

14 January 2011

Dale Webster
Project Manager
Department of Justice
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By Email: dale.webster@justice.tas.gov.au

Dear Project Manager,

Submission on the proposed Tasmanian Human Rights Charter

The Arts Law Centre of Australia (**Arts Law**) is pleased to provide its submission in relation to the Directions Paper (**Paper**) on a Charter for Human Rights in Tasmania (**Tasmanian Charter**) and commends the Tasmanian Government's commitment to engage with the broader community, including the arts, in this consultation. Our submission is informed through being unique in the service we provide, straddling the worlds of both art and law and representing a large group of Australian artists, including Tasmanian artists. We base our submission on the objective of both increasing the rights afforded to artists and promoting their ability to access those rights.

Executive Summary

We note that the Paper assumes support for a Tasmanian Charter and seeks input on the model to be adopted. Arts Law endorses the Paper's support for a Tasmanian Charter and we agree with the statement that the charter 'should be enacted as an ordinary Act of Parliament of Tasmania' (8.1.1). Tasmania should act on the recommendations of the United Nations Human Rights Committee to implement legislation dealing specifically with protection of human rights.¹ A Tasmanian Charter would act as an important signifier of the Tasmanian government's commitment to upholding the human rights standards endorsed by the international community (and Australia as signatory to many international treaties). Tasmania has an opportunity to be among the States leading the way on the human rights agenda. We believe that the implementation of a Tasmanian Charter would also help build momentum and support for a National Charter of Rights.

While we are generally in support of human rights for all, our focus in this submission is on those rights relevant to artists. Arts Law broadly supports the model proposed in the Paper, but believes that certain details pertaining to the listed rights should be expanded and we also make some suggestions as to the way a Tasmanian Charter should function in practice.

About the Arts Law Centre of Australia

Arts Law was established in 1983 and is the only national community legal centre for the arts. It provides expert legal advice, publications, education and advocacy services each year to more than 6000 Australian artists and arts organisations operating across the arts and entertainment industries.

About our clients

Our clients not only reside in metropolitan centres, but also contact us from regional, rural and remote parts of Australia, and from all Australian states and territories. Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them.

The comments that we make in this submission are informed by our clients' profile, which is that they are usually:

- earning low/limited incomes;

¹ UN Human Rights Committee, Concluding Observations, Australia, 3/4/2009, CCPR/C/AUS/CO/5 at [8]

- both Indigenous and non Indigenous, and rural, remote or urban
- limited in their ability to enforce their rights (and as a result increasingly vulnerable to the abuse of those rights);
- dedicated to the creation of art across all disciplines;
- either new, emerging artists or established arts practitioners or arts organisations;
- operating arts businesses;
- working in both traditional and digital media;
- self-reliant in business;
- eager for accessible legal information, although they typically have limited legal education.

About our Indigenous clients

Arts Law through the Artists in the Black (AITB) service has provided targeted legal services to Indigenous artists and their organisations and communities for the last seven years throughout remote, regional and urban Australia, and across all art forms. Much of that advice has focused on ways of securing effective protection of Indigenous cultural heritage as expressed through Indigenous art, music and performance.

1. WHICH RIGHTS?

1.1 Rights for everyone

Arts Law supports the protection of all rights enshrined in all of the international agreements to which Australia is a signatory, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Declaration on the Rights of Indigenous People (DRIP) and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CPPDCE). We note that the rights listed in the proposed model do not include all of the rights enshrined in these international agreements. However, for the purpose of this submission, we will largely confine ourselves to discussion of the specific rights affecting artists.

1.2 Rights for artists

We support the enactment of legislation for the protection of human rights in Tasmania with specific reference to:

- right to freedom of expression generally and artistic expression specifically;
- cultural rights that refer to the right to take part in cultural life and to benefit from the protection of the moral and material interests resulting from any literary or artistic production, including the right to protection of Indigenous Cultural and Intellectual Property (**ICIP**);
- rights of access to legal system, information and assistance for artists, including those who are Indigenous, live remotely, are disabled, or are Culturally and Linguistically Diverse (**CALD**).

1.2.1 Freedom of expression generally

We note that this right is listed in the Paper as one that should be included in any Charter on Human Rights and Arts Law supports the inclusion of this fundamental right in the Tasmanian Charter. This right has been recognised in many foreign jurisdictions because it encourages public comment and debate and therefore accountability of those in positions of power. In Australia, the courts have only recognised a limited right to freedom of expression, primarily parliamentary privilege.² There is, however, no recognition or promotion of a general right to freedom of expression in Australia. As a result, there are no restrictions on policies or laws which hinder 'free speech' or expression.

It is imperative to the democratic nature of any political system that questions and comments about this system are not unduly restricted. We see this right as imperative to the existence and effectiveness of other associated rights.

Freedom of artistic expression

We consider it vital that the right to freedom of expression, be clearly stated to encompass freedom of expression for artists. 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, the existence of such a right encourages and fosters artists in the political and social arena. 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. Any articulation of the right should also be coupled with a complementary right stating that the artist is entitled to receive protection of their moral and material interests resulting from their creative pursuits (this is elaborated upon further under the heading cultural rights).

² *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1

We note that p.41 of the Paper suggests that the right to freedom of expression be described in any final charter to include:

(b) every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Tasmania and whether orally; in writing; in print; by way of art; or in another medium chosen by the person.

We agree that the right to artistic expression should be expressly articulated in the final charter as an essential aspect of the right to freedom of expression and we agree with the current level of detail in the proposed model (as set out directly above).

1.2.2 Cultural rights

The right to take part in cultural life and for ‘authors’ to receive protection of their moral and material interests

Arts Law supports the Paper’s decision to give specific protection in the proposed charter to cultural rights both to ‘peoples with a particular cultural, religious, racial or linguistic background’ and to ‘Aboriginal people’.

We also support the express inclusion of the right of Aboriginal people not to be ‘denied the rightto enjoy their identity and culture, and to maintain and use their language’. We note that the wording of this provision is in similar terms to the first part of section 19 of the *Charter of Human Rights and Responsibilities Act (Victoria)*. However, the proposed Tasmanian model does not include subsections 19(2)(c) and (d) which provides that Aboriginal people have a right to maintain ‘their kinship ties’ and ‘their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection with under traditional laws and customs’. These rights should also be listed in the Tasmanian Charter. We also suggest that the Tasmanian Charter should adopt the approach taken by the Victorian Charter by including a preamble that acknowledges that 'human rights have a special importance for the Aboriginal people... as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters'³.

We discuss the cultural rights for Indigenous people in more detail below.

³ Preamble to the Charter of Human Rights and Responsibilities Act (Victoria)

The Rights of Indigenous People and Indigenous Cultural and Intellectual Property (ICIP)

As discussed above, Arts Law supports the protection of all rights enshrined in DRIP, ICESCR and CPPDCE. Article 15 of ICESCR, articles 11, 13 and 31 of DRIP and articles 2, 7 and 8 of CPPDCE set out some of Australia's international obligations concerning Indigenous artists and measures that government should take to protect traditional knowledge and cultural expression.

Among other things, article 31 of DRIP obliges member States to 'take effective measures to recognize 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 cultures, sciences, technologies and cultures ...'
- 'maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions'.

Articles 7 and 8 of the CPPDCE also mention the measures that parties should take to promote and protect cultural expressions.

Article 15 of the ICESCR sets out a cultural right that extends to include the right to receive the 'protection of the *moral and material interests* resulting from any literary or artistic production' and obliges State parties to take steps to ensure the 'full realization of this right' including steps 'necessary for the conservation, the development and the diffusion of science and culture'.

Australia is a member of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Intergovernmental Committee). The Intergovernmental Committee is charged with the responsibility of 'reaching agreement on a text of an international legal instrument ... which will ensure the effective protection of Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions'⁴ and have produced *Draft Articles on the Protection of Traditional Cultural Expressions/Expressions of Folklore* (Draft Instrument). The WIPO General Assembly will convene a Diplomatic Conference for the purpose of implementing an international instrument along the lines of the Draft

⁴ WIPO General Assembly Thirty-Eight (19th Ordinary) Session September 22 to October 1, 2009, Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Agenda Item 28.

Instrument this year. The Draft Instrument draws on many years of consultation with WIPO Member States, Indigenous peoples and other interested parties. We recommend that this Draft Instrument be given consideration in the drafting of any final model of the Tasmanian Charter.

The cultural rights as currently framed in the Paper appear to focus on the right of both individuals and communities to 'enjoy', 'practice' and 'use' but do not address the fundamental question of the degree to which legal protection will be afforded against misuse or appropriation by third parties. Arguably, implicit in the right to 'enjoy' culture is a right to protection against its abuse by others. However, absent express articulation of such a right, any charter is likely to be construed as not extending that far. To that extent, the Paper clearly falls short of offering the types of protections envisaged by the international covenants and international working documents discussed above. Further, by failing to elaborate as to the scope of what is contemplated by 'culture', the Paper does not guarantee assistance or obvious basis for the protection of Indigenous Cultural and Intellectual Property (ICIP).

ICIP refers to all of the interests that Indigenous people have (and want to control) to protect their arts and culture. Many of these interests are currently not legally recognised, and therefore not legally enforceable as rights. The following is a non-exhaustive list of the interests comprised in ICIP:

- **Right to ensure that traditional laws and customary obligations are respected**, particularly when money is made from ICIP. For example, when a T-shirt is manufactured with a print of a traditional motif on it, the design should be one that is allowed by the Indigenous custodians to be used for this purpose;
- **Right of Indigenous people to be paid for the use of their ICIP**, particularly if it has been used without their permission. For example, if someone copies artwork comprising ICIP and sells it, remedies should be available (for example, they should be paid) for the illegal use of that ICIP (in addition to any remedies to which the artist would currently be entitled under the *Copyright Act 1968*);
- **Right to full and proper attribution or naming of the community connected with the work;**
- **Right to protect traditional knowledge and sacred cultural material;**
- **Right to prevent insulting, offensive and misleading uses of ICIP in all media.** For example, an artwork containing traditional knowledge is printed on underwear;

- **Right to control the recording of cultural customs and expressions, and language which may be essential to cultural identity, knowledge, skill and teaching about Indigenous culture** For example, by being able to place conditions on an anthropologist who wants to make a book about an Indigenous language; and
- **Right not to have traditional cultural expressions used without prior authorisation of the community.** For more detail about how such a right might be expressed and enforced and how authorisations might be granted see Article 4 of *WIPOs Draft Provisions for the Protection of Traditional Cultural Expressions/ Expressions of Folklore* and the associated commentary.

There is currently no protection under Australian law for any communal ICIP right and only limited protection of individual ICIP rights. This includes, firstly, works that are protected by Australian copyright law. The Australian *Copyright Act 1968* (**Copyright Act**) protects the individual's material expression of an idea for instance, in a painting, or a story or music that is written down or taped. Secondly, the Copyright Act protects a group of rights of the individual known as moral rights. These include the right to attribution, the right against false attribution and the right of integrity of authorship i.e. the right not to have the work subjected to derogatory treatment. Thirdly, designs registration under the *Designs Act 2003* can protect the appearance of an object which is new and distinctive.

Australian law does *not* protect other aspects of ICIP, including:

- the underlying idea or information that is put into a work eg the story told in a painting;
- a style or method of art eg cross hatching or dots;
- some performances such as dance and music if they have not been recorded at all; and
- in general, a community's rights in its traditional cultural knowledge including stories, images and languages.

Many of the interests encompassed in ICIP are not compatible with current legislation because of the very distinct differences in the way art is created, treated and passed down by Indigenous Australians. For example, an oral history of story telling through art means that generations of an Indigenous family group will paint a story which belongs to them. The Copyright Act protects work which is 'original' (i.e. the original creation of the creator of the work). This means that the Copyright Act

would not protect the interests of the second or third generation of those repainting the work created to pass on the story or, indeed, any story handed down orally.

A number of protocols and policies have been introduced by government and government agencies, which recognise the failure in the current legislative framework in protecting ICIP and attempt to remedy it. An obvious example which demonstrates the Tasmanian government's own express recognition of the failure of existing legal regimes adequately to protect Indigenous culture in Tasmania is 'Respecting Cultures', which is Arts Tasmania's own publication intended to promote "greater awareness of the protocols needed to ensure that Aboriginal artists are acknowledged and their intellectual property and culture is respected and protected". It can be downloaded at

http://www.arts.tas.gov.au/about_us/our_publications/respecting_cultures. Another recent example is the 'Indigenous Australian Art Commercial Code of Conduct' (**Code**) which contains rules aimed at addressing some of the gaps between the current legislation and that which would be required to adequately protect the interests of Indigenous artists. The Code deals with '*Respect for Indigenous Practices and artists' rights*', including the treatment of sacred works.⁵

Unfortunately, like the protocols in 'Respecting Cultures', the Code is not mandatory. This means that while it contributes overall to an improved 'best practice' standard, those most likely to offend its objectives are unlikely to be bound by its terms, making it ineffective in relation to the most egregious abuse. Only legislation can deliver that level of protection.

Arts Law supports the recommendation of the United Nations Committee on Economic, Social and Cultural Rights (Committee) expressed in the Concluding Observations on Australia's Implementation of the International Covenant on Economic, Social and Cultural Rights identified in paragraph 33. That recommendation was in the following terms:

The Committee recommends that the State party (a) strengthen its efforts to guarantee the indigenous people's rights under articles 1 and 15 to enjoy their identity and culture, including through the preservation of their traditional languages; ... and (e) 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 recommends that a registry of

⁵ 'Indigenous Australian Art Commercial Code of Conduct', Sec 15, Australia Council

intellectual property rights of indigenous peoples be opened and that the State party ensure that the profits derived thereof benefit them directly.

The protection and maintenance of ICIP is based on the principle of self-determination. The proposed model includes the right to self-determination and we endorse the inclusion of this right in the Tasmanian Charter.

Arts Law is an advocate for a legal framework that specifically acknowledges ICIP rights. Whilst this may be seen as a predominantly Federal issue, a Tasmanian Charter setting out some of the fundamental rights that form a basis for ICIP rights (for example, those rights set out in article 15 of ICESCR and articles 11, 13 and 31 of DRIP) would be a significant acknowledgement and step toward such a framework. This could also help promote Indigenous artists to pursue economic, social and cultural goals through art and bolster the right to self-determination and the corresponding right to maintain their distinctive identity and culture. Such a step by the Tasmanian government would also provide further impetus for remedying existing gaps in the level of federal protection of ICIP.

1.2.3 Rights of access to legal system, information and assistance for artists

The Paper lists as the right to a fair hearing " the right to the support needed to effectively understand and participate in legal processes either as a claimant, respondent/defendant or as a witness". In our view, this appears to target primarily the protection of the individual engaged in the criminal legal process and should be expanded to cover access to such support in respect of all the rights enshrined in the charter. This is critical not only to artists but all those whom the charter seeks to protect. Without the ability to acquire legal assistance and information where necessary, including in relation to the above mentioned rights, the expression of those rights in the charter is a hollow promise. Arts Law supports the inclusion of rights that facilitate access to justice and to legal information and assistance for those with disability, for Indigenous artists, including those in remote Australia, and for CALD clients. We discuss below how such lack of access affects artists in particular, including those who are Indigenous, physically or intellectually disabled or culturally and linguistically diverse.

Indigenous artists

Many of the Indigenous clients Arts Law assists live in regional or remote communities. It is in these outreach services that we recognise the difficulties in accessing legal advice and assistance for artists living outside major cities. For

many artists, our visit may be the first opportunity they have had to ask questions about how the law protects their art and what to do if someone copies it.

Intellectually or physically disabled artists

Accessing justice or information and advice requires both having the mental and physical capacity to do so. For artists suffering mental health issues, there is limited support. For example, there is a lack of readily available, easy to understand information for artists who suffer mental illness or disability.

Further, there are numerous heritage listed buildings, housing, arts organisations and activities where access is limited for artists who are physically disabled. For example, many heritage listed buildings where art is created are not required to construct access ramps or lifts, and as a result artists and others who might ordinarily participate are unable to as a result of their disability.

We note that the Paper seeks comment on whether the 'Additional Rights' listed in table 4 should be incorporated into the proposed model. These rights include disability rights and we support their inclusion in any final model for the Tasmanian Charter.

CALD artists

Artists who do not speak English as a first language often require additional support in their practice, for example assistance with funding applications for a grant or legal advice services. Although interpretive services exist, these are limited and may not be available for certain purposes. Much information is only available in English because of limited resources.

Without increasing the access of those who are socially disadvantaged to the law and justice, a Tasmanian Charter may be of little effect. Arts Law supports the investment of government into education and support programs which specifically target Indigenous, disabled or CALD clients in making the scheme effective. We would support a Tasmanian Charter which would require that Government act on the rights of those with physical or mental disability (not just artists) to increase access, for example, by recognising and funding support agencies which assist artists with disabilities in advocating their needs to access, and looking at physical access and to those buildings hosting artistic activities.

Who should the rights apply to?

Arts Law ideally supports a charter which imposes responsibility on all individuals, entities and government and non- government institutions in Tasmania to respect the rights enshrined within it. We recognise there are a number of rights which are currently enforceable as between individuals, including the *Racial Discrimination Act 1975* (Cth). However, at a minimum, the Tasmanian Charter should bind government, public entities/institutions (eg government departments), government agencies and those entities performing public functions. We therefore answer 'yes' to consultation points 15, 16 and 17 in the Paper but encourage a more rigorous approach to be taken.

We also support the obligation of those agencies responsible for complying with the Tasmanian Charter to guard against human rights infringements as against individuals for example, educating agencies and individuals working with Indigenous artists about their human rights and investigating reports of abuses of such rights.

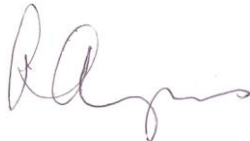
Conclusion

Rights for artists are vital if we are to maintain the cultural growth of Australia. A Tasmanian Charter which gives artists rights will recognise the cultural and financial contribution non-Indigenous and Indigenous artists make to our society and is essential if we are to foster the cultural and creative energies which facilitate sustainable artistic practice and contribute to a society which values and respects the diversity of its culture and the arts in general. The importance of art in Indigenous society and its relevance in maintaining traditions and heritage of Indigenous communities and groups should receive appropriate recognition in a Tasmanian Charter.

Further information

Please contact Robyn Ayres if you would like us to expand on any aspect of this submission, verbally or in writing. We can be contacted at artslaw@artslaw.com.au or on (02) 9356 2566.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Robyn Ayres', written in a cursive style.

Robyn Ayres
Executive Director
Arts Law Centre of Australia