

1 November 2011

Mr Paul Lynch, MP  
PO Box 3089  
Liverpool NSW 2170  
Australia

By Email: [electorateoffice.liverpool@parliament.nsw.gov.au](mailto:electorateoffice.liverpool@parliament.nsw.gov.au)

Dear Mr Lynch,

**Amendment to the *Interpretation Act 1987 (NSW)***

The Arts Law Centre of Australia (**Arts Law**) is grateful for the opportunity to provide input on the proposed amendment to the *Interpretation Act 1987 (NSW)* (**Act**). We write to express our support for the amendment in principle, and outline our response to the issues raised in the brief discussion paper, a copy of which was provided to us by Community Legal Centres NSW.

Arts Law was established in 1983 and is the national community legal centre for the arts in Australia. Arts Law provides legal advice, publications, education and advocacy services each year to over 6000 Australian artists and arts organisations operating across the arts and entertainment industries. We are particularly interested in human rights reforms which preserve artistic and creative freedom of expression and which protect the rights of Australia's Indigenous peoples to their traditional knowledge and cultural heritage. Our primary position is that enacting a Federal Bill of Rights is the appropriate mechanism to ensure protection for fundamental human rights in Australia. However, in the absence of such a charter, we recognize the value of ensuring that our courts at least look to

fundamental rights as a yardstick by which all legislation should be construed and measured.

**1. Should the rights referred to be those in the international conventions? Should some be excluded?**

Arts Law agrees that the starting position to identify 'fundamental rights' should be those rights laid out in international conventions. Arts Law supports the inclusion of those treaties listed in the discussion paper. In addition we urge the proponents of this reform to include the rights comprised in *the UN Declaration on the Rights of Indigenous Peoples*<sup>1</sup>. This declaration was endorsed by the Government in 2009 and states in Article 31 that;

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>2</sup>

There is currently no explicit protection of Indigenous Cultural and Intellectual Property (**ICIP**) in Australia, and the inclusion of declaration would be an important step toward recognition of such rights.

We applaud the inclusion of the International Covenant on Civil and Political Rights (ICCPR) in the definition of human rights. We are optimistic this will result in parliamentary consideration of the impact of proposed laws on freedom of expression, a right which we believe is imperative for all Australians, in particular artists. However we would encourage widening the definition of human rights to take into account the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions<sup>3</sup> to which Australia became party in 2009. As the UNESCO convention states in article 2;

Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed.

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<sup>1</sup> United Nations, *UN Declaration of the Rights of Indigenous Peoples, 2007* (available at: [http://www.un.org/es/soc/dev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/es/soc/dev/unpfii/documents/DRIPS_en.pdf))

<sup>2</sup> *Ibid.*

<sup>3</sup> UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, (available at: <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>)

The inclusion of this convention would further ensure critical examination of the potential impact of new legislation on freedom of expression.

**2. Should the provision make the use of such conventions mandatory or permissible in the interpretation of legislation, where such interpretation is required?**

Arts Law believes that this should be a mandatory rule of construction.

As it is however a mere rule of construction (and absent a Federal Bill of Rights), we understand the intention is not to affect those situations where the New South Wales Parliament has, for legitimate purposes, expressly and unambiguously determined to restrict certain freedoms. (However we would hope that reforms such as those proposed would lead to a more cautious approach to such legislation with clear justification being provided.) We understand that the rule would operate where more than one construction was open such that a construction favouring the least restraint on fundamental freedoms is to be preferred.

In such circumstances, the proposed rule of construction could have only nominal impact if voluntary or restricted to those legislative enactments drafted with specific Conventions in mind or if applied only to those enactments expressly drafted to require such a construction. Indeed, the latter course is already open to Parliament and does not require separate legislative reform.

In summary, we would like to see all New South Wales legislation construed sympathetically and consistently with Australia's international human rights obligations.

**3. Should there be a 'reasonable limitation' clause included?**

The inclusion of a 'reasonable limitation' clause would be useful in enabling the Courts to prefer an alternative construction in circumstances where there is a strong public interest in reasonable limits to a fundamental freedom. For example, film classification schemes can be argued to restrict freedom of expression however limits are agreed to be appropriate if the content is unsuitable for young children or is defamatory. This may involve a balancing act between competing freedoms.

Please do not hesitate to contact us if you require further information.

Yours sincerely

Robyn Ayres/Delwyn Everard

A handwritten signature in blue ink, appearing to read 'Robyn'.A handwritten signature in blue ink, appearing to read 'Delwyn'.

Executive Director/Senior Solicitor