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Introduction

1 This is a written submission by the British Art Market Federation ("**BAMF**") in response to a call for evidence regarding the proposed Cultural Property (Armed Conflicts) Bill 2016/2017 by the House of Commons Public Bill Committee.

2 BAMF is a federation formed in 1996 to represent the interests of institutions and businesses involved in the UK's art and antiques market, in its contacts with the government. It has a special interest in the proposed Bill, particularly regarding the potential exposure of art dealers to the Bill's new criminal offences.

3 While BAMF supports the Bill in its intentions, it is particularly concerned with the *mens rea* of the new offence in clause 17(1), which criminalises the dealing in unlawfully exported property whereby the dealer knows or has reason to suspect that the property has been unlawfully exported. The offence carries a maximum sentence of seven years' imprisonment.

4 BAMF believes that this standard of *mens rea* would impose an unacceptably draconian level of objective liability and is inconsistent with similar offences. Such a low standard is not common in the criminal law nor is it required by the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols (the "**Hague Convention**").

5 BAMF suggests that the *mens rea* for the offence in clause 17(1) should be "knows or suspects"; or in the alternative, "knows or believes" or "dishonestly knows or believes". The merits of each suggestion as well as a comparison of them are provided below.

6 BAMF has taken legal advice from counsel for the purposes of this submission.

Principles of *mens rea*

7 A key principle of criminal liability is the phrase *actus reus non facit reum nisi mens sit rea*, i.e. "the act is not culpable unless the mind is guilty".

8 *Mens rea* is often categorised as subjective or objective. A subjective *mens rea* requires that the individual concerned actually held, and acted with the requisite mental state. By contrast, an objective *mens rea* does not require the individual to have, in fact, held that mental state: his or her conduct is compared instead to an objective standard, usually that of a reasonable person. In practice, many offences combine both objective and subjective elements, and an over-reliance on strict categories can be unhelpful. A more realistic view would be to consider subjectivism and objectivism "along a spectrum" (*Smith & Hogan on Criminal Law* (14th Ed) at §5.1.1).

9 Where a statute is ambiguous, the appellate courts have appeared to prefer a subjective approach: see *R v G* [2003] UKHL, which concerned recklessness, in which the House of Lords departed from *Caldwell* (i.e. objective) recklessness. Lord Bingham explained the principled rationale for subjective fault:

"32. …It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication: R v Majewski [1977] AC 443) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment." [Emphasis added]

10 The general shift in recent years has been towards greater subjectivity in *mens rea*.

The current proposal

11 The current Bill provides that knowledge that the item has been unlawfully exported will be sufficient to commit the offence. BAMF has no objection to this.

12 The difficulty arises with regards to the lower standard *mens rea* and alternative to knowledge, in this instance "having reason to suspect." A number of issues arise as a result of the current drafting:

12.1 **First**, this is not a common *mens rea* for criminal offences. The phrase "having reason to suspect" is used in certain statutory defences: for example, Serious Crime Act 2015, s.69(2)(b); Sexual Offences (Amendment) Act 1992, s.5(5); Public Order Act 1986, ss.19, 21, and 23; and Misuse of Drugs ACt 1971, s.28(2). But it is not regularly used by the criminal courts when determining if a substantive offence has been committed.

12.2 **Secondly**, in those statutory provisions mentioned above, "having reason to suspect" is treated as an alternative to actual suspicion, and does not require actual suspicion. And as a matter of language, that must be right. The effect of this is to provide for a low threshold for criminal liability. An art dealer could genuinely not suspect that the items were unlawfully exported, but nevertheless be guilty because he had reason to suspect and yet had not drawn the relevant conclusions from those reasons. There is a real risk of hindsight being relied upon to condemn the unsuspecting art dealer.

12.3 **Lastly**, the proposed *mens rea* would import in practice an objective liability, which would be inconsistent with the court's preferred approach as established in *G*. Although the prosecution would have to prove that the defendant "had" the reason(s) to suspect, whatever reason that may be, the question for the jury would be "did the defendant have information that could have led him to suspect, even if he did not?"

Alternative to the current proposal

Suspicion

13 The most appropriate alternative to "having reason to suspect" would be a requirement of actual suspicion.

14 Suspicion is a much more commonly used standard. For example, s.340(3) of the Proceeds of Crime Act 2002 ("**POCA**"), provides that property is criminal property,

inter alia, if the alleged offender knows or suspects that the property constitutes or represents benefits from criminal conduct.

15 The leading case on "suspicion" is *Da Silva* [2006] EWCA Crime 1654, which concerned the (now repealed) offence of assisting another person to retain the benefit of criminal conduct, knowing or suspecting that that other person was or had been engaged in criminal conduct, under the Criminal Justice Act 1988. Longmore LJ gave a definition of "suspicion" in paragraph 16 of the judgment:

> *"It seems to us that the essential element in the word "suspect" and its affiliates…is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be "clear" or "firmly grounded and targeted on specific facts", or based upon "reasonable grounds"."* [Emphasis added]

16 *Da Silva* has been followed in criminal and civil cases since 2006 and in the context of Part VII of POCA. It is generally thought that Longmore LJ's guidance can be applied to other offences which require proof of actual suspicion (see, e.g. Archbold on Criminal Evidence and Pleading 2016). Moreover, the current guidance issued to Crown Court judges by the Judicial College has cited *Da Silva* as a reference for judges providing directions on the meaning of suspicion.

17 Suspicion is a relatively low test to satisfy although it is higher than "having reason to suspect" in that it requires an individual to subjectively suspect that the item was unlawfully exported, rather than be aware of a relevant fact (however unreasonable or remote) that could be sufficient to establish that he had a reason to suspect.

Belief

18 Belief is a subjective *mens rea*, and a higher standard than mere suspicion, and in the alternative, would be a preferable standard to the current test.

19 In *R v Hall* (1985) 81 Cr App R 260 at 264, the Court of Appeal described belief as:

> *"Belief, of course, is something short of knowledge. It may be said to be the state of mind of a person who says to himself: I cannot say I know for certain that these goods are stolen but there can be no other reasonable conclusion in the light of all the circumstances, in the light of all that I have heard and seen."*

20 The Courts have fallen short of saying that, in order to establish "belief", it is sufficient to show that the defendant "shut his eyes" to the blindingly obvious. But it is clear that (i) shutting one's eyes to the obvious can – evidentially – substantiate "belief" and (ii) "suspicion" does include deliberately shutting one's eye to the obvious.

21 Importantly, "knowing or believing" is used in two offences that bear strong similarities to clause 17(1) of the Bill, in particular the offence of dealing in tainted cultural objects under section 1(1) of the Dealing in Cultural Objects (Offences) Act 2003:

> *"(1) A person is guilty of an offence is he dishonestly deal in a cultural object that is tainted, knowing or believing that the object is tainted."* [Emphasis added]

22 Similarly, handling stolen goods requires knowledge or belief that the goods are stolen, as well as dishonestly dealing with them in some way. Section 22(1) of the Theft Act 1968 provides:

> *"(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so."* [Emphasis added]

23 Parliament has even mentioned during the Bill's debate the fact that these three offences will be interrelated. The offences of dealing in tainted cultural objects and unlawfully exported property both carry a maximum sentence of 7 years' imprisonment. It is difficult to see the legal and public policy arguments why clause 17(1) should have the lower standard for *mens rea* of the three offences.

Dishonesty

24 The offences of dealing in tainted property and handling stolen goods both require dishonesty. The test for dishonest in criminal law remains the combined objective and subjective test espoused by Lord Lane CJ in *R v Ghosh* [1982] QC 1053, namely:

24.1 The objective test - whether according to the ordinary standards of reasonable and honest people what was done was dishonest; followed by (if the first limb is satisfied)

24.2 The subjective test - whether the defendant himself realised that what he was doing was by those standards dishonest.

25 Dishonesty is a higher threshold to satisfy that "suspicion" and "belief", and applies in a great volume of cases in English courts – all those offences involving an element of dishonesty, which includes all Theft Act, Fraud Act and common law conspiracy to defraud cases, and many other offences under specific legislation. It is submitted that this too would be a more appropriate standard than the current wording.

Conclusions

26 In light of the above analysis, BAMF has expressed the following concerns in relation to clause 17(1), as currently drafted:

27 **First**, and more importantly, "having reason to suspect" is a very low standard, as actual suspicion is not required. Short of imposing strict liability (i.e. criminalising any dealing, regardless of what one thought about it), it is difficult to conceive of a lower standard. If a person knows information that *could* lead to a suspicion, they are liable to investigation, prosecution and conviction. The proposed *mens rea* risks criminalising individuals who make an honest judgement that an item has not been unlawfully exported. It is debatable whether this is a fair or sensible use of the criminal law.

28 **Secondly**, very few offences have the standard "having reason to suspect" (save for a limited number of statutory defences). The analysis above demonstrates the array of different knowledge/belief/suspicion/dishonest based standards currently in use.

To add yet another standard would be undesirable as a matter of principle and public policy, and risks (a) further complexity for judges directing juries; and (b) appellate litigation.

29 **Thirdly**, it is difficult to see why the dealing in unlawfully exported goods should have a *mens rea* that is so much lower than that of similar offences, including dealing in tainted cultural objects and handling stolen goods, both of which require belief and dishonesty. The harm that this new offence seeks to prevent is similar to those offences. There is no sufficient public policy reason to explain the discrepancy.

30 **Fourthly**, contrary to the assertion made by certain MPs, such a low standard is <u>not</u> required by the Hague Convention. Article 15 of the Second Protocol provides that Contracting Parties should legislate for criminal responsibility where a person <u>intentionally</u> commits the more serious of the Convention's offences. Intention, whether direct or oblique, is a higher standard of *mens rea* than the current test.

31 **Fifthly**, the objective of this legislation is to prosecute dishonest criminals, in particular dealers who handle blood antiquities, not responsible art dealers who make the wrong judgment call. The scope for making the wrong judgment is also further increased by the fact that: (1) the Act does not identify occupied countries; and (2) cultural property is so widely drafted that it could include almost anything of artistic merit.

32 **Sixthly**, it could lead to hard-earned reputations of art experts/dealers being destroyed. It is not a satisfactory response by the Government to say that "scrupulous dealers have no reason to fear prosecution or increased business costs under the Bill" when industry experts, particular *bona fide* experts, will, in fact, likely have that suspicion in relation to a specific item. The grave reputational impact of an investigation on a person or company should not be underestimated.

33 **Seventhly**, the judgments involved in handling antiquities are not straightforward. Art objects - both ancient and modern - rarely have a complete provenance or documentary evidence of export compliance, and often for good reasons. Provenance records only recently became an important ingredient. Judgment therefore has to be exercised in each case based on the information that is available and consideration of the circumstances. Someone exercising a judgment call in relation to provenance needs certainty that, provided he is diligent and honest, he will not prosecuted. Under the current proposal, there is no such certainty. He can be diligent and honest yet be convicted of a criminal offence for making the wrong judgment call.

34 **Lastly**, the licit trade has played a big part in setting the standard for due diligence and promoting good practice. The aim of the legislation should be to deter offenders while encouraging honesty and diligence in the licit trade. Getting the balance wrong would result in the licit trade feeling reluctant to trade in antiquities at all, leaving antiquities to be traded on the black market and in harm's way.

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