

CONSULTATION ON DRAFT BASELINE STUDY

FEEDBACK FROM THE ARTS LAW CENTRE OF AUSTRALIA

31 August 2011

Thank you for taking the time to provide feedback on the consultation draft Baseline Study on human rights in Australia. **Submissions are due by 31 August 2011.** We look forward to hearing from you soon.

For sections of the Baseline Study that you would like to provide feedback on, please consider:

Introduction:

- What other information (if any) would you include in the introduction?

The omission of any reference to the government's position on enacting comprehensive human rights legislation gives an incomplete picture of the "status of human rights in Australia". Australia's response to the Universal Periodic Review states unequivocally that Australia does not intend to introduce a Human Rights Act.

That policy position should be stated in the Introduction so that it is clear that the human rights issues to be addressed by the National Action Plan "**NAP**" and the actions and strategies adopted to deal with them will need to be based on individual targeted reforms and proposals on an issue by issue basis.

Chapter 1: Protection and promotion of human rights in Australia

- What other information (if any) would you include in summarising the key institutional and legal protections and arrangements for promoting human rights in Australia?

We repeat our comments above. Any discussion of the key institutional and legal arrangements to address human rights in Australia and implement Australia's international obligations under the core treaties necessarily involves consideration of the existence or absence of a comprehensive human rights charter (as evidenced by the fact that the National Human Rights Consultation Report "**NHRCR**" - identified to in the introduction to the Baseline Study "**BS**" as a foundation resource document and referred to throughout the BS - devoted several chapters to this issue). That Australia does not have a charter and sees no reason to adopt one is fundamental to understanding the existing structure dealing with human rights in Australia.

In section 1.5.1, the current status of the Human Rights (Parliamentary Scrutiny) Bill should be provided, together with an explanation as to the procedure proposed in the draft bill to deal with draft legislation that is not found compatible with the core human rights treaties. The Bill is currently identified on the Government's parliamentary information website as the subject of a January 2011 report of the Senate Legal and Constitutional Affairs Legislation Committee which recommended numerous amendments. There does not appear to have been any progress since then. The BS needs to do more than simply recount the introduction of a bill in June 2011. It needs

to clearly state the government's ongoing commitment to the enactment of legislation in those terms.

The summary of "Positive Steps Australia is Taking" refers to Australia's announcement of support for the Declaration on the Rights of Indigenous Peoples "DRIP". An announcement of 'support' without an accompanying commitment to enshrine those rights in domestic law is ineffectual.

The BS should address how such support will be translated into tangible recognition of such rights under Australian law to the extent that such rights are not already recognized.

A commitment to examine ways to ensure that the rights of Indigenous peoples as set out in DRIP are reflected in Australia's laws and practices should be included in the section "Issues that a National Action Plan could Address".

Chapter 2: Human rights concerns of the general community

- Are there additional concerns that could be included in this section? (Please specify)

Chapter 2 identifies four issues which are described as "some" of the key issues identified in the National Consultation. Those issues are access to justice, counter-terrorism measures, use of force by police and human trafficking. The summary then focuses on "Positive steps Australia is taking" and "Issues that a National Action Plan" could address as if these are the only human rights concerns of the general community deserving of inclusion in the NAP. There is no discussion to justify why these four concerns (which we agree are important) have been selected at the expense of the multitude of other issues addressed in the NHRCP.

Although these issues are introduced as merely "some" of the issues, the effect is to restrict the focus of the BS to those issues alone and to suggest implicitly that they are the only ones that a NAP should address and that all other issues canvassed in the NHRCP are considered less important. If the BS is recommending or concluding that these four issues are the human rights issues of primary concern to the Australian community, this should be unambiguously stated and the rationale for this explained. If not then it should be made clear that the BS is not suggesting that a NAP focus principally on these four issues and the Summary (both the "Positive steps ..." and "Issues ..." sections) should reflect that.

In our view however, as demonstrated by the NHRCP, there is widespread public concern and community support for reform to address numerous other human rights concerns as well.

Arts Law recommends that the following human rights concerns be included:

- Freedom of speech and freedom of expression - the NHRCP specifically recommended this right be given express legislative protection and noted that considerable attention in submissions and community roundtables was given to the right to freedom of thought, conscience and religion. This right encourages public comment and debate and therefore accountability of those in positions of power. Australian courts have recognised only limited freedom of political expression. There is, however, no recognition or promotion of a general right to freedom of expression in Australia, in particular beyond the political arena. As a result, there are no restrictions on policies or laws which hinder 'free speech' or expression.
- Protection of Indigenous Cultural and Intellectual Property (ICIP) – the NHRCP observed that the issues facing Indigenous Australians were one of the most frequently raised subjects

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throughout the entire consultation evidencing that the human rights of Indigenous Australians are a matter of general community concern rather than a concern of one particular interest group. Arts Law's particular interest is the lack of protection for Australia's unique Indigenous cultural heritage – something which is valued not just by Indigenous Australians but all Australians and the importance of which was recognised by the Federal government when reversing the position of the previous Liberal government to express support for the DRIP.

- What additional statistical data or research findings could be included to better paint the human rights picture? (Please provide references)

We will focus only on the two human rights issues identified in our response above.

A. Freedom of expression

In Australia there is an expectation that, as a nation, we will uphold basic human rights principles including the right to freedom of expression set out in Article 19 of the Universal Declaration of Human Rights (UDHR), and in the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory. The NHRCP recommended that these international instruments be supported by domestic legislation. Australia is also a party to the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* which recognizes the value of cultural goods, services and activities as carriers of meaning and identity and their integral role in sustainable cultural and economic development.

Although the right to freedom of expression is not so absolute that laws cannot be made in relation to defamation, racial vilification as well as laws to protect national security, public order, health and morals, any such restriction must only be to the extent "necessary" in a democratic society. It is imperative to the cultural identity of the nation and the democratic nature of the Australian political system that questions and comments about this system are not unduly restricted. This is essential for the existence and effectiveness of other associated human rights.

Australia's existing framework focuses on restrictions to freedom of expression without any underlying guarantee of that right. The High Court has found only a limited right of freedom of expression is implied in the text of the Constitution in relation to public and political affairs: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579. This right is directed at ensuring that people are free to discover and debate matters which enable them to exercise a free and informed choice as voters. The digital age and technological developments over the last 10 years have resulted in exponential growth in opportunities for communication and expression and placed increasing pressure on the existing systems of classification and censorship to adapt to deal with such new platforms. This increasing patchwork focus on setting limits has ignored the corresponding need to reiterate and confirm the fundamental human right of freedom of expression.

The Australian arts industries have participated enthusiastically in the new opportunities made available through technology and innovation and continue to develop new ways for artists to connect with each other and their audiences. According to the Australia Council report, *More than Bums on Seats: Australian Participation in the Arts*, a third of all people surveyed used the internet to research, view, or create artistic works and performances and 16% of all users had "creatively

participated" in the production of such material.¹ The internet has dissolved the barriers between creator and viewer and is providing new mechanisms for interaction. There has never been a more important time to commit to freedom of expression.

The importance of the economic and social contribution of the arts to the Australian economy is set out in the recently released National Cultural Policy Discussion Paper – the creative industries workforce accounts for over 5% of the Australian workforce and in 2008-2009, the creative industries were valued at over \$31 billion in terms of industry gross product.

Freedom of artistic expression is critical to nurturing and developing the full economic and social potential of Australia's creative industries. This includes the right to create or perform art which expresses a particular opinion or belief about an issue. In recognition of the importance of art in comment and criticism of society and politics, such a right would encourage and foster artistic creativity and productivity and contribute to a vital and creative culture. The right to use art as a means of expressing an opinion or belief is vital in articulating public or social debate, and developing a culture reflecting and documenting the society in which we live.

B. Protection of Indigenous Cultural and Intellectual Property (ICIP)

The United Nations Committee on Economic, Social and Cultural Rights' Concluding Observations on Australia's Implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recommended that Australia strengthen its efforts to guarantee Australia's Indigenous peoples' rights under articles 1 and 15 to enjoy "their identity and culture, including through the preservation of their traditional languages; ... and develop a special intellectual property regime that protects the collective rights of indigenous peoples, including protection of their scientific products, traditional knowledge and medicine." The Committee also recommended that a registry of intellectual property rights of Indigenous peoples be opened and that Australia ensure that the profits derived thereof benefit Indigenous peoples directly.

A National Indigenous Cultural Authority as envisioned in Terri Janke's *Beyond Guarding Ground*² provides a useful starting point for a government strategy on Indigenous cultural heritage.

Arts Law supports the establishment of a comprehensive legal framework designed to recognise and protect Indigenous cultural heritage (sometimes referred to as Indigenous Cultural and Intellectual Property or ICIP). Such an objective requires reform on a holistic level. There is currently no general legal right of community cultural heritage which would support a right to a royalty, no legal obligation to respect traditional knowledge which could be the basis for mandatory standards of third party conduct using or affecting such knowledge and no legal right of ownership of Indigenous cultural heritage capable of enforcement by the Australian legal system (except to the limited extent of native title and existing legislation concerning areas and objects). These are all matters to be addressed by legislation implementing Australia's obligations under Article 31 of DRIP to "take effective measures to recognise and protect the exercise of ... rights" to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.

¹ *More than Bums on Seats: Australian Participation in the Arts*, Australia Council for the Arts, 2011, http://www.australiacouncil.gov.au/__data/assets/pdf_file/0004/71257/Full_report_More_than_bums_on_seats_Australian_participation_in_the_arts2.pdf

² Janke, T, *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, Terri Janke and Co, 2009

- What major existing government initiatives are missing that should be included?

We will focus only on the two human rights issues identified in our response above.

A. Freedom of expression

- The National Classification Review which will consider the existing classification laws, the rapid pace of technological change, the effect of media on children and the desirability of a strong content and distribution industry.
- The Convergence Review examining the regulatory and policy frameworks applicable to the converged media and communications landscape.
- The Creative Industries Strategy for 21st Century Australia released in August 2011 "**CISTCA**" which acknowledges that creative expression is essential to a vibrant and rich Australian culture and that creative businesses and talent need freedom to innovate and exploit ideas and commercial opportunities, without any undue interference or unnecessary regulation.

B. Protection of Indigenous Cultural and Intellectual Property (ICIP)

- Australia's support of the articulation of the rights expressed in TRIP
- Australia's Response to the United Nations Committee on Economic, Social and Cultural Rights' Concluding Observations on Australia's Implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The current review of Australia's Indigenous Heritage Laws
- The Indigenous Heritage Program which provides funding for projects that identify, conserve and promote Indigenous heritage.
- The release of the National Cultural Policy Discussion Paper "**NCPDP**" in which Australia's vision is described as being to "protect and support Indigenous languages and culture."

Chapter 3: The human rights experience of specific groups in Australia

- Are there additional specific groups that could be included in this section? (Please specify)

While our view is that the interests of artists as a group in the right to freedom of expression should be considered as a general community concern, Australia's very significant artistic community should also be identified in this Chapter as a group with specific human rights concerns. The NCPDP and CISTCA each emphasize the economic and social importance of Australia's creative industries and the substantial contribution made in terms of employment and gross national product. The NCPDP and the CISTCA also reiterate the importance of ensuring that creative expression is essential to a vibrant and rich Australian culture and that Australia's creative businesses and talent need freedom to innovate and exploit ideas and commercial opportunities, without any undue interference or unnecessary regulation. Essential to building capacity and sustainability within this sector and encouraging innovation and a vibrant national culture is freedom of artistic expression. We repeat our comments on this issue as set out in section 2 above.

- What additional statistical data or research findings could be included to better paint the human rights picture for a specific group? (Please provide references)

A. Artists and the creative industries

We repeat our comments in section 2 above.

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A further example of how restrictions on freedom of expression can work to the particular detriment of artistic communities absent a clear articulation and guarantee of the fundamental right to such a freedom is the proposed mandatory internet filtering system. Arts Law understands there are a number of issues with that system (as it is currently proposed) including that it:

- may block legitimate content;³
- is likely to slow internet speed;⁴
- will be mandatory (at the lower filter tier, anyway); and
- will be based on a list of websites which is inaccessible to the public (and therefore incapable of debate or appeal as to whether those sites should in fact be on the list).

If the filtering system is implemented as proposed, the risks are that those artists disseminating their work online are subject to rules which are not transparent. This could lead to two undesirable outcomes for the arts; namely limited use of the internet to disseminate art where for some online distribution is the only means; and self censorship of art which is disproportionate and unnecessary to the stated objective of child protection.

The voluntary filtering scheme which has been implemented by internet service providers (ISPs) Telstra and Optus whereby illegal content, specifically child pornography, is automatically blocked is not detrimental in principle. Under the voluntary scheme, ISPs focus on a blacklist provided by international criminal police organisation Interpol. It is understood that for a site to be added to this blacklist, law enforcement agencies from at least two separate jurisdictions must validate the entry as illegal and not just objectionable. Anyone who seeks to access a site on the list is directed to an Interpol page explaining why the site has been blocked, and if the user believes the site has been blocked unfairly, the user can complain to the Australian Federal Police or Interpol to seek a review. Such a specific, restricted list, with clear lines for appeal, is supported by the Internet Industry Association of Australia, and would not impact artists or freedom of expression.

In comparison, a broader mandatory list to filter offensive or content refused classification has the strong potential to restrict the flow of content which is not illegal. Such plans would infringe on basic personal autonomy and freedom of expression, and are out of step with Australia's peers internationally. For example, neither the United States nor Canada requires ISPs to engage in evaluations regarding the legality of content.

Classification and censorship laws should reflect the overarching principle that people should be able to read, see and hear what that want. In many western democracies materials which are restricted (subject to a 'restricted' classification – "RC") in Australia are readily available. In addition, currently in most jurisdictions in Australia, it is not illegal to possess RC material (unless illegal pursuant to criminal laws) or view it on the internet. Current proposals to prohibit this content appear to want to return to a pre-internet era which is unlikely to be acceptable in Australia today.

This highlights a crucial gap in the evaluation and treatment of artistic merit in Australia relative to the international community. In the United States for example, "serious" artistic works are

³ In addition to the broad range of content that will be intentionally blocked under the scheme, trials show that an ISP level filter will accidentally block huge numbers of legitimate sites. At best, it will accidentally block one in 50 sites; at worst, one in 12 sites.

⁴ Australian Communications and Media Authority, Closed Environment Testing of ISP-Level Internet Content Filtering (June, 2008) 45.

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protected from blanket prohibition based on the freedom of expression guaranteed by the First Amendment. In the United Kingdom, works would only be refused classification if they were to corrupt and deprave those likely to come in contact with the work, effectively exempting art exhibited in galleries and art house theatres. Additionally, artistic merit is a defence against legal action taken to ban the material as well as against criminal obscenity charges. In contrast, in Australia where artistic merit is not a defence to criminal pornography charges in some jurisdictions, it is conceivable that a photograph (and others like it) such as the Pulitzer Prize winning photo 'Huynh Cong' by Nick Ut featuring a naked Vietnamese girl running from a Napalm attack on her village in Trang Bang could possibly be deemed to be child pornography because the subject was a victim of torture. Given the global cultural climate and that in most jurisdictions in Australia it is not illegal to possess or view privately much RC material (unless illegal pursuant to criminal laws), proposals to prohibit this content appear to be detached from the realities of the internet era.

Since 2008 the arts industry has been disproportionately targeted in relation to censorship and classification issues primarily due to the high profile controversy generated over the work of one artist, Bill Henson. Despite the fact that both the Classification Board and the prosecuting authorities determined that his work was fairly mild in terms of the content (the Classification Board rated the images PG, and no charges were ever laid by prosecutors), there have been ongoing calls for the classification of artworks and the removal of allowances for the artistic merit of creative work. It is clear that this has had a chilling effect on the arts with some artists choosing to avoid controversial themes, particularly if they involve children. To some extent this has been exacerbated by the creation of additional bureaucratic layers, such as the protocols for working with children implemented by the Australia Council for the Arts.

Given the number of inquiries devoted to censorship and media attention afforded to these issues, it is fair to conclude that freedom of artistic expression is currently under threat, especially in view of the calls to expand the range of materials that should be banned, restricted or classified in Australia. In this context Arts Law reiterates that not only do the creative arts provide an important means of expressing a wide variety of opinions and beliefs vital to the articulation of public or social debate, but the arts also assist Australians to develop a culture which reflects and documents the society in which we live. Guaranteeing the right of artistic expression (subject to reasonable limits) - rather than the existing approach setting limits without any underlying acknowledgement that they should first be measured against a basic right to freedom of expression - will assist the arts to flourish in Australia and encourage creativity and innovation.

B. Aboriginal and Torres Strait Islander peoples

We repeat our comments in section 2 above concerning the human right of Indigenous peoples to the protection and preservation of their cultural and intellectual property.

A striking example of the failure of existing laws to provide the protection promised in Article 31 of TRIP is the recent controversy concerning the commission and display of a sculpture and artwork with an accompanying book and website by non-Indigenous artists depicting sacred Indigenous images of the Wanjina spirits. The Worrora, Wunumbal and Ngarinyin Aboriginal people of the remote Kimberley region in Australia have been painting Wanjina images for many thousands of years, at sacred rock sites and in caves, on dance totems and bark, and now on canvas and paper. The Wanjina is their supreme creator, the maker of the earth and all upon it. They are recognized

as the only Aboriginal nations entitled to depict the Wanjina. This right is respected by all other Aboriginal language groups. Copyright law which protects contemporary individual creative expression is unhelpful. It treats artwork by an artist who died more than 70 years ago as residing in the public domain and freely available for reproduction. The unknown artists responsible for the ancient and extraordinary rock art of the Kimberleys are long gone. The images in issue are not infringing copies of particular artworks by known artists. Rather they are instantly recognizable depictions (albeit distorted and lacking the elegance and power of genuine Kimberley Wanjina) of the sacred spiritual imagery of a community within which the artist and those who commissioned him have no authority. This is an unauthorized misappropriation of an Indigenous community's traditional culture and knowledge or ICIP.

In February 2011, the Land and Environment Court upheld the Blue Mountains City Council's decision to refuse development approval for the sculpture on the grounds that it had an adverse social impact⁵. The result is that the sculpture must be moved – not destroyed or removed altogether from public view – but moved from its current location. This case highlights the gaps in the current level of legal protection of Indigenous culture and heritage in Australia. It is disturbing given Australia's stance on, and commitment to, TRIP that the Kimberley Indigenous peoples are forced to rely on planning laws for a very limited remedy against the misappropriation and misuse of their culture. It is distressing that while the sculpture must be moved, no direct remedy could be found to deal with similar cultural misappropriation and misuse as evidenced by the book, the website and the other artworks.

- Are there any additional human rights issues that could be added which affect the specific groups identified in this section?

As stated above, the issue of the protection of Indigenous cultural heritage and intellectual property should be added to the issues affecting Aboriginal and Torres Straits Islander peoples.

- What major government initiatives are missing that should be included?

We repeat our responses as set out in section 2 above under the heading "What major government initiatives are missing that should be included"?

Issues that a National Action Plan could address:

- What further actions or desired outcomes would you include to protect or promote human rights?

Arts Law would include the enactment of a Human Rights Act as an essential measure for the effective protection of human rights in Australia. However, given the Federal government's stated position that any NAP will not include such a measure; we would include the following:

- A vibrant and innovative culture where political and artistic creativity and innovation is stimulated and encouraged by protecting and guaranteeing freedom of expression as a fundamental human right;

⁵ Tenodi v Blue Mountains City Council [2011] NSWLEC 1183 (21 June 2011)

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- The preservation and protection of Australia's unique Indigenous cultural heritage by prohibiting the unauthorized misuse and misappropriation of ICIP and establishing a system whereby the commercial benefits and management of ICIP generates economic opportunities for Australia's Indigenous peoples.
- What specific measures would you suggest to address these issues?

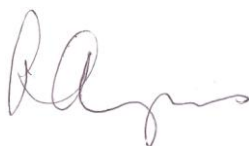
A national classification and censorship system which starts by articulating the fundamental right to freedom of expression as set out in Article 19 of the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights (ICCPR) and allows only such limits to be imposed as are necessary and reasonable to protect Australians against defamation, racial vilification, misappropriation of ICIP and to protect national security, public order, health and morals.

Sui generis legislation to protect ICIP rather than ad hoc and piecemeal amendments to existing intellectual property laws for the following reasons:

- ICIP covers a broader range of creative and intellectual and cultural concepts than under the existing copyright, designs and patent laws. It should be dealt with in one piece of legislation and any attempt to deal with it solely in the context of, say, copyright will be artificial and incomplete.
- ICIP is fundamentally different from traditional legal constructs of intellectual property in that it is a communal not individual right albeit with individual custodians
- ICIP is an intergenerational right which does not lend itself to traditional approaches involving set periods of time
- ICIP evolves and develops over time unlike traditional Intellectual property rights which focus on fixing a point in time at which the property which is protected is defined.
- ICIP is not concerned with individual originality which is the basis for all existing intellectual property rights whether copyright, design or patents.
- ICIP stands beside existing intellectual property rights – it is not an extension of them.

Do you have any other comments or suggestions for improving this baseline study?

Arts Law would welcome the opportunity to participate in any working groups or discussion groups to examine the BS and build a NAP.



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