved accredited status.

<sup>45</sup> For example, the HLF programme Collecting Cultures, which closed in 2007. It stated on the HLF website that it was for only MLA accredited or registered museums (HLF 2007). This also applies to the Purchase Grant Fund administered by the V&A (2007) and the Art Fund (2007), a registered charity.

accreditation is not permanent and accredited museums have to send a return to the MLA every two years or as directed by the MLA. If a museum is not meeting the standards they can be placed on a provisional standing or removed from the accreditation scheme from where they would need to re-submit an accreditation application once the museum met the standard again. These standards are enforced as Bury Art Gallery and Museum were removed from the accreditation scheme following Bury Council's sale of the Lowry painting.

Accreditation was reviewed in 2009. The MLA consulted with the sector through consultants who made a number of recommendations for improvement. The MLA responded to these suggestions in early 2010. Importantly, the MLA accepted that, "*Accreditation is one standard but it is not one size.*" (2010d, p3). This extends not only to comparing national museums with small local museums, but also Designated collections being held to higher standards than other museums. They also promised to look into multiple site applications for local authorities with more than one museum, a facility currently available to the National Trust and English Heritage. The revised standard has been piloted in ten museums and will focus on organisational health, collections, and users and their experiences (2011a, pp2-3). The MLA hopes that new accreditation will be able to support museums during the period of restricted public finance. The proof will come with the publication of the final standard in October and its implementation by the Arts Council.

### **Designated Collections**

Designated collections are part of a separate programme which began in 1997 to identify collections of national and international importance held in non-national museums (MLA 2008b). Initially, designated collections were sought in two tranches via an application



process, so those museums who did not apply did not have an opportunity to have their collections designated. This type of process can disadvantage the smaller museum with less staff or time to make these types of applications. This scheme has been opened up again with two meetings year to discuss new applications (MLA 2008d). Designation was due to be reviewed during 2010/11. It now is transferring to the Arts Council in October 2011.

The MLA considers that Designation gives a number of benefits. Collections are given an increased status by peers and governing bodies, and Designation is used as part of the marketing strategy for the museum. Most importantly, Designation should enable enhanced fundraising through HLF, DCMS / Wolfson Fund, Renaissance funding, and the Designation Challenge Fund which aims to improve access and care of designated collections. They do not require an export licence for loans within the European Union and they have a reduced level of liability under the Government Indemnity Scheme for loans (MLA 2011b).

### **Financial sustainability?**

The MLA published a document responding to the current economic and public sector financing climate, *Sharper investment for changing times: getting more out of museums, libraries and archives* (MLA 2010a). It was a joint prospectus covering all three services. It called for political engagement and strong leadership to deliver high quality services but, most importantly, stated that, “a systematic and radically different view of the design and delivery of services is needed. Some organisations will not be saved, but for many others help is at hand,” (MLA 2010a, p7). It identified ten headings under which practical steps for securing these services future could be grouped. Of those, the first relevant comment was in relation to distribution of services where it stated that, “we cannot sustain

*the number of buildings we have,”* and that digital media offers a way forward. New governance and delivery models noted models ranging from privatisation, through public/private partnerships, trusts, and community ownership as being options for the future and used Luton Borough Council as the case study where it was anticipated that local authority spending would be reduced from 73% to 50% of the trust's budget in the next ten years with the other 50% coming from alternative sources (MLA 2010a, p9).

It called for new funding models to be explored with museums becoming more entrepreneurial, or attracting charitable trusts or philanthropists. It posed questions about the simplification of Gift Aid and tax breaks for donating items to museums. The fourth area was about locally-driven strategic investment and simplifying the plethora of funding streams to local government. Performance and efficiency was reviewed in terms of outcomes not outputs and engaging with diverse communities to design services was recommended. Working across local boundaries was exemplified by the Tyne and Wear museums and archives merger. It concluded that, *“[i]n this economic climate, no change is not an option. If we do nothing, change will happen, but through closures and reductions. The public will notice reduced service, worse service and poorer, less accessible collections,”* (MLA 2010a, p19).

Roy Clare, the last Chief Executive of the MLA, was unable to save the organisation from the public sector cuts of 2010 despite actively volunteering for reductions, though not for abolition. The MLA, and its predecessor incarnations, has provided eighty years of support for the museums sector implementing government policy. In fact, the Culture, Media and Sport Select Committee *Report in the Funding of Arts and Heritage* could find no persuasive reason for its abolition (2010, at 137). Whilst many consider the funding provided by Renaissance as being the

pinnacle of their contribution to the sector, in fact the accreditation system is likely to prove to have longevity. The use of accreditation to drive up standards but also to enforce policy decisions through its link to funding streams has been successful.

## **Fear not for the future, weep not for the past?<sup>46</sup>**

The Arts Council formally adopted the lead for museums in October 2011. Having commissioned Baroness Morris of Yardley, former Minister of State for the Arts, to review the existing strategic framework for arts and make recommendations on how it could reflect the needs of museums and libraries, the Arts Council published a companion document to the strategy in September 2011<sup>47</sup>. The Arts strategy is a ten-year plan running from November 2010, the companion document focuses on the period 2011-2015, whilst setting five ten-year goals based on those in the arts strategy. Museums and libraries have been bound together to deliver 1) excellence, 2) visitors and inspiration, 3) sustainability, resilience, and innovation, 4) leadership, and 5) access for all children (Arts Council 2011b).

In a sense, these are just words with a concerning undertone that the phrase 'museums and libraries' is imbued with. For these services are distinctly different. A fact that abundantly is clear when reviewing their historical and current local authority governing legislation. To reduce the financial challenges faced by museums to new income streams and more philanthropy, and for smaller museums to be joined with arts provision, demonstrates how far the Arts Council needs to develop in order to become the national advocate for museums. For instance, a commitment to supporting the "*sustainable development*" of museum collections is a

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<sup>46</sup> *The Revolt of Islam*, Canto XI, stanza 18 by Percy Bysshe Shelley.

<sup>47</sup> Baroness Morris stressed the need for an ongoing process rather than an event, with a merger rather than a take over to truly incorporate the best from both spheres. Her recommendation for an overarching goal was not around excellence, but the sector realising, "*its potential as an essential part of a civil and civilised society,*" (2011, p8).

trite phrase which has the capacity to be meaningless without either capital investment or strong policy or legislative intervention, as the following chapters will testify to (Arts Council 2011b). The augurs are not promising with a loss of expertise between the MLA and the Arts Council<sup>48</sup> and the differing organisational ethos of the two institutions<sup>49</sup>.

## **Local government considerations**

The Audit Commission report *The Road to Wigan Pier* published in 1991 provided a snapshot of local authority museums. Expenditure on the museums was equal to that of the national museums and over 40% of the local authority museums and galleries existing at that time had been set up in the last twenty years. With over 650 museums in total, this demonstrates a second boom in museum development (pp1&5). The Commission believed that with a lack of statutory definition of purpose, councils needed to be clear on their purpose and role within the suite of public services provided and be customer oriented (p6). One of the more controversial suggestions made by the report was that objects which did not fit within the acquisition policy of that museum should be disposed of where possible (p7). The Commission envisaged museums, much as Sir Henry Miers did sixty years earlier, with a core focus augmented by touring exhibitions. In this short period with the Community Charge in place, museums were under financial pressure (p19) and the Commission exhorted councils to business plan their museums. However, ultimately, the Commission upheld the important role they had not only in preserving and interpreting heritage but also to the quality of life and economic viability of an area (p43). It is with this conceptual background that local authority management of museums has to be considered.

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<sup>48</sup> The author has been told in conversation of the significant numbers of MLA staff not attempting to transfer to the Arts Council, which has been evidenced by the job adverts placed on the Arts Council website over summer 2011.

<sup>49</sup> Experienced at first-hand by the author.

## Governance

Local authority structures have faced significant change four times in the past 165 years. In 1889 the historic counties were superseded in local government terms by administrative counties and county boroughs. The system was changed again in 1974 to metropolitan and non-metropolitan counties. The Greater London Council and the metropolitan counties were abolished in 1986. Some so-called unitary councils, similar to the former county boroughs, were introduced in the 1990s and 2009<sup>50</sup>. This has corresponded with a change in governance arrangements moving away from the committee system to a cabinet and scrutiny model for most councils.

The change away from the committee system impacts on museums. Many local authority museums originally were governed by a Museum Committee which reported to the full Council. In the modern Cabinet model museums are in the same position as any other service in gaining attention from either Cabinet or scrutiny committees who operate on yearly-defined work programmes. Coverage of museum issues relies on lobbying by senior staff or interest by councillors unless it forms part of budget setting. Museums tend to fall within a councillor Cabinet portfolio of leisure or culture often grouped with sports facilities, parks, art, and tourist information.

This move away from specialism to generalism in the political sphere has been replicated in the officer realm. This has meant that the

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<sup>50</sup> Councils are subdivided by the Audit Commission into counties, districts, metropolitan districts, London Boroughs, and unitaries. The latter three are all single tier councils whilst counties and districts are found in two tier areas. Metropolitan districts were created under *s.1(3) Local Government Act 1972* and became single tier councils after the abolition of metropolitan county councils by *s.1 Local Government Act 1985*. London Boroughs were created under *s.1 London Government Act 1963* and became single tier authorities after the abolition of the Greater London Council (GLC) by *s.1 Local Government Act 1985*. Unitary councils have been created under the provisions contained in the *Local Government Act 1992* and the *Local Government and Public Involvement in Health Act 2007*.

professional level of the most senior museum staff within local authorities has reduced over time. The Standing Committee on Museums and Galleries report in 1963 documented the position prior to the 1974 reorganisation. The larger provincial museums had museum directors or curators who were heads of departments which focused on museums within their care and were considered one of the Chief Officers of the local authority (1963, p38). Some formed departments along with the Public Libraries and others were under the care of the Borough Librarians. Of approximately 280 directors or curators of local authority museums and galleries, around 140 were either in charge of the libraries or were subordinate to the Borough Librarian.

After 1974 many museums and libraries were split between county and district responsibility. Now museums find themselves part of broad directorates of services working to a director and a 'head of service', essentially a Chief Officer, for culture or leisure originating from a wide variety of professional backgrounds. The most senior operating officer for a museum often reports to the head of service. Formal posts, such a Borough Librarian or Borough Curator no longer exist owing to the amalgamation of senior posts. This has resulted in the diminution of the status of museum services within local authorities. These 'heads of service', in the experience of the author, frequently are drawn from a sports and leisure operational background. This has benefits from an operational perspective, but can result in difficulties, such as not understanding the role of curatorial staff which are not considered to be 'front line'.

*Treasures in Trust* set out the common attributes of a museum in 1996. The second was that museum collections should be under the management of a specific board such as trustees, "...whose *primary responsibilities are towards the collections and who run the museum...*" This has been interpreted by many councils as their full Council or Cabinet

committee. However the third common attribute of a museum was that such a board should not have other responsibilities other than managing the museum and collections (1996, p.6). In 1996, the report estimated that local authorities ran about one-third of all the museums in England (1996, p.16). Whilst it was a stated ambition in the report that local authority museums looked at charitable trust status for their museum services, which would have necessitated a board of trustees, other models, such as the joint county and district service provision in Norfolk were held up as alternative models. Of course, this particular example is one of the few supervised by a dedicated (joint) museums committee.

## **Compulsory vs discretionary services**

2006 in particular saw a number of closures or reduction in service for local authority museums<sup>51</sup>. This was owing to the part of the response to increasing pressure on local authorities to save money to meet efficiency savings and ensure that Council Tax rises did not rise above a 5% capped limit. In fact, those councils who did breach the 5% cap found that their rises were refused by the government and they were forced to make further reductions<sup>52</sup>. A further round of reductions in service has been seen following the local government finance settlement in 2010 for the period 2011 to 2015. Museums are particularly at risk because of their status as discretionary rather than compulsory services<sup>53</sup>. Essentially, they can, but do not have to, provide museum services.

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<sup>51</sup> This included Glasgow City Council proposing to close its museums on a Monday, which was prevented only by a generous donation from a benefactor (Heywood 2006); St Albans District Council facing major budget cuts including threats of closure; Southend-on-Sea Borough Council making £94,000 worth of redundancies; Norfolk Museums and Archaeology Service having to find £87,000 savings, and Derby City Council closing its museums on bank holidays and freezing acquisition budgets (Steel 2006a).

<sup>52</sup> In an oral statement to the House of Commons on 27 March 2006, Phil Woolas, the then Minister of State confirmed that in 2004/05 14 authorities were capped, in 2005/06 nine authorities were capped and in 2006/07 two authorities were facing capping (Woolas 2006).

<sup>53</sup> Though the savings required between 2011 and 2015 are such that many councils chose to make proportional cuts to all services for 2011/12.

Two areas provide councils with the opportunity to save money without appearing to reduce the level of service for compulsory services. The first area is to reduce services which are discretionary, such as museums; the second is through loss of staff via redundancy or not filling vacant posts, as staffing costs make up a significant proportion of a local authority budget. Therefore, it is no surprise that museums have seen cuts to both service and to staffing. Prior to the recession, there had been renewed calls and discussion over whether museums should be made a compulsory rather than discretionary statutory service (Goodison 2004 p17, Kilminster et al 2006; Holden 2006; and Kelly 2007).

Many of those who supported compulsory status for museums believed that this would protect museums from the cuts they were facing (Kilminster et al 2006). Others argued that it would make no difference as all services, whether discretionary or not were facing cuts<sup>54</sup>. Whilst the principle of mandatory museum services is supported by the Museums Association, its Chief Executive noted in a *Municipal Journal* article that whilst obligatory services would be preferable, primary legislation to that effect would stifle the development of charitable museum trusts (Kelly 2007). However, the budget setting processes for 2011/12 suggests that no service, compulsory or discretionary, is safe from cuts when those cuts are more than mere efficiency savings.

These calls for a change in status for museums have been ignored by central government as cultural issues are not a priority for change and whilst it would bring museums within the remit of the revenue support grant that is given by central government to local government, central government does not want to increase the burden on its own stretched resources. It would take an in-depth investigation of local government

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<sup>54</sup> See the comments of Vincent Paliczka of the Chief Cultural and Leisure Officers Association as quoted in Kelly's article that just because a service is compulsory does not mean it is not subject to inconsistency across authorities (Kelly 2007).



finances over the past ten years to see whether museums have been unfairly treated in the round of efficiency savings, which is beyond the scope of this paper. As a comparison, research by DEMOS stated that forty percent of authorities have been increasing their investment in culture, whilst another forty percent have been decreasing investment (Holden 2006, p13). However, eighty percent of unitary authorities reported decrease to a greater or lesser extent. This may indicate that unitary authorities, who, like county councils are having particular difficulty balancing the funding of major non-discretionary services such as social services and education, are finding that as they also provide a number of discretionary services, more prevalent on the lower tier of local government, that they can offset their budget difficulties against the unprotected services. There is less scope for this to happen in a two-tier area<sup>55</sup>.

The potential effect of making museum provision compulsory across the board, whilst laudable, is unsustainable. Not all local authorities provide museums. In two-tier areas you have a divide between museums provided by one-tier alone or by both tiers. A compulsory provision of museum services would require a consequent restructuring of museum services in every city and county. As has been seen with the bids for unitary status in 2007<sup>56</sup>, whole-scale change was not the objective of the previous Government and adding additional burdens is against the philosophy of the current Government. However, should compulsory provision of museums be a longer term aim for the sector? Transference of cultural assets such as museums has happened between councils and between councils and English Heritage<sup>57</sup> before, so placing the burden of provision

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<sup>55</sup> A possible exception to this would be the Norfolk Museums and Archaeology Service which was formed in 1974 through a joint agreement between the County and District Councils who delegated their powers to manage the service to a Joint Committee (Norfolk Museums and Archaeology Service, 2007). However, how it is funded is not clear from publicly accessible documents.

<sup>56</sup> Whilst several district and county councils applied to become unitary authorities, only a few were granted.

<sup>57</sup> Under s.44 *Local Government Act 1985* the historic house museums of the Greater London Authority, namely Kenwood House, Marble Hill House, the Ranger's House and land adjacent to Kenwood House were transferred

on a particular tier of local government in two tier areas is not necessarily a charter to create new museums. A change in status for museums would allow them to attract revenue support grant, something which any government will be reluctant to allow in the current financial climate, which would help many councils who, even if they did not provide a museum service would not be able to dispose of the artefacts within their care. In fact, this would be contrary to government policy of reducing burdens on local authorities. Whether this is a realistic aim given the increasing public sector burden owing to an aging and rising population competing for resources remains to be seen, and it would require statutory intervention to implement such a policy aim.

### **‘You’ve never had it so good’: the changing fortunes of finance**

Local government finance is a complex and emotive subject. Council Tax provides approximately one-quarter of a local authorities’ yearly budget with the rest being made up of income, investments, and the formula grant and other funding streams from central Government. The formula grant is made up of a complex calculation which is supposed to make a fair distribution across authorities as some will generate more National Non Domestic Rates (business rates), income tax and VAT receipts than others. Crudely, the formula has been redistributing tax receipts from the south to the north, and has resulted in a number of fast growing areas in the south feeling that their education grant in particular has not equalled that of other authorities. The national spending settlement is reviewed approximately once every three years and after an election.

## **The calm before the storm**

Whilst local government had been asked for efficiency savings in the 2004 and 2007 government spending rounds, the 2008 global recession left the United Kingdom with a high level of public debt and a number of local authorities hit financially through bad investments. How to balance the nation's books was the key issue in the 2010 General Election with very different approaches being put forward. Essentially, the question was: do you cut or spend out of the recession? These two options had dramatically different impacts on the public sector. A survey by the Local Government Chronicle preceding the 2009 Autumn conference season, saw local government councillors from all three political parties identifying museums and galleries (33%), tourism (33%), and leisure services (24%) as the top three services preferred for cuts if budgets needed to be balanced (Blackman 2009).

## **Not quite business as usual**

Local authorities, at time of writing, are starting to plan their second budgets in the brave new world. After implementing emergency cash savings on winning the election in 2010, the Coalition's settlement on local government for 2011/12 to 2014/15 resulted in an overall 28% cut in funding and a freeze on Council Tax, though this affected individual local authorities in different ways. Several instances of cuts to museum services have appeared as councils try and prepare their budgets for April 2011, but no complete closures of museum services<sup>58</sup>. Reductions in budgets for acquisitions, opening hours, or staff numbers have been noticeable<sup>59</sup>. The question about disposal of artefacts has returned but anything seems more

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<sup>58</sup> Though the political arguments about the closure of Tymperleys Clock Museum in Colchester since October 2010 when the museum service apparently made an underspend for financial year 10/11 for twice the amount of the museum's running costs rumble on (Daily Gazette 2011, and Essex County Standard 2011).

<sup>59</sup> A BBC report in June 2011 on a Museums Association survey suggested that staffing had been cut in museums by at least 10% (2011).

popular that completely removing a service, though how much this had to do with the district and unitary councils all having councillor elections in 2011, to paraphrase that great fictional politician Sir Francis Urquart, "You may think that, but I could not possibly comment." The general consensus among local government specialists is that 2012/13 will be more difficult across the board as several councils have shouldered the brunt of the cuts starting in 2011 either through good financial planning or through taking the easier decisions as to stopping or reducing services. However, at a County level it is different as their elections are not until 2013 and for them it is better that the pain is quick and sharp to allow time for people to adjust before having to vote again. In the 2011 local elections, the Liberal Democrats bore the brunt of the electorate's fury, with the Conservative vote holding up and Labour making some, but not strident, gains owing to the unpopularity of some local decisions.

## **Entrance charges**

Whilst local authorities have been cutting spending, they also are looking at income generation. Setting entrance charges for the museums in their care is one area they have discretion. Entrance charges have been returned to as a policy topic both at a local and national level since the Royal Commission report in 1929 where they considered factors such as visitor numbers at national museums which charged and those that did not (pp44&54). *The House of Commons Education, Science and Arts Committee* report of 1989 into whether national museums should charge took evidence on why, at that time, some national museums charged and others did not. The Committee concluded that if a national museum charged, such money raised should not go towards running costs which should be covered by the public purse (pxiv).

The evidence given by Neil McGregor, then Director of the National Gallery now Director of the British Museum, set out why the National Gallery was free and why he believed that all museums should be free,

*“Our policy is not only to have as many visitors as we can, but to persuade them to come as often as they can and to spend as long as they can looking at particular objects.”* (p6).

He noted that of all the cultural activities, museums and galleries had the greatest proportion from lower socio-economic classes (p7) and that it was not accidental that the *Museums Act 1850* which extended the franchise to set up museums to more Boroughs did so on a free basis (p11). The Committee also had taken evidence from the National Maritime Museum, which did charge, to which point Neil McGregor developed the concept of the “*spontaneous visitor*” – one which the National Gallery or other central museums are well placed to capture, but those situated like the National Maritime Museum often could not benefit from such interest and as such, placed their charges in a different category similar to the National Trust or English Heritage. That is to say, because of their location remote from other attractions, you will need to plan to visit and therefore are likely to spend more time at the museum or house. Whereas, in places with other activities, spontaneous shorter visits may be made, such as during a lunch hour or shopping trip.

The MGC 1998 report *To charge or not to charge* set out the arguments for and against charging generated by a survey undertaken of museums. In the reasons against charging were such factors as reductions in visitor numbers, did not meet museum aims, and decline of secondary spend revenue. Rationale for museum charges included economics, principle, and accountability (p8). In 1999, Lord McIntosh of Haringey, differentiated between the then government's pledge to make national museums free and his belief that local museums should contemplate the establishment of charges (Local Government Chronicle 1999).

Free entry to national museums for all has been in place since 2001<sup>60</sup>. The scheme is being maintained through the current Comprehensive Spending Review period from 2011 to 2015 (DCMS 2010b). As free entry is available throughout the DCMS sponsored museums, the availability of free museums is not contained purely in London. Along with university museums, such as those provided by Cambridge University and most of Oxford University's museums which do not charge (Pim 2008 and Oxford University 2008), these museums in the districts potentially place additional pressure on local authority museums which have the discretion to charge. Free entry is not universally supported, with Brian Sewell, the Evening Standard's Art Critic, arguing that it would be better to have a £1 across the board charge which also would give accurate visitor numbers; the current numbers he disputes (2010, p15).

Not all local authority museums charge, for example the Museum of Oxford<sup>61</sup>. However, the debate reopened with the onset of the recession. A newspaper article regarding the Norfolk Museums Service asked the question, why are they not free when elsewhere museums have free entry policy? The article highlighted all the difficulties that local authority museums face. Some operate schemes which provide free access for residents; however other councils have been advised that it breaches European law as it discriminates against other European nationals. In respect of Norfolk, admission makes up £800,000 of a £5,500,000 budget which leaves councillors divided as to whether the service would be sustainable if admission charges were removed. King's Lynn Museum in Norfolk offers free admission in the quieter months which is predominantly targeted at residents without being discriminatory (Pim 2008).

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<sup>60</sup> Children were admitted from April 1999, the over-60s from April 2000 and 18 to 59's from December 2001 (DCMS 2008)

<sup>61</sup> From 16th September 2006, the museum has had free entry (Oxford City Council 2008).

Essentially, whether you pay to enter a local authority museum is a postcode, and sometimes and time of year, lottery. The policy framework permits individual decisions, which is supported by the political philosophy of localism – local decisions by local people for local people. But contrasts against the maintenance of the free entry to national museums even through the spending cuts in 2010<sup>62</sup> and the fact that university museums generally are free, though whether this will remain the case in the future following the changes to university funding will be interesting to watch.

### **Lies, damn lies and statistics<sup>63</sup>**

The perennial issue central government has with local government is ensuring that councils deliver what central government promises. From policy levers such as the Citizen's Charter and LAAs through to the legislative freedoms promised by the Localism Bill to enable local authorities to deliver the Big Society as they see fit, it all boils down to central government being able to prove that positive change has happened and that councils are functioning properly. This is where measuring performance is essential; however, a change of government can see a change in emphasis in data collected or in the whole philosophy of measurement. Museums have not been immune to the quest for data which will prove their value to society, or at least their contribution to delivering government policy.

Under John Major, a suite of performance indicators were collected between 1993/94 and 1996/97 which included an indicator on the net expenditure by local government on libraries and museums. In 1997/98 and 1998/99 New Labour used an amended version of this indicator suite but did not include any statistics which related to local authority museum

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<sup>62</sup> To the detriment to other aspects managed by the DCMS.

<sup>63</sup> As per Mark Twain.

services. In 1999/00, they amended the set further and included five performance indicators for museums. They measured how many museums were operated or supported by councils, whether they were registered museums, how many people used the museum and how many of those visited in person<sup>64</sup>, and finally how much the museum cost per usage<sup>65</sup>. In 2000, under Tony Blair, the government introduced the concept of 'best value'<sup>66</sup> and created Best Value Performance Indicators (BVPIs) to measure councils' success at delivering this idea. The Best Value principles were intrinsic to their public service reform agenda and were based on one of their first White Papers of the new government, *Modern Local Government: In touch with the people*, published in 1998. Performance of local authority museums was measured until end March 2008 through three yearly and one triennial suite of performance indicators.

The first yearly indicator measured contact with the museum(s), for example, telephone calls, post or website hits. The second measure measured the number of visitors to the museum(s). The final indicator recorded the number of school children visiting the museum(s) each year<sup>67</sup>. In order to make these calculations, museums had to record the number of people visiting the museum and contacting the museum. The triennial indicator measured satisfaction with the museum service through the 'user survey'. BV119 noted the overall satisfaction with the service by all respondents and additionally the user satisfaction with the service and the non-user satisfaction with the service<sup>68</sup>. This final category caused difficulty among councils as they found that non-users of a service were dissatisfied

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<sup>64</sup> These figures were converted to how many people per 1,000 population so that they could be compared across authorities with varying population levels. But even this has its difficulties as how can you compare Birmingham (current population estimate over 1 million) with Bury St Edmunds (population estimate approximately 40,000).

<sup>65</sup> The data for performance indicators and their descriptions from 1993 to 2008 can be found on the Audit Commission website (Audit Commission, 2010).

<sup>66</sup> The Best Value regime was introduced by the *Local Government Act 1999*. S.3(1) sets out the general duty on councils, "to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness."

<sup>67</sup> Again, to make these comparable across England, they were calculated on a visits per 1,000 population basis using the population estimate issued each year in September for the previous year.

<sup>68</sup> The survey was run three times in 2000/01, 2003/04 and 2006/07.



with it (this especially happened with planning) whereas users of a service rated services highly. This meant that they thought the overall satisfaction score was not representative of the quality of service provided. After the demise of the BVPIs, museums were reduced to a single indicator measuring attendance at the museum, not by counting the numbers, but through a questionnaire survey and was measuring whether or not respondents have visited any museum and gallery in the past year (DCMS 2008, p20-21). This data may have been interesting for DCMS and removed a burden on council museums, but the statistics were meaningless to their visitor numbers and could easily be misused by their application to a particular council museum rather than being seen as museum attendance, anywhere. The Coalition government are keen to reduce the burden of measurement further on local authorities. Their initial thoughts, unsurprisingly, hark back twenty years when considering what indicators to develop. For museums, they considered public subsidy per visit but it was not clear whether this applies only to the museums directly funded by DCMS or whether more local calculations were anticipated (DCMS 2010b, p24). By 2011, only visitor numbers to national museums and galleries were listed as key data (DCMS 2011a, p26).

The other aspect of the Best Value regime which was designed to improve performance was the Best Value Review. These reviews challenged authorities to look at their services under the principles of '*the four C's*'. Councils were directed to ask four questions about their services: challenge, consult, compare, and compete. Essentially: Why do we do this? What do other people think? What do other councils do? Is there a cheaper way of doing this? (DCLG 2010). Reviews were undertaken enthusiastically by some authorities; though went out of favour with others owing to their bureaucratic methodology. However, these reviews engendered fear in the local authority museum world, which was articulated in 2003 by Ian Lawley who thought that Best Value could be

used as a justification for the reduction or removal of museum services (pp78-9)<sup>69</sup>. As with many initiatives, this turned out not to be the case.

## **Can you measure the value of a museum?**

The question raised by performance indicators is how do you measure the performance of a museum? Is the true measure of a museum's performance the number of people it has had pass through its doors each year, or is it the quality of the interaction with the museum? It depends on who is setting the performance measure. Whilst central Government wants top level statistical information which can be benchmarked against other local authorities, at a customer service level it is an individual's interaction with the museum that you are trying to capture. How can you measure how much an individual has learnt from a visit, or how much they have been inspired, or how much they have been moved, without being either intrusive or spoiling the visit by turning it into a test? How do you acquire the negative knowledge about a customer visit that will allow you to improve the experience and thereby potentially affect the visitor numbers or other such statistical data through an indirect route?

### **The Toyota method**

*"The test of a good measure: does this help in understanding and improving performance?"* (Seddon, 2003 p62) As John Seddon outlines in his book *Freedom from Command and Control* there is a difference between targets and capability measures. Targets distort the system<sup>70</sup> as people working within the system focus on achieving the target, and if they cannot achieve the target, how they could appear to achieve the

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<sup>69</sup> Whether or not Lawley's fears turned out to be justified are beyond the scope of this paper.

<sup>70</sup> Seddon's book took the Toyota practice of systems thinking in a manufacturing environment and applied it to the service sector. Under this methodology, the 'system' denotes the entire process of getting the goods or service to the end user, the customer starting from the original customer request.

target<sup>71</sup>. All this creativity, ingenuity and effort are directed at the wrong thing – survival through achieving the target, rather than actually improving performance of the service through investing time and effort on the end product for the consumer, in this case interesting and exciting museum displays and exhibitions. The suites of indicators outlined above were targets based around quantity rather than quality.

That is not to say that performance should not form part of management information. Correctly targeted capability measures<sup>72</sup> can give real and prompt information to managers of museums could help them to develop or profile their services and identify problems more quickly. *“Capability measures tell you what a process of system is predictably achieving,”* (Seddon 2003, p71) By plotting information, for example values for sales in the museum shop or café plotted against days of the week, you will establish the upper and lower control limits (in this example the most and least sales plotted against days). If this is carried on week after week a picture will emerge which may show a pattern (you sell more at weekends) or change (you get an increase during the summer holidays). However, the purpose of these sales figures is not to set an artificial target for the total value of sales but through knowing when your peaks and troughs are with sales figures means that you can deploy staff and volunteers more effectively meaning that you can maximise both customer experience and sales<sup>73</sup>. They also can demonstrate the effectiveness of an intervention, for example, demonstrating an increase in visitor numbers or sales linked to an exhibition, and help a museum make the case for local authorities to support their ability to deliver such improvements in access and income.

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<sup>71</sup> Through creative use of the calculation basis for achieving the target.

<sup>72</sup> Capability measures help staff to start seeing patterns in their service provision and delve further to understand why this happens with the objective of making positive changes which will enhance the experience of the end customer, in this case the museum visitor.

<sup>73</sup> This example has been worked up based on John Seddon's method (Seddon 2003, p71-76).

Capability measures differ from performance indicators in the way they are directed and used. They are not based around the artificiality of achieving a target, unlike BVPIs which were reviewed by the Audit Commission as part of their assessments of councils for the direction of travel of the indicators against the targets set for them, or have a performance reward linked to them such as national indicators identified in Local Area Agreements. BVPIs additionally had national performance quartiles set for them which meant that if the figure the authority achieved was in the top twenty-five percent of the national figures returned the council would be classed as top quartile which meant it was one of the best in the country. This was based on arbitrary statistical measures as one year a council could achieve one figure and be top quartile and the next year it could improve considerably but if more than twenty-five percent of other councils score higher then it would rank only as second quartile.

At a practical level, monitoring which products sell in the museum shop, and which do not, can help a museum maximise its extra income potential by providing what the customer wants. These types of indicators are of no interest to central government as they are operational tools. But measuring the performance of the purpose of a museum is impossible because museums fulfil a number of different purposes within society which cannot be encapsulated within a single performance indicator or capability measure. The one element that neither measurement philosophy captures is the value of museums to society. It is both impossible to capture but has been imperative to prove, when academic treatise are not considered enough to articulate the wider public benefit derived from museums.

## **Only Smarties have the answer?**

From the publication of *Treasures in Trust* onwards, direct sole provision of museum services has not been seen as a prerequisite to a thriving local museum. Different options have been advocated as management alternatives to a council with a museum. There are a number of reasons a local authority might explore different models for running a museum service. The most obvious is to reduce cost, but other reasons including access to expertise and eligibility for external funding for museum capital or revenue activities. However, unlike with council sports facilities; there has not been a surge, but a trickle, of local authorities seeking to substitute an element of museum governance for a particular and often specific reason and circumstances. This may change in the future, as the author has noted increased interest from local authorities in finding service solutions for a wider range of core activities, including those they are compelled to provide by statute, beyond the usual bin collections. Whilst there are a myriad of different operating models, they can be grouped under two main approaches – sharing services with other local authorities or outsourcing to another organisation.

Shared services are where two or more local authorities combine their assets into one service to find savings through de-duplication. This usually means less staff or it can mean fewer sites. Outsourcing to a charitable trust is another other model of choice and often favoured within the cultural sector. More rarely, museums go to existing independent museums, form part of a private museum or become a national museum<sup>74</sup>. The author does not know of any cases where a private company has been brought in to provide the service on behalf of the council<sup>75</sup>. Many

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<sup>74</sup> Such as the National Museums in Liverpool, private sector involvement in Weymouth and Walsall, and outsourcing in Macclesfield and North Lincolnshire (MLA 2006a, pp1&2).

<sup>75</sup> Such as Capita providing planning and conservation advice for Breckland District Council, and other councils, under a fifteen-year agreement which resulted in staff being transferred from Breckland to Capita. The result is

potential legal issues relating to ownership can arise in transfer scenarios and it is worth noting that no option provides an easy solution to provide maximum service for less cost, or else there would be a plethora of them.

Shared services are not new and one has been working effectively in Norfolk since 1974. The service is managed by a joint committee between the local authorities involved and is one of the Renaissance hub museums in East Anglia. Though a successful service, Norfolk is reviewing the alternative models available, but not primarily for savings. In conversation with Vanessa Trevelyan<sup>76</sup>, she outlined how at the moment the models divide museums between complete council control and complete outsourcing, whereas a model allowing museums flexibility whilst not relinquishing the local authority control and losing the direct public benefit has not been developed. As discussed above, museums have become small services in large organisations without the dedicated governance model that the committee system afforded them. This has engendered over time a lack of understanding in museum problems and opportunities, a consequent risk of which is bad decision making. A model as envisaged by Norfolk Museums Service would correct the balance for those museums staying within local authority control, whether as individual or part of shared services.

Another more recent joint service forged nearby is the Colchester and Ipswich Museum Service. Both district authorities in different counties, they are separated by another district. Rationalisation for museums in a shared service scenario to reach efficiency savings can come from three places (1) curatorial and management staffing, (2) consolidation of museum storage, and (3) fewer museum sites. However, shared services are not immune from budgetary cuts as they remain part of a local authority.

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that whilst staff are focused on Breckland, they are expected to work for other Capita clients when necessary.

<sup>76</sup> Head of Norfolk Museum and Archaeology Service and President of the Museums Association.

Whilst it may be an answer for individual councils to group together and make savings through a shared service, for those already in a shared service and expected to find financial savings, there are limited options, as Colchester and Ipswich Museum Service must have felt when faced with a decision over Tymperleys Clock Museum last year.

### **In museums we trust**

The first MLA report on museum all types of museum trusts was published in 2006 (2006a&b). It was produced by noted solicitors in the cultural sector, Farrer & Co, and museum professional Adrian Babbidge's<sup>77</sup> heritage management consultancy, Egeria. At the point of publication, twenty-three local authorities had sent museums to alternative structures, many of which since *Treasures in Trust* encouraged local authorities to look at the trust model for future sustainability (MLA 2006a, p1). The review found many reasons for outsourcing museum services, but service improvement was not a prominent one. Rationalisation, financial pressures and best value service reviews all appeared as significant drivers for change (2006c, p2).

Charitable trusts in particular are attractive to a local authority for a number of reasons. Firstly, if the authority sets up the charity it can specify that councillors have to be on the board of trustees. Additionally, a charity can be in receipt of charitable funds through charitable foundations set up to give money away to other worthy causes. They also are more likely to benefit from philanthropy, being able to counter the perception that you are donating to a service which should be publicly funded. A council can in theory reduce its financial contributions to the museums service as the

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<sup>77</sup> Adrian Babbidge is a renowned museum professional who has published widely the area of disposals from museum collections. He has written what is considered in the museum sector as the authoritative statement on the law relating to disposals from museums. He is now a business consultant and his biography on Egeria's website states that he completed 'legal vocational training' at Nottingham Law School at some point during his career (Egeria 2010).

trust will have alternative sources of income. The Report documented that for the trust pioneers, there were a notable number of benefits that had accrued through freedom from local authority status, particularly in respect of encouraging philanthropy and financial benefits around gift aid and eligibility for funding from other charitable organisations.

After transfer, existing trust museums have been successful in securing new sources of funding in addition to a core local authority grant. The problem is that most of this funding was from alternative public sector sources rather than private sources and the evidence is documented in a report predating the recession, let alone the new government (MLA 2006a, pp5&6). It also should be noted that the report was published when the shift from museum trusts to culture or leisure trusts were just beginning. Most of the trusts reviewed by the report were either full asset transfers or hybrid trusts where some assets (normally staff) were retained by the local authority (MLA 2006a, pp4&103).

The Farrer / Egeria report made a number of recommendations to aid local authorities thinking about devolution of museum services. This included the suggestion that partial transfers were not preferable to full transfers (MLA 2006a, p7) and that full legal agreements should be drawn up, including whether services were to revert to the council at the end of the term. It should be noted that full transfer generally excludes museum collections (MLA 2006a, p101). This is owing to legal complications and risks which are considered in chapters four, five and six. In respect of the issue of funding, the recommendation was to develop a strategy to attract both private and commercial donors (2006c, p9). The authors were unable to universally recommend the charitable trust status model. This possibly was because of a number of factors but primarily that each museum will have a distinct set of financial, legal and other factors at any given time and that the merits of whether to move to trust status or not can be assessed only at



a particular point of time given those factors. The answer may be different if the question is posed five or ten years later.

Charitable trusts, to be truly self sustaining, need financial security when they are set up. This means not only transferring the assets, potentially both real and personal property, but also ensuring that an endowment is made to provide either start up capital or, preferably, an investment which generates an income to cover a proportion of the overheads as the trust will in the future rely on income generation through sales and donations. Often, these trusts are set up on a model which requires a year-on-year grant from the authority which set it up in the first place but with the 'selling point' that as a charitable trust it can access funding sources that the local authority cannot. This model has the opportunity to defeat the object of sending the service out to trust in two different ways. Either the year-on-year grants continues, and potentially grows, which defeats the object of creating the trust in order to reduce liabilities for the Council Tax payer, or the trust remains too reliant on the grant and if it is cut the service is threatened<sup>78</sup>. It will be interesting to see how trust based models fare in the new economic climate given that alternative funding sources (public, private and charitable) and local government core grant funding is in short supply<sup>79</sup>. Will those trusts with a high level of council control on the board of trustees fare badly in comparison, if they are imperilled by council cuts? This is unlikely given councillor trustees can lobby effectively on behalf of the service.

Luton Borough Council put their museums into a charitable trust in April 2008. Museums formed part of a wider cultural trust which encompassed

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<sup>78</sup> Though some may create a trust with the intention of maintaining a grant over the long term.

<sup>79</sup> An interesting exception is the HLF whose budget is due to increase once the 2012 Olympics has been paid for and who will be seeing an immediate improvement in their budget owing to the return to a twenty percent share of the profits and the increase in Lottery sales during the recession.

libraries<sup>80</sup> as well as arts services to create a critical mass of service provision for sustainability. Peter Jones, the council's then Head of Leisure and Community was quoted by the council as saying that, "[t]he council has recognised the benefits of its cultural services over the years by investing significant sums in their provision. However, it does not have to provide most of them and this is a way of protecting them while the council directs resources to its statutory duties." The council estimated it would make £476,000 of financial savings in 2007/08 (Jones, 2007) by sending the services out to trust. It is worth noting that the council owns Luton Airport which provides a significant revenue stream to underwrite non-discretionary services. Peterborough City Council is the latest council in the East of England to move to a cultural trust with Vivacity created in 2010 including a successful HLF bid and Council match funding to improve the museum service. However, it is facing almost immediate cuts in the funding received from the council in the 2011/12 budget (Seaton and Harrison 2011, pp102-4).

### **Beyond shared services and trusts**

The 2010 MLA report, *The Opportunity of Devolved Governance*, built on the previous Egeria / Farrer & Co report but extended it into the wider cultural trust concept and anticipating future public sector financial restraint (MLA 2010b, p2&3). It offered four new examples of service provision as an alternative to directly provided individual services. Strategic commissioning comes from the social care sector and is about providing services that meet individual needs. That is to say you commission and pay for services from an alternative provider instead of providing them yourself, a common example of this is with care home provision. At the highest concept level it is about providing seamless and holistic services to individuals, at its lowest it is a way of levering in budgets from other

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<sup>80</sup> Luton is a single tier authority with both county and district service responsibilities.

elements of the public sector to fund your own. Joint services have been outlined above with a number of successful joint operations providing museum services. Culture and Sport Glasgow was given as an example of integrated and co-located services as a charitable company with the Glasgow Life brand and a number of sub-brands including Glasgow Museums. The Luton and Wigan Cultural Trusts were given as an example of devolved services (MLA 2010b, p3). The report reviews eleven different legal formats of alternative legal personality to local authority ownership. These are grouped under three main headings: philanthropic, enterprising and investment and move from a charitable basis, through community enterprise, to mutual ventures, and finally private business (MLA 2010b, p5). As with the Egeria report, there is no conclusion on the best model for outsourcing services as each circumstance of potential outsourcing is different, but the report provides a useful starting point for those considering to outsource services.

What this demonstrates is that there is no silver bullet governance and operating model for local authority museums. Outsourcing in whatever form is not necessarily the answer and any legal change to a museum's status should be taken only after careful consideration of the implications. It certainly is not a guaranteed way to reduce the burdens on the public purse. Some may require endowments to reduce the risk of further public subsidy; others may require increased public finance into an organisation which is not in council control. However, the benefits of having a dedicated governing body as offered by the trust model, as long as the service is not outsourced with others, is an opportunity for harnessing public support and engagement to take the museum in different directions.

## Conclusion

Policy has an important role to play in museum services. For local authority museums, it often is local government policy rather than museum specific policy that has an immediate effect on how these services are provided. Such policy, of course, cannot be divorced from the law, as it can require legislation to fully implement change or be underpinned by legislative requirements. It should be noted that this is not a new phenomenon. In fact in the late 1980s Palmer commented that, “...modern museum administration cannot be divorced from its political and economic context. Its fundamental statutory precepts are subordinate to policies and budgets,” (Palmer 1989, p177).

The impact of policy is all the more surprising as it was not until 1996 that there was a government policy statement on museums. Previous reports from a Royal Commission or for the Paymaster General had been commissioned so that ideas could be cherry-picked based on their usefulness, attractiveness, and affordability, with more difficult, though worthy, elements left unaddressed. *Treasures in Trust*, published towards the end of Major's government marked the starting point of a flood of government policy intervention which was the hallmark of the New Labour style.

Like other services, museums found themselves under pressure to justify their existence through a variety of different mechanisms. Museums were caught between the generic requirements of government for local authorities and the generic professional expectations of the government's specialist adviser, the MLA, and the relevant trade association, the MA. This did not match up, and often could conflict. Whereas local authorities were asked to ensure best value was achieved from sales on behalf of the tax

payer, they were expected to dispose of items from museums within the sector at below market cost. Additionally, local authorities were to manage their real assets for the benefit of the tax payer, maximising profits, minimising ongoing maintenance liabilities, and disposing of surplus buildings. Museums often are housed in historic public buildings with maintenance deficits caused by a backlog of repairs which did not meet the criteria for sustainable asset management.

This burden has not abated with the Coalition government given the financial parameters local authorities are working within. With both a general perception, evidenced by the abolished performance indicators, of low attendance numbers (Audit Commission, 2010) and limited opportunity for innovation owing to budgetary constraints; the combination of current habits and future social trends places museums in a dangerous position as services are being cut. More pressure will be placed on looking at alternative models of provision, potentially taking museums out of local authority control. In addition, increased focus will be placed on selling collections to fund operating expenses, whether it is considered acceptable or not.

Where does this leave museum policy? Is it providing the guidance required in these challenging times? In the author's experience it has been improving, though is not there yet, and the Arts Council has prove that it has the ability to lead museums. Until recently, some in the museum fraternity were quick to castigate based on media reports decisions made when the political or economic pressures have dictated a certain course of action. Some required such scrutiny, but others have been ethical tests which required balanced consideration and support, not public pillory<sup>81</sup>. It

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<sup>81</sup> It should be noted that the author has experienced first hand the rush to judgement and derision when she led a review and authored a report which ultimately closed a local authority museum in existence for ten years with high maintenance costs and low visitor numbers in favour of investing in the two other well attended museums dating back thirty and a hundred years respectively. What was missed by those who were quick to condemn was the overall package focusing on improving access to the collections. Inaccurate reporting by the local

is not surprising that with the expectation of such a reception which attempts to polarise opinion that it seems to galvanise a certain breed of councillor to drive through reforms regardless rather than work constructively to address concerns.

A look at the historical policy trends demonstrates that planned change specifically for museum is slow, but change that potentially affects local authority museums can be quick and rapidly changing. In the past thirty years, museums have had records levels of investment and opportunity available to them, but also have had to navigate pressures for cuts and efficiency savings. As with all sectors, some museums are high performing and others are not. This is not down to luck. Strong leadership, political support and a willingness to innovate and grasp opportunities has meant that some museums are in a stronger position to weather the storm. It is this, rather than making museums compulsory, which will make the difference in the future. What has been lacking is a real will to deal at a national political level with the problems and to consolidate what is good in the sector.

## Chapter 3: The origins and legal development of local authority museums

*“In the nineteenth century this country, by a series of measures, threw open, as wide as the circumstances of the time permitted, access to knowledge, to education, and to all the refining arts, which are helped to be spread by the existence of museums and galleries.”<sup>82</sup>*

### **Introduction**

To understand the legal status of local authority museums today and their role within society, one needs to understand their origins and development as legal entities. Changing ideas, legislation and policy have formed the current legislative framework within which local authority museums operate. Different statutory constructs have been tried and tested, but throughout local authority museums have adapted to the changes. Whilst society has evolved and developed through time, have museums? Do some basic ideals hold true, for both museums and the society within which they exist? Every institution of age has seen the same concepts come and go whilst they weather the storm and continue. Is this because of the constancy of purpose or because they are flexible through changing legal duties? Does the societal and legislative origins and development of museums give a blueprint for local authority museums in the future?

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<sup>82</sup> As per Mr Ede, Member for South Shields, in the House of Commons debate on 8<sup>th</sup> June 1964 on the Public Libraries and Museums Bill (Hansard 1963-64 Vol.696, p86)

## **The investment and prestige of collections<sup>83</sup>**

Man's interest in the past can be seen throughout recorded history. One of the earliest noted instances of a fascination with artefacts and collecting dates back to ancient Babylon and the excavations at Ur by Nebuchadrezzar and the last King of Babylon, Nabonidus. In fact, it was Nabonidus' daughter who was interested in local curiosities and appears to have displayed them in a room in her house, an ancient forerunner to the collectors of the past five hundred years (Daniel 1981, p18).

The first museum, as it would be comprehended now, dates from the late-15<sup>th</sup> century. Pope Sixtus IV, builder of the Sistine Chapel, gave the Conservatori (the Roman civic authority) a collection of ancient statues which were to be housed in the palace built on the Capitol by one of his predecessors, Pope Nicholas V. This collection was added to by subsequent popes; then later divided into marble, to be displayed at the Vatican, and bronze, to remain at the Capitol. Many of the nobles in Italy also amassed large collections of antiquities and later material. In the 17<sup>th</sup> and 18<sup>th</sup> century many of these collections, including the great Medici collection were sold off and whilst sold into private hands, over time many of these collections found their ways in to the emerging museums across Europe. This scenario would be repeated countless times across the succeeding centuries owing to beneficence or relative poverty of the current owners.

Collecting antiquities in England became fashionable in the early 17<sup>th</sup> century following King Charles I's purchase of the collection of Gonzagas of Mantua. The two leading collections outside of royal hands at that time were those of the Earl of Arundel and the Duke of Buckingham. The Earl

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<sup>83</sup> This section draws upon unpublished lecture notes the author collated during a development of Roman archaeology course run by Professor John Wilkes of the Institute of Archaeology, part of a Masters of Ancient History degree run by University College London during 1999 to 2000.



had travelled extensively in Italy with Inigo Jones and collected from Greece, Italy and Asia Minor. On his death much of the collection<sup>84</sup> was sent to the Ashmolean collection in Oxford, the remainder being left in the rubble of his former home, Arundel House, in the Strand. The King's collection eventually was sold before the Restoration to Cardinal Mazarin of France and later became the centre of the Louvre collection, reinforcing the pattern of art collections as commodities in this period.

Collecting reached new heights during the 18<sup>th</sup> century in England. It became fashionable for the English aristocracy to go on a Grand Tour of Europe during which they would acquire pieces, predominantly sculpture, to aggrandise their country houses. Whilst the work of Johann Joachim Winckelmann changed perceptions of Greek and Roman art in Europe with his classification of Greek sculpture which categorised Roman art as derivative altering the perception of collectors in favour of Greek sculpture; the preference of English collectors remained with Roman art and artefacts. They were influenced heavily by the work of Richard Payne Knight, the noted collector and authority on Roman bronzes and coins, who left his collection to the British Museum. It is some of these Grand Tour collections that later formed the foundations of British Museum.

At this time, many transfers of collections to museums were not made for purely philanthropic reasons. The British Museum was founded with Sir Hans Sloane's bequest of his library and collection of antiquities, the Harley manuscripts and the Cotton library. Sloane sought money for his heirs in exchange for the bequest and Harley had run into financial difficulties at Wimpole Hall and had had to liquidate his real and personal assets<sup>85</sup>. After

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<sup>84</sup> Including thirty-seven statues, one hundred and twenty-eight busts; and two hundred and fifty inscriptions, sarcophagi, altars, coins and medals.

<sup>85</sup> Sloane's bequest to the nation was on the condition that £20,000 was paid to his heirs. If this was refused, the collection would have been offered abroad. The first Act of Parliament establishing the museum, which was funded by a public lottery, was passed in 1753. Also included was a collection of manuscripts, the Cotton Library, given to the nation in 1700 and the Lord Harley's library which was purchased when he had to sell it owing to debts (British Museum 2008, and Souden 1999, p18).

the additions of the coin collection of Richard Payne Knight, Sir William Hamilton's Greek vases were purchased by Parliament for the princely sum of £8,400, and the artefacts of Charles Townley, cost the nation £20,000 and a Townley Gallery<sup>86</sup>. In this age of exploration and Empire, a sense of trade rather than gratuitous patronage abounded. But one can argue, is that any different from today when the Duke of Northumberland received £22 million, including £11.5 million of public funds, for Madonna and the Pinks?

Those collections in private hands were not necessarily out of public view. The collection of the Tradescant family in the 17<sup>th</sup> century, commonly known as Tradescant's Ark owing to its eclectic nature was available for viewing. It was later acquired by Elias Ashmole, and with his own collection was given to the University of Oxford to form the Ashmolean Museum. The Elgin Marbles also were originally on public display in Park Lane, after Lord Elgin had spent over £40,000 of his own money in acquiring them. Controversial, even at the time, they were purchased for the nation, for £35,000, only once public opinion had shifted on whether they should have been removed from Greece in the first place.

During the 19<sup>th</sup> century Britain became awash with artefacts, not only from Grand Tours but also from building railways across the Empire. As they constructed these monoliths of modern civilisation, they began excavating ancient artefacts along the routes and had empty boats which required ballast in lieu of the heavy machinery that had been carried out, waiting to return home. These boats returned to Britain carrying a variety of ancient sculpture, inscriptions and stonework which required depositories back home. The market had changed.

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<sup>86</sup> Originally housed in the Townley Gallery, some of the collection can now be found in the Roman Sculpture Gallery.

## A national appreciation or asset?

The first museum in England was the Ashmolean Museum in Oxford which was formed in the late 17<sup>th</sup> century. The label 'museum' was first ascribed to it in the Oxford English Dictionary in 1683 (Saumarez Smith 1989, p7). It was followed in the mid-18<sup>th</sup> century by the British Museum<sup>87</sup>, the Natural History Museum, the British Library, and later, the development of the museums in South Kensington following the move of the British Museum's natural history collections there<sup>88</sup>.

Saumarez Smith<sup>89</sup> states in his article on *Museums, Artefacts and Meanings* when discussing the Ashmolean and the British Museum that the essential difference between museums and private collections at that time were that meanings were given to artefacts which were accepted by the majority, that the collections were accessible to at least a section of the public, and that those who visited museums would be educated by the encounter (Saumarez Smith 1989, p6). He went on to postulate that the initial objective behind the development of museums was to eradicate issues of private ownership from artefacts and establish a public collection, "*which was expected to be established in perpetuity.*"

Understanding the development and applicability of the concept of public museums holding artefacts in perpetuity is at the heart of the local authority museum issue. Alongside the notion of perpetuity is the corresponding ability to dispose for value in order to invest in acquisition.

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<sup>87</sup> "The British Museum was founded in 1753 to promote universal understanding through the arts, natural history and science in a public museum. Since its foundation, the British Museum has been guided by three important principles: that the collections are held in perpetuity in their entirety; that they are widely available to all who seek to enjoy and learn from them and that they are curated by full-time specialists." (British Museum 2007).

<sup>88</sup> The Crystal Palace which accommodated the Great Exhibition of 1851 was moved from Hyde Park to Sydenham after the exhibition ended to house the forerunner to the V&A, the Museum of Ornamental Art, with its displays of cutting edge design (V&A 2008). The V&A later moved to its permanent home on Exhibition Road opposite the Natural History Museum (part of the British Museum until 1963) and the Science Museum.

<sup>89</sup> Dr Charles Saumarez Smith CBE FSA was Director of the National Portrait Gallery from 1994 to 2002, Director of the National Gallery 2002 to 2007, President of the Museums Association from 2004 to 2006. He has been Secretary and Chief Executive of the Royal Academy since 2007 (Debretts 2010).

Whilst the idea of holding collections in perpetuity is a laudable theory, the law relating to possessing collections in perpetuity and disposing of them in a not for profit manner has not been consistent and not even always practiced by museum professionals until recently<sup>90</sup>. What items should be kept in perpetuity? Which institutions should keep objects in perpetuity?

With the development of the earliest museums, can we say the motivation was perpetuity? Certainly, in some cases a perpetual memorial linked to the transfer of an entire collection, though often, it has to be noted, for financial gain either for the benefactor or his heirs rather than loftier aspirations<sup>91</sup>. But were the donations to universities which founded some of the great local museums meant to be static or for study and development? That is not to say that the foundation of museums was not a positive movement, with the introduction of classification and order to what had sometimes been cabinets of curiosities.

## **Museums to the masses? The municipalisation of art.**

The great development of municipal museums in this country came later in the 19<sup>th</sup> century. The foundations of museums across the country were made initially through universities, schools and learned societies, and were often based around the need to house and look after existing collections. Such museums were established throughout the early 19<sup>th</sup> century. The 1963 report of the Standing Commission on Museums and Galleries noted that by 1800 that five provincial museums had developed: the Ashmolean in 1683, the Spalding Gentlemen's Society Museum (1710),

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<sup>90</sup> The author has seen public records from the 1920s to the 1970s documenting the disposal of artefacts from a council museum, including those which were bequeathed under the terms of a trust.

<sup>91</sup> This includes Sir John Cotton's house and library, *Cotton House and Library Act 1706*, Sir Hans Slone's house and collection and the Harleian Library of the Earl of Oxford, *British Museum Act 1753*, the Townleian Collection of Charles Townley, *British Museum Act 1805*, and the Elgin Marbles, *British Museum Act 1816*. An exception was the noted collector Richard Payne Knight who asked for one of his descendents to be named as trustee with perpetual succession, *British Museum Act 1824* c.60, as had Lord Elgin. The composition of the Board of Trustees was altered by s.1 *British Museum Act 1963*. All twenty-five are appointed.

the museum of the Society of Antiquities of Scotland (1781), Ipswich (1791), and Stoneyhurst College (1794) (1963, p3). This growth in local museums coincided with a dynamic period in local government. In the nineteenth century day-to-day discretionary services such as sewerage, education, and later museums and libraries, were provided at the local authority level. This meant that these practical and pleasurable municipal facilities developed at different rates in different areas with a focus on the urban areas. In effect, service provision was, as it is now termed, a postcode lottery as it was up to local authorities to provide the services that the local area demanded and raise the money required.

## **The move to publicly funded museums**

Whilst the early dynamism for provincial museums was driven by the voluntary or private sector, the mid to late nineteenth century saw a shift towards the university and local government spheres. Manchester Museum, began life in 1821 from a private collection bought by a learned society, was taken in by the university sector in the 1860s after the society had run out of money<sup>92</sup>. The New Walk Museum and Art Gallery in Leicester was formed from a gift of the collections of Literary and Philosophical Society in 1849 and was one of the first museums established under the 1845 Museum Act by the town council (Fisher 2004). This trend continued, for example with Moyse's Hall Museum being formed by the then local authority, Bury St Edmunds Borough Council, in 1899 following the gift of artefacts from the Bury St Edmunds and West Suffolk Archaeological Institute in 1878 (St Edmundsbury Borough Council 2008).

Two exceptions to the tendency are found in Horsham and Bolton. Horsham Museum was founded in 1893 as an independent museum from

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<sup>92</sup> A group of like-minded men bought the collection of John Leigh Philips and set up the Manchester Natural History Society from which the museum developed. It initially became part of Owens College in the 1860s and later the University of Manchester (Manchester Museum 2008).

the Horsham Museum Society meetings where members exhibited their own artefacts. Over time, objects were left to the Society and a permanent home was found in 1928 in the council offices. By 1941 more space was required, so the Society moved to the Museum's current location in a mediaeval building. In 1966 the Society loaned the collections to the then Horsham Urban District Council as it became unable to run the Museum. This was formalised in 1974 when Horsham District Council took over the whole museum thereby following the trend, having bucked it, over a hundred years after everyone else (Horsham Museum 2008). The first museum in Bolton containing the Council's collections dated from 1852 when the Council acted under the new legislation. Bolton did not have the donations from literary and philosophical societies which founded many other museums but one of the first donations to the new museum was a collection of fossils<sup>93</sup>. Bolton demonstrated how the enabling legislation could benefit society at a time when there was still a great divide between the industrial north and the educated south. The growing populations finally were being served following the first of the political reform acts in 1832 and were determined to make their mark.

## **The legal basis for local authority museums**

Palmer remarked that, "*English law contains relatively few provisions which are peculiar to cultural property alone,*" (1989, p174) though the position has improved in the intervening twenty-two years. Legislation in respect of museums is one of those curiosities. Therefore, the starting point for any investigation into local authority museums is the development of the national and local legislation governing their operation. Legislation relating to museums and artefacts has been sporadic and, generally, is designed to deal with specific museum issues, often though not exclusively, relating to

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<sup>93</sup> Bolton claims to be the third council in the country which opened a museum under the new legislation (Bolton 2008).

the national museums. As alluded to in the quote from Palmer, the day to day transactions of a local authority museum are governed by the common law and through general municipal statutes. The reliance on such provisions is particularly noticeable in the areas of acquisition and disposal, covered in the following chapters. However, the governance of such organisations relies primarily on specific enabling legislation and accompanying provisions in local government legislation. In this way it deviates from the precedent set by national museums and sets these provincial neighbours clearly as sub-ordinate products of the legal entity of the council.

This legislative framework for local authority museums has developed in a piecemeal fashion. While local authorities have been providing museums since the 19<sup>th</sup> century, the current statute governing them does not include powers relating to acquisition or disposal of artefacts, legislators having preferred to rely on existing local authority powers for acceptance of gifts and the purchase and sale or other disposal of chattels. By choosing this specific route, in comparison to the legislation governing the national museums, reviewed later in this chapter, the inference is that legislators could be suggesting that a painting is no different to an office chair, subject to any conditions accepted on transfer. This is at odds with the position of policy framework which governs the conduct of museums, including that put in place by the MLA and MA.

Local authority museums are referred to by councils, inaccurately in the legal sense, as 'non-statutory services'. This does not mean that they are not governed by statute but that the council has the discretion, not a duty in law to provide this service. The *Public Libraries and Museums Act 1964* is the governing Act for museums in the local authority sector. There have been seven preceding main acts relating to local authority museums. These are the *Public Libraries Act 1919*, *Public Libraries Act 1901*, *Public*

*Libraries Act 1892, Museums and Gymnasiums Act 1891, Public Libraries Act 1855, Public Libraries Act 1850 and Museums Act 1845.* Before exploring in detail the legislative framework as it stands today, reviewing the evolution of the law gives an important insight into how legislation and societal common beliefs are linked and change at any given point of time.

### **Three Acts in ten years: the Bills of William Ewart**

The introduction of legislation for provincial museums was driven by schools of design. An 1836 Select Committee had recommended the introduction of schools of design in London and the manufacturing towns. It also had recommended that art galleries or exhibitions should be available in those manufacturing towns and other large towns (Hansard 1845 Vol. LXXVIII, pp381-2). Whilst the schools of design had been developed by the 1840s, museums had not. William Ewart, Member for Dumfries and a Liberal, supported the *1845 Museum Act* through the Commons. However, he found opposition to the concept of not only allowing councils to provide museums but also to introduce revenue expenditure on museums. This resulted in a tightly defined population criteria required to support a museum and a cap on the expenditure able to be raised for maintenance (Hansard 1845 Vol. LXXIX, p387).

In 1850 William Ewart introduced a Public Libraries Bill into the House of Commons. This piece of legislation was primarily concerned with the creation of libraries and marks the foundation of public library services as provided by local authorities. Though primarily focused on libraries, an opportunity was taken to amend the provisions of the museums legislation, introduced five years previously, which had been amended and passed by a predominantly Conservative rather than Liberal parliament. Ewart's primary objectives in this new piece of legislation were to, "...vest fixedly and for ever the property and the buildings in the town councils," to extend



the ability to provide museums to all municipal authorities,<sup>94</sup> and to make museums free to enter.

The Bill faced significant opposition in its second reading in the Commons as there was general concern about further levies of taxation without consent on a burdened populous in the wake of the Corn Law crisis and the potato famine in Ireland and it passed with only a majority of seventeen (Hansard 1850 Vol. CIX, p852). This resistance resulted in William Ewart inserting a population limit of over 10,000 inhabitants and the requirement to call a public meeting of rate payers to obtain consent (Hansard 1850 Vol. CX, p154). These amendments appeased some of those opposing the Bill and a motion passed in the Committee stage of the Bill on this subject received a majority of thirty-five (Hansard 1850 Vol. CX, p162). Sir George Pechell, Member of Parliament for Brighton, had been asked by the town to propose an amendment so that it could extend to large towns governed under local Acts as well as those large municipal corporations (Hansard 1850 Vol. CXI, p110). This he was unable to achieve.

Five years later, William Ewart sponsored his final municipal museums bill through the House of Commons. The Public Libraries Bill in 1855 endeavoured to address the population limit for creation of a museum, and the resulting town coverage were the issues of debate in the Committee stage of the Bill. The county of Cornwall wanted the population limit reduced from the proposed 5,000 to 4,000 as this would bring the major towns of Cornwall such as Bodmin and Launceston within the scope of the legislation, (Hansard 1855 Vol. 137, p208&213). However, William Ewart had already compromised to get 5,000 as the population limit and thought that any further alterations would not be supported (Hansard 1855 Vol. 137, p213). A returning concern was the rural hinterland included

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<sup>94</sup> When asked in the House of Commons where the 1845 Act had or was being adopted, William Ewart informed the House that it had been adopted, "...in Warrington, Salford, Manchester, Leicester, and other places," (Hansard 1850 Vol. CXI, p1178).

within some towns' municipal boundaries whereby people who lived there potentially would be taxed to provide a museum but would not necessarily be able to access said museum or library regularly. This is in contrast to today where 'hinterland' is much wider and the issue is about providing services to those who are outside of municipal boundaries and therefore do not contribute financially towards a service.

## **One man, one approach?**

With one man being so intrinsically linked to the first ten years and three Acts of local authority museum legislation, a natural assumption would be that there was a consistency of approach with the frequent changes reflecting the dynamism of population growth at this time. Whilst there was some level of uniformity in approach, notable changes reflected, possibly, a philosophical shift on what local authority museums should become.

## **Threshold for provision**

Local authorities were first given the ability to provide museum services under the *1845 Act*. As with all subsequent acts, it required positive action to adopt the Act and operate under it. This Act was contingent on the local authority being a municipal borough<sup>95</sup> and having a population of over ten thousand people. This population threshold did not change in the *1850 Act*, s.1, but as the Act introduced library services it is interesting to note that no differentiation was made between the application of the provisions of the Act to the two services at this time. The *1850 Act* covered

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<sup>95</sup> Municipal Boroughs were created in 1835 following the enactment of the *Municipal Corporations Act 1835*. Existing Boroughs, created by Royal Charter, were governed by municipal corporations. The Act required the creation of a council of Mayor, aldermen and councillors elected by the people. 178 Boroughs were initially reformed by the Act and the Act also allowed towns to petition Parliament for Borough status. This particularly benefited the settlements, such as Birmingham, which had grown through the Industrial Revolution and were consequently under represented both politically and municipally. Only one council remains unreformed by this Act – the City of London Corporation.

libraries, museums and added Schools of Art and Science to the joint provisions, though all museums established under the repealed 1845 Act were to be maintained under the *1850 Act, s.IX*. The *Public Libraries Act 1855* repealed the *1850 Act*. The *1855 Act* extended the opportunity to provide museums and libraries beyond municipal Boroughs, to districts operating within the confines of an Improvement Act, and a parish or group of parishes if they had a population of five thousand or more, halving the population threshold of the previous two Acts. As Hansard documents, the population thresholds were some of the most contentious elements of the three Acts, with Ewart having to make difficult decisions balancing the benefit of passing the bills against the requests of smaller communities to provide museums. Sunderland (1846), Warrington (1848), Leicester (1849), and Salford (1849) were some of the first councils to set up or adopt existing museums under the new legislation (Standing Commission on Museums and Galleries 1963, p3).

The *1855 Act* had six subsequent amendments<sup>96</sup>, four of which are significant for the evolution of museums legislation. The *1866 Amendment Act* removed the minimum population requirement that had been established for museums since 1845, s.6. The Act also permitted parishes to join with Boroughs, districts or parishes that had already or were contemplating establishing museums, libraries or schools of art or science to adopt the Act, s.4. The final noteworthy provision was that once a library or museum had been established under the Acts if a local authority wished to found the other institution, they could do so without taking further proceedings as set out in the *1855 Act, s.10*.

The *1871 Amendment Act* extended the scope of the preceding act to local boards established under the *Public Health Act 1848* and *Local*

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<sup>96</sup> *Public Libraries Amendment Act (England and Scotland) 1866, Public Libraries Act 1855 Amendment Act 1871, Public Libraries Amendment Act 1884, Public Libraries Acts Amendment Act 1887, Public Libraries Acts Amendment Act 1889, and the Public Libraries Acts Amendment Act 1890.*

*Government Act 1858* in addition to districts operating under an *Improvement Act*, as had been provided for in the *1855 Act*. However, this was not applicable to districts where the whole or part of which lay within a municipal Borough or the authority of Commissioners under an *Improvement Act*. The *1884 Amendment Act* built on the additions of the 1866 amendments. *S.3(1)* stated that where a museum, library, art gallery, school or art and / or science had been established, any of the others could be added without further proceedings under the *1855 Act* as amended. In 1887, the provisions of the preceding acts were extended to the metropolis of London<sup>97</sup>, *s.10*, excepting the Corporation of London which had been provided for under the original enabling act.

## **Finance**

Money for the establishment of a museum could be raised through the Borough Rate; however the amount levied was capped at one halfpenny in the Pound in any one year. There also was provision made for a separate levy with similar capping. An admission charge of up to one penny could be charged to offset running costs. In order to make the reforms in the *Public Libraries Act 1850*, eligible local authorities were given the power to use the money raised through the Act to run and equip both public libraries and museums. Money was to be raised by local authorities through a separate Rate or in an addition to the Borough Rate so long as it did not exceed one halfpenny in the pound on the value of property rateable, *s.III*. Most significantly, the *1850 Act* introduced the concept that local museums and libraries should be free of charge, *s.VII*, thereby reversing the position of five years previously and introducing the concept of universal access for the first time. The *1855 Act* simply extended to each type of local governance covered by the Act the power to levy a rate to raise funds to pay for the library, museum or school.

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<sup>97</sup> As defined in the *Metropolis Local Management Act 1855*.

## Real and personal property

Under the 1845 Act, eligible councils were permitted to purchase land and build a museum for art and science, accept gifts of land or buildings, or contribute towards the creation of a museum in a neighbouring Borough. In relation to the artefacts to be contained within the museum, the Act was clear that the Mayor, Aldermen and Burgesses of the Borough held objects purchased for or presented to the Museum, “...vested in and held upon trust for ever.” No mention was made of powers of disposal. By 1850 this had extended to buildings housing museums, fixtures, fittings as well as the artefacts contained within which were to be vested in and held by the Mayor, Aldermen and Burgesses on trust for the benefit of the inhabitants of the Borough in perpetuity, s.VI.

S.VI stated that the items identified, “*shall be vested in and held upon trust for ever by the Mayor, Aldermen, and Burgesses of the Borough...and shall be managed by the Council of the Borough...and kept in proper Order, for the Benefit of the Inhabitants of the Borough and others resorting thereto.*” The phrase “*in perpetuity*”, first seen in the *British Museum Act 1824 c.60*, is not used instead they return to ‘for ever’ which had been used in the previous British Museum Acts. Was it the intention of the legislators to create a legal trust covering both buildings and contents and held by the local authority for the benefit of the local population? There is no evidence in Hansard to support this supposition, but if it was the case, it would have taken the legislation beyond the realms that had been conceived by the British Museum Acts on behalf of the national collection where some individually gifted collections were held on trust through the terms of their donation towards a higher concept of ownership and use of the collections.

Lands on which a museum or library sat or buildings that they inhabited had to be, “so purchased, erected, extended, or altered.” The contents of the museums and libraries were defined as being “presented to” said museum or library and were confined to, “Books, Maps, and specimens of Art and Science.” However, fixtures and furniture and “[a]rticles of every [d]escription” could be “presented to or purchased for” the library or museum directly or by the local authority for the purposes of the library or museum. These provisions indicate that a donation based acquisition policy was generally envisaged with the local authority providing the means for access to such collections, though with a catch all provision which would allow the Council to make purchases for the museum or library. Museums in the Act are described as “Public Museums of Art and Science” which sets the scope anticipated for their collecting needs.

Boroughs and districts were able to appropriate land to deliver the purposes of the Act<sup>98</sup>. Boroughs, districts and parishes were able to purchase or rent land or buildings for libraries, museum and schools. All three were given power to demolish, alter and extending buildings and to rebuild, repair and improve. Provisions were made for fit out, furnishing and the continuing supply of necessities with the ability to acquire fittings, furniture and “conveniences” in order to do the same, s.XVIII. There was the opportunity to sell or exchange lands in order to purchase or exchange for lands better suited to the local of a library, museum or school of art or science, s.XX. The provision that museums and libraries would be free of charge was reinforced in this Act, s.XXV.

The ongoing regulation of such establishments was vested in the Council, Board or Commissioners or a committee that they created to do the same. This included the hiring and dismissal of salaried posts and the

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<sup>98</sup> A specific provision was made for the Corporation of London, s.XXIV.

rules and regulations in relation to health and safety and use of such establishments, s.XXI. This section additionally gave them the right to “purchase and provide” not only supplies of necessities such as fuel or lighting but also, “[b]ooks, [n]ewspapers, [m]aps, and [s]pecimens of [a]rt and [s]cience,” and allowed them to be repaired as necessary. The presumption seen in the 1850 Act that most of the contents of such museums and libraries would be donated was not to be found in the 1855 Act. Most notable in its absence was the concept that the real and personal property relating to a museum and library would vest in the governing body of the local authority for ever, on trust and for the benefit of the inhabitants of the area. Real and personal property simply vested in the governing body, which gave unencumbered ownership, subject to terms of bequest, contract or gift.

### **Changing expectations**

In a matter of ten years, local authority museums had had three governing acts. They document a reduction in population threshold to open a museum, a change from admission charges to universal access, and most importantly three different interpretations on the ownership of property. This move from protecting chattels, to protecting real and personal property through trusts, and then the volte face to unencumbered ownership would suggest a debate recorded in Hansard, but it does not make an impression. Were these changes self-evident? Did they reflect society? Practice? Re-asserting basic legal principles of ownership? It is difficult to tell with the lack of supporting documentary evidence.

## A new approach – the high point of museum legal diversity

The Museums and Gymnasiums Bill was designed to allow the creation of museums without a library (or a gymnasium without adopting the *Baths and Washhouses Act*)<sup>99</sup>. The Bill passed through the Commons with little comment except for its geographical extent. Its purpose, as described by Lord Thring when moving for the Bill's Second Reading in the Lords, was to provide a combined museum and assembly room space. The museum would be free to enter part of the week and the assembly room space would be available for chargeable lectures or other events which would offset the significant cost of running a museum. This would allow smaller towns to found sustainable museums (Hansard 1891 Vol. 351, p1693).

The *Museums and Gymnasiums Act 1891* extended the potential provision of museums, along with that of gymnasiums, to urban sanitary districts, s.3(1)<sup>100</sup>. This act operated alongside the *Public Library Act 1855*, as amended, but the politicians of the day chose not to replicate those provisions. Their ambition to extend museums to the network of market towns in England required a different model which focused on the needs of the local area. Museums were to be provided for “*local antiquities or other objects of interest*” and councils had the ability to build or provide buildings for a museum, s.4. These museums had to be open to the public for at least three days per week and be free of charge, although they could charge for lectures and exhibitions, s.5.

These fees had to be used to defray the expenses of the museum or the expenses accrued by the local authority through the execution of the

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<sup>99</sup> As per F. S. Powell, Member of Parliament for Wigan (Hansard 1891 Vol. 350, p1007).

<sup>100</sup> Urban sanitary districts were formed under *Public Health Act 1875* in municipal boroughs, Improvement Commissioners Districts, or in areas with local boards of health formed under *Public Health Act 1848* or the *Local Government Act 1858* which formed part of the 1848 Act. The 1848 Act covered those districts which included the whole or part of a Borough. The 1858 Act extended this to Boroughs which the 1848 Act had not been applied, areas covered by an elected or partially elected Board of Improvement Commissioners, and ‘*all other places having a known or defined Boundary.*’



*Public Health Acts, s.10(1)&(2)*. A capping provision of halfpenny in the Pound was included for museum expenditure, *s.10(5)*. If a museum, which had been established under the *1891 Act* for seven years or more, was found to be “unnecessary or too expensive” then it could be sold with the consent of the Local Government Board, *s.12(1)*<sup>101</sup>. The proceeds of such a sale would first be used to repay any money borrowed for the establishment of the museum, otherwise the money could be applied to any purpose to which the Local Government Board approved, *s.12(2)*. The local authority had the ability to make regulations in relation to the museum including those for “generally regulating and managing the museum,” *s.7(1)(g)*. These provisions were designed to ensure that no smaller museum became a burden on the population supporting it, such comfort thus encouraging the appropriate development of sustainable museums.

## **Consolidation?**

The evolution of libraries and the consequent museum legislation was consolidated in the *Public Libraries Act 1892*. This Act was primarily a codification of the *1855 Act* as amended and repealed the *1855 Act* and the six amendment acts, *s.28(1)*. As such it was subject to little comment in both Houses of Parliament. This may seem remarkable in itself given the important changes made in the Act and the fact that the *Museums and Gymnasiums Act* was passed only in the previous year, but focus of the Act was on the library rather than museum provisions, which were almost incidental.

The Act applied to urban districts and every parish, *s.1(2)*. Urban districts were defined as a municipal Borough, Improvement Act district, or

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<sup>101</sup> The Local Government Board was founded in 1871 to replace a number of boards including the Poor Law Board and the General Board of Health by the *Local Government Board Act 1871*.

a local government district. There was a certain amount of overlap with the eligible bodies for the *1891 Act*, for example, the district Local Boards of Health created under the *1848 Act* required the district to be wholly or partly in a corporate Borough whereby the Mayor, Aldermen, and Burgesses of such Borough would form the Board of Health, *s.XII*. These same Boroughs were eligible to operate museums under the *1892 Act*. As had been seen in earlier Acts, London was a special case and provision was made for the city of London to be a relevant district and authority under the act, *s.21(1)*, as were the districts identified in Schedule B of *Metropolis Management Act 1855* as amended.

One change from the repealed legislation was the creation of Commissioners for Public Libraries and Museums in Parishes, *s.5(2)*. Parishes also were not able, as previously, *s.XXI 1855 Act*, to set up a committee to manage the services, though urban authorities retained that right, *s.15(3)*. Another significant change was the inclusion of art galleries among the organisations that could be established, *s.11(1)*. Art galleries were first mentioned briefly in the *1884 Amendment Act* in respect of their establishment under the *1855 Act* as amended, *s.3(1)*. However, a clear difference was established in the *1892 Act* as libraries and museums had to have no admission charge, this did not extend to art galleries, *s.11(3)*.

Once one of the organisations so listed in the Act had been established, either prior to the Act or under the Act, no further proceedings were required to add more different institutions, *s.11(2)*. However, this applied only to the current Act or the repealed acts and was not extended to cover any institutions founded under the *1891 Act*. Vesting of property also followed the format set in the *1855 Act* as amended with no return to the perpetuity or trust concepts seen in the *1850 Act*, *s.14*.

## Pragmatism – the 1891 Act takes precedence

The Public Libraries Bill in 1901 was primarily about libraries and slightly contentious. The change it proposed to the museum legislation was where a museum had been provided for under the library legislation and a town subsequently wanted to found a library, they had to maintain both institutions within the capped rate contained in the Act. The 1901 proposed changes meant that if a museum already had been provided for under the library legislation, then if a library was to be established, the *1891 Act* would then apply to the museum as if it had been founded under it to allow the full provisions of the Library Acts to be directed at the public library rather than both institutions being funded from the Library Act provisions<sup>102</sup>.

The *Public Libraries Act 1901* was the first Act which integrated the emerging separate provisions for museums and libraries. It ensured that the *Libraries Offences Act 1898* applied to museums and art galleries<sup>103</sup>. It dealt with the dual applicability of the *1892 Act* and the *1891 Act* to some authorities. Under s.7 an urban authority<sup>104</sup> who had already adopted the *1891 Act* to provide museums could take on a museum operated in their district under the *1892 Act* and manage it under the *1891 Act*. This allowed the provisions of the *1892 Act* to be used to deliver and fund library services whilst the *1891 Act* provided for museums. However, this clause specified only museums not art galleries which were particularly identified in the *1892 Act*. Museums were defined in the *1891 Act* as being, “...for the reception

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<sup>102</sup> As per Lord Windsor moving the Second Reading of the bill in the House of Lords (Hansard 1901 Vol. 91, p211).

<sup>103</sup> This covered people behaving in a disorderly manner, betting or gambling, staying after closing hours, and using, “violent, abusive or obscene language,” s.2 *Libraries Offences Act 1898*.

<sup>104</sup> An urban authority included the newly created urban district councils, s.21 *Local Government Act 1894*. The *Local Government Act 1894* merged the sanitary authorities, to which the *1891 Act* applied, in municipal borough areas within the corporation and other urban sanitary districts were renamed urban districts and were governed by an urban district council as part of the reorganisation of local government which began with the creation of county councils by *Local Government Act 1888*. The interpretation of the *1901 Act* included provisions for London under s.13 to cover the city of London and the metropolitan boroughs.

*of local antiquities or other objects of interest...*," which could conceivably include paintings and sculpture if in a museum rather than an art gallery.

During the Marquess of Salisbury's tenure as Prime Minister, three Acts had changed local authority museum legislation. The link with libraries was being broken by the politicians to allow the growth of both libraries and museums without the financial constraints occasioned by running both under the Libraries Acts. Local authorities had choice over which regime they chose to operate museums under and flexibility from the *1891 Act* which clearly did not follow the early attempts to introduce a concept of perpetuity into museum holdings. In fact, Sir Henry Miers noted in his 1928 report to the Carnegie Trust that, "*it was the Museums and Gymnasiums Act of 1891...which resulted in the creation of the greater number of municipal museums,*" (Miers 1928, p10). This success would last nearly thirty years before tide turned under the Liberal-led post-war coalition of David Lloyd George.

### **Retrenchment or clarity? The beginning of the end of the 1891 revolution.**

The *Public Libraries Act 1919* ushered the legislation in the opposite direction and took into account the *Education Act 1902*. The changes to museums registered little comment of note in Hansard but made fundamental changes as to how museums operated and indelibly linked them with libraries. While s.8 removed the power to create and maintain new schools of science or art, more significantly s.9 repealed s.4 of the *1891 Act* permitting authorities to set up museums under the more advantageous provisions. Museums established under the Act before the date of enactment of the *1919 Act* would be allowed to continue under the *1891 Act* unless they became part of a library district, at which point the

museum services would be provided under the *Public Libraries Act 1901* as amended. The final significant legislative change prior to 1964 came with *Statutory Instrument 810 of 1920* where the Minister of Health, who was the successor to the Local Government Board, handed responsibility for s.12 of the *1891 Act* to the Minister of Education; s. 12 being the ability to close and sell a museum which was unnecessary or too expensive.

Why the change? It is difficult to document the motivations following the high point of the *1891 Act* given the lack of evidence. The absence of debate in Hansard suggests that the proposals were uncontroversial for the politicians. Henry Miers' review in 1928 gives little illumination. He notes that the 1913 British Association committee review on the work of museums in relation to education did not publish their findings until 1920, after the Act, owing to the interruption of the First World War (p7). Miers also documented that the findings of a 1919 Committee on Adult Education report were opposed by the library and museums associations, though the report's recommendation was that the ½d museum rate from the *1891 Act* should be abolished was incorporated in the *1919 Act* (pp8&13). This intimates that the lack of evidence should not imply that the changes were welcomed.

Henry Miers recounted an opinion contained in an extract of *Museums Journal* from 1920 that, "...museums and art galleries had received their charter. The removal of the rate limit should lead to great developments in museums throughout the country. Large towns would desire independence, but in smaller towns something might be said in favour of museums and art galleries being taken over by county councils and managed by the county education committees."<sup>105</sup> However, he commented later that whilst the *1919 Act* placed museums on the same basis as libraries; they had not received the same support nor had been

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<sup>105</sup> By Dr Lowe of Leicester, *Museums Journal*, 1920, XX, p53.

developed on the same scale over the intervening nine years (p37). This contrasts to his earlier documentation of the dynamism accorded by the 1891 Act. Whilst the reasons behind the changes may not be clear, the result was. Museums and libraries were bound together. So much so, that when Arthur Hewitt urged the need for consolidation in 1931 and published a model act, his proposals were to further link libraries and museums together with a universal right of provision (pp9&14-27).

## **Why 1964?**

After over one hundred years of predominantly combined legislation and a thwarted attempt to give museums a different operating basis, museums were not supposed to form part of the library legislation proposed in 1964<sup>106</sup>. Museums had been recently the subject of a *Survey of Provincial Museums and Galleries* by the Standing Commission on Museums and Galleries and when the Libraries Bill was introduced in February 1964 into the House of Commons, it was the Government's intention not to introduce museum legislation until the Commission's report could be reviewed in full. However, following submissions to the Government that it would be expedient to make certain changes with widespread support as part of the Libraries Bill, rather than waiting for a Museums Bill to find time in the legislative programme, changes were made to the Library Bill<sup>107</sup>, thus preventing the division of legislative link between libraries and museums. The subsequent *Public Libraries and Museums Act 1964* has remained the primary legislation for local authority museums in a relatively unamended form to this day.

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<sup>106</sup> Mr Willey as quoted in Hansard in the House of Commons debate of 8<sup>th</sup> June 1964 (Hansard, 1964, p93).

<sup>107</sup> As per Lord Newton's speech as Minister of State for Education and Science introducing the second reading of the Public Libraries and Museums Bill in the House of Lords on 30 June 1964 as quoted in Hansard (Hansard 1964 Vol. 696, p514).

This history explains the length of debate surrounding the library provisions in the Bill but not the museum sections in both Houses. Two particular issues vexed both Members of Parliament and Lords. The most contentious element of what was supposed to be an uncontroversial Bill<sup>108</sup> was the proposal to allow but not proscribe museums to charge. This provision was born from the fragmented nature of museum development prior to this point. As discussed above, library authorities were able to provide museums, as were the successors to urban sanitary districts but this did not provide universal coverage across all local authorities, which left some providing museums under local acts and others unable to provide museums<sup>109</sup>. This was replicated in the different charging powers: charge for art galleries but not museums under the library legislation, open free three days per week but could charge otherwise under *1891 Act*, and local acts depended on the individual provisions in the act.

The initial draft of the 1964 Bill stated that local authority museums and art galleries would be provided free of charge. This was subsequently changed to the ability to charge but with reference to education of children and students. Both clauses eradicated the sometimes artificial divide between a museum and an art gallery, but one secured existing rights to levy charges whilst one took those rights away from some institutions which charged. The juxtaposition of removing power from local government against free access to museums troubled both Houses of Parliament. Mr Sydney Irving, Member of Parliament for Dartford, commented in the debate that a local authority committee considering whether or not to charge for their museum and art gallery services would not have the parliamentary debates available to see that the intention of

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<sup>108</sup> As per Lord Newton's speech as Minister of State for Education and Science introducing the second reading of the Public Libraries and Museums Bill in the House of Lords on 30 June 1964 as quoted in Hansard (Hansard 1964 Vol. 259, p521) where he commented that this uncontroversial bill had 140 amendments laid before it in Standing Committee.

<sup>109</sup> See Lord Newton's speech as Minister of State for Education and Science introducing the second reading of the Public Libraries and Museums Bill in the House of Lords on 30 June 1964 as quoted in Hansard (Hansard 1964 Vol. 259, p520).

Parliament was to preserve a right rather than provide a mandate for charging<sup>110</sup>. This, of course, gets to the heart of the legislative point that it is the letter rather than the intention of the law which is applied in the English legal system. A point that is crucial at the refining stage of a draft bill through Parliament. It is both interesting and important to this thesis that there is a division today between charging and non-charging museums, especially given the emphasis on income generation placed on local authorities.

The focus given to those in education during the debate highlights an interesting discrepancy. James Boyden<sup>111</sup>, Member of Parliament for Bishop Auckland, quoted a 1956 National Institute for Adult Education report on museums and adult education which quoted Dr. Douglas Allan,

*"...museums are education. They exist only to further it; they can be neither provided, maintained, nor utilised without it."*

It was commented on by Mrs White<sup>112</sup> that there were few counties which maintained museums, two exceptions being the Bowes Museum by Durham County Council and Kenwood House by London County Council<sup>113</sup>, as most were in municipal and county boroughs<sup>114</sup>. This was important as county councils were the primary local education authorities along with county boroughs under the *Education Act 1902* with municipal boroughs with populations of over 10,000 and urban districts with populations of over 20,000 being local education authorities for primary education only.

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<sup>110</sup> House of Commons debate of 8<sup>th</sup> June 1964 (Hansard, 1964 vol. 696, p80).

<sup>111</sup> Harold James Boyden was a barrister and formerly the Chairman of the National Institute for Adult Education (1957-1960) and councillor on Durham County Council (1952-1960), member of the Fabian Society and the Labour Member of Parliament for Bishop Auckland. Later that year, following the election, he became Harold Wilson's Junior Minister for Education and Science.

<sup>112</sup> House of Commons debate of 8<sup>th</sup> June 1964 (Hansard, 1964 Vol. 696, p102). Mrs Eirene White, nee Miss Lloyd Jones and daughter of a former Deputy Secretary to the Cabinet, was the Labour Member of Parliament for Flint East between 1950 and 1970. She held a number of ministerial posts in Harold Wilson's 1964 government before becoming Baroness White of Rhymney.

<sup>113</sup> Now in the care of English Heritage since the abolition of London County Council's successor body, the Greater London Council in 1986.

<sup>114</sup> In fact, Mrs White stated that there were 204 boroughs in England and Wales and 16 burghs in Scotland maintaining museums in the debate of 8<sup>th</sup> June 1964 as recorded by Hansard (1964 Vol. 696, p88).



This division of museum from education has a legacy in relation to charging, as although it was the intention of the legislators for museums to preferably not charge or offer lower rates to school children, school parties are a major source of income for museums that charge owing to the class sizes that are brought. Because of the separation of education from heritage and the pressure to maximise revenue, detailed in chapter two, it can result in one arm local of government, the district local authority charging the other arm of local government the county council in the same county for entrances fees for a school visit. Whilst perverse, when it is a district charging a neighbouring county, with a different pool of tax payers, it can be justified on the basis that the tax payers of X county are not maintaining those facilities for people in a neighbouring county which uses but does not pay for those facilities<sup>115</sup>. This is not the case across the public sector, with English Heritage providing free access to all sites for school parties. What results is either the shifting of public money from one part of the public sector to another, which then limits the number of trips a school can make owing to the high cost of transport where additional trips could be met from the cost of entrance fees, or the introduction of additional funding from parents through schools to the museums creating an additional funding stream, or additional tax depending on how you perceive it, on parents which reduces the number of trips as the school has to be careful how much and for what it asks parents to pay for in the state education sector.

### **The current legislation: the operating blueprint**

Local authorities are allowed to “*provide and maintain*” museums under s.12(1) *Public Libraries and Museums Act 1964*. They have the ability to run museums both within their administrative area or elsewhere in

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<sup>115</sup> It is the same justification for car parking charges – the user pays. In this particular case, the charge is levied against a person, who may or may not live in a particular district. In respect of school visits, whilst they may partially be funded by parental contribution, schools often make up significant elements of trip costs themselves.

England and Wales<sup>116</sup>, and to do, “*all such things as may be necessary or expedient for or in connection with the provision or maintenance thereof.*” Whilst this appears to be a catch all provision, it does not expressly give a local authority the ability to acquire and dispose from a collection. Museums are a discretionary service that a local authority can provide therefore not all local authorities have museums. Many of those authorities which have museums have inherited them from other bodies or predecessor authorities and most museum services were in existence prior to the 1964 Act coming into force, rather than councils electing to provide them under the new legislation. In contrast to the position of museums, services such as planning and building control or waste collection have to be provided by a local authority.

A difference with national museums, occasioned by the move to free entry, is the local authority museum's ability to levy admission charges. The 1964 Act provides the authority for making admission charges, s.13(1). This is a discretionary power, as s.13(2) reiterates, and in levying charges for a museum, the local authority has to ensure that the museum, “*plays its full part in the promotion of education in the are,*” and it must have, “*particular regard to the interests of children and students.*” In reality, the effect of this section is that those museums that charge put in place graduated charging schemes if they choose to charge. This provision may be increasingly difficult to maintain with the continuation of free entry to national museums<sup>117</sup>. In addition, s.20 allows a museum premises to be

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<sup>116</sup> Whilst there are examples of joint working between councils, for example the Norfolk Museums and Archaeology Service or the cross-county merger in April 2007 of the museums services provided by Ipswich Borough Council and Colchester Borough Council (Ipswich Borough Council, 2008), the author has so far not found an example of a local authority running a museum outside of its administrative area without reference to the host council. However, with increasing emphasis being placed on the shared services agenda, this may become an option in the future. Whether this would result in stronger museums taking over the operation of weaker museums to improve service delivery or result in the consolidation of stronger museums is difficult to judge.

<sup>117</sup> Admission charges for national museums were removed in three stages from 1999 culminating in free access for all in December 2001. Fourteen of the twenty-two nationally funded museums are classed as national museums for the purposes of free access. The Coalition Government protected the free entry policy to national museums as part of the Comprehensive Spending Review 2010 which had a consequent effect to the severity of the cuts to other DCMS funded organisations.

used for educational and cultural events and accept payment for this and charge admission. Again, this is discretionary. The types of events covered by this section include meetings, exhibitions, film and slide shows which are of an educational or cultural nature. This provision enables museums to generate alternative funding streams but their ability to make use of this provision is likely to vary from institution to institution based on a range of factors from the quality of external exhibitions (if any) that they can attract, the quality of their own collections, and their staffing levels to support such 'non-core' activities.

Local authority museums are not sustainable without support from public funding. Local authorities primarily fund museum services not through the revenue support grant but through directly earned income and Council Tax. *S.14(a)* allows local authorities to contribute towards, "*providing or maintaining a museum or art gallery in any place within England or Wales,*" which means that local authorities can use this public taxation based income stream to fund museum services. This section allows local authorities to support museums outside of their control, such as those set up under or transferred to a trust model. It is worth noting that *s.14(b)* allows councils to fund advisory services. These can be found both at the district and county level and often provide support for smaller community based museums. As outlined in the preceding chapter, the caps placed on the ability to raise revenue through Council Tax has a direct effect on museum services because of the way legislation permits their funding and generates calls for museums to be placed on a non-discretionary basis.

Looking at the specific areas of acquisition and disposal of artefacts from museums there is surprisingly little direct legislation on the subject. *S.12(2)* of the *1964 Act* provides that a local authority can transfer a "*museum...and its collections*" to another authority empowered to provide such a service and allows other local authorities to acquire those

collections. This expressly allows a transfer of objects within a limited purview of the public domain (national or university museums are not mentioned). However, the 1964 Act does not expressly provide any other provision specifically giving or restraining powers of acquisition or disposal of artefacts from the museum collection. Therefore, subject to the common and statute law the 1964 Act does not place any restrictions as s.12(2) is a positive presumption.

This provision for fluidity of movement of artefacts between public institutions is a remarkable enactment in the respect that it has never been used to its fullest extent to create an internal market of artefacts. It also both helps to enable the preferential provisions for disposal set out in the policy framework binding museums, discussed later in this paper, but also goes beyond it as these policies include a negative presumption against disposal, whereas the law has a positive presumption in favour of retaining objects in the public domain. The limitation of the section being that it enables entire museums and or collections to be transferred rather than individual items.

A particular problem for local authority museums at the present time is the ability to add to their collections through purchase. Authorities have the power to set up an art fund<sup>118</sup> under s.15(1) of the 1964 Act for the purchase of “objects for exhibition” either for a museum the authority currently maintains or which it plans to provide under the Act. If a museum already had maintained a similar fund provided for under a local Act, it had the opportunity to amalgamate the funds into the art fund, s.15(2). Only authorised payments can be made into the fund, *schedule 2 section 1*. The fact that a museum may choose to dispose of an artefact by sale is considered by the Act in *schedule 2 section 3*. It provides that if an

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<sup>118</sup> The fund is not defined revenue expenditure or defined revenue income for the purposes of *Local Government Finance Act 1987*.

artefact is sold which is not subject to the terms of a trust which prevent the proceeds of a sale being used to purchase other objects for exhibition in a museum maintained for the time being, then that money (or part of it) may be paid into an art fund for further acquisitions<sup>119</sup>. However, the Act does not require that the proceeds from the sale of an object from the museum has to be paid into an art fund for future acquisitions.

## **Current legislation: the impact of the Cottesloe report**

The legislation failed to address a number of issues raised in the oft quoted *Report of the Committee of Enquiry into the Sale of Works of Art by Public Bodies* which was published in January 1964<sup>120</sup>. Notably, it even was not referred to in the Parliamentary debates which developed the Bill to include museums. The Committee reviewed a number of different institutions to assess their abilities to dispose of nationally important pieces which reside in their collections in the wake of the infamous case involving the Royal Academy's sale of a Leonardo cartoon. They included large local museums such as the Art Gallery and Museum in Glasgow, the City of Leeds Art Gallery, and the City Art Gallery in Bristol. The Committee found in the course of the investigation that many of the provincial museums and galleries were not completely aware of the implications of charity law on their holdings<sup>121</sup>.

The *Cottesloe Report* attempted to summarise the legislative position in non-technical language and without reference to legal precedent and statute. This, the Committee acknowledged, would lead to potential

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<sup>119</sup> Such funds are noted in council budgets and are exempt from the usual public sector 'spend it or lose it' system of finance.

<sup>120</sup> Known as the Cottesloe Report after its Chairman, Lord Cottesloe, who also was Chairman of the Arts Council. The committee included Sir Anthony Blunt, Surveyor of the Queen's Pictures and Director of the Courtauld Institute who later was revealed as a member of the notorious KGB spy ring recruited at Cambridge University, and Lord Robbins who had published the Robbins report which underpinned the new universities (Cottesloe 1964).

<sup>121</sup> In the author's experience, this situation, in respect of local authority museum law in general, remains today.

censure over inaccuracy, but this report has served in the museum world since its publication as the definitive statement of the law relating to collections. One interesting caveat placed on the three general principles outlined in the review by the authors, which is not often reported, is that legal advice should be sought about individual artefacts to assess their legal position and therefore, what legally, a museum or its governing body can do with it. This entire aspect of museum law and operation was ignored by the *1964 Act*.

The first general principle was that private individuals who give chattels for public purposes create a trust so that the object is used for the purposes for which it is given. In the case of museums and galleries, this meant that the governing authority is a custodian, or more specifically a trustee, who is holding that chattel on behalf of the public. However, the example given in *Cottesloe* was that a piece given for general exhibition can be used only for general exhibition. Does this mean that it has to be on display at all times, or is having a piece in a museum's store, so long as it is not permanently in that store, permissible? If this construction holds, local authorities would be able to dispose of artefacts only with the permission of the courts or the Charity Commissioners and would have a duty to display those items given for that purpose. This is not tenable as a construct.

The second basic principle was that if an object was given to a charitable institution which includes in its purposes that of exhibition of such artefacts to the public, then a presumption would arise that the gift was made for this purpose unless it could be proved otherwise. In effect, the chattel could not be sold without consent of the Charity Commissioners. This could affect a local authority where it has placed its museum collection into a charitable trust as part of outsourcing museum services. The final element of Committee's opinion relating to museums was that if an artefact has been bought from a local authority's general funds then it

could be sold only if the local authority has the power to dispose of such items by statute or charter. This is discussed in further detail below under general local authority powers which apply to museum services (Cottesloe 1964, p9).

## **The local government dimension**

It is the *Local Government Act 1972*, not the *1964 Act*, which provides local authority museums with the essential powers to acquire and dispose of property. The subsidiary powers that s.111 of the *1972 Act* confers on local authorities the ability to, “...do anything (whether or not involving....the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.” As the provision of museums is a function that can be provided under the *1964 Act*, s.111 gives the authority to local authority museums to acquire and dispose of artefacts. Again, that ability is not constrained as it is derived from a general provision in local authority legislation, although any museum objects acquired or disposed of under s.111 would remain subject to the terms of any other applicable legal constraints, if any applied<sup>122</sup>.

Many acquisitions by museums are made through gifts to the museum. It is general local authority legislation also that provides the authority for local authorities to accept gifts, be they inter vivos, donatio mortis causa or through a bequest. S.139 of the *1972 Act* is a wide provision allowing local authorities to (a), “accept, hold and administer...for the purpose of discharging any of their functions, gifts of property, whether real or personal, made for that purpose,” or (b), “for the benefit of the inhabitants of their area or some part of it, gifts made for that purpose.”

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<sup>122</sup> Ealing Council disposed of *The Birth of Eve* by Solomon J Solomon specifying the powers granted under s.111, (Ealing 2009).

This section allows a local authority both to accept gifts of real or personal property. Any gift can be accepted where it will aid an authority to discharge a function; this is not limited to obligatory statutory functions, or where it is made for the benefit of the inhabitants of the area, or part of the area<sup>123</sup>. *S.139(2)* allows an authority to spend money on maintaining a gift it has received. This is important for the future conservation of any gifts made to museums. The additional permission to accept gifts which are for the benefit of only part of a local authority area is important particularly following the amalgamation of smaller authorities in the 1970s. Bequests and donations often are made for the benefit of a particular town or village rather than a convenient administrative construct which could be re-organised again.

It has been argued<sup>124</sup> that such gifts, given under *s.139* of the *1972 Act*, could constitute a trust without the usual express or precatory words required for a legally binding trust. This idea is in part based on the opinion in the *Cottesloe report* that gifts to a museum create a charitable trust between institution and the people (1964, p9). This view is used to support the policy position that there should not be disposal from museums as artefacts are given to museums in perpetuity. However, as even Adrian Babbidge, a leading advocate for this position in the museum sector, admitted in his support for the *Cottesloe* position, the decision in *Re Endacott [1959]* which stated that local authorities are not defined enough to be considered charitable would prevent the public trust interpretation of *s.139*. As of this date, this concept remains unchallenged in the courts.

Since the *1964 Act* was passed, significant changes have been made to local government structures. The first major reorganisation was

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<sup>123</sup> This is important with the significant reshaping of local government in both the 1970s, 1990s and in 2007 as some smaller authorities which were perhaps confined to a principal town no longer exist as they have been subsumed in larger bodies. The author has worked on the legal issues relating to bequests which are made to specific towns which are now part of a larger geographical area.

<sup>124</sup> By Adrian Babbidge (1991, p260).



encapsulated in the *Local Government Act 1972* which saw the demise of several shire counties, Boroughs and the rural and urban councils. S.206 *Local Government Act 1972* sets out the local authorities to which the *1964 Act* applies following the repeal of the definition of a local authority found in s.25 of the *1964 Act*<sup>125</sup>. Under the *1972 Act*, the *1964 Act* applied to the new county councils, London borough councils, district councils<sup>126</sup>, the Common Council and the Council of the Isles of Scilly. The existing provision also covered the transformation of metropolitan district councils, such as Birmingham or Leeds, into single tier authorities under the *Local Government Act of 1985* owing to the interpretation of ascribed to 'district' under s.270(1) *Local Government Act 1972*.

Further change in local government was made in the 1990s following the Banham Review<sup>127</sup>. The *Local Government Act 1992* provided for further reorganisation and the creation of what are commonly referred to in local government as unitary councils which provide the services of both county and district councils, s.14, outside London, as London Borough Councils do within London. Whilst many aspects of the *1972 Act* are amended in the *1992 Act*, no express provision is made for s.206 of the *1972 Act*. As the creation of unitary councils either requires a district council to take on the responsibilities of a county council or a county that of a district council the provisions of s.14(2)(b)(i)<sup>128</sup>, or conversely of s.14(2)(b)(ii)<sup>129</sup> allow these functions to pass. The implications are that, legally, the councils retain their previous designation under the *1972 Act* as either a district or county with enhanced provision of functions. Therefore, s.206 still applies to

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<sup>125</sup> Repealed by s.272(1) *Local Government Act 1972*, as identified in schedule 30 of the *1972 Act* as amended by s.102 *Local Government Act 1985*, as identified in schedule 17.

<sup>126</sup> Some district and unitary councils retain their historic title of Borough based on the absorption of former Borough Councils during the 1972 reorganisation.

<sup>127</sup> The Local Government Commission for England, chaired by John Banham was formed by the *Local Government Act 1992*. The remit was to undertake structure reviews of the non-metropolitan counties in England in order to recommend unitary authorities for these areas. However, the reviews coincided with an economic downturn which meant that several areas were recommended to stay the same and other proposal, like that for Cambridgeshire, were rejected.

<sup>128</sup> Which provides for the transfer to county councils of the functions of district councils.

<sup>129</sup> The transfer to districts of county council functions.

unitary authorities such as Plymouth City Council or Bath and North East Somerset Council.

These so-called 'unitary' councils have been added to by the *Local Government and Public Involvement in Health Act 2007* with a number of county and district level councils being split and amalgamated into new unitary structures. The problem with these changes is that museums, and their historical assets, have been transferred from one successor body to another in 1972; and in some cases on to further bodies in the following forty years. These changes can and have meant that the legal basis for museum holdings have been forgotten and in one case the author knows of a bequest of books and art which was split in 1972 between the county council (libraries) and the district council (museums) contrary to the terms of the bequest.

In addition to the provisions in the 1964 Act, local authorities can jointly run museums under the general power in *s.101(5) Local Government Act 1972*. This section also permits a joint committee to discharge those functions, as is the case for the Norfolk Museums Service. Under *s.1 Local Authorities (Goods and Services) Act 1970* a council can agree to provide services for another council in return for payment. *S.95 Local Government Act 2003* allows a council to set up a company to run a service for a commercial purpose<sup>130</sup>. Finally, a council can contract another provider to deliver services under *s.1 Local Government (Contracts) Act 1997*. As councils have the power to operate their museums in a number of different ways, it is interesting that the predominant mechanisms are direct provision and outsourced to a charitable trust which takes them beyond the scope of the 1964 Act and reliant on the powers given to the charitable trustees. Norfolk's joint service, more recently followed by Ipswich and Colchester appears to be a more practical model to keep control of assets. Given

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<sup>130</sup> In 2006 the MLA noted that no local authority had chosen to operate a museum under this particular provision (p32).

that Norfolk has operated successfully over thirty years it is surprising that other councils have not followed their lead.

## **Local Acts and other provisions**

In addition to the generally applicable acts, a number of local acts contain conditions relating to local authority museums. The *Greater Manchester Act 1981* included the Manchester Central Art Gallery<sup>131</sup>. It states, s.149(2), that, “*the Art Gallery and all works or other objects of art therein shall be held upon trust by the Manchester council for the benefit of the citizens of Manchester.*” However, that provision is qualified by s.149(3) which stipulates that the council can “*sell or exchange*” art that has been acquired by them for the gallery so long as the proceeds of the sale are used to purchase other works. This includes items that were gifted or bequeathed to the gallery as s.149(3)(a) requires the council to consult with donors or their representatives if possible before disposing of an object and provides that an artwork that is donated cannot be disposed of within twenty-one years from the date the item becomes vested if that is inconsistent with the terms of the gift, unless consent is received from the donor or their representatives. These clear legislative provisions on the terms and conditions upon which artefacts are held by the museum are not found in the *1964 Act* or in the policy framework museums operate within.

The same *1981 Act* offers an interesting comparison to the provisions made for the Central Art Gallery. S. 152 provided for the council and other bodies including the university to maintain the North-Western Museum of Science and Industry<sup>132</sup>, which opened in 1969, under the *1964 Act*,

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<sup>131</sup> Now know as Central Art Gallery and managed by Tameside Metropolitan Borough Council following the abolition of Greater Manchester County Council in 1986.

<sup>132</sup> The museum is now known as the Museum of Science and Industry and is funded by the DCMS (Museum of Science and Industry, 2008).

s.152(3). Whilst acquisition of artefacts for the museum was provided for, s.152(3); no corresponding disposal powers, as had been given to the art gallery in an earlier section, were enacted for the museum, merely the provision to make and receive loans, s.152(4)(c). This demonstrates a clear difference between artwork and other forms of artefacts, as it clearly states that all gifts or bequests of artwork will form part of the art gallery collections, s.149(4), even though many museums have significant painting and sculpture collections. Another local act governing local authority museum services is *Plymouth City Council Act 1987* which relates to a specific gift which was transferred to the council under the *Plymouth Corporation Act 1915*. It provides for the Cottonian Collection to be “maintained intact” and exhibited separately from the Council's other collections, s.23(1)(a). There are no powers of acquisition or disposal and the main provisions relate to appointing trustees, s.25, and for levying entrance charges, s.23<sup>133</sup>.

Still in force, the *Literary and Scientific Institutions Act 1854* is applicable to all institutions established for the, “*foundation and maintenance...of public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs,*” s.33. The Act allows local authorities to support the development of institutions through grants of real property to further their promotion of the fine arts, s.6. The institutions are allowed to accept gifts of real and personal property, so long as there is nothing in the terms of the gift or in the rules of the institution to prevent the expenditure of the corpus of the property, *Re Prevost, Lloyds Bank Ltd v. Barclays Bank Ltd [1929]*. Also, property is to be vested in the institution not the trustees of the institution, s.20, a clear distinction that property was not intended to be acquired under terms of a trust. Therefore the case law supporting the

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<sup>133</sup> Whilst entrance charges can be made, one day per week must be free of charge between 10am and 4pm, and any monies accumulated must be spent on the maintenance of the Cottonian Collection, s.24.

legislation again corroborates the position that the law does not wish to encumber the acquisition or disposal of property from such institutions.

## **Comparison with the national museums**

Local authority museums can be contrasted with the nationally funded museums. The Department of Culture Media and Sport directly funds twenty-one museums and galleries (DCMS 2008). Thirteen of these are defined by the DCMS as national museums because they were founded by Act of Parliament<sup>134</sup>. The remaining eight are classed as 'non-nationals' by the Department<sup>135</sup>. The DCMS will be ceasing any funding and control of these museums by 2014.

One of the nationals originated as a local authority museum – the National Museums Liverpool<sup>136</sup>. Three of the non-nationals were originally local authority museums. The Geffrye and the Horniman Museums transferred to the Inner London Education Authority (ILEA) when the Greater London Council (GLC) was abolished and subsequently have become charitable trusts which are funded by DCMS as non-departmental public bodies<sup>137</sup>. The transfer of all three suggests that they have ceased to

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<sup>134</sup> The thirteen national museums are: the British Museum, the Imperial War Museum (Lambeth, Duxford Airfield, Churchill Museum and the Cabinet War Rooms, HMS Belfast and IWM North), the National Gallery, the National Maritime Museum (Maritime Galleries, Royal Observatory, Queen's House), the National Museums Liverpool which is the only national museum wholly based outside of London (World Museum Liverpool (formerly Liverpool Museum), Walker Art Gallery, Lady Lever Art Gallery, Sudley House, Merseyside Maritime Museum, National Conservation Centre, International Slavery Museum, and the Museum of Liverpool), the National Museum of Science and Industry (Science Museum, the National Railway Museum, the National Media Museum and the Swindon store), the National Portrait Gallery, the Natural History Museum (Kensington and Tring), the Royal Armouries (Leeds, the Tower of London, Fort Nelson, and Louisville, Kentucky), Sir John Soane's Museum, the Tate Galleries (Tate Britain, Tate Modern, Tate Liverpool and Tate St Ives), Victoria and Albert Museum (South Kensington, The Museum of Childhood in Bethnal Green, and soon V&A Dundee) and the Wallace Collection.

<sup>135</sup> The eight non-national museums are: the Design Museum, the Geffrye Museum, the Horniman Museum and Gardens, the Museum of Science and Industry in Manchester, the National Coal Mining Museum for England, the National Football Museum (currently closed and due to reopen in Manchester in 2012), the People's History Museum, and the Tyne and Wear Museums (Arbeia Roman Fort & Museum, Discovery Museum, Great North Museum, Hatton Gallery, Laing Art Gallery, Monkwearmouth Station Museum, Regional Museum Store & Resource Centre, Segedunum Roman Fort Baths & Museum, Shipley Art Gallery, South Shields Museum, Stephenson Railway Museum, Sunderland Museum & Winter Gardens, Washington 'F' Pit).

<sup>136</sup> The Museum of London was formed from the collections of the London Museum and the Guildhall Museum, s.2 *Museum of London Act 1965*, of the Corporation of London and GLC. The origins of the National Museums Liverpool were in the Liverpool Museum created in 1851 (National Museums Liverpool 2008).

<sup>137</sup> The GLC was abolished under s.1 *Local Government Act 1985*. The Geffrye and the Horniman were

be governed by the 1964 Act and now are confined by their charitable objects. The Tyne and Wear Museums Service, by contrast, is a federation of eleven museum managed by a Newcastle City Council joint committee of twenty-three elected members from five local councils<sup>138</sup>. Newcastle City Council is the lead council in the federation. The five councils and the University of Newcastle are the principal funders of the service along with the DCMS and the MLA which leaves it in the position of being a hybrid – nationally supported but governed under the *Public Libraries and Museums Act 1964* (Tyne and Wear Museums Service 2008, p14).

The British Museum and the Natural History Museum are regulated by the *British Museum Act 1963*. The Victoria and Albert Museum, the Science Museum, and the Armouries are overseen by the *National Heritage Act 1983*. The National Gallery, the Tate Gallery, the National Portrait Gallery and the Wallace Collection fall within the purview of the *Museums and Galleries Act 1992*. The Imperial War Museum has two statutes, including the oldest still in force, the *Imperial War Museum Act 1920* and the *Imperial War Museum Act 1955*. The National Maritime Museum is governed by the *National Maritime Museum Acts of 1934 and 1989*.

## **The British Museum: a case study**

There have been numerous British Museum Acts over the past three hundred years. Tracing their developmental history and comparing them to the developments in municipal museum regulation at the same time documents differing and changing attitudes towards museums in general. The first act that relates to the British Museum dates from 1706 and is the

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transferred, s.45, to the Inner London Education Authority (ILEA), created under s.18 and further transferred to the London Residuary Body after the ILEA's abolition by SI 362/1990. SI 437/1992 transferred the functions and property to the Horniman Museum and Public Park Trust. The Geffrye Museum became an independent charitable trust in 1990 on the abolition of the ILEA (Geffrye 2011).

<sup>138</sup> Six from Newcastle City Council, five from Sunderland City Council, four from Gateshead Council, four from North Tyneside Council and four from South Tyneside Council.

*Cotton House and Library Act 1706* which provided for the purchase of the Cotton Library, coins and medals for public access and managed by a board of trustees<sup>139</sup>.

Prior to the 1963 Act, the main statute governing the British Museum was the *British Museum Act 1753*, as amended. This Act brought together provisions for Sir Hans Sloane's bequest of books, drawings, manuscripts, prints, medals, coins, antiquities, seals, cameos and intaglios, precious stones, mathematical instruments and miscellany, with the remainder of the Cotton bequest<sup>140</sup>, the Arthur Edwards bequest to the Cotton Library, and the Harleian purchase. These were to be housed in "one general repository" in a convenient location and that these collections, and those added to it were to be, "*preserved therein for public use to all posterity,*" s.IX. The trustees of this new museum and collection were to be called The Trustees of the British Museum, s.XIV, and would have had the ability to purchase and receive goods, chattels and land. Interestingly, they were able to devise "*statutes, rule and ordinances*" with which to look after the collection which it was, "*intended to remain in the said general repository,*" s.XV. This is an interesting choice of word given the language of the 1753 and 1706 Acts. Did those that drafted or enacted this legislation foresee a time when part of the collection would not be required?

The collections were vested in the trustees "for ever" with the requirement of free public access, s.XX. The Act also included provisions for a national lottery to raise the funds required to purchase new premises for the collections, pay the donors and pay for staff. The lack of provision for disposal of artefacts was rectified within thirteen years in the *British Museum Act 1766* following a number of donations by the King and others. This Act

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<sup>139</sup> The Act also provided for the purchase of Cotton's house where the Library was installed which, subject to public access, was to be lived in by Cotton's grandson, his heirs and successors, s.I.

<sup>140</sup> In 1731 Cotton's house and the collection were ravaged by fire. That which was saved was moved to an alternative location which was not as accessible to the public.

enabled trustees to exchange, sell or dispose of duplicates with the money raised to be directed to acquire further examples to add to the collections. This is the earliest example of a provision in English law of disposals funding acquisitions in a museum context. It is notable that in the next act acquiring a collection for the museum, *British Museum Act 1805*, whilst Charles Townley's collection was vested in the Trustees to be known as the Townleian Collection, no mention is made of retention forever or for posterity<sup>141</sup>.

The *British Museum Act 1807* saw further allowances in relation to disposal when items were “*unfit*”. These items were to be disposed of through exchange or sale and the money raised was again to be used for further purchases. The term unfit actually meant, in modern parlance, that the items did not fit with the existing collections or the collecting intentions of the trustees, not that they were unfit for being kept as the Act states that, “...*any Articles in the said Museum which they [the Trustees] then adjudge to be unfit to preserve therein...*” In fact, the Trustees had ultimate discretion as to what they determined was unfit for the collection and had the option to expend any sale income on, “...*other Things which may be wanting in or proper for the said Museum.*” This opened the potential for proceeds to be put towards running costs rather than capital acquisitions. The next notable act is the *British Museum Act 1824*<sup>142</sup>. It is in relation to Richard Payne Knight's bequest that the term “*in perpetuity*” is first used in relation to the vesting of that particular collection in the trustees, *s.III*.

These Acts all were passed prior to the establishment of local authority museum legislation. They balanced two competing concepts – that of artefacts being taken into a permanent repository against the operating

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<sup>141</sup> The term in perpetuity is not used in the early British Museum acts.

<sup>142</sup> This is the second of the two *1824 Acts*, c.60. Those Acts not being discussed are the *British Museum Act 1816* regarding the Elgin Marbles and the *British Museum Act 1824* c.40 which added more specialist trustees to represent the expanding collections.



needs to prune said collections of objects. It is interesting that the *1824 Act* relating to Richard Payne Knight's collection specifies the fact that the bequest is made in perpetuity, signifying a difference with other parts of the collection amassed by the British Museum. It suggests, along with the Acts of *1766* and *1807*; that in the 1820s it was not taken for granted that such acquisitions were inalienable. It is the establishment of these ideas which provided the background for the development of local authority museums. So it is testament to the drive of Mr Ewart that he achieved, in the first two Acts of *1845* and *1850*, his aim of ensuring that the acquisition of all historic chattels to local authority museums were to be made in the knowledge of their permanency.

Further changes were seen in the *British Museum Act 1878*<sup>143</sup>. This Act saw the transfer of the natural history collections to the Natural History Museum which was being built, as an extension of the British Museum, on Exhibition Road, s.1. More significantly, the Act allowed the legal transfer of pictures to the National Gallery and the National Portrait Gallery, s.2. It also allowed the trustees to give away, rather than exchange or sell, duplicate items, unless they were given to the museum for “*use and preservation therein*,” s.3. This is the first time that the concept of disposing of items not for value is introduced in the British Museum legislative framework. The idea of items being tied to the museum and beyond disposal finds its first declaration in this piece of legislation.

The final significant change prior to the *1963 Act*, was the *British Museum Act 1955*<sup>144</sup>. This Act allowed the museum to do two things. Firstly,

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<sup>143</sup> In addition, the *British Museum Act 1832* allowed the King to appoint a trustee in recognition of the donations of the reigning and previous monarchs had made to the institution. The *British Museum Act 1839* provided for the purchase of further land to extend the museum in its current location.

<sup>144</sup> The other acts are: the *British Museum Act 1902* allowing the trustees to store print material at Hendon; the *British Museum Act 1924* which enabled the museum to loan duplicates, and occasionally those objects that were not, to university and local authority museums; the *British Museum Act 1930* which separated the natural history collections from the care of the Principal Librarian; the *British Museum Act 1938* which enabled the trustees to accept a bequest from Lord Rothschild which included maintaining his museum at Tring (this is now the Natural History Museum at Tring); the *British Museum Act 1946* which sanctioned the loan of the Lacock Abbey Magna

it enabled the natural history collections to be used for research through loans to other organisations which did not have to be within the United Kingdom, s.1, though this could not be done if it was inconsistent with terms attached to its acquisition. The Act also provided for the destruction of artefacts which had become useless through deterioration or through infestation.

The 1963 Act both encapsulated and redefined the legal framework that had evolved. There was the iteration that a disposal could be sold or exchanged, s.5(1), which was first seen in the 1766 Act concerning duplicates, a reason for disposal that was retained, s.5(1)(a). However, a curtailment appeared on those items unfit for the collections as they had to be without interest to students, s.5(1)(c). The flexibility that had been seen in earlier versions had essentially gone and left the British Museum with one of the more impenetrable disposal schemes, much to the chagrin of the Greek government in respect of the Elgin Marbles. Another interesting choice related to the more recent development of loans. Unlike the Act eight years previously, no specific mention was made of lending artefacts for research, s.4. Instead a risk assessment based provision for all loans was included. This potentially would open up the museum's collections to other museums.

## **Themes in national museum legislation**

### **Governing bodies**

The provisions of each Act are different. The British Museum and the Natural History Museum are governed by boards of trustees whose composition is set out by statute. In the case of the British Museum, for

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Carta to the Library of Congress in the United States of America; and the *British Museum Act 1962* which authorised the loan of artefacts to a Council of Europe exhibition in Vienna.

instance, the trustees are appointed by the Queen, the Prime Minister, the Secretary of State, and the board of Trustees themselves, s.1 of 1963 Act. This differs from local authorities as directly managed museums are governed by elected councillors. However, those in arms length organisations bear a similar resemblance as they often require trustees who are appointed by the council and other bodies.

The *National Heritage Act 1983* provides separate sections for each institution it covers that mirror each other in the main provisions, altering them for the specific specialist area of the museum in question. They contain similar provisions setting out boards of trustees. Ultimately, the trustees are there to preserve and increase the collections whilst ensuring public access. The trustees number between 12 and 20 for each institution and are appointed by the Prime Minister. The trustees appoint a Chairman from among their number. The rules for the museums governed under the *Museums and Galleries Act 1992* are similar but each institution has a different number of trustees.

### **General powers**

Enshrined in the legislation is a general provision setting out the general powers of the British Museum and the Natural History Museum which gives them the ability, “...to enter into contracts and other agreements, to acquire and hold land and other property, and to do all other things that appear necessary or expedient for the purposes of their functions.” This is in contrast to local authority museums which primarily get their contractual powers and ability to acquire real property from general local authority legislation as the *Public Libraries and Museums Act 1964* is just an enabling Act to allow local authorities to provide museums as part of their suite of services. The *National Heritage Act 1983* contains similar provisions regarding contractual powers, and ability to own land for each

of its institutions. However, the museums cannot acquire or dispose of land without consent of the Secretary of State. They can form companies to operate the commercial sides of running a museum. Similar provisions are found in the *Museums and Galleries Act 1992*.

The *National Maritime Museum Act 1934* is the second oldest governing statute for a national museum still in force. It also is the Act which established the museum. The board of trustees have the power to make regulations to ensure the smooth administration of the museum and to preserve the objects contained within it, s.2(3)(a). The more recent *National Maritime Museum Act 1989*, confers the land upon which the museum was founded to the trustees of the museum. It is notable that this particular museum collection has a governing legal regime which is noticeably different from the other nationals<sup>145</sup>.

### **Public access to collections**

The V&A, the Science Museum, and the Armouries are asked to ensure that artefacts are made available to those, “...seeking to inspect them in connection with study or research...,” which is a different position to allowing the public access. This provision does not give a general public right of access as they will have to demonstrate that they are either studying or researching the artefacts or an element related to the object. Again, as discussed above, local authorities do not have these provisions at all. As the historical policy documents show, their collections were not seen as valuable enough to warrant further study or research, amounting to nothing more than cabinets full of curiosities. The four art institutions<sup>146</sup> named in the *Museums and Galleries Act 1992*<sup>147</sup> have joint provisions within the Act. However, these provisions are similar to those provided for in

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<sup>145</sup> See chapters four and five.

<sup>146</sup> The National Gallery, the Tate Gallery, the National Portrait Gallery, and the Wallace Collection.

<sup>147</sup> Prior to the 1992 Act, the institutions operated under different governing statutes.

the *National Heritage Act 1983* and maintain the distinction between public access and access for study and research.

The British Museum and the Natural History Museum have specific conditions placed upon them in relation to their collections. They have a duty to make available the objects within their care to the public upon request where practicable, even those artefacts in storage, s.3(3). There is no similar duty placed upon a local authority museum or other national museums. This is because these national collections have been seen traditionally as superior, therefore such a provision would be seen as a burden on smaller museum. However, as public institutions, should not local authorities have a similar duty to make available the collections they hold? As only a small fraction of collections in most museums are on display at any one time, the rights of access for a member of the public in respect of a local authority museum, rest on the *Freedom of Information Act*<sup>148</sup>.

## **Conclusion**

Different statutory regimes have been tried to govern local authority museums. Approaches have ranged from a more permissive regime to one more akin to a public trust. These changes can be mapped against the political party in power at the time and show the competing political philosophies that have and continue to drive public service. Museum legislation was marked by change in the 19<sup>th</sup> century and stability in the 20<sup>th</sup> century. The Victorian period saw rapid change twice in how local authority museums could operate in 1845, 1850, and 1855, and later in 1891, 1892, and 1901. In comparison the 1919 and 1964 pieces of legislation provided continuity and consolidation of thought.

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<sup>148</sup> It is worth noting that if the object in question is written information that is not published elsewhere, for example a letter, then the *Freedom of Information Act 2000* may be used to access the information, though not necessarily to see the original. This is not the purpose for it was originally drafted.

The two most important pieces of legislation passed were the 1850 and 1891 Acts. They provide two ends of a barometer of permissiveness for councils providing museums. Lord John Russell's Liberal government of 1850 followed the Conservative initiating legislation of 1845 with an amendment which established a trust between council and people to hold not just the artefacts but the buildings and fittings in trust in perpetuity. Whilst this was scaled back five years later, the idea of not only the chattels but also the public buildings housing them being permanent structures in perpetuity would be attractive to many museum professionals, giving the statutory basis for the service that many believe would give further protection to the services now.

In contrast, the 1891 Act proved to be a high point in museum development, whilst being one of the most permissive pieces of legislation. Sir Henry Miers reported in 1928 that it was this *Museums and Gymnasiums Act 1891* had which created the greatest number of local museums (p10)<sup>149</sup>. With museums being linked with libraries and under the same rating regime, it did not encourage museum development as libraries took precedence. The 1891 Act broke this cycle, thus allowing the blossoming of museum provision with a particular focus on local antiquities that Miers described. The most radical element of this Act was the ability to sell those museums which proved to be unnecessary or unduly expensive on the tax payer. Perhaps this reflected the philosophy of the government. David Steele in his biography of Salisbury quotes Edward Hamilton in August 1889 as stating, "*It is becoming quite a misnomer to call the...government Conservative...[as in the past two years they have passed]...really Liberal measures with a smack of radicalism about them,*" (Steele 1999, p.227).

Though this was one of the high points of museum development, Markham considered that by 1938 there was an issue of quantity over

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<sup>149</sup> This was the case until the 1964 Act came into force, but the 1891 Act was fully in force for a shorter timescale.

quality. This was exacerbated after the war with a number of museums sustaining damage or remaining closed; a legacy which lasted into the 1960s. The 1964 Act can, in some senses, be seen as a wasted opportunity. The last minute addition of museums to the libraries bill promulgated the link between museums and libraries, when museums were due to receive their own separate Act. This rush to permit, though not require, charging and paring down the legislation, including acquisition budgets but not addressing the contemporaneous issues raised in Cotteloe in respect of sales or the legal basis under which artefacts are held; has left an imperfect instrument and without clarity.

It is neither one thing, nor the other. Some would say that it is the place of policy to set down more stringent standards than the law, such as with the planning regime. However, when that policy is set down by a trade association rather than the government, or an agent of government, one has to question whether the result is what the government intended. That local authorities are not restricted in operating museums through their reliance on general powers for the important areas of acquisition and disposal; sets a precedence in how those items are valued in comparison to the national museum collections. This flexibility is a threat and an asset. It allows museums and their governing bodies to evolve along with society, but it also allows councils to undervalue their holdings. By holding national museums to a more stringent standard in law, essentially it indicates to councils that their museums are not special or different to the other services they provide. This misconceived perception belies a lack of understanding of the legislative development of local authority museums; whereby the end result is a legislative compromise which is useful but unclear.

## Chapter 4: the art of permanent acquisition

### Introduction

#### Why do museums acquire artefacts?

Museums are about accessing history. A traditional museum is a convenient construct which allows people to engage with history through the prism of artefacts from the past. Therefore, objects become a museum's *raison d'être* and the acquisition of artefacts is initially a museum's principle aim in order to exist. One can argue that you do not need museums to access history, however, their development and continued existence demonstrates that some concept is required. What museums permit is the concentration of history, from a range of periods and locations including abroad, and the interpretation and explanation of history brought to a given population. In respect of provincial museums, whilst there often is a local focus to objects, reflecting development within modern collecting policies, historical acquisitions frequently bring depth and breadth to local collections. But once formed, why should museums continue to collect<sup>150</sup>?

History continues to be created as each day passes, so, as time moves forwards new history is available for museums to acquire<sup>151</sup>. In addition, older pieces, which previously were not accessible, can become available complimenting existing collections. Whilst museums have more collections than they have room to display; museums are there to document the past. It could be argued that without continual renewal through the addition of artefacts, museums would increasingly become less relevant to the society and time that it inhabits. It is rare for museums to have a policy to not add

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<sup>150</sup> Temporary and shared acquisition is dealt with in chapter six.

<sup>151</sup> It is beyond the scope of this thesis to enter into discussion as to when current affairs stop and history starts.



to existing collections because of this point. However, to our 18<sup>th</sup> and 19<sup>th</sup> century forbearers, the question as to whether museums should acquire was not a question at all. Aesthetics were of paramount importance and art, architecture, and artefacts of classic design continued to fill both museums and stately homes. To them, what was worth documenting for this or any age was items of beauty, of individuality, of uniqueness. Not for them, the mundane or the common place.

Many museum bodies believe that continual acquisition is a pre-requisite for being a museum. This ignores both rare collections such as the Wallace Collection which cannot be added to, and a museum's capacity, be it financial, be it spatial, or the ability to conserve that which is acquired. However, as acquisition appears to be fundamental to a museum's continued purpose and prosperity, local authority museums either need to continue to permanently acquire or exhibit high quality touring exhibitions<sup>152</sup> to ensure that they have the ability to draw in new audiences to the museum. This, of course, assumes that art and antiquities are collected for their interpretation and display value rather than simply their historical research significance. Most items have both, but museum stores are filled with both untapped potential and collections of scholarly, rather than public, interest<sup>153</sup>.

Collections seem to have developed almost by happy accident from a hotpotch of sources. But, planned acquisition can be absolutely crucial to the successful development of a museum and its ability to handle its own collections. The fact that this accidental development often includes hazy remembrances, poor documentation, and lack of understanding over terms makes the issues more difficult. This begs a number of questions. Is

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<sup>152</sup> See chapter six.

<sup>153</sup> The author is reminded of a vast collection of hundreds of flint axe heads once shown to her which are an important historical record but extremely difficult to display to the public in an interesting and meaningful manner.

acquisition a reality in the current financial climate? Should collecting be focusing on unusual but affordable objects through E-bay and other commercial retailers? Will private munificence return as a source of acquisition? Will people be prepared to donate if institutions are under threat from spending cuts? This chapter seeks to explore the basis of acquisition in museums, how museums acquire new objects, what the legacy problems of previous acquisitions are, and identify to what extent local authority museums are under threat from their previous acquisition policies and practices.

## **The concept of accessioning**

Acquisition is different from accessioning. Museums may acquire items without accessioning them to their collection. Providing opaqueness to older procurements, a local authority can obtain artefacts that neither belong to the museum nor are accessioned by the museum<sup>154</sup>. Accessioning is the method for a museum to identify which objects they wish to place in their permanent collections. Such items must not be inconsistent with the museum's collections policy, though in reality most policies have been written around the existing museum holdings rather than an assessment of what artefacts should form part of their core expertise and presentation. In fact, the Concise Oxford English Dictionary<sup>155</sup> describes accessioning as to, "*record the addition of (a new item) to a library or museum.*" This indicates a positive action on behalf of the museum and its governing body of identifying that particular item as being part of the museum's collection beyond the mere legal method of its acquirement<sup>156</sup>. Chattels suitable for handling collections would not be

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<sup>154</sup> The author investigated a situation where there was a Borough Collection containing the Mace, Mayor's chains of office, and some paintings separate from the museum collection. Over time, these two collections became blurred with items from one contained in the other.

<sup>155</sup> Ninth edition, (1995, p8).

<sup>156</sup> Manisty and Smith suggest that in a local authority scenario that could include the passing of a resolution at full Council or in the relevant committee (2010, p4), though the author's experience suggests that the demise of museum committees after the 1974 reorganisation has rendered such decisions to be taken by officers rather

accessioned as their end use is incompatible with the standard of care expected for an accessioned artefact. Knowing the internal provenance of any item is as essential as its external path to the museum when it comes to the questions of deaccessioning and disposal discussed in the following chapter.

## **Are we being served?**

Museums use a variety of legal mechanisms to acquire art and artefacts. Many acquisition decisions are opportunistic and unplanned<sup>157</sup>. Consequently, they either come in a ready formed legal model, such as bequests, or circumstances dictate the course of action, such as where grant funding is required to raise capital for purchase. The choice to acquire may be motivated by other factors such as political will or sentimental attachment, with the result that the legalities are almost an afterthought. Councils should be setting parameters, not just of what is within their collecting policy, but how they are prepared to accept the acquisition of future material based on an assessment of what is acceptable for the policies of that particular council. To do this, consideration has to be made of the benefits and drawbacks of the different types of permanent acquisition.

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than ratified by councillors.

<sup>157</sup> A Sunday Times report in November 2010 highlighted the perceptual problems with individual public institutions making new acquisitions. It concerned a print entitled *A History of the World* by Jeremy Deller, one of the Tate Gallery's trustees. A copy was bought by the Arts Council in 1998 for £250. Over the next eleven years, three further copies were purchased by publically funded organisations with the price rising each time. The Tate Gallery paid £500, the British Council £1,000 and the Government Art Collection £2,760. The cost of a print in 2010 was £6,000. The public acquisition of a living artist's work gives a cachet which translates into an increase in value. David Lee, editor of the arts magazine *The Jackdaw*, was reported informing a Commons committee that there should be no duplicate acquisitions from the public purse, and that acquisitions should only be made in necessary circumstances as the four organisations involved in the Deller case already owned more artworks than they can possibly exhibit (Alberge 2010, p5).

## The perils of purchasing

The purchase of museum artefacts is governed in English law by the common law rules of contract, the *Sale of Goods Act 1979* and subsequent legislation. Purchases can be made through a private sale, in a shop, through a dealer, and at an auction. Councils can buy outright or be supported by grant funding from another institution which can bring with it a number of additional conditions. Acquiring new artefacts through a contractual transaction can offer some protection and importantly documentation for the museum. The *Sale of Goods Act 1979* applies to contracts for the sale of goods made on or after 1<sup>st</sup> January 1894, s.1(1) in England and Wales. As the Act was a codification of several previous Acts, it contains different rules if the purchase was made prior to 1<sup>st</sup> January 1980. The Act covers both commercial retailers and private individuals making sales.

Contracts for sale have the capacity to be conditional, s.2(3), therefore a seller who offers a museum an artefact for sale can add conditions to that sale. These conditions will be enforceable only by the parties to that contract, so the right would die with the vendor unless the item was sold by a body with legal personality such as a company, charity, or trust. This situation could arise where a painting was on loan to a museum and the owner then wished to sell it to the institution but with the guarantee that it would remain on display rather than placed in storage, or that it should not be loaned out to other museums and galleries. Conditional clauses can provide comfort that an object will be treated in a certain way whilst the seller is living, but allows flexibility for the museum to manage property once they have died. It is important to manage expectations, particularly with descendents, if items are bought with constraints.

There is no requirement in English law that such a contract for sale of goods has to be written down, s.4(1). In fact, lack of documentation is a problem for early acquisitions by museums. Either there was no record made or the paperwork has been lost or destroyed in the intervening period. It is essential to keep all documentation relating to a purchase, recording and evidencing in particular the seller, date of purchase, price of purchase, provenance, due diligence checks, and any conditions attached. Private sales are no different. Many artworks bought in the post-Second World War period which are not fully provenanced now are tainted by lack of information when they may not have been spoliated. The result of which is that museums are limited in how they can use the item in question, just in case it turns out to have been spoliated.

The *Sale of Goods Act 1979* implies terms into a contract for the sale of goods regarding title. This is important to a museum as many institutions have to ensure through MLA accreditation and / or membership of the MA that they do not purchase illegally traded or spoliated objects, let alone the moral obligation not to do so. There is an implied condition that the seller has the right to sell the goods, s.12(1); and implied warranties that the goods are free from unknown encumbrances, s.12(2)(a), and that the buyer will have quiet possession of his purchase, s.12(2)(c)<sup>158</sup>. Thus if a seller did not have good title, a museum could repudiate the contract as a breach of condition. This provision should protect a local authority museum if they purchase illegally traded or spoliated goods from a reputable organisation whose due diligence has failed, but would provide little comfort otherwise as pursuing a rogue trader is unlikely to result in the return of consideration.

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<sup>158</sup> This section applies to purchases after 18<sup>th</sup> May 1973. Prior to that date, *Schedule 1 (3)* provides alternative wording but the right to sell remains an implied condition. The *Sale and Supply of Goods Act 1994* amended s.12(1) and (2)(a)&(b) with the word "term" and inserted s.12(5A) which set out the respective condition and warranties to s.12(1) and (2)(a)&(b). The main difference between the two sections is that prior to 18<sup>th</sup> May 1973 the condition and two warranties are implied unless the contract shows a different intention. Whereas after 18<sup>th</sup> May 1973 if it appears following the contract or the circumstances of the contract that the seller is transferring only the title that he has, then other warranties are implied, otherwise there is an implied condition that the seller has the right to sell the goods.

## Auctions in the age of eBay

Auctions of all sizes are held across the country with a regular flow of art and artefacts potentially out of reach for the average council museum. Annual acquisition revenue budgets or capital funds are required to pursue significant objects which would enhance a museum collection. Where these are not in place, active participation in the auction market relies on (1) where the council has insurance money following a theft and is seeking to replace pieces, or (2) where the council has secured external funding. Smaller acquisitions can be made at local auctions or eBay. The difficulty for a local authority museum buying at auction is that it will be competing against private collectors or dealers who may have deeper reserves than the council. Auctions are an adversarial contest, the result of which can mean that the acquisition price is inflated beyond the reserve price which is the figure that will be used to approve maximum expenditure and the level of any match funding.

eBay has been derided by some in the museum profession as being a haven for looters and unprovenanced material, and not without evidence<sup>159</sup>. However, eBay has been taking steps to monitor the items being offered for sale. Artefacts, antiquities, cultural items and grave-related items are classified as restricted items on eBay<sup>160</sup>. They direct potential sellers to the relevant online legislation and guidance for the United Kingdom and the Republic of Ireland. In particular, its advice focuses on archaeological material and specifies that sellers should state clearly the provenance of an item. Historical gravestones are prohibited from sale, even if they are legally owned to prevent encouragement of

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<sup>159</sup> In 2009 a man from Cardiff tracked down £8,000 of kitchen appliances stolen from his house whilst he was away being sold through eBay by someone living 30 miles away (Telegraph, 2009).

<sup>160</sup> A Harrier Jump Jet which had been decommissioned for museum display purposes was removed in February 2011 as it contravened eBay's policies on weapons. This is despite the removal of the engine and the weaponry (Evans, 2011).

defacement of churchyards (eBay 2010). At an industry gathering<sup>161</sup>, the author participated in a workshop on acquisition and disposal where some museums specialising in modern or social history explained that eBay provided an opportunity to purchase items for their collections at reasonable prices<sup>162</sup>. eBay is an emerging market for the purchase of artefacts giving easy access to 20<sup>th</sup> century items which have been given to or inherited by people who would not normally give artefacts to museums, and often may not see their historical worth but understand their potential value. It is interesting that with ephemera you are looking at philanthropy not from the richer in society but from the poorer. It is here that museums have a task to explain the wider public benefits of donating items and to articulate why, when there is a strong international market in collectible ephemera owing to its affordability, people should choose to donate when museums could participate in the market against other private collectors.

### **Selling your soul not the family silver? The use of external grant funding.**

Many recent acquisitions in the local authority sector have been made jointly with grant funding from charitable or Government sponsored organisations. Such grant funding comes with conditions to ensure public or charitable money is not being misused. Local authorities can be laissez-faire in respect of the receipt of grant funding. The author has seen first hand how happiness at being awarded funding can obscure the longer-term implications of accepting the funding and how time, and the turnover of staff, can ensure that conditions are forgotten. Over recent years such funding has come through the V&A, the Art Fund, the HLF, the National Heritage Memorial Fund (the funder of last resort), the Headley Trust, and the Beecroft Bequest administered through the MA.

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<sup>161</sup> Museums Association Annual Conference 2005 at the Queen Elizabeth II Conference Centre, London.

<sup>162</sup> An example was given by a museum in the north of England of the purchase of match tickets and other football paraphernalia from fifty years ago which added to their social and local history collections.

The V&A Purchase Grant Fund is a government grant fund which was set up in the 19<sup>th</sup> century to provide help to local museums and other bodies to acquire artefacts relating to the arts, literature and history. The V&A has administered the fund on behalf of the government since 1881. Grants from the Purchase Grant Fund are normally for 50% of the purchase price, but can be up to 80% of the purchase price. The cost of the purchase has to be between £500 and £300,000. The HLF have been distributing lottery money since 1994 and their general Your Heritage<sup>163</sup> and Heritage Grants<sup>164</sup> schemes permit acquisitions. The Art Fund, is an independent charity founded in 1903 whose objective is to save art for the nation. It is a membership organisation and has developed a dual function. It actively campaigns and lobbies on issues to do with museums, seeking increased funding for museums. The primary reason it was set up, a function that continues, is to provide funding towards purchasing major works of art for the nation and preventing them from being sold abroad from private collections. It runs a Main Grants<sup>165</sup> and Small Grants<sup>166</sup> scheme and like the HLF sometimes has time-limited specific schemes<sup>167</sup>.

To access funding from the V&A or the Art Fund, museums have to be accredited under the MLA scheme (Art Fund 2011a). To be eligible for a purchase, V&A applicants must, "*argue the significance of the proposed purchase in the context of the permanent collection*" (V&A 2007) whereas Art Fund includes the development of new areas of collecting<sup>168</sup>. Prior to a grant being made, museums must have viewed and confirmed the item

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<sup>163</sup> Grants between £3,000 and £50,000.

<sup>164</sup> Grants over £50,000.

<sup>165</sup> Grants over £5,000 or for works worth more than £10,000.

<sup>166</sup> Works costing less than £10,000 and grants primarily under £5,000.

<sup>167</sup> There are three additional funding streams. Art Fund Collect is an annual opportunity to purchase in the area of applied and decorative art with an annual budget of £75,000 to share. Art Fund International is a £5 million programme running between 2007 and 2012 and has five partnerships of museums and contemporary art organisations to help museums build collections of international contemporary art. RENEW celebrates the 50<sup>th</sup> birthday of the Esmée Fairbairn Foundation and will allow six museums to develop new collections or refresh and develop existing ones with £600,000 to be shared between the successful museums. Larger council museum have been recipients of the first two programmes.

<sup>168</sup> Works do not necessarily need to be at threat of export, but they do have to be of international, national or demonstrably significant local interest.



and have to provide valuation and condition reports. Additionally, V&A applicants must have checked that they are not competing with another institution to purchase the artefact. Both the V&A and the Art Fund have separate documents setting out the due diligence and provenance checks that museums are expected to undertake. For the Purchase Grant fund, museums are asked to state on application where the permanent location for the object will be and publicise the fund support where it is displayed. Art Fund purchasers are under a duty to insure through their grant conditions and credit fully the charity in display; however, recipients are given 60 days to remedy any breach of the Grant Terms and Conditions (Art Fund 2010). Both funds allow temporary loans of grant funded acquisitions.

As the Purchase Grant and Art Fund schemes apply to accredited museums, the model acquisition and disposal policy all accredited museums are required to adopt contains provisions regarding the purchase of items. Museums are required to exercise due diligence in their purchases and be satisfied that they will acquire a valid title to the artefact. Additional provisions require museums to be satisfied that the item has not been acquired in or exported from its country of origin or a country in which it has been legally owned in violation of its laws (including the United Kingdom) and will reject any illicitly traded artefacts<sup>169</sup>.

The HLF, in contrast, has standard grant conditions covering a multitude of potential projects for each of their general funds. In respect of

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<sup>169</sup> This is in accordance with the *UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, which the UK ratified with effect from November 1 2002, the *Dealing in Cultural Objects (Offences) Act 2003*, and the DCMS guide "*Combating Illicit Trade*" (2005b) which details the process of purchase and due diligence. Between 2004 and 2009 registered museums were going through the procedures to become accredited museums. The terms for registered museums were slightly different as they were based on an earlier version of the model acquisition and disposal policy. A museum needed to be satisfied that it could obtain a valid title to an artefact and that it had not been illegally acquired in or exported from its country of origin or an intermediate country where it had been legally owned, this included the United Kingdom. The additional provisions concerned the transfer of biological and geological material and archaeological antiquities and the circumstances under which they can and cannot be acquired. This difference was owing to the fact that the model policy was drafted prior to the accession to the UNESCO 1970 treaty and the 2003 Act.

acquisition, the minimum requirement is the acknowledgement of HLF funding on publicity, documentation and signage relating to the grants-supported items (HLF 2011). There is no specific requirement in the general schemes that a museum has to be accredited. The Heritage Grants stream obliges grant-funded property to be insured, and that if a recipient wishes to transfer possession and potentially title, they must have agreement from the HLF first who reserve the right to seek a share of proceeds, for any transfer to be at full market value or any other needs they may consider at the time (HLF 2008). Failure to comply with the terms of the grant can result in the full amount being repaid to the HLF. The Your Heritage grants terms different to the Heritage Grants. There is an express provision that any property subject to the grant cannot be used as collateral for a loan if the grant is above £25,000 which does not appear in the Heritage Grant conditions. There cannot be sale or loan without HLF permission but if granted in addition to reserving the right for additional conditions it states that if disposed of full market value must be received. This potentially would hinder a transfer to another local authority museum by sale or loan and highlights the potential perverse effects of conditions which are designed to cover a multitude of different projects.

The difference in the funding bodies is indicative of their origins and priorities. Failure to meet criteria set by these organisations also can jeopardise future applications to these institutions for support. The relationship goes beyond contractual and some bodies may use moral pressure where a council does something that does not contravene the acquisition of the piece but affects it, such as a redisplay or relocation. The problem is that when councils need grant funding, normally it is not part of a planned acquisition to a collection which can be thought through, funding secured and object then sought. Grant funding seems to be used when an item suddenly has appeared at auction or treasure has been found and money needs to be raised to save it. It is easy for the details to

be lost in the rush to save an important historical legacy. This will not stop being the case. However, it is incumbent upon councils to plan and research their potential funding partners before committing to a course of action which is not sustainable in the longer term.

## **The gift that keeps on giving?**

A gift theoretically is the ideal form for a museum to receive what it wants given that it is a gratuitous transfer of property. But as the economist Milton Friedman said, there is no such thing as a free lunch. Property brings with it liabilities and gifts can easily be a burden as well as a benefit. Gifts can be made through bequests, on the anticipation of death or whilst living. It is essential for the legal title of the gift to pass to the recipient so they are not put in the position of a mere bailee.

## **Philanthropy and the ability to let go**

In English law this transfer of title can simply be performed by physical delivery of the chattels<sup>170</sup>. However, for a museum wanting to prove ownership prior to a potential disposal, loan or change of conditions, this lack of documentation is critical. Many items in museum collections have been given in this way, and in later years disputed by descendants of the donor who believe that a loan was made to the museum<sup>171</sup>. Best practice is to have a formal transfer document setting out the parameters of acceptance, but historically this did not happen<sup>172</sup>. Conditional gifts place

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<sup>170</sup> As happened in the York Castle Museum case of *Troughear v. Council of the City of York* [1995] where a motorcycle was parked at a museum and the receptionist told that it had been left. See also chapter six.

<sup>171</sup> For example, the Australian case of *Nolan v. Nolan* [2003] was a result of a dispute between the second wife of the deceased artist Sir Sidney Nolan and his daughter Jinx in respect of paintings Jinx believed were given to her mother, Cynthia, during his lifetime. Cynthia had continued managing aspects of Sir Sidney's artistic affairs until his death, sometimes sending works to exhibitions without his consent whereby she was credited as the owner. It was held that the paintings had been bailed not gifted. *Re Escot Church* [1979] revolved around whether a painting had been bailed or gifted by the now deceased benefactor. In this case all other items donated to the church by the Kennaway family had been gifts. See also chapter six.

<sup>172</sup> In the Canadian case of *Canadian Pacific Limited v. Lamont and Callbeck and Callbeck (third parties)* [1983] about whether the twelve-foot model of the ship *Empress of France* was a gift or a bailment, the actions of

obligations on the recipient museum which may or may not be legally binding depending on their form. The ideal position for a museum is that an artefact does not come with conditions, and failing that, that the donor has contacted them in advance of making the gift to discuss the conditions they wish to place upon the object. However, any gift on condition which prevents the absolute alienation of a chattel, thereby fettering the new owner's ability to use the item, is likely to result in the condition becoming null and void, *Re Rosher [1884]*, or held to be a trust, especially if the museum holds similar property as a trustee, *Re Frame [1939]* (Hayton 1998, p121).

If the donor wishes to make such conditions enforceable, then a simple deed of gift will not be enough as under such a deed the title should pass free from encumbrances. To make the conditions enforceable, it would require terms and conditions in a contract, which would require consideration on the part of the museum to be valid. The difficulty for the donor with this method is that only parties to the contract can enforce them which means that the museum is not compelled to follow the conditions after their death unless there are other parties to the contract. The other option is to make constitute a trust, but that will require trustees to operate it after the death of the settlor, who can be a trustee during his lifetime. Given the expense of such legal constructions, it would be worth undertaking only for significant artefacts or collections, and it is unlikely that a museum would want to accept such a gift, unless it was from a particularly generous benefactor who was prepared to support the museum financially.

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Canadian Pacific in arranging a presentation ceremony, in failing to correct newspaper reports of the gift, and subsequent refusal of redelivery when the Navy League needed to re-home it all equalled a gift, despite Canadian Pacific giving evidence of its normal procedures for making gifts.

## **A gift perfected by death**

A person who makes a gift *donatio mortis causa* does so if they are facing death<sup>173</sup>. It was described by Buckley J in *Re Beaumont [1902]* at 892 as a gift which had, “*an amphibious nature, being a gift that is neither entirely inter vivos nor testamentary. It is an act inter vivos by which the donee is to have the absolute title to the subject of the gift, not at once, but if the donor dies. If the donor dies the title becomes absolute not under but against the executor. In order to make the gift valid it must be made so as to take effect on the donor’s death.*” In the scenario that is most likely to be faced by a museum, an item already on loan to the museum which the donor wishes to make a gift on his death, as the museum already has possession of the object the gift will become perfect on the death of the donee without any further action. However, if the museum is not in possession of the artefact it requires either proof of the gift in the form of a deed of gift or some kind of relinquishment of dominion over the gift, such as the only key to a safety deposit box containing the artefact, *Sen v. Headley [1991]*<sup>174</sup>.

## **The problem with wills**

Gifts left to a museum in a will are one of the main routes that have enabled local museums over time to develop such wide and ranging collections. One of the main benefits of a testamentary gift is the fact that it is documented as a gift, though even a gift in a will can be disputed<sup>175</sup>. It can be an alternative way for the donor to circumvent conditions dying out and to encourage acceptance by the museum. This is a high risk strategy if the gift has not been discussed with the recipient museum in

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<sup>173</sup> That is to say either that death is imminent, in the case of one who is terminally ill, or that death is a strong possibility, in the case of a soldier in a war zone or an explorer.

<sup>174</sup> The author would note that she has neither found a *donatio mortis causa* case nor has it been highlighted as a problem during her research.

<sup>175</sup> Such as a gift of clocks made by Frederick Gershom-Parkington in his will to the town of Bury St Edmunds, which local people believed was subject to a trust rather than an outright gift. See chapter five.

advance. Dialogue can clarify expectations on both sides and ensure that any conditions are manageable<sup>176</sup>. Museums do not want to be placed in the position of refusing quality donations because of the stipulations that are attached, or losing important pieces because they are bundled in the will with inconsequential items which the museum made find difficult or impossible to dispose of, depending on the terms and the objects. “*Cherry picking*” in these circumstances is not an option.

Other gifts through a bequest may be capable of creating a charitable trust. The law relating to charities was last consolidated in the *Charities Act 2006*. Under s.1(1) of the Act a charity is defined as a body set up for charitable purposes. A charitable purpose requires public benefit, s.2(1)(b), and the purpose to be listed under s.2(2), s.2(1)(a). S.2(2)(b) provides “*the advancement of education*” as a charitable purpose and s.2(2)(f) “*the advancement of the arts, culture, heritage or science*” Prior to this Act, the work of museums was held as charitable owing to their educational nature, *Re Spence [1938]*. To create a trust in a will the intention needs to be clear, though the word trust is not necessary, and in fact just because the word trust is included does not mean that a trust can be created.

The terms on which a museum accepts any bequest are all important for its successful future in that museum. If the terms are too onerous, future managers may wish to change those terms or find themselves constrained by those terms, such as in the case of Glasgow City Council<sup>177</sup>. Modern awareness of these issues has come at a time where there has been a decline in artefacts being left to museums. Those that do want to leave their legacy to a museum with such conditions as they feel befit both their

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<sup>176</sup> The former museum director (NPG and V&A) Sir Roy Strong planned to leave the Laskett Gardens, the largest private formal gardens to be created in England since 1945, to his local council. He now is in discussion with the National Trust after the council got cold feet over costs (Sunday Times 11<sup>th</sup> September 2011).

<sup>177</sup> The terms of the Burrell Collection were successfully challenged by the Council but such was the public outcry, the flexibility to loan the collection outside of Glasgow has never been fully brought into effect (McCulloch 1998, and Manisty and Smith 2010, p17). See chapter six.

memory and the objects sometimes seek a different route to ensuring their wishes are met, rather allow the chance that a museum would refuse the bequest under such terms and conditions. One way of ensuring that wishes are met, but leaving options if your chosen institution cannot or will not comply with them, is the National Arts Collection Fund.

## **Art Fund**

The Art Fund actively encourages potential donors to gift or leave artefacts to the Fund rather than directly to a museum. Either the donor leaves the artwork to the Art Fund to be placed in a museum or museums of their choice<sup>178</sup> or leaves the work to a particular institution through the Art Fund<sup>179</sup>. In this way, the Art Fund can ensure that any terms and conditions, either the Art Fund's or the donors, are complied with and can request that the items are returned to the Art Fund if terms and conditions are not complied with. In the case of a donor who has a preference for which museum they are displayed in the Art Fund can remove them from that museum if they are not providing the correct access to the items<sup>180</sup>. One key term is that the majority of the artefacts that are acquired through the Art Fund are on display. The Art Fund option provides a route for potential benefactors who wish to ensure their wishes are met to secure this without the expense or difficulty of setting up their own charitable trust. So far, to the author's knowledge, the Art Fund has not had to alter or had difficulty with the terms of a donor's gift in placing it with a museum. This method currently appears to be the most sustainable way of ensuring donors' wishes and holding receiving museums to account.

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<sup>178</sup> For example the Naomi G Weaver bequest of prints was left to the Art Fund's discretion as to where to place them. They chose Falmouth Museum and Art Gallery as it contains one of the most important print collections outside London (2009).

<sup>179</sup> Such as *Birdman* by Elizabeth Frink which was gifted to the Art Fund by the artist's estate and her gallery the Beaux Arts for display in the Leeds Art Gallery, whose important sculpture collection did not include a Frink. The condition is that *Birdman* is displayed and not put in storage (Brown 2010).

<sup>180</sup> The author knows of one council who closed a museum which had a significant collection of paintings by a local artist which was left to that particular museum through the Art Fund. The council wished to transfer the paintings to an alternative museum in the town, however, they had to seek the Art Fund's agreement to retain the paintings on that basis and set out a plan for their display.

## Acceptance in Lieu

The Acceptance in Lieu Scheme has been running for over a hundred years. It allows owners of historic objects or works of art to use them as payment in lieu of inheritance tax<sup>181</sup>. It has contributed over the past ten years over 300 items in lieu worth over £235 million have been placed with museums in the United Kingdom (MLA 2010a). The scheme is advantageous as if an owner sold the item on the open market as part of the inheritance settlement, tax generally would be due at 40% of market value whereas if offered in lieu, tax is rated at 25%, and as it is the residue which would be applied to the tax liability, the taxpayer is 17% better off through the in lieu scheme. Museums can therefore receive an item at no cost<sup>182</sup> and items which already are on long-term loan are not excluded from the scheme<sup>183</sup>. If items are offered without identifying a specific institution, then offers can be made by museums. The main criterion is that the item/s are pre-eminent. However, only a limited number of objects are donated this way every year with an average of 30 each year between 2001 and 2010 (MLA 2010b).

The Government currently is consulting on a companion scheme to acceptance in lieu. It would encourage donors to give pre-eminent items as a permanent gift to the nation during their lifetimes in return for a reduction in tax liability based on a percentage of the value of the objects worth. This is different from in lieu which is based on payment of tax in kind. Items taken will be lent out to suitable institutions by the government through the Acceptance in Lieu Panel which also will manage the scheme. The government expects that most recipient museums will be charities though it later states that public museums are likely to benefit. This suggests

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<sup>181</sup> A conditional exemption scheme also runs in respect of inheritance tax and capital gains tax.

<sup>182</sup> Though, if the value of the item is greater than the tax burden an offeror can seek an agreement with a museum that they will pay the difference if the offer is made conditional to that institution (MLA 2009).

<sup>183</sup> It should be noted that items under the AIL scheme which remain in situ such as at Holkham Hall and Houghton Hall, both in Norfolk, also are vested in a public institution such as the Fitzwilliam Museum in Cambridge or the Victoria and Albert Museum (Manisty and Smith 2010, p5).



an assumption that the scheme is to benefit the national museums which also are charities rather than local authority museums, though those which have been outsourced to charitable trusts may have an advantage under this presumption. This may be altered following consultation responses, with the consultation due to finish at the end of September 2011. As objects are given permanently to the nation, if a museum no longer wanted an artefact, it would be handed back to the Panel for reallocation. The consultation also covers the terms of a loan, with an obligation to display not currently mentioned (HM Treasury 2011). Whether this is a new opportunity for local authority museums remains to be seen, but it relies on philanthropy for tax benefit which may be more attractive to people than pure beneficence.

### **Model of a modern acquisition**

From a local authority perspective there are two preferable methods for adding to a collection. Directly purchasing without external financial support and unconditional gifts allow museums flexibility to choose how to best use the item for the benefit of the museum service. These options require either financial ability<sup>184</sup> which is dependent on collecting priorities and the council's financial position, and supportive philanthropists who are prepared to entrust the fate of their items to someone else. As many people who give to museums envisage that these items are going to that particular museum in perpetuity, the conceptual gap will not be bridged in the short-term. From a donor's viewpoint, the best option, unless the Treasury scheme is implemented, is to leave items to the Art Fund to manage on their behalf within a set of parameters, safe in the knowledge that artefacts can be suitably relocated in the event of unforeseen difficulties.

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<sup>184</sup> The size of which depends on what is being collected. Modern social history may require a more modest budget to that of continuing to develop a collection of Old Masters, for instance.

Councils should accept grant funding with caution. It has been the mainstay of acquisition since the late 19<sup>th</sup> century, but local authorities need to be clear about both the medium and long-term plans they have for museums and their collections before accepting terms and conditions that they may come to regret. However, it is important that these grant funding schemes continue as they allow smaller museums to participate in the acquisition of some superb objects, such as the recent purchase of *The Little Train* by Graeme Green and illustrated by Edward Ardizzone for Seven Stories, the British museum of children's books in Newcastle (Art Fund 2011b). In another example, Reading Museum and Art Gallery used £12,000 of Purchase Grant Funding towards a gold Bronze-age neck ring in 2003/4 (V&A 2011)<sup>185</sup>. The use of grant funding would benefit from a shift away from emergency purchases toward planned acquisition against collecting policies to ensure collecting needs among the museum community were being met rather than the rush to save X for the nation / local area. Though the author has to acquiesce that such an idea is more wishful thinking, than achievable policy.

## **The policy context**

Local authorities are constrained only by themselves when acquiring art and artefacts. This applies equally to both the law and the elements of the policy framework they choose to follow.

## **Government direction**

The first policy statement by government made no recommendations in respect of acquisitions. However, the first guiding principle set out in the report was that, "*the fundamental purpose of a museum is to*

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<sup>185</sup> Treasure is reviewed in chapter six.

acquire...collections," (Department of National Heritage 1996, p5). This can be contrasted with the concern of the Royal Commission in 1929 regarding the potential growth of national museum collections over the next fifty years and whether the collection policy of the time should continue unchanged in the future (1929, p4). Such uncertainty was returned to in the *Understanding the Future* publications, where different government priorities meant that acquisition was no longer a primary aim (DCMS 2005a & 2006). The government, and political philosophy, has changed but as yet there is no policy statement setting a steer for the importance of acquisitions.

The Royal Commission noted that there were many bequests made to the national museums with conditions attached, such as being kept together, being displayed as a identified separate collection, or a prohibition on loans and disposal (1929, p57). The Commission considered that some institutions and bequests were ill-matched, but decided that 'correcting' such mistakes would have been worse than the happenstance acquisition of such artefacts in the first place. The Commission was appreciative of the role philanthropy had played in the origins of many of the national and provincial institutions. These contributions, they thought, were significantly more important than any such restrictions placed on the objects in question. They counselled the national museums to not accept pieces that were duplicates of items already within their collections and to direct potential benefactors towards other organisations, particularly local museums, who could benefit from such a gift (1929, pp58 & 76-7). This assumed that the donor approached the museum within their lifetime. It was recognised that museums may have to refuse bequests made without consultation on such terms that would disadvantage the organisation.

In 1963 the Standing Commission noted improvements in acquisition with an increase in the Purchase Grant Fund and a special government

grant for a particular provincial museum purchase (1963, p11). There had been a movement within local museums to save part of the annual acquisition budget to establish a fund to afford an “*outstanding centrepiece*” which the Commission concluded could significantly improve “*an otherwise commonplace collection.*” The Commission found that local benefaction remained strong with local bonds still in place. Some philanthropists found that their potential gifts would have a greater impact in their local area rather than being lost within the national collections. Long term loans of individual pieces and whole collections remained commonplace within the larger provincial museums. The Commission encouraged the development of Friends groups who could raise additional funds or channel one-off endowments<sup>186</sup>. The report painted a picture of healthy and vibrant local collections.

The picture painted by the reports is a healthy one prior to local government reorganisation in 1974. Councils were active in soliciting donations, and saving for the future from the annual acquisition budget to create larger capital funds. Friends groups could encourage numerous smaller financial donations which could amount collectively to substantial sums. The shift ten years ago which resulted in museums being directed away from collecting, conserving, and interpreting, towards inclusivity, accessibility, and social cohesion, altered the focus of councils. As such, it was easier to justify the erosion of acquisition budgets and failure to continue to invest in acquisition funds, a process compounded by the public sector cuts. This is short-sighted. Museums exist both as individual institutions and part of a greater public sector whole; and anything but a holistic view of funding and dependency before making changes is likely to result in decisions which store up problems for the future.

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<sup>186</sup> These funds can be protected if the Friends Group forms a separate charitable trust. One such trust is the Gershom-Parkington Trust which was created to relate to a particular bequest now in the management of St Edmundsbury Borough Council.

## **Ethics – a higher standard for policy**

Prior to the *Code of Ethics* first being published in 2002, the MA circulated two key pieces of guidance. Section 2.1 of the *Museums Association Code of Practice for Museum Governing Bodies* provided that,

*“...[d]onors make their gifts, and acquisitions to the museum collections are made, in the expectation that they will be preserved in perpetuity, and this expectation should be respected. In the light of the above, the governing body or the museum as appropriate should view itself as custodian or trustee of these collections rather than absolute owner.”*

The guidance further advised governing bodies to adopt a Collections Management Policy which should set out “*objectives, criteria and procedures*” for acquisitions. It stressed the need to take into account the, “*long-term resource implications of new acquisitions...[in particular] the museum governing body should always take careful account of any conditions attached to such acquisitions.*” This important point regarding assessing and alerting to governing bodies the resource implications of acquisitions is repeated in the 2004 Acquisition Guidelines but is not reflected in the current MLA accreditation guidance.

The *Museum Association Code of Conduct for Museum Professionals* required museum professionals to acquire artefacts in accordance with the Collections Policy, rule 3.1. The MA considered that it was not unethical to collect more material than was required during archaeological fieldwork if the intention was to transfer the “*excess material to appropriate institutions.*” More importantly, the guidance also provided that where a mixed lot was acquired either at auction or through a legacy which included material outside of a museum’s Collections Policy, then loans or transfers of those artefacts to other museums were a priority. This clause assumed that a legacy which included material inconsistent with the Collecting Policy did not have conditions preventing the permanent

transfer or loan to another institution. The clause relating to material from fieldwork and mixed lots, accepted the principle that a museum may choose to acquire something, but not necessarily with the intention of permanent ownership. This was in complete contradiction to the museum professional's contractual obligation towards the museum's trustees, s.1.4, whose obligation under the corresponding code was to respect donors' expectations that gifts were made in perpetuity.

The MA's *Acquisition Guidelines* in 2004 developed the 'mixed lot' concept, 6.2.11. Museums specifically are advised not to accession unwanted items from a purchased 'mixed lot' to the museum's catalogue, thus excluding unwanted gifts. The guidance suggests that suitable outcomes for 'mixed lot' material are use within an handling collection, transfer to another museum or sale. This extends the acceptable methods of disposing of unwanted artefacts from loan or transfer to another museum, and potentially reflects upon the fact that a museum may have bought items at auction so therefore should not be constrained from disposing of them in the same manner. However, the MA guidance strongly recommends that a condition is entered into any transfer deed to prevent a new owner claiming that they had been part of the museum's collection to ensure that it does not appear that the museum is selling objects. With gifts, it recommends prior discussions with the donor differentiating those which a museum is prepared to accession and those which it will accept on the condition that they will not be accessioned and it is not expected to retain them, 6.1.1(e). It is advised that a similar clause regarding ownership is included in any transfer deed. Whether potential philanthropists in the UK are prepared to consider part of their collections as disposable is a leap beyond current practices of Art Fund distribution and direct gifts to museums which has not been made yet.

The MA *Code of Ethics* has replaced the two *Codes of Practice*. It is described in the forward to the 2008 edition by then Convenor of the Ethics Committee, Vanessa Trevelyan, as an ethical code for this time and this place providing, “*a set of consensual values and standards of behaviour that are agreed at a particular time to define a relationship of trust between the museum and the communities it serves,*” (p3). It encourages the incorporation of adherence to the Code into employment or other contracts of service to make it legally enforceable. Whilst this is a practical and sensible suggestion, it is unlikely that any local authority would want to fetter itself by incorporating such provisions. In effect, an employee could have two masters with the ethical code being in conflict with the employer's wishes. That is not to say that the code and local authorities are incompatible, nor to imply that local authorities would seek to go against the code.

The *Code of Ethics* begins with a basic statement of principles. Section 1 looks at the belief that, “*society can expect museums to hold collections in trust on behalf of society.*” In particular, this means that museums should, “*treat collections as non-negotiable assets in financial affairs,*” 1.4, and that it holds everything, including its real property, “*in explicit or moral terms...in trust for the benefit of the public,*” 1.5 (p10). These two clauses have caused problems for local authorities as they confine how a local authority is expected to use its assets and go against the prevailing orthodoxy where nothing is non-negotiable. Though, it would be an overstatement to expect that local authority councillors have given much thought to the philosophical and legal bases that their museum collections are held.

As repeated in the *MLA Accreditation Standard*<sup>187</sup>, “society can expect museums to acquire items honestly and responsibly,” section 5. This requires published collection policies, 5.1. Acquisitions should be made only after the long-term future of the object has been ascertained, 5.2. Artefacts should only be added to the collections if long-term care and public access are assured, 5.3. Museums must exercise due diligence in their acquisitions, 5.7. Items that may have been taken during conflicts, 5.8, stolen, 5.9, or illicitly traded, 5.10, should be refused, with limited exceptions. Museums should also reject objects without a full ownership history unless it can be shown that they were exported before 1970, 5.11 (p14). These are all sensible provisions to ensure high moral standards in museum acquisition and to prevent adding to the problems of existing collections. Whether councillors are concerned about such matters when confronted with a decision to acquire a significant piece or collection is debatable.

The critical acquisition sections in relation to local authorities are 5.17 to 5.20. It cautions museums about conditions attached to gifts and bequests and recommends that these should be discussed, where possible, in advance and details written down, 5.17. If gifts or bequests do not meet the collecting policy, they should be refused, 5.18. Unwanted, unsolicited gifts should be refused, in writing, 5.19. Conditions attached to an artefact that has been acquired must be adhered to, 5.20. The idea that you should refuse items which currently are not within the collecting policy is interesting as it potentially confines a museum to future acquisitions linked to the haphazard accumulations of the past. If a potential local donor approaches his town museum with an unsurpassed collection of Wedgwood, but they do not collect porcelain, should they direct him to another museum which does, or change their policy? If they have the capacity to accept such a gift, they should change their policy as

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<sup>187</sup> 4.1.2 of the Standard. The accreditation standard is highly derivative of the *Code of Ethics*. In respect of acquisition it does not require a separate evaluation.



museums should not stagnate in the past. It is similar to the work of English Heritage in respect of historic buildings, their role is not to say no, but to manage the inevitable change that a building faces during its lifespan, as it has done prior to any listing.

6.1.2(b) of the 2004 *Acquisition Guidelines* provides an interesting, if controversial, potential request of would-be donors. Alongside the donation of an artefact, a financial donation towards the ongoing conservation and display of that item should be encouraged. Donors to museums are driven by a sense of public benefit and some of the items they leave are of considerable value. Many may not have the financial means to look after the object in question. Should museums be routinely suggesting to donors that a financial contribution would be, as the guidelines term it, 'welcome'? It is a difficult matter. It is well known that the National Trust generally require endowments to take on houses and gardens whose purpose is to be open to the public, except in the most exceptional of cases. This is to offset against the numerous properties which have been accepted previously without financial support and now require subsidy from other parts of the National Trust's business<sup>188</sup>. However, the National Trust is a charity, albeit one created by statute. Local authorities, not being charities and charged to provide public services from taxation, could face the accusation that the taxpayer should bear the burden if the gift is being accepted on the basis of its importance to the nation or to the locality. Could councillors say no to a gift which is wanted by the museum or important to the local area without financial payment? It is unlikely, given the media furore that would be likely to ensue.

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<sup>188</sup> Only a handful of the National Trust's portfolio of properties makes a profit. That profit is shared with the loss-making houses and gardens in an effort to ensure sustainability across the portfolio.

When discussing all types of purchases the essential message from the MA is *caveat emptor* – buyer beware. It suggests negotiating a museum discount from dealers, not disclosing your interest as a museum at an auction unless you need to verify details to ensure an item has not been illicitly traded, and not paying the full market price to a private vendor who approaches the museum. The favoured method of purchase is directly from an individual, though if the MA guidance is read by a potential seller before offering an item, it would suggest to them that to ensure that they secured best value for their object, then they should offer it for sale through an auction or sell to a dealer rather than offer it directly to a museum!

## **An alternative view**

### **National museums**

National museum legislation is generally unremarkable in respect of acquisitions. One exception is the *National Gallery and Tate Gallery Act 1954* which separated the gallery formerly known as the National Gallery of British Art<sup>189</sup> from the National Gallery. This Act left part of the earlier *National Gallery Act 1856* in force. One part of the retained nineteenth century legislation permitted the National Gallery to choose from any gift or bequest<sup>190</sup> those items which met the criteria of the National Collection and returning those unwanted items to the donor or estate of the deceased, s.3. This section is similar to the 'mixed lot' idea developed by the MA but unlike where the MA retrenched from gifts to cover only auction purchases, the National Gallery provisions clearly anticipate that quality donations should be unencumbered by substandard pieces, even when they are gifts. Remarkably, it extended to gifts already received by

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<sup>189</sup> The Gallery became known as the Tate after its founder, Sir Henry Tate. This name was adopted officially in the separating Act.

<sup>190</sup> Excluding those which had contrary conditions attached.

the Gallery, allowing a spring clean of material accepted. This Act has been superseded by the *Museums and Galleries Act 1992* and the provision has been repealed. As a clause, it lasted 136 years, which demonstrates longevity in museum legislation. This probably is owing to the practicality of the section and the clarity it provided to potential benefactors. If the law was reviewed, this clause would be a useful inclusion setting the standard for future gifts.

## **The American way**

Many American museums have followed a different path. With wealthy benefactors and international brand names, American museums have operated on the art markets as equals rather than poor cousins. Looking at the museum as a business and the artefacts as the collateral, museums will sell to buy on the open market. An anathema in the English tradition, it is mainly seen in museums in the United States where the principle is accepted and the area for discussion is whether you can apply proceeds towards running or other capital costs (White 1996, p377). Could such a system work here? With the concept of accessioned items, non-accessioned pieces could easily be identified as 'tradable' to increase the acquisition fund in order to be in a position to buy and compete without the need for temporary bars on export and massive fundraising campaigns from other public and charitable sources. This rationalisation could form part of good museum management, though it would require previously accessioned objects to be reviewed against modern collecting policies to identify those items which have been accessioned, but should not have been. Is this the future or is it a step too far? In conversation with the President of the Museums Association it is apparent that such a scenario is not beyond the realms of possibility in the future, but the hope always remains that we have not reached it yet, and that we will never reach the point whereby trading is the first, or only, option.

## Conclusion

Is acquisition a reality in the current financial climate? There are few constraints on what a local authority museum may acquire through gift or purchase. But it is clear with the government's moves to encourage philanthropy, the proliferation of additional funding for museum acquisitions, and the removal of acquisition budgets; that permanently adding new pieces to collections is heading towards a luxury not an essential part of a functioning museum. Museums are caught between conserving what they have, acquiring more of that type as defined in collecting policies to strengthen their collections and, as time moves on, recognising that what was once contemporary is now history. Acquiring more for something that has plenty is an anathema, it is never a priority, and therefore, actively acquiring new pieces for a local authority museum through purchase in particular needs a strong argument and often additional external funding.

External funding for purchases is the issue of the future. All of the main external funding sources are either public sector, charity, or lottery – they are not private finance. This may be a good thing. Do we really want to see the saved Staffordshire Hoard in the West Midlands, as sponsored by Cadbury's; a corporate sop from the new American owners, Kraft? Or a conserved Seahenge<sup>191</sup>, backed by Ronseal? But it is only at this level of public interest that such corporate support can be garnered. Would the private sector be so keen to support the acquisition of a clock for Colchester or Bury St Edmunds' famous clock collections? Unlikely. As for individuals, often the money is channelled through charitable trusts such as with the Sainsbury family or the Clore Duffield Foundation or they are seeking to donate items, or make donations to capital building projects

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<sup>191</sup> Now displayed at the Lynn Museum in King's Lynn, part of the Norfolk Museums and Archaeology Service.

that can bear their name rather than support the purchase of individual items.

The public and voluntary funding is not without problems. Differing and stringent terms and conditions attach to the funding, understandably, but do councillors understand fully the restrictions placed on a particular object if they accept grant funding? The author's experience is not. When artefacts are for a specific museum, which is closing, councillors do not see the problem with exhibiting them elsewhere, the funders might. For those with acquisition budgets, or historic funds, the opportunity is to purchase low cost items and move with the market on to E-bay. If there is a reluctance to engage with alternative means of acquisition it could place 20<sup>th</sup> century history collecting at threat as another generation of artefacts is slowly being sold off and placed beyond the grasp of the ordinary museum. Museums are no longer competing with a handful of rich collectors, but a multitude of fans interested in ephemera related to their particular interest.

There is also the question of whether museums have truly grasped the modern acquisition market and whether they are equipped to make acquisitions. The developing best practice given by the MLA and the MA has evolved to tackle the due diligence issues which are essential to prevent spoliation and illicit trade, but little effort has been expended on addressing the larger issue of under what legal constraints are the artefacts that already have been acquired by museums held. To understand the extent of the problem would require a massive research programme of all items in a museum's possession, which is prohibitively expensive and time consuming for councils to undertake when cutting budgets. Yet many councils must be contravening the terms of bequests, the knowledge of which has been lost in the midst of time and paperwork. To encourage new bequests you must be able to demonstrate that past gifts have been

cared for in a considerate way, though the conditions placed on some of these gifts do make it difficult in the modern world. It is only by understanding what you hold that you can encourage more philanthropy on a basis which does not fetter the use of the collection for the benefit of the public in the future by demonstrating the problems, and solutions for the past. Unfortunately, many councils have either adopted the ostrich position to hope that the problem will go away or not appear, or have wilfully ignored their duties and undermined the confidence in the system which engendered the policy backlash in the 1980s which the sector is now coming to terms with rebalancing.

Further complications ensue from the concept of accessioning. The idea that the proverbial man on the Clapham omnibus understands the difference between an accessioned item which should not be disposed of from a museum's collection and an object which has not been accessioned, and therefore can be used or disposed of in anyway that is seen fit appears slightly preposterous. It is an artificial construct to aide public confidence in museum handling of items, but as museums start to dispose of items from the accessioned collection in limited circumstances, has the idea become defunct? It is time for a classification system that identifies the status of the item held such as (a) permanently held not to be disposed, (b) acquired for display and/or study unlikely to be disposed, (c) acquired as an example of type can be traded up, and (d) acquired for handling collection. A policy framework, based on the legal principles under which any given item is held, could restore confidence and broker an honest relationship with the public who could be confident in the values of the museum.

Council governors of museums need to be investing in the future. To do this they need annual acquisition budgets or permanent acquisition funds. In the period of financial constraint, if the council is unable to

provide, then it should be supporting private philanthropic efforts to develop endowments or at least fundraise in order to purchase more material for the collections. It also should take steps to identify what it holds that does not conform to existing collecting policies and which is unlikely to form the basis of further collecting. So long as there are no legal bars, museums should begin to consider whether it is possible to sell in order to buy and if not, what it is going to do to re-home items surplus to requirements.

## **Chapter 5: deaccessioning, disposal and repatriation - legal and policy principles for local authority museums.**

*“Most people who visit or use museums, and the great majority of people who give or bequeath objects to them, have the legitimate expectation that museum collections are essentially permanent entities...In particular it is generally assumed by those who use museums that wishes and conditions attached to bequests, once accepted by the governing body of the benefiting institution, will be accepted.” (Warren, 1996 p5)*

### **The perpetuity principle**

This chapter proposes to investigate the legal and policy framework governing deaccessioning, disposal and repatriation and to assess whether museums are unduly fettered in their ability to manage their property in an effective manner for the benefit of the museum. This will cover gifts, purchases, bequests; the legal title and the right to sell. Grant funded purchases, their terms and conditions, will be evaluated within the long term context of viability and flexibility. The MLA accreditation scheme and the MA ethical standards will be investigated and the effect of the policy framework on legal rights will be established. The difficult issues of human remains and spoliated artefacts and the changes to disposal powers and policies these objects have caused also will be reviewed, assessing the developments against the wider legal and policy obligations.

As guardians of the nation's heritage museums are property rich but often cash poor. However, the real property and chattels in question are frequently the museum building and the artefacts exhibited within it. Most museums have built their collections over decades, even over a century. These artefacts have been obtained through a number of routes and are held on differing legal bases. Documentation in the museum sector has been poor throughout the years and many items have not been fully



catalogued, let alone the history and ownership or the terms of their acquisition completely documented. As discussed in the previous chapter, items may have been left on long-term loan, have conditions attached through bequests or may not have been given with good title. This has caused problems for museums and makes any potential disposal more difficult.

Over the past twenty or thirty years, the museum sector has changed. Documentation has become more important, provenance is essential, and items should not be bought, sold or transferred in any way without the correct paperwork. However, the legacy of the past, incomplete information and missing objects, still looms over the sector. Many institutions do not have the resources, time, people, or money to document their collections. An example of the impact this process has on a small local authority museum is Horsham Museum in West Sussex where a volunteer team of about fifty and the museum's staff have catalogued 70,000 items since 1988 and in 2005 estimated that it would take them at least another six years to finish (MA, 2005 p46).

The impact of not knowing what you have or the basis on which it is held provides an additional layer of problems to those posed by the legal and policy framework. Several cautionary tales have been told to the author. One example was that of a series of military photographs which were returned to a local authority museum by another institution, forty years after they were borrowed. The museum in question did not have records of owning them and it was owing to a minute documenting the loan found in the minute books of the predecessor authority that the museum could prove ownership. Another example was uncovered when the author was investigating a list of items bequeathed to a local authority museum in the 1920's and when the question was asked whether all the items were still in the museum's possession that it was ascertained that not only were some

of the descriptions in the will inaccurate but also that many of the items were missing.

Disposal remains a contentious area of museum operation. Such laissez-faire attitudes seen in previous decades towards collections resulted in an understandable swing in the Eighties and Nineties towards holding museum collections in perpetuity and disposal became an anathema<sup>192</sup>. This problem from within was dealt through heavy self-regulation by the museum world's professional body to ensure that the sector did not fall into disrepute. This was achieved at a price. The position has softened following the changes to the MA *Code of Ethics* published in 2008 but still the question of disposal causes professional divisions. Should museums be able to 'trade up' objects through the art market? Should parts of collections be sold to offset running costs or fund capital projects? Is the current law and policy the right framework for the current and future continuation of museums? What role does accessioning and deaccessioning have in facilitating changes? This chapter seeks to investigate the 'sharp end' of museum operations to give an answer when councillors are questioning how to best use museum 'assets'.

## **The concept of deaccessioning**

What is the difference between deaccessioning and disposal? In the context of a museum disposal is a method which is part of a wider policy notion called deaccessioning. When an object is received by a museum it is catalogued and a decision is made as to whether it is accessioned to the museum's collections. Accessioning signifies the status of the piece and dictates in policy terms what a museum can do with the artefact. For example, a piece destined for a handling collection which is likely over

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<sup>192</sup> Caused by a number of high profile cases documented by Manisty and Smith (2010, p11) and National Museums Directors' Conference (2003, pp10-13).

time to get damaged would not be accessioned to the museum's collections in the first place as there is a significant possibility that its function will result ultimately in the artefact's disposal, probably through its destruction<sup>193</sup>. To deaccession an object means that a museum is selecting something that had been identified as of a quality for research and display to place it elsewhere<sup>194</sup>. There are many reasons why a museum may wish to do this. It may have identified an object which has deteriorated from the original qualities with which it was accessioned. An item may no longer fit with the collection policy of the museum. Or, more controversially, its value may be the primary reason that deaccessioning is sought.

Deaccessioning does not necessarily mean that they wish to remove the object from their ownership. According to museum professionals, deaccessioning has a number of potential outcomes which have a preferential order depending on the context. Deaccessioning to a handling collection is a good example of where an object may remain within a museum's ownership but no longer forms part of the main collection. Even a disposal from the museum itself may not result in a change of ownership given the recommended order for such removals. As such, museums are encouraged to look for, "*...transfer by gift, exchange or loan<sup>195</sup> to another museum (or to another public institution such as a research or educational institution),*" before resorting to the sale of an object to a private collection or individual, or finally, the object's destruction (MA 2005, p49). However, the Concise Oxford English Dictionary has defined deaccessioning differently with the ninth edition stating, "*...(of a museum...) sell (a work),*"<sup>196</sup> and the eleventh edition expanding this to, "*officially remove (an item) from a museum or art gallery*

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<sup>193</sup> A handling collection contains items which can be handled by the public, and therefore, are subject to greater 'wear and tear' and greater risk of damage. Items in handling collection are not accessioned to the museum.

<sup>194</sup> See also White 1996, p375 noting that whilst it refers to removing an item from the collection it is commonly used to describe the sale of artefacts.

<sup>195</sup> Though you do not have to deaccession an item in order to loan it to another museum.

<sup>196</sup> Thompson 1995, p343.

*in order to sell it,"* (Manisty and Smith 2010, p1). Manisty and Smith note in their article that the return of human remains and spoliated artefacts also should be added to the range of outcomes from deaccessioning.

## **Legal permissibility or constraints on disposal**

Museums classify and record the items they hold under four headings: accessioned to the museum, loaned to the museum, handling collection, and items held which have an unknown status<sup>197</sup>. Accessioned items and those in the handling collection have provenance and documentation and are items to which the museum holds good title. Loans are those items that the museum is holding under terms of bailment, whether gratuitous or not. Artefacts of unknown status are those items which have poor documentation, little or no provenance and are of unidentified legal status. Should the museum wish to dispose of them, all three categories provide problems from a legal perspective. It is worth noting that accessioned items still may be bound by additional legal constraints.

The starting point for legal disposal by local authority museums is the statutory basis under which they can provide museum services. How the museum is constituted may also place constraints on its powers to dispose. This is followed by the law relating to the item in question which is usually determined by the terms of acquisition<sup>198</sup>. These aspects have been documented in the preceding chapters. Any terms and conditions placed on an artefact at the point of acquisition will affect whether or how it can be disposed of in the future.

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<sup>197</sup> On the basis that everything that is owned is accessioned, though this may not be the case and a fifth criteria of artefacts which are owned but not accessioned may be used.

<sup>198</sup> The limited situations where taxation may be an issue are beyond the scope of this thesis but have been covered by Manisty and Smith (2010, pp8-10).

## Every artefact has its price?

If a council wishes to sell an object that it has purchased, it will be giving certain guarantees. In a contract of sale there is an implied term that the seller has the right to sell the goods in question, *s.12(1) Sale of Goods Act 1979*, and that the goods are free from charges or encumbrances which are, “*not disclosed or known to the buyer before the contract is made,*” *s.12(2)(a)*. The exception is when either it can be inferred through the circumstances of the transaction or through the terms of the contract that the seller is transferring only such a title that, “*he or a third party may have,*” *s.12(3)*. Therefore, as a basic principle, a good faith buyer should receive good title to the item purchased. A local authority as a purchaser will benefit from the same implied terms from its own seller.

In English law, *s.21(1)* provides that where goods are sold by someone who is not the true owner, the buyer acquires no better title than the seller; the *nemo dat quod non habet* rule. Therefore it is crucial that if a museum plans to trade an item that it chooses one that it can prove that it owns. If the Council has not obtained good title through its purchase, it is not in a position to subsequently market that item unless one of the exceptions to the *nemo dat* rule, found in *s.21 Sale of Goods Act 1979*, applies<sup>199</sup>.

Generally, most items purchased by a museum will have good title and allow the museum as owner of the item to dispose of the artefact as it sees fit. Purchases will not necessarily have been made with documentation, such as a receipt, having been produced. Paperwork also can disappear over time owing to accidental destruction or negligent

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<sup>199</sup> If a museum has purchased an artefact from abroad, different rules may apply. Unless the contract states that it was made in accordance with English law, the legal system will be determined either by the jurisdiction named in the contract, or failing that the country in which the sale was made, the *lex situs* rule. Many civil law jurisdictions allow a good faith purchaser to acquire good title to items even when the seller did not have the title himself.

handling. In order to prove that an object has been made by a purchase the most preferable form of documentation is a formal receipt. However, inclusion of auction catalogue entries which tally with acquisition dates in systems or a minute in a council meeting authorising expenditure on a particular item also can help to pull together the provenance of an artefact. If an item has been purchased from an auction or a dealer it is likely that the museum will have purchased it with good title without legal fetter on its future disposal. If it has been the subject of a private sale from a private collection it may not have formal receipts from the seller but has the potential for a conditional sale from someone who may wish to ensure the long term public benefit of the object in question. The link between sale and public benefit is not an incompatible one. Sir Hans Sloane and Lord Elgin's collections were offered to the nation for public benefit but on the understanding that some of the outlay made in collecting these pieces would be reimbursed to the offeror.

### **Purchases made using grant funding**

The Purchase Grant fund and the Art Fund have been in existence over one hundred years, the National Heritage Memorial Fund for thirty and the HLF for over fifteen. Therefore, it is likely that many museums have objects which have been acquired using these schemes. Once an artefact is purchased using Purchase Grant funding, for example, a declaration form is sent back by the institution which sets out the terms and conditions which are attached to the grant and it forms a legally binding contract. If at any time a museum cannot meet the terms and conditions, the Purchase Grant Fund is permitted to recover any grants made.

One of the main terms and conditions is that a museum will not dispose of an object without prior approval by the Purchase Grant Fund. Any disposal should follow the guidelines set out in the museum's MLA

accreditation, given that only accredited museums can participate in the scheme<sup>200</sup>. If the item is sold, the Purchase Grant Fund will receive a percentage of the proceeds in proportion to percentage the grant formed of the purchase price. Purchase Grant pieces cannot be used as collateral for a loan. The Art Fund has a charitable scheme to support purchases. The grant terms and conditions are clear that, "*Art Fund-assisted Objects must not be sold, pledged, charged or otherwise disposed of without the prior written consent of the Art Fund which will only be granted in exceptional circumstances, and must not be treated as part of the general assets of the Beneficiary.*" If an organisation wishes to dispose of an item by any means it is required to give the Art Fund at least sixty days notice. If the Art Fund permits disposal by sale, it receives a percentage of the proceeds based on the proportion of the original grant (The Art Fund 2010).

The terms and conditions for each scheme available differ slightly. A cynical local authority would consider the potential future of any grant funded acquisition and ensure they have the best terms and conditions for their needs in case it comes to a sale in the future given that the schemes have slightly different criteria. This will not work in more expensive cases, such as the Staffordshire Hoard, which require a suite of match-funders with potentially differing terms and conditions. Whilst this funding is a positive thing enabling smaller museums to continue purchasing key pieces for their collections, councils should be clear about the commitment they are making by accepting such support.

## **The Birth of Eve**

The sale of *The Birth of Eve* by Solomon J Solomon by Ealing Council is a recent example of an *inter vivos* gift sale. The considerations set out in

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<sup>200</sup> This applies only to those grants made since the introduction of registration, now accreditation, in the mid-1990s. It is likely similar criteria applied prior to this point.

the Cabinet report have been described as a template for the consideration of issues for an organisation determined to sell, (Manisty and Smith 2010, p14). However, it is worth noting that the painting was not accessioned to a museum and formed part of the Borough Arts Collection of paintings which were displayed in public buildings throughout Ealing (Ealing 2009). The painting was a gift by the artist's widow and was documented in her letter of offer and minutes of the Council's acceptance. Its size meant that it was difficult to display and its subject matter did not fit with the Collection which was Ealing focused. In their preparation, the Council contacted three surviving descendents of Solomon, none of whom objected to the sale but who asked for an opportunity to view and photograph the painting before sale. The Council received £570,000 as proceeds from the auction and decided in 2011 that it should be spent on 'cultural facilities' within the Borough, specifically implementing the Library Strategy Action Plan following cuts to the library service<sup>201</sup>. This case has set a precedent for cultural items which can be disposed of, through the not uncommon situation of a local authority having both a museum and council collection.

## **Don't look a gift horse in the mouth**

### **The Cottesloe question**

There is one rule expounded in the *Cottesloe Report* of 1964 which has been accepted by the museum fraternity. Setting out a legal opinion, it has been repeated by Babbidge (1991a, p257 and 1991b, p32), Museums and Galleries Commission (1991, pp14-5), Warren (1996, p17), and the National Museums Directors' Conference (2003, pp17-18) to greater or lesser degrees of finesse.

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<sup>201</sup> This includes installing wi-fi in libraries and community centres, purchasing e-readers to encourage the use of electronic books, and providing Apple Macintoshes in libraries.



*“The basic principle upon which the law rests is that when private persons give property for public purposes the Crown undertakes to see that it is devoted to the purposes intended by the donor, and to no others. When a work of art is given to a museum or gallery for general exhibition, the public thereby acquires rights in the object concerned and those rights cannot be set aside. The authorities of the museum or gallery are not the owners of such an object in the ordinary sense of the word in they are merely responsible, under the authority of the courts, for carrying out the intentions of the donor. They cannot sell the object unless authorized to do so by the courts, or by the Charity Commissioners or the Ministry of Education on behalf of the courts, because they themselves have nothing to sell. If they attempt a sale in breach of trust, it is the function of the Attorney-General to enforce the trust and protect the rights of the public in the object by taking proceedings in the Chancery Division,”* (Cottesloe 1964, p9)

This concept has never been challenged in the courts and the principle was not being followed at the time by local authority museums at the time<sup>202</sup>. This was referred to in the Report when it stated that, *“[i]n the course of the necessary enquiries it has become clear to us that many of those responsible for the administration of these [major provincial museums and galleries] institutions do not fully appreciate the extent and force of the restrictions imposed by the law of charity...”* (Cottesloe 1964, pp8-9). Warren considered that the Cottesloe rule was simply an, *“...expression of principle and not the law...”* and implied that there was a difference between *“works of art”* on *“general exhibition”* and other parts of the collection (1996, p17). The former can be explained owing to the subject matter of the Report being art, the latter causes more problems given that many museums either rotate their exhibition pieces or have a high number in permanent storage.

As discussed in chapter three, *S.139 Local Government Act 1972* allows local authorities to accept gifts of property to enable them to discharge

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<sup>202</sup>The author's own review of one council's minute books for both the council and the museum committee from the 1890s to 1974 there were documented numerous sales of artefacts, often to raise money for specific developments at a museum or new acquisitions.

their functions or gifts designed to benefit the inhabitants of that local authority area. This section was quoted by Babbidge to support his hypothesis that in fact such gifts, given under the 1972 Act constituted trusts in themselves without the usual express or precatory words found in creation of trusts (Babbidge 1991a, p260). This does not stand scrutiny. Given the enactment of s.139 after the *Public Libraries and Museums Act 1964* and the Cottesloe Report of 1964, and the specific inclusion of how a local authority holds, uses, maintains and disposes of gifts, it could be argued that s.139 supersedes the discussion in Cottesloe in as far as it may apply to local authorities. Even Babbidge questioned whether trust relationship that he proposed existed for councils owing to the decision in *Re Endacott [1959]* which stated that local authorities are not defined enough to be considered charitable in character. This position is supported by Manisty and Smith (2010, p24). Therefore, the view as opined in the Cottesloe report that gifts to a museum create a charitable trust between institution and the people does not apply in respect of local authority museums and potentially has limitations in the charitable sphere.

### **A lasting legacy?**

Gifts made through bequests in wills can result in a number of different outcomes depending on the intentions of the donor and the drafting of the will. Straight gifts will give the donee good title to the item in question with no terms and conditions attached. If, however, the donor passes the object within the terms of a trust whereby the recipient is a trustee of the artefact rather than de facto owner, it alters considerably what can be done with the said item<sup>203</sup>. Local authorities and museums are not in themselves charities. However, local authorities can hold as trustees charitable property and museums can be held as charitable either through

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<sup>203</sup> Whilst charitable trusts can be constructed during a person's lifetime, it is those created through wills which, naturally, can create more problems.

their educational function or after the *Charities Act 2006* through their ability to develop arts, heritage, culture and science, s.2(2)(f). Council museums which have not been outsourced will not be charitable in themselves as they are not a separate organisation, though those which have been devolved to trusts are likely to have used a charitable model so that councillors remain in the board of trustees. It is the former that we are concerned with here.

When a gift is made through a testamentary disposition which seems to be beyond an absolute gift of ownership, the contextual words are crucial. Do the surrounding explanatory words construe a trust or just set out an expression of wishes? Each case is individual in its interpretation of whether a will, as constructed, creates an express trust through its use of words, as there is no requirement to follow a set legal construction to create a trust. If a trust is created, it could be a non-charitable purpose trust or a charitable trust.

In the case of *Re Denley [1968]* land was conveyed to trustees to maintain as a sports ground mainly for the employees of an identifiable company. This non-charitable purpose trust was distinguished from other such trusts because of its identifiable beneficiaries who had *locus standi* to enforce the trust, unlike with most purpose trusts which cannot be enforced owing to a lack of beneficiary. Whether a town or city could be held as a specific set of beneficiaries if an artefact was left to the inhabitants of Ambridge, for example, is unclear, as in *R v. District Auditor ex parte West Yorkshire Metropolitan County Council [1985]*, a trust benefiting the residents of West Yorkshire failed owing to the certainty rules, Lloyd LJ's judgement commented that the number of beneficiaries under this non-charitable purpose trust was too large to be ascertainable.

It is probable that any gift of objects in a trust form is likely to be a charitable trust. Prior to the *2006 Act* this was because a gift of artefacts for exhibition would meet the criteria of an educational charitable purpose, after the Act s.2(2)(f) applies. For charitable trusts in existence prior to 1 April 1974, s.210 *Local Government Act 1972* set out the transfer of existing charitable trusts and property held by councils on behalf of the inhabitants of a particular area to the new local authorities coming into existence. S.139 of the 1972 Act permits future legal acceptance of new gifts, including bequests and those constituted in trusts.

If a bequest to a local authority is held to be a charitable trust, its powers are those ascribed to it in the will. This would include the powers to both add to the collection and dispose from it. If a trust has not been constituted with particular powers, trustees may be able to vary the trust through the inherent jurisdiction permitted by the courts or through application to the Charities Commission under s.26 *Charities Act 1993*. Inherent jurisdiction would be of little help to local government trustees seeking to dispose of charitable property. The traditional powers of emergency, salvage, maintenance, and compromise either do not apply or do not cover such a situation, though the courts have the ultimate power to enable variation of trusts not settled by Act of Parliament under the *Variation of Trusts Act 1958*. S.74 *Charities Act 1993* as amended by the *2006 Act* sets out the powers for small and unincorporated charities. It allows set statutory variations for such charities in a number of circumstances, though Manisty and Smith believe that inserting a power to dispose would be beyond the scope of the provisions (2010, p21). It should be noted that even if there is a power to dispose, then the proceeds must be put towards the objects of the charity and could not be used for an alternative council service. The case studies below illustrate the issues in practice.

## Sea City, Southampton

Southampton City Council has been planning a new museum to focus on the city's links with RMS Titanic. In order to fund such capital developments, the council proposed selling works of art from the City Art Gallery<sup>204</sup>. This proposal was taken to the MA Ethics Committee in 2009 who believed that it was an extraordinary opportunity which had the potential to enhance long-term public benefit from the museums service subject to a number of reservations. Manisty and Smith use this as an example of what is acceptable use of acquisition originated funds for capital projects though the sale itself was hampered by outstanding legal issues not considered by the MA (2010, p32&34).

Southampton is a good example of how not to handle a potential disposal. The sales were proposed to meet the Council's match funding to an HLF grant. The Council wished to sell them to another museum or gallery. The Council announced the sales and a public consultation without informing either the HLF, or the MLA or the MA. The HLF response was clear – no grant funding for Southampton or any public purchaser if there was a sale<sup>205</sup>. The MA, whose ethics committee were inclined to accept the disposal if it was the last resort, were placed on the back foot when it was presented as the one and only option. The Council also was clear it had taken legal advice, but that advice was not specific enough when it came for the Council's Cabinet to choose which items to sell, for they were all subject to bequest of the City Gallery's founder.

The Council had been executor of the will and were trustees of the bequest, creating a potential conflict of interest with its aspirations as a local authority vis-à-vis that as a trustee. The items chosen were purchased

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<sup>204</sup> Namely Munnings' *After the Race* and either Rodin's *Crouching Woman* or *Eve*.

<sup>205</sup> At the beginning of 2011, following a meeting between the HLF and the MA, the MA reported that the HLF does not see match-funding for capital museum projects coming from the sale of collections (Steel 2011).

from an acquisition endowment that formed part of the bequest. Whilst disposal is allowed, under the direction of the Director of the National Gallery or someone nominated by him; the proceeds of a disposal had to be returned to the acquisitions fund. A new museum was not an eligible use of such resources. As Manisty and Smith note, the Tate, who had helped the Council under this clause in the past, had made a press statement warning against disposal, which left little room for manoeuvre by the Council. The Council has abandoned plans to sell the works and the new museum is due to open in 2012 with HLF support and the Council finding the money from elsewhere<sup>206</sup>.

### **Beer, banks and the bar**

One example of a statutory intervention in respect of a bequest is that of Felix Cobbold's<sup>207</sup> gifts to the then Ipswich Corporation. During his lifetime he gave Christchurch Mansion to the authority to form a museum. His will left an endowment for the purchase of pieces for the museum using the income, but no express provisions allowing permanent disposal, loans or alternative locations of display other than at the Mansion. Ipswich was granted powers under *s.147 Ipswich Corporation Act 1948* to permit transfer of ownership, alternative locations of display within the Corporation's control, and loans to other organisations (Manisty and Smith 2010, p16).

### **Gershom-Parkington's clocks**

An example of a bequest commonly thought to be a trust is that of Gershom-Parkington's clocks. The bequest was made by Frederick Gershom-Parkington<sup>208</sup> to the Town of Bury St Edmunds of his collection of

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<sup>206</sup> See Manisty and Smith 2010, pp40-46; HLF 2010; BBC News 2011b; and Southampton City Council 2011.

<sup>207</sup> Philanthropist who was an active part of the Cobbold brewing and banking dynasty. Called to the bar and Lincoln's Inn, MP for Stowmarket, farmer, he also was the Bursar at King's College Cambridge.

<sup>208</sup> Gershom Parkington was a musician and leader of the Gershom Parkington Quintet who performed during the 1930s on radio and in films. His bequest was in memory of his son, John Gershom Parkington, who was the cellist

clocks and watches, to be known as the John Gershom Parkington Memorial Collection. The bequest also contained a provision that after the death of his wife, Dora, that the remainder of the estate was to be divided equally between the Royal College of Musicians to set up a trust fund called the Gershom Parkington Fund and the Town of Bury St Edmunds to invest in the maintenance and further acquisition to the John Gershom Parkington Memorial Collection.

The original gift was made to the then Bury St Edmunds Borough Council, but the subsequent gift was completed following the death of his wife and local government reorganisation to St Edmundsbury Borough Council<sup>209</sup> as successors in title. It was thought by many in the town that as the town of Bury St Edmunds was unable to hold property in its own right, that the Council held the clock collection and the money for its upkeep on behalf of the town as an educational charitable trust. Others felt that a non-charitable purpose trust had been created as the bequest was made in memoriam of his son, John Gershom-Parkington, and in fact the terms of the bequest expressed a desire for it to be known as the John Gershom-Parkington Memorial Collection. To further complicate matters, the Council itself created a separate Gershom Parkington Memorial Trust charitable trust in the 1980s to further the work of the collection though this had subsequently become dormant.

The issue came to a head during a thorough but controversial review of the museum services and assets during 2005. Counsel's opinion was sought, and the Council was advised that the collection and financial bequest were an outright gift as no words in the will could expressly or imply a trust<sup>210</sup>. This altered significantly the position the Council had followed for

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in the Quintet and who predeceased him as he was killed during World War Two.

<sup>209</sup> The Council was formed from: the Borough of Bury St Edmunds, the Urban District of Haverhill, the Rural District of Thingoe, and the Rural District of Clare.

<sup>210</sup> In fact, there were three bequests to the Town of Bury St Edmunds in the will, the clocks, books on clocks, and money. The money was one half of an interest in the trust fund of his residuary estate, subject to a prior life

fifty years in dealing with the collection and allowed more freedom in designing the removal of the collection to two separate locations. Though it should be noted that the Council's actions in respect of the collection, however honourable, had given rise to the misconception that the items were held in trust and compounded that confusion amongst the public by creating the separate trust thereby creating additional problems that a clear understanding of the basis of the holdings and communication of that to the people of Bury St Edmunds would have circumvented.

### **Artefacts as assets: the satisfaction of debts**

So far we have looked at the application of the law on voluntary disposal of objects, but what happens when disposal is forced owing to satisfaction of debts? Whilst a local authority can be a debtor<sup>211</sup>, unlike a company, they cannot be liquidated or put into receivership. The majority of local authority museums are funded directly by a council as a service they provide<sup>212</sup>, and have the council as the governing body. There has been a trend over the past ten years of operating services through arms length organisations, often with grant funding from the authority. In the case of discretionary services like museums and leisure centres this means sending the service out to incorporated, sometimes charitable, trusts.

The primary model used has been one operating trust covering all assets, buildings, staff and collections. This model has problems if that trust faces financial difficulties as the collections become the assets and, therefore liable for sale in satisfaction of debts. Only artefacts which did

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interest. The other half had been left to the Musicians Society using words in direct contrast of the wording of the money left relating to the clocks.

<sup>211</sup> "Since 1994-95 the Chartered Institute of Public Finance and Accountancy (CIPFA) has required local authorities to account for their fixed assets and to draw up registers of all material fixed assets; including museum collections. This requirement only applies to the historical cost (net of any grants) of acquisition and not to donated material. It is also subject to CIPFA's definition of community assets, 'assets that the local authority intends to hold in perpetuity, that have no determinable useful life, and that may have restrictions on their disposal,' (Warren 1996, p25).

<sup>212</sup> Though some council museums have admission charges, these are there to offset the costs to the council tax payer rather than remove the direct funding completely.



not have a legal fetter on them could be transferred to a trust, unless that trust was constituted as a charitable trust to meet the purposes of a specific bequest and had been transferred under s.74 *Charities Act 1993*. The model advocated by the then Museum and Galleries Commission and the Museums Association was that museums should be operated under two separate trusts – one for the collections and one for the operation of the museum to prevent museum collections being seized in satisfaction of a debt. From a local authority perspective, this method of disposal is not to their advantage and poses serious questions about the creation of arms length management operations. The two cases on this area come from Stoke-on-Trent over fifteen years apart.

### **Recession: a salutary lesson**

The Chatterley Whitfield Mining Museum went into liquidation in 1993 and the collection, though not on the balance sheet, was used to satisfy the debts. However, the British Coal Collection was prevented from being part of the liquidation owing to their collections being at the museum on a trust basis (Warren, 1996 pp19-20). Whilst this may not at first glance appear to be relevant to a local authority, the growing trend to put services in arms length organisations indicates that this is an issue that needs to be addressed. Indeed, In Switzerland, a Swedish company to whom the Russian government were indebted, was initially granted a court order to seize fifty-five paintings from the Pushkin collection on loan in Switzerland<sup>213</sup>.

### **Pensions: a new twist in the tale**

The Wedgwood Museum Trust was forced to go into administration in 2010 because of its employees' participation in the Wedgwood Pension

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<sup>213</sup> The museums in Russia are nationally owned, however, the Swiss federal government overrode the decision of the court (DCMS 2006).

Scheme. The Museum had six employees in the fund, which covered 7,000 employees mainly from three Wedgwood companies which had become insolvent in 2009. The Museum had opened in 1906 and had taken ownership of the Wedgwood Collections in 1962 when they were handed over by Josiah Wedgwood and Sons (Atkinson, 2010). The collections are the main asset of the charitable trust. The pension scheme currently is arguing that these assets should be sold to meet the liabilities of the pension fund, for all employees, not simply that of the museum employees. This is being contested. At stake is the company Wedgwood collection which is extremely valuable, irreplaceable if dispersed and beyond the financial means of the public purse and the charitable sector if placed on the open market. The judgement in this case potentially will be significant for local authorities who have outsourced services or plan to outsource services and have a pension deficit. The Collection is one of only twenty in the United Kingdom selected for the UNESCO Memory of the World Register, similar to UNESCO's World Heritage Sites (Wedgwood Museum 2010).

## **The return of spoliated artefacts**

Spoliation is a noun of plunder which was particularly used in relation to the sack of neutral vessels in time of war. In law it means the destruction, mutilation or alteration of a document to prevent it being used as evidence. The word is now used to refer to the period of cultural removal by force from owners which characterised the period of 1933 to 1945 under the Nazi regime in Germany and conquered territories. Within the terms of this thesis it is solely used in this context<sup>214</sup>. It is worth noting at this point that whilst the original removals may have been made by officers of the Third Reich or through forced sales, after the fall of Hitler, plundering and purchases by Allied personnel, both systematic by the Red Army and

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<sup>214</sup> Though cases have been brought in respect of material appropriated during the Russian Revolution.

individual by western soldiers did occur and compounded the problem<sup>215</sup>. It is because of all these actions that artefacts of dubious provenance have found their way into English museums.

### **The history of international spoliation obligations**

The scope of the material devastation of the Nazi regime was enormous. Two trends can be discerned from their actions: the acquisition of certain types of property for monetary purposes, the war effort, or artistic Aryan values and the destruction or sale of those items deemed 'degenerate' i.e. non-Germanic. There was a concerted effort in particular to collect items of cultural value. This ranged from art works to jewellery, furniture, and other objects owned by the subjugated peoples. Though done under the aegis of the conquering Nazi party, many of the requisitions of cultural items were made for private gain rather than for German institutions. Various strategies were used to obtain property during the period. Requisition, duress, removal, and exchange for safe passage were the most popular means of procurement. Statutes and documents justified and legalised their behaviour and provide an insight into the methodology and extent of the problem.

The cultural policies of the Nazi administration had been noticed before 1945<sup>216</sup>. By the end of the war measures were in place to return the great numbers of displaced objects to their original location. The general terms of *The Declaration of the Allied Nations Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control* were designed to put neutral governments and good faith purchasers on notice that the seventeen signatory governments and the French National

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<sup>215</sup> Not all transactions during this period were spoliation and not all Allied personnel implicated in cases of spoliation were cognisant of that fact at the time. Confusion, misunderstanding, opportunity and good faith purchasers all appear in these cases.

<sup>216</sup> See Kowalski 1998, p38.

Committee would, “...do their utmost to defeat the methods of dispossession practiced by the governments with which they were at war against countries and peoples who have been so wantonly assaulted and despoiled.” The declaration covered all types of transfer of property regardless of, “...whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.” Kowalski describes this document as being “revolutionary” in international law and it has been used in many other treaties subsequently (1998, p41).

The Bretton Woods Conference<sup>217</sup> had provisions dealing with the restitution of looted property. This supported the Allies individual efforts to plan the return of cultural property. The conference asked neutral countries to undertake measures that would prevent looted property from leaving their control and stated that works of art should be secured after liberation ready for restitution. After the war ended the Paris Conference dealt with reparations and restitution<sup>218</sup>. It detailed the restitution of art to their owners, however, if the owners could not be identified the art would form part of the country’s general reparation claim (although there was a provision for restitution in kind for that which would not be returned). They also required that Allied experts on the ground executed the search and return plans<sup>219</sup>.

All of the aforementioned measures were implemented to a certain extent. However, criticism must be levelled at the provisions even when related to the actual situation. On the ground the position for the Allies was rather different. Facing the end of the war, the division of Germany into sectors, in the middle of a humanitarian crisis, and facing the true horrors of

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<sup>217</sup> The United Nations Monetary and Financial Conference was held at Bretton Woods on 1-22 July 1944.

<sup>218</sup> Eighteen members of the Allied countries met in Paris between 9 November to 21 December 1945 to decide Germany’s war reparations and divide the gold seized in Germany.

<sup>219</sup> Restitution was dealt with in other separate documents. Germany and Austria passed legislation on restitution. Other Axis countries began restitution after their surrender or the Armistices. The neutral and Allied States also passed individual and multi-lateral agreements. However, all had relatively short deadlines for claims.

the Holocaust, it is obvious that resources were stretched and a changing political landscape on the ground meant that many works of art slipped through the net. The mass movement and destruction of people and objects meant that owners, even if they or their descendants were alive, would be difficult to trace. The competing interests of the Russians with their trophy squads and the rest of the Allies guaranteed that injustice would be done. There also was a sense of urgency with many agreements and legislation passed having time limits for claims and a wish by all to return things to 'normal' quickly. Another problem was the scattered approach to tackling the problem with several layers of agreements working between different parties. Theoretically those documents that had been drawn up provided for a radical idea of restitution but, as has been seen, the reality has been very different.

### **Domestic legalities**

The ability to return spoliated material from public museums faced the same problems that have been outlined above in respect of general disposal of artefacts. In this respect, the national museums are governed by specific statutes, local authority museums are governed by the *Public Libraries and Museums Act 1964*, and many national museums additionally are charities along with outsourced local authority museum services. The legal position for a council is no different to any other type of disposal; it is free to dispose of artefacts not constrained by charitable trust provisions. If a charitable trust is in place, the *Charities Act 1993* as amended by the *Charities Act 2006* can provide some relief if the trust cannot divest itself of property because of the terms of the trust. Under s.27 the Charity Commission or the Attorney-General may permit a charity's trustees to divest themselves of charity property where they have no power to do so but feel that they have a moral obligation to do so. This was recognised in *Re Snowden [1970]* but it does not apply to a charitable museum which is

prevented from divesting itself of its property by statute, *HM Attorney-General v. Trustees of the British Museum [2005]*.

As the cases that have been before the Spoliation Panel<sup>220</sup> demonstrate; stating a case for the return of Holocaust art under moral obligation provisions is a complicated, evidential matter. For local authority museums, the establishment of a moral obligation could help if a situation arose where a request was made for an item within collections which were held in a charitable trust either through choice or as part of a charitable bequest. If the return of an object would be, “*expedient in the interests of the charity,*” under s.26 the Charity Commission can allow trustees to exercise their powers to return a piece whether or not it is within the trust's powers. The stigma of Holocaust art is such that it could be fitting and compassionate for a council in its guise as charitable trustees to be seen to take an honourable course of action rather than alienate local people or undermine the academic standing of its museum. Political pressure is important.

### **Danse Macabre: the law and human remains**

Whilst it is possible for a local authority museum to have spoliated art amongst its collections, for the smaller museums human remains may be a more pertinent issue. The collection of human remains and their public display has been commonplace over the past two hundred years and the moral dimension, such as whether this is a culturally acceptable practice, has begun to be questioned only in recent years<sup>221</sup>.

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<sup>220</sup> Discussed below.

<sup>221</sup> The issue of reburial of human remains found on archaeological digs after 2008 is beyond the scope of this thesis.

## The body as property

When discussing the legal position of human remains in museum collections, it is important to state the general legal rule that there is no property in a body, parts of a body or other human remains<sup>222</sup>. The exception to this rule was set down in *Doodeward v. Spence [1908]*<sup>223</sup> which specified the criteria for creating possessory rights over a body or human remains. Lawful work or skill must have been applied to the remains. The body or remains has to have a differentiating attribute after the work has been done. The title is good against everyone except the person<sup>224</sup>. This concept was developed in *Dobson v. North Tyneside Health Authority [1996]* where it was held that whilst preservation would give rights in property, it would be for teaching or exhibition purposes.

The *Human Tissue Act 2004* now regulates the handling of human tissue and remains. Under this Act consent is required to hold, s.1(1)(a), and publicly display human tissue, s.1(1)(f). Licences are required for storage and public access of human remains, s.16(2)(d), (e)(i)&(ii), (f)(i) &(ii). The

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<sup>222</sup> *Sharp [1857]* was the first case to state the no property rule, basing the judgement on *Hayne's Case [1614]* where winding sheets which bound the corpses and which were dug up and stolen were held to be the property of the owners of the sheets not the bodies. This was supported in *William v. Williams [1882]* where it was stated that executors have a limited possessory right to bury a body, as there is no property in a body. *Dobson v. North Tyneside Health Authority [1996]* reaffirmed this principle in respect of a brain removed during an autopsy and preserved in paraffin. The rule was upheld by *R v. Kelly [1998]* in deciding whether preserved body parts from the Royal College of Surgeons, used by an artist to create casts to display in an art gallery, constituted property. The rule was distinguished in *Jonathan Yearworth v. North Bristol NHS Trust [2009]* which related to the destruction of sperm samples stored by cancer patients prior to undergoing chemotherapy which might render them infertile. Lord Judge CJ sitting in the Court of Appeal noted that the law had developed in relation to corpses or parts of bodies but not in respect of parts or products of a living body. In deciding that the sperm had the capacity to be property, the court chose not to base the judgement on the exception to the no-property rule established in the Australian case of *Doodeward v. Spence [1908]* as the new law would be founded on an exception to the rule relating to no ownership of a human corpse on the basis that work or skill had been applied to it, which was tenuous in the case of sperm frozen by liquid nitrogen. See also Palmer 2009, pp1524-6.

<sup>223</sup> In this case a two-headed foetus has been preserved and put on display.

<sup>224</sup> Not such a fanciful legal construction when one considers the Mark Quinn sculpture of his head entitled *Self*, made in his own frozen blood, owned by Charles Saatchi (BBC News 2002). It is unclear, given the ruling in *Dobson [1996]* whether freezing is enough to demonstrate lawful work and skill. Blood has the capacity to become property. In the case of *R v. Rothery [1976]* a man pleaded guilty to stealing a specimen of his own blood from Police. The decision in *Yearworth v. North Bristol NHS Trust [2009]* where the sperm was held as property to be used for the creator's benefit, its use and storage governed by the *Human Fertilisation and Embryology Act 1990*, sets an interesting precedent as whilst it is clear that Quinn's blood may have the capacity of property, whether that can be sold on to another person is unclear – *Yearworth* would need to be distinguished on the public policy grounds which is legislated for, that you cannot buy sperm to create a child. This question does not appear to have arisen when Saatchi bought the work in 1991 for an alleged £13,000 or sold it in 2005 for £1.5 million, after rumours of its demise in a kitchen refit for Saatchi's wife, Nigella Lawson, proved to be exaggerated (Akbar 2005).

exceptions to this are where the person in question died before the Act came into force and where one hundred years have elapsed since death<sup>225</sup>. It also seeks to stem the trade in human tissue, though an exemption is made for s.32(9)(c), “material which is the subject of property because of an application of human skill.”

The 2004 Act clearly makes the distinction between human remains and artefacts containing human remains. It is unlikely that any property vests in the skeletons or partial human remains that many museums hold owing to archaeological investigations and for historical reasons. The Act supports this provision in curtailing the potential trade in these remains<sup>226</sup>. Museum collections of human remains contain both those items which attain the status of ownership and those artefacts to which the no-property rule applies. For those falling within the no-property rule, a museum could not legally sell, loan or gift the material. However, possession of the artefacts could be transferred to another museum on the understanding that it has no legal basis or remedies for enforcement of the terms under which the transfer was made<sup>227</sup>. The extension of this is that if the human remains were acquired through a mechanism which prohibited disposal of the artefacts transferred, this condition could not apply to the human remains as they are not property thus a local authority governing body would not be restricted from returning remains subject to a request (Palmer 2009, p1517 footnote 92).

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<sup>225</sup> S.1(5)(b) public display of a body, s.1(6)(c) public display of material from a body and s.16(4)(a)&(b) relates to a body.

<sup>226</sup> The *Human Tissue Act 2004* was drafted to cover both hospital, educational and museum use of human remains, therefore, the provisions are wider than just skeletons but would also cover body parts.

<sup>227</sup> Though Palmer notes that if a museum refused to return human remains bailed to it to which the no-property rule applied, then a claim for breach of contract may provide some relief so long as it did not rest on the material being property (2009, p1518 footnote 96).



## **A legal time bomb awaiting a good faith purchaser?**

Missing items from a museum's accession list or bequest can be hiding a disposal. In an example that the author became aware of, museum staff, some of whom had worked there for decades, began systematically looking for missing items from one bequest. This was not a simple task as they had problems with documentation and became reliant on conversations with former employees, council meeting minutes and the pages of auction catalogues in their detective work. This was compounded by the deliberate destruction of many of the museum's records by a curator before he retired in the 1970's.

The museum found that Etruscan and Egyptian items were disposed of when the collections policy changed in the 1930s to the then county boundary. Manchester Museum was identified, anecdotally, as having obtained the Egyptian material, the fate of the rest remains unknown. In the 1950s a parchment calendar was exchanged for furniture held by another museum, fortunately this exchange was still documented. The 1960s saw the theft of the coins and medals. In the 1980s one member of the current museum staff remembered being at a meeting with the then Borough Treasurer and the Borough Curator where the Borough Treasurer confirmed the sale in the 1970s of two items from the bequest in order to fund an extension to the museum; the Treasurer remarked, with hindsight, that the items should not have been sold. Finally, another item, which was thought to be an ivory carving, was sold through auction in 1968 actually turned out subsequently to be a rare 14<sup>th</sup> century ivory French mirror back. The museum unfortunately is not alone in its findings. However, public museums are in an inevitable position, if it admits the past mistakes a local, if not national, media storm will erupt, but if it stays silent, who will ever ask about a bequest nobody remembers?

## **Policy controls on deaccessioning and disposal**

### **What has the law to do with ethics?**

The Museums Association had maintained the same position on disposal of artefacts from museums for the past thirty years until a review in 2007 altered the presumption against disposal orthodoxy. Prior to the 2008 *Code of Ethics*, disposal as a concept was actively discouraged through procedure and certainly not for value<sup>228</sup>. In fact, there was a school of thought that gifts and bequests should remain where they were donated regardless of whether the museum is legally able to dispose of them, along with items purchased by the museum itself with or without grant funding. Transfers of artefacts and title without benefit can cause problems as the transfers are gifts because of the lack of consideration to make an enforceable contract. Whilst this may not seem a significant problem, it leaves institutions open to liabilities deriving from the non-performance of an agreement to transfer, or more probable, insurance issues during transfer. In contrast deaccessioning is seen as part of effective collections management.

For the MA, collections are held by museums on trust on behalf of the public with the intention that the collections have a long-term future in the public domain<sup>229</sup>. The conflict between the law and the concept of museums as seen by the industry is dealt with up front. Whilst museums may be the legal owners of historical collections, they are the “*ethical*

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<sup>228</sup> The position was that a museum should adopt a collections policy under which it will operate. This policy should provide a clear strategic framework, which sets out the policy on acquisition, the position regarding any part of the collections which fall outside the scope of active acquisition and the basis under which return of objects to their rightful owner will be considered. Such a policy needed to be drawn up and adopted before any disposal process can be considered. The presumption against disposal narrowed down the items that potentially fell within the purview of the mechanism. Any area of active collecting, unless the item has been damaged beyond repair, was not for disposal. Once disposal was an option under the MA guidelines and then there was the presumption towards retaining items in the public domain and legally transferring title to items without receiving remuneration.

<sup>229</sup> Cf. MLA 2004, p6.

guardians” (MA 2002, p9 and 2008, p24 1) and require the consent of the public to act beyond the scope of perpetual owners. In fact, museums should, “...[a]void behaviour that could be construed as asserting personal ownership or control of collections or any part of them,” (MA 2002, p9 and 2008, p10 1.3). This can be contrasted with the American Association of Museum’s Code of Ethics which states, “...disposal of collections through sale, trade, or research activities is solely for the advancement of the museum’s mission. Proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum’s discipline, but in no event shall they be used for anything other than acquisition or direct care of collections,” (2000, p3).

The MLA’s Accreditation Standard was published in 2004 and begins with a presumption against disposal, “By definition, the museum has a long-term purpose and should possess (or intend to acquire) permanent collections in relation to its stated objectives. The governing body accepts the principle that, except for sound curatorial reasons, there is a strong presumption against the disposal of any items in the museum’s collection,” (MLA 2004, p49). A museum should ensure that the aim of the disposal is not to generate funds (p49 d). They should then establish that the museum holds a good legal title to be able to dispose of an artefact (p49 b). Any conditions placed on the object through a joint purchase with grant funding should be followed (p49 c)<sup>230</sup>. The decision to dispose has to be taken by the museum’s governing body on the advice of curatorial staff (p49 f). Decisions should never be made by museum staff. The artefact should be offered to other accredited institutions first (p49 g). Any money received through a disposal primarily should be applied to purchase further items for the collections, although care of existing collections may be permitted (p49 e).

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<sup>230</sup> The implications of accepting grant funding for a purchase have been set out in the preceding chapter.

As part of meeting the *Accreditation Standard*, museums have to adopt an acquisition and disposal policy based on a stipulated version provided by the MLA. This model policy was updated most recently in 2010 and reflects the changes made in the 2008 MA *Code of Ethics*, and conflicts with the *Accreditation Standard* as drafted<sup>231</sup>. The new policy offers two options to accredited museums, either to rule out financially motivated disposals (2010, p5 f) or to set out the basis upon which financially driven discarding could be undertaken (pp5-6 f-m)<sup>232</sup>. Whilst the MLA takes the three tests for financial disposal directly from the MA *Code of Ethics*, it chose not to include the final two on consultation with sector organisations and, more significantly, that the item is outside of the museums core collection as defined in the policy (MA 2008a, p17 6.14 and MLA 2010, p5 f). This has promulgated the situation that an organisation which is both accredited and a member of the MA potentially can be in breach of one and not the other through its actions (see also Manisty and Smith p30).

The position on disposal has been tempered by the publication of the MA *Disposal Toolkit*, also in 2008. This toolkit was drafted partly in response to the position the Watts Gallery found itself in relation to the sale of paintings from its non-core collection. It was described as a major change of policy and the MA itself stated that disposal should become, “*a routine part of collections development*,” (BBC, 2008). The toolkit reiterates the position of the updated *Code of Ethics*. The assumption that artefacts identified for disposal will remain in the public domain forms the core of the document. The interaction of ethics and the law in the document is significant. It states that the MA *Code of Ethics* supports responsible disposal as long as it meets legal requirements. This qualifies a museum’s

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<sup>231</sup> An updated Accreditation Standard is due to be launched by the Arts Council in October 2011 once they have assumed the function of Accreditation.

<sup>232</sup> A separate section is included for whether or not the museum is prepared to deaccession by way of exchange (p6 n-r).

ability to dispose in the view of the MA. Acting responsibly includes the intention to keep the item within the public domain. The legal restrictions mentioned are confined to statutory prohibitions, charity legislation and conditions attached to gifts and bequests.

The guidance sets out the types of items that can be identified by museums for disposal. An interesting inclusion is items identified for sale in order to purchase a better example of the same artefact. This is known in the trade as 'trading up' and is, according to the MA, not common practice in the United Kingdom. Whilst not explicitly condemning the practice, the words used caution museums to think about the consequences of disposing of such an item which is identified for inclusion within your museum, as you wish to replace it. Manisty and Smith in their analysis of the Toolkit, conclude that of the four American practices<sup>233</sup>, they believe only strategic sales, which do not undermine a museum's purpose, are permissible under the guidance (2010, p31)<sup>234</sup>. This begs the question of whether a conflict will arise once the Arts Council takes over the MLA functions given that it proposed selling to acquire from its modern and contemporary art collection (BBC News 2011a)<sup>235</sup>.

The guidance includes a wider discussion on disposing of items to generate income. This is described as, "*in all but the most exceptional circumstances...unacceptable.*" It sets out a five point test to assess whether such a disposal is exceptional which includes the object falling outside of the collecting policy and seeking alternative sources of funding.

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<sup>233</sup> (1) selling a part of the collection to found or enhance another part, (2) selling specific artefacts to improve the collection without changing the museum's raison d'être, (3) 'trading up', and (4) sale of items from one part of the collection to purchase in another area.

<sup>234</sup> Trading up in limited circumstances was supported by the House of Commons Select Committee on Culture, Media and Sport in 2007 (p56).

<sup>235</sup> The recommendations of the Culture, Media and Sport Select Committee in 2010 following their investigation into the funding of arts and heritage included that the Arts Council should reassess the non-disposal policy with the objectives that not only could more works be bought, but also it could underwrite the costs of the loans to other organisations.

The MA states that this course of actions involves a 'high level of risk' though does not elaborate as to what that risk is.

The consequences of disposal decisions which are considered unacceptable are set out in chapter three of the toolkit. It is considered that disposals, such as those made for financial reasons, can attract damage to the public trust in all museums, negative perceptions of museums along with adverse publicity, the loss of MLA accreditation and expulsion from the MA, if the museum or its governing body is a member. The ultimate sanction, as discussed earlier is the ability for the MA to affect an organisation's ability to attract external funding, through the inclusion of principles drafted by the MA in funders' agreements. This does not mean that such decisions cannot be made, as they are permitted in the *Code of Ethics*, but that the Toolkit urges caution in proceeding down such a course.

Whilst the principle of disposal is accepted in limited terms, often mirroring that of the *British Museum Act 1963* in respect of duplicate and unfit items, there continues to be a preference for transfer by free gift to other organisations as it is part of the "longstanding tradition" of museums. The guidance states that unless a disposal is going directly to another accredited museum or is being returned or repatriated then the disposal should be published on the MA website. The guidance cautions the option of returning a gift to its donor, recommending that this option should be considered only once other museums have been given the opportunity to accept the item. The guidance recognises that some museums have a legal duty to sell rather than give away artefacts under charity law, or may wish to sell because it was purchased from a museum's acquisition budget. If such a sale within the public domain is not available, the guidance suggests looking at reducing the price or offering the object on long-term loan.

The question that this poses is whether an object bought by a museum from its own acquisition budget has a greater right to be sold for value than one that was given to the institution or exchanged with another institution for an item that was in its collections? It gets to the heart of the issue – should museums sell items in order to replenish their acquisition budgets? The MA has the difficulty of exhorting the ideal – sale to a domestic public sector or charitable buyer with the reality of potentially an international buyer or private sector purchaser, leaving it open to charges of inconsistency. Whilst it is recognised that the national museums have greater acquisition budgets than local authority museum, which can range upwards from non-existent, given the constraints placed on public sector organisations, be they centrally funded, in local government or in the education sector must mean that the opportunities for any public sector purchases must be limited except in the most exceptional of circumstances. What is clear is that the change in Ethics Guidance and the publication of the Toolkit has not enabled more unwanted museum artefacts into public salerooms; there has been no rush to sale as even as the option of last resort. However, there has been a weakening against the prevailing presumption against disposal as financial constraints have pushed some local authorities to question the reigning orthodoxy.

## **The practical application of MA and MLA guidance**

Four cases straddling the change in the *Code of Ethics* provide a series of precedents for acceptable behaviour. They provide an ethical benchmark for any local authority considering disposal of artefacts for market value.

## The Bury Lowry

When MA institutional member, Bury Metropolitan Borough Council, decided in 2006 to sell one of its L. S. Lowry paintings worth at least £50,000 to fund other, non-heritage<sup>236</sup>, services the MA took disciplinary action against the Council. The authority was lambasted in an article in the MA's *Museums Journal* and it was suggested that it would lose its accredited status, though in the case of the only previous expulsion<sup>237</sup> for the same reason in 1991 membership had subsequently been reinstated (Steel 2006). Momentum in the press regarding the story developed in September and October 2006 after the date of the sale at Christie's on 17<sup>th</sup> November was announced. The MA publicly stated that disciplinary proceedings were in place if the sale went ahead and that expulsion was a punishment option open to the panel. The Council went ahead with the sale and the painting sold for £1.25 million (BBC 2006).

The action resulted in the Council being barred from becoming members of the MA again after it resigned its membership before the disciplinary tribunal could be held. Bury also lost their accreditation from the MLA<sup>238</sup>. These punitive measures, with the MLA's potentially being harsher owing to the financial effect of not being able to access grants compared to the approbation delivered by the MA, were considered under the old *Code of Ethics*. It is unlikely that Bury Council could have made the case for disposal under the new *Code of Ethics*. Long-term sustainability applies to the museum and its service not to the council as a whole and the suite of services it provides.

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<sup>236</sup> Though it should be noted that the disposal of an artefact for value to fund the museum itself is prohibited by the MA.

<sup>237</sup> The only expulsion since the MA was founded in 1889 was Derbyshire County Council who sold a collection of paintings.

<sup>238</sup> The MLA was quoted in a BBC article as stating that the Council had not met the standards for disposal that were required (BBC News 2006).



## Bolton's changing priorities

The difference between the MA guidance and MLA accreditation was evidenced following a Bolton Council announcement in 2007 that they were seeking to dispose of artefacts from within their collections. They stated that they planned to follow the MLA guidance, and by abiding by the first refusal policy to other museums, they would be able to dispose of unwanted artefacts from store to other museums services and make £300,000 from items in the museum stores which were not required by other museums to help fund recurring savings required in the Adult Services Department.

Even though this was not in contravention of MLA accreditation, it resulted in a press release from the MA quoting Caitlin Griffiths, the MA's adviser on professional issues, who stated that, "*[w]e are very pleased that the council has listened to the advice of its museum professionals and said it will not do anything to imperil its status in the museum world....We are naturally concerned about reports coming out of Bolton about the Council's decision to look into generating funds by selling off items in the Borough's museum collection. However, we are hoping to be able to discuss this with Bolton as soon as possible,*" (MA, 2007b). The question it left was that had the outcome of the proposal have been to add recurring revenue to a museum service rather than to create a capital pool to fund existing general revenue budgets to offset raises in Council Tax, would the MA have had a different view<sup>239</sup>?

In autumn 2010 it published new proposals to sell items from its collections to fund new storage space for the museum's collections. It

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<sup>239</sup> St Edmundsbury Borough Council faced the same criticisms when a building housing a museum was sold in order to generate capital receipts to ensure revenue reductions, alongside capital investment at other museum sites. As this was not a breach of MLA guidelines, nor were the Council members of the MA, no direct action could be or was taken. It is questionable whether the closure of a museum and the relocation of artefacts for display elsewhere when a council has more than one museum is a breach of MA guidance.

excluded from the remit of the review for disposal its core collections, and those items which had been donated or bought with grants or other external funding. The MA proposed to refer the sale to its Ethics Committee to see if it met the criteria set out in the *Code of Ethics*, but noted that since the Code was changed in 2007 only two sales had been approved – the Watts Gallery and the Royal Cornwall Museum (Harris 2010). Following consideration, the MA approved the sale for the long-term benefit of the collections, which the Council said it had no capital funds for, on the basis that one painting was removed from sale as it did fall within the core collection (Bolton Council 2011 and MA 2011).

### **Bondage and the Sea Maiden**

The Royal Cornwall Museum is an independent museum run by the Royal Cornwall Institute. The museum sought to sell two paintings in order to contribute £3 million to an endowment fund, the interest from which would go towards the ongoing maintenance of the remaining collections, matching funding their earned income and grant from Cornwall County Council. The Royal Institution of Cornwall consulted with its members, the general public and took the proposal to the MA Ethics Committee. It secured agreement from the descendents of the original donors of the works. 60% of the museum's £1 million annual running costs were provided by a sole public sector source which was due to reduce in March 2011 because of spending cuts. The approved sale, on the basis that it was a one-off sale from outside the core collection, of *Bondage* by Ernest Normand and *Sea Maiden* by Herbert Draper raised £2.1 million. The museum plans to raise a £10 million endowment by 2018 (MA 2010a). Georgia Butters from the museum remarked to the MA Annual Conference in 2010 that the public accepted the decision as being better than the museum closing and that the outcry was from the museums sector (MA 2010b).

## **Heritage at Risk**

The Watts Gallery is an independent museum set up by the artists G F and Mary Watts. Housed in a Grade II\* Arts and Crafts building, purpose-built for the Watts by local architect Christopher Hatton Turnor, it was placed on the English Heritage 'At Risk' Register in 2005. In 2006 it came second in the BBC programme Restoration Village and was awarded a £4.9 million HLF grant towards an £11 million restoration to make the museum viable for another hundred years (Watts Gallery 2011, HLF 2011). The proposed disposal of two non-core paintings in the collection for approximately £1 million was not to match fund the building project but to ensure the long term viability of remainder of the collection. They had the misfortune to bring this proposal at the same time Bury was planning to dispose of the Lowry and were lambasted in the professional press even though they were not in breach of their MLA accreditation and the case was being reviewed by the MA Ethics Committee (MA 2006). The Watts case failed under the 2002 Code of Ethics, but the issues it raised were behind the review of the Code in 2007. The case was brought before the MA Ethics Committee again after the new Code was published in 2008 and was agreed. The sale eventually raised £1.5 million.

### **A licence to sell?**

These cases do not amount to a presumption in favour of disposal for value. In fact, local authorities seem to have a higher burden than charities to establish financial need. Should council museums or those recently outsourced to charitable trusts which remain primarily funded by the local authority<sup>240</sup> be held to a different standard? Where local authorities have chosen to provide museum services, they are providing

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<sup>240</sup> Identifying a difference between those charitable trusts created by councils to outsource their museum services and independent charitable museums which receive local authority funding.

them as part of a portfolio of services which can gain revenue from a variety of sources, be it central Government, Council Tax, investments, sales and charges. It is their duty to balance that portfolio for the benefit of their inhabitants; therefore it is right that they are held to a higher burden of proof if they are asking for help, be it for sales through the MA Code of Ethics or support from the Heritage Lottery Fund. Especially since evidence from the Bury Lowry or the Ealing *Birth of Eve* suggests that such sales may be misappropriated, though it could be argued that this is a council balancing their portfolio in favour of other services. To justify special treatment protecting core collections there is scope for further work between councils, MLA / Arts Council and MA to set some realistic expectations for disposals.

### **A right of return?**

During the aforementioned review undertaken by St Edmundsbury Borough Council which brought the Gershon-Parkington issue to light, the Council also found that it was faced with a number of requests by donors to the museum requesting 'their' items back in protest at the changes proposed by the Council. As the service was due to renew its acquisition and disposal policy required under the then MLA Registration it asked potential requestors to wait until the full process of the Council was followed and a decision had been made which could then be applied to the cases in question. Some of the items requested did, in fact, fall outside of the Council's collecting policy and it anticipated that it would be able to satisfy these requests if the donors still wanted the items returned after the furore died down.

Legally, good title in these artefacts rested with the Council as the donors had not made these conditions when originally donating the items in question. What the donors were objecting to was a political policy

decision which they disagreed with and were trying to exert moral rights on the museum to return the items. However, unlike cases of spoliated art, the proposals of the Council were about the number of museums it had and how much of the contents could be made publicly available, not whether items in the collection had been looted or put up for sale. They also were not in contravention of MLA or MA guidance. Ethically, the Council behaved correctly, but authorities are placed in an invidious position by donors or their descendents when they try and revoke outright gifts as a form of political protest.

## **The moral obligations of spoliation**

The position in the United Kingdom has been developed not by legislation but by guidance. Therefore, it is important to document the policy development first to see how it formed the legislation that is in place today. The Spoliation Panel was created in April 2000 by the DCMS. Its purpose is to assist the resolution of claims made against items in United Kingdom national collections which are alleged to have been removed during the Nazi regime<sup>241</sup>. It advises the claimants, the institution, and the government as to the possible actions that may be taken by the parties. The Panel has adjudicated on eleven cases.

*Restitution of Objects Spoliated During the Nazi-Era: A Consultation Document* was published by the Department of Culture Media and Sport in July 2006. The basis of the document was the proposal made by the Spoliation Advisory Panel, based on the first five cases they heard, that without a change in the law, these cases could not be effectively dealt with through existing law and the Panel alone. The consultation document set out a number of legislative proposals and asked questions based on

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<sup>241</sup> It also can investigate claims against private individuals if the claim has been jointly referred to the Panel by both parties (DCMS 2009).

each one. It contained a partial regulatory impact assessment setting out both a risk analysis of the proposals and a cost benefit analysis. It also documented the effect of the options on existing situations, including the Beneventan missal in the British Library. The consultation response, published in 2007 (DCMS 2007), found support in the sector for time limited legislative change solely in respect of spoliation claims relating to the Nazi period.

### **Meeting accreditation and trade association expectations**

The template Acquisition and Disposal Policy provided for accredited museums includes model clauses on spoliation for national and non-national museums. Non-national museums should, “...use the statement of principles ‘Spoliation of Works of Art during the Nazi, Holocaust and World War II period’, issued for non-national museums in 1999 by the Museums and Galleries Commission,” (MLA 2010, p4) These guidelines initiated the research, particularly into the non-national Designated collections, of artefacts acquired during or after the 1933 to 1945 period. Those museums which have undertaken a search publish the details of their methodology and works identified with incomplete provenance on a Government website supported by the MLA and the DCMS relating to the trade of cultural objects entitled *Cultural Property Advice*<sup>242</sup>.

Spoliation is not specifically covered by the MA *Code of Ethics* as it is a collection of broader principles. However, it is covered by the sections relating to the acquisition of artefacts and to protecting the interests of owners. The MA website does provide detailed information on the history of spoliation and the work of the Spoliation Panel but does not add to what is a comprehensive policy provision by government. The MA published a statement in 2006 on the restitution of cultural property but deliberately

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<sup>242</sup> [www.culturalpropertyadvice.gov.uk](http://www.culturalpropertyadvice.gov.uk).

chose to address the wider issues of the restitution of property removed illegally; an issue that many museum professionals feel is not dealt with in the same way as specific spoliation.

### **Case studies from the Spoliation Panel**

In the eleven cases that the Spoliation Panel has reviewed only one related to a local authority museum, in Scotland. The first case it assisted in was regarding *View of Hampton Court Palace* by Jan Griffier the Elder which had been in the Tate Gallery (Hurst 2001) since 1961. Its return had been requested in 1999 by the three children of the German Jewish owner who had been shot in 1937. It apparently had been sold by their mother to ward off starvation during the war. The recommendation of the Spoliation Panel was accepted by the Government. An *ex gratia* payment was made to the family in respect of their loss of ownership and the public benefit gained between 1961 and 2001 of £125,000. Alan Howarth, the then Arts Minister, stressed the fact that the decision did not set a precedent and each case brought before the Panel would be decided on its own merits<sup>243</sup>.

### **A still life formerly attributed to Jean-Baptiste-Siméon Chardin**

The second case before the Panel related to Glasgow City Council (Hurst 2004). The picture in question formed part of the significant Burrell Collection which was given to the Council's predecessor authority in 1944. The claimants were heirs of five Jewish shareholders of an art gallery in Munich who said that the painting was subject to a forced sale in 1936. Glasgow City Council's title was secure under the *Prescription and Limitation (Scotland) Act 1973*.

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<sup>243</sup> See Palmer 2000, p15 and DCMS 2001.

The claimants stated that the forced sale through auction was to meet an extortionate tax demand levied on their ancestors before they would be allowed to leave the country. As such it fell within the terms of *British Military Law No 59* as, whilst they were paid a fair price for the painting, they were not free to dispose of the proceeds how they saw fit. The respondents in return did not dispute the basis of the claim but were bound by the terms of the gift from returning the picture<sup>244</sup> and an ex gratia payment was thought to be ultra vires for a local authority. The referral to the Panel was for an ex gratia payment by central Government.

The Panel concluded that a financial award was not appropriate in this particular case<sup>245</sup>. It focused its efforts on whether the terms of the Burrell donation prevented restitution under Scottish law as it had expressly prevented sale, donation and exchange or whether the Burrell Estate could waive the stipulation in the memorandum of agreement. The Panel held that the painting should be restituted to the claimants using one of the mechanisms identified above.

### **A difficult balance**

Spoilation cases are rare and almost unheard of in local authority museums. However, the fact remains that an extraordinary amount of valuables were misappropriated by the Nazis between 1933 and 1945 which made their way into public and private collections. The statistical probability that there is spoliated material in local authority museums is quite high. Every museum has a duty to research their collections and publicise those artefacts whose provenance is dubious to ensure that the

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<sup>244</sup> Hurst 2004, p8 says that the memorandum of agreement that existed between the donors and the Corporation of the City of Glasgow states that, "...the donees shall not be entitled on any pretext whatever to sell or donate or exchange any item or part of the Collection..."

<sup>245</sup> The claimants already had some small compensation from the German government and the painting's attribution had since changed resulting in a significantly lower valuation which, when conservation and insurance was taken into account, made the financial difference negligible.



descendents of those who were wronged can be reunited with these pieces or recompensed for their loss.

Forty-six museums have published the results of their investigations on the Cultural Property Advice website<sup>246</sup>. Of those, twenty-four are non-nationals, of which some are the larger local authority museums. Not all of the identified works will have been spoliated, they just have an incomplete provenance for the period. This leaves museums in a difficult position as if they have identified these works, their ability to deaccession or dispose of the works by whatever means and for whatever reasons must be limited. Smaller council museums also face the problem of having adequate resources to research the collections to identify those objects at risk, which is why only the larger museums have completed this important task. It is easy to ignore a problem that does not seem pressing and may eventually go away when there are more immediate calls on attention and finances, but this unintentionally cynical adopting of the ostrich position just stores up problems for the future, especially if a local authority wishes to dispose from its collections.

## **The ethical conundrum of human tissue**

### **Guidance for the Care of Human Remains in Museums**

To bridge the gap between the coverage of the *Human Tissue Act 2004* and the wealth of human remains held in museums in England, Wales and Northern Ireland, the Department for Culture Media and Sport published non-statutory guidance on the care of human remains in museums (DCMS 2005)<sup>247</sup>. It sets out the steps an institution should take and

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<sup>246</sup> As of 2<sup>nd</sup> August 2011.

<sup>247</sup> This followed on from the Working Group for Human Remains in Museums which was set up under the chairmanship of Professor Norman Palmer CBE QC in 2001 by the then Minister for the Arts, Alan Howarth CBE MP. The working group included noted medical, legal and national and university museum specialists but did not

information it should assemble before making a decision on a request to return human remains. Whilst legislation for some of the national museums allows de-accessioning and disposal of remains up to 1,000 years old, the guidance suggests that requests for return of remains more than three hundred years old are likely to be unsuccessful and that beyond five hundred years are likely not to be possible to substantiate (2005, p27). DCMS has also created the *Human Remains Advisory Service* to support smaller museums dealing with claims they receive for human remains. Being able to access this support is subject to the endorsement of the 2005 guidance or similar provisions being drawn up internally (DCMS 2008).

### **Meeting accreditation and trade association expectations**

The main MLA guidance in relation to human remains is found in the model acquisition and disposal policy. A museum should either state that it does not hold or intend to acquire human remains, or set out that it had or intends to get remains which are less than 100 years old, then they must acquire the correct licence under the *Human Tissue Act 2004*. In addition if it holds or plans to hold any human remains it has to include a clause that it will follow the *Guidance for the Care of Human Remains in Museums*. The MLA also supports the *Human Remains Subject Specialist Network* to provide support to museums which hold human remains to which approximately thirty museums are members. The MA website provides a summary of the human remains issues and signposts readers to a number of websites and documents which can provide more information. Their *Code of Ethics* asks museums to answer requests for return of human remains with “understanding and respect” and directs members to the DCMS 2005 guidance.

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include a representative of council museums. The group reported in 2003 with a number of recommendations including changing the law to enable national museums to dispose of human remains and a Code of Practice. The group envisaged that the no-property rule would not be affected by the changes proposed (Palmer 2003, pp199-219).

## First-hand experience

There are few examples of repatriation of human remains in the United Kingdom, and only one request that the author knows of received by a local authority for domestic remains<sup>248</sup>. That request was subject to a quasi-judicial process of a hearing and decision made by a local authority committee<sup>249</sup>. The result is based on legal opinion and remains untried in a court of law, but illustrates how the common law, statute and policy work together in cases of requests for repatriation of human remains from local authority museums.

### The case of William Corder, the notorious 'Red Barn Murderer'

St Edmundsbury Borough Council had received a request for the return of human remains which formed part of certain artefacts on display in Moyses's Hall Museum in Bury St Edmunds. These objects were a contemporary book of the trial of William Corder bound in his skin from 1828 and his preserved scalp and ear<sup>250</sup>. The claimant wished to cremate the book binding and the scalp and ear and bury them in the Corder family grave at Polstead where she had buried Corder's skeleton which had been returned to her previously by the Royal College of Surgeons<sup>251</sup>. Other

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<sup>248</sup> The working group noted two successful requests to return human remains at Manchester Museum (Maori in 1990 and Australian Aboriginal in 2003), one from Peterborough Museum (Aboriginal skull) in 1990, and a portion of a Canadian skull and parts of two Maori skeletons from Museums of Exeter in 1996. It recorded decisions pending at Bristol Museum and Art Gallery and Saffron Walden Museum (Palmer 2003, pp18-9).

<sup>249</sup> The author of this thesis provided legal guidance alongside the Council's Head of Legal and Democratic Services to the Committee and authored both the terms of reference for the specially constituted committee and the paper to the committee setting out the factual, legal and policy issues which needed to be considered as part of the decision making process and from which this case study derives (Tobutt, 2007a).

<sup>250</sup> William Corder is known as the 'Red Barn Murderer' and was convicted of murdering Maria Marten of Polstead in 1828. He was tried in Bury St Edmunds and sentenced to death by hanging followed by the dissection of his body. This was a typical punishment under the *Murder Act 1752* to provide teaching hospitals with the necessary corpses for dissection, however, the practice was waning by the time of Corder's conviction and the punishment was repealed two years later by the *Anatomy Act 1832*. Mr Corder's body was taken to West Suffolk Hospital and dissected by George Creed, Surgeon. Mr Creed preserved the scalp and ear and some of the skin through a tanning process. He had a book of the trial published in 1828 bound in the leather made from the skin taken from the body. The skeleton was used as a teaching aid at the hospital and later was displayed at the Royal College of Surgeons.

<sup>251</sup> It was established during the St Edmundsbury request that the claimant was not a blood relation, and her link to the family was through the second marriage of her grandfather into a distant branch of the Corder family. After this fact was established, she acted as a representative for some of the descendents of William Corder's sister in New Zealand.

descendents requested that the artefacts remained on display in the Museum. The committee paper set out the Council's legal ownership of the objects and therefore their ability to arbitrate in this familial dispute as well as establishing their right to decide the fate of these objects<sup>252</sup>.

The Council had to demonstrate that both the objects were capable of being property. Starting from the general rule that there is no property in a human body or tissue, the local authority had to show that the remains had a differentiating attribute. This characteristic would require lawful work or skill to change the remains to this state, *Doodeward v. Spence [1908]*. Property rights would accrue if the preservation was carried out for teaching or exhibition purposes. It was considered that the leather made of Corder's skin which formed the book binding met the criteria of having a clear differentiating attribute as it had been transformed into another material. However, the position of the scalp and ear was not as clear as it was understood that it may have been preserved through an alternative method to the tanning process which clearly had changed the skin beyond its normal composition, as such *Dobson v. North Tyneside Health Authority [1996]* had to be considered. The scalp and ear had been preserved for teaching purposes at the local hospital and had subsequently been put on display in a museum. On viewing the object it was apparent that the scalp and ear did not retain the natural properties of human tissue as it was not in a process of decay and bore a resemblance to a crude form of leather following whatever process had been applied to it in the early 19<sup>th</sup> century. Therefore, it was considered sufficient to be property and as such the Council, as owners, was under no legal obligation to return the remains. This position, as articulated in the committee report, was not challenged by any of the parties.

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<sup>252</sup> The Council could trace an unbroken line of proprietary rights from George Creed, the Surgeon, having held the pieces since the late 19<sup>th</sup> century. The *Human Tissue Act 2004* did not apply owing to the age of the remains.

Moyse's Hall Museum was then a registered museum with the MLA<sup>253</sup>. Under the terms of their registration, the Museum had to have an officially adopted council policy on the acquisition and disposal of artefacts from their museums. This policy had been approved with amendments in 2006 after a required five-year review (Tobutt, 2006a&b). This included stating that the Council would in the circumstances of a request for the return of human remains, take account of the guidance issued by DCMS on such requests (DCMS, 2005). The guidance set out ten areas which the Council should consider when deciding the outcome of a request. These included the views of genealogical descendants, the legal position, the fate of the remains, and their historical importance.

These ten areas were reviewed in the committee report with particular issues coming to the fore. Owing to the passage of time and a number of second marriages with children issuing, the Corder family tree was extremely difficult to establish and the Council had to employ the services of a respected genealogist to verify some of the submissions. One of the positive outcomes of the process of assessing the claim was that a number of genealogical issues were clarified for the various family members. A crucial point for the Committee arising from this research was that though Corder's nearest relatives, descended from his sister, wanted the remains returned for burial, the Committee could not establish beyond reasonable doubt that Corder's son did not have surviving descendants.

The assessment of the cultural, spiritual and religious significance of the remains was difficult. Having confirmed that the Church of England was prepared to give the remains a Christian burial if they were released, the contemporary position was explored. As such, it was established that the punishment given to William Corder was to expressly prevent him receiving a Christian burial and the punishment was considered the ultimate

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<sup>253</sup> It is now accredited.

deterrent whilst in force, in comparison to a hanging which would have been followed with a burial. It also was established that the remains had been obtained in a manner which would have been typical for those suffering this type of punishment<sup>254</sup>. Fortunately for the Committee, the decision whether to return or keep the artefacts did not rest on this question alone, absolving them from having to make complex moral and ethical judgements.

The most important consideration for the Committee were the scientific, educational and historical value of the remains to the museum and the public. In this respect, the guidance states that, “...if the remains do have value for research, teaching and display, a museum should decide whether this can override other factors, particularly such as the wishes and feelings of genealogical descendants.” One of the significant points in relation to the book of the trial was the rarity of books covered in leather made from human skin, which was established by an assessment of the British Library, the danger the book itself would face if the binding were to be removed from it, and the issues of loss of historical context. Because of the information contained in the Committee report, the family members requesting the return for the remains, waived their claim against this book binding before the Committee was held. In respect of the scalp and ear, it was considered a significant part of the Council's local history and crime and punishment collections as such sentences were rare and it served a potent illustration of different, though recent, ideas on crime and punishment.

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<sup>254</sup> A similar fate awaited William Burke, of the infamous Burke and Hare, in 1829. Only convicted criminals could be dissected in medical schools prior to the *Anatomy Act 1832* being passed. With a limited number of corpses available, bodysnatching of recently buried bodies was a lucrative pastime. Burke and Hare wanted a more secure income stream, and resorted to murder. Burke was hanged and sent for dissection. His skeleton remains on display in the Edinburgh University Museum, and a pocket book covered in leather made from his skin can be seen in Surgeons' Hall Museums, Royal College of Surgeons of Edinburgh (Museums and Galleries Scotland 2011 and Surgeons' Hall Museums 2011). Following the release of an Hollywood film about Burke and Hare starring Simon Pegg and a number of notable British actors in 2010, the museum has seen a rise in visitor numbers.

The final aspect of the ten areas which was particularly striking, was precedent. The Guidance stipulated that the Committee should review past requests for the return of remains both from St Edmundsbury Borough Council and from other bodies. However, having checked with Museums, Libraries and Archives Council East of England (MLAEoE), it was established that there had been no other such request within the Eastern region and that all the cases recalled by both the Council and MLAEoE concerned remains which were claimed by cultural communities of origin abroad rather than identifiable descendants of a United Kingdom national. The only other request that could guide was the request made to the Royal College of Surgeons by the Claimant herself for the return of the skeleton of the person in question in the case before the Committee.

The Committee were advised that there were two factors in the case that should be considered. Firstly, the legal rule that there is no property in a body and therefore the Royal College of Surgeons would have had no rights of ownership over the skeleton, which differentiated the two cases as the Council had established ownership. Secondly, that the officers of the Council understood from the Claimant's submission, that the Royal College of Surgeons based their decision on the belief that all William Corder's descendants agreed with the request to return the skeleton for cremation and burial. This subsequently had been repudiated by one of the family members involved when the claim before the Council was made. In addition, other descendants had come forward who had not been involved in the original claim to the Royal College of Surgeons who disagreed with the Claimant's position.

All parties in the case had the opportunity to put forward a written statement in the Committee report. The Claimant, another descendent who disagreed with the Claimant's position and the lead officer of the Council's Heritage Service put forward their positions directly to the

Committee before it retired to reach a decision. The Claimant brought additional genealogical material to the Committee hearing in support of her position that there were no surviving descendants from William Corder's direct line; however, the evidence was not conclusive.

The Committee were given a number of different options. The family was polarised between two options. Although the guidance recommended that any decision should be open to negotiation, the terms of reference for the Committee were written to give a final decision, which in this case, given the limited movement available, was the only way forward for the family (Tobutt, 2007b). The Committee decided to retain the artefacts and keep them on display in the museum. The two critical areas which supported their decision was the division amongst the family, with the potential for closer descendants to appear in the future, and the historical significance of the artefacts. This decision has been respected by all in the process and some of the descendants of William Corder's sister who had requested the return of the objects hoped to visit the museum during a visit from their homeland in New Zealand<sup>255</sup>.

### **A satisfactory conclusion?**

The debate will continue as to whether there should be any human remains in museums<sup>256</sup>. However, as the St Edmundsbury case demonstrates, a request for return of remains entails detailed investigations which require time, money and expertise to address. The Guidance from DCMS is clear and effective, but specialist advice still would be needed if a demand for restoration was received. With few known precedents to guide museums, there is potential for further guidance in this area

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<sup>255</sup> It possibly is unsurprising given Corder's infamy that his sister's children chose to emigrate to New Zealand. From the author's e-mail correspondence with the family in New Zealand it was clear that the history relating to Maori human remains being held in museums influenced their views in respect of Corder.

<sup>256</sup> This question is beyond the scope of this thesis.



collecting and publishing case studies from those museums which have dealt with a request.

The idea that human remains could be disposed of for value will appear to many people as morally repugnant. Certain human tissue does not attract the properties of property; therefore leaving a museum in a position where it cannot dispose of something it cannot exercise ownership over but in the paradox that it holds the objects, potentially accessioned to the museum's collection<sup>257</sup>. However, particular human remains are chattels in their own right, but are there any which are acceptable to dispose of and does the method of disposal affect the answer? Leaving aside the issues of whether the sculpture *Self* bought and sold by Charles Saatchi attracts property through lawful work and skill and any macabre feelings towards the object, it is clear that a contemporary artwork made from the living artist's body has been traded on the basis that consent has been given. A gratis transfer of material from one museum to another, more able to care for the items in question, also must be beyond reproach. Though whether another museum would accept items with the potential for future liability in respect of any request for return is debateable. Further than these specific areas, a local authority museum is entering a market of ghoulish fascination which they enter at their own peril.

## **A way forward?**

Ultimately, whatever criteria are set down by the MLA or the MA can be avoided or ignored. Not being an institutional member of the MA does not carry the same penalties that not being accredited under the MLA system does, though that purely is in respect of access to grant funding<sup>258</sup>. One would assume that designation status also would be at threat if the

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<sup>257</sup> Given that accessioning is not a legal concept there is no bar to unworked human remains being accessioned or deaccessioned from a museum's collection.

<sup>258</sup> A position supported by Manisty and Smith 2010, pp18-19.

situation arose<sup>259</sup>. However, the changes to policy mean that beyond disposal for short-term revenue generation, proposals will be dealt with on a case-by-case basis. As we have seen with the Watts Gallery, disposal was approved as the plan put to the MA Ethics Committee demonstrated how a long-term benefit was to be achieved (Manisty and Smith 2010, p30).

Manisty and Smith have asked for joint guidance from the MLA and MA on the subject of disposal for value (2010, p33). If joint guidance was forthcoming, it would provide clarity for the sector on what was permissible from a policy basis. However, it is the MLA currently who is the Government's adviser on museums and whilst much of their guidance repeats verbatim text from the MA, there always are important omissions. Omissions which must have been made for a reason. Has the MLA been trying to assert itself against a stronger trade association? Manisty and Smith question whether the MA as a trade association should be both law maker and judge on ethical rules and their application to member organisations. They raise concerns about the conflict between the law and policy places charitable trustees in particular in a difficult position when decision making. Another aspect of potential concern is a local authority's duty to achieve best value for the tax payer, and whether an offer from the museum sector at less than full market value is possible. Manisty and Smith suspect not and suggest that the MA and MLA should ensure that disciplinary action was not taken against an institution if this situation arose (2010, pp33-4).

It is clear that cases of spoliation or human remains need to be dealt with on a case by case basis. Whilst such a decision must be taken by the museums governing body within the confines of the law, the policy guidance on these matters has a lot to offer ensuring due process and sensitive consideration of moral obligations. The fact that there are few

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<sup>259</sup> The author has not found a disposal situation which Designation was an issue.

cases is both a blessing and a curse. The author knows from her own experience in searching for precedent to help explain the Corder case to councillors charged with making the decision on behalf of the council. In these cases, the relative legal freedom that local authority museums have to dispose of items helps if a successful claim is brought forward. However, what authorities may underestimate is the time and effort that should be put in to handling any such claim, especially when it relies on checking facts, as in the genealogical research required in the Corder case.

## **The national perspective**

### **Disposal in legislation**

When discussing the ability to dispose from a museum, the focus has been on the national museums governed under statute. The *British Museum Act 1963*<sup>260</sup>, as an example, provides under s.3(4) that, “[o]bjects vested in the Trustees as part of the collections of the Museum shall not be disposed of by them otherwise than under section 5 or 9 of this Act (or section 6 of the *Museums and Galleries Act 1992*).” S.5(1) allows them to, “sell, exchange, give away or otherwise dispose of any object,” if (a) the object is a duplicate of another in the collection, (b) the object has been made since 1850 and is mainly printed material which can be copied, (c) the object is unfit to remain in the collection and is of no significant interest to students. However, if the object was a gift or bequest *subsection (1)* cannot be exercised in contravention of the terms of that gift or bequest. *Subsection (2)* permits the Trustees to destroy or dispose of an object if it is damaged, physically deteriorated, or has become infested by destructive organisms.

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<sup>260</sup> See also s.6 *National Heritage Act 1983* for the Victoria and Albert Museum, s.14 for the Science Museum, s.20 for the Armouries, and s.4 *Museums and Galleries Act 1992* for the National Gallery, the Tate Gallery, the National Portrait Gallery, and the Wallace Collection.

The *Imperial War Museum Act 1920* is the oldest of the governing statutes still in force. The Board of Trustees has the power to dispose of duplicate artefacts, unfit objects, and those items not required for the purposes of the museums, s.2(1)(c). Money raised from exchange, sale, disposal of artefacts, the disposition of land, gifts or admission charges can be used to fund more acquisitions, s.2(d). The *Imperial War Museum Act 1955* gave the trustees a power to lend artefacts. The National Maritime Museum has the most freedom with the option to exchange, sell or otherwise dispose of both duplicate objects and those which are not required for the purposes of the museum, s.2(3)(b) *National Maritime Museum Act 1934*, although not if it conflicts with a condition of a gift or bequest. In comparison s.1 *National Gallery Act 1856* allowed the trustees of the National Gallery to select those works that were “unfit” for the National Collection and sell them at public auction. The proceeds of which, did not return to an acquisition budget, as we have seen in the British Museum provisions, but was to return to the Exchequer as part of the consolidated fund, s.2. These provisions were repealed in 1954<sup>261</sup>, demonstrating a possible change in attitude towards public collections.

S.9 *British Museum Act 1963* entitles the Trustees of the British Museum and the Natural History Museum to transfer objects between themselves. S.6 *Museums and Galleries Act 1992* has extended this provision. Bodies listed under *Schedule 5* of the Act can, “...by way of sale, gift or exchange...” transfer objects and documents between themselves, s.6(1)&(2). Gifts and bequests with conditions attached can be transferred when it is inconsistent with the conditions if the donor or his personal representatives allow such a deviation, s.6(3), though the object will still be held according to the original trust or condition, s.6(4). Thus creating a mechanism for giving and accepting artefacts between the Armouries, British Library, British Museum, Imperial War Museum, Museum of London,

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<sup>261</sup> By the *National Gallery and Tate Gallery Act 1954*.

National Gallery, National Galleries of Scotland, National Maritime Museum, National Museums and Galleries on Merseyside, National Museums of Scotland, National Portrait Gallery, Natural History Museum Science Museum, Tate, and Victoria and Albert Museum<sup>262</sup>. Could and should this internal market be opened up to local authority museums?<sup>263</sup>

There is one significant problem with an internal market for artefacts beyond loans. The statutory foundation of national museums, though technically it can be removed at any time by Parliament, provides more certainty than a local authority's ability to provide museum services, especially as they can outsource them. The idea that an object formerly from British Museum collections could be in a museum run on behalf of a council under a service level agreement with a private sector firm providing public sector services such as Capita is practically inconceivable. Ultimately, this could be addressed through legislation, but would any government be prepared to tell a council that they have to provide a museum, if they do not already have one, and that they have to be provided directly by the council? It is unlikely. This is one of the principles that undermines the idea of a national collection of artefacts held by national, local authority and university museums on behalf of the public. On a practical level, it is not workable.

## **Spoliated artefacts and governing statutes**

Five of the eleven cases before the Spoliation Panel have related to national institutions<sup>264</sup>. As documented above, the first case in respect of the Tate and *ex gratia* payment was advised given the limited options at

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<sup>262</sup> The Wallace Collection is not listed owing to the status of the collection. The National Library of Wales, National Museums of Wales, Ulster Museum Ulster Folk and Transport Museum and National Museums and Galleries Northern Island are transferees only.

<sup>263</sup> The provision in s.12(2) *Public Libraries and Museums Act 1964* enables only the transfer of entire collections between local authority museums.

<sup>264</sup> The Tate, the British Museum and the British Library, with one case appearing twice – the Benevento Manuscript.

that time. However, one of the more challenging cases was that of the Benevento Manuscripts which appeared twice before the Panel.

### **The British Library Benevento Manuscript case**

A 12<sup>th</sup> century manuscript in the British Library was the subject of the third report of the Spoliation Advisory Panel (Hurst 2005). The Metropolitan Chapter in Benevento claimed that possession of the manuscript was lost between September 1943 and April 1944. It was acquired by the British Museum in 1947 and transferred to the British Library on its creation on 1<sup>st</sup> July 1973<sup>265</sup>. As per the previous cases, the statute of limitations had run out and the Panel had to make a judgement based on the moral claim. The Panel found that on balance of probabilities, the moral claim to the manuscript had been established through the evidence provided. However, as the claimants only wanted the return of the manuscript and would not accept an ex gratia payment or required compensation, the remedy sought was not available and the Panel recommended to the Government that the relevant legislation be enacted to allow the return of the manuscript. Understanding the political implications and procedural timescales to such a change, the Panel's interim recommendation was for an interim loan so that the manuscript could be returned to Benevento.

### **HM Attorney-General v. The Trustees of the British Museum [2005]**

The fifth report, published in April 2006 (Hurst 2006), related to four drawings in the British Museum. The claim was brought by the heirs of a doctor whose collection of paintings and drawings was, "...seized by the Gestapo in his villa in Brno, on the day the Germans invaded Czechoslovakia." The British Museum had bought three of the drawings at a Sotheby's auction in 1946 and had been given the fourth as part of a

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<sup>265</sup> British Library Act 1972.

significant bequest from Mr Campbell Dodgson who was a former Keeper of Prints and Drawings at the museum. The statute of limitations had secured the British Museums' title to all four drawings.

Prior to the claimants and the British Museum making a joint submission to the Spoliations Advisory Panel, the Commission for Looted Art in Europe (CLAE) had originally brought the case on the defendants' behalf, requesting the return of the four drawings. This resulted in the case *HM Attorney-General v. The Trustees of the British Museum [2005]*. This case confirmed that the British Museum could not use the moral obligation clause in the *Charities Act 1993* to circumvent the clauses preventing disposal of artefacts in the *British Museum Act 1963*. Following this case, the claimants removed the authority for CLAE to act on their behalf and reached a joint proposal with the British Museum that the drawings would remain in the museum but that the claimants would be recompensed at market value.

The joint proposal went to the Spoliation Advisory Panel so they could advise on whether drawings had been spoliated and if so, what the market value should be set at. This was a difficult task as the pre-war owner, Dr Feldmann, had sold several of his works of art in 1934, and lots included some of the drawings in question, in lots they had to prove were not sold. The Panel held that on the balance of probabilities that the drawings that were in the sale in 1934 were returned to the collection and were still there in 1939. Therefore an ex gratia payment was made to the claimants in relation to the drawings.

### **Time waits for no man**

Two pieces of porcelain from a seized family collection which was auctioned had two different remedies applied owing to the types of

museum holding them (Hurst 2008). The sole heir to the family was recommended to receive a payment in respect of the British Museum piece and credit in future of the piece's history when displayed or published but in respect of the piece in the Fitzwilliam, an university museum, restitution was recommended as requested by the claimant. The piece in the British Museum was particularly linked to the family and had been kept in the family over many years, but the Panel thought that waiting for an indefinite time for a change in the law was not suitable.

### **A change in the law**

Until 2009 there had been no direct provisions dealing with spoliated works of art in any legislation relating to museums in the United Kingdom. It had been argued in the case of the British Museum that it could have divested itself of such works without contravening its statute because the objects were unfit to be retained. However, it would have been difficult, given the circumstances of their arrival, to argue that such artefacts would not have been of interest to students. It may have been easier to justify if the piece in question had been a duplicate but could it have been argued that the work had been 'damaged' or that an object could have been photographed as an alternative if it was a recent piece?

The terms in the *Museums and Galleries Act 1992* may theoretically have provided an alternative route to divestment. The principle being that you could transfer a piece to a museum which could divest itself of spoliated objects, but, there remained two problems. Would a museum have been able to transfer a work when it was simply a mechanism to avoid its own governing statute and what about any potential trusts and conditions? An option could have been to apply the *Regulatory Reform Act 2001* to governing statutes removing the problem entirely. The Act



allows a Minister to make an order by statutory instrument which relieves<sup>266</sup> a burdensome piece of legislation if it is over two years old at the time of the order and has been unamended by primary and secondary legislation in that period, s.1(2)(a)&(4)(a)&(b). The clauses then in question and the corresponding unintentional effects were within the definition of burden, s.2(1). A possible public access argument<sup>267</sup> would probably have failed in the courts because of the 'sufficient interest' requirement for *locus standi* depending on who brought the judicial review case, *R v. Environment Secretary, ex parte Rose Theatre Trust [1990]*.

This issue has been superseded by the *Holocaust (Return of Cultural Objects) Act 2009* brought into force by the *Holocaust (Return of Cultural Objects) Commencement Order 2010*. The Act gives the power to certain national cultural organisations<sup>268</sup> to return spoliated items under a certain set of conditions, s.2. The main two are that the Spoliation Panel have recommended the return and the Secretary of State has approved that recommendation<sup>269</sup>. The Act covers items removed during the period 1<sup>st</sup> January 1933 to 31 December 1945, s.3(3)(a)& (b). The Act itself is time limited to ten years following Royal Assent, which was given on the 12<sup>th</sup> November 2009 and the Act came into force under the Commencement Order on 13<sup>th</sup> January 2010. The two cases which have been assessed by the Panel since the change has resulted in one recommendation for return<sup>270</sup>.

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<sup>266</sup> He can under s.1(1)(a) remove or reduce the burden, (b) re-enact the provision which imposes the burden, (c) make a new provision which alters the burden, or (d) remove inconsistencies and anomalies.

<sup>267</sup> Under s.3(1)(b) an order may not prevent anyone from, "...continuing to exercise any right or freedom which he might reasonably expect to continue to exercise."

<sup>268</sup> The Armouries, British Library, British Museum, Imperial War Museum, National Galleries of Scotland, National Gallery, National Library of Scotland, National Maritime Museum, National Museums and Galleries on Merseyside, National Museums of Scotland, National Portrait Gallery, Natural History Museum, Royal Botanic Gardens, Science Museum, Tate Gallery, Victoria and Albert Museum, Wallace Collection.

<sup>269</sup> In respect of the Scottish institutions, the Secretary of States approval requires the consent of the Scottish Minister.

<sup>270</sup> The Benevento Manuscript and a Courtauld Institute Rubens which was held not to be a Spoliation case (Hurst 2010b).

## **The Tenth report: British Library Benevento Manuscript case**

A renewed claim for the Benevento Manuscript was made following legislative amendments to national museum powers by the *Holocaust (Return of Cultural Objects) Act 2009* (Hurst 2010). The Panel had been designated by the Secretary of State under the Act to hear the case. The original report in 2005 had recommended that the manuscript be placed on loan, but this had not happened as the British Library decided that their standard conditions for loan had not been met by the Metropolitan Chapter of Benevento. The British Library was seeking that these conditions be met before they transferred the title and physical object to the Chapter, along with an acknowledgement of the Library's loss. The Panel agreed that appreciation of the Library's concerns were appropriate but that it was not for the Panel to specify any additional terms or conditions of transfer. Therefore, it was the Panel's recommendation that the manuscript should be returned to the Chapter.

### **At the forefront**

Both the legal and policy mechanisms for dealing with spoliation requests to national museums now are in place. Both before and after legislation, cases were being resolved providing certainty for both institutions and claimants. The cases and the process of identifying works at risk owing to poor provenance which the nationals have been through can act as a best practice guide for local authorities who are not confined always by the same legal constraints. There is an opportunity for the national museums to offer support and encouragement to the smaller museums to go through the same preparatory process in respect of their holdings, though whether this is feasible in the current climate would need to be established.

## Human Remains

The *Human Tissue Act 2004* provides an exception to the *British Museum Act 1963*, amongst others, which prevents the museum of divesting itself of its artefacts<sup>271</sup>. The British Museum has had problems with its many remains of Aboriginal origin. A display of Aboriginal artefacts on loan to the Museum Victoria in Australia, became subject to an injunction preventing their removal at the end of the exhibition whilst the claims of the native Aborigines to the artefacts was investigated. In the end, the items were returned to the British Museum, a year late. Subsequently, using the powers granted by the *Human Tissue Act 2004*, the British Museum returned two Tasmanian Aboriginal funerary ash bundles, the first time in its history that it has given an artefact back. This area remains ethically challenging, but the law and guidance are in place for any future requests.

## Proposals for change?

Manisty and Smith identify four areas for positive change to clarify the position relating to disposals for museums. That a qualitative standard, akin to the listing regime for the historic built environment, is adopted for museum holdings. First suggested by the Waverley Committee in 1952, Manisty and Smith have devised a simple three-grade system (Grade 1, Grade 2 and Ungraded) whereby Grade 1 objects are not for disposal outside the sector, Grade 2 require extraordinary circumstances, and Ungraded which institutions are free to trade. Their grade sub-categories

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<sup>271</sup> Under s5 *British Museum Act 1963* the Museum can dispose of objects from the collections under a limited number of circumstances: s.5(1)(a) duplicates, (b) printed material after 1850 which the museum holds a photographic copy of, (c) items unfit to retain in the collections, and (2) items which are useless owing to physical deterioration. S.47 *Human Tissue Act 2004* gives a power to de-accession human remains to the Royal Armouries, the British Museum, the Imperial War Museum, the Museum of London, the National Maritime Museum, the National Museums and Galleries of Merseyside, the Natural History Museum, the Science Museum, and the Victoria and Albert Museum. This covers remains from people who died after 1,000 years before the provision came into force, s.47(2). If the human remains form part of a greater object from which they are inseparable, there is a power to transfer the whole, s.47(3). Palmer notes that arguably this enactment was unnecessary for those items which are not property, (2009, p1517 footnote 92).

allow artefacts to be identified individually or as part of collections allowing for where the value of the group is greater than the sum of its discrete parts. The creation of a Supervisory Committee akin to the Reviewing Committee on the Export of Works of Art to assess requests for disposals of Grade 1 and 2 objects from museums is proposed. The committee would be supported by representatives from the MA and the Charity Commissioners and would make a recommendation to the Secretary of State.

Their third proposal is that funds raised from disposals should be ring-fenced to support collections, thus preventing the Bury Metropolitan Borough Council and Ealing Council situations. Finally, there must be penalties that actually are penalties. Using the criminal penalties in place for listed buildings under the *Planning (Listed Buildings and Conservation Areas) Act 1990* and the *Dealing in Cultural Objects (Offences) Act 2003* as a template, they suggest that fines or imprisonment backed up by enforcement routes and injunctions to prevent sales could form a better deterrent than the approbation of the MA, MLA and the HLF (2010, pp56-70).

These are interesting proposals but are they workable? The chances of getting such legislation through Parliament given what happened to the Heritage Protection Bill<sup>272</sup> which had cross-party support, appears minimal. There is no appetite for change beyond museum and legal professionals working in this area. Even if time were available, is a listing scheme workable? English Heritage records over 300,000 listed buildings with over 55,000 in the East of England alone. However, the average local authority museum collection can run to thousands of items. Again, in the East of England alone there are 52 local authorities. Theoretically, if each authority

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<sup>272</sup> The Heritage Protection Bill which included a rationalisation and extension of listing and scheduling powers for English Heritage was due to be in the Queen's Speech in 2008 but was pulled at the last minute to provide room for legislation reacting to the recession. It remains shelved awaiting Parliamentary time.

maintained a museum collection of 10,000 accessioned items; that is 520,000 to grade, along with all the items not accessioned in addition. There are 353 local councils in England. Extending the theory that each council maintains one museum with 10,000 artefacts, there would be 3.5 million accessioned objects to grade. An impossible task without staff, and staff are at a premium in these straightened times.

An alternative would be to base the system around the current Designation system. This argument is flawed on several counts. The self-selectivity of Designation through an application scheme would mean that an unscrupulous council could deliberately not offer up for designation items which were of designatable quality. The fact that the designation scheme remains open is a reflection of the number of designation quality collections which have not been designated for whatever reason in England.

## **Storage to sale?**

Art critic Brian Sewell<sup>273</sup> believes that sub-standard pieces in collections should be sold off without a condition that funds raised should be invested back in the museum. His thoughts came in response to a BBC investigation in the South West in 2010 which revealed that local authorities in Somerset, Wiltshire and Gloucestershire, excluding Bristol City Council<sup>274</sup>, owned 40,506 pieces of art alone worth over £48 million with 79% of artworks being in storage (BBC News 2010). Mr Sewell's opinion is that national and local museums should be selling art works which are not of national significance. This would be contrary to many local museum collecting policies which focus on including locally important pieces,

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<sup>273</sup> London Evening Standard art critic since 1984 and described by Rachel Cooke from the Guardian as, "*Britain's most famous and controversial art critic*," (Cooke, 2005).

<sup>274</sup> The information was released as part of Freedom of Information requests made by the BBC. Bristol City Council refused to answer as they would be in breach of their agreement with their insurers.

though is less radical than the position articulated by the Audit Commission in *The Road to Wigan Pier* in 1991 that items outside of the core collecting policy should be considered for disposal. Whilst a shocking statement; and no doubt designed to be so, is Sewell is articulating an unpalatable truth that whilst museum stores are overflowing, are they bursting with quality or inherited tat?

Should the taxpayer be expected to bear the burden of maintaining both the historically important and valuable as well as the collected miscellany left by past generations? But who judges worth? As we have seen, the movement against disposal was reacting to decades of misguided and wanton pruning. Are we able to assess what to keep? If not, how can we claim to have the critical ability to choose what to collect?<sup>275</sup> A comparison can be drawn with listed buildings. Whilst English Heritage make a recommendation against set criteria, it is up to the Secretary of State whether a building is listed or not, and not all recommendations are listed. Consequently, there is loss, for these buildings are altered or demolished without reference to what is special about them, and there must be something significant about them for a recommendation to list to be submitted by the government's adviser. The Secretary of State is taking a risk, but overall the majority are protected. Should we be the same about our museum collections?

## **'Rental'**

In the market-driven American museum sector 'rental' is seen as an option. Rather than loan your artefact, use a contract for hire to generate income from that asset for the owner museum and allowing the host museum to display something that it could not possibly afford to acquire

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<sup>275</sup> Isabel Andrews, former Keeper of Ceramics at the V&A, suggested in her 2007 article that US museums were more able to sell and trade up because they had not been as discriminating in their purchases and rarely turned down gifts, unlike UK curators.

(White, p388). This also could be applied to the private sector with individual exhibits in transportable display cases being able to be hired by a company for its offices. Could this work in practice? The author observed a pilot scheme of four individual exhibits in bespoke wooden display cases with a hire cost of £50 per month from a medium-sized local authority museum around seven years ago. In an affluent area and during the boom years, the museum struggled to find a steady private sector market, and the scheme was quietly dropped. Whether there was a return on investment is not clear however, until there is a confidence amongst the private sector, such ideas will be seen as a luxury. Between museums, the concept of renting out pieces would no doubt be attractive to councillors, but whether they would be prepared to borrow is another thing, especially if it cancelled out the income from any hires.

## **In conclusion**

Manisty and Smith summed it up well when they said that, “...a body of trustees or a local authority determined to deaccession armed with advice...will usually succeed in plans to sell,” (2010, p14). As cases have shown, MA opposition is not enough, or even using sanctions against those who were their institutional members, to stop such plans. The precedents set out in this chapter, both positive and negative, do not seem to have deterred the determined local authority. So if this practice is to continue, and the sector's policy impact is limited, is it not a case for legislative intervention to direct that sales resulting from museum assets should be directed back towards the service itself, or preferably the acquisition of further artefacts<sup>276</sup>? However, this runs counter to the current

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<sup>276</sup> David Gordon, as reported by Manisty and Smith, ably sets out the conditions for such sales supporting targeted revenue or capital investments in the American museum sector but even for the author, perhaps this is one stage too far and takes us too far away from our ancestors original aspirations for publicly funded museums (2010, pp10-11).

Government's policy aspirations of freeing local authorities from the fetters of 'central Government diktat'<sup>277</sup>.

The previous position that museums should not benefit financially from disposals is fine for the majority of low grade or low economic value artefacts which could be transferred, though if transferred in bulk this may change the impact of their economic value; but if a museum has identified that it cannot physically look after a painting worth thousands of pounds, what incentive does it have to dispose of it rather than keep it and let it deteriorate?

The tension between the museum professional sector and local authority museum governing bodies needs resolution. The custodianship of the artefacts within the museum's collection is paramount, but whether that custodianship means accepting that that particular local authority museum may not be the best keeper or that the sacrifice of one piece may benefit the rest of the core collection needs guidance beyond that which is available at the moment. When local authorities are working in a financial context where difficult choices must be made, it is essential that the professional museum organisations support local authorities to make choices which both benefit their public but which also are ethical.

It is important to remember that, except in respect of certain bequests, generally museums are not unduly fettered legally from disposing of items from museum collections. Generally, the legal framework in this area bears no greater burden than if the artefact was a mere chattel. The approbation of the MA, acting as both law maker and judge, is not enough to stop sales which are contrary to the benefit of the museum. The movement of the MA on disposals and the new *Code of Ethics* is not

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<sup>277</sup> Though Ed Vaizey, in a speech at a Farrer and Co seminar on Art and Heritage in May 2011 discouraged disposal whilst promoting loans, especially where they were income generating from business or overseas touring exhibitions.



enough, as is the punitive threat to grant funding through loss of accreditation. Even with grant funded purchases themselves, if the proper procedures are followed then there is no reason to prevent the sale. However, if an authority was seeking further grant funding for purchases this may not be forthcoming in the future either owing to the principle they have set or because the sale raised significant funds from their proportion of the proceeds which would allow them to make further purchases without grant funding.

It is clear that the commonality of disposals prior to 1974 has left a legacy of mistrust in managing museum collections. This has not been aided by a number of disposals identified as mistakes owing to curator-led changes in collecting policy or erroneous attribution to the subsequent financial and cultural detriment of the authority. However, museum professionalism has moved on considerably since the days of the all-powerful curator who reigned supreme. Whilst steps have been taken to move the policy framework back from the brink reacting against disposals, the balance has not been reached. The collections have not reached the stage of viability and flexibility which would ensure their future. This is because of a number of reasons.

Firstly, as has been documented in previous chapters, the research requirements to catalogue museum holdings would divert staff from the perceived front line service of opening the museum to the public. This is short-sighted, as understanding holdings and developing collections and new exhibits can support increased usage of the museum. Curatorial support is not an administrative extra but an essential part of museum operations. Secondly, councils as museum governing bodies do not understand the legal constraints and cultural values of museum collections so can make bad decisions when considering disposal, bringing the whole concept into disrepute. This is owing in part to the decline of the status of

in-house curatorial advice coupled with a lack of respect for MLA and MA guidance compared to the law. As Manisty and Smith say, there is a lacuna in the provision of disposal guidance which recognises the practical realities that local authority museums are working in. This could reinforce for councils the idea that the MLA and MA are out of touch with their particular problems, or that they are lost in generic guidance for all museums where one size definitely does not fit all.

It would be a misnomer if all blame was placed on the other organisations. Councils too must take responsibility. They should use their powers of disposal wisely. It is difficult to advocate the principal of councils selling artefacts to develop acquisition funds when councils such as Bury and Ealing have made sales to underwrite other services. Manisty and Smith have suggested that legislation should be brought forward to prevent this and encourage the proceeds of any sales to be re-invested in future acquisitions. Whilst an admirable proposal, it is unlikely to happen imminently which is precisely the time when local authorities are under increasing budgetary pressures. Therefore, there is an opportunity, with the responsibilities for museums transferring to the Arts Council, for a re-negotiation of the covenant between government, trade representatives, and local authorities to set acceptable mutual boundaries in the absence of legislation. Rather than being an imposition, guidance should be developed with the sector which encourages ethical decisions when faced with difficult choices, similar to that developed on behalf of the DCMS on human remains.

## Chapter 6: art mobility – is it possible to get a Monet?

### Introduction

Whilst globalisation may be a relatively new phenomenon for some, it is not in respect of the art and antiquities market. As has been documented in previous chapters, over the past two hundred years both collections in museums and private assemblies of objects have been formed through the international discovery and trade of art and artefacts, though not always in the most salubrious of circumstances by modern standards. These objects are concentrated in the United Kingdom, Europe, Russia and the United States of America through a mixture of imperialism, opportunism and finance. This concentration in the northern hemisphere means that, technically, these items should be easily accessible for local authority museums to purchase or borrow to expand, temporarily or otherwise, their collections. This is not always the case. But art mobility in museum terms goes beyond the traditional bounds of global movement of goods. The aim is to achieve maximum public and scholarly access to the world's heritage wherever it is and whomsoever holds it. Museums have an important role in facilitating this opportunity to learn and enjoy from the wealth of artefacts available<sup>278</sup>.

Mobility is linked indelibly with the acquisition terms and conditions. If an authority does have the freedom to use its chattels elsewhere, there are a number of mechanisms that it can use depending on whether they wish to relinquish ownership of the piece. As the previous chapter dealt comprehensively with the issue of sale from a collection, the focus of this chapter is on the legal and public policy issues of sharing collections whilst

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<sup>278</sup> Art mobility raises a number of moral and philosophical questions about the current distribution of antiquities across national borders owing to historical acquisitions. Whilst this has to be acknowledged in respect of the cultural patrimony of the United Kingdom potentially available to council museums; it is beyond the scope of this paper to investigate these questions.

retaining ownership. This chapter investigates temporary access to objects and asks the question whether art and antiquities are truly mobile for local authorities and whether they should be. It will assess whether council museums could benefit further from loans of material or whether the legal issues are too complex for the smaller organisations.

## **How does art mobility benefit local museums?**

The core collections of many local authority museums have been established in a happenstance way. Many have resulted from the beneficence of local notables or societies, each of whom will have had a particular interest, which will have influenced what was chosen for the collections. This means that most local authority museums have particular specialisms and ongoing collecting policies deriving from these gifts. In addition to documenting local history, seemingly random collections of horology, porcelain or fashion and textiles can appear when there are no local links to the trade manufacturing such objects.

That is not to say that local museums should not have these collections. Having specialist collections is an asset and can result in dynamic displays and a reason to convince others to lend works for temporary exhibitions. But they also can constrain a museum in the respect that local people think that each time they go to the museum they will see the same thing. As many local authority museums are on a smaller scale, the feeling that you can experience the history of the world under one roof, as demonstrated by Neil McGregor in his book and radio series *A History of the World in 100 Objects*<sup>279</sup> about the collections of the British Museum, is unachievable for all but the largest university and council museums such as the Fitzwilliam, Ashmolean, or Birmingham. Such vast collections can allow

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<sup>279</sup> Which could be considered to be a very glossy justification of the Museum's past and present collecting policies. However, it does illustrate effectively the interest that people have with the stories behind the artefacts, not just their place in the historical record.

visitors to discover new things on each visit, and give depth to the material available to scholars.

This theoretically should not be a problem for smaller museums. Only a fraction of what any museum holds is on display at any one time. Therefore, provincial museums should be able to regularly review and refresh their collections in order to attract people back into the museum to see something new. But this relies on three factors. Firstly, adequate staffing levels allowing time to develop and research new displays from objects in store or securing short-term loans. Secondly, money for changing the displays, be it new labels or display cases or costs of loans. Finally, it requires the artefacts within the store to be of a quality that they are worth displaying or have a reputation which will encourage the major players to lend. This latter point necessitates ongoing conservation of artefacts, reviews of objects in store as to whether they are more suitable for handling collections or pure research, and potentially continuing acquisition of new pieces. Many museums may find that the concept of refreshing with just one piece, let alone a temporary exhibition or rethinking of existing collections; is just too much.

The other aspect to consider is quality. In years past the most significant collections have been left to or have formed the basis of the major national museums, such as the British Museum or the Wallace Collection, and university museum collections, such as the aforementioned Fitzwilliam in Cambridge, the Ashmolean in Oxford, and the Petrie at University College London. As a result, these attract further high quality gifts and bequests, can attract funding for more significant purchases, and have benefited, the British Museum in particular, from an assumption through the principles of treasure that major finds should rest in the 'national repository'. This has resulted in museums in the provinces not having the opportunity to provide a home for important finds, and

potentially receiving more eclectic collections containing a range of quality from throughout the spectrum. This is now changing, as the recent case of the Staffordshire Hoard demonstrates, with financial contributions being made by Birmingham and Stoke City Councils for display in their museums<sup>280</sup>. That is not to say that there are not quality collections out in the provinces. The designation scheme identifying pre-eminent collections alone demonstrates that this is not the case, and there are more besides. But there is a perception, based on elements of reality, that the national museums have more to offer than their local counterparts, which council museums have to overcome.

## **A modern problem?**

It would be a fallacy to say that art mobility is a modern problem. Policy statements and reports over the past eighty years have tried to encourage and cajole more items out across the country from the national to the local museums,

*"...their [the national museums] great possessions must be made as comprehensible as possible, as attractive and as widely known as possible to the general public."* (Royal Commission 1929, p26)

Most people must have had the experience in a local museum of that off familiar sign in replacement of particularly good piece that it was 'temporarily on loan to...' (fill in your own particular national museum) which demonstrates that art mobility clearly works in at least one direction!

There was a concern articulated in the Royal Commission report that there was, *"...no united and dynamic connection between the national and provincial institutions,"* (1929, p11). This would become a common theme throughout the subsequent reports, with national museums urged to

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<sup>280</sup> Though the ownership of the Hoard probably remains with the Crown. This raises a number of issues if the councils wish to loan items as they would be unable to give guarantees of title or be able to insure it.

improve. Both in the 1929 and the 1963 Standing Committee reports, the V&A Circulation Department was identified as a beacon of best practice among the museums. It was commended for having the only department among the national museums focused on making loans to local museums in the 1920s.

The Royal Commission recommended that the V&A's Circulation Department model should be built upon across the national museum sector to form a separate collection partly transferred from the organisation's main collection<sup>281</sup>, part special purchases and partly formed of gifts to lend out to provincial museums (1929, p27). The proposals excepted significant high quality artefacts from the permanent collections from loan to provincial museums as it was considered that those items which were essentially surplus to requirements were still of an appreciably high standard that they were of display quality for local museums. This consideration now seems rather a patrician view, but also indicates the contemplations that potential donors may have made in respect of matching the quality of their objects with that of the potential destination museum<sup>282</sup>.

However, it considered that these developments would not be enough to forge links between the national and local museums. The Commission advised that national and local museums should become formally associated in order to facilitate semi-permanent loans and

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<sup>281</sup> Whilst recognising that there were several categories of artefacts that they thought could not be loaned, the Commission stated that the national museums and galleries should make their superfluous collections available elsewhere, especially as all taxpayers contributed to their preservation (1929, p27). Art and antiquities considered not for bailment included those items of the national collection forming part of the exhibition collection and the reserves held for replacement, reference and research (1929, p26).

<sup>282</sup> The 1963 Standing Commission report noted a word of caution about the acceptance in lieu scheme following the transfer of fine art from Chatsworth to London under the scheme in the 1950s (1963, p10). The Committee thought that provision of the great house collections supplemented a patchy coverage of quality museums across the nation in respect of paintings, drawings and sculpture but were concerned that these collections could be disbanded and centralised when accepted in lieu of death duties. However, in respect of pieces of national importance which were non-treasure trove, the committee thought that the national museums would be preferential receivers of objects by either loan or permanent acquisition (1963, p21).

exchanges of artefacts in both directions (1929, p73). They believed that such agreements were necessary to disseminate the collective education resources available in the sector. Such ideas were both laudable and ahead of their time. This was returned to in the government policy statement of 1996 which made a recommendation that the national museums were to, "...develop further the assistance they give to other museums," (Department of National Heritage 1996, p2).

That is not to say that the other national museums did not participate in mobility. The Standing Committee in 1963 commended a scheme whereby the National Gallery and the Tate Gallery channelled pictures on up to five years loan through the Arts Council to local museums (p49). Over the intervening years, the links between the Arts Council and museums and art galleries seems to have withered. The inclusion of museums and art galleries in the Arts Council portfolio from October 2011 would be an opportune moment to re-establish links and review past schemes such as the one above to see if it could be resurrected in some form between institutions, not just national to local, through the support of the Arts Council.

One of the main barriers to mobility always has been time and money. The 1963 report noted the limitations of the V&A programme on account of staff and financial resources. By 1973, The Provincial Museums and Galleries report committee found that the main barrier to encouraging more loans between national and provincial institutions was that of staff time to manage the tasks required to complete a loan such as packing, conservation and organising shipment and insurance. The committee thought that the employment of extra staff would be a cost-effective way of supporting provincial museums. The second barrier to loans was advertising to local museums what was available for loan and on what basis (1973, p44). This latter barrier has been overcome to a certain extent



through the medium of the internet. The V&A in particular publish comprehensive details of the touring exhibitions ready to display, though lists of works available for short and long loan are not identified on any national museum website as they are assessed on a case by case basis.

The concept of travelling exhibitions was a post-war phenomenon according to the 1973 committee. The report noted that many local museums did not have the capacity to take advantage of these exhibitions. Despite this, the V&A Circulation Department was a success with the report documenting that it had 70 exhibitions reaching 184 local museums and other institutions in a one year period (1973, p.45). This appears to be a high point in mobility in comparison to today. Whilst the committee noted the limitations of only 40 of 250 organisations meeting the criteria of the V&A for their highest quality exhibitions and individual loans, the committee did not consider the investment and implications for provincial museums in providing space for temporary exhibitions when there was not a secure supply or staffing to generate locally sourced exhibitions to ensure that the space was continually filled with interesting and engaging material. This omission perhaps illustrates the legacy of missed opportunities. Mobility requires not just institutions prepared to lend but organisations able to receive, an aspect which is overlooked in many assessments of mobility.

Finally, in 1996 the government policy statement set an objective for the national museums to widen public access to their collections (1996, p14). These objectives would be incorporated in to each institution's funding agreement with government therefore setting a target for each museum in return for their public funding. The government was keen that more collaboration happened and the statement noted that national museums would be asked to include in their yearly corporate plans how they would be working more closely with provincial museums. Of the five

areas identified for joint working in the document, two related to moving objects round the country, either through individual loans or development of travelling exhibitions. Cultural mobility was government policy.

The notion of mobility is taken for granted. Over ninety years, the same refrain is repeated. More mobility is required from the national to the local museums. Whether this is the most effective means of accessing collections is not questioned and public access appears to take primacy over scholarly access. The underlying issues that prevent mobility were not dealt with, and innovative ideas such as the partnership between two national museums and the Arts Council to distribute works of art were not continued. Without investment, be it of time or money, mobility remained an imperfect aspiration wanted by many but difficult in practice. The legacy of this inability to decide how to implement mobility remains with museums today.

## **European mobility**

Mobility of museum collections became a European issue in 2000 according to Open Method of Communication Expert Working Group on the Mobility of Collections (2010, p5). In 2005 the report *Lending to Europe* documented that of 30,000 museums in Europe at that time only 300 held major temporary exhibitions. The report made a link between increased visitor numbers and the provision of such exhibitions (Leeuw 2005, p8). The report proposed a number of recommendations including following the ICOM *Code of Ethics*, not insuring at market value<sup>283</sup>, not to insure if an object is not insured in the originating member state, the universal development of immunity from seizure provisions, encouraging long-term loans through simpler terms such as non-insurance, not to see loan fees as income generation, and to minimise work requiring fees to cover

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<sup>283</sup> Given how much insurance costs as a proportion of exhibition budgets and the small number of claims.

overheads (2005, pp11-17). This primarily was to ensure inter-Europe rather than intra-national lending.

The report set out ten reasons to lend and ten reasons not to lend (2005, p26). Positive reasons for lending included accessing reserve collections for public access or study, supporting reciprocal loans, and temporarily re-uniting series or elements of art and antiquities. Barriers to lending included legal restrictions on objects, the fragility of artefacts or frequency of recent travel, borrowing museum not up to standard, or the item being of significant importance to the local community. Not identified as problems were incomplete provenance, human remains, or importance to collection for scholarly purposes. Some of the reasons clearly were focused on inter-Europe issues; many were applicable to intra-member state lending. Several of the positive outcomes of lending relied upon on curatorial capacity to develop exhibitions. Some of the impediments to mobility were highly subjective, such as considering an exhibition to be too niche or too commercial to participate in. As such, the report was interesting but not necessarily helpful in solving mobility issues.

Consequently, the report was followed a year later by an action plan which sought to provide concrete actions for improvement (Ministry of Education, Finland 2006). However, the actions mainly consisted of raising awareness, encouragement, and promotion of various changes identified amongst Member States as any greater impact was beyond the powers of the European Union. Thus the impact was limited and the European Commission set up an Open Method of Communication (OMC) committee to review art mobility in 2009<sup>284</sup>. The OMC recommended that universal state indemnity was enshrined in law across the EU providing door-to-door coverage (2010, pp13-4). The group was keen for shared liability to be

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<sup>284</sup> The Commission planned to use the OMC work as part of the evidence base for the *Work Plan for Culture* for 2011 onwards.

developed enabling a choice to be made between no insurance, insurance for transportation, or insurance for the whole loan; though the group was concerned that non-state owned museums would be prevented from doing this by the trustees' powers (pp16-7). The harmonisation of lending and borrowing provisions was to be encouraged (p24). These are ambitious aims and would be difficult to achieve in the UK given that all public museums are at arm's length from government. For smaller local authority museums, such changes would be unlikely to impact on their business and the larger museums already have the resources to encourage international loans, if they so choose.

The resulting *Work Plan for Culture 2011-2014* actions comprise investigating methods of lending and borrowing in order to simplify the process. In 2011/12 a toolkit will be produced on state indemnity provision, followed by best practice guidance on other issues. The Commission are expected to receive a report on the illicit trafficking of cultural chattels in 2011 which will form the basis of the Commission's activities which is likely to include a toolkit in 2012/13 containing best practice and a code of ethics covering due diligence which is based on current codes. In addition, the Commission will be undertaking comparative research into valuations for insurance, state indemnity and shared liability purposes. Given the comprehensive guidance in the UK on such matters, the impact on domestic museums is likely to be slight, though the investigations into insurance and shared liability is timely. However, without harmonisation of law and policy relating to museums in the EU, it is unlikely that the work will make a great impact on increasing mobility across the EU.

## **Mobility in practice**<sup>285</sup>

### **A national collection?**

There is a great variation in the national museums approach to loans to other institutions. One similarity is the development and preference of using museums who are partners to that particular institution to receive loans and from whom loans can be generated. This can mean that larger organisations are preferred to smaller ones to enable a collection with the depth and quality to facilitate a number of reciprocal loans.

### **The value of partnerships**

Partnerships UK is the British Museum network of seventeen partner museums in England, Northern Ireland, Scotland and Wales. These museums are prioritised in collaborative projects, touring exhibitions and loans which are planned by the British Museum. Many of the partner museums are or have their origins as local authority museums<sup>286</sup>. These museums are seen repeatedly in the loans and touring exhibitions listed on the British Museum website, demonstrating that developing a partnership with a national museum can benefit a local museum through repeat loans. However, there also is a geographical bias to both the location of the partners and the stops for touring exhibitions. The Home Counties, East Anglia and the South East receive fewer loans than other areas of the United Kingdom. This could be owing to the easy access to the capital by rail which is enjoyed by these areas, or a focus on more remote or deprived

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<sup>285</sup> This section does not cover museum outreach services or handling collections as their objective is to further mobility within the council area. The focus of this section is on mechanisms of temporary transfer between different organisations and people.

<sup>286</sup> The museums are: Ulster Museum, Birmingham Museum and Art Gallery, Bolton Museum and Art Gallery, Bowes Museum, Bradford Museums and Galleries, Bristol Cities Museums and Art Gallery, National Museums and Galleries of Wales, Exeter City Museums and Gallery, Glasgow Museums, Hampshire Museums County Service, Horniman Museum, Leicester City Museums Service, Lincoln, Manchester Museums and Whitworth Art Gallery, Norfolk Museums Service, Sutton Hoo, Tyne and Wear Archives and Museums, and York Museums Trust.

communities. However, the access argument is valid only for parts of all these areas. The organisations involved in the partnerships also tend to be larger museums which limits distribution of benefits both geographically and through excluding small and medium-sized museums.

The National Portrait Gallery (NPG) has a different partnership approach, working with three particular country houses. The NPG works with the houses, including the National Trust's Beningbrough Hall in Yorkshire, to develop changing displays, activities and events. The NPG also has strategic partnerships with the North East and South West museum hubs working particularly with Museums Sheffield, Tyne and Wear Museums, and Plymouth City Museum and Art Gallery (NPG 2011a). Partnership museums have benefited from specific touring exhibitions. The Gallery's *National Strategy 2010 – 2015* sets out the NPG's criteria in the future for partnership work. Any partnership should be able to demonstrate benefits for both the partner museum and the NPG and any partnerships should deliver, *"a net gain to the understanding of portraits and portrait practice as it relates to the national collection,"* (2010, p1). Other than their long term partners, the NPG's focus currently is in developing more partnerships in the North East and South West. The Victoria and Albert Museum has a partnership with the Sheffield Museums and Galleries Trust which means that major exhibitions are shown at Sheffield venues. It additionally has partnerships with Birmingham Museums and Galleries, Tyne and Wear Museums, Manchester City Galleries, and Brighton and Hove Galleries and Museums, some of the largest museum services. This partnership predominantly is designed to promote education, but has involved exhibition development. Though these partnerships are a positive development, some institutions are profiting from support from multiples of nationals where others have the assistance of none.

## **The spread of loans**

In the case of the British Museum, smaller short term loans often are made in support of the Portable Antiquities Scheme to other museums, with three examples given covering two partner museums and one smaller museum (British Museum 2011). The V&A actively lends and borrows object across the country. In 2008/09 1,800 V&A objects were lent to British institutions (V&A 2011). The NPG also has a number of paintings on short-term and long-term loan across a number of different institutions in the United Kingdom including a number of local authority museums. Most places in England benefit well from this a dispersed geographical distribution including London, South East and South West. This totals over 1150 loans to 173 venues. However, East Anglia fares poorly again with only one museum, Norwich Castle, and one house, Euston Hall, benefiting from the Gallery's patronage (NPG 2011a). Individual short loans can be important in anchoring 'home-grown' exhibitions from a museum's own display collections and stores. This can add new interpretation, new information, or just 'star quality' which will attract people back to the museum as well as encouraging new visitors. Whether local museum staff have the time to create such exhibitions in order to refresh their offering is a crucial question for delivery of local exhibitions but with the increasing pressures on budgets translating into staff loss, this capacity may decrease.

The National Gallery has two paintings on long term loan to Bristol City Museum and Art Gallery and the Walker Art Gallery in Liverpool (2011). It does not promote through its website the possibility of loans therefore the terms and conditions and charges, if any, are not available. The NPG has numerous items on long and short-term exhibition loan in the United Kingdom. Some of these are documented by region on the Gallery's website. Analysis of the loans published on the website in January 2011 shows a geographical discrepancy. Of forty-six long-term loans and two

short-term loans, twenty-two benefit museums and organisations in London. The East Midlands does not have any loans and Eastern England and the West Midlands have one apiece. The South West and the North West profit the most outside of London with seven and six loans respectively. Being a strategic or regional partner does not appear to result in on loans as only two of the six partners have received long-term loans; again located in the South West and the North West. Ninety-three of the 137 organisations in receipt of exhibitions or loans from the NPG are museums (2011a). The V&A has over 2,000 items on long term loan in Great Britain (V&A 2011a).

The Tate makes hundreds of works of art available for exhibitions each year both at home and abroad. The Tate is the most geographically spread of the national museums with two museums in London, one in Liverpool and two galleries in St Ives. Loans to institutions will be considered only in three circumstances. These are:

- 1. exhibitions that demonstrate innovative ways of increasing knowledge, understanding and appreciation of art in a wide public;*
- 2. exhibitions that demonstrate original research and that will make a contribution to art-historical or other knowledge;*
- 3. significant one-person exhibitions that enhance knowledge of the work of the artist.*

Organisations also have to make a request for a piece or pieces; there is no proactive lending collection or solicitation of requests. Long loans, over two to five years, are available for museums and public buildings in Britain where the museum can demonstrate how the painting will add to their existing collection. As the Tate does not document its loans online, a desktop assessment of the impact of the loans in England, and the effect



on those loan locations of the Tate galleries in St Ives and Liverpool is impossible.

The Arts Council Collection is a collection of contemporary art which has been built up by the Arts Council. It has been extensively added to and toured since after the Second World War. The Arts Council Collection website documents the exhibitions and long loans that have been drawn from the collection, which is based in Yorkshire. In January 2011 there were loans to forty-five institutions, only four of which were museums or art galleries. Thirty-one percent of loans were to educational institutions and a further sixteen percent to medical organisations. The list of borrowers included two London law firms, Clifford Chance and Eversheds LLP<sup>287</sup>. Geographically, 49% of loans went to institutions in London and a further 24% in the South East. The East and West Midlands, and North East and West did not benefit from any loans, with the East, South West and Yorkshire and Humber barely registering with ten organisations between them. Whilst it is not surprising that Yorkshire and Humber is not represented so highly owing to the location of the Collection, a dramatically distinct bias, different from those seen with the national museums, is concentrating modern art loans in the south east of England<sup>288</sup> (2011a).

### **Government Indemnity Scheme**

The Government Indemnity Scheme provided for in the *National Heritage Act 1980* provides an alternative to commercial insurance when national or local authority museums borrow artefacts. It covers the objects both in transit, in storage and on display, the so-called 'nail to nail' cover. The MLA states that it saves museums approximately £5 million per year (MLA 2011b). Local authority museums are covered both as borrowers and

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<sup>287</sup> Fees are payable based on the value of the art work ranging from £150 per annum for a work worth under £1,000 to £500 per annum for one valued at £40,001 to £50,000 (Arts Council Collection 2011b).

<sup>288</sup> Two receiving institutions were in Wales and none in Scotland or Northern Ireland.

lenders and national museums only as borrowers as it is not considered appropriate for property of national museums to be protected under the government indemnity scheme contained in *s.16 National Heritage Act 1980*, although the law permits them to be covered at the discretion of the Secretary of State (DCMS 2004, p4).

The result of this is that local authority museums are indemnified when national museums borrow from their collections. Local authorities also can be protected when they have loaned to other local authorities. However, when loaning items from national museums, councils could attract the requirement of commercial insurance. This may be financially prohibitive or act as a disincentive to some authorities from encouraging loans from these museums. However, the guidance about the Scheme directed at non-national museums states that whilst national museums are expected to lend at their own risk, non-national museums are not expected to purchase commercial insurance to cover the liability. This is in part attributable to the fact that national museums are Exchequer-funded already (MLA 2004, p6).

### **Charges in practice**

The NPG charges £500 per venue preparation costs for loans with venues needing to find in addition their insurance, packaging and transportation costs (NPG 2011b). This charge normally will be waived for UK museums which themselves meet the preparation costs of items being loaned from their own collections. The V&A costs for preparing and packing items range from £100 to £3,000 depending on the item borrowed. The V&A states that these costs are designed to recover some of the expenses of loans, thus offsetting the staff costs required to operate a loan system through generating income, though not profit (V&A 2011b). In addition, if the Government Indemnity Scheme applies to the institution, the V&A expects the borrower to meet a minimum liability standard of

£300, if the item is worth under £4,000, or £300 plus 1% of the value if the artefact is worth over £4,000 unless the museum is Designated Museum with a liability agreement (2011c). Transportation costs are excluded from these amounts.

Museums in the United Kingdom do not have to pay for loans from the Tate, but have to pay for incidental costs such as insurance, packaging and transportation. The Tate insists on 'nail to nail' commercial insurance cover with agreed valuations, art works and Tate identified on the insurance. The Tate sets minimum liability requirements for loss or damage to loans whereby the Tate bears the greater liability and the non-national a lower proportion, though different arrangements are in place for the Designated Museums liability scheme (Tate Gallery 2011). The Arts Council Collection sets out per annum costs based on value for their long term loans of between three and five years (2011b). Their Select scheme, which provides a bespoke service, does not publish a fee scale as some artworks require installation in addition which increases the fee. They advise that venues can seek sponsorship to offset the cost of fees. As with other schemes, transportation and insurance is extra and 'nail to nail' coverage is expected unless the Government Indemnity Scheme is applicable.

This variation in approach does not help encouraging the mobility of the most significant pieces in the country. The Government Indemnity Scheme was put in place to support lending between institutions, but the government's policy decision not to underwrite the cost of national museum loans has not resulted in the anticipated outcome that they would be lent without risks covered. The V&A and the Tate expect a proportion of that risk to be underwritten by the receiving museum either through insurance or their general funds. Given that above a certain threshold that liability increases, this does not encourage local authorities to request more significant pieces thereby constraining their mobility to places which can

afford or are prepared to pay. Others may argue that this protects the national collection, keeping it central for scholars and visitors alike to enjoy where they anticipate finding it, but the nationals hold collections of such richness and value that only a small fraction of the display-grade collections they hold are available to the public at any one time. The Arts Council Collection has the most beneficial scheme for lending. Coupled with the arrangement in the 1960s of facilitating loans for the National Gallery and Tate Gallery, the Art Council has an opportunity from October 2011 to work towards common standards for loans which will enable greater mobility of a wider number of pieces.

### **Sprinkling gold dust**

Beyond individual or group loans, there are touring exhibitions which have been curated to visit a number of different venues. Not all national museums actively develop their own touring exhibitions. The British Museum documents current and previous touring exhibitions back to 2006 on its website. An analysis of these exhibitions shows an uneven distribution of access to these high profile exhibitions. Fifteen exhibitions are listed with sixty-six museum locations across the four home nations. If England is divided into the constituent nine modern administrative regions, it shows that the North East, North West and Yorkshire and Humber had half of all the stops in England and 44% of the total number of stops. The East of England and South East, and home nations received below average coverage. These other locations have suffered from a lack of access to these potential crowd attracting displays of national treasures over a six year period (British Museum 2011). The Tate does not have a documented programme of touring exhibitions, but its guidelines state that any touring exhibitions developed will generally go to four venues or less (Tate Gallery 2011). The National Gallery does not note any touring exhibitions (National Gallery 2011).

The V&A develops touring exhibitions for provincial museums<sup>289</sup>. Their website records the pre-prepared exhibitions drawn from their collections available for interested institutions to exhibit soliciting expressions of interest though some exhibitions only are available for international loan<sup>290</sup>. They estimate that there are 300,000 visitors to V&A touring exhibitions in the UK per year (2011a). In 2011 they introduced worldwide mapping of their past, present and future touring exhibitions using Google Maps covering 2004 to 2014. Fourteen different exhibitions were included in the United Kingdom sample with four venues ranging from one to five stops. Of the forty-two locations, thirty-eight are in England. Similar to the British Museum touring exhibitions, East Anglia and the South East suffers from a lack of provision in respect of these significant exhibitions, though the South West fares badly with no exhibitions held or due over this ten year period compared with two in the East and three in the South East. Venues in North East, North West, and Yorkshire and Humber make up 45% of the England tour stops. The V&A are actively encouraging institutions, not just museums, to borrow from their own collections and providing branded touring exhibitions which carry a cachet, but despite this, it is the same institutions that have benefited from other national museums loan programmes who mainly form the core organisations engaged with the V&A exhibition programme, though only four of the thirty-four venues in Great Britain have hosted more than one exhibition (V&A 2011).

The National Portrait Gallery has three country house partners in Somerset, York and North Wales which have both touring exhibitions and collaboratively produced exhibitions. In addition, the Gallery is working with Tyne and Wear Museums, Sheffield Museums and Galleries, and Plymouth City Museum and Art Gallery to do joint exhibitions. They are

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<sup>289</sup> In 2009/10 there were 419,400 visitors to ten V&A exhibitions going to twenty-two venues in the UK. Of the 1,212 objects in the exhibitions 61% were from the V&A and 39% from elsewhere. Individual venue numbers ranged from 1,900 to 92,000 (Frampton and Davies 2010, p20). These numbers were highly dependent on the location of the exhibition and accessible the topic was to the public.

<sup>290</sup> Touring Theatre and Performance exhibitions are listed separately.

prepared to work with other museums and galleries in Britain. Past partnership exhibitions are detailed on their website. An analysis of the data provided in January 2011, which dates back to 1998, demonstrates geographical bias. Of the 201 exhibition stops in the United Kingdom<sup>291</sup>, 151 were in England. 16% of English stops were in Yorkshire and Humber, the same as in the North East, followed by 14% in the South West. These locations cover four of the six strategic and regional partners. Like with the British Museum touring exhibitions, 46% of exhibition stops in England are in the North East, North West and Yorkshire and Humber. As with the British Museum and the V&A, a lack is seen in East Anglia with only two percent of stops and 5% in the East Midlands. Tours will normally be three venues or less and less than twelve months, to lessen the chance of damage (NPG 2011a).

The Arts Council Collection put on many exhibitions at their gallery in Yorkshire, but those that have travelled over the past ten years possibly do not meet the Arts Council's strapline "*great art to everyone*". Perhaps, more accurately, it could be called great art to everyone, except if you live in the South West or East Anglia. However, between 2001 and 2011 the Arts Council Collection has had 126 stops of numerous touring exhibitions across Great Britain, excluding those that stopped or were held at their Longside Gallery near Wakefield. This has encompassed ninety-one institutions, with only a handful of places receiving multiple exhibitions. Whilst these figures are, generally, promising, Yorkshire and Humber, the site of the Longside Gallery, has benefited the most with 19% of the exhibitions stops, excluding the Longside figures. Again, the North East, North West and Yorkshire and Humber combined equates to 43% of the exhibition stops in England, though the South East and the East Midlands are

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<sup>291</sup> For the purposes of this analysis the stops of those exhibitions which toured abroad have been omitted from the calculations.

represented well with fourteen and thirteen percent respectively (Arts Council Collection 2011).

It is clear that touring exhibitions are available and are being shown in some local authority museums. Some national organisations are better than others at touring their extensive catalogue. What is apparent is that some institutions prefer to loan beyond the traditional museum and art gallery bounds, extending art into the community through the public, private and charitable sectors. It also is evident that some regions of England and particular museums benefit from exhibitions more than others. This is likely to be for a number of reasons. Primarily, distance from the concentration of national museums in London, ability and enthusiasm to support touring exhibitions, and perceived additional cultural benefits for a socially disadvantaged population. This has meant that the East, South East and South West, all with their own particular problems, appear to have missed out. Whether this is owing to the size of museums in these dispersed regions of market towns and villages or attributable to a lack of ambition on the part of the museums and councils themselves is not clear.

Despite this, visitor numbers to museums have been decreasing recently. In 2009, the now abolished National Indicator 9 measuring the number of people visiting museums was showing a decrease in all regions except London and Yorkshire, no doubt buoyed by free entry to national museums in London and Leeds and the location of the Arts Council Collection in Yorkshire. In the last user satisfaction survey undertaken by councils the mean satisfaction with museums was 40% with mean satisfaction much higher in the metropolitan and unitary councils covering the larger towns and cities and lower in the smaller district councils (Audit Commission 2011). However, if you look at the BVPI data recorded from 1998/99 to 2007/08 you can chart the visits to museums per 1,000 people of individual councils. In 2006, for example, Graves Art Gallery in Sheffield

hosted a NPG touring exhibition. Data for all council museums in Sheffield for 2005/06 show 1,112 visits per 1,000 but in 2006/07 this had increased to 1,799 visits per 1,000. The same can be seen in Wolverhampton, whose art gallery had a NPG touring exhibition in 2008. Visits per 1,000 in 2006/7 were 617 and in 2007/8 were 840. These indicative examples<sup>292</sup> demonstrate that it is possible for these touring exhibitions to have a noticeable and positive effect on local authority museums and therefore should be considered by councils wishing to re-invigorate the connection between people and their local museum.

### **Private sector loans**

Loans from the private sector, be it individuals or companies, rely on prestige. Historically, the foundation of many museums is linked to the beneficence of local notables. As the world has got smaller, the sphere of influence that an individual wants to extend into has got larger. Where at one point of time the approbation of those in the local town and villages was enough, in the age of the internet names linked to brands with national or international identity can exert wider coverage of one's patronage and thereby one's standing. As such, philanthropy through advantageous loans or donations is more likely for the national museums than it is for a smaller local museum. This, of course, is a gross generalisation, but one which is based on an element of truth.

The other issue is that of quality. Whilst nationally important pieces are distributed across the national, local authority and university museum sectors, there are greater concentrations in the nationals, top flight museums and larger municipal museums as a result of money, prestige and the significance of alumni. Private owners will want to lend where their

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<sup>292</sup> These examples were the first and only two randomly chosen by the author in respect of the NPG. Whether this holds true against all touring exhibitions from all national museums held during the period 1998 to 2008 when compared to the BVPI data is beyond the scope of this thesis.



piece is highlighted as being of importance, be it through an exhibition or adding to an existing permanent display. This is more likely when that contrast is against similar works of note rather than being the proverbial 'big fish in a small pond.' One of the ways such an issue can be circumvented for smaller or more remote local authority museums is for the loan to form part of a touring exhibition curated by one of the national museums. But since the nationals often limit their touring run owing to the chance of damage to their core collections, the liability issues in respect of a private owner are that much higher

### **A marriage made in heaven?**

The National Gallery is the only national museum actively highlighting a joint acquisition programme. Three paintings have been jointly acquired with, in turn, the National Museum and Gallery in Cardiff, the Barber Institute of the University of Birmingham, and the National Galleries of Scotland (National Gallery 2011). The paintings rotate display between the two co-purchaser institutions. None of these museums is within the local government sphere in England. Two other notable treasure cases are a Viking Hoard shared by the British Museum and the York Museum Trust, and the previously mentioned Staffordshire Hoard shared by Birmingham City Council and Stoke-on-Trent City Council (Yorkshire Museum 2011). Both required grants from the Art Fund and the National Heritage Memorial Fund, the government's fund of last resort in order to secure the significant valuations both hoards received by the Treasure Valuation Committee. However, as has been mentioned previously, it is debateable as to whether these are joint acquisitions as ownership is likely to rest with the Crown, regardless of the payments made by the institutions. If so, this has implications for the ongoing fundraising, transport between the institutions involved, insurance, and potential for loans.

These purchases do mark a change in how Treasure is acquired for the nation. Up until recently, the British Museum would automatically have been the sole recipient and fundraiser to protect and display nationally important treasure. The Mildenhall Treasure is one of the most famous cases of the common law treasure trove. Found during the Second World War, the late Roman tableware was declared treasure after the war and have been the cornerstone of the British Museum's Roman Britain galleries ever since. This is despite significant local museums at the university in Cambridge and by the then local authority in Bury St Edmunds. Mildenhall Museum itself was not founded until the decade after the find; local people perhaps inspired by the find on their doorstep or perhaps in the hope that they might borrow it back. Another pre-*Treasure Act* example from the 1980s is that of the Salisbury Hoard. Not Treasure under the common law Treasure Trove, it had been subject to extensive nighthawking<sup>293</sup> and the British Museum was pivotal in recovering some of that hoard for the nation, to be displayed in London.

In a partnership situation, a council museum is likely to be joining with a fellow council or national museum to acquire possession of an artefact. This raises a number of potential problems for the future. It is advisable for the parties to draw up a legal agreement clearly setting out the ownership of the piece in question as it can be formed a number of different ways, potentially including a trust, or as we have seen not being owners at all, and this will constrain how the parties can look after the object. It is quite feasible that years down the line differences of opinion may appear in respect payment for insurance, conservation, and who has the object when. A fragile object may become unfit to travel but is shared by a council in Cornwall and one in Northumberland. Does the council 'on whose watch' this is established have to buy-out the other partner? These

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<sup>293</sup> See Ian Stead's book (2000). Nighthawking is the illegal removal of artefacts without permission, usually by means of metal detecting, and in the case of treasure, subsequent non-reporting to the coroner.

questions in respect of joint purchases have not been thoroughly tested given the recent developments of this type of purchase.

Several of the national museums are involved in international joint acquisitions which can cover both common and civil law jurisdictions, such as the purchase by the Tate of Bill Viola's *Five Angels for the Millennium*, 2001 with the Whitney Museum in New York and the Centre Georges Pompidou in Paris. Any potential complications are then magnified. Such a collaboration for a local authority museum may be inadvisable, except for the larger museums, as they are less equipped to support such an arrangement, though many councils have established relationships with international 'twin towns' which could be a starting point for a cultural exchange. Regardless of whether such partnerships are advisable, the fact that smaller museums need funding partners to acquire new objects means that this is a developing area of law and any local authority considering such a purchase should be wary. This is where the grant funding from the HLF, Art Fund and the Purchase Grant Fund can be invaluable to allow museums to purchase with 'sleeping' partners who require an item to have a permanent location. Whilst thwarting mobility, a secure future for important cultural heritage is surely more important?

## **State-sponsored mobility**

Acceptance in Lieu items do not always go to museums<sup>294</sup>. With certain country houses open to the public, the items remain in situ to be enjoyed where they were intended to be seen. Ultimately, it is the Acceptance in Lieu Panel who make a recommendation to the Minister of State in respect of the allotment of items. Some objects are given with

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<sup>294</sup> Items also can be accepted under conditional exemption from inheritance or capital gains tax allowing the item to be transferred by gift or on death to a new owner who must agree to abide by the exemption. It can be revoked if they do not and tax becomes payable. When related to chattels, such items usually relate to a house rather than a museum (HM Revenue and Customs 2011).

stipulations that they go to particular museums and galleries, and if agreed to by the Minister, such transfers are immediate. When an indication is made as to a potential institution, or no preference is stated, then artefacts are advertised on the Museums, Libraries and Archives Council website for museums to volunteer why such a piece would be best served by their institution and collection (MLA 2011a). Thereby, the Minister has the power to encourage the mobility and benefit of acceptance in lieu objects around the country.

## **The law: barrier or incentive?**

### **Neither a borrower nor a lender be**

Borrowing artefacts is both an opportunity and a potential problem for museums. Such prospects can bring at low cost interesting new items to a museum and museums can benefit from short-term agreements for the display of objects, particularly in the context of the development of special exhibitions which can attract more people or return visits to the museum. Conversely, people who own a relatively valuable item can view a long-term arrangement with a museum as beneficial when they do not have the room to store it securely or wish to have the insurance liability<sup>295</sup>, as a museum offers a temporary storage or exhibition solution with the reserved right to sell the artefact at a later date<sup>296</sup>. A significant problem with this is that the museum, and the public, can over time perceive or believe that the piece is part of the museum's permanent collection, which is problematic if the owner wishes to sell it<sup>297</sup>. However altruistic the original

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<sup>295</sup> Council museums do not always insure their collections on the basis that items are irreplaceable or can be replaced from reserves. They also may choose to underwrite borrowed items in this way but the insurance provision should be included in any loan agreement. This is another area where practice may be more ad hoc in smaller museums.

<sup>296</sup> Such as a case recounted to the author about the offer of a recently purchased long case clock on long term loan by a member of the public who, when told that such clocks were not on the priority acquisition list and the museum did not enter into new long-term loans, immediately offered the unwanted clock as a gift.

<sup>297</sup> A case in point is that of *Madonna and the Pinks* which was on loan to the National Gallery by the Duke of

intention behind borrowing pieces, long term agreements in particular, whilst providing public access to private collections, have the potential for difficulties and complications when objects are removed from public display. New long-term loans are rare in the museum world following a number of historical cases, such as the *Madonna and the Pinks* at the National Gallery.

In the past, it was common for museums to accept items without clear legal terms. This can and has caused problems in later years. The author has been told stories of both inter-institutional and personal loans of artefacts, which have not been returned, or worse, lost, and the precise ownership of items can become unclear with the passage of time, especially if an owner has not asserted ownership. The lack of documentation complicates matters. Often, artefacts were offered on a temporary basis to a museum without a set term which has caused problems for donors, their successors in title and museums at a later date with museums assuming that it was a gift, given the lack of term, rather than a bailment<sup>298</sup>. Modern arrangements, regardless of length, should specify liabilities for insuring items, who will be maintaining the item and the term of years that they will be borrowed for. Museums have found, when reorganising their displays, stores, or reducing their collections that some

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Northumberland until he decided to sell it to the J Paul Getty Museum in California for £29 million. An export ban was placed on the artwork to allow the National Gallery enough time to raise £22 million to secure it for the nation. This included £11.5 million from the HLF and £400,000 from the Art Fund and a promise to display the painting in prominent museums and galleries around the country.

<sup>298</sup> One example is the case of *Troughear v. Council of the City of York [1995]* which concerned a vintage motorcycle. The owner drove it to the museum at some point during the late 1950s, letting the receptionist know that he had parked it in the courtyard on the way out. In the early 1990s, by which time the motorcycle had increased in value, the donor enquired after the machine and finding it had never been displayed revoked his gift claiming it was on condition that it was displayed. The contention was that it had been a loan or gift on condition which reverted to a loan if the condition was not fulfilled. His court action failed as the condition had not been documented and was against the museum's collecting policy. It subsequently emerged that the motorcycle had been cannibalised for parts, leaving neither party acting in an edified manner (Palmer 2009, pp197-8 and 1997, pp173-4). See also the case of *Re Escot Church [1979]* where the son of the now deceased donor claimed that a painting was a loan not a gift when the church discussed selling the painting. This ran contrary to all other gifts made by the family to the church and the painting had even been restored at the cost of the parochial church council (Palmer 2009, pp193-4).

owners do not want to receive borrowed items back before the term of the bailment expires or even at the expiry date<sup>299</sup>.

At the heart of this issue is the lack of knowledge of bailment among museum professionals. This is not surprising, given its lack of prominence even among lawyers. However, it is essential because as Palmer says, “*bailment is one of the commonest transactions of everyday life,*” (2009, p1). Museum terminology works within the parameters of short- and long-term loans which belies the complexity of the bailment principles which underpin such transactions. As modern loans of objects frequently are based on specific terms drafted between parties there can be an assumption on the part of museum staff that they fall within the law of contract. Conversely, those items borrowed without formal documentation still attract duties of care, whether museum staff have cognisance of them or not.

Bailment is one of the few areas of English law that has its origins in Roman law. In *Coggs v. Bernard* [1703] Holt C.J. set out the concept of bailment chattels in English law<sup>300</sup>. For the loan of an object to fall within the purview of gratuitous bailment or *commodatum*, then the agreement must be for the sole benefit of the bailee. The bailee has no security of possession of the chattels, which a lender can recover at anytime, regardless of any promise as to the term of the loan<sup>301</sup>. Palmer is doubtful that despite the decision in *Hammersley v. de Biel* [1845] that equity can provide relief given the subsequent confinement of the principle established in that case that a representation then acted upon by a bailee should be enforceable (Palmer 2009, p689). The problem revolving upon

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<sup>299</sup> Anecdotal evidence provided to the author.

<sup>300</sup> It is worth noting that whilst Holt spoke of the loans as contracts, they would actually fail due to lack of consideration. This concept persisted until the 19<sup>th</sup> century (Palmer 1997, p18).

<sup>301</sup> See the Australian case of *Parastatidis v. Kotaridis* [1978] as recounted by Palmer (2009, p688).

the point that there is no legal relationship at the point such a promise is made.

Can and should an art loan be a gratuitous bailment? Given that the bailor should obtain no benefit from the agreement, except where it is accidental and inadvertent, and the receiving institution cannot enforce security of possession for a specified time period, the answers are possibly no and no. An individual or institutional bailor may gain social prestige or more prosaically a share in receipts which could equate to consideration taking it beyond the realms of gratuitous bailment (Palmer 1997, p22). Additionally, as documented above, national museums charge for their loans, even between fellow public sector institutions. However, a museum cannot ignore gratuitous bailment. Whilst the lack of secure term does not lend itself as the preferred basis for future in-loans<sup>302</sup>, many museum holdings, especially from individuals, may fall within this category of bailment. This means that those items can be requested at any time by their bailors and that the museum owes a standard of reasonable care<sup>303</sup> and to return the object at the appointed time<sup>304</sup> (2009, p693&700).

On the basis that a museum loan does form a contract, it probably forms a bailment by way of hire<sup>305</sup>. There are four requirements for such a loan: (i) possession for the bailee, (ii) ability to use, (iii) benefit for the bailor<sup>306</sup>, and (iv) provision for the end of the bailment through return or alternative instructions (2009, p1124 and 1997, pp26-7). The consequences

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<sup>302</sup> Though could be particularly attractive to councillors for out-loans between institutions.

<sup>303</sup> This burden has reduced since *Coggs v Bernard [1703]* from "strictest care and diligence" to returning the item in the condition in which it was lent, subject to reasonable wear and tear and reimbursing the bailor for any damage due to negligence or misuse, *Swann and Swann v. Seal [1999]* (Palmer 2009, p693).

<sup>304</sup> Though with lapse of time and an untraceable bailor, a museum may be entitled to dispose of the goods, (Palmer 2009, p700).

<sup>305</sup> See *Kamidian v Holt [2008]* which accepts the principle that a loan to museum is beyond a gratuitous loan, though the Faberge egg in question was not acknowledged as being part of a bailment by way of hire (Palmer 2009, p1129).

<sup>306</sup> This includes where a loan fee is paid or, according to Palmer, where two museums have an agreement to waive fees for reciprocal loans (2009, p1129). However, the consideration need not be monetary, but a "quid pro quo" as per Atkinson J in *TRM Copy Centres (UK) and others v. Landwell Services Ltd [2008]*. See also s.6(3) *Supply of Goods and Service Act 1982*, "...whatever is the nature of the consideration for the bailment or agreement to bail by way of hire," (Palmer 2009, p1128).

of this are that the bailee may have a secure term<sup>307</sup>, warranty as to title giving protection against ownership claims, and implied warranties on description and fitness for purpose which protects against inauthenticity<sup>308</sup>. Finally, the borrower may acquire a proprietary interest in the chattels which not only secures the term against the bailor but would prevent immediate possession if there was a sale by the bailor to a third party.

This legal mechanism has clear advantages for museum mobility beyond security of possession. Warranties of title and authenticity can encourage museums to borrow having been relieved of the burden of any potential claims<sup>309</sup>. It also takes into account of the preparation fees charged by the national museums which prevent such transactions as being gratuitous bailments. Contracts for hire either allow for reasonable wear and tear or include an obligation to return a chattel in the condition it was in when first hired. Applied in a museum setting, where objects can be fragile, it begs the question as to whether such items should be travelling to promote access. What is reasonable wear and tear on a 300 year-old painting which is subject to microscopic fractures and flaking in the paint? There is no test case. However, such provisions suggest caution for museums seeking to borrow or planning to lend items from their collections. Whilst increased art and antiquity mobility is admirable, that should not be at the expense of the objects themselves and their long-term viability, ensuring future public and scholarly access.

Museums are unlikely to borrow under bespoke loan terms. In fact, such terms would not facilitate increased mobility given the lack of

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<sup>307</sup> Such as s.7 *Supply of Goods and Services Act 1982*.

<sup>308</sup> Such as ss.8-10 *Supply of Goods and Services Act 1982*.

<sup>309</sup> Under the *Dealing in Cultural Objects (Offences) Act 2003*, a museum that borrows or hires a chattel as a bailee or lends a chattel as a bailor when it knows or believes that it may be a tainted cultural artefact probably commits an offence under the Act according to Palmer, (2009, pp1685-6). The *Iraq (United Nations Sanctions) Order 2003* in respect of cultural chattels illegally removed from Iraq since August 1990, also covers loan or hire of an artefact. A defendant had to demonstrate that he did not know nor had reason to assume that the chattel was illegally removed during the period, however the burden for discharging this is the balance of probabilities, though Palmer queries whether this breaches the *Human Rights Act 1998* (2009, pp1687-8).



professional support within museum services. Where museums have developed standard loan terms<sup>310</sup> and are borrowing from other institutions with differing provisions, the common practice of exchanging signed copies of each others contracts provides additional complications. The result of this can be a contract for hire that bears no relation to the two it is formed from or no contract at all, removing the protection that both parties expected to be there. This situation is just as risky as letters or even telephone calls agreeing to a loan with no terms and conditions attached which can happen where there are established professional relationships (Palmer 1997, pp31&34). Neither of these methods ultimately promotes mobility, especially if the museum is operated by a risk adverse council, and undermines councillor faith in museum professionals to operate museums to the maximum benefit of the inhabitants of the area.

### **Touring exhibitions**

As Palmer succinctly describes, *“touring exhibitions differ from ordinary loans in that the component works visit more than one site before returning home; they travel on a circuit rather than simply ‘in-and-out’.* Moreover, *the works in question often belong to a variety of lenders, who may be either private or institutional or a mixture of both.”* (1997, p223). Most touring exhibitions in Great Britain are curated by a national museum<sup>311</sup> and can be formed from their own collections or be constituted of pieces from a number of different lenders. Whilst both provide legal issues the latter is more complex. A secondary issue affecting the legal construction of such touring exhibitions is whether the organising museum proposes to exhibit the touring exhibition or whether it is just acting as an intermediary to facilitate access to pieces.

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<sup>310</sup> Taylor and Sansom's research in 2007 found that 28 of 45 (62%) council museum respondents had loan-out terms and 22 of 46 (48%) had loan-in terms (p13). Perhaps this is a result of an assumption that they are more likely to be asked to loan-out than be able to loan-in?

<sup>311</sup> Exhibitions can tour internationally which gives rise to jurisdiction and governing law issues. However, the smaller local museums are unlikely to be the recipient of an international touring exhibition, so this thesis will focus on the issues relating to loans under the governing law of England and Wales. See Palmer 1997, p224.

In *Art Loans*, Palmer looks at the different legal constructions that can result, something that many museums may not consider. Where the organising museum takes possession of the exhibits, they will be acting as a bailee and as the tour moves around the different museums, each one in turn becomes a sub-bailee of a secondary bailor (the original bailee)<sup>312</sup>. Whereas, if the organising museum does not take possession of the exhibits, Palmer considers that the organisers are in the position of quasi-bailor to the quasi-bailee borrowing museums (Palmer 1997, p223)<sup>313</sup>. The most important thing for a lender is ensuring that there is no gap in liability when lending an object. In a sub-bailment, the original bailee remains responsible for the artefact to the owner, *Gilchrist Watt and Sanderson Pty Ltd v. York Products Ltd [1970]*. In addition, the sub-bailee owes duties to both the original bailee and the owner (the original bailor)<sup>314</sup>. The duties of a sub-bailee to the original bailee and bailor are to take reasonable care of the chattels, an indemnity against any wrongful acts against the objects by their employees, and to protect the original bailee in respect of loss or damage of artefacts whilst in the possession of the sub-bailee. Whilst both the original bailor and bailee have a right to enforce against the sub-bailee for a breach of duty, that right is extinguished for the other if either party recovers full costs from the sub-bailee. In this circumstance, if it is the original bailor's rights that have been eclipsed they still have a separate right of action against the original bailee who had recovered against the sub-bailee (Palmer 1997, pp.227-8).

Palmer considers that the sub-bailment model applied to museum loans would be positive for lenders because the organising institution continues to be liable throughout the tour; and for the exhibiting institutions

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<sup>312</sup> As per Lord Diplock in *China Pacific SA v. Food Corporation India, The Winston [1982]* and cited by Dyson LJ in *Wincanton Ltd v. P&O Trans European Ltd [2001]* (Palmer 2009, p1240).

<sup>313</sup> In quasi-bailment the duties have been held as being similar to that of a bailee, *Hobbs v. Petersham Transport Co Pty Ltd [1971]*.

<sup>314</sup> "A person who holds possession of goods as sub-bailee of an original direct bailee also owes some duty of care towards the owner." As per Lord Diplock in *China Pacific SA v. Food Corporation India, The Winston [1982]* HL.

as they are only liable while they have the piece/s (so long as further sub-bailment does not happen). The problem for the organising institution, however, would be to establish who, of a number of sub-bailees, was at fault if something goes wrong and such sub-bailments would also include a necessity to cover the transit of pieces (1997, p229). Common practice is to add the transport company as a co-insured on any policy so that if the organising institution is indemnified the transport company cannot be pursued. If this insurance is delegated to the individual institutions there is a risk that they will not insure or will not include the transporter setting up a litigation triangle if something happens to an object (Palmer 1997, pp230-1).

An alternative legal construction on the same model is that of substitutional, or springing, bailment where a new bailee replaces the previous one. The Faberge egg clock case of *Kamidian v. Holt* [2008] was described by Tomlinson J as, "...the paradigm example of a springing bailment" (Palmer 2009, p1245). If arrangement has been made for the original bailee to return the items to the bailor, the first bailee will remain liable under a sub-bailment model. However, if the artefacts are to be returned by someone other than the original bailee or there is no agreement as to how the objects are to be returned, then a springing bailment model whereby each subsequent bailee accepts liability is in place (2009, pp1251&2). Palmer likens it to a baton relay with the liability being handed over on a schedule (1997, p232). He believes that this concept would not be popular with lenders who would want a single source of liability. However, it would be attractive to councillors wishing to limit liability whilst benefiting from the touring exhibitions established by the national museums.

A joint bailment model, whereby all the borrowers in the tour remain liable through the whole exhibition period is attractive for lenders as it

provides additional protection against the insolvent or under or uninsured borrower. *S.3 Civil Liability (Contribution) Act 1978* overturns the common law position that you are debarred from taking proceedings against other joint bailees once you have recovered against one, adding additional comfort for a lender (Palmer 1997, pp233-4). This is unlikely to find favour among councillors whose museum is one of many stops on an exhibition tour. Though, if councillors were tempted to not insure touring exhibits, in common with their own holdings, and were not prepared to underwrite loss it is unlikely that they would benefit from future loans and exhibitions.

## Treasure

Prior to 1996, treasure was managed by ancient common law rules of treasure trove. Treasure trove was classed as gold or silver which had been hidden with the intention to return and recover. Lost items were covered by the law of finders. The *Treasure Act 1996*<sup>315</sup> codified and amended the rules on treasure to make it clearer and to remove some of the perverse decisions which the common law rules, not designed for modern treasure scenarios, occasioned<sup>316</sup>. Primarily, the *Treasure Act 1996* removed the distinction between items which had been hidden and those that were lost or had been buried for ritual purposes and extended the range of artefacts which could be classed treasure<sup>317</sup>.

Treasure vests with the Crown or a franchisee of the Crown, for example the Duchy of Cornwall, *s.4 Treasure Act 1996*. The reward for

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<sup>315</sup> As revised in 2003.

<sup>316</sup> The issues related to finders of treasure are beyond the scope of this paper but has been described by Palmer as, "...one of the more questionable forms of bailment..." (1991, p1418). As a general rule, a finder has a good title against everyone except the owner, *Armory v. Delamirie (1722)*.

<sup>317</sup> Treasure is defined in a number of ways. It is an item which is at least 300 years old when it is found, *s.1(1)(a)*, is not a coin but has at least 10% precious metal content (This means gold and silver, *s.3(3)*), *s.1(1)(a)(i)*, or is at least two coins with at least 10% precious metal content, *s.1(1)(a)(ii)*, or is at least ten coins. Those objects that are at least 200 years old have the capability of being classed as treasure, *s.1(1)(b)*, by the Secretary of State if they are of "outstanding historical, archaeological or cultural importance," *s.2(1)*. Anything that would have been treasure under the common law remains treasure under the statute, *s.1(1)(c)*. Other items that are found as part of the same find, such as the pot in which a hoard of coins is found, become treasure removing one of the perverse common law rules, *s.1(1)(d)(i)&(ii)*.

treasure which is transferred to a museum is paid for by the museum even though the ownership rests with the Crown, or franchisee, s.10 *Treasure Act 1996*. What this means for the accepting museum is not stipulated in the Act. It is clear that many museums believe they receive ownership of the items, as evidenced in Wilson's *The British Museum: a history* which relates the "gift" from Queen Victoria of a Viking hoard from Cuerdale in 1840 (2002, p105). It is likely that some form of bailment for reward exists in this situation, but given the common perception of ownership this is unlikely to figure in any loan agreements the host museums may have with other institutions. The rewards are determined by the Treasure Valuation Committee and are normally at or near market value, to ensure that the correct incentive for declaring treasure remains.

As treasure, by its nature, is often of significant value, this can prevent local authority museums purchasing artefacts that are found in its area because of cost or has been subject to a deference that nationally important pieces should be in the relevant national museum<sup>318</sup>. This is demonstrated clearly in the book *A History of the World in 100 Objects* by the Director of the British Museum in which he selected some of the prize exhibits of the museums' collections to illustrate a history of mankind. These included the Sutton Hoo Anglo-Saxon treasure found in Suffolk in 1939, the Hoxne Hoard of Roman gold and silver from Suffolk found in 1992, and the Vale of York Hoard found near Harrogate in 2007 (McGregor 2010, pp 301-6, 257-261 & 361-5)<sup>319</sup>. All of these finds were near to local authority museums at the point of discovery.

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<sup>318</sup> Though Wilson notes that, "[l]ater finds of treasure trove did not always come to the Museum so easily, as the Treasury later demanded (and still demands) payment by the purchasing body of the full market value of the find..." (2002, p105).

<sup>319</sup> Other notable treasure hoards obtained by the British Museum include the Roman Mildenhall treasure from Suffolk in the 1940s, a Roman hoard from Water Newton (Roman Durobrivae) in Cambridgeshire in 1975, and a Roman hoard from Thetford in 1979 (Wilson 2002, pp238 & 323-4). The British Museum is aided in their knowledge of new finds by the formal role they have in respect treasure assessment on behalf of the government.

Recently, there has been a shift towards such finds going to local museums, but local authorities have not been the primary funders. The Staffordshire Hoard<sup>320</sup> is shared between Birmingham City Council and City of Stoke on Trent Council who both contributed £100,000 to the reward fund. It was valued by the Treasure Valuation Committee at £3.285 million and the Art Fund began a campaign to save it for the nation. £900,000 was collected from public donations from around the world and a grant of £1,285,000 was made by the National Heritage Memorial Fund<sup>321</sup>. Additional funding came from Staffordshire County Council (£80,000), Lichfield District Council and Tamworth Borough Council (£20,000 each). The Councils still need to raise a further £1.7 million for the conservation, study and display of the hoard.

The Wickham Market Hoard is another remarkable hoard<sup>322</sup>. It has been saved for Ipswich Museum in Suffolk through a patchwork of funding covering reward, conservation and a travelling exhibition encompassing Norwich Castle Museum and the university-run Fitzwilliam Museum in Cambridge. The primary funder was the HLF at £225,900 with £40,000 from the Art Fund and £20,000 from the MLA/V&A Purchase Grant Fund. Further funding was raised from the Friends of Ipswich Museum (£10,000), The Jennings Bequest<sup>323</sup> (£10,000), and the Headley Trust <sup>324</sup>(£10,000). With this case, Ipswich Borough Council who own and operate Christchurch Mansion Museum in Ipswich as part of the Colchester and Ipswich Museum Service did not have to contribute directly to the reward and conservation of the hoard.

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<sup>320</sup> The Staffordshire Hoard was found near Lichfield in 2009 and comprises nearly 4,000 objects. The Hoard includes 5,094 kilos of gold, 1,442 kilos of silver and 3,500 cloisonné garnets. There is no other hoard like it in Europe (Staffordshire Hoard 2011).

<sup>321</sup> The National Heritage Memorial Fund began in 1980 as a fund to save significant artefacts at risk of loss to the nation and it receives a grant from the DCMS. It has administered the HLF since its formation in 1994 to dispense Lottery money (2011).

<sup>322</sup> Formed of 840 gold Iron Age coins, it is the most complete in existence. It was buried in the territory of the Iceni 2,000 years ago (HLF 2011).

<sup>323</sup> The Jennings Bequest Trust Fund exclusively is for the purchase and conservation of artefacts for Ipswich's Christchurch Mansions museum (Ipswich Museums 2007).

<sup>324</sup> The Headley Trust is part of the Sainsbury Family Charitable Trusts (2011).

Large sums of public and charitable money are being paid out as rewards for treasure. Over £1.6 million of the Staffordshire Hoard funding, half the reward, came from central and local government whereas with the Wickham Market Hoard £70,000 was from charitable sources, over £225,000 from the Lottery and only £20,000 from government sources. If it were not for these funds, saving such heritage would be beyond the resources of local authorities, and they have made the possession of such gems attainable for some. However, it is not clear what museums are receiving in return for these commitments beyond possession of the items in question. The standard terms and conditions for grant funding, as reviewed in chapter four, are based on ownership of the artefacts in question. This leaves museums having raised money essentially to permanently hire objects on unclear terms and conditions with the potential to be in breach of grant funding. It is a question that many wish to ignore, like the historical disposal of art and antiquities from charitable trusts which was a risk in the early 20<sup>th</sup> century.

### **In legal limbo: objects of unknown status**

Items of unknown status<sup>325</sup>, in museum terms, are the most difficult to deal with. These items lack documentation of their origins, which has either been lost or the artefacts have been accepted without it. This can mean that an item's true legal status will never be known. This places a museum at risk if it disposes of an artefact by any means without documentation as evidence could come into light in the future proving that the museum was not the legal owner. This can easily occur with long-term loans. In this scenario, unlike the possessory title that can accrue with twelve years adverse possession of land, the continued possession of artefacts can be an act against the rights of the real owner.

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<sup>325</sup> Primarily these artefacts will be in a museum's possession, however, others may have been lost or destroyed but remain on the accession list.

S.1(1) Theft Act (1968) provides that, “a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and ‘thief’ and ‘steal’ shall be construed accordingly.” The actus reus for theft is met under s.3(1) by, “any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as an owner.” However, most museums would find that the relevant mens rea is not there for theft as under s.2(1)(c), “A person’s appropriation of property belonging to another is not to be regarded as dishonest - ... if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.” Whilst the museum has the actus reus for theft, lack of mens rea takes us into the realms of the tort of conversion.

Conversion is the oldest chattel tort. Originally based on trover, it has been enlarged as a concept by statute to include aspects of common law detinue which was abolished in 1977<sup>326</sup>. It consists of deliberate interference with a chattel which is inconsistent with the rights of the owner<sup>327</sup> to the point that they are dispossessed of use and possession (2009, pp83-4)<sup>328</sup>. Acting by mistake or in good faith is not an adequate defence, *Fowler v. Hollins [1872]*<sup>329</sup>. So a museum which has originally taken in an artefact under a bailment and subsequently sells the object believing that it is the owner would terminate the bailment on account of the conversion and leave the bailor the option of suing the museum bailee, or the innocent third party, who also could be a museum, *Cooper v. Willomatt [1845]*. Simply holding the items may not be enough for conversion, though the deprivation of use over time should be sufficient. If

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<sup>326</sup> By s.2(1) *Tort (Interference with Goods) Act 1977*.

<sup>327</sup> Or another person entitled to possession.

<sup>328</sup> See *MCC Proceeds Inc v. Lehman Bros International (Europe) [1998]* and *Kuwait Airways Corp. v. Iraqi Airways Co (No 6) [2002]*.

<sup>329</sup> As followed in *Union Transport Finance Ltd v. British Car Auctions Ltd [1978]* and *R H Willis & Son v. British Car Auctions Ltd [1978]*.



an object is intentionally destroyed, it will be converted, as in the case of sale with delivery. Using an item would be conversion. Clearly the display of an artefact would be ample cause but would holding an object in a museum store, which is where it would be placed to keep it safe, and therefore not convert it? It may depend on whether it was used whilst in storage for research, publications, marketing material or simply left alone. Ultimately, loaning the chattel to another museum would equate to conversion, thus limiting the mobility of such items.

S.2(2) *Tort (Interference with Goods) Act 1977* provides for loss or destruction of an object which a bailee has permitted to happen in breach of duty to the bailor. Under statute this is actionable in conversion though prior to 1977 it was detinue. The main remedy for conversion is damages. S.2&3(1) *Limitation Act 1980* places a limitation on tort actions at six years after the conversion even where there are subsequent conversions. If an owner does not recover their goods within this limitation period, their title is extinguished, s.3(2)<sup>330</sup>. In the unlikely circumstance that the right of action has been deliberately concealed by the museum, the limitation period runs from the time that the owner discovers the concealment or could have been reasonably expected to do so, s.32. It is conceivable, especially with natural history taxidermy collections which are prone to infestations, that a museum chattel would need to be destroyed, but to do so would be committing a tort against the owner for which necessity is not a defence.

As Palmer notes in *Art Loans*, there are several problems for a museum relying on the 1977 Act, in particular the requirement that the item must have been bailed on or after 1 January 1978<sup>331</sup> and the museum must be able to prove that it was bailed rather than bought or donated (1997,

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<sup>330</sup> S.2&3 do not apply in the case of theft, s.4. Where damages are paid in respect of a conversion the claimant's title also is extinguished, s.5(1) *Tort (Interference with Goods) Act 1977*.

<sup>331</sup> For goods bailed prior to this date, the relevant legislation is the *Disposal of Uncollected Goods Act 1952* which was repealed by the *Tort (Interference with Goods) Act 1977* but the repeal did not affect goods bailed before the commencement date of the 1977 Act, s.15(1)&(2).

p177). In particular, in respect of the power of sale over uncollected goods where a bailor has failed to take delivery of their chattels or the bailee has been unable to trace or communicate with the bailor having taken reasonable steps, s.12(1)&(3). However, as this provision requires the bailee to account for the proceeds of sale to the bailor minus costs, it is of little use to a museum. Firstly, the requirement of sale may bring the museum in contravention of the MA Code of Ethics depending on how integral the item is to the museum's collection and whether or not it has been mistakenly accessioned. In addition, the museum cannot benefit from the proceeds of the sale towards their acquisition funds. Finally, they cannot secure good title to the artefact if they wish to permanently acquire it, only the purchaser gets good title against the bailor, s.12(6). However, if another museum purchased the item; that could lead to further art mobility once title is secure.

In the absence of a claimant, a museum could argue that it is, in fact, a finder under *Parker v. British Airways Board [1982]*. Therefore, a museum could protect their right of possession against third parties and legally hold the artefact which seems to be discarded or mislaid. This would be sufficient for holding the item for display purposes but would not extend to the disposal of the artefact, thereby frustrating further art mobility. Alternatively, s.10 Greater Manchester Act 1981 permits lost or uncollected property to vest in the council within three months of coming into the possession of the council. This provision is likely to be included in other local acts for the major municipal councils.

Museums are left in a difficult position if they are unable through research to establish under what legal basis they hold a particular artefact. By choosing to display it, it could be argued that they are inadvertently be committing the tort of conversion, but if they do not use an object it will just

sit in the stores costing money through its housing and conservation<sup>332</sup>. If they choose to dispose of it, even by loan, they also may be committing conversion, and how could they possibly warrant the title? However, depending on how this was publicised, this could alert, or be seen as notice to the true owner to that conversion. Whilst some may argue that this could then attract a legal case within the statutory time limits<sup>333</sup>, it would have the benefit of starting the limitation period which may run out before action is taken. In either case it would solve the issue of ownership of the chattel in question.

## **The legacy of preventing mobility**

One of the most common problems for art and artefact mobility is restrictive terms and conditions in place on acquisition. These have been discussed in more depth in the previous chapters in respect of new acquisitions and disposal by sale, but their effect on the ability to loan objects of value, thereby encouraging reciprocal arrangements is a significant barrier for local museums. Conditions which were understandable when they were set down can over time become unduly burdensome or worse, counter-productive, to achieving the donors original intentions.

## **The Norwich School**

Norwich Castle Museum, part of the joint local authority Norfolk Museum Services, houses the R. J. Colman Bequest of Norwich School artworks. The post-war bequest included capital to fund the construction of an art gallery for the collection, which owing to costs became two new

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<sup>332</sup> Whilst they may be under no positive obligation to look after an artefact, in case the legal basis they actually hold it is ownership or under some loan terms they would be foolish not to maintain the item and either be in breach of terms and conditions or devaluing their own assets.

<sup>333</sup> Many councils are risk-averse and would not seek to solicit a legal case rather than deliberately acting surreptitiously to actively deprive an owner of their possessions.

galleries added to the Castle Museum. Only pictures from the Colman bequest can be shown in the galleries, pictures by two specific artists may not be lent, and much of the collection cannot leave Norwich. According to Palmer, the donor wished to keep the collection together in Norwich, to encourage visitors to develop an understanding of the art in its birth place (1997, p76). This is admirable but extremely constraining. The museum service is unable to display the works in the other museums in Norfolk for which it cares, let alone lend them to other institutions.

In 1982, the V&A and the Whitworth Gallery in Manchester were doing an anniversary celebration exhibition on one of the restricted artists, and the family trustees refused a request to waive the loan bar and instead supported a rival exhibition in Norwich (1997, p77). As Palmer postulates, the paintings would have reached a greater audience had they participated in the V&A / Whitworth exhibition, and potentially could have benefited Norwich through bringing the exhibition home with works from other institutions. This can be contrasted recently when the museum was shut for redevelopment and an arrangement was made with the Tate so that Norwich School pictures were on display there for six months. This was achieved with the consent of the grandson of R. J. Colman. Even with this diligence, the Museum was contacted by Donor Watch, who felt that even with consent, the Museum was contravening the bequest<sup>334</sup>. Interestingly, Norwich Museum has purchased more Norwich School works of art from its own funds to add to the Colman bequest. The family trustees have not objected to this continuation of collecting, despite their permission not being sought. Palmer believes that in this case any consequent breach of condition has been given implied consent by the trustees.

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<sup>334</sup> Noted to the author in conversation with Vanessa Trevelyan, Director of the Norfolk Museums Service and President of the Museums Association.

Vanessa Trevelyan noted that it is unlikely that a publicly funded museum in the United Kingdom would nowadays accept a bequest with such terms. Noting that many benefactors are unaware of how a museum operates in practice, she believed that the gratefulness and deference which may have determined acceptance in the past has given way to a reality whereby the ability to share a collection and encourage reciprocity from other institutions can make a local collection dynamic and interesting whilst raising the profile of the particular collection or movement that the particular museum is known for. This in turn can promote visits to the donor museum from the host museum and support further study at all levels on the topic in question.

### **A clause in the tale?**

Unlike many of the national museums, local authority museums generally do not have a statutory provision which allows them to override the terms of a trust in certain circumstances<sup>335</sup>. They are reliant on charity law and applications to the Charity Commission to attempt to vary any condition which is now seen as being injudicious for the best use of the bequest. The, aforementioned in previous chapters, Burrell Collection belonging to Glasgow City Council is the cause célèbre of amending testamentary provisions. Now able to loan overseas<sup>336</sup>, the media and public furore has prevented the council from exercising its new found trustee powers<sup>337</sup>.

The terms and conditions of the Memorandum of Agreement established by Sir William and Lady Burrell and the Corporation of the City

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<sup>335</sup> An exception is s.149(3)(b) *Greater Manchester Act 1981*. See also s.2 *Holocaust (Return of Cultural Objects) Act 2009*, s.47 *Human Tissue Act 2004*, s.2(4)(b) *Imperial War Museum Act 1955*, s.5(3) *Museum and Galleries Act 1992* and ss.7(3), 15(3) and 21(3) of the *National Heritage Act 1983*; the exception to these similar provisions is the British Museum, though the construction of s.4 *British Museum Act 1963* suggests otherwise (Palmer 1997, p80).

<sup>336</sup> The trustees had been given the powers to loan works from the collection within Great Britain.

<sup>337</sup> As it was governed under Scottish law there was no comparable application process to that of the Charity Commissioners acting under the Charities Acts therefore private legislation was required (McCulloch and Koravos 1998, pp196-7).

of Glasgow, which preceded the will, were onerous in certain respects. The council's gratefulness for the donation of 9,000 high quality artworks was such that through the settlement, Glasgow accepted significant limitations on its permanent location, consented to keep the bequest intact and separate from its other collections, adding to the collection from a designated fund, and not lending outside of the United Kingdom. His will tried to further limit the power to lend by excepting pastels and textiles, but this has never been treated as binding by the council or trustees as it did not appear in the Memorandum (McCulloch and Kostavos 1998, pp193-5). The motivations behind the change were financial. Art mobility for public access and educational study already could be facilitated throughout Great Britain. Glasgow were hoping that they could raise revenues by entering into international reciprocal loan arrangements which would bring new pieces into the United Kingdom which would in turn increase visitor numbers to Glasgow and the museum and address the falling receipts, a result of steadily declining visitor numbers.

Glasgow's aim was to secure the future of the collection. Intra-Great Britain loans were not seen as enough to generate the interest required for their business model. They secured a trade. An ability to loan overseas, in return for the legal enforcement of the request in the Will that the pastels and textiles would not be lent (1998, p199). Has this supported long-term benefits for the museum or the collection? In respect of the national collections touring exhibitions and loans, it seems that it is the Glasgow Museum of Modern Art which has been the beneficiary of national support in the intervening period, with the exception of the British Museum which has sent three touring exhibitions to the Burrell Collection<sup>338</sup>. As for the ambitions of becoming an international centre of loans, they are possible but not probable.

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<sup>338</sup> Ancient Greeks: Athletes, Warriors and Heroes in 2009, Mind-forg'd Manacles: William Blake and Slavery in 2007/8, and The Emperor's Terrapin in 2007 (British Museum 2011).

Glasgow and Norwich approached the problem of limited mobility in distinct ways and secured different outcomes. Norwich's engagement of the family trustees enabled specific mobility which was benefited public access at a time when the museum temporarily closed. Glasgow's heavy-handed approach and ultimate aim upset a vocal number of people. Ultimately, the councillors' objective was not public or scholarly access and mobility, given they already had the ability to loan within the UK, but fundraising through international loans. The access to overseas art and antiquities appears to be a means to an end rather than the end in itself. Whilst the most fragile elements of the Burrell Collection, the pastels and textiles, were excluded from the ability to loan, by accepting the terms of the memorandum they also prevented these objects from being loaned in future within the UK, contrary to their previous powers. It has to be questioned as to whether the potential for damage to chattels, the additional limitations on the pastels and textiles, and lack of public and scholarly access within the UK occasioned by an international loan is worth the freedom obtained. The author is of the opinion that is not.

### **Beyond free movement of goods: the European perspective**

A.167<sup>339</sup> of the *Consolidated Treaty on the Functioning of the European Union* is concerned with the cultural heritage of Member States of the European Union<sup>340</sup>. Under the Treaty, as amended, the Union focuses on promoting co-operation and assisting Member States to make “*non-commercial cultural exchanges*” and, “*improvement of the knowledge and dissemination of the culture and history of the European peoples,*” A.167(2). The Union is prevented under a.167(5) from harmonising national laws to achieve its aims. The Resolution of the Council

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<sup>339</sup> Ex-article 151 *Treaties of the European Communities*.

<sup>340</sup> As of August 2011 the Member States are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

of the European Union of 16 November 2007 on a European Agenda for Culture (2007/C 287/01) sets out Ministers' agreement that, "...as regards promotion of cultural diversity and intercultural dialogue:...promoting cultural heritage, namely by facilitating the mobility of collections and fostering the process of digitisation, with a view to improving public access to different forms of cultural and linguistic expressions..." Public access is not simply defined through physical mobility of chattels but through the digitisation of museum holdings and their display and interpretation through the internet. Whilst no substitute for seeing the original, it allows mobility without the risk of damage to what are valuable and often fragile pieces of history.

Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods requires uniform export controls on cultural chattels leaving the European Union through export licensing. Annex I details the objects which are covered by this Regulation with fifteen classes of material further subdivide by type and age. It covers archaeological material, art, objects, books, archival material, and different financial thresholds apply to different types and classes of chattels. This puts all European museums on an equal footing when seeking to loan artefacts outside of the EU.

*Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State*, as amended<sup>341</sup> allows Member States to recover nationally important objects of artistic, historic or archaeological value unlawfully removed after 1<sup>st</sup> January 1993 and permits States to legislate to extend the right prior to that date. This was implemented in the United Kingdom through *The Return of Cultural Objects Regulations 1994* which permits other Member States to seek the return of items taken after 1993. If found, a requesting Member of

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<sup>341</sup> By Council Directive 96/100/EC of 1 March 2001 and Council Directive 2001/38/EC of 10 July 2001.



State has two months to check whether the item is in fact a cultural object under the regulations. Member States have a year on becoming aware of the location of the artefact to start proceedings and any proceedings must start within thirty years of an object's removal, or seventy-five if it is in a public, or certain ecclesiastical, collections. Palmer notes that the regulations do not cover, "...the mere theft and subsequent export of an object..." as the regulations cover only those items which either have been removed in violation of domestic rules protecting national treasures or in breach of the then cultural export regulation EEC No. 391/92<sup>342</sup> as the regulations refer to the Directive to give the definition of unlawfully removed<sup>343</sup>. As such, this is unlikely to be a significant concern for museums which are likely to be engaging with public museums in these states to arrange loans or exhibitions using material legally obtained and held within that jurisdiction.

## **Anti-seizure statutes and the moral conundrum**

Anti-seizure statutes have become popular in many countries to protect and encourage international lending of art between museums. The public access argument is extremely strong when so-called 'blockbuster' exhibitions and tours bring important works by major artists to a wider audience. They also can be money-spinners for the parties in question with targeted merchandising. Art as big business brings profile, prestige, and money - all important for art museums. Of course, this is competing with the stigma of Holocaust art but these anti-seizure statutes, whilst not passed for this reason, provide museums with an excuse, immunity from seizure, and makes them attractive venues for loans.

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<sup>342</sup> EEC No.391/92 as amended was codified by Council Regulation (EC) No 116/2009.

<sup>343</sup> In 2002 the United Kingdom became a party to the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. Cultural property has been defined to align with the European legislation, between European Union countries the EU legislation applies, and English limitation periods apply. The United Kingdom is not a signatory to the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects.

These statutes are not primarily designed to prevent the return of Holocaust art<sup>344</sup>. Those seeking to seize cultural objects include companies who claim that they are creditors of a particular country<sup>345</sup>, or police in the course of their duties<sup>346</sup>. However, it is in respect of Holocaust art that they make their most notable effect. The Schiele litigation in New York failed owing to the anti-seizure statute since the works in question were on loan to the Museum of Modern Art<sup>347</sup> and Monet's *Waterlilies 1904* did not transfer from Boston to the Royal Academy in London with the 'Monet in the Twentieth Century' exhibition because of the lack of an anti-seizure statute<sup>348</sup>. As a result, plaintiffs turned to alternative legal means of securing recognition and reparations as securing the physical assets were not an option, with cases being brought in the United States by the Shchukin family and the heirs of the artist Kazimir Malewicz to gain declarations of either ownership or how the paintings were removed coupled with damages or compensation linked to the commercial value of the exhibitions in question (O'Connell 2005, pp16-7 and 2008, p7).

### **The British approach**

The United Kingdom government incorporated anti-seizure legislation within the *Tribunals, Courts and Enforcement Act 2007*. Part six protects

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<sup>344</sup> It is not just Holocaust art, but also the Russian Revolution such as in the French case of *Stchoukine v. Le Centre National et d'autres* [1993]. Madame Shchukina sought to sequester her father's works from an exhibition pending a decision on ownership. They had been nationalised in the aftermath of the Bolshevik revolution though they were bequeathed in his will to a gallery for public viewing. She failed at first instance owing to sovereign immunity and when the case was heard on appeal it was dismissed as the paintings had already left the country (Redmond-Cooper 1996, pp73-8).

<sup>345</sup> Such as the 2005 action by a Swiss company against paintings lent by the state-owned Puskin Museum in Moscow to the Pierre Gianadda Foundation in Switzerland in respect of debts it claimed the Russian government owed for an oil-for-food programme (O'Connell 2008, pp1-2). This case was used as a reason by the British government in its *Partial Regulatory Impact Assessment* as to why legislation should be introduced, though this scenario has the potential to fall within the purview of the *State Immunity Act 1978* which provides immunity to states from the jurisdiction of the United Kingdom courts in respect of certain matters. The *Assessment* argues that as this Act does not apply to chattels to be used for commercial purposes, there is an argument that the Act does not apply as so called 'blockbuster' exhibitions can generate significant sums of money for the host institution. Whether the loan can be called commercial would depend on what terms the loan was made and for what reason (DCMS 2006).

<sup>346</sup> Such as in 2006 where a medieval casket alleged to have been looted from Poland was seized by Police under the *Police and Criminal Evidence Act 1984* from the V&A (O'Connell 2008, p13).

<sup>347</sup> See Palmer 2000, pp14-5, 56-7, and Appendix III.

<sup>348</sup> It had been placed on the Art Loss Register who aided in its eventual return to the heirs of Paul Rosenberg.

cultural objects on loan to the United Kingdom. An artefact can be protected if it is not owned by a United Kingdom resident, s.134(2)(b), is normally kept outside of the United Kingdom, s.134(2)(a), and has been brought to the United Kingdom for a temporary public exhibition in a museum or gallery, s.134(2)(d). Items are protected under the legislation whilst the object is in the United Kingdom for purposes identified in the Act, s.134(4)(a). The artefacts cannot remain protected for more than twelve months, s.134(4)(b), unless it is being repaired owing to damage sustained whilst it was in the United Kingdom under the protection of this legislation, s.134(5). The artefact can return to the United Kingdom and a further twelve months protection will be afforded it, s.134(6).

Objects are afforded significant protection under the 2007 Act. Artefacts are protected from seizure and forfeiture except when a United Kingdom court has made a court order which it is obliged to under Community law or international treaty, s.135(1). Whilst the liability for any offence relating to the item, the act removes the power of arrest to prevent an offence through preventing the object leaving the United Kingdom is suspended, s.135(2). Anna O'Connell<sup>349</sup>, in her 2008 paper for the LSE, stated that the British legislation is one of the most stringent in the world as it potentially prevented alternative forms of redress such as declarations of ownership, hire charges for periods of unlawful possession, or damages. Whether this would stand up against application of the *Human Rights Act 1998* remains to be seen.

To benefit from the legislation, an institution first needs to pass the criteria to be an approved institution. There are seventeen approved institutions in England as of September 2011<sup>350</sup>. Of these only two council museum services, Manchester City Galleries and Wolverhampton arts +

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<sup>349</sup> Solicitor at Klein's and visiting fellow at the LSE, formerly of the Art Loss Register.

<sup>350</sup> The power to grant approved institutions is delegated to the devolved administrations in Northern Ireland, Scotland and Wales.

museums, are approved among the list of national, university, and noted charitable foundations (DCMS 2011). To achieve approved status museums have to meet high 'due diligence' standards, follow international standards and the DCMS guidance on *Combating Illicit Trade* (2005a). It also must demonstrate its in-house ability to undertake provenance research, alongside its standard loan policy and agreement (O'Connell 2008, p6). As such, it is unsurprising that few local authority museums have taken up the opportunity to attain approved status to facilitate international loans, given their size and the requirements to be able to adequately research the provenance of the potential in-loans. However, it is surprising that some of the larger museum services, such as in Birmingham, have not sought to benefit from the changes.

The 2008 statutory instrument relating to the act sets out the requirements for publicising information on borrow items. As museums and galleries have to be able to determine ownership and provenance of items on loan, s.136(3), and make this information available to the public, this ultimately could allow information regarding an artefact to be passed on to a person who would now be prevented from seeking its restitution through seizure under the Act. This statutory assuaging of state guilt relies on the potential claimant being able to use this information to bring a case in another jurisdiction to settle their claim. The argument is that by publishing this information, the UK is alerting potential claimants to information as to an artefact's whereabouts and owner which may not have been in the public domain previously. However, as was seen in the Malewicz case, the claimants were barred by statutory limitations from furthering their case in the Netherlands, leaving alternative legal remedies other than seizure in the country of display, the US, the only option available. If O'Connell is correct, even this would not be open to a plaintiff in an English court, potentially leaving claimants with no source of redress but to track future loans of the items in case they were brought into a

favourable jurisdiction, which would be extremely unlikely if the lending museum in question was alerted to their knowledge of the museum's holdings. Thus begs the question as to whether this act capitulates to facilitating international cultural and commercial exchange at the expense of those who have suffered loss.

So is the incorporation of anti-seizure legislation into United Kingdom law to the benefit or detriment to the United Kingdom's cultural standing in the world? It is clear that the potential for a country's cultural heritage to be held for economic ransom, as in the Pushkin Museum case in Switzerland, is undesirable and is reminiscent of cultural asset stripping. But the untested British legislation potentially goes too far in facilitating international mobility of art and artefacts at the cost of individual rights of restitution or compensation. Often those most keen on such legal protection have the most to hide, and other political motivations potentially can underlie decisions, as could be argued with the rush to introduce the legislation to appease the Russian government.

### **The issue for local authority museums**

These discussions can seem remote in relation to a local authority museum. However, it can be argued that if they are to benefit from art mobility they will need to be able to make and accept loans in the knowledge that the items in question are protected both here and if they consequently lend items abroad. Or more simply, not to lend those objects which do not have complete provenance during key periods such as 1933 to 1945. As there is not complete coverage in legislation across Europe and the traditional international collecting countries, perhaps a more pragmatic approach which would allow smaller council museums to participate is required? One based on assessing what parts of a collection are 'safe' to lend and avoiding the need to apply for approved museum

status to accept incoming fully provenanced items. Because, in reality, many of the smaller museums do not have the capacity to fulfil the criteria needed, and consequently are too little to attract those controversial pieces in the first place. They also could set a standard, following on from the promising engagement with the Cultural Property Advice website listing council museum items which require better provenance for the 1933 to 1945 period, by not attempting to attract those loans they are unlikely to be in receipt of and focusing on domestic or non-contentious international loans.

## **Mobility in the future?**

### **Shotgun marriage?**

The Culture Media and Sport Commons Select Committee undertook an investigation in Autumn 2010 into funding arts and heritage. The Art Fund submission to this inquiry noted its financial support for the aforementioned Staffordshire Hoard and for the joint National Gallery / National Museums and Galleries of Scotland purchase of Titian's *Diana and Actaeon*, as well as a purchase by the Imperial War Museum and the Wolverhampton Art Gallery. The Art Fund believes that in the current financial climate and given the prices in the art and antiquities market, joint acquisitions should be the way forward.

### **Nationalisation**

It could be said that each country's formation of museums reflects the underlying philosophy of its people. In essence, museums truly do reflect their society. In England, the network of museums are formed of individual institutions, most founded or heavily reliant on a charitable basis, and each

very identifiably separate. This is seen in documents such as the reference to the 'National Art Collections' (plural) in the 1929 *Royal Commission report* (p72) and the clear idea it contained that the core elements of each national museums' collections could not be loaned out to other organisations. The Waverley Criteria for exports are formulated around the outstanding importance, be it aesthetic, scholarship or historical, of a piece rather than it forming part of a greater whole (Waverley 1952). The *Cottesloe Report* in 1964, whilst promulgating the concept of given artefacts to public institutions being tied in perpetuity, still continued the concept of 'the national collections' (pg.8) and the 'public collections' (p17). Even the 1996 *Treasures in Trust* refers to collections<sup>351</sup>. But in the new financial world should we be thinking about a single national collection? The Art Fund believes we should.

In the Art Fund's submission to the Funding for Arts and Heritage inquiry by the Commons Select Committee on Culture, Media and Sport they introduced the idea of sharing collections (2010). It could be argued that all those collections funded by the public sector, namely the national museums, the local authority museums and the university museums, that they should be mobile, at no charge, between these institutions. All of these institutions hold the majority of their collections in storage and all of these institutions need changing exhibits to encourage people to visit and make return visits. Such an arrangement could be extended to cover the collections held by English Heritage (also publicly funded) and the National Trust which, though technically a charity, has a quasi-public link with both government and English Heritage in the distribution of certain national assets. With the United Kingdom encompassing devolved governments

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<sup>351</sup> The DCMS statement *The Value of Museums* came the nearest to creating a philosophical concept of a national public collection which was in the direct ownership of many individual institutions but should be seen as a single resource (2005b, p15).

and part of the European Union, where the line should be drawn if such an idea was implemented is difficult<sup>352</sup>.

To create this free movement of cultural objects would require legislation. Restrictive clauses in governing legislation and charitable trusts would need amending, as in the case of the Burrell Collection, raising moral issues as well as undermining the enforceability conditions attached to future gifts by way of trust. An alternative approach would be to exempt those trusts with restrictive conditions placed upon them, unless they were placed by statute, given that they could be repealed or amended to facilitate such mobility. But this notion is so contrary to our national idea of property and ownership, of liability and finance – could it actually work in practice when even publicly funded institutions have such ingrained individuality, in particular the local authorities where many of whom can trace their origins back to the municipal organisation which sprang up from the people, that they do not see themselves as part of a wider public whole there for public benefit? A good example in point is that of the reasoning for car parking charges in municipal car parks. Even though they are indiscriminate, their philosophy is often attributed by councillors to ensuring that people who travel from outside of the district to use their services (i.e. non-council tax payers to the council) then pay for those services. This is despite the fact that three-quarters of a local authorities' income comes directly from government and the general taxation levied upon all.

### **National Collection by stealth?**

As mentioned in chapter four, the current consultation by HM Treasury aimed at boosting philanthropy sees cultural treasures as a national

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<sup>352</sup> The potential discrimination of EU nationals if the scheme was confined to the United Kingdom may require the same rights be open to museums in EU member states. Setting aside the issue of funding expensive international loans, the question of Greece and the Elgin Marbles would have to be addressed.



resource. The proposal would allow someone to donate an item in return for an *inter vivos* reduction in tax liability. Similar to how the Art Fund manages some bequests, objects taken in under the scheme would form part of a national collection which can be distributed and gathered back in. This has a benefit that museums can be held to certain standards and items can be moved if they no longer meet them. It also means that the collection can be more mobile, with the opportunity to share significant pieces with a number of museums. As the government already maintains an art collection and staff to care for it, it would seem a natural extension of this work<sup>353</sup>. But it would set a precedent in establishing a truly national collection which would be distributed through museums. This idea has been resisted until now, with each organisation fiercely guarding its own holdings, be they in Parliament, Royal Palaces, national museums, universities or local authorities, though all in public ownership. Whether this is seen as a problem or an opportunity remains to be seen.

It could be argued that both of these ideas both support and run counter to the Government's support of localism. By providing mechanisms for significant local pieces in major collections, in the case of the Art Fund suggestion, or in private hands, in the case of the Treasury proposals it could support localism by enabling the return of such pieces to local museums. However, as the means to achieve this is essentially nationalisation it seems like the proverbial sledgehammer to crack a nut and ignores important aspects of availability for scholarly research and collective interpretative importance of museum collections. The Treasury proposals, being similar to a scheme already operated by the Art Fund, have the potential to make a notable but not a significant impact, and are unlikely to mass enough pieces in the short to medium term to raise questions of a formal national collection. However, the Art Fund

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<sup>353</sup> Though this is not mentioned in the consultation document. The Government envisages that the current Acceptance in Lieu Panel also will assess any gifts under this scheme if it is approved.

suggestion, whilst laudable, raises significant problems which are too difficult for a Government to expend time on solving.

## **Conclusion**

The purpose of art mobility is to ensure maximum public and scholarly access. Mobility has the potential to help and hinder both. Local authority museums could benefit more from mobility, but it is not the answer to all ills. In theory, the barriers to local authority museums borrowing individual pieces or whole exhibitions are relatively non-existent. In practice it is clear that not all museums are created equal in terms of accessing national museum loans and touring exhibitions. There also is no formal mechanism for inter-council museum loans or curation of exhibitions without reliance on a national museum to act as broker for contributions and ideas<sup>354</sup>. This consequently has a cost which further deters mobility.

Calls for greater sharing of the national patrimony have been made in reports for the last eighty years. Whilst all can point to good work from national museums, it is not enough to say that some progress has been made. It is too simple to blame the nationals for paying lip service to greater access to the national collections. If that were the case, why does the V&A have exciting pre-curated exhibitions ready to tour unbooked? It would be a shame if this is the result of a poverty of aspiration in our local authority museums. It is not clear that councillors know what opportunities are available to their museums. Museums staff under increasing pressure are unlikely to propose opportunities which will not receive political support, thus the opportunities available go untouched by all but the most engaged museums. There is an opportunity for national museums to do more to inform, educate and build partnerships not just with local authority

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<sup>354</sup> The hub museums would seem a logical point but do not appear to fulfil this role.

museum staff but with the councillor governors, extolling how museums help build a sense of community and shared understanding which is critical for local government and achieving true localism.

There are those who would argue that those exhibitions, loans and partnerships already are in place. However, the author's research demonstrates that the uneven geographical access<sup>355</sup> to the existing opportunities, particularly of touring exhibitions, leaves significant sections of the public without easy access to the diverse cultural patrimony that is the legacy of past generations<sup>356</sup>. Exhibitions and loans are, in general, biased in favour of the North and Yorkshire and Humber regions. Some of the oldest museum services with wonderfully diverse collections are held in these areas from Manchester to Sheffield. Their need for new and exciting pieces is no greater than any other museum in the country. In fact, it could be argued that their need is less given the quality of the collections they hold. However, through these repeat exhibitions, the museums in question have built up partnerships and developed the expertise that is required to put on a good show. These personal links encourage further lending and borrowing, which is good for the particular institution but makes it more difficult for those who do not have that background.

The problem for the smaller council museums is that it is difficult to develop a rolling programme of interesting exhibitions to keep people returning to the museum. There is no money for acquisitions. No time or staff to curate exhibitions from storage. No budget to support the display of a national touring exhibition, such as the provision of display cases. No wish to take on the subsidised liability for borrowed art nationals. There is no mechanism to join with other local authority museums, except in formal joint services, to work together on developing exhibitions or loaning pieces

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<sup>355</sup> The position of the Scotland, Wales and Northern Ireland in this respect is beyond the scope of this paper.

<sup>356</sup> In fact, the Taylor and Sansom report established that 26 of 46 (57%) local authority museum respondents were keen to borrow long-loans (2007, p5).

to complement and enhance the permanent exhibitions of another museum. Areas are 'twinned' towns around the world but these relationships do not develop to an exchange of cultural patrimony. Councils think they are radical by divesting themselves of the services into a trust. What would be radical is to take a look at the core assets, the collection and ask what do I have and how best can it serve the public? However, with the demise of subject-specific museum committees, many councillors lack the knowledge and the imagination to develop an alternative solution to the problems faced by museums.

Turning scrutiny on to collections would require dealing with the items of unknown origin and the legal position of treasure. Objects of unknown origin are more difficult than those constrained by bequests, as they remain in legal limbo unless evidence appears to demonstrate whether they are a loan or a permanent acquisition. There is an opportunity, if the law were to be reviewed to look at provisions, similar to that of a possessory title in land for items in museum collections to give greater comfort that the title a museum may or may not acquire after time without committing the tort of conversion. Such a principle would be controversial, on the basis that it runs contrary to the common law tradition protecting an owner's title to chattels against a good faith purchaser. The development of a possessory title based on items which have been in a museum's collections twenty-five years or more coupled with the publication of a notice to take possession of such items could be a way forward. An alternative would be an ability to display or lend items whilst in possession on the understanding that if the true owner came forward, that the item would be restored to them as a matter of public policy. The latter would provide the flexibility whilst preserving owner's rights.

Councils may be keen to share services but have they the foresight to share art? Wholesale mobility of art and artefacts is neither required nor

advisable, but limited mobility, particularly of branded touring exhibitions would benefit smaller council museums. This can be seen by the increases in visitor numbers. To achieve this, current barriers need to be removed and new partnerships between museums and nationals developed. The government could improve the impact of the Indemnity Scheme through the funding agreements with the nationals to prevent unnecessary indemnity underwriting. It also could address the different approaches to costs in the same manner, for the funding is all public money and it is ridiculous if a council does not take up an opportunity because it cannot afford to pay. However, councils themselves need to invest in the infrastructure to receive loans or touring exhibitions<sup>357</sup>. Finally, the transfer of museum policy to the Arts Council, who through the Arts Council Collection has one of the highest proportion of loans of art to institutions per year, should be the trigger for a re-evaluation of art mobility in local areas with their newly appointed museum officers focusing on the Arts Council's mission statement of "*great art for everyone*" and mobilising museums into a renaissance of new discovery for the public they serve.

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<sup>357</sup> Dedicating one gallery to rolling exhibitions, whether from within the museum or outside, was one of the essential changes recommended in a report the author wrote back in 2005.

## Chapter 7: are council museums viable?

Local authority museums are working within a fairly permissive legal framework and a complex policy landscape. In practice, council museums are managing with what exists but this does not mean that it is the model for the future or that some relatively easy changes could not improve the present situation. In order to achieve financial and ethical sustainability in the future, this thesis proposes a scheme of short and medium term measures which, together, would provide clarity to the sector, governing bodies, and to the general public who, ultimately, are both audience and funder.

This scheme is underpinned by a set of assumptions in respect of acquisition and disposal which have been developed from the evidence set out in this thesis. Museums have to accept the need for disposal if their premise is based on continuing to collect, and financial and physical resources for that museum are finite<sup>358</sup>. Further to this, council museums have to accept that disposals have to be permitted outside of public sector museums in the United Kingdom. Shifting material between national, university and other local authority museums does not address the problem and only shifts the public sector burden. The charitable sector additionally poses problems, as had been evidenced in the Wedgewood and Chatterley Whitfield cases<sup>359</sup>. A permanent transfer of material to such a body could later put that material at risk of disposal in an uncontrolled manner. Therefore, controlled disposal for value should form part of ethical collections management.

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<sup>358</sup> See pp43 & 65-6.

<sup>359</sup> See pp183-4.

## **The Scheme**

The scheme is based on a medium-term aspiration for legislative change coupled with short-term policy improvements. New primary legislation and a Government policy statement are the main methods of amendment. Some of the scheme's proposals, whilst designed to address the particular issues raised by council museums, also will provide benefits for other museums. This is not a return to 'one size fits all' museum policy, but a recognition that some museum problems are universal, although they will often affect local authority museums disproportionately.

### **The development of a new Museum Act**

The principle of a separate Museum Act is an important political statement as to their continuing importance. An Act would reaffirm local authority museums' status as discretionary services, drawing a line under the debate. The argument for compulsory provision is an unattainable dream and an unwanted burden<sup>360</sup>. The Act would be a practical mechanism to deal with outstanding legislative amendments; a new statute for local authority museums need not codify those provisions already contained in *Public Libraries and Museums Act 1964* and *Local Government Act 1972*. The proposed Act would contain five specific provisions which are set out below.

#### **a) Removal of the power to charge for entry**

The most controversial measure proposed in this thesis is the removal of the power to charge<sup>361</sup>. Council museums are a national educational resource. The nationals and most university museums do not charge. The

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<sup>360</sup> See pp61-4.

<sup>361</sup> See pp66-9

stated motivation of councils to ensure that the user pays rather than the local tax payer is a fallacy. Regardless of the charges, the local tax payer will be subsidising the museum. Further to that, even though the local tax payer is contributing towards the museum, due to European law they cannot be exempted from the charges as residents of the district, therefore charging discriminates against those who actually pay for the museum and provides a disincentive to visit. Councils face stark financial realities but free access encourages both repeat visits and incidental spend.

## **b) Clarification of the legal status of gifts and museum holdings**

The assumption that gifts made pursuant to *s.139 Local Government Act 1972*, interpreted through the opinion in *Cottesloe*, constitutes a charitable trust is false<sup>362</sup>. So, too, is the assertion that all public museum holdings are inalienable and held in perpetuity. However, these beliefs have been reiterated with such frequency and assuredness that they have attained the status of 'urban myth'. Thus the debate surrounding effective collections management and the limits on ethical disposal have been clouded by professionals indoctrinated with misinformation. The law needs to be clarified to make it clear that such gifts are absolute and without restriction. This is the most sensible position as there are other legal mechanisms available if a donor wishes to attach conditions such as one preventing disposal.

## **c) Restricting the proceeds of sale from disposals from museum collections to future acquisitions**

It is clear that the issue of disposal for value is controversial. An acceptance of the need for disposal for value, however, has the advantage that councils can invest in future collecting, and acquire the

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<sup>362</sup> See pp117-8 & 174-6.



ability to manage disposal. A determined local authority, as has been shown, can and will dispose of material for value. This is why legislative intervention is required, not to give a charter for sales, but to prevent the dissipation of the proceeds of such sales away from the museum or collections<sup>363</sup>. The new Act should direct that the proceeds of sales should be placed in acquisition funds to aid new purchases, following the precedent in the *Greater Manchester Act 1981*<sup>364</sup>, and to prevent the diminution of the collection to pay for the service. However, the Ealing case raises a further issue in respect of separate 'Borough Collections' which contain ceremonial regalia and other civic gifts. The differentiation is artificial. The policy proposals below and any newly drafted legislation should address this anomaly.

#### **d) Power to return spoliated material held in a trust**

Local authorities are not covered by the *Holocaust (Return of Cultural Objects) Act 2009*, which is understandable given that they are not unduly fettered by the law from returning spoliated material. However, in the instance of an item held under a charitable trust, as seen in the Glasgow Spoliation Panel case, a council is constrained. In *HM Attorney-General v. Trustees of the British Museum* Anthony Morritt V-C documents the principle established in *Re Snowden* that payments from charitable funds (where otherwise a moral wrong would be committed) are permissible. Whilst there is an inference that this could be extended to cover property, it was not expressly made clear in the decision that this was the position<sup>365</sup>. Thus, legislation is required to deal with this lacuna.

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<sup>363</sup> See pp226 & 232

<sup>364</sup> See p121.

<sup>365</sup> See pp205-7.

### **e) Granting ownership of artefacts of unknown legal title to councils after a period of years**

Items of unknown legal status are problematic for local authority museums. Lack of documentation means that museums are in the position of a finder when, in fact, they may be an owner. The *Tort (Interference with Goods) Act 1977* gives little comfort<sup>366</sup>. Drawing on the precedent of s.10 *Greater Manchester Act 1981*<sup>367</sup>, the Act would include a provision vesting property documented to the museum but of unknown legal title after a certain period of time. Additionally, a council would have to demonstrate that it has taken reasonable steps to investigate the ownership of pieces<sup>368</sup>.

### **The creation of a complementary policy structure**

What robust legislation can do is help create the conditions and flexibilities for museums to flourish through minimum regulation. This is possible only with a policy environment to complement rather than contradict the aims of the legislation. *Treasures in Trust* brought clarity to the sector in 1997<sup>369</sup>; it is time for another unambiguous Government policy statement to replace the contradictions left by the *Understanding the Future* publications. The transfer of responsibilities from the MLA to the Arts Council would make this a timely intervention, especially given that the Arts Council appears to view 'museums and libraries' as one entity. Whilst they have been handed a difficult job, retro-fitting their aspirations for the arts and failing to grasp the disparateness of the sector will do museums, local authority or otherwise, no favours. It is the responsibility of the Government, who occasioned this 'shotgun marriage', to provide the plan for future

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<sup>366</sup> See pp270-4.

<sup>367</sup> See p273.

<sup>368</sup> See p291.

<sup>369</sup> See p42.

success<sup>370</sup>. The policy statement would supplement and anticipate the Act and would need to cover or direct the following changes.

**a) The removal of the financial disincentive to borrow from national museums**

There should be no charges for inter-public sector loans and exhibitions. The requirement for insurance imposed by the national museums upon local museums, as well as the imposition of service charges, is contrary to the spirit of the Government Indemnity Scheme. These requirements should be removed by the Government through their funding arrangements with the national museums<sup>371</sup>. The cost of packing materials and transport issue could be managed through an Arts Council or philanthropic fund<sup>372</sup>.

**b) A new transparent classification scheme for museum collections**

The fact that the museum sector seems to be fluid - the less charitable would say opportunistic - about the definitions of acquisition, accession, disposal and deaccession has been unhelpful for both legal and museum commentators. Museum professionals are the people who advise councillors, potential donors and, by extension, the tax-paying public. As Manisty and Smith rightly identified, a new classification scheme is required<sup>373</sup>. However, their proposed model does not completely address the issues raised by this thesis.

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<sup>370</sup> See pp82-4.

<sup>371</sup> See pp248-9. The Scheme is clear in respect of borrowing from national museums; therefore legislation is an inappropriate mechanism to deal with the problem.

<sup>372</sup> See pp249-51 & p292.

<sup>373</sup> See pp226-7.

The proposal this thesis puts forward for inclusion in the new policy structure is a system based on legal constrictions and usage<sup>374</sup>. Items would be divided into (a) those which are permanently held owing to legal restrictions upon disposal or because they form part of the core collection of the museum, (b) those unlikely to be disposed of owing to their acquisition for study or display, (c) acquisitions which would be 'traded up' for a better artefact, (d) items for the handling collections, and (e) objects to be permanently disposed of by way of exchange or sale, or offered on long-term loan. This latter category does not mean that items falling within classes (a), (b), or (c) could not be loaned, but that long-loan is one method of, temporarily, disposing of an object for which the museum has no use at that time.

This system would give clarity to the public and potential donors regarding museum holdings, and would help councillors understand the cultural heritage that they have been entrusted with shepherding to the next generation. It would act as a basis for potential exchanges with other museums, and would clearly state which parts of the collections were seen as being available for disposal for value, preventing opportunistic disposals. Finally, it would remove the confusion and doubt occasioned by the use of accessioning and 'Borough Collections' to differentiate different holdings.

### **c) Joint guidance from the Arts Council and MA on acquisition and disposal**

The Arts Council and the MA should devise joint guidance on acquisition and disposal<sup>375</sup>. Based on and incorporating the new classification scheme above, it should be reinforced through the MA's *Code of Ethics* and the Arts Council's *Accreditation Standard* thus removing the conflict between legislation and policy. The guidance should

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<sup>374</sup> See p164.

<sup>375</sup> See pp226 & 232-3.

provide flexibility in the system, supported by legal practice. The advice is required to stop the default position of the sector, which might be described as 'attack first, ask questions later'. Several museums have been criticised publicly when first discussing proposals for disposal or changes to services, despite subsequent approval or support from the sector. This is not constructive.

This guidance would ensure that council museums in particular, are no longer in fear of losing their accreditation (and therefore potential funding streams for larger capital projects), or of being castigated by the MA, whether or not they are members of the organisation. This advice should include explanations of recent precedents<sup>376</sup>. Additionally it should promulgate working examples of requests for return of human remains, taking as a precedent the useful publication of Spoliation Panel reports, given their rarity and complexity. Finally, it should reinforce the point that museums, unless restricted by statute, are free to sell items purchased wholly from their acquisition budgets, building upon the mixed lot principle<sup>377</sup>.

The HLF also can contribute to a coherent policy framework in respect of acquisition and disposal in three ways. Firstly, their grant terms and conditions need to be altered to reflect the legal status of possession of treasure, rather than ownership<sup>378</sup>. Secondly, the condition in their grant terms requiring full market value if an artefact is disposed of should be modified so as to permit public sector transfers<sup>379</sup>, either gratis or at a reduced cost. Finally, disposal for value within the ethical framework set out above should not be a bar to receiving funding from the HLF<sup>380</sup>.

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<sup>376</sup> Ealing (pp173-4), Southampton (pp179-80), Bury (p198), Bolton (pp199-200), Royal Cornwall Museum (p200), Watts Gallery (p201), Glasgow (pp205-6) on spoliation, and Bury St Edmunds (pp209-14) on human remains.

<sup>377</sup> See p197 and pp155-6.

<sup>378</sup> See p270.

<sup>379</sup> See p144.

<sup>380</sup> See p179.

#### **d) Measures to increase the mobility of collections within the public sector**

Art mobility could make a substantial difference in a short space of time to access to the public collection of cultural property and to the attractiveness of council museums. The focus should be on mobility within the United Kingdom. Whilst the idea of inter-European mobility is an ambition, it is clear that more could be done to facilitate exchanges between domestic museums, and there remains the issue of scholarly access. Fragile items, of course, should not be moved, but neither should museums be afraid of lending. If history is reduced to seeing artefacts in pictures online, we will lose touch with the irreplaceable connection that seeing an object in the flesh gives us to our past. All access ultimately leads to destruction, so that access should benefit as many people as possible.

It is clear that the national museums have done much in the past fifteen years to address the perennial question about borrowing from the nationals<sup>381</sup>. However, it also is apparent from the analysis in this thesis that much more can be done. Part of the solution rests with the Government and the management of the Indemnity Scheme<sup>382</sup>. National museums themselves should follow the V&A's lead by developing 'ready to tour' exhibitions. Work needs to be undertaken by the National Museums Directors Conference, or Arts Council, to understand why these exhibitions are not always taken up and why there is a geographical bias in those institutions which have benefited from exhibitions and loans over the past fifteen years<sup>383</sup>. Support should be given to encourage museums who have not participated in such arrangements to do so, and a regular pattern of exhibitions and dispersed locations established so that the public come to know that interesting and exciting pieces will be coming to their door step, much like the touring plays do each year.

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<sup>381</sup> See pp244-8 & pp251-55.

<sup>382</sup> See recommendation on policy a) above and p292.

<sup>383</sup> See pp289-90.

## **e) Introduction of stronger governance structures**

Strong governance structures, such as a museum management committee, are an easy 'quick win' for local authority museums. As demonstrated by the dedicated political boards of those with shared services, councillor engagement directly in museum services ensures that their value and concerns are appreciated at a decision making level. The decline in direct management of museums seen since 1974 needs to be halted<sup>384</sup> and councillors given access to the museum professionals, not just the senior council staff, whose background often is insufficient when questions of joint or grant funded acquisitions, requests for return of artefacts, potential disposals, or outsourcing to charitable trust, arise.

Improvement could be made in increasing the understanding of councillors about the implications of a number of different issues about which they may need to make important decisions<sup>385</sup>. This directly relates to the diminution of the role of Borough Curator and the reduction in museum committees. In particular, there needs to be increased comprehension of the implications of terms of conditions attached to grant funding for acquisitions<sup>386</sup>, the advantages of joint acquisitions with other local authorities, the legal constraints on items or parts of collections, and the legal and ethical concerns regarding requests for return of objects. It is incumbent on senior council staff to ensure that the expertise housed within the museum and legal staff is made directly accessible to councillors, and councillors also should be obliged to develop the requisite knowledge required to manage the service.

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<sup>384</sup> See pp59-61.

<sup>385</sup> For example p291.

<sup>386</sup> See pp141-5, 152 & 163.

This experience is essential when questions are raised regarding outsourcing services to charitable trusts or other external models<sup>387</sup>. Enthusiastic and knowledgeable volunteers have successfully set up and run niche museums in the charitable sector, but that is different in scale to major public buildings housing a diverse range of artefacts, sometimes with multiple sites, with even more in storage. Councillors have to ensure that collections are protected from potential creditors or pension liabilities<sup>388</sup> and not underestimate the amount of public subsidy that may be required if no endowment is made or if the new trust is saddled with a high maintenance liability from an older public building forming part of the transfer<sup>389</sup>.

If the trend continues to outsource museums alongside other disparate services into a charitable trust construct, museums could be at risk owing to the failure of other services. As such, the Arts Council or the MA could build on the work of the MLA, in conjunction with Farrers and Egeria, by reviewing again the fate of outsourced services and make a true assessment of the benefits and burdens placed on both the collections and the councils. The author has yet to see a local authority outsourcing model in the museum or heritage sphere which, in common parlance, 'stacks up' for the long term or does not rest on securing further public or lottery subsidy. It certainly is not the silver bullet perceived by many, and councillors should ensure that they receive advice from a number of sources before making decisions of such magnitude.

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<sup>387</sup> See pp77-81.

<sup>388</sup> See pp182-4.

<sup>389</sup> This is where the new Endowments Fund could provide a lever. Primarily aimed at the national museums, local authority museums have an opportunity to fundraise for their recent or newly proposed trusts to give some financial security in the future.



## **f) Establishing the legal ownership and possession of museum collections**

Councils need to invest the time to research their collections. This may seem an onerous administrative task in straightened times, but is crucial in order that local authority museums participate in loans, make exchanges, or sell<sup>390</sup>. From the author's experience and knowledge of other museums, such work can be programmed in on a priority-led basis<sup>391</sup>. It also is essential for establishing the new classification scheme, dealing with spoliation, and developing robust bespoke collecting policies. The process will evidence museums' ownership (or basis of possession) of their collections including any conditions or restrictions, for what purpose the museum holds the objects, and identify any missing items or missing records. This will enable a museum to understand its holdings and identify the potential for future exhibitions, outward loans, and gaps in the collection to prioritise for future acquisition. In respect of spoliation, museums have a duty to highlight their collections on the *Cultural Property Advice* website<sup>392</sup>. Only the largest council museum services have done so, and it is time that the others followed, linked to this drive to improve documentation across all museum holdings.

## **g) Creating acquisition funds for future purchases**

The first thing any council museum governing body should do, if they do not already have one, is set up an acquisition fund<sup>393</sup>. This can provide a focus for generating philanthropy from others – why would you donate money to an authority that does not try and set aside some money each year towards building its own acquisition fund<sup>394</sup>? It also is essential for holding the proceeds of sales from the museum collections.

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<sup>390</sup> See p232.

<sup>391</sup> For example p167 & 191.

<sup>392</sup> See p207.

<sup>393</sup> Under s.15 *Public Libraries and Museums Act 1964*, see pp114-5.

<sup>394</sup> See p164.

## **h) Writing new acquisition and disposal strategies to reflect legislative and policy change**

Writing a bespoke collections policy will aid the future development of the museum's holdings. Traditional policies are built around the haphazard collections and local history<sup>395</sup>, but these policies should be flexible enough to benefit from future philanthropy which may not fit within the existing collections. That is how these collections were amassed in the first place. However, in taking this path, councils must be clear to potential donors what their terms and conditions are for accepting gifts and should encourage those with more complicated wishes to come forward and negotiate with the museum rather than put them in the position of accept or refuse<sup>396</sup>. The default answer to a potential benefactor asking a lawyer how best to leave cultural objects and have their wishes observed should not simply be to direct them to the Art Fund<sup>397</sup>.

## **i) Developing a market for inter-council loans, exhibitions and joint purchases**

Perhaps it is natural parochialism which has meant that joint acquisitions have not been popular between local authorities. The Staffordshire Hoard seems to be an exception. Whilst there is a prestige to joint purchases with national museums, it is surprising that more local authorities have not considered pooling resources through this mechanism<sup>398</sup>. Councils should investigate opportunities for joint purchases when more expensive artefacts come on to the market with their near neighbours or museums with similar collecting interests. They also should

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<sup>395</sup> See p136.

<sup>396</sup> See p138 for contracts of purchase, pp145-6 for conditional gifts and the salutary tale of *Troughear v. Council of the City of York*, p147 for *donatio mortis causa*, and pp147-9 for bequests.

<sup>397</sup> See p151.

<sup>398</sup> See pp256-8.

take legal advice on determining risks and responsibilities for an object which will only be in their possession part of the time.

Councils also should be building their own market for loans and touring exhibitions<sup>399</sup>. The hub museums have been a focus in each geographical area, but with their demise there is an opportunity to review the possibilities for provincial public sector museums. There is no reason why a touring exhibition cannot be developed by a group of local authority museums from their collections for the benefit of the group. There is no reason why more reciprocal loans could not be developed between these museums, within the terms of the Government Indemnity Scheme. It is for council governing bodies and museum staff to start entering into contractual arrangements which make the best use of the cultural patrimony that already is held within the public sector, and for the Arts Council or the HLF to support, either financially or with advice, to ensure this happens.

## **A manifesto for change?**

It is clear that there is a lack of understanding among some museum professionals and councillors regarding the complex and interesting development of local authority museums. In this respect the author hopes that this thesis has gone some way to addressing this imbalance in what has been a neglected area of study from the legal perspective. This thesis also provides a comprehensive statement on the current law pertaining to local authority museums in an attempt to dispel some of the myths that have arisen over time. It is not the author's intention that this information becomes a disposal charter, but is used to address pragmatically the difficult questions facing the sector. The analysis of the rare request for return of domestic human remains is a salutary tale for those museums

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<sup>399</sup> See p292.

holding such material; it is published here for the first time as a case study for future requests. Similarly, the issue regarding ownership of treasure has been explored and raised as a potential problem for the future. The drive to ensure that treasure reaches beyond the British Museum is both laudable and needed, but provides additional complications which have been ignored. The scheme contained in this final chapter is designed to address the questions raised, but requires a concerted effort by the sector to face and deal with the problems.

It is a sector on the cusp. There is an opportunity to redress the disparity between the law and the policy framework that has existed during the past forty years. As such, it is hoped that this thesis is a timely contribution to the debate which will establish whether local authority museums will continue to be sustainable. Whilst some limited legislative amendment is needed, and a government policy statement concentrating on the concerns raised would be helpful, it is likely to be left to the Arts Council and the MA to take up the baton, if they so choose, to implement the proposals contained within this thesis.

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## **Chapter 2: 'in museums we trust'. The policy context for the modern local authority museum**

### **Acts of Parliament**

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<sup>400</sup> The author published some articles under her former married name.

## **Chapter 3: The origins of museums**

### **Acts of Parliament**

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Baths and Washhouses Act 1878  
British Museum Act 1963  
British Museum Act 1962  
British Museum Act 1955  
British Museum Act 1946  
British Museum Act 1938  
British Museum Act 1930  
British Museum Act 1924  
British Museum Act 1902  
British Museum Act 1878  
British Museum Act 1839  
British Museum Act 1832  
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British Museum Act 1816  
British Museum Act 1807  
British Museum Act 1805  
British Museum Act 1766  
British Museum Act 1753  
Cotton House and Library Act 1706  
Education Act 1902  
Freedom of Information Act 2000  
Greater Manchester Act 1981  
Human Tissue Act 2004  
Imperial War Museum Act 1955  
Imperial War Museum Act 1920  
Libraries Offences Act 1898  
Literary and Scientific Institutions Act 1854  
Local Authorities (Goods and Services) Act 1970  
Local Government Act 2003  
Local Government Act 2000  
Local Government Act 1999  
Local Government Act 1992  
Local Government Act 1985  
Local Government Act 1972  
Local Government Act 1894  
Local Government Act 1888  
Local Government Act 1858

Local Government and Public Involvement in Health Act 2007  
Local Government Board Act 1871  
Local Government (Contracts) Act 1997  
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Metropolis Local Management Act 1855  
Municipal Corporation Act 1835  
Museums Act 1845  
Museums and Galleries Act 1992  
Museums and Gymnasiums Act 1891  
Museum of London Act 1986  
Museum of London Act 1965  
National Gallery Act 1856  
National Gallery and Tate Gallery Act 1954  
National Gallery Loan Act 1883  
National Gallery (Overseas Loans) Act 1935  
National Heritage Act 1983  
National Maritime Museum Act 1989  
National Maritime Museum Act 1934  
National Portrait Gallery Act 1889  
National Theatre and Museum of London Act 1973  
Plymouth City Council Act 1987  
Plymouth Corporation Act 1915  
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Sale of Goods Act 1979  
Treasure Trove Act 1996

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1973/1313 National Gallery and Tate Gallery: The National Gallery (Lending Outside the United Kingdom) Order, 1973.  
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## **Chapter 4: Acquisition**

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## **Chapter 5: Disposal**

### **International Treaties and Conventions**

Declaration of the Allied Nations against Acts of Dispossession committed in Territories under enemy occupation or control

### **Acts of Parliament**

Administration of Estates Act 1925	Museum and Galleries Act 1992
Anatomy Act 1832	National Gallery Act 1856
British Library Act 1972	National Gallery and Tate Gallery Act 1954
British Museum Act 1963	National Heritage Act 1983
Charities Act 1993	National Maritime Museum Act 1934
Charities Act 2006	Planning (Listed Buildings and Conservation Areas) Act 1990
Dealing in Cultural Objects (Offences) Act 2003	Prescription and Limitation (Scotland) Act 1973
Holocaust (Return of Cultural Objects) Act 2009	Public Libraries and Museums Act 1964
Human Fertilisation and Embryology Act 1990	Regulatory Reform Act 2001
Human Tissue Act 2004	Sale of Goods Act 1979
Imperial War Museum Act 1920	Theft Act 1968
Ipswich Corporation Act 1948	Trusts of Land and Appointments of Trustees Act 1996
Local Government Act 1972	Variation of Trusts Act 1958
Murder Act 1752	

### **Statutory Instrument**

2010/50 Holocaust (Return of Cultural Objects) Commencement Order 2010

### **Cases**

Dobson v. North Tyneside Health Authority [1997] 4 All ER 1 WLR 596  
Doodeward v. Spence [1908] 6 CLR 406 (Australia)  
Hayne's Case [1614] 12 Co. Rep. 113  
HM Attorney-General v. Trustees of the British Museum [2005] 3 WLR 396  
Howe v. Earl of Dartmouth [1775-1802] 7 Ves Jun 137; 32 ER 56  
Jonathan Yearworth v. North Bristol NHS Trust [2009] EWCA Cir. 37  
R v. District Auditor ex parte West Yorkshire Metropolitan County Council [1985] 26 RVR 24  
R v. Environment Secretary, ex parte Rose Theatre Trust [1990] 1 QB 504  
R v. Kelly [1998] 3 All ER 741  
R v. Rothery [1976] 63 Cr. App. R. 231  
Re Denley [1969] 1 Ch 373  
Re Endacott [1959] 3 All ER 562  
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## **Chapter 6: Art Mobility**

### **International Conventions**

1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property  
1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects

### **European Instruments**

Consolidated Treaty on the Functioning of the European Union  
Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State  
Council Directive 96/100/EC of 1 March 2001 on the return of cultural objects unlawfully removed from the territory of a Member State  
Council Directive 2001/38/EC of 10 July 2001 on the return of cultural objects unlawfully removed from the territory of a Member State  
Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods  
Resolution of the Council of the European Union of 16 November 2007 on a European Agenda for Culture (2007/C 287/01)  
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Disposal of Uncollected Goods Act 1952	National Heritage Act 1983
Greater Manchester Act 1981	State Immunity Act 1978
Holocaust (Return of Cultural Objects) Act 2009	Supply of Goods and Services Act 1982
Human Rights Act 1998	Theft Act 1968
Human Tissue Act 2004	Tort (Interference with Goods) Act 1977
Imperial War Museum Act 1955	Tribunals, Courts and Enforcement Act 2007

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# Chapter 7: Conclusion

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