

29 January 2010

The Director
Criminal Law Review Division
NSW Department of Justice and Attorney General,
GPO Box 6, Sydney NSW 2001

Dear Director,

Submission on the Report of the Child Pornography Working Party

The Arts Law Centre of Australia (**Arts Law**) is pleased to provide its submission to the Criminal Law Review Division (**you**) and commends the State Government's commitment to engage with the arts community in relation to the proposed removal of the artistic purpose defence. Our submission is informed through being unique in the service we provide, bridging the worlds of both art and law and representing a large group of Australian artists and arts organisations. Arts Law bases its submission on the objective of ensuring the rights of artists and arts organisations are protected, while supporting the clearly justifiable objective of child protection in Australia.

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 4000 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. Many of our clients create works of art with children, whether as subjects or co-creators.

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; and
- eager to comply with laws which apply to them and their work.

Executive Summary

Arts Law thanks the New South Wales Attorney General for its consultative approach, to the implementation of the removal of the artistic purpose defence from the *Crimes Act 1900* (NSW) (**NSW Act**) and a more streamlined approach between State and Commonwealth jurisdictions.

Arts Law supports the objective of drafting legislative changes which consider upfront whether works of art are child pornography. The challenge is to ensure that the removal of the defence is balanced with a well administered scheme which accurately classifies legitimate artwork and creates a clear separation between art (which might incorporate children and nudity), and child pornography. The crux of our submission is:

1. Arts Law supports the adoption of the Commonwealth provisions including the definitions set out in section 473.1 of the Code on the proviso any new section used for assessing the offensiveness of material defines 'artistic merit' in a practical way. The 'artistic merit' requirement must be broader than a test which, based on the common use of the words 'artistic merit', rests on the established reputation of the artist in question when determining whether material is 'offensive'. The NSW Act should also identify where journalists are protected when reporting the news (for example, when photographing children who may have been subject to torture), and whether material which is 'imaginary' rather than based on a real child is to be treated in the same way by a court.
2. Any new provisions dealing with the defences available to an individual charged with 'child abuse material offence' in the NSW Act should include classification of the work by the Classification Board as a complete defence.
3. Law enforcement authorities responsible for administering the new scheme should be provided with education in relation to the making of an assessment as to whether the work is 'offensive' and should be able to call on the assistance of art experts in making this assessment.
4. Artists should be informed about the changes, so that they properly understand what these changes mean to them and can understand the potentially positive result that these changes might affect. This will reduce the likelihood of a chilling effect on the art world due to increased self censorship due to the risk artists perceive their rights are narrowed with the removal of the defence but do not understand the way that the new definitions in the *NSW Crimes Act 1900* might assist them.

1. Defining Child Pornography in accordance with the Commonwealth legislation.

a. Artistic ‘merit’ vs. ‘purpose’

Arts Law supports the move to better capture whether works are classified as ‘child pornography’ at the outset. We are concerned that the current criteria upon which the ‘offensiveness’ of the work is judged in section 473.4 of the *Commonwealth Criminal Code Act 1995 (Code)* is too narrow if the words ‘artistic merit’ are given their common usage meaning. If ‘merit’ means ‘reputation’, the definition is of no use to artists who are emerging or completely unknown. These artists, if required to do so, will be incapable of proving the ‘merit’ of their work, and the definition is likely to fail them. This is because the current construction of the words ‘artistic merit’ will, likely, follow the common meaning of the words and will fail to accurately address the question of whether the work *itself* is child pornography because an assessment of the merit of the work inevitably leads to an assessment of the merit or reputation of its creator. Arts Law appreciates the inadequacy of the ‘artistic purpose’ defence to identify works of legitimate art from those of child pornography.

b. Determinative factors - whether the work is ‘offensive’

Artistic merit

Arts Law's first preference would be that the legislation itself clarifies what factors are taken into account when assessing whether a work possesses artistic merit. In the event that this is unacceptable to you, we therefore support the creation of a set of guidelines for the Department of Public Prosecutions about the meaning of the words ‘artistic merit’ in this particular instance, so that these words are not merely representative of reputation. Factors which could be considered when assessing a work's ‘artistic merit’ include:

- i. Whether the work is regarded by an art expert as having ‘artistic’ value, regardless of the reputation of the individual seeking to rely on the ‘artistic merit’ of the work,

- ii. Whether the work is part of a broader collection or body of artworks and the nature of that collection;
- iii. Whether the individual seeking to rely on the 'artistic merit' of the work has exhibited this/these works previously and the context of their exhibition;
- iv. Whether the individual seeking to rely on the 'artistic merit' of the work has studied art, whether formally or informally;
- v. Whether the individual seeking to rely on the 'artist merit' of the work is considered by an expert witness to be accepted as part of the broader arts community; or
- vi. Whether in all the circumstances the creation of the work was born of a legitimate artistic purpose.

Actual or imagined subjects

Arts Law is concerned that the current Commonwealth definition of child abuse material and child pornography will treat those individuals who have created material using real children in the same way as those who have created the images by drawing, painting or sculpting a child (without the involvement of any real child). We are aware that the current legislation treats these images in the same way as those based on real children in the interests of:

- i. protecting against a child abuse culture in which such material whether real or artistically/technologically created is freely disseminated, or produced; and
- ii. maintaining a singular test for the production and dissemination of such material, rather than considering whether a real child was subject to harm or not.

However, to illustrate how this might detrimentally affect artists, Arts Law has prepared an example: An artist, x, is a child rights advocate. This artist paints a work which depicts a child in a sexual pose in a shopping centre, to highlight concerns about the sexualisation of children in marketing products, including clothing.

We ask that you consider including guidelines on making the assessment of whether a work is 'offensive' which deal with whether a work is based on a real child is actually harmed in the production of the material.

c. Journalistic material

In addition to the need to clarify what is intended by the phrase 'artistic merit', it would be useful if the definition more clearly identified legitimate journalistic material (including photographs, literary descriptions etc) as exempt from being child abuse material. The current definitions in section 473.1 of the Code do not make it clear whether journalists would be exempt due to their coverage of material which might otherwise be categorised as child abuse material under sec 473.1 of the Code. To rectify this lack of clarity, Clause 473.4 should read:

The matters to be taken into account in deciding for the purposes of this Part whether reasonable persons would regard particular material, or a particular use of a carriage service, as being, in all the circumstances, offensive, include:

(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and

*(b) the literary (**including journalistic**), artistic or educational merit (if any) of the material; and*

(c) the general character of the material (including whether it is of a medical, legal or scientific character).

d. Defining Child pornography as a form of Child abuse material

Arts Law agrees that having two completely separate definitions is a false distinction and support the streamlining of this part of the Code.

2. A defence of classification of the work by the Classification Board

Arts Law supports the retention of 91H(4)(2)(b) and 91H(4)(2)(e) from *the Crimes Act 1900* (NSW) dealing with the classification of the works, in the new section reflecting those defences currently available in section 474.21 of the Code. This would allow those artists who have had their work classified either before or after the commission of the alleged offence to rely on classification as a complete defence. The retention of this defence in the New South Wales legislation would create a safeguard for those artists whose art work may have not been properly assessed at the time that charges were laid. If indeed the work is child

pornography, it will be refused classification and this might be taken into account in prosecuting the defendant.

3. How the new legislation is administered

The proposed changes will only be effective in achieving the aim of protecting children from harm while retaining the rights of journalists and artists to depict valid situations involving children if administered by those who understand the objectives of the legislation and are able to perform their duties accordingly. We recognise the role of the arts community in supporting New South Wales and Federal police, as well as the DPP in making assessments of works they may be unfamiliar with and suggest that a more effective recognition of what is in fact child pornography and what is art will target the resources of these organisations at charging and convicting child sex offenders.

a. Education of the police and the DPP

Arts Law would be happy to provide feedback on materials developed by the DPP and the NSW police with respect to the how the changes are to be administered and the training are provided.

b. Ability to seek expert assistance

Arts Law supports the setting up of relationships between NSW Police, the DPP and a panel of art experts who are able to provide feedback and support to the DPP and NSW Police in assessing, for example, whether material has 'artistic merit' based on the guidelines above.

4. Education of artists about the change

Arts Law supports the creation of educational materials about what the changes of the law mean. Artists are already, in our experience, very concerned that innocuous work might be considered pornography, merely because it depicts nudity or children, or both. Artists are especially concerned where the work involves the nudity of a child. Arts Law encourages at the very least, the release of publicly accessible information about what the changes are, so that rather than viewing the removal of the defence as the narrowing of a right, the focus is on more accurate categorisation of child pornography in order to avoid legitimate art being mistakenly characterised as child pornography.

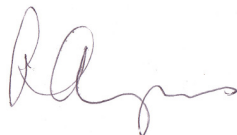
Conclusion

Arts Law believes these changes could be positive for artists as they require law enforcement agencies, the courts, and in turn the general public, to consider carefully whether a work falls within the definition of child pornography before acting on that assessment. Arts Law is keen to provide feedback on the draft changes to the legislation, the guidelines for the NSW and Commonwealth DPP on 'artistic merit' and any proposed education scheme as discussed at 2(a) or 4 above.

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. Arts Law can be contacted at artslaw@artslaw.com.au or on (02) 9356 2566.

Yours faithfully



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