

# **Repatriation of Historic Human Remains: Australia, New Zealand, and the United Kingdom**

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### AUSTRALIA

## REPATRIATION OF HISTORIC HUMAN REMAINS

### *Executive Summary*

*In recent years, the Australian government has initiated a number of programs to facilitate the return of indigenous human remains and cultural objects held by museums to their communities of origin. One such initiative, the Return of Indigenous Cultural Property Program, focuses on holdings by Australia's major government-funded museums. Along with other entities, the Program also funds the National Museum of Australia's highly successful repatriation unit, which both repatriates the National Museum's holdings and coordinates the efforts of other Australian museums. In addition, the government of New South Wales has launched an independent repatriation program for the return of Aboriginal materials held by the National Parks and Wildlife Service. Repatriations from overseas are coordinated by the International Repatriation Program of the Department of Families, Housing, Community Services and Indigenous Affairs.*

*Various Australian states have also enacted legislation on the return of indigenous human remains. In Queensland, this legislation consists of the Aboriginal Cultural Heritage Act 2003 and the nearly identical Torres Strait Islander Cultural Heritage Act 2003, while in Victoria the legislature has adopted the Aboriginal Heritage Act of 2006. These Acts vest ownership of indigenous remains in those peoples with a traditional or familial links to such remains regardless of prior claims of ownership. The Victoria legislation also created an advisory Aboriginal Heritage Council.*

*Overall, the government's efforts have resulted in a large number of successful repatriations to Australia's indigenous communities.*

### **I. Introduction**

Large collections of human remains and other items from indigenous Australian communities were collected and sent to parts of Europe and beyond in the late nineteenth and early twentieth centuries. These remains were used by different nations in scientific research into the biological differences of races.<sup>1</sup> The indigenous population of Australia has a belief that the spirits of the dead cannot rest until returned to their country and also want to reassert control over their cultural heritage. They have been requesting the return of these remains from different institutions in countries around the world.

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<sup>1</sup> Marilyn Truscott, Repatriation of Indigenous cultural property (2006) (paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra), available at <http://www.environment.gov.au/soe/2006/publications/emerging/repatriation/pubs/repatriation.pdf>.

Over the past twenty years there has been a movement among Aboriginal and Torres Strait Islander peoples, as well as Australian museums and the government, to develop arrangements with other countries to repatriate indigenous ancestral remains and secret sacred objects to their communities of origin.<sup>2</sup> One example of these arrangements is the joint declaration between the Prime Ministers of Australia and the UK on the repatriation of human remains, which states that the governments of these two countries will increase efforts to repatriate human remains.<sup>3</sup> Specifically, the Joint Statement is as follows:

The Australian and British governments agree to increase efforts to repatriate human remains to Australian indigenous communities. In doing this, the governments recognise the special connection that indigenous people have with ancestral remains, particularly where there are living descendants. The Australian government appreciates the efforts already made by the British government and institutions in relation to assisting the return of human remains of significance to Australian indigenous communities. We agree that the way ahead in this area is a cooperative approach between our governments. Our governments recognise that there is a range of significant issues to be addressed in order to facilitate the repatriation of indigenous human remains. Addressing these issues requires a coordinated long-term approach by governments involving indigenous communities and collecting institutions. Consultation will be undertaken with indigenous organisations as part of developing any new cooperative arrangements. Significant efforts have already been undertaken by individuals and particular organisations in this area. More research is required to identify indigenous human remains held in British collections. Extensive consultation must also be undertaken to determine the relevant traditional custodians, their aspirations regarding the treatment of the remains and a means for addressing these. The governments agree to encourage the development of protocols for the sharing of information between British and Australian institutions and indigenous people. In this respect we welcome the initiative of the British Natural History Museum which has catalogued the 450 indigenous human remains in its collection and provided this information to the Australian government. We endorse the repatriation of indigenous human remains wherever possible [and appropriate] from both public and private collections. We note that several British institutions have already negotiated agreements with indigenous communities for the release of significant remains. In particular, Edinburgh University, following extensive consultation with the Australian government and indigenous organisations, has recently completed repatriation of a large collection of remains. Our governments look forward to continuing to address this issue in a cooperative and constructive spirit.<sup>4</sup>

## II. Programs

Given the importance attached to human remains by the indigenous populations in Australia and of repatriation as a significant part of the reconciliation program in Australia, the government has initiated a number of programs to encourage and facilitate the return of these

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<sup>2</sup> Department of the Environment, Water, Heritage and the Arts (DEWHA), *Return of Indigenous Cultural Property*, <http://www.arts.gov.au/indigenous/return> (last visited July 23, 2009).

<sup>3</sup> Number10.gov.uk, *Prime Ministerial Joint Statement on Aboriginal Remains* (July 5, 2000), <http://www.number10.gov.uk/Page2829>.

<sup>4</sup> *Id.*

remains.<sup>5</sup> It has been working closely with museums and indigenous communities to develop arrangements for the repatriation of human remains.<sup>6</sup> The following is a summary of these programs.

### A. The Return of Indigenous Cultural Property Program

The Return of Indigenous Cultural Property Program is “an initiative of the Cultural Ministers’ Council as part of a government program to return Indigenous human remains and sacred objects to the Australian Indigenous peoples with cultural rights to those materials.”<sup>7</sup> The program is limited in application to Australia’s major government-funded museums, not privately funded institutions, universities, or overseas holdings.<sup>8</sup> Also excluded is the Australian Capital Territory, as it “does not hold collections of Indigenous remains and secret sacred objects, so does not participate in the program.”<sup>9</sup>

The program is overseen by “a Management Committee of museum and Indigenous representatives from each state, the Northern Territory and Museums Australia,”<sup>10</sup> and aims to return human remains and other sacred objects held in “major government-funded museums to their communities of origin where possible and when requested.”<sup>11</sup>

The objectives of the program are to:

- identify the origins of all ancestral remains and secret/sacred objects held in the museums where possible
- notify all communities who have ancestral remains and secret/sacred objects held in the museums
- appropriately store ancestral remains and secret/sacred objects held in the museums at the request of the relevant community [and]
- arrange for repatriation where and when it is requested.<sup>12</sup>

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<sup>5</sup> DEWHA, *Return of Indigenous Cultural Property*, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> Marilyn Truscott, *supra* note 1.

<sup>8</sup> These museums are: the Australian Museum; the Museum and Art Gallery of the Northern Territory; the Museum Victoria; the National Museum of Australia; the Queensland Museum; the South Australian Museum; the Tasmanian Museum and Art Gallery; and the Western Australian Museum. DEWHA, *Return of Indigenous Cultural Property*, *supra* note 2.

<sup>9</sup> *Id.*

<sup>10</sup> Marilyn Truscott, *supra* note 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

The Return of Indigenous Cultural Property Program is funded jointly by the Commonwealth Government and State Governments.<sup>13</sup> The program was reportedly due to lapse in December 2005, but was extended to June 2007 without additional funding.<sup>14</sup> The Department of the Environment, Water, Heritage and the Arts notes, however, that in the 2007-8 annual budget, the Australian government provided the Return of Indigenous Cultural Property Program with funding of AU\$4.716 million over the next four years.<sup>15</sup>

The program aims to give financial support to communities who wish to regain cultural remains or secret and sacred objects. The funding extends to purposes such as “assistance with travel for applicants to view and pick up the remains and secret and sacred objects; ...[or] assistance with funding for ceremonies associated with the receipt of the remains or secret and sacred objects.”<sup>16</sup>

## B. National Museum of Australia - Repatriation Unit

The National Museum of Australia held a large number of human remains from the indigenous population, which were “largely derived from the collections originally held by the former Australian Institute of Anatomy.”<sup>17</sup> While the museum did not actively seek to collect these remains, it is designated as the legally-prescribed repository under the Aboriginal and Torres Strait Islander Heritage Protection Act 1987 to safe keep unprovenanced remains referred to the Minister for Aboriginal and Torres Strait Islander Affairs.<sup>18</sup> As of 2008 there have been no human remains deposited in the National Museum of Australia under the Act.<sup>19</sup> The National Museum of Australia may also store human remains or secret or sacred objects if the indigenous communities do not have the resources to take them.<sup>20</sup>

The National Museum of Australia established a repatriation unit in 2000.<sup>21</sup> The program is funded both by the National Museum of Australia, the Aboriginal and Torres Strait Islander Commission, and the Return of Indigenous Cultural Property Program.<sup>22</sup> In the

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> DEWHA, *Return of Indigenous Cultural Property*, *supra* note 2.

<sup>16</sup> National Museum of Australia (NMA), *Repatriation: Process*, <http://www.nma.gov.au/collections/repatriation/process/> (last visited July 23, 2009).

<sup>17</sup> Marilyn Truscott, *supra* note 1.

<sup>18</sup> NMA, *Aboriginal and Torres Strait Islander Human Remains Policy*, vers. 2.1, 2009, [http://www.nma.gov.au/shared/libraries/attachments/corporate\\_documents/policies/atsi\\_human\\_remains\\_policy/files/27533/POL-C-011\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_human\\_remains\\_2.1\\_\(public\).pdf](http://www.nma.gov.au/shared/libraries/attachments/corporate_documents/policies/atsi_human_remains_policy/files/27533/POL-C-011_Aboriginal_and_Torres_Strait_Islander_human_remains_2.1_(public).pdf); NMA, *Annual Report 2007-8*, 2008, at 28, available at [http://www.nma.gov.au/shared/libraries/attachments/annual\\_report/annual\\_report\\_2007\\_2008/annual\\_report\\_2007\\_08\\_part\\_two/files/25854/NMAAnnualReport08\\_PT2.pdf](http://www.nma.gov.au/shared/libraries/attachments/annual_report/annual_report_2007_2008/annual_report_2007_08_part_two/files/25854/NMAAnnualReport08_PT2.pdf).

<sup>19</sup> NMA, *Annual Report 2007-8*, *supra* note 19, at 28.

<sup>20</sup> *Id.*

<sup>21</sup> Marilyn Truscott, *supra* note 1.

<sup>22</sup> NMA, *Annual Report 2002-3*, 2003, [http://www.nma.gov.au/about\\_us/nma\\_corporate\\_documents/annual\\_report/annual\\_report\\_2002\\_2003\\_html\\_version/part\\_2\\_performance\\_reports/performance\\_commentaries/ou](http://www.nma.gov.au/about_us/nma_corporate_documents/annual_report/annual_report_2002_2003_html_version/part_2_performance_reports/performance_commentaries/ou)

Museum's 2007-8 annual report it noted that its funding during this period was primarily through the National Museum of Australia's own resources, although some funding was received through the Return of Indigenous Cultural Property Program.<sup>23</sup>

The repatriation of human remains from the National Museum of Australia follows strict policies that provide for the "unconditional return of remains and artifacts to traditional owners and custodians."<sup>24</sup> It is required to "conduct appropriate and diligent research to identify the correct communities/custodians responsible for Aboriginal and Torres Strait Islander ancestral remains in its custody"<sup>25</sup> and return remains upon request to the appropriate communities once the identity of the requestor has been verified. The Museum's policy does not allow it to place conditions upon the return of the remains and provides that: "The community/custodians from the group or area from which the ancestral remains originated shall be involved in deciding what will happen to repatriated remains."<sup>26</sup>

The Repatriation Unit at the National Museum of Australia not only serves to repatriate remains held at the national museum, but also coordinates repatriation efforts from other museums and "advises on and assists with the repatriation of Indigenous human remains and sacred objects to federal, state and territory cultural heritage institutions, Indigenous communities and representatives."<sup>27</sup>

Repatriation efforts by the National Museum of Australia have been largely successful and have been documented in the annual reports of the National Museum of Australia.<sup>28</sup> In 2002-3 the National Museum of Australia's annual report notes that it returned the remains of "405 individuals to Aboriginal communities in the Northern Territory, South Australia, New South Wales and Victoria"<sup>29</sup> and the remains of 132 individuals in 2003-4.<sup>30</sup>

The following table reflects the number and destination of both remains and secret and sacred items returned by the National Museum of Australia for the period 2002-2005:

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<sup>23</sup> NMA, *Annual Report 2007-8*, *supra* note 19.

<sup>24</sup> NMA, *Aboriginal and Torres Strait Islander Human Remains Policy*, *supra* note 19.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> NMA, *Annual Report 2007-8*, *supra* note 19.

<sup>28</sup> *See, e.g.*, NMA, *Annual Report 2002-3*, [supra](#) note 23.

<sup>29</sup> *Id.*

<sup>30</sup> Marilyn Truscott, *supra* note 1.

Year	No. Of Individuals' Remains Returned	No. of Secret/Sacred Items Returned	Aboriginal Communities Receiving Remains <sup>31</sup>
2002-2003	405	-	NT, SA, NSW, VIC
2003-2004	132	-	NT, SA, NSW, WA, VIC
2003-2004	-	308	WA
2004-2005	39	-	NT, SA, NSW, WA, VIC

### C. Repatriation from Overseas

The Department of Families, Housing, Community Services and Indigenous Affairs manages the International Repatriation Program. The aim of this program is to facilitate “the return of Indigenous human remains held in overseas collections to their communities of origin.”<sup>32</sup>

This program funds a variety of activities to meet this aim, including:

- research to establish the origins (provenance) of human remains;
- research to establish inventories of overseas collections of Indigenous human remains;
- consultations with traditional custodians on their wishes in relation to repatriation;
- the return of human remains to communities of origin;
- care and management of remains that cannot be returned to their communities of origin; and
- assistance for [the] community following the return of their ancestral remains e.g. site preparation, ceremonies, reburials etc.<sup>33</sup>

Since 2000, over 1,000 indigenous remains have been returned to Australia, with 166 of these coming from eighteen institutions since 2004.<sup>34</sup> However, the program’s work is not yet complete, as it has estimated that there are more than 900 indigenous Australian remains held in museums around the world.<sup>35</sup>

<sup>31</sup> Key: NT=Northern Territory; SA=Southern Australia; NSW=New South Wales; VIC=Victoria; WA=Western Australia.

<sup>32</sup> Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), *International Repatriation Program*, 2009, <http://www.fahcsia.gov.au/sa/indigenous/progserv/repatriation/Pages/default.aspx>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; *Indigenous remains coming home from UK*, THE AGE (Australia), July 20, 2009, <http://news.theage.com.au/breaking-news-national/indigenous-remains-coming-home-from-uk-20090720-dqnr.html>.

<sup>35</sup> FaHCSIA, *International Repatriation Program*, 2009, *supra* note 34; *Indigenous remains coming home from UK*, *supra* note 36.

## D. New South Wales Program

The National Parks and Wildlife Service (NPWS), the agency responsible for protecting Aboriginal heritage in New South Wales, has until now favored the removal of cultural materials (including ancestral remains) from its original setting to ensure their “protection.” As a result of almost thirty years of this practice, the NPWS now has large collections of cultural materials, including ancestral remains.

There has been a drive in recent times through a Repatriation Program established by the government in 2002 to develop protocols and “return these collections in a strategic manner.”<sup>36</sup> Despite being established in 2002, the Program does not report many incidents of repatriation and notes on its website that it is “approach[ing] Aboriginal Communities seeking guidance on the management of cultural material in the organisation’s collections, and in particular its repatriation.”<sup>37</sup> The Repatriation Program has returned the remains of over thirty individuals.<sup>38</sup>

## III. Legislation

Various states of Australia have introduced legislation on the return of indigenous human remains. The following provides an overview of this legislation relating to indigenous human remains in Queensland and Victoria.<sup>39</sup>

### A. Queensland

In 2003, the Queensland government enacted the Aboriginal Cultural Heritage Act and the Torres Strait Islander Cultural Heritage Act, which are collectively known as the “Cultural Heritage Acts.”<sup>40</sup> These Acts only apply to Queensland.

The Aboriginal Cultural Heritage Act 2003 aims to “provide effective recognition, protection and conservation of Aboriginal cultural heritage.”<sup>41</sup> and “recognizes that Indigenous people are the primary guardians, keepers and knowledge holders of their cultural heritage, with recognition of Aboriginal ownership of human remains and secret and sacred material, as well as cultural heritage removed from land.”<sup>42</sup>

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<sup>36</sup> Department of Environment and Climate Change, *Repatriation*, 2008, <http://www.environment.nsw.gov.au/conservation/Repatriation.htm>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> An overview of legislation applying both federally and to other Australian states is available online. See Western Australia Department of Indigenous Affairs, *Aboriginal Heritage Act & other legislation*, 2008, <http://www.dia.wa.gov.au/Heritage--Culture/Heritage-management/Aboriginal-Heritage-Act--other-legislation/>.

<sup>40</sup> For an analysis of the implementation of these acts, see Margaret Stephens, *Queensland’s Indigenous Cultural Heritage Legislation: A Critique*, 10 JOURNAL OF SOUTH PACIFIC LAW (Issue 2, 2006), available at <http://www.pacii.org/journals/FJSPL/vol10no2/4.shtml#fnB14>.

<sup>41</sup> Aboriginal Cultural Heritage Act 2003, § 4, available at <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/A/AborCultHA03.pdf>.

<sup>42</sup> Marilyn Truscott, *supra* note 1.

Notably, the Act provides for “Aboriginal or Torres Strait Islander people who have traditional or familial links with human remains to seek ownership of these remains regardless of who claimed previous ownership.”<sup>43</sup> It states:

**15 Ownership of Aboriginal human remains**

- (1) On the commencement of this section, Aboriginal people who have a traditional or familial link with Aboriginal human remains in existence immediately before the commencement become the owners of the human remains if they are not already the owners.
- (2) Subsection (1) applies regardless of who may have owned the Aboriginal human remains before the commencement of this section.<sup>44</sup>

**16 Aboriginal human remains in custody of State**

- (1) This section applies to Aboriginal human remains if the human remains are in the custody of an entity that represents or is the State.
- (2) The persons who own the human remains may at any time ask the entity—
  - (a) to continue to be the custodian of the human remains; or
  - (b) to return the human remains to them.
- (3) If the entity is satisfied the persons making the request under subsection (2) are the owners of the human remains, the entity must comply with the request to the greatest practicable extent.
- (4) The persons who own the human remains are not limited to making only 1 request under subsection (2). . . .<sup>45</sup>

The Torres Strait Islander Cultural Heritage Act 2003 is essentially identical in its substantive provisions to the Aboriginal Cultural Heritage Act 2003. The approach, however, is to deal with the indigenous cultural heritage of the Torres Strait Islanders separately from the indigenous cultural heritage of the Aborigines.<sup>46</sup>

The legislation gives legal recognition to the Torres Strait Islanders as indigenous parties in any heritage proceedings and recognizes Torres Strait Islander ownership of human remains and burial items, secret and sacred material currently held in State collections, and cultural heritage previously removed from the country. As with the Aboriginal Heritage Act, the Torres Strait Islander Cultural Heritage Act states that ownership of the remains is with those who have familial or traditional links with the remains, and those with these links are legally entitled to have the remains returned by any state entity, or a representative of such entity.

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<sup>43</sup> Queensland Government, *Aboriginal Cultural Heritage Act 2003 & Torres Strait Islander Cultural Heritage Act 2003, Part 2 - Human Remains Guideline*, available at [http://www.nrw.qld.gov.au/cultural/heritage/pdf/hr\\_remains\\_guideline.pdf](http://www.nrw.qld.gov.au/cultural/heritage/pdf/hr_remains_guideline.pdf) (last visited July 24, 2009).

<sup>44</sup> Aboriginal Cultural Heritage Act 2003, pt. 2, div. 2, § 15, “Ownership of Aboriginal human remains.”

<sup>45</sup> *Id.* § 16, “Aboriginal human remains in custody of State.”

<sup>46</sup> Margaret Stephenson, *Queensland’s Indigenous Cultural Heritage Legislation: A Critique*, 10 *Journal of South Pacific Law* (Issue 2, 2006), available at <http://www.pacii.org/journals/fJSPL/vol10no2/4.shtml>.

## B. Victoria

The state of Victoria has also adopted legislation on the repatriation of human remains in the Aboriginal Heritage Act 2006.<sup>47</sup> This Act creates an “Aboriginal Heritage Council, with membership of traditional owners who will advise on the protection of Aboriginal heritage” and provides for registered Aboriginal parties to “enter into cultural heritage agreements and negotiate the repatriation of Aboriginal human remains.”<sup>48</sup> This Act is substantively similar to the Queensland Acts, vesting ownership of Aboriginal remains in the Aboriginal peoples who have a traditional or familial link, regardless of who had possession prior to the effective date of the Act. The Act also provides for the Council to provide assistance to the Aboriginal people when making a request for the return of human remains and requires that the requests for return must be complied with to “the greatest extent practicable.”<sup>49</sup>

## IV. Concluding Remarks

Overall there have been a large number of repatriations from museums to the indigenous communities throughout Australia. This is due to the museums’ responses both to the culturally sensitive requests from the indigenous communities, which ultimately resulted in legislation in some states, and strict policies within museums aimed at facilitating the return of these cultural items. As demonstrated in the case of New South Wales, the process is ongoing in some cases, but the success of repatriation programs in other states shows the willingness of museums to respond to requests, particularly when strict policies are in place.

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<sup>47</sup> Aboriginal Heritage Act 2006, Act 16/2006, available at [http://www.legislation.vic.gov.au/Domino/Web\\_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/481F4F0770858034CA257169001D1F4A/\\$FILE/06-016a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/481F4F0770858034CA257169001D1F4A/$FILE/06-016a.pdf).

<sup>48</sup> Press Release, Minister for Aboriginal Affairs, New Legislation Another Step Towards reconciliation (Feb. 27, 2007), available at [http://www.legislation.vic.gov.au/domino/Web\\_Notes/newmedia.nsf/955cbeae7df9460dca256c8c00152d2b/9f7ac0efc662b67cca25728f007e4cfb!OpenDocument](http://www.legislation.vic.gov.au/domino/Web_Notes/newmedia.nsf/955cbeae7df9460dca256c8c00152d2b/9f7ac0efc662b67cca25728f007e4cfb!OpenDocument).

<sup>49</sup> Aboriginal Heritage Act 2006, Act 16/2006, § 15(3).

# LAW LIBRARY OF CONGRESS

## NEW ZEALAND

### REPATRIATION OF HISTORIC HUMAN REMAINS

#### *Executive Summary*

*The return of human remains taken from the country is of particular and unique concern to New Zealand because of the large number of preserved Maori heads that were acquired by foreigners prior to 1831. New Zealand has established a program for the return of Maori remains, which is largely administered by its national museum. Through this program, New Zealand has secured the cooperation of over forty foreign museums. New Zealand is a party to international conventions on the return of cultural artifacts and has enacted implementing legislation. The relevant law allows foreign countries to claim culturally significant objects being held in New Zealand and requires governmental permission for culturally significant domestic objects to be exported.*

#### **I. Introduction**

New Zealand has a population of approximately 4.2 million persons.<sup>1</sup> Almost eight percent of the population is descended from the indigenous Maori people and about four and one-half percent of the population is composed of other Pacific Islanders, many of whom have immigrated to the country in search of employment over the past thirty years.<sup>2</sup> Although many Maori have moved to the nation's largest cities, the Maori people still hold significant amounts of land in rural areas.

As a relatively young and small country, New Zealand is not a major repository of cultural property, human remains, funerary objects, objects of cultural patrimony, or sacred objects brought to the country from abroad. Neither individual New Zealanders nor the New Zealand Government and the museums it maintains appear to be in possession of many objects the return of which is highly coveted by other countries. For example, the website for New Zealand's museums show that they contain very small collections of Old World antiquities and only one Egyptian mummy.<sup>3</sup>

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<sup>1</sup> Central Intelligence Agency, World Factbook: New Zealand, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/NZ.html>.

<sup>2</sup> *Id.*

<sup>3</sup> NZMuseums, <http://www.nzmuseums.co.nz/>.

While New Zealand does not hold a large number of foreign cultural objects the return of which is sought by foreign governments or peoples, New Zealand is very active in seeking the return of human remains taken from the country during its colonial period. In New Zealand's case, the type of remains that have generated the greatest efforts, attention, and response have been preserved heads. These heads are usually tattooed and greatly reduced from normal size. At one time, these heads were commonly displayed in foreign museums as curiosities, but they are now usually kept both within and outside of the country for private inspection or returned to tribal communities for burial in accordance with established customs.

The Maori people of New Zealand speak a common language, but have historically been divided into tribes called *iwi*. The Government currently recognizes eighty-one separate *iwi* in the country and has been negotiating land claims with them through a Waitangi Tribunal named after the Treaty of Waitangi signed between the British and Maori in 1840.<sup>4</sup> Many of the *iwi* are subdivided into smaller groups called *hapu*. Fighting between different *iwi* and *hapu* pre-dated European colonization. In fact, the period just before colonization was a time of intense conflict and is now known as the period of the Maori wars. It appears that during this time, the heads of fallen warriors were preserved by their communities to remember their sacrifice and were used for ceremonial purposes. However, early European visitors and traders eagerly sought these preserved head as souvenirs. *Iwi* communities then began preserving the severed heads of enemies for bartering. It appears that there was even a gruesome period between 1815 and 1831 during which various *iwi* "manufactured" preserved heads by making war for the purpose of collecting them or killing slaves and captives for their heads.<sup>5</sup> Trade in preserved heads was banned by the British government in 1831.<sup>6</sup>

While most of the preserved heads were obtained through bartering, some were also taken by British soldiers from Maori villages. Other Maori artifacts were also obtained through trade and pillaging. Grave robbery does not, however, appear to have been a major means of acquiring Maori artifacts, as Maori dead were not usually buried with their treasures or belongings in tombs.<sup>7</sup>

In 2007, a representative of the British Museum visited New Zealand to investigate the attitudes of the Maori people respecting the return of human remains to the country. He found that the people generally welcomed the return of bones, both to the country and their communities, but that there was a wider range of opinion respecting the preserved heads. Many of those interviewed were uncomfortable speaking about the subject and were not sure how returned heads should be received as it is very difficult to know whether any one head was preserved to honor that person, mock an enemy, or for trade. Nevertheless, most Maori groups

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<sup>4</sup> Lissant Bolton, British Museum, Repatriation Request From Karanga Aotearoa (Repatriation Unit), Te Papa Tongarewa (Museum of New Zealand): Report on Discussions held in New Zealand 108 (Sept. 27, 2007), available at <http://www.britishmuseum.org/pdf/00%2026%20Lissants%20Report%20to%20Trustees.pdf>.

<sup>5</sup> *Id.* at 111.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 109.

seem to believe that the heads should at least be returned to New Zealand even if it is impossible to determine which *iwi* should handle them once they have been recovered.<sup>8</sup>

## II. Legislation

New Zealand has signed both the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property, signed in Paris in 1970,<sup>9</sup> and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, signed in Rome in 1995.<sup>10</sup> New Zealand's statute, which implements these two international Conventions, is the Protected Objects Act, 1975.<sup>11</sup> Section 1A of this statute states that its purpose is as follows:

- To provide for the better protection of certain objects by—
- (a) regulating the export of protected New Zealand objects; and
  - (b) prohibiting the import of unlawfully exported protected foreign objects and stolen protected foreign objects; and
  - (c) providing for the return of unlawfully exported protected foreign objects and stolen protected foreign objects; and
  - (d) providing compensation, in certain circumstances, for the return of unlawfully exported protected foreign objects; and
  - (e) enabling New Zealand's participation in—
    - (i) the UNESCO Convention; and
    - (ii) the UNIDROIT Convention; and
  - (f) establishing and recording the ownership of *ngā taonga tūturu*; and
  - (g) controlling the sale of *ngā taonga tūturu* within New Zealand<sup>12</sup>

The term *ngā taonga tūturu* refers to items relating to Maori culture, history, or society.<sup>13</sup>

The first part of the Protected Objects Act requires governmental permission for the export of protected New Zealand objects.<sup>14</sup> The second part of the Act requires that applications for permission to export objects that may be of aesthetic, archaeological, architectural, artistic, cultural, historical, literary, scientific, social, spiritual, technological, or traditional value must be

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<sup>8</sup> *Id.* at 112.

<sup>9</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, signed Nov. 14, 1970, entered into force Apr. 24, 1972, 96 Stat. 2329, 823 U.N.T.S. 231, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>10</sup> UNIDROIT (International Institute for the Unification of Private Law) Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, registered with the U.N. Mar. 31, 2007, No. 43718, available at <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>.

<sup>11</sup> Protected Objects Act 1975, 1975 N.Z. Stat. No. 41, as amended, available at [http://www.legislation.govt.nz/act/public/1975/0041/latest/DLM432116.html?search=ts\\_act\\_protected+objects\\_resel&p=1&sr=1](http://www.legislation.govt.nz/act/public/1975/0041/latest/DLM432116.html?search=ts_act_protected+objects_resel&p=1&sr=1).

<sup>12</sup> *Id.* § 1A.

<sup>13</sup> *Id.* § 2.

<sup>14</sup> *Id.* §§ 5-7A.

reviewed by expert examiners appointed by the government.<sup>15</sup> The third part of the Act provides for the creation of a register of objects which may not be permanently exported.<sup>16</sup> The fourth part of the Act provides for the granting of certificates of permission to export and allows the government to place conditions in the certificates. The fifth part of the Act implements New Zealand's international commitments by prohibiting the importation of foreign objects illegally exported from participating countries and allows for the filing of claims for their return by Convention members.<sup>17</sup> The sixth part of the Act deals specifically with protected foreign objects that have been stolen from foreign cultural institutions.<sup>18</sup>

The Protected Objects Act also has provisions relating to the return of *ngā taonga tūturu* to Maori communities. For this purpose, the Maori Land Court is given jurisdiction to decide who should be given custody of remains and property recovered from any Maori burial sites.<sup>19</sup> The law also requires any person who finds Maori remains or artifacts to turn them over to the government.<sup>20</sup>

### III. Funding

New Zealand's Museums receive governmental appropriations and private donations. The Museum of New Zealand Te Papa Tongarewa Act 1992 gives the Board of the national museum (hereinafter referred to as Te Papa) in the capital city of Wellington broad discretion in deciding how it should spend the funds it receives,<sup>21</sup> but operates under a governmental order to develop and implement a repatriation program that was issued in 2003. The program that Te Papa has developed in response to this directive is implemented by the Karanga Aoteroa Repatriation Unit. Under the conforming program adopted by Te Papa, the national museum will pay the following expenses:

- Crating of the remains;
- Shipping, freighting, and transportation costs;
- Expenses incurred by the museum's representatives; and
- Burial expenses.<sup>22</sup>

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<sup>15</sup> *Id.* §§ 7B-7E.

<sup>16</sup> *Id.* §§ 7F-7G.

<sup>17</sup> *Id.* §§ 10A-10C.

<sup>18</sup> *Id.* §§ 5-10.

<sup>19</sup> *Id.* § 11.

<sup>20</sup> *Id.*

<sup>21</sup> Museum of New Zealand Te Papa Tongarewa Act 1992, 1992 N.Z. Stat. No. 19, § 9, as amended, available at [http://www.legislation.govt.nz/act/public/1992/0019/latest/whole.html?search=ts\\_act\\_museum\\_rese&p=1#d1m260204](http://www.legislation.govt.nz/act/public/1992/0019/latest/whole.html?search=ts_act_museum_rese&p=1#d1m260204).

<sup>22</sup> MUSEUM OF NEW ZEALAND TE PAPA TONGAREWA, THE KARANGA AOTEAROA REPATRIATION PROGRAM, available at <http://www.tepapa.govt.nz/sitecollectiondocuments/tepapa/abouttepapa/repatriation/01repatriation-programme.pdf>.

Estimates as to how much has been spent annually by the Repatriation Unit and governmental agencies involved in the repatriation of human remains are not currently available.

Aside from Te Papa, relevant *iwi*, other museums, Air New Zealand, and a number of government ministries are all involved in the Karanga Aotearoa Repatriation Program. Among the latter are the Ministry of Culture and Heritage, the New Zealand Customs Service, the Ministry of Foreign Affairs and Trade, and the Department of Conservation. The four strands of the program are to identify human remains, to negotiate with overseas institutions, repatriation, and the return of remains to a final resting place. Te Papa has a Wananga forum to hear feedback from *iwi* and a Repatriation Advisory Panel. Remains that have been repatriated but not returned are preserved by Te Papa, but it is not a final resting place. The goal of the program is to return all remains to the relevant *iwi*.<sup>23</sup>

New Zealand's repatriation program does not cover Maori remains in foreign war graves.<sup>24</sup> Most New Zealand soldiers killed in World Wars I and II are buried in European graves. These graves are maintained by the Commonwealth War Graves Commission.<sup>25</sup>

#### IV. Obstacles to Returning Human Remains

Through its Karanga Aotearoa Repatriation Programme, Te Papa has been able to recover Maori remains from over forty museums around the world. In 2007, the Field Museum in Chicago became the first United States museum to repatriate Maori ancestral remains. One unusual aspect of this repatriation was that the repatriation delegation was accompanied by seven native American representatives. The Field Museum has stated that “the American Indian Center has developed a close and special relationship with [its] Maori meeting house” known as Ruatēpupuke II.<sup>26</sup>

In 2008, the remains of six Maori decedents were repatriated by three Canadian museums.<sup>27</sup>

The country with which Te Papa has had the most protracted and difficult negotiations appears to have been France. In 2007, the Mayor of Rouen announced that the Museum of Natural History in that city would return the tattooed head of a Maori warrior, but he was quickly overruled by the Minister of Culture on the grounds that French law provides that works of art

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> The Field Museum, *Repatriation of Maori Human Remains*, <http://sites.google.com/a/fieldmuseum.org/pacific-web/Home/partnerships/repatriation>.

<sup>27</sup> Government of Canada, *Canadian-Held Maori Remains Repatriated to New Zealand*, July 10, 2008, [http://geo.international.gc.ca/asia/newzealand/news/canadian\\_news\\_bulletins-en.aspx?id=13390](http://geo.international.gc.ca/asia/newzealand/news/canadian_news_bulletins-en.aspx?id=13390).

are “inalienable.”<sup>28</sup> However, the current French government has reversed its position and supports the return of more than a dozen mummified Maori heads. The Senate has approved a bill calling for the return of the heads acquired through “barbaric trade” and it has been sent to the National Assembly for debate.<sup>29</sup> The major French objections to the return of the Maori heads appear to have been based on a fear that it might set a precedent for claims for Egyptian mummies, Asian treasures, and African artifacts. The heads have not been on display for a number of years, but some have argued that destroying them by returning them for burial would “erase a page of history.”<sup>30</sup>

## V. Conclusion

Since World War II, the Government of New Zealand has paid increasing attention to the concerns of the Maori people. One desire of the Maori people is that human Maori remains taken out of the country prior to 1831 should be returned to New Zealand. Most of the remains held by foreign museums and other parties are in the form of preserved heads. New Zealand is a party to two international conventions that call for the return of culturally significant remains and artifacts taken during colonial times and it has established a repatriation program that is largely administered by the national museum with the assistance of governmental agencies. The government hopes to return all repatriated remains to the appropriate Maori community, but the task of identifying which *iwi* a particular preserved head or body part came from is difficult. Many Maori are uncomfortable with this chapter in their history.

New Zealand has met its international commitments by enacting legislation that implements the Conventions it has ratified. This legislation aims to not only provide protection for objects of national significance, but also create a mechanism that allows treaty partners to claim objects of national significance to them.

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<sup>28</sup> Elaine Sciolino, *French Debate: Is Maori Head Body Part or Art?*, N.Y. TIMES, Oct. 26, 2007, available at [http://www.nytimes.com/2007/10/26/world/europe/26france.html?\\_r=1&scp=1&sq=French%20Debate:%20Is%20Maori%20Head%20Body%20Part%20or%20Art?&st=cse](http://www.nytimes.com/2007/10/26/world/europe/26france.html?_r=1&scp=1&sq=French%20Debate:%20Is%20Maori%20Head%20Body%20Part%20or%20Art?&st=cse).

<sup>29</sup> *Barbaric Mummy Trade: Return of Heads Backed*, GOLD COAST BULLETIN (Australia), July 1, 2009, section B.

<sup>30</sup> Sciolino, *supra* note 28.

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## UNITED KINGDOM

### REPATRIATION OF HISTORIC HUMAN REMAINS

#### *Executive Summary*

*The UK has a large number of institutions that collectively possess a vast array of human remains. The majority of these remains originated in the UK; however, a considerable amount are from indigenous peoples overseas and were collected under suspect circumstances during the growth of the British Empire. Legislation was recently enacted to provide certain institutions with the ability to return these remains to their legitimate ancestors, and as a result a number of remains have been returned. These returns have not been without issues, however.*

#### **I. Introduction**

Many institutions in the United Kingdom<sup>1</sup> possess a variety of cultural items and human remains from countries around the globe. The vast collections stem from centuries of exploration and the growth of the British Empire through colonization.<sup>2</sup> Collecting cultural items and human remains from other countries has been documented at least as far back as the fifteenth century.<sup>3</sup> For the period after the fifteenth century these items, collected locally, were used to study differences in human populations and the origin of the human species, with items from overseas being brought back only if they were “rare or unusual specimens ... for their curiosity value as well as for research.”<sup>4</sup>

The nineteenth century marked an increase in the acquisition of human remains from various countries, predominantly those under colonial control. These were acquired for scientific purposes, to study evolution and the origin of the human species, as well as in response to “a desire to preserve mementos of what were believed to be vanishing races.”<sup>5</sup> These remains were acquired from a variety of sources, including transfers from foreign museums and trade with indigenous peoples. Some remains were acquired without consent from the indigenous population in colonial times when there was an uneven balance of power, and frequently:

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<sup>1</sup> Due to the availability of information and differences in laws across the UK, notably in Scotland, this report especially emphasizes England.

<sup>2</sup> Department for Media, Culture and Sports, *Care of Historic Human Remains: A Consultation on the Report of the Working Group on Human Remains* (hereafter *Working Group Consultation*), 2003, ¶ 4.1, available at <http://www.culture.gov.uk/images/consultations/HistoricHuman.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* ¶ 4.2.

in circumstances which were unethical even by the standards of the time, including duress, deceit, unlawful removal and, very occasionally, murder. Colonised peoples were often unable to prevent the removal of human remains because of the dynamics of power in colonial situations. Collecting practices were adopted which would have met with both criminal punishment and moral outrage had they been applied to the bodies and graves of white citizens.<sup>6</sup>

There has been no formal survey of the number of human remains held by institutions across the UK, and no widespread informal survey.<sup>7</sup> A government group, funded by Re:source, the Council for Museums, Archives and Libraries, surveyed 148 institutions on their holdings of human remains to “map the broad scope of human remains held in English [institutions].”<sup>8</sup> The results of the survey indicate that the majority of human remains held in institutions across England originate from the UK.<sup>9</sup> Of the 146 institutions that responded to the survey, sixty responded that they held human remains from overseas from the period 1500-1947.<sup>10</sup> Thirteen of these have received between them thirty-three requests for the repatriation of human remains, with twenty-seven of these requests originating from Australasian communities, and five from communities in the United States. Three of the institutions surveyed (the British Museum, the Natural History Museum, and the Royal College of Surgeons) received twenty of the thirty-three requests.<sup>11</sup> During the time frame of the survey, seven of the requests resulted in the repatriation of remains, five decisions were pending, thirteen of the requests were refused on the basis “that they were prohibited by legislation, and eight were refused for other reasons, two specifically citing scientific evidence.”<sup>12</sup> The survey reported that evidence indicated to them that a total of ten institutions in England have returned or agreed to return human remains.<sup>13</sup>

## II. Legislation

Prior to the early twenty-first century, indigenous communities that claimed rights to human remains in UK museums faced numerous legal difficulties – from the fact that certain national museums could not dispose of objects within their collections where such disposal would be detrimental to the interests of students,<sup>14</sup> to the fact that under principles of English law, the concept of property, and thus the right of ownership, does not exist in relation to human

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<sup>6</sup> *Id.* ¶ 4.3.

<sup>7</sup> JANE WEEKS & VALERIE BOTT, SCOPING SURVEY OF HISTORIC HUMAN REMAINS IN ENGLISH MUSEUMS UNDERTAKEN ON BEHALF OF THE MINISTERIAL WORKING GROUP ON HUMAN REMAINS (Feb. 2003), available at <http://www.cep.culture.gov.uk/images/publications/ScopingSurveyWGHR.pdf>.

<sup>8</sup> *Id.* ¶ 1.2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., § 5(1)(c) of the British Museum Act 1963, c. 24.

remains, unless they have been altered or treated “through the application of skill.”<sup>15</sup> This has been noted as presenting “legal difficulties in practice,” as it is difficult for claimants or the museums themselves to assert rights of ownership over the remains.<sup>16</sup> Indeed, it has been noted that “the legal traps and voids encountered in a claim for human remains are more formidable, because of the no-property rule and the fact that culturally different concepts are at work between claimant and respondent.”<sup>17</sup>

In light of these legal issues and the continued attempts from indigenous peoples to have the remains of their ancestors returned, most notably from Australia, in 2000 the Prime Ministers of the United Kingdom and Australia met and made a “Joint Declaration to increase efforts to repatriate human remains to Australian indigenous communities, wherever possible and appropriate.”<sup>18</sup> As a result of the signing of this Joint Declaration, the UK Minister for the Arts established a Working Group on Human Remains to review the current status of human remains within the collections of publicly-funded Museums and Galleries and consider legislative change in this area.<sup>19</sup> The Working Group considered challenges posed by legislation to the return of remains, the potential use of legislation to return human remains, such as through the Human Rights Act 1998, as well as reportedly the possibility of introducing legislation to make the return of remains compulsory.<sup>20</sup>

The government acted upon these recommendations and, under the Human Tissue Act 2004, enabled nine national museums<sup>21</sup> to de-accession human remains from their collections where the museums believe it appropriate to do so, and where the remains are from a person reasonably believed to have died less than one thousand years prior to the effective date of the

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<sup>15</sup> Department for Culture, Media and Sport, *Guidance for the Care of Human Remains in Museums*, 2005, at 12, available at <http://www.culture.gov.uk/images/publications/GuidanceHumanRemains11Oct.pdf>. The origins of this law have been noted as being “obscure in origin, and subject to important exceptions, the general rule has twice been upheld by the Court of Appeal over the past seven years and must be taken as established.” Department for Media, Culture and Sports, *The Report of the Working Group on Human Remains*, 2007, App. 2, available at [http://www.culture.gov.uk/images/publications/Appendix\\_2\\_human.pdf](http://www.culture.gov.uk/images/publications/Appendix_2_human.pdf), referring to *Dobson v. North Tyneside Health Authority* [1996] 4 All ER 474 (CA), and *R v. Kelly and another* [1998] 3 All ER 741 (CA).

<sup>16</sup> *Guidance for the Care of Human Remains in Museums*, 2005, *supra* note 15. This report also provides a summary of US legislation in App. 10, at [http://www.culture.gov.uk/images/publications/Appendix\\_10\\_human.pdf](http://www.culture.gov.uk/images/publications/Appendix_10_human.pdf).

<sup>17</sup> Department for Media, Culture and Sports, *The Report of the Working Group on Human Remains*, 2007, App. 2, available at [http://www.culture.gov.uk/images/publications/Appendix\\_2\\_human.pdf](http://www.culture.gov.uk/images/publications/Appendix_2_human.pdf).

<sup>18</sup> *Guidance for the Care of Human Remains in Museums*, 2005, *supra* note 15, at 5; Prime Ministerial Number10.gov.uk, *Joint Statement on Aboriginal Remains*, July 2000, <http://www.number10.gov.uk/Page2829>.

<sup>19</sup> *Guidance for the Care of Human Remains in Museums*, 2005, *supra* note 15, at 5.

<sup>20</sup> *Working Group Consultation*, *supra* note 2; *Guidance for the Care of Human Remains in Museums*, 2005, *supra* note 15, App. 3; Kathy Marks, *Britain to hand back remains of colonial-era Aborigines*, INDEPENDENT (London), May 25, 2009, <http://www.independent.co.uk/news/world/australasia/britain-to-hand-back-remains-of-colonialera-aborigines-652245.html>.

<sup>21</sup> These museums are: The Royal Armouries, the British Museum, the Imperial War Museum, the Museum of London, the National Maritime Museum, the National Museums and Galleries on Merseyside, the Natural History Museum, the Science Museum, and the Victoria and Albert Museum.

Act.<sup>22</sup> Previously, these national museums were not able to dispose of objects “vested in them and comprised in their collections, except where they [were] duplicates or ... unfit to be retained, and [could] be disposed of without detriment to the interests of students.”<sup>23</sup> The government has noted that it is not aware of other institutions being subject to a statutory bar on de-accessioning human remains, unless otherwise through individual constitutional documents. It encourages any museums that have restrictions on the ability to de-accession human remains to remove them.<sup>24</sup>

The Human Tissue Act 2004 also serves to prohibit the removal, storage, or retention of human remains for certain activities, including research and public display, without the consent of the individual from whom the tissue is taken.<sup>25</sup> However, the requirement for consent does not extend to existing holdings, imported remains, and those older than 100 years; thus the majority of the remains of indigenous peoples held in museums across the UK fall outside the purview of the Act.<sup>26</sup>

Other legislation that may affect the display of human remains of indigenous peoples in the UK is the Tribunals, Courts and Enforcement Act 2007. This Act provides a certain measure of protection from seizure by the courts for objects that are on loan from overseas in museums in the UK when certain conditions are met.<sup>27</sup>

Guidance on the de-accessioning of human remains also notes that the UK’s Human Rights Act 1998, which incorporated the European Convention on Human Rights into its national legislation, may provide some exercisable rights for individuals affected by the retention of human remains in the UK.<sup>28</sup>

#### IV. Guidance on Repatriation of Human Remains

The Department for Media, Culture and Sport has produced non-statutory guidance on the implementation of the provisions of the Human Tissue Act 2004 relating to the return of human remains. The aim of the guidance is to:

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<sup>22</sup> Human Tissue Act 2004, c. 30, § 47. Guidance has been published on this Act and is available in the Department for Culture, Media and Sport’s, *Guidance for the Care of Human Remains in Museums*, 2005, *supra* note 15.

<sup>23</sup> British Museum Act 1963, c. 24, § 5.

<sup>24</sup> *Guidance for the Care of Human Remains in Museums*, 2005, *supra* note 15.

<sup>25</sup> Human Tissue Act 2004, c. 30.

<sup>26</sup> *Id.* § 14; Department for Culture, Media and Sport, Cultural Property, *Legislation – Cultural Property Advice*, 2006.

<sup>27</sup> Tribunals, Courts and Enforcement Act 2007, c. 15, Part 6, available at [http://www.opsi.gov.uk/acts/acts2007/ukpga\\_20070015\\_en\\_13#pt6](http://www.opsi.gov.uk/acts/acts2007/ukpga_20070015_en_13#pt6).

<sup>28</sup> Detailed analysis of the potential application of the Human Rights Act 1998 with regards to human remains is provided in: Department for Media, Culture and Sports, *The Report of the Working Group on Human Remains*, 2007, App. 3, available at [http://www.culture.gov.uk/images/publications/Appendix\\_3\\_human.pdf](http://www.culture.gov.uk/images/publications/Appendix_3_human.pdf).

[ensure] that the future treatment of indigenous remains in museums balances the need to respect the culture and wishes of indigenous communities with the need for scientific research, and that decisions in response to requests for return are made equitably and transparently.<sup>29</sup>

When making decisions regarding the de-accession of human remains, museums are required to take into account ethical principles provided for in the guidance. These principles are:

- Non-maleficence – *doing no harm...*;
- Respect for diversity of belief – *respect for diverse religious, spiritual and cultural beliefs and attitudes to remains; tolerance...*;
- Respect for the value of science – *respect for the scientific value of human remains and for the benefits that scientific inquiry may produce for humanity...*;
- Solidarity – *furthering humanity through co-operation and consensus in relation to human remains...*;
- Beneficence – *doing good, providing benefits to individuals, communities or the public in general...*<sup>30</sup>

Pursuant to the guidance, museums determine whether to repatriate human remains on a case-by-case basis, considering who the requestors are, as well as:

the cultural and religious values of the interested individuals or communities and the strength of their relationship to the remains in question; cultural, spiritual and religious significance of the remains; [the age of the remains,] [the status of the remains within the museum,] the scientific, educational and historical importance of the material, [and how the remains were originally removed and acquired]. Also to be taken into account are the quality of treatment of the remains, both now and in the past in their current location and their care if returned [the policy of the country of origin with regards to the human remains as well as any precedents].<sup>31</sup>

The guidance notes that the majority of claims for the repatriation of remains will be for those between one hundred and three hundred years old, which “corresponds most closely to the period when expansion took place by European powers with its subsequent effect on Indigenous peoples.”<sup>32</sup> The guidance further notes that:

archaeological and historical study has shown that it is very difficult to demonstrate clear genealogical, cultural or ethnic continuity far into the past, although there are exceptions to this. For these reasons it is considered that claims are unlikely to be successful for any remains over 300 years old, and are unlikely to be considered for remains over 500 years old, except where a very close and continuous geographical, religious, spiritual and cultural link can be demonstrated.<sup>33</sup>

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<sup>29</sup> *Guidance for the Care of Human Remains in Museums*, 2005, *supra* note 15.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 23 & Part 3.

<sup>32</sup> *Id.* at 27.

<sup>33</sup> *Id.*

## V. Implementation

The vast majority of claims for the repatriation of human remains originate “from North America, Australasia and the Pacific, despite the fact that many remains in English collections are from other regions [such as Egypt].”<sup>34</sup> While the Human Tissue Act 2004 provided certain institutions with the power to allow the return of human remains, it did not establish a central body charged with decision making and the return of human remains, and the ultimate decision rests with the institution holding the remains. As noted above, the Department for Media, Culture and Sport has produced guidance on the care and return of human remains but this guidance remains non-statutory.

The lack of a central body responsible for administering the return of human remains has resulted in there being no formal figures in the UK on how many human remains have been returned. In January 2009, the Department for Media, Culture and Sport responded to a freedom of information request about aboriginal remains in the UK. The response did not provide up-to-date figures, and pointed to the information in the Report of the Working Group on Human Remains, published in 2003, and the figures which are noted in this report, above.<sup>35</sup>

While the ultimate decision as to whether to return human remains rests with the institution holding them, there is diplomatic pressure exerted on these institutions to return remains, as well as conflicting pressure from the scientific community for them to retain certain remains for their scientific and anthropological value and concerns that the remains will be destroyed upon their return. The Natural History Museum, which has one of the largest collections of human remains in the UK, established an independent Human Remains Advisory Panel in 2006 to assess the merits of each request and report to the Museum’s Board of Trustees.<sup>36</sup> In one instance, acting on recommendations from this panel, the Museum agreed to return the human remains from “17 Tasmanian Aboriginal people to an appropriate custodian nominated by the Australian Government, following a short period of data collection.”<sup>37</sup> The data collection period was, due to the “uniqueness of the information contained in the

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<sup>34</sup> Working Group on Human Remains in Museum Collections, *The Report of the Working Group on Human Remains*, [http://www.culture.gov.uk/images/publications/wghr\\_reportfeb07.pdf](http://www.culture.gov.uk/images/publications/wghr_reportfeb07.pdf) (last visited July 20, 2009).

<sup>35</sup> Department for Culture, Media and Sport, *Freedom of information requests: archive 2009: Human Remains - Case 110667*, 2009, [http://www.culture.gov.uk/reference\\_library/foi\\_requests/5893.aspx](http://www.culture.gov.uk/reference_library/foi_requests/5893.aspx).

<sup>36</sup> Press Release, Natural History Museum, Natural History Museum offers an alternative dispute resolution to the Tasmanian Aboriginal Centre (TAC) (2007), available at [http://www.nhm.ac.uk/about-us/press-office/press-releases/2007/press\\_release\\_10853.html](http://www.nhm.ac.uk/about-us/press-office/press-releases/2007/press_release_10853.html). The panel is comprised of:

members ... appointed by the Natural History Museum’s Board of Trustees. The panel was designed to have six members and two ex-officio members (a Trustee and a member of Museum staff) .... The remit of the panel is to provide independent advice to the Trustees on claims for return of human remains to countries of origin. It also considers issues, as raised by the Museum’s Director or Director of Science, relating to the Museum’s activities in this area, which includes research, conservation and documentation. Account has been taken of Department for Culture Media and Sport guidance in developing this advisory structure. The decision on the advice to Trustees must be agreed by at least four independent panel members. The Trustee and staff member do not have decision-making powers as members of the panel.

<sup>37</sup> *Id.*

remains,”<sup>38</sup> an attempt to balance “the interests of the community group and those of science, [by undertaking] certain specified data collection processes to collect information which might be preserved for future research.”<sup>39</sup> The Tasmanian Aboriginal Council (TAC) did not agree to the decision and, in the first case brought against a decision by a museum to return human remains since the implementation of section 47 of the Human Tissue Act 2004, went to the High Court to seek judicial review of the Museum’s decision, obtaining an injunction against the Natural History Museum to prevent it from conducting tests on the remains. The claim was ultimately resolved through mediation, where it was “agreed that the remains would return to Tasmania, with some of the material to be preserved under the joint control of both the TAC and the museum pending further discussions over the feasibility of data collection and testing on them.”<sup>40</sup>

Overall, the guidance provided by the government on the return of human remains and the actions of the Natural History Museum show that the decision whether or not to return human remains is a fine balancing act that is influenced by the cultural beliefs of the indigenous communities, the benefits that the remains can bring to science, and diplomatic pressures.

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<sup>38</sup> Press Release, Farrer & Co., Farrer & Co advises the Natural History Museum in the settlement of Aboriginal Remains claim (May 25, 2007), available at <http://www.farrer.co.uk/Default.aspx?sID=736&cID=33&ctID=43>.

<sup>39</sup> *Id.*

<sup>40</sup> *Natural History Museum hands over Aboriginal remains*, CULTURE 24, Apr. 6, 2007, <http://www.culture24.org.uk/places+to+go/south+west/bristol/art47128>.