Written evidence submitted by the Antiquities Dealers' Association (CPB 09)

Summary

The Antiquities Dealers' Association is supportive of the aims of The Hague Convention and has reflected this in its Code of Conduct http://theada.co.uk/code-of-conduct/, which has been widely held up as the model of industry codes. This is why the ADA wants to be able to support the Bill fully, as well as the Government's ratification of the Convention and the Protocols to the Convention. However, while we understand the Government's eagerness to lead the field in doing so, we also want to ensure that the ratification is effective and does not enshrine any unforeseen consequences in law.

We have several substantive issues with the Bill:
a) The lack of clarity surrounding the definition of Cultural Property; and
b) The level of mens rea, linked to the lack of clarity over occupied territories and standards of due diligence or codes of conduct.
c) Retroactivity.

The lack of clarity stems from confusion over whether the Government views the definition as being limited to objects 'of great importance to the cultural heritage of every nation', as it appears to indicate in much of its argument, or the complete list of art and objects of even the most ordinary type, as the wording of the definition indicates [1], which risks having a seriously damaging impact on the legitimate art market. We do not ask for the definition to be changed, but we do ask for the Government to make clear its interpretation of the definition as part of the Bill.

The level of mens rea. In all of its arguments, the Government stipulates that dealers will not have to do anything more than they already do via due diligence and their codes of conduct, but our example shows [2] this is not the case and too much doubt and uncertainty remains for trade to be viable under these circumstances. DCMS has also indicated that the level of mens rea matches existing definitions under UN Sanctions Orders. However, along with a number of legal experts, we argue that this is not a fair or appropriate precedent in this case.[3] Further, the Bill does not make clear what constitutes an acceptable level of due diligence, nor does it specify which code of conduct will be taken as the industry standard.

Both the Secretary of State and the Parliamentary Secretary of State currently guiding the Bill have stated that it will not damage the art market.[4] However, we fear that unless our concerns surrounding the definition and mens rea, as set out above, are satisfied, together with a clear guide to acceptable due diligence and codes of conduct, it will do very significant damage indeed.

We also argue that our arguments are consistent with the Government's own 2008 response to the previous attempt at this Bill.

ADA submission in detail

The lack of clarity surrounding the definition of Cultural Property under the Bill.

The DCMS has said that the definition of 'Cultural Property' under the Bill is only meant to apply to objects 'of great importance to the cultural heritage of every people'.

However, the punctuation in the definition in Article 1 of the Hague Convention that is being adopted in full in the Bill[1], with its series of semi colons, appears to set this out as simply the first item in a list of items to be included. That list following the first semi colon appears to include all types of art and artefact, even the most simple and inexpensive object.

Hansard records mixed messages from ministers on this issue during the 2nd reading on October 31.

The Secretary of State first says the following: "It defines cultural property as movable or immovable property of great importance to the cultural heritage of every people, such as monuments, works of art, or buildings whose main purpose is to contain such cultural property. The definition is broad and the list of examples is not exhaustive. As well as traditional works of art, the definition could also include, as was made clear during discussions in the other place, modern or digital types of cultural property such as very rare or unique film or recorded music." (Column 698).

However, the Parliamentary Under Secretary of State later states: "Let us be clear that the dealing offence applies only to a very small but very special category of cultural objects—those which are of great importance to the cultural heritage of every people." (Column 740).

Such conflicting messages place the trade in an impossible position and will certainly result in damage to the market and how it operates, something the Secretary of State vows will not happen (Column 700: "It is important that we are clear that the Bill will not hamper the way in which the art market operates.")

If the Government's intention is for the definition only to cover cultural property of 'great importance to the cultural heritage of every people' (including, it is hoped, for archaeological material), then it needs to state this clearly in the Bill and not simply refer to the definition in Article 1 of the Convention.

Concerns over the level of mens rea under clause 17 of the Bill

The level of mens rea is set so low at "knowing or heaving reason to suspect", that it is just one short step from strict liability. The British Art Market Federation (BAMF) has commissioned an independent expert analysis of the meaning and implications of each level of mens rea and it is quite clear, from the standpoint of legal opinion, that the draft Bill sets the bar surprisingly low.

The DCMS has told the ADA it believes the proposed level of mens rea is in line with UN Sanctions Orders.

However, when the UK acceded to the UNESCO Convention, the level of mens rea in the supporting legislation of the Dealing in Cultural Property (Offence) Act 2003 was 'knowing or believing'. [1]

The Sanction Orders set a precedent but such Orders in Council are not subject to Parliamentary scrutiny. More relevant parallels are Acts of Parliament, namely the Theft Act and the Dealing in Cultural Property (Offences) Act 2003.

In addition, the Sanctions Orders focus on finance and money laundering, for which there are clear rules, whereas this Bill focuses on artefacts, which can only be assessed according to available documentation, the eye of the specialist and due diligence protocols set out under various codes of conduct. Judgment here is not as exact a science, which calls into question the suitability of the Sanctions Orders as precedents. (*See Professor Janet Ulph's arguments below*)

Furthermore, Greek law 3691/2008 (Prevention and suppression of money laundering and terrorist financing and other provisions) adopts the test of knowing and intention rather than suspecting, a higher test than that of suspecting proposed under English law. [5]

Sir Edward Garnier QC MP has already set out dangers for the trade eloquently, both during the 2nd Reading on October 31 and in his article in The Times on November 3, ***a copy of which is attached in Annex 1*** Chris Bryant MP put it succinctly in the 2nd Reading: "There could be an unreasonable reason. Will the Government be open to suggestions to improve the Bill so that people are not unwittingly caught by the law?" (Column 700).

Meanwhile, Sir Edward is far from being a lone expert voice on this matter.

Professor Janet Ulph of the Leicester University School of Law is Arts and Humanities Research Council (AHRC) Fellow at the Museums Association and is the major co-author of *The Illicit Trade In Cultural Property: Money Laundering, Criminal and Civil Liability, and Recovery* (Hart Publishing, 2012). She has recently given evidence to the All Party Parliamentary Group on Culture.

This is what she has to say on the matter.

> "1) A test of "reasonable grounds to suspect" is an objective test. It means that the offence would be committed if the accused ought to have been suspicious. It does bring the test down to one of negligence.
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> "2) The test of "reasonable grounds to suspect" is easier to apply in the financial sector. e.g. it is used in section 330 of the Proceeds of Crime Act 2002. The reason I think that the test is easier to apply in the financial sector is because there is detailed guidance provided by the Joint Money Laundering Steering Group. Solicitors have their own guidance provided by the Law Society. In contrast, because the art world has so many specialist groups, there are a large number of professional codes of ethics.
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> "In short, it might seem more appropriate, given the wide variety of objects and expertise, if the test was the same as for the principal money laundering offences (sections 327 to 329), which apply to everyone. i.e. the test set out in section 340(3) of the Proceeds of Crime Act is: "knows or suspects"."

The ADA has argued on numerous occasions, and agrees with Sir Edward Garnier's views as expressed in The Times article that "The mere making of an unfounded allegation that an item was unlawfully exported from an occupied territory after 1954 may place in the mind of the potential dealer or auctioneer a reason to suspect that it has been unlawfully exported; and although it may later turn out to be untainted, he will not go near it."

This effectively reverses the burden of proof in all but name, introducing a 'guilty until proven innocent' element to the Bill directly against the objections lodged by Lords Inglewood and Howarth (Hansard June 27, Columns 1514 and 1516), as well as the assurance of the previous Parliamentary Under Secretary of State, Lady Neville-Rolfe (Hansard June 27, Column 1511). Such a change would undoubtedly "hamper the way in which the art market operates", which the Secretary of State has promised the Bill will not do (Hansard, October 31, Column 700).

The ADA is also aware of the 2015 report 'Don't Look, Won't Find', by Transparency International UK, which raises concerns about money laundering risks within the art market because of perceptions of secrecy. These concerns are highlighted on pages 60 and 62 of the report [6] and it is understandable how the views expressed might have prompted the desire to include a different test from dishonesty to be included in the Bill because a test of dishonesty is seen as nurturing an environment where people do not ask questions in transacting. While understanding these concerns, the ADA would argue that the test for the principal money laundering offences ("knows or suspects") should answer, at least to an extent, the concerns about secrecy.

In tandem with this, we would suggest a Treasury initiative in conjunction with the trade that would help fulfil the terms of Recommendation 16 of Transparency International, as set out on page 70 of the report[6]: It recommends strengthening "intelligence sharing frameworks between law enforcement authorities, AML supervisors, civil society and key private sector entities".

Taking all of this into account, however, it would be inappropriate for this Bill to be seen as a way of responding to the concerns of Transparency International. The main purpose of the Bill is to enable the Government to ratify the Convention and its two Protocols.

The lack of clarity over acceptable levels of Due Diligence and standard Codes of Conduct

As Professor Ulph states above, "because the art world has so many specialist groups, there are a large number of professional codes of ethics". The ADA represents a number of the leading UK dealers in antiquities, but there are other associations who represent interests within the coins trade as well as auctioneers and other trade associations in the wider market, all of whom will be affected by the Bill. Each has a different code of conduct tailored to their specific area of trade, although many are also members of the British Art Market Federation whose guidelines they also follow.

The ADA has upgraded its code of conduct in 2016 [7] in recognition of the greater care that now needs to be taken with due diligence in light of world events.

However, while the Bill does not deal directly with due diligence, it has formed part of the debate and is referred to by ministers during the 2nd Reading. The difficulty is that there appears to be no consensus over what the standards of due diligence should be, nor which codes of conduct should apply.

For example, on October 31, during the 2nd Reading, the Secretary of State told the House of Commons: "Dealers will not be required to carry out any further due diligence beyond that which they should already be conducting." (Column 700-701) However, she did not state what she understood that due diligence to be.

David Burrowes MP, co-chair of the APPG, then states: "It is worth noting that the National Police Chiefs Council lead for heritage and cultural property crime, who should be commended and for whom resources for the enforcement effort are important, said that given that dealers in cultural property are expected to conduct due diligence checks, they would be unlikely to fall foul of the objective test of "reason to suspect"." (Column 719) However, he too neglects to mention what the standard of due diligence is in this case.

Robert Jenrick MP notes: "It is extremely important that the due diligence being carried out is proportionate and does not dissuade legitimate businesses from participating in the market." (Column 723). Again, though, there is no indication of what that might be.

Finally, the Paliamentary Under Secretary of State notes: "I am sure that the Minister will provide us with an assurance that the threshold is not low to scoop up innocent people but rather ensures that prosecutions are brought against anyone who has not conducted their due diligence." (Column 728). Yet again, however, no explanation is given regarding levels or standards of due diligence.

The ADA believes it is important to know these standards as they would have an important bearing on the "having reason to suspect" test arising from any legal challenge and must be relied on by those facing such a challenge.

Why is the trade concerned?

Auction houses, and increasingly dealers with an online presence, routinely receive letters from various embassies and governments asking for proof that the objects they are selling were legally exported. These approaches almost never offer any evidence to support their claims. Instead, they ask for proof of the trade's due diligence procedures etc, adopting the attitude that it is up to the auction house or dealer to show that the items are not illicit rather than for the embassy or other challenger to show that they are. These letters tend to arrive a few days or only hours before the auction, with little time to react. It is widely thought that such approaches are deliberately left until the last minute for the specific purpose of disrupting the sale. We agree that only a few of the countries from whom we receive such letters would be considered occupied. However, the list of occupied territories is unlikely to be made public because of international sensitivities.

Joanna van der Lande has shown the DCMS examples of letters the industry receives from Cyprus, and though the DCMS does not regard them as a trigger (as proof of wrong-doing is seldom if ever provided), we know the Cypriot Government is doing all it can to reverse the burden of proof. (It has announced this as a priority.[8]) Whether Cyprus is successful in this or not is another matter. The 'having reason to' element is objective and as such it would be for the courts to decide if a crime had been committed, rather than the DCMS or the Art Squad. The ADA is in agreement with the police, however, in that we do not think it likely that there would be many successful prosecutions, but with the penalties in place and forfeiture procedures, it would cause considerable fear and confusion as well as legal expense to those of us who work within the law. There are plenty of other laws in place to tackle illicit trade, but the proposed level of mens rea in this Bill would have a direct and unnecessary impact on the law-abiding members of the trade.

Would honest dealers wish to run this risk of prosecution – all for a Cypriot pot that we believe is legitimately on the market but perhaps has no paperwork that supports this, other than the testimony of the vendor and the dealers' own assessment of their credibility?

Anti-trade campaigners have dismissed these concerns as groundless, saying that simple consultation with a specialist lawyer in each case would solve the problem. However, they have failed to take into account the time and cost required – most often at very short notice prior to a sale – which would render proceeding with the consignment all-but impossible and uneconomic.

Retroactivity

Although it has been made clear the Bill is not intended to be retroactive, as our business is international, we routinely import items for sale from outside the UK. After the Act is passed, the objects entering the UK could be caught by this offence, even where they are items that have been legitimately on the market in Western jurisdictions such as the United States.

Conclusion

So, we have a number of uncertainties. The uncertainty:

- **of whether a country is occupied or not.**
- **of whether an item would constitute 'Cultural Property' under the Act.**
- **over what constitutes due diligence under the Act.**
- **over which codes of conduct would apply under the Act.**
- **of whether a challenge of illicit selling, offering no evidence to supports its claim, would fulfil the test of 'having reason to suspect' under the terms of the Act.**
- **over whether the modern-day state making the claim on the artefact(s) had sovereignty over the ancient site where they were found (this is because of ancient trade routes and the movement of borders over time).**

As things stand, we are being advised that we would have to rely on the subjective judgment and goodwill of whoever happened to hold the relevant post at Scotland Yard at the time, although, in reality, only the courts would have jurisdiction.

We are told that the Bill will not change how the art market operates, yet all the indications are that it will have a significantly detrimental effect on the market. Likewise, without any clear definitions, rulings or wording under the Act, ministers' reassurances must necessarily count for little, since it will be the courts that decide in the event of a prosecution.

Although the Act would seemingly apply to relatively few objects, the level of criminal liability, including joint personal and corporate liability for galleries and auction houses, and uncertainty resulting from the lack of clarity over the definition of cultural property and occupied countries all adds up to too much risk for honest, law-abiding dealers and auction houses.

We are also most concerned that the proposed level of mens rea would set a precedent for future legislation. Our concerns on mens rea could be met with a simple amendment, while the other issues could be satisfied by clarifications within the Bill, which we argue would also be essential for the Crown Prosecution Service.

Finally, the ADA argues that the priority must be getting the Bill right rather than rushing it through.

November 2016

Footnotes

1 Cultural Property (Armed Conflicts) Bill

Part 1 – under Key Definitions

2. "Cultural Property"

In this Act "cultural property" has the meaning given in Article 1 of the [1954 Hague] Convention.

Hague Convention Definition in full:

Article 1. Definition of cultural property

For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and

depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.

2 Example:

An auctioneer is preparing to hold a sale of 300 lots in three days' time when he receives a letter from the Republic of Cyprus, Department of Antiquities noting the Turkish occupation in the northern part of Cyprus dating back to 1974 hindering the Republic's ability to protect its cultural heritage, preventing the enforcement of laws and regulations relating to the importation and exportation of cultural goods and national treasures. They then go on to note that the auction contains categories of goods that are usually discovered in tombs that are frequently looted. They then go on to request provenance information from prior to 1960 when the Republic of Cyprus's Antiquities' Law was already in force, requesting documentary proof.

The letter provides no evidence of wrongdoing. Instead it requests proof that the object pre-dates their Antiquities Law, assuming that without such proof it a) contravenes the Cypriot Antiquities Law, or b) It has been looted from a tomb possibly in the Turkish occupied section of Cyprus.

What should the auctioneer do? Is this just another vexatious claim to disrupt the auction? Or is there any validity to the claim? The auctioneer has carried out full due diligence procedures as defined by his firm's code of conduct and found nothing wrong. In quite a number of cases, the lots concerned are accompanied by details setting out the objects' ownership history.

Currently, Scotland Yard advise that if the auctioneer can show proper due diligence then no further action is likely under the new Act. However, that opinion may change as the relevant Scotland Yard officer moves on and is replaced and is, anyway, only an opinion. Likewise, although the Government has hinted that it considers the Act should be limited to artefacts 'of great importance to the cultural heritage of every people', it has not stated this unequivocally when introducing the legislation, and the definition of Cultural Property under The Hague Convention 1954 remains unchanged within the Act. This leaves the courts free to include any object that falls under the wide-ranging terms of the standing definition.

Under these conditions, if the auctioneer decides to ignore what appears to be a vexatious approach from Cyprus and proceed with the sale three days later, they must do so not knowing how a court might subsequently rule on:

- whether the objects concerned fell within the definition of Cultural Property under the Act;
- whether, on the advice of Scotland Yard (or not), their level of due diligence was sufficient to quash any argument that they might have had '*reason* to suspect' that something might have been wrong.

We argue that this level of uncertainty, in the context of a potential seven-year prison term if found guilty, would be too burdensome for any auctioneer (dealer or collector) to proceed with the sale.

However, it is unlikely to have much effect on the illicit market, which would simply go underground.

3 UN Sanctions Orders.

(2009 No. 1747, UNITED NATIONS The Terrorism (United Nations Measures) Order 2009)

See http://www.legislation.gov.uk/uksi/2009/1747/pdfs/uksi_20091747_en.pdf

The wording in 10.3 and subsequent relevant paragraphs offering a defence is as follows: "In proceedings for an offence under this article, it is a defence for a person to show that they did not know and had no reasonable cause to suspect that the funds or financial services were being made available, directly or indirectly, to a restricted person."

However, the application of this defence, using the term 'no reasonable cause to suspect' here, applies only to issues of finance and money laundering. It does not take into account the much more complex requirement of identifying artefacts and their valid origins beyond reasonable doubt, which is how they are being applied in the draft Cultural Property (Armed Conflicts) Bill. This requirement significantly adds to the burden of risk for the collector, dealer or auction house, especially in terms of time and potential liability that often arise as result of last-minute challenges prior to sales, effectively rendering their operations unsustainable. In light of this, the level of mens rea in the UN Sanctions Orders is not a fair or appropriate precedent for the level of mens rea in the draft Cultural Property (Armed Conflicts) Bill. On the other hand, the level of mens rea applied in the Dealing in Cultural Property (Offences) Act 2003 does offer a suitable precedent. In that case, it is 'knowing or believing'. It is notable that it, too, attracts a maximum sentence of seven years in prison.

It is also worth noting that 'reasonable cause to suspect' is not the same as 'having reason to suspect' because the former restricts liability to reasonableness, whereas the latter also encapsulates unreasonable causes, as pointed out by Chris Bryant MP (2nd Reading, Hansard, October 31, Column 700).

4

•"It is important that we are clear that the Bill will not hamper the way in which the art market operates." Secretary of State for Culture Karen Bradley MP, 2nd Reading, October 31, Hansard, Column 700

• "It is important to note that Bill will not require the art market to change how it operates."
Parliamentary Under Secretary of State Tracey Crouch MP, 2nd Reading, October 31, Hansard, Column 739

5 See http://www.bankofgreece.gr/BogDocumentEn/law_3691_2008.pdf

6 See http://www.transparency.org.uk/publications/dont-look-wont-find-weaknesses-in-the-supervision-of-the-uks-anti-money-laundering-rules/

7 See http://theada.co.uk/code-of-conduct/

8 See http://goo.gl/BVt8kY

Annex 1

Cultural property bill threatens London's world art market

What objection could there be to the Cultural Property (Armed Conflicts) Bill, which has just had its second reading in the Commons?

The bill incorporates into domestic law the offences created by Article 15 of the Second Protocol to the 1954 Hague Convention for the protection of cultural property — works of art, libraries, books and manuscripts, as well as items of archaeological and historical interest — in the event of armed conflict, makes military commanders liable for failing to prevent certain offences such as destroying it, and criminalises dealing in certain cultural property.

The bill's clause 17(1) makes it an offence to deal in unlawfully exported cultural property that the dealer knows or has reason to suspect has been unlawfully exported. So far, so good: no one can support dealing in unlawfully exported cultural property when you know it has been unlawfully exported. However, the criminal intent required under this provision has caused concern in the London art market, which worries that these three small words — "reason to suspect" — will place an unacceptable and stifling burden on that market and have enormous but unintended consequences.

It would be fairer, more sensible and in line with other criminal statutes to require it to be shown that the dealer "knows or suspects" or "knows or believes" or "dishonestly knows or believes" that the object in question has been unlawfully exported. The expression "reason to suspect", although not unheard of in statute law, is not usually found in our law as a basis for establishing criminal intent.

To be convicted of handling stolen goods, a defendant has to be shown to have known or believed the goods were stolen. The law is clear and the defendant knows that when he is convicted the jury was sure he knew or believed the goods were stolen. Under this bill as framed, a convicted defendant cannot be sure that his conviction reflects his actual state of knowledge or belief and that he was not convicted simply for lacking curiosity.

Of course, it is not possible to tell how wide the effect would be. The Hague Convention governs cultural property exported from an occupied territory since 1954, although the criminal offences in the bill are not retrospective. The mere making of an unfounded allegation that an item was unlawfully exported from an occupied territory after 1954 may place in the mind of the potential dealer or auctioneer a reason to suspect that it has been unlawfully exported; and although it may later turn out to be untainted, he will not go near it.

The position is exacerbated by the government's refusal to provide a list of what it considers to be occupied territories, so the art market will have to err on the side of caution and refuse to deal in any objects that might have been lawfully exported from territories that may not come within the terms of the convention.

Unfair convictions aside, this provision will stultify the art market. No sensible dealer or auction house is going to touch an imported cultural object if this bill comes into law for fear of falling foul of the "reason to suspect" wording.

The risk to a dealer's or auctioneer's reputation, and the future of his business, let alone his liberty, will mean that legitimate trade will cease — to the detriment of London as the premier world art market; genuine sellers will go to less scrupulous jurisdictions — and the Treasury will miss out on the tax that would have come its way.

Sir Edward Garnier, QC, MP, former solicitor-general

Times p.56 Nov 3, 2016