

## APPENDIX VIII

### SCHEME FOR THE PROTECTION OF CULTURAL HERITAGE WITHIN THE COMMONWEALTH

#### OBJECTIVES OF THE SCHEME

1. (1) The provisions of the Scheme govern the return by one Commonwealth country of an item of cultural heritage found within its jurisdiction following export from another Commonwealth country contrary to its laws.
- (2) The provisions of the Scheme will apply to the export and import of items which take place after the adoption and implementation of the Scheme. The Scheme adds to and in no way derogates from future and existing means of recovery of items of cultural heritage.
- (3) The Scheme is intended to be complementary to, and does not in any way exclude, full participation in other international arrangements such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, the European Communities directive on the return of cultural objects unlawfully removed from the territory of a member State and the regulation on the export of cultural goods from member States of the European Community.

#### DEFINITIONS

2. For the purposes of the Scheme:

- (a) "country" means:

- (i) each sovereign and independent country within the Commonwealth together with dependent territories which that country designates; and
- (ii) each country within the Commonwealth which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.

- (b) "country of export" means the country from which an item covered by the Scheme has been unlawfully exported.

- (c) "country of location" means the country where an item which has been

unlawfully exported is located at the time the provisions of the Scheme are invoked by the country of export for the return of the item.

- (d) "unlawful export" in relation to any country means an item which was exported from that country in contravention of its law: it includes an item which has been taken out of the country of export under a conditional permit and where there has subsequently been a breach of the conditions of the permit, in which event "unlawful export" is deemed to have occurred as of the date of the breach of the condition.

### ITEMS COVERED BY THE SCHEME

- 3. (1) The Scheme covers all items of cultural heritage so classified by, and subject to export control by, the country of export.
- (2) Items classified should be of national importance by virtue of one or more of the following criteria:
  - (a) the close association of the item with the history or life of the country;
  - (b) the aesthetic qualities of the item;
  - (c) the value of the item in the study of the arts or the sciences;
  - (d) the rarity of the item;
  - (e) the spiritual or emotional association of the item with the people of the country or any group or section thereof;
  - (f) the archaeological significance of the item.
- (3) Where a country is unable by reason of laws pursuant to other international obligations to extend protection to all such items it shall be open to other countries similarly to restrict the protection they afford to that country under this Scheme.

### VALIDATION SYSTEM

- 4. (1) As part of the Scheme, a system of validation may be introduced whereby an intending purchaser of an item of cultural heritage or any other interested person is enabled to request of the central authority of the country of export a validation certificate to the effect that the item is not an unlawful export from that country.
- (2) Such a validation certificate would constitute a complete defence to any claim by the country of export that the item had been unlawfully exported.
- (3) Where an application is made for a validation certificate in respect of any item, the application should be granted or refused within six months of receipt of the

application. If the application is not granted or refused within that period, the country of export should be precluded from claiming that the item has been unlawfully exported from that country.

## OPERATION OF THE SCHEME

5. (1) Each country will prohibit the export of items covered by the Scheme except in accordance with the terms of an export permit.
- (2) Each country will take the measures necessary to ensure the return of items covered by the Scheme to the country of export.
6. (1) Each country will designate a central authority for the making and the receiving of requests for the return of items covered by the Scheme.
- (2) Each country will notify the Commonwealth Secretary-General of its central authority.
7. (1) When the country of export learns of the whereabouts of an item covered by the Scheme, it may request the country of location for assistance in the recovery and return of that item.
- (2) Where two countries of export make a request for the return of the same item, the request of the country from which the item was last exported will be proceeded with; but that will not prejudice further requests in respect of the item.
- (3) The request will give sufficient detail to clearly identify the item and where possible its location and shall be accompanied by an official notification from the country of export to the effect that the item is covered by the Scheme and has been unlawfully exported.
- (4) Such notification will be *prima facie* evidence of the matters stated therein.
8. Upon receipt of a request, the country of location will take appropriate steps in accordance with its laws to secure or safeguard the item.
9. (1) The authorities in the country of location may either:
  - (a) give notice to the holder of the item that unless court proceedings are commenced within a stipulated period, the item will be returned to the country of export, or
  - (b) institute proceedings or advise the country of export to institute proceedings with a view to securing an order for the return of the item to the country of export.
- (2) In any proceedings instituted either by the holder of the item or by the authorities in the country of location or of export the court will determine whether the item is covered by:

- (a) the Scheme;
- (b) an export permit; or
- (c) a validation certificate.

If the item is covered by the Scheme and such a permit or certificate has been issued, or if the item is not covered by the Scheme, the court may order that the item be returned to the holder. If the item is covered by the Scheme and such a permit or certificate has not been issued, the court will order that the item be returned to the country of export.

- (3) Prior to ordering the return of the item the court will determine whether the holder of the item is an innocent purchaser for value having exercised due care and attention in acquiring the item and, if it is proved that the holder is such an innocent purchaser with valid title to the item, the court will order that fair and reasonable compensation be payable by the country of export to the holder as a condition for the return of the item to the country of export. All other questions of title and compensation will be determined by proceedings in the country of export.
  - (4) In any proceedings in the country of location, the holder of an item may, unless the contrary be proved, be presumed not to be an innocent purchaser for value if he has neglected or failed to utilise any relevant validation system under the scheme.
- 10. The central authority in the country of export to which an item is returned will be required to hold the item for a period of twelve months. During this period it will be open for any person to take proceedings in the country of export to determine any question of title and compensation.
  - 11. In the event that proceedings to establish title are not commenced within the twelve month period, the central authority will deal with the item in accordance with the law of the country of export.
  - 12. In any proceedings in a country of location, the court will have due regard to the relevant laws of the country of export.
  - 13. The person adjudged to have title in the item will not have any right to remove the item from the country of export otherwise than by the process of applying for and obtaining an export permit.

#### **LIMITATION PERIOD**

- 14. No claim for the return of an item alleged to have been unlawfully exported may be made under the scheme more than five years after the date the country of export had knowledge of the whereabouts of the item in the country of location.

## CRIMINAL PROCEEDINGS

15. Each country:
- (a) will make it an offence to unlawfully export from its territory an item of its own cultural heritage covered by the Scheme; and
  - (b) may make it an offence to unlawfully import an item of cultural heritage covered by the Scheme unlawfully exported from another country.

## COSTS

16. (1) The country of location in implementing the Scheme may require the country of export to meet the expenses necessarily incurred in implementing the request of the country of export for the return of any item of cultural heritage.
- (2) If in the opinion of the country of location the expenses required in order to comply with the request are of an extraordinary nature, that country will consult with the country of export as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the country of location may refuse to comply further with the request.

## STANDARD FORMS

17. In implementing the Scheme, each country will as far as is practicable use standard forms which will be settled by consultation through the Commonwealth Secretariat.