

15 June 2009

The National Human Rights Consultation Secretariat  
Attorney-General's Department  
Robert Garran Offices  
BARTON ACT 2600

By Email: [humanrightsconsultation@ag.gov.au](mailto:humanrightsconsultation@ag.gov.au)

Dear Secretariat,

**Submission to the National Consultation on Human Rights**

The Arts Law Centre of Australia (**Arts Law**) is pleased to provide its submission to the National Consultation on Human Rights (**Consultation**) and commends the Federal 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. 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

Arts Law supports a Charter of Human Rights for Australia. While we are generally in support of human rights for all, our focus is on those rights relevant to artists. We support the enactment of legislation, preferably constitutional, for the protection of human rights in Australia with specific reference to:

- right to freedom of expression generally and artistic expression specifically (1.2.1)
- right to protection of Indigenous Cultural and Intellectual Property (**ICIP**) (ref 1.2.2); and
- 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**) (ref 1.2.3)

Arts Law wants a change in the rights 'culture' in Australia. This means improving the way Australia deals with human rights, including those listed above. We propose a multi tiered approach, and recognise that while legislation is not a panacea, it would be reflective of our specific intention as a society to maintain and protect human rights for all. The multi tiered approach we propose includes:

- Possibly constitutional, but at least statutory rules which mandate the protection of human rights in Australia (for example a Charter of Human Rights (**Charter**));
- education about human rights and how to access assistance if those rights are infringed (for example information sessions, fact sheets, websites);
- increased access to legal services, i.e. information and advice (for example, government support for extension of current legal services available through funding and policy as below )
- policies and necessary funding to support human rights (for example creating government and council policies on the arts and the rights of artists and providing funding to foster those organisations supporting artists, creation of mandatory codes for those dealing with vulnerable artists).

We support a Charter which mandates that government, government agencies and those funded by the government to perform government roles:

- consider human rights in making decisions and laws; and
- issue a statement declaring whether that decision or law is compatible with human rights, and if not, why government has chosen to make that decision or enact that law; and

- are accountable for failures to comply with the Charter and are legally answerable (i.e. can be sued) for that failure.

We submit that the first step in changing our rights 'culture' and clarifying those duties of government in respect to such rights, is the introduction of specific legislation enshrining human rights protection.

### **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;
- 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.

## **1. Which human rights (and corresponding responsibilities) should be protected and promoted?**

### **1.1 Rights for everyone**

Arts Law supports the protection of all rights enshrined in both the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. While Australia is a signatory to both Covenants, we recognise that the rights affecting Australians in their capacity as artists fall primarily within the ambit of the ICCPR, and thus would support a model enshrining at a minimum, those rights in the ICCPR as well as any rights listed below which might fall outside the ambit of the ICCPR, for example, the right to self determination comprised in Article 1 of the ICESCR, and the associated right for Indigenous artists to protect their ICIP.

### **1.2 Rights for artists**

#### **1.2.1 Freedom of expression generally**

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. Australian courts have recognised only a 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. Australia has recently seen a number of restrictions on this right, which highlight the dangers of failing to protect free expression. Examples of these limitations follow below at 2.

It is imperative to the democratic nature of the Australian 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.

#### **Right to freedom of artistic expression**

In addition to the need for a general right to freedom of expression, a specific right to freedom of expression should be available to artists. This right 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 artists in this agenda. 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.

## **1.2.2 Protection of Indigenous Cultural and Intellectual Property (ICIP) and Indigenous Artists**

### **What is 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.

Australian law currently protects only some ICIP. This includes, firstly, works that are protected by Australian copyright law. The Australian *Copyright Act 1968* (**Copyright Act**) protects the material expression of an idea for instance, in a painting, a song that is written down or taped or a written story. Secondly, the Copyright Act protects a group of rights 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 an artwork

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 to be used for this purpose;
- **Right to be paid for use of your ICIP**, particularly if it has been used without your permission. For example, if someone copies artwork comprising ICIP fabric 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; and
- **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.

The protection and maintenance of ICIP is based on the principle of self-determination. Self-determination is a principle reflected in the first Article of the ICESCR, to which Australia is a signatory. This right specifically refers to the rights of all people to “pursue their economic, social and cultural goals”<sup>1</sup>. In creating a legal framework which maintains and promotes the ability for Indigenous artists to pursue such goals through art, Australia would empower Indigenous artists with legally enforceable rights to their cultural heritage and traditional knowledge, thereby fostering the principle of self-determination.

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

Arts Law supports the ability of artists to acquire legal assistance and information where necessary, including in relation to the above rights. Enshrining this right in legislation alone will not achieve access to information and assistance. The creation of a Parliamentary statement in the form of legislation recognising the necessity for increased access is a vital first step. Arts Law would support a right which facilitates 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

Rights of any type are of little use if those afforded such rights are not able to understand or enforce them, so education and support is key in improving the status of these human rights.

## **2. Are these human rights currently sufficiently protected and promoted?**

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<sup>1</sup> ICESCR, Article 1.1

We recognise that there are currently a number of protections which maintain certain human rights in Australia including constitutional, statutory and common law rights. Those protections fall short of enshrining our international obligations in a single domestic statute purporting to protect and maintain human rights in Australia. In our experience, the absence of a comprehensive legislative model dealing specifically with the maintenance and protection of human rights leads to a number of gaps, as outlined above at 1.2 and negatively affects Australian artists in their artistic practice. Examples follow below.

## **2.1 Right to freedom of expression generally and artistic expression specifically**

While the courts have recognised limited freedoms, primarily parliamentary privilege in Australia, there is no enshrined or implied right to free speech.<sup>2</sup> Further, there are a number of existing and proposed limitations on freedom of expression and the freedom to comment and question the society and politics.

### **Proposed mandatory internet filtering system**

A recent example of Governments' limitation on any interest in freedom of expression 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;<sup>3</sup>
- is likely to slow internet speed;<sup>4</sup>
- 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:

1. Limited use of the internet to disseminate art where for some online distribution is the only means; and

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<sup>2</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1

<sup>3</sup> 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.

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

2. Self censorship of art disproportionate and unnecessary to the stated objective of child protection.

### **Removal of 'genuine artistic purpose' defence**

A further example of Government limiting those rights afforded artists is the intended scrapping of the 'genuine artistic purpose' defence in the *Crimes Act 1900* (NSW) (**Crimes Act**) in s 91H(4). The 2008 Bill Henson controversy saw heated debate about child pornography and art, following which the Government accepted a recommendation from former Supreme Court Judge James Wood, that the 'genuine artistic purpose'<sup>5</sup> defence currently available to artists who might be charged with producing, disseminating or possessing child pornography in the Crimes Act be scrapped.<sup>6</sup> That recommendation is currently included in draft legislation for the amendment of the Crimes Act.<sup>7</sup> This proposed change to the legislation is not mirrored in the defences available for those acting for a genuine 'scientific, legal or medical' purpose. An example of how this might limit artistic freedom of expression is a photograph (and others like it) such as the Pulitzer Prize winning photo, entitled Huynh Cong by Nick Ut. The world renowned image features a naked Vietnamese girl running from a Napalm attack on her village in Trang Bang. In the event the 'genuine artistic purpose' defence is removed, this image would possibly be deemed to be child pornography because the subject was a victim of torture and therefore meets the definition in section 91 H (1) (c). If the defence were removed from that section there would be no defence available for someone who produced or possessed such a photograph.

### **2.2 Right to protection of Indigenous Cultural and Intellectual Property (ICIP)**

While some protection is afforded by the Copyright Act and the Designs Act (as discussed at 1.2.3), there is inadequate legal protection for ICIP in Australia. Many of these interests 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

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<sup>5</sup> *Crimes Act 1900* (NSW), s 91H(4)

<sup>6</sup> This recommendation was in the NSW Sentencing Council report entitled 'Penalties Relating to Sexual Assault Offences in New South Wales', August 2008

<sup>7</sup> Crimes Amendment (Sexual Offences) Bill 2008 (NSW)



interests of the second or third generation of those repainting the work created to pass on the story.

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. For example, the draft 'Indigenous Australian Art Commercial Code of Conduct' (**Code**) 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.<sup>8</sup> Sadly, the Code is not mandatory. This means that those likely to offend its objectives are unlikely to be bound by its terms, making it ineffective.

Highlighted by the issues above, there is no overarching legislation supporting the ideal of self-determination for Indigenous Australians.

### **2.3 Rights of access to the legal system, information and assistance for artists, and to the arts generally**

Arts Law recognises a number of gaps in the protection and promotion of access to the arts, and to legal assistance. Artists affected include those who are Indigenous, physically or intellectually disabled or culturally and linguistically diverse (CALD).

#### **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, for example.

#### **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.

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<sup>8</sup> 'Indigenous Australian Art Commercial Code of Conduct', Sec 15, Australia Council

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.

### **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.

### **3. How could Australia better protect and promote human rights?**

Australia needs to create a human rights 'culture'. This means mandating and maintaining human rights as a nation. Laws that principally promote and maintain human rights would protect and promote this culture but unless resources are invested in the promotion of knowledge about those rights.

#### **3.1 Legislation**

Arts Law supports introduction of Charter preferably in the constitution. If not constitutionally entrenched, the next best option is a Charter. Australia should act on the recommendations of the United Nations Human Rights Committee that we implement legislation dealing specifically with protection of human rights.<sup>9</sup>

#### **What the Charter should achieve**

Arts Law would support a Charter which:

- Mandates parliamentary consideration of human rights when making laws affecting rights to freedom of expression, freedom of artistic expression, access etc – need to balance an existing human right of [freedom of expression] with other rights such as racial, religious discrimination and rights protecting society from violence;
- Forces government to recognise these rights in the development of policies affecting those rights;

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<sup>9</sup> UN Human Rights Committee, Concluding Observations, Australia, 3/4/2009, CCPR/C/AUS/CO/5 at [8]

- Forces those services affecting artists to consider above how their policies affect artists with respect to their human rights; and
- Provides remedies where human rights are breached.

### **3.2 How would a Charter change things for artists?**

#### **3.2.1 Right to freedom of expression generally, and artistic expression specifically**

Recent heated debate about the mandatory filtering system (discussed at 2.1) indicates that Australians are very eager to protect their interest in freedom of expression on the internet. A Charter mandating this right would require that government considers the right to freedom of expression in the planning and implementation of any system regulating online content access, and more specifically considers the effect that implementing such a regime would have on artists and their ability to disseminate, and therefore generate income from, their work. Rights of artistic expression (if implemented as described above) would require that before the removal of the 'genuine artistic purpose' defence from the Crimes Act 1900 (NSW), Government assess whether the removal of this defence is compatible with artists' rights to expression, and indeed whether the removal of the defence achieves the objective of more effectively protecting children from becoming the victims of child pornography, in light of artistic examples like the one given at 2.1.

#### **3.2.2 Right to protection of ICIP**

By implementing a Charter recognising the rights to self-determination and ICIP, the Australian Government would indicate their commitment to respect for and maintenance of, a living history of unique art and culture. Arts Law would support a Charter which forced government to consider the effects of its policy and decision making on ICIP and make clear statements about where and why such decisions are inconsistent with the general principles set out in the Charter. This transparency of and accountability for the effects of Government decision making on Indigenous artists would surely improve the culture of human rights for Indigenous artists. A Charter would also act as an impetus for remedying gaps in the protection of ICIP, through, for example, the introduction of *sui generis* legislation.

#### **Sui Generis Legislation for the protection of ICIP**

Regardless of the Charters introduction, Arts Law is a proponent of *sui generis* legislation for the protection of ICIP. The objective of such legislation would be the

express, mandatory protection of ICIP dealing with communal rights, traditional knowledge and cultural heritage.

### **3.2.3 Rights of access to legal system, information and assistance for artists, including those who are Indigenous, live remotely, are disabled, or CALD**

Without increasing the access of those who are socially disadvantaged to the law and justice, a 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 Charter which would require that Government act on the rights of those with physical or mental disability 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, for example.

### **3.3 Education**

Education about rights and what they mean to the individual and community is essential if legislation mandating those rights is to be effective. If artists and indeed the broader community understand the rights they have and how to implement those rights, any legislation becomes more effective in promoting and protecting human rights and a human rights culture. Education of all those responsible for complying with the Charter is essential.

### **3.4 Who should the rights apply to?**

Arts Law ideally supports the imposition of human rights and responsibilities on all Australians. However, we recognise that the practical difficulty in enforcing such rights as between individuals may hinder the effectiveness of the Charter. We recognise there are a number of rights which are currently enforceable as between individuals, including the *Racial Discrimination Act 1975* (Cth). Arts Law would support the imposition of the Charter on government, public entities/institutions (eg government departments), government agencies and those entities performing public functions at a minimum.

We also support the obligation of those agencies responsible for complying with the 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 Charter which gives artists rights will recognise the cultural and financial contribution Indigenous and non-Indigenous artists make to our society and is essential if we are to foster the rights which facilitate sustainable artistic practice and a society which values and respects the arts in general. It is essential that importance of art in Indigenous society and its relevance in maintaining traditions and heritage of Indigenous communities and groups is recognised in such a Charter.

## **Further information**

Please contact Robyn Ayres or Suzanne Derry 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](mailto:artslaw@artslaw.com.au) or on (02) 9356 2566.

Yours faithfully



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