

Scheme and Model Bill for the Protection of Cultural Heritage Within the Commonwealth



The Commonwealth

Office of Civil and
Criminal Justice Reform

Scheme and Model Bill for the Protection of Cultural Heritage Within the Commonwealth



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Introduction

The Commonwealth Scheme for the Protection of Cultural Heritage within the Commonwealth represents an important step to protect items of national importance because of their historical, archaeological, cultural or spiritual significance.

The Scheme applies to items classified as of national importance by virtue of their close association with the history of life of a country; the aesthetic qualities of the item; the value of the item in the study of the arts or the sciences; the rarity of the item; the spiritual or emotional association of the item with the people of the country or any group or section thereof; or the archaeological significance of the item.

The Scheme includes provisions on a system of validation 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 the country. The Scheme also provides for criminal offences related to unlawful export or import of an item of cultural heritage covered by the Scheme.

The Scheme complements work done by UNIDROIT and the European Community and contains practical provisions relating to the export and import of objects which take place after its adoption and implementation. The Scheme does not operate retrospectively and does not detract in any way from the possibility of Commonwealth countries entering into bilateral discussions amongst themselves in relation to the repatriation of specific items of importance for the cultural heritage of the countries concerned.

The Scheme is accompanied by a Model Bill that constitutes a guide for countries to use when enacting the necessary legislation for implementation of the Scheme.

Background

The need to provide better protection for material cultural heritage was first placed on the agenda of meetings of Commonwealth Law Ministers in 1983.

A draft scheme for the protection of cultural heritage within the Commonwealth was prepared by the Secretariat and considered by Commonwealth Law Ministers at their meeting in 1986, held in Harare, Zimbabwe. The meeting invited the Commonwealth Secretary-General to establish a small working party to examine and refine the proposal and to make a firm recommendation to the next Law Minister's meeting, held in Christchurch, New Zealand, in 1990.

The working party was established and reported at the 1990 Christchurch meeting. The working party was reconvened in Rome in February 1993 and produced a revised draft Scheme for the Protection of Cultural Heritage within the Commonwealth.

The revised Scheme for the Protection of Cultural Heritage within the Commonwealth was considered by Commonwealth Law Ministers at their meeting held 15 to 19 November 1993 in Grand Baie, Mauritius. At that meeting, Law Ministers adopted the Scheme and agreed that Commonwealth jurisdictions should take early steps to give effect to the new Scheme in their domestic law, while acknowledging that not all countries were as yet in a position to do so.

At that meeting, Law Ministers also accepted an offer by Australia to assist the Commonwealth Secretariat in the development of model legislation which would be of assistance to a number of member countries wishing to adopt legislation giving effect to the Scheme in a timely manner.

A first draft of such model legislation was prepared by the Attorney General's Department, Australia, and reviewed by Senior Officials of Commonwealth Law Ministries. Commonwealth Law Ministers adopted a Model Bill to give effect to the Scheme for the Protection of Cultural Heritage within the Commonwealth at their meeting held 5 to 7 May 1999 in Port of Spain, Trinidad and Tobago.

Model Bill for the Protection of Cultural Heritage

An Act to give effect to the Scheme for the Protection of Cultural Heritage within the Commonwealth; to facilitate its operation in [name of legislating country] and for related purposes.

The Parliament of [name of legislating country] enacts:

Part 1 – Preliminary

Short title

1. This Act may be cited as the *Protection of Cultural Heritage (Commonwealth Countries) Act ...*).

Commencement

2. This Act commences [specify date; or on a day to be fixed by Proclamation].

Interpretation

3. (1) In this Act, unless the contrary intention appears:
 - “**central authority**” means the [Minister/person/body] designated for the making or receiving of requests for the return of protected items and responsible for the administration of this Act;
 - “**conditional export permit**” means a permit to export a protected item that is granted subject to conditions specified in the permit;
 - “**Commonwealth country**” means -
 - (a) each sovereign and independent country within the Commonwealth together with any dependent territory which a country designates as forming part of that country for the purposes of the Scheme; and
 - (b) each country within the Commonwealth which, though not sovereign and independent, is not a territory designated for purposes of the preceding paragraph;
 - “**conditional validation certificate**” means -
 - (a) in relation to [name of legislating country] a certificate granted under section 9(4)(a) in conjunction with subparagraph (b)(iii) of that section;

- (b) in relation to a [reciprocating] Commonwealth country, a certificate granted under the corresponding legislation of that country to the effect that a protected item specified in the certificate was exported under a valid conditional export permit and the central authority has no reason to believe that the conditions of the permit have been breached.

"**corresponding legislation**" means legislation of a [reciprocating] Commonwealth country enacted to give effect to the Scheme;

"**court**" means a court of competent jurisdiction;

"**export permit**" means:

- (a) in relation to [name of legislating country], a permit to export a protected item granted under section 8;
- (b) in relation to a [reciprocating] Commonwealth country, a permit to export a protected item granted under the corresponding legislation of that country;

"**holder**", in relation to a protected item that has been seized under this Act, means the person who was in physical possession or control of an item immediately before it was seized;

"**List**" means the Cultural Heritage Protection List prescribed under section 6;

"**protected item**" means:

- a) in relation to [*name of legislating country*], an item, or an item belonging to a category of items, included in the List;
- b) in relation to a [reciprocating] Commonwealth country, an item, or an item belonging to a category of items, subject to export control under the corresponding legislation of that country and classified as an item of cultural heritage, being of national importance because of:
 - (i) the close association of the item with the history or life of that country, or
 - (ii) the aesthetic qualities of the item; or
 - (iii) the value of the item in the study of the arts or the sciences; or
 - (iv) the rarity of the item; or
 - (v) the spiritual or emotional association of the item with the people or any group or section of the people of that country; or
 - (vi) the archaeological significance of the item.

"**reciprocating Commonwealth country**" means a Commonwealth country designated as a reciprocating Commonwealth country in the regulations in accordance with subsection 5 (1);

"**regulations**" means regulations made by the central authority under section 31;

"**requesting country**" means a country that makes a request under section 13;

"**requested item**" means a protected item in respect of which a request is made under section 13;

"**Scheme**" means the Scheme for the Protection of Cultural Heritage within the Commonwealth;

“**unlawful export**”, subject to subsection (2), means:

- (a) in relation to *[name of legislating country]*, a protected item which has been exported from *[name of legislating country]* in contravention of this Act;
- (b) in relation to a *[reciprocating]* Commonwealth country, a protected item that has been exported from that country in contravention of the corresponding legislation of that country;

“**validation certificate**” means:

[Paragraph (a) is an optional provision which, together with section 9, implements Paragraph 4 of the Scheme]

- (a) in relation to *[name of legislating country]*, a certificate granted under section 9;
 - (b) in relation to a reciprocating Commonwealth country, a certificate granted under the corresponding legislation of the country to the effect that an item of cultural heritage specified in the certificate is not an unlawful export.
- (2) For the purposes of the definition of unlawful export, if a protected item has been removed from *[name of legislating country]* or a reciprocating Commonwealth country under a conditional export permit and a condition subject to which the permit was granted has been contravened, the item is deemed to have been unlawfully exported from the date of the contravention;

Act not to limit other procedures

4. Nothing in this Act prevents or limits the operation of any other law of *[name of legislating country]* for the return of unlawfully exported items of cultural heritage.

Application of the Act in respect of Commonwealth countries

5. (1) Subject to subsection (2), this Act applies to all Commonwealth countries.
- (2) The regulations may designate a Commonwealth country as a reciprocating Commonwealth country, and may provide, subject to any limitations, exceptions or modifications specified in the regulations, that this Act shall apply only to a Commonwealth country or countries so designated.
- (3) In deciding whether to designate a Commonwealth country as a reciprocating Commonwealth country under subsection (2), the central authority may, without limiting the power conferred under that subsection, consider whether the country could, pursuant to its laws, return to *[name of legislating country]*, in a corresponding situation, items of a similar class or category to items which are protected items under this Act.

Part 2 – Exports

Cultural Heritage Protection List

6. (1) Subject to subsection (2), the regulations may prescribe a list, to be known as the Cultural Heritage Protection List, of items, or categories of items which are:
 - (a) classified as items of cultural heritage; and
 - (b) to be subject to export control.
- (2) An item should not be classified as an item of cultural heritage unless it is of national importance because of:
 - (a) the close association of the item with the history or life of *[name of legislating country]*; or
 - (b) the aesthetic qualities of the item; or
 - (c) the value of the item in the study of the arts or the sciences; or
 - (d) the rarity of the item ; or
 - (e) the spiritual or emotional association of the item with the people or any group or section of the people of *[name of legislating country]*; or
 - (f) the archeological significance of the item.

Unlawful exports

7. (1) A person who knowingly:
 - (a) exports, or attempts to export, a protected item of *[name of legislating country]* otherwise than in accordance with the terms of an export permit; or
 - (b) contravenes, or attempts to contravene, a condition of an export permitis guilty of an offence punishable on conviction in accordance with subsection (2).
- (2) A person guilty of an offence under subsection (1) shall be punishable:
 - (a) on conviction on indictment -
 - (i) to a fine not exceeding _____ or imprisonment for a term not exceeding _____ years or both; or
 - (ii) if the person is a body corporate, to a fine not exceeding _____
 - (b) on summary conviction -
 - (i) to a fine not exceeding _____ or imprisonment for a term not exceeding _____ years or both; or
 - (ii) if the person is a body corporate, to a fine not exceeding _____

- (3) If a protected item:
- (a) has been placed on board a ship or aircraft at a particular place in *[name of legislating country]* with the intention that it be taken out of *[name of legislating country]* by that ship or aircraft and departure of the ship or aircraft from that place has commenced; or
 - (b) has been delivered as a postal article into the control of the postal authorities of *[name of legislating country]* at a particular place in *[name of legislating country]* with the intention that it be sent out of *[name of legislating country]* by post and the movement of the postal article from that place has commenced;

the *item* is taken, for the purposes of this section, to be exported.

- [(4) Without limiting the meaning of attempting to export a protected item, a person is deemed to attempt to export a protected item if the person conveys, or has possession of, the item with the intention of exporting it or with the knowledge that it is intended to be exported.]
- [(5) For the purposes of this section, a person who exports, or attempts to export, a protected item is deemed to export, or attempt to export, the item otherwise than in accordance with an export permit if, before exporting or attempting to export the item, the person fails to produce on demand or within a reasonable period after demand has been made an export permit to a Customs officer performing duties in relation to export of protected items.]

Grant of export permits

8. (1) A person may apply to the central authority for a permit to export a protected item.
- (2) An application shall be made in the prescribed form or, if no form is prescribed, the form approved by the central authority.
- (3) On receiving an application, the central authority shall:
- (a) within six months from the date of the application grant an export or a conditional export permit; or
 - (b) refuse to grant a permit.

[The legislating country should insert here procedure for decision on application.]

- (4) Where the central authority refuses to grant an export permit or conditional export permit under this section *[it]* shall, forthwith on taking the decision and within the period mentioned in subsection (3), serve or cause to be served on the applicant notice in writing of the refusal setting out the reasons for the refusal.
- (5) A permit granted under subsection (3) shall:
- (a) be in the prescribed form or, if no form is prescribed, the form approved by the central authority; and
 - (b) come into force on the date on which it is granted or, if a later date is specified in the permit, on that later date; and
 - (c) remain in force for an indefinite period or, if a period is specified in the permit, for that period.

[Clause 9 is an optional provision implementing clause 4 of the Scheme.]

Grant of validation certificate

9. (1) A person who intends to purchase, or who has an interest in, an item that appears to be a protected item which has been exported from *[name of legislating country]* may apply to the central authority for a validation certificate to the effect that the item is not an unlawful export from *[name of legislating country]*;
- (2) An application shall be made in the prescribed form or, if no form is prescribed, the form approved by the central authority.
- (3) The central authority shall decide an application within six months from the date of the application.
- (4) Subject to subsection (5), the central authority shall grant a certificate in relation to an item if:
- (a) the item has been exported from *[name of legislating country]*; and
 - (b) either:
 - (i) it is not a protected item; or
 - (ii) it was exported under a valid export permit; or
 - (iii) it was exported under a valid conditional export permit and the central authority has no reason to believe that the conditions of the permit have been breached.
- (5) Where a protected item has been exported pursuant to a conditional export permit the validation certificate shall set out the conditions of the permit and contain a statement that the central authority has no reason to believe the conditions have been breached.
- (6) Where the central authority refuses to grant a certificate under this section the central authority shall, within the period mentioned in subsection (3), serve or cause to be served on the applicant notice in writing of the refusal setting out the reasons for the refusal.
- (7) A validation certificate shall be in writing, in the prescribed form or, if no form is prescribed, the form approved by the central authority.
- (8) For the purpose of subsection (1), "interest" means an interest recognised by law or in equity.

Requests by *[name of legislating country]*

10. (1) Where a protected item has been exported from *[name of legislating country]* in contravention of this Act, and is located in a reciprocating Commonwealth country, the central authority may, subject to subsection (2), make a request to that country for the return of the item.
- (2) A request shall be made within a period of 5 years from the time when the central authority knew that the item was located in that country.
- (3) For the purposes of subsection (2) the central authority shall be deemed to have known that the requested item was located in that country when an officer whose duties -

- (a) related to the administration of this Act; or
- (b) would require the officer to report a matter relating to the administration of this Act to the central authority or to another officer referred to in paragraph (a), knew the requested item was located in that country.

Dealing with unlawful exports when returned

11. (1) Where a protected item is returned to [*name of legislating country*] in response to a request under section 10, the central authority shall retain the item until the end of a period of twelve months from the date of its receipt.
- (2) If no legal proceedings claiming the item or compensation in respect of the item have been commenced within the period applying under subsection (1), the item may be dealt with and disposed of in accordance with law.

Part 3 – Imports

Unlawful importation

[Clause 12 is an optional provision, in accordance with paragraph 15 (b) of the Scheme. If it is included, subclause 16 (7) should also be included.]

12. (1) Where a person imports an item, either directly or indirectly, from a [reciprocating] Commonwealth country knowing that the item:
 - (a) is a protected item of that country; and
 - (b) has been unlawfully exported from that country;the person is guilty of an offence punishable in accordance with subsection (2).
- (2) A person guilty of an offence under subsection (1) shall be punishable:
 - (a) on conviction on indictment -
 - (i) to a fine not exceeding _____ or imprisonment for a term not exceeding _____ years or both; or
 - (ii) if the person is a body corporate, to a fine not exceeding _____
 - (b) on summary conviction -
 - (i) to a fine not exceeding _____ or imprisonment for a term not exceeding _____ years or both; or
 - (ii) if the person is a body corporate, to a fine not exceeding _____

Request by reciprocating Commonwealth country for return of protected item

13. (1) A reciprocating Commonwealth country may make a request to the central authority for the return of a protected item unlawfully exported from that country and located in [name of legislating country].
- (2) A request shall be accompanied by:
 - (a) a description of the item with sufficient details to identify the item clearly;
 - (b) any information which may assist in identifying the location of the item;
 - (c) an official notification from the reciprocating Commonwealth country that:
 - (i) the requested item is a protected item of that country; and
 - (ii) the requested item is an unlawful export from that country; and
 - (d) any other information that may assist in compliance with the request.

Request by more than one reciprocating Commonwealth country.

14. (1) Where two or more reciprocating Commonwealth countries make a request under section 13 for the return of the same protected item, priority shall be given to the request of the country from which the item was last exported.
- (2) Where the request for which priority is given in accordance with subsection (1) is refused under section 15 or is withdrawn, the other request or, if there was more than one other request, the request with next priority in accordance with subsection (1) revives unless it has been withdrawn.

Refusal to comply with a request

15. (1) The central authority may refuse a request by a [reciprocating] Commonwealth country for the return of an item to that country if:
 - (a) [it] is satisfied that export of the requested item was not unlawful under the corresponding legislation of that country;
 - (b) [it] is satisfied that that country had knowledge of the location of the requested item in [name of legislating country] for a period of more than five years before the request was received.
- (2) The central authority may refuse a request by a [reciprocating] Commonwealth country for the return of an item to that country
 - (a) that country is unwilling to pay the expenses necessarily incurred in complying with the request;
 - (b) [it] considers at any stage that compliance or continued compliance with the request would involve extraordinary expense and, after consultation with that country as to the terms and conditions under which the compliance of the request may continue satisfactorily, agreement is not reached.
- (3) This section is subject to section 26.

Seizure of requested item

16. (1) Where:
 - (a) a request by a reciprocating Commonwealth country for the return of a protected item of that country has been received; and
 - (b) there are reasonable grounds to suspect the requested item is located in [name of legislating country]

the central authority may authorise a police officer, in writing, to apply to a court for the issue of a search warrant in respect of the requested item.
- (2) Where a police officer authorised under subsection (1) has reasonable grounds to believe that the requested item is, or will at a specified time be, in a person's possession, the police officer may:
 - (a) lay before the court an information on oath setting out the grounds for that belief;
 - (b) apply for the issue of a warrant under subsection (3) to -

- (i) search the person and any article found in the person's possession for the item; and
 - (ii) if the item is found in the course of the search, to seize the item.
- (3) Where an application is made under subsection (2), the court may, if it is satisfied that there are reasonable grounds to believe that the requested item is, or will at the specified time be, in the person's possession, issue a search warrant authorising a police officer, with such assistance and by such force as is necessary and reasonable -
 - (a) to search the person, and any article found in the person's possession, for the item;
 - (b) if the item is found in the course of the search, to seize the item.
- (4) For the purposes of subsections (2) and (3), a reference to an article in a person's possession includes a reference to an article worn or carried by that person, and a reference to a requested item in a person's possession includes a reference to a requested item on or within the same.
- (5) Where a police officer authorised under subsection (1) has reasonable grounds to believe that the requested item is, or will at a specified time be, upon any land, or upon or in any premises, structure, vessel, aircraft or vehicle, the police officer may -
 - (a) lay before the court an information on oath setting out the grounds for that suspicion; and
 - (b) apply for the issue of a warrant under subsection (6) to -
 - (i) search the land, premises, structure, vessel, aircraft or vehicle for the item; and
 - (ii) if the item is found in the course of the search, to seize the item.
- (6) Where an application is made under subsection (5), the court may, if it is satisfied that there are reasonable grounds to believe that the requested item is, or will at the specified time be, upon the land, or upon or in the premises, structure, vessel, aircraft or vehicle, issue a search warrant authorising a police officer, with such assistance and by such force as is necessary and reasonable -
 - (a) to search the land, premises, structure, vessel, aircraft or vehicle for the item; and
 - (b) if the item is found in the course of the search, to seize the item.
- (7) A warrant issued under this section shall state:
 - (a) the purpose for which the warrant is issued, including a reference to the nature of the requested item in relation to which entry and search are authorised;
 - (b) whether the entry is authorised to be made:
 - (i) at any time of the day or night; or
 - (ii) during specified hours;
 - (c) a description of the requested item authorised to be seized;
 - (d) a date, not later than one month after the issue of the warrant on which the warrant ceases to have effect;

- (e) any condition subject to which a search may be carried out, which the court considers necessary to ensure that such search is reasonable;
- (8) A police officer who conducts a search in accordance with a warrant issued under this section shall as soon as practicable -
 - (a) make a report in respect thereof to the court; and
 - (b) deliver any item seized as a result of that search into the custody and control of the central authority, which shall arrange for the item to be safeguarded until it is dealt with in accordance with this Act.

[Subclause 16 (7) is an optional provision in accordance with paragraph 15 (b) of the Scheme. It should only be included if clause 12 is included.]

- (9) If, in the course of searching under a warrant issued under this section for the requested item, the police officer finds anything that he or she believes on reasonable grounds:
 - (a) will afford evidence of the commission of an offence against subsection 12 (1) in relation to the requested item; and
 - (b) is likely to be concealed, lost or destroyed if it is not seized;

the warrant shall be deemed to authorize the police officer to seize the thing.

[Two versions of clauses 17-27 are provided.]

Version A gives effect to paragraph 9 (1) (a) of the Scheme, viz. the authorities in the country of location may 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.

Version B gives effect to paragraph 9 (1) (b) of the Scheme, viz. the authorities in the country of location may 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.]

Clauses 17-27 – version A

Power of retention

- 17A. A requested item seized under section 16 may be retained until -
 - (a) a court orders the return of the item to the holder, and all appeal procedures have either been exhausted or are no longer available; or
 - (b) the central authority returns the item to the requesting country in accordance with section 26.

Notice of seizure and intended return

- 18A. Where a requested item liable to be returned to the requesting country has been seized under this Act, the central authority shall serve or cause to be served on the holder a notice in writing, as soon as practicable after the seizure:
 - (a) identifying the item and the date of the seizure;
 - (b) setting out the reasons for the seizure; and
 - (c) containing the information set out in sections 19 and 26.

Proceedings for recovery

- 19A. (1) Subject to subsection (2), where a requested item has been seized under this Act the holder may institute proceedings against the central authority for the recovery of the item on the ground that the item is not liable to be returned to the requesting country.
- (2) Proceedings under subsection (1) shall be instituted within a period of ____ months after service of the notice referred to in section 18, but if the holder does not, within a period of days _____ months after service of the notice -
- (a) institute proceedings; or
 - (b) notify the central authority in writing that the holder intends to institute proceedings,
- the holder shall not be entitled to institute proceedings after the expiry of that period of thirty days ____ months.

Determination in relation to the requested item

- 20A. In proceedings instituted under subsection 19 (1) the court shall determine, on a balance of probabilities, whether -
- (a) the item is a protected item in relation to the requesting country; and if so,
 - (b) the requesting country has granted under its corresponding legislation:
 - (i) an export permit; or
 - (ii) validation certificate; in relation to that item.

Order of court

- 21A. (1) In proceedings instituted under subsection 19(1), where the court determines that -
- (a) the item is a protected item in relation to the requesting country;
 - (b) either:
 - (i) no export permit or validation certificate in relation to the item has been granted by the requesting country; or
 - (ii) the requesting country has granted under its law a conditional export permit in relation to the item but there has been a breach of a condition of that permit subsequent to export;
- the court shall, subject to section 27, refuse the holder's application for recovery of the item.
- (2) In any other case the court shall order the return of the item to the person who was last lawfully entitled to possession of the item.

Title not decided or affected by order

- 22A. An order of the court in respect of a requested item shall be deemed not to decide or affect title to the item.

Relevant laws of the requesting country

23A. In proceedings instituted under subsection 19 (1), the court shall have due regard to the relevant laws of the requesting country and, for that purpose, may take judicial notice of those laws.

Evidence

24A. In proceedings instituted under subsection 19 (1):

- (a) a duly authorised notification by the requesting country that the requested item is -
 - (i) a protected item in relation to that country; and
 - (ii) an unlawful export from that country;

included in the request for return of the item in accordance with paragraph 13(2) (c), may be produced in evidence by the central authority and shall be sufficient evidence of the matters stated in it in the absence of proof to the country; and

- (b) a duly authorised validation certificate (other than a conditional validation certificate) granted by the requesting country in relation to the item shall be a complete defence to a claim by the requesting country that the item is an unlawful export from that country; and
- (c) where -
 - (i) a holder applied to the central authority of the requesting country for a validation certificate in relation to a protected item; and
 - (ii) the application was neither granted nor refused by the requesting country within six months of the date of application,

the requesting country is deemed to have granted the validation certificate.

Compensation

25A. (1) In proceedings instituted under subsection 19 (1), if the court proposes to refuse the application of the holder, the court shall [, if the holder so requests,] first determine whether the holder -

- (a) is an innocent purchaser for value; and if so
 - (b) in acquiring the item, exercised due care and diligence with regard to the lawfulness of its export from the requesting country[: and if so
 - (c) acquired valid title to the item].
- (2) If the court is satisfied of the matters set out in paragraphs (1) (a), (b) [and (c)] the court shall order the central authority not to return the item until the requesting country pays to the holder an amount determined by the court as fair and reasonable compensation.
- (3) If the court is not satisfied of the matters set out in paragraphs (1) (a), (b) [and (c)] it shall refuse the application of the holder without making an order for compensation.

- (4) For the purposes of this section, "innocent purchaser for value" means a holder who -
 - (a) purchased the requested item for a reasonable price; and
 - (b) neither knew nor ought to have known of any defect in the title of the person from whom the holder acquired the item.
- (5) Where, at the time of the purchase of the requested item by the holder -
 - (a) a system of issuing validation certificates was in place in the requesting country; and
 - (b) either:
 - (i) the holder did not apply to the central authority for the grant of a validation certificate at the time; or
 - (ii) the holder's application was refused;

the holder is presumed not to [have exercised due care and diligence with regard to the lawfulness of the export of the item from the requesting country] unless the holder proves the contrary.
- (6) Except as provided in this section, no compensation shall be payable in respect of loss of requested items dealt with under or in accordance with this Act.

Return of requested items

- 26A. (1) Where:
- (a) no proceedings are instituted by a holder within the time specified in subsection 19 (2); or
 - (b) if proceedings are instituted under section 19 and are subsequently withdrawn or discontinued and the time specified in subsection 19 (2) has expired; or
 - (c) the court refuses an application for return of the requested item to the holder, and all appeal procedures have either been exhausted or are no longer available
- the central authority shall subject to subsection (2), arrange or cause to be arranged, return of the requested item to the requesting country as soon as possible, allowing for any special requirements for its transport;
- (2) The cost of returning the item under subsection (1) shall be borne by the requesting country.

Limitation

- 27A. (1) The court shall make an order for return of a requested item to the holder where the court is satisfied, on the balance of probabilities, that the requesting country knew, more than five years before the date on which the central authority received the request for return of the item, that the requested item was located in [name of legislating country].
- (2) For the purposes of subsection (1) the requesting country shall be deemed to have known the requested item was located in [name of legislating country] when:

- (a) the central authority administering the corresponding legislation of the requesting country; or
- (b) an officer of the government of the requesting country whose duties:
 - (i) related to the administration of the corresponding legislation; or
 - (ii) would require the officer to report a matter relating to the administration of the corresponding legislation to that central authority or to an officer referred to in subparagraph (i),
 knew the item was located in *[name of legislating country]*.

SECTIONS 17-27 - VERSION B

Power of retention

17B. A requested item seized under section 16 may be retained until:

- (a) the time for the central authority to apply to the court under section 19 for an order to return the requested item to the requesting country expires without the central authority making an application of that kind;
- (b) where the central authority applies to the court under section 19 for an order to return the requested item to the requesting country, the court refuses the application and all appeal procedures have either been exhausted or are no longer available; or
- (c) the central authority returns the requested item in accordance with section 26.

Notice of seizure and intended return

18B. Where a requested item liable to be returned to the requesting country has been seized under this Act, the central authority shall serve, or cause to be served, on the holder, a notice in writing, as soon as practicable after the seizure -

- (a) identifying the item and the date of the seizure;
- (b) setting out the reasons for the seizure; and
- (c) containing the information set out in sections 19 and 26.

Proceedings for order for return

- 19B. (1) The central authority or the requesting country may apply to a court within [_____] days of the seizure of the item under section 16 or such longer period as the court may allow on application for an order that the item be returned to the requesting country.
- (2) The court may allow an application for an extenuation of time to institute proceedings if the court is satisfied that there are reasonable grounds for doing so.

Determination in relation to the requested item

20B. In proceedings instituted under subsection 19 (1) the court shall determine, on a balance of probabilities, whether -

- (a) the item is a protected item in relation to the requesting country; and

- (b) if so, the requesting country has granted under its corresponding legislation:
 - (i) an export permit or
 - (ii) a validation certificate; in relation to that item.

Order of Court

- 21B. (1) In proceedings instituted under subsection 19 (1), where the court determines that -
- (a) the item is a protected item in relation to the requesting country; and
 - (b) either:
 - (i) no export permit or validation certificate in relation to the item has been granted by the requesting country; or
 - (ii) the requesting country has granted under its law a conditional export permit in relation to the item but there has been a breach of a condition of that permit subsequent to export,
- the court shall, subject to section 27, order the central authority to return the item to the requesting country.
- (2) In any other case the court shall order the return of the item to the person who was last lawfully entitled to possession of the item.

Title not decided or affected by order

- 22B. An order of the court in respect of a requested item shall be deemed not to decide or affect title to the item.

Relevant laws of the requesting country

- 23B. In proceedings instituted under subsection 19 (1) the court shall have due regard to the relevant laws of the requesting country and, for that purpose, may take judicial notice of those laws.

Prima facie evidence

- 24B. In proceedings instituted under subsection 19 (1):
- (a) a duly authorised notification by the requesting country that the requested item is:
 - (i) a protected item in relation to that country; and
 - (ii) an unlawful export from that country;included in the request for return of the item in accordance with paragraph 13(2)(c), may be produced in evidence by the central authority or the requesting country and shall be prima facie evidence of the matters stated in it; and
 - (b) a duly authorised validation certificate (other than a conditional validation certificate) granted by the requesting country in relation to the item shall be a complete defence to a claim by the requesting country that the item is an unlawful export from that country; and
 - (c) where:

- (i) a holder applied to the central authority of the requesting country for a validation certificate in relation to a protected item; and
- (ii) the application was neither granted nor refused by the requesting country within six months of the date of application,

the requesting country is deemed to have granted the validation certificate.

Compensation

- 25B. (1) In proceedings instituted under subsection 19 (1), if the court proposes to order return of the item the court shall [, if the holder so requests,] first determine whether the holder -
- (a) is an innocent purchaser for value; and if so
 - (b) in acquiring the item, exercised due care and diligence with regard to the lawfulness of its export from the requesting country; [and if so
 - (c) acquired valid title to the item.]
- (2) If the court is satisfied of the matters set out in paragraphs (1) (a), (b) [and (c)], the court shall make it a condition of the order for return of the item that the requesting country pays to the holder an amount determined by the court as fair and reasonable compensation.
- (3) In any other case where the court may order return of the requested item to the requesting country it may do so without a condition as to compensation
- (4) For the purposes of this section, "innocent purchaser for value" means a holder who:
- (a) purchased the requested item for a reasonable price; and
 - (b) neither knew nor ought to have known of any defect in the title of the person from whom the holder acquired the item.
- (5) Where, at the time of the purchase of the requested item by the holder:
- (a) a system of issuing validation certificates was in place in the requesting country; and
 - (b) either:
 - (i) the holder did not apply to the central authority for the grant of a validation certificate at the time; or
 - (ii) the holder's application was refused;
- the holder is presumed not to have exercised due care and diligence with regard to the lawfulness of the export of the item from the requesting country unless the holder proves the contrary.
- (6) Except as provided in this section, no compensation shall be payable in respect of loss of requested items dealt with under or in accordance with this Act.

Return of requested items

26B. Where:

- (a) in accordance with section 21, the court orders the central authority to return the requested item to the requesting country; and
- (b) all appeal procedures have either been exhausted or are no longer available;

the central authority shall arrange, or cause to be arranged, return of the requested item to the requesting country as soon as possible, allowing for any special requirements for its transport.

Limitation

- 27B. (1) The court shall refuse an application for an order to return a requested item to a requesting country where it is satisfied, on the balance of probabilities, that the requesting country knew, more than five years before the date on which the central authority received the request for return of the item that the requested item was located in [name of legislating country].
- (2) For the purposes of subsection (1) the requesting country shall be deemed to have known that the requested item was located in *[name of legislating country]* when -
- (a) the central authority administering the corresponding legislation of the requesting country; or
 - (b) an officer of the government of the requesting country whose duties -
 - (i) related to the administration of the corresponding legislation; or
 - (ii) would require the officer to report a matter relating to the administration of the corresponding legislation to that central authority or to an officer referred to in subparagraph (i),knew that the requested item was located in *[name of legislating country]*.

Part 4 – Miscellaneous

Delegation

28B. The central authority may, delegate to [*specify class of officer*] all or any of its powers under this Act other than this power of delegation.

[Saving

29. This Act is taken not to affect the operation of any provision, not directly inconsistent with this Act, of any other law.]

Designation of dependent or overseas territories

30. The regulations may designate a dependent or overseas territory of [*name of legislating country*] as a part of [*name of legislating country*] for the purposes of this Act and of the Scheme.

Regulations

31. (1) The [*central authority*] may make regulations, not inconsistent with this Act, prescribing matters:
- (a) required or permitted to be prescribed by this Act; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) The regulations may prescribe penalties, not exceeding _____ for a natural person, or _____ for a body corporate, for offences against the regulations.
- (3) Every regulation made under subsection (1) shall be published in the Gazette and shall come into operation on the date of such publication or on such later date as may be specified in the regulation.
- (4) Every regulation made under subsection (1) shall, as soon as convenient after its publication in the Gazette, be brought before Parliament for approval. Any regulation which is not so approved shall be deemed to be rescinded from the date of its disapproval but without prejudice to anything previously done thereunder.

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 and the European Communities 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 Europe Community.

Definitions

2. For the purposes of the Scheme:
 - (a) "country" means:
 - (i) each sovereign and independent country with in the Commonwealth together with any 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 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
- (a) either 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) may 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 shall 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.



The Commonwealth