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## **National Consultation on Human Rights Submission by The National Association for the Visual Arts (NAVA)**

**June 2009**

“Regulation and legal interference in free speech is controversial, especially in a self-stated democratic society. When art and law does collide, the result is often unsatisfactory. The nature of the adversarial system pits conflicting interests against each other: the language of boundless creativity and strict regulation could be seen as comparing apples with oranges”.

Quote from *Freedom of Expression* research paper by Jenny Lovric commissioned by the Visual Arts Industry Guidelines Research Project in 2001 and published on NAVA's website <http://www.visualarts.net.au/readingroom>

The National Association for the Visual Arts (NAVA) welcomes the opportunity to make a submission to the National Human Rights Consultation Committee.

NAVA is the peak body representing and advancing the professional interests of the Australian visual arts, craft and design sector, comprising 25,000 practitioners and about 1000 galleries and other art support organisations. Since its establishment in 1983, NAVA has worked to bring about appropriate policy and legislative change to encourage the growth and development of the visual arts sector. It sets best practice standards and works to increase professionalism within the industry. It also provides direct service to the sector and its members through offering expert advice, representation, resources and a range of other services.

We note the Human Rights Consultation Committee has sought submissions on three questions. This submission addresses only one such right - freedom of expression - because of its central importance for artists. The major part of this submission sets out numerous examples of how the freedom of expression of artists has been restricted under current Australian laws, by police, by governments and by non-government officials alike. Our constituents have had exhibitions closed and artworks withdrawn from exhibition or publication despite their genuine artistic intent and merit. Some of our constituents have been charged with criminal offences later dropped without explanation. As a result, and in answer to question two, NAVA maintains that freedom of expression is not adequately protected under current laws, at State or Federal level.

In answer to question three, NAVA supports the introduction of a legislated Charter of Human Rights in Australia, and argues for the protection of freedom of expression for all citizens and artists in particular.

## **Ensuring Artists' Freedom of Expression**

NAVA is concerned to ensure that there should be no inhibition of artists being able to exercise their democratic right to represent, discuss and critique ideas through their artwork or other forms of public or private expression. NAVA asserts that, as with all Australian citizens, artists should be free to challenge current orthodoxies as well as government policies, legislation and actions and those of other key decision makers.

However, in the absence of a statutory human rights framework in Australia, NAVA has been extremely concerned that there have been many cases of unjustified interference in artists' legitimate freedom of expression. Because artists' work is often oblique, using metaphorical imagery, quotation or allusion and satire, many meanings can be drawn from it. To some extent these are in the eye of the beholder.

For fear of possible misinterpretation of their work or abuse of power by governments or enforcement authorities, artists, galleries and art publishers are often under pressure. With the risk of adverse treatment by police or other authorities, and the seriousness of potential legal consequences, self-censorship can occur. The result can often be the stifling of freedom in the expression of opinion, censorship of some forms of inquiry or dissent and the consequent blandness of contemporary cultural production.

NAVA acknowledges that there are occasions when the right to freedom of speech and expression must be balanced against the need to protect vulnerable members of the community against violation of their rights. However NAVA believes that existing laws in a range of areas (eg vilification, discrimination, blasphemy, obscenity and defamation) offer this protection already, and indeed in some cases are in need of liberalising reform.

As an example, the federal sedition law which originally dated back to 1914 as part of the Commonwealth Crimes Act, was revised conservatively in 2005. The opportunity was not taken to update the law to reflect contemporary attitudes and circumstances. NAVA is urging the Attorney General, Robert MacLelland to fulfil the Federal Government's promise to make the changes recommended in the Australian Law Reform Commission's report "Fighting Words: a review of sedition laws in Australia", July 2006.

Artists' work can change public opinion and bring to light injustice, flawed thinking and questionable or reprehensible action. NAVA acknowledges that artists can also hold less lofty views and their opinions are not always popular or well understood. Some people may disagree with them. However, the tolerance of any member of the community's right to express their views which are then open to be judged by others is indicative of a healthy liberal democratic society.

There is a general perception in Australia that censorship happens very infrequently. However, this is not NAVA's experience. It happens all too often, and can simply be based on a complaint from a member of the public or special interest group or because of the personal views of someone in a position of decision making power. Often censorship is allowed to go ahead unchallenged because of a power differential. Cases come to NAVA's attention when artists, galleries or art magazine publishers seek advice or intervention from their professional association to assert what they believe to be their rights (see several examples below). Censorship is not only damaging to an artist's reputation, but can result in the loss of opportunity for the

public exposure and discussion of their work and a loss of income from potential sales or commissions.

NAVA and its constituency are only too aware of the way that laws have been used by repressive regimes and individuals in other countries and through history to curtail citizens' right. NAVA's knowledge and experience of the kinds of abuses that artists have been subjected to in Australia, leads us to be very concerned over the lack of appropriate legislation and review mechanisms to prevent the curtailment of the right of freedom of expression, not only for artists but for all members of the community.

## **Some Selected Censorship Examples**

### **1. Political Sensitivities & Sedition**

There are many highly respected artists who have made deeply concerned and thoughtful comments on the September 11 terrorist attacks in New York, Australia's detention of asylum seekers, the involvement of Australia in the Iraq war and other government actions with which they disagreed. These and other politically sensitive matters dealt with in art works are often threatened with censorship or actually removed.

#### 1.1 Overseas artist (wants to be anonymous)

NAVA learned of an incident in 2005 where an invited artist visiting from overseas was taking documentary video footage in public places. Twice in ten days the artist was told that her name would be sent for possible inclusion in a terrorist watch list. In the first instance, despite previously having been given authorisation to film in an airport, the artist was apprehended by a security official who took her identification details and said she would be noted as a possible security risk. Some of her video footage had to be deleted. The second time the artist was approached by the police while videoing road signs and the same threat made. The artist is very concerned now that her name will be on terrorism suspect lists, and that when travelling internationally in future, she will be treated as a suspect and may have visa and travel permits declined.

#### 1.2 Azlan McLennan and Trocadero Art Space

In January 2006 Trocadero Art Space exhibited the work of Azlan McLennan on its external billboard exhibition space. McLennan's work, *Proudly unAustralian*, was fabricated from a partially burnt Australian flag, installed directly on the billboard. The exhibition of the work was intended to coincide with Australia Day.

Unfortunately the exhibition was mounted just after the Cronulla race riots in Sydney. A couple of days after the work was installed, the Footscray Police gained access to the exhibition space, without prior notice or a search warrant and outside of gallery hours while the space was un-staffed. Climbing through the window of a neighbouring business, two officers walked along a first floor awning to where the billboard exhibition space was located and ripped down the artwork. It was taken back to the Footscray Police station as 'evidence'. On enquiry, staff from Trocadero Art Space were informed that the work had been removed due to "a number of complaints from the community" and that investigations were taking place to ascertain whether any laws had been broken and therefore whether charges would result.

A media storm erupted and the issue was picked up by local, state and national newspapers, ABC Radio National, ABC TV's 7:30 Report, and numerous web-based news and discussion sites. As a result of the public furore and the questions raised,

the then Prime Minister John Howard publicly confirmed that burning an Australian flag was not illegal. As interest slowly waned in the media, the Footscray Police maintained that they would continue their investigation and cited the possibility of action being taken because of "Offensive Public Behaviour." However some time later the artwork was returned to the artist and later still the artist and gallery were informed by letter that it had been decided that no further action would be taken against them and no charges pursued. The artwork was re-installed for the final hours of its scheduled exhibition, coinciding with a public forum on the issue.

### 1.3 Van Thanh Rudd

In 2007 artist Van Thanh Rudd undertook a performance in which he carried his painting *Portrait of an Exploding Terrorist* in various public locations around the country as part of his *The Carriers* project. The project had received a government grant. When he attempted to perform the act through Queen St Mall, Brisbane, Rudd was warned by Brisbane City Council officers to leave the area. The council officers told Rudd that he "shouldn't be showing an image like that—it may scare people". The following day he was approached by police and threatened with arrest under public nuisance laws and told that he was "obstructing public safety".

Police also said there had been a number of complaints from the public regarding the hazardous nature of carrying a painting that size in public. This threat caused Rudd to cancel the last day of the exhibition on the Brisbane part of the tour. The Courier Mail newspaper on 7<sup>th</sup> July '07 reported that the Lord Mayor had said that Rudd "did not appear to have obtained the necessary permits performance artists needed to operate in the mall".

### 1.4 Michael Agzarian

In 2005 Michael Agzarian, an artist and art school lecturer, exhibited his artwork *No More Lies* as part of the *Conduit* exhibition at the Wagga Art Gallery. The exhibition was of work by several staff in the School of Visual and Performing Arts at Charles Sturt University. The work showed digitally enhanced images of the then Prime Minister, Attorney General and Immigration Minister with their lips sewn together at a time of sensitivity around the detention of asylum seekers. A member of the public visiting the gallery lodged a complaint with the Prime Minister's Office that the work might be regarded as an act of treason. The Department for Communication, Information Technology and the Arts then rang the gallery director following up the complaint and asked whether the exhibition was funded by the federal government's "Visions" program. If taken any further this could reasonably be understood to be an implied threat. The artist was understandably concerned that his work may be censored, or worse that he could be charged with sedition. The gallery was also concerned that their funding might be in jeopardy because of adverse publicity.

### 1.5 Zanny Begg & Blacktown Council

In 2004, artist Zanny Begg was asked to remove her work from the Blacktown *Out of Gallery* project because it was deemed inappropriate in the climate of terrorism. The work *Checkpoint for Weapons of Mass Distraction* consisted of life size cutout stencils of armed American soldiers, to be installed in public places around Blacktown. The artist's aim was to satirise the US search for weapons of mass destruction in Iraq. Council staff threatened the artist with arrest during the installation process, later impounding the works and declaring the theme inappropriate.

It has been alleged the censorship was part of ongoing interference in the operation of the Blacktown Arts Centre by the then Mayor. Staff reported that state and federal funding was under threat because the mayor was imposing his personal taste on the

Arts Centre. The previous year, the same mayor cancelled an exhibition entitled *Guerilla Art* because he said one of the artworks planned for display on Blacktown's streets "discredited the council".

In the wake of the controversy, all other artists involved in the *Out of Gallery* project were asked to change or move their works out of Blacktown. The work was re-exhibited at Mori Gallery in Sydney and over 120 artists contributed a work to show their opposition to art censorship.

#### 1.6 PVI Collective

In 2002, artist group PVI Collective felt under considerable pressure to pull a performance work called *Terror[ist] training school: route 65* from the Artrage festival in Perth. As PVI collective member Kelli McCluskey explained "with only a few weeks to go until opening night, our publicity campaign was out and everything was going fine, then the Bali bombings happened". PVI opted to postpone the work which was re-exhibited some months later, with an abbreviated title and a publicity campaign.

#### 1.7 George Gittoes

In 2002, Melbourne property tycoon and architect Fender Katsalidis commissioned internationally recognised Australian war artist George Gittoes to produce a work for temporary display on the Melbourne city's Republic Tower apartment building. Just before the painting was due to be unveiled, Gittoes was told the work had been rejected because of residents' concerns. Melbourne University art historian Christopher Heathcote commented in *The Age* newspaper that this was reflective of the kind of "censorship that occurs when there is warfare in the air." In protest at this act of censorship, the church across the road exhibited the work.

#### 1.8 Karen Lindner

In 1996, art student Karen Lindner, in a collaborative project involving the Victorian College of the Arts and Transfield Obayashi construction company, created an artwork for the Melbourne City Link Tunnel project which featured text messages such as "Why do you control?" and "Why are you afraid of your vulnerability?" During the state's fourth anniversary celebrations, though there was no complaint from the construction company, the Victorian state government ordered that the work be covered up. When there was a community outcry, Premier Jeff Kennett responded by saying "if the community want, as they do, corporate sponsorship, they must decide whether to bite the hand that feeds them".

## **2. Racial/Ethnic/Cultural Sensitivities**

### 2.1 Van Thanh Rudd and Platform Artists Group

In March 2009 Van Rudd exhibited his work *Economy of Movement (A Piece of Palestine)* in the exhibition *Resisting Subversion of Subversive Resistance* at Platform gallery. The exhibition space is situated within the Degra St railway subway. The pro Palestinian artwork was the cause of a number of complaints to the City of Melbourne which funds Platform gallery.

A number of Jewish lobby groups contacted Platform with complaints about the work. The Executive Officer of B'nai B'rith went to Platform unannounced and demanded that the artwork be removed and that Platform make a formal apology. Platform staff felt threatened by his behaviour and his threats of further action.

The Communications Manager for Connex Melbourne also contacted Platform and demanded the artwork be removed, threatened that multiple law suits would be filed against the artist, organisers and council and made further threats about Platform's

lease and funding. Connex holds the contract to run the public transport system and whose parent company, Veolia, is part of a contract to build a light rail through disputed Palestinian territory. Connex said it would sue the council on the basis of an IP / trademarks breach. In a report in The Age newspaper on March 8 2009, Connex denied having made a complaint.

With the artist's permission, Platform made the decision to cover the work while they sought legal advice. The City of Melbourne then invoked their Protocol on Artworks and sent out a call for its Review Panel members to assess the situation. The Panel found there was no valid argument to prohibit the work in the public domain, while acknowledging potential concerns that might be raised by the artwork. It considered the concerns insufficient to override the freedom of expression principle articulated in the Victorian Charter of Human Rights and Responsibility. Platform undertook further legal checks and opened with the work on show on Friday 6 March 2009. The Review Panel's findings were posted and no further complaints were received.

## 2.2 Mai Long

In May 2008 artist Mai Long's *Pho Dog* installation was exhibited in Perth as part of the Casula Powerhouse touring project *I Love Pho*. The work was an installation of 12 dog sculptures painted with several nations' flags. The artist explained Pho Dog as "a character that contemplates difference and tries to understand it in the broader context of human nature and complex political histories". Due to hostile responses from the organisation Vietnamese Community in Western Australia, Long decided to shroud the entire installation with a black cloth. That artist said "The little mongrels are symbols of the need to find a bridge between different cultures. A little mongrel dog that's fluent across many different cultures and wherever it goes it can fit in and understand and just be empathetic towards whatever group it's in".

Earlier in the year, one of the dogs created an outcry among leaders of Australia's Vietnamese community. The offending dog was painted with images of flags, including the former flag of South Vietnam. Phong Nguyen, President of the Vietnamese Community In Australia said "Art should not hurt people. Art should make people feel uplifting and feel good about it, not about upsetting - not insulting people, insulting those who have died under that flag. There are millions of people who have died".

## 2.3 Treasures of Palestine at the Powerhouse Museum

Mr Ali Kazak, the head of the General Palestinian Delegation in Australia, created the exhibition *Treasures of Palestine* from works in his private collection. When the exhibition was mounted at the Canberra Museum and Gallery in 2003, director Peter Haynes rejected a request from the Israeli embassy to remove a number of the items. Later that year, when the exhibition moved to Sydney's Powerhouse Museum, some exhibits, including 44 photographs, political posters and two documentary films on the Intifada, were not displayed.

Paul Heywood-Smith of the Australian Friends of Palestine Association was quoted in The Advertiser newspaper as saying, "This exhibition confirms that in the 19th century Palestine had an advanced society with a highly-developed arts industry, cities and towns.... The exhibition also contains maps, coins and banknotes that trace the history of the Palestinians and their frustrated yearning for an independent homeland. Most controversially, it uses photographs, posters and documentary videos to portray their struggle. It is not possible to remain unmoved by these images of ugly refugee camps, houses being demolished, youths being beaten by Israeli soldiers and grieving families".

The president of the South Australia's Jewish Community Council, Norman Schueler, was quoted in the Murdoch press saying that *Treasures* contained "dishonest and tendentious material" that was "calculated to incite anti-Israeli hatred and, by extension, anti-Semitism". By contrast, on the Arab Council Australia (ACA) website, Chairperson Hassan Moussa said: "What this represents is the deliberate suppression of one community's narrative in favour of another's. This is an issue that must concern the public. In the interests of transparency and community relations, the ACA has called on the Powerhouse Museum to explain why the exhibition was cut and who influenced the decision to censor".

ABC TV's *Lateline* program revealed that some Museum staff had concerns about the way the project was being handled. In a confidential staff minute obtained by *Lateline*, staff expressed concern that "the influence of external stakeholders has taken on a much more influential role than has initially been indicated." The official reason finally given by museum management was that there was not enough room for the entire exhibition. However, the decisions regarding what was included was entirely in their hands after Kazak was obliged to sign those rights over to Powerhouse management. NSW Arts Ministry's then Director General later told a government Estimates Committee meeting that the museum's trustees "decided that they were not going to become a political football in what is a very difficult and vexed issue".

### **3. Violence & Cruelty**

#### 3.1 Azlan McLennan and the University of Melbourne's George Paton Gallery

In 2009 artist Azlan McLennan was told that the University of Melbourne's George Paton Gallery would not include for exhibition, several of the artworks he had submitted for his Masters of Fine Art examination exhibition. The gallery had agreed to exhibit his graduating show but on learning about the violent nature of one component - a video work of the real life beheading of a hostage - discussions began between the artist and gallery staff about the work in question.

In an email to the artist, staff stated their intention not to include the work on the basis that they felt the material to be displayed would have direct impact on their own psychological well-being. Very close to the opening date it was finally agreed that the work could be shown in an isolated booth with prominent warning signs.

#### 3.2 Adam Cullen and Cash Brown

In a climate of nervousness about national security, in 2005 two Sydney based artists, Adam Cullen and Cash Brown, contacted NAVA about whether federal sedition law would pose a threat to their planned performance work. They were seeking a gallery that would be willing to allow them to present a work which was offering detailed satirical information about how to make a variety of weapons including Molotov cocktails etc, to demonstrate how easy it was to find this dangerous information on the web. In the period just before revised sedition laws passed through parliament, they gained approval and showed the work at Sydney's Museum of Contemporary Art. However, with the threat of a possible conviction imposing seven years jail, they were clear that if the law had been in place, they would have exercised self censorship rather than run the risk of being misunderstood and taken too literally.

#### 3.3 Emily Bullock

In 2008, Emily Bullock was granted a solo show, which incorporated dead mynah birds, at the Tin Sheds Gallery in Sydney. One month before the show, the Sydney

Morning Herald ran a story about the artist and her work. A week before the exhibition was due to open in January 2009, the gallery contacted the artist to say that the show could not proceed because of a complaint from two members of the community and because the gallery manager was not comfortable with the work. A mediation meeting was held between the artist and the Dean of the Architecture Department at Sydney University, which manages the Tin Sheds, and it was agreed that the exhibition could go ahead. In response to a complaint from the public, the RSPCA contacted the artist but did not find her at fault, other than noting that the trapping method she used was 'old fashioned but not illegal'.

### 3.4 Mike Parr and the Sydney Biennale

Artist Mike Parr is no stranger to controversy. Much of his performance work over his long life has involved the imposition of self-inflicted pain and physical endurance tests, often with social and political references. In 2008, police were called to Cockatoo Island in Sydney in response to complaints about a video which formed part of the huge Biennale of Sydney exhibition. An old dilapidated building had been used to house documentation over many years of Mike Parr's work. The particular video work which was the subject of the complaint, had been made and shown many years before. It filmed live chickens having their heads cut off. Though the media immediately picked it up with enthusiasm, the police did not proceed any further.

## **4. Pornography, Indecency, Nudity etc**

By far the largest number of threatened and actual censorship cases occur in the area of anything to do with sexuality.

### 4.1 Bill Henson

It would be hard to imagine that anyone in Australia was not fully aware of the controversy which erupted early in 2008 over the censorship of an exhibition by internationally recognised Australian photographic artist Bill Henson, so it will be dealt with only very briefly here. The exhibition at Roslyn Oxley9 Gallery in Sydney was raided by police on the day it was to open, the works were confiscated by police and the artist and gallery were threatened with legal proceedings. On request, the police received advice from the Public Prosecutor who said that a case was highly unlikely to succeed. The work was then referred to and cleared by the Classification Board. This seemed to settle the legal question, however, debates around whether the work was indecent or child pornography raged for months, fuelled by public pronouncements by everyone from the Prime Minister downwards.

There were innumerable repercussions which included instructions from the federal Arts Minister Peter Garrett to the Australia Council for the Arts to produce mandatory protocols for artists working with children for any grant recipients: artists; exhibitors; publishers and other distributors. Some state governments seem keen to follow suit. The NSW Attorney General tried to convince his other state and territory counterparts to excise the artistic defence from the law and to tighten other laws about creating images of children and making them publicly available. In March 2009 the federal Communications Minister admitted that images by Bill Henson had been added to the communications regulator's list of prohibited websites. The list had been compiled by the Australian Communications and Media Authority. The Minister said the inclusion was a technical error and because Henson's images had been cleared by the Classification Board they shouldn't have been on the list.

The most problematic outcome seems to be the gradual disappearance of images of children, clothed or unclothed from the public realm and vastly increased levels of anxiety over nudity of whatever kind.



#### 4.2 Polixeni Papapetrou and Art Monthly magazine

In July 2008, Art Monthly magazine reproduced as its cover image, the work *Olympia as Lewis Carroll's Beatrice Hatch Before White Cliffs* (detail) 2003 by artist Polixeni Papapetrou. In the photograph the artist's daughter, Olympia at age 6, sits matter of factly naked on a painted backdrop. The photograph had previously been publicly exhibited 10 times both in Australia and overseas and included in 7 forms of publication, including a set of greeting cards made for a bank.

This quickly became a media story with journalists hounding the artist's family. The Prime Minister, Kevin Rudd, publicly said that the image was "undignified" and that he "could not stand the stuff". There were over 400 news articles and other media coverage around the world. Papapetrou has said: "I was dismayed to see how quickly the debate moved away from art censorship and the portrayal of nudity in art to personal attacks on us as a family and on my work."

The Art Monthly magazine articles had actually focused intelligently on the contemporary debate about nudity, consent and censorship. The magazine was submitted to the Classification Board and was given an Unrestricted classification with a consumer advice of M (Mature) not recommended for readers under 15 years. Directly after the furore, the federal government department Austrade cancelled its subscriptions to the magazine which it had distributed over many years to Australian embassies overseas. When NAVA asked why, it was told Austrade was making economies. In answer to the question, how many magazine subscriptions it had cancelled, Austrade said two.

#### 4.3 Concetta Petrillo

In 1995 art student Concetta Petrillo made a series of photographic works which were studies of her young sons partly draped. The photo lab responsible for processing her film notified the police. She was charged by the CIB and threatened with a 10 year jail sentence. She was taken by the police and extensively questioned, all her work and equipment was confiscated, her supply of photographic paper was destroyed when her home and studio were searched without a warrant, and eventually some artworks were never returned as they had been apparently misplaced by the police. During the raid the police also took family snaps of the children growing up. Also taken were some art books of some of the world's best photographic artists that were on loan from the university library. The library was subsequently raided and this in turn led to all books that had any images that could be deemed to be risky being placed in a closed section of the library and could no longer be taken out on loan.

Petrillo was charged with the same charge as Bill Henson but, as there was no precedent at the time, she had to go through the trauma and tribulations of a trial in order to set this precedent. She was told that the work broke the law and she had committed a criminal offence, one that is punishable by a 10 year jail term. When the works were eventually shown in court the judge that presided over the case stated that she could not understand why the case had gone so far. At the end of the trial this same judge had the Clerk of Court hold up the work for the public to see and declared that it was beautiful and should be admired. She also came to the artist's subsequent exhibition at Perth Institute of Contemporary Art.

At the end of the trial, after the artist had been found not guilty by a jury, she returned home only to find that there was a second summons waiting for her with a twelve month jail term attached to it. She was charged with possession of pornographic material though the works had just been through a trial and had been deemed not

indecent. The process started all over again with appearances in court. Eventually the case was thrown out of court as it was found that the police had no case.

#### 4.4 Nicole Boenig McGrade

In 2009 Subiaco Library requested that photographer Nicole Boenig McGrade not submit for its art competition a work called *Kids In Suburbia*. The image had been commissioned by the parents of the two children in the photograph aged 3 and 18 months, who were naked from the waist up. The Library expressed concern that the public might object and the images might contravene the Australia Council's working with children protocols, though they were not being funded by the Australia Council and therefore not bound by these protocols. Although shocked by the request the artist agreed, but the decision was later overturned after the media ran a story questioning the decision.

#### 4.5 Hazel Dooney

On the 24th April, 2007, just prior to the opening of *Art Melbourne '07*, artist Hazel Dooney was asked to take down four of five sexually explicit works in mixed media on paper that were being exhibited as part of an installation titled *Sex Tourist* which she had created, for Metro 5 Gallery of Melbourne, as part of a special segment of the overall event called *Renault New Generation Art*.

The organisers of Art Melbourne had been warned in advance that the images were sexually explicit. Close to the opening, Renault, a major event sponsor, and the Royal Exhibition Buildings expressed concern about the content of both the artworks and the overall installation being accessible to minors. They wanted the installation re-arranged so that the sexually explicit images would be invisible to those passing the cubicle. The artist refused because the work was conceived to tell a sequential story.

As the event opened, the exhibition centre's management had a white sheet draped across the entrance to the space where the work was displayed. The artist had not been told of this in advance so she scrawled 'CENSORED' across the sheet in red lipstick. Before long, the space was overflowing with viewers and over the next four days, *Sex Tourist* became, by far, the most popular exhibit at Art Melbourne.

However, Renault Australia, was unhappy that its brand had been associated with this art. The company had originally asked the artist to execute large, artistic decals to be displayed on five Renault cars outside the entrance of the show at the Royal Exhibition Buildings. These were now removed, again without the artist being informed.

The national press, led by The Age newspaper and ABC television news took the view that this was corporate censorship of fine art and gave the controversy extensive coverage over the weekend. All the works were sold within 24 hours of the opening of Art Melbourne.

Since this event, the artist had to contend with other attempts to censor exhibitions of her work. For example last year, she was invited by World Vision to submit two works to a high profile charity art auction in Sydney to help raise funds for and awareness of the organisation. Despite the fact that neither of the works was at all sexual, they were removed from the public showing and catalogue just a day before the auction itself, the artist being told this was done on the instruction of senior World Vision management.

#### 4.6 Jill McFarlane

As a figurative narrative oil painter Jill has experienced objections to the nudity in her work over the course of her career. However, the following case was particularly difficult. In March 2007 Jill was selected for a solo exhibition at a gallery in a major urban retail/village complex in Brisbane; the exhibition was to open on 31st May 2007. The exhibition was brokered by a well known Queensland arts organisation which was selecting artists to exhibit on behalf of a large multinational development and construction firm which owns the gallery and complex.

The artist completed a body of work for the exhibition but at the beginning of May was informed by the arts organisation that the site owner had taken offence over her work, based on viewing the exhibition invitation, and would not agree to exhibit any paintings containing frontal nudity. This aspect of the artist's work was evident when she made the original application for the exhibition and in the majority of the artwork produced for the exhibition.

The artist did not want to modify the exhibition and so informed the arts organisation that she had no choice but to cancel the exhibition. The arts organisation then discussed the matter with the site owner and later contacted the artist to say the exhibition could go ahead provided the invitation was changed to a different image and a written warning accompanied the exhibition. The artist reluctantly agreed and preparations for the exhibition progressed including press for the exhibition. On the 18th of May 2007 the arts organisation again contacted the artist and said that the site owner had changed their mind again and decided to cancel the exhibition.

McFarlane was professionally embarrassed by the cancellation as well as having been caused distress and anxiety. The press articles were unable to be cancelled because they had already gone to print and the artist had to inform her clients of the last minute cancellation. McFarlane says that no form of compensation was offered by the site owner.

#### 4.7 Cherry Hood

NSW artist and Archibald Prize finalist Cherry Hood, known for her haunting portraits of young boys and girls, has also been at the receiving end of censorship. She had an exhibition closed by police and her home searched by detectives after she photoshopped penises on to images of prepubescent girls to transform them into boys. "I found there was an abundance of images of girls but none of young boys and I was making a political statement about this fact," Hood said. "My show was also closed by the police. I did not seek publicity about it but it did cause me to change my practice to focus on the face rather than the nude body."

#### 4.8 Fiona Whitton and Kim Skinner

In 1999 the artists were given permission to use several empty shops to display artworks for a month long period in Newcastle. With satirical intent, Fiona Whitton and Kim Skinner invented a faux national awareness day called "Bums Out Against Racism Day", and designed a logo of cartoon style people of all ages and races 'mooning'. Literature placed in the window stated that the campaign was a call to all people to moon any racists that they encountered on the day. The window display also included a faux colouring in competition of the logo, with twenty or so 'entries' that were coloured in 'children style' by the artists. Also in the window were A3 laminated photocopies of 'celebrity bums' (photos of their friends' bottoms) that they signed with faux celebrities' signatures. Less than 48 hours after installation, the work was destroyed by the real estate agent through which they were loaned the shopfront. They were not given the opportunity to remove the work. They do not

believe the destruction was the result of community complaint but because of the estate agent's personal opinion about the work.

#### 4.9 Mike Brown

In 1965, a famous censorship case occurred which now seems hard to credit, such is the shifting sand of community values. The Sydney Vice Squad visited the newly opened Gallery A in Paddington, Sydney to close down an exhibition titled *Paintin' A-Go-Go!*. The exhibition by artist Mike Brown contained a number of four-letter words. Brown was charged with obscenity, and the adverse reaction of the magistrate Gerry Locke to the work, resulted in the 27 year old artist being sentenced to three months hard labour. The move sent a wave of anger throughout the arts community, which was outraged and fearful of censorship. The sentence was converted to a modest fine on appeal, but it has stuck in the artworld's collective memory.

### **5. Blasphemy**

#### 5.1 National Gallery of Victoria and Andre Serrano

Dr Timothy Potts, the then director of the National Gallery of Victoria earned the ire of the arts community by making the decision to close an exhibition of works by American artist, Andres Serrano, on 12 October 1997. The particular work at issue was called "*Piss Christ*" and was an image of a crucifix purportedly suspended in urine. The reasons Potts gave were that the gallery could not guarantee the security of the visitors and staff or of the works of art after staff had been injured and very serious threats made. Firstly a man tried to remove the artwork shortly after the exhibition opened. He pleaded guilty to charges of criminal damage and burglary and was given a one month suspended sentence. Shortly after, two youths attacked the artwork with a hammer, and were charged with criminal damage and burglary.

Three days earlier Justice Harper of the Supreme Court of Victoria gave the exhibition the go ahead by refusing to grant an injunction to the Catholic Church to prevent the exhibition from opening on the ground that *Piss Christ* was blasphemous. Dr George Pell, Archbishop of Melbourne, had applied for an injunction on 8 October against the gallery to prevent the exhibition of *Piss Christ* on two grounds: that publicly exhibiting the photograph would constitute the criminal offence of blasphemous libel, and would contravene section 17 (1)(b) of the Summary Offences Act 1966 (Vic). Justice Harper decided the case on the technical point that a civil court will not exercise criminal jurisdiction. Thereby, he did not need to rule on whether the law of blasphemy existed in Victoria, or on whether the exhibition of *Piss Christ* would have constituted an offence of indecency or obscenity.

#### 5.2 Sensations Exhibition

In 1999, the *Sensation* exhibition from the UK was cancelled by the National Gallery of Australia's then director, Dr Brian Kennedy. Kennedy claimed it was because of "museum ethics" regarding sponsorship, but it was widely believed that there was political intervention and the exhibition was censored because of its controversial content. In New York the exhibition had sparked deep controversies over whether one of the works was blasphemous. Artist Chris Ofili had depicted the Virgin Mary as black, and used elephant dung in the image (a reference to his traditional Nigerian cultural practices).

#### 5.3 Blake Prize for Religious Art

The Blake Prize, Australia's top prize for religious art is often embroiled in controversy. In 2008, one of its judges resigned in protest over the inclusion of a crucifixion painted by the artist Adam Cullen. The triptych showed Christ on the cross

with the inscription "Only Women Bleed", a line in a song by the rock musician Alice Cooper.

The previous year there was also contention and media hype over two entries, one which was a statue of the Virgin Mary shrouded in a burqa and a second which was a hologram of Christ morphing with Osama bin Laden. These images had angered the Catholic Archbishop of Sydney, Cardinal George Pell and the then Prime Minister, John Howard, who called them "gratuitously offensive".

## **6. Health & Safety**

### 6.1 Hannah Bertram

Artist Hannah Bertram's practice explores the use of worthless materials such as dust, ash, dirty water and grime. These are materials that normally settle as a patina over our domestic existence and are usually viewed as undesirable and removed. The artist is interested in ephemera in contrast to the usual status of art objects as collectable and saleable. Bertram's installations have been viewed by audiences in both public and domestic places and are often exposed to a variety of elements that affect the condition and duration of the work.

Recently a series of dust installations were commissioned and planned for the streets of Melbourne. After the first piece was installed raindrops splattered the work, then leaf litter blew onto it echoing the botanical patterns in the design, and finally pedestrians traipsed across it smudging the pattern and carrying away the residue of the work on the soles of their shoes. The full project was never completed as the Council refused a permit and threatened fines. It considered the work firstly to be graffiti, then an environmental hazard and lastly a potential liability.

### 6.2 Antonio Dattilo-Rubbo

In April 2009 The Sydney Morning Herald newspaper reported that staff of the Manly Council had digitally altered a reproduction of a painting by Dattilo-Rubbo, who died in 1955. The image was being prepared for uploading to a website relating to an exhibition connected with the Manly Art Gallery. The painting was *The Artist and the Model*. The alteration removed two cigarettes from the painting. It was reported that the reason for the removal may have been because of the Council's anti-smoking policies. Council staff later said that the alteration to the image had been a misunderstanding. The instruction from Council had been to remove the whole image from the website.

## **7. Internet**

The Australian Government's Plan for Cyber-Safety which will introduce a filter into Australian homes, schools and public computers to prevent access to prohibited material, is creating a new debate. Will the application of mandatory nation-wide blocking of prohibited material place unjustified restrictions on the community's right to freedom of access and freedom of expression? Whilst the protection of children is undeniably important, the case for this particular proposed form of censorship of online content has yet to be proven. This is especially the case with mandatory involvement rather than the opt-out options which have been adopted by all other Western governments who have implemented a similar scheme. In March when a blacklist appeared on Wikileaks, it made evident that despite Government's denial this was the official Australian Communications and Media Authority's blacklist. Following the leak, the Government issued a media release claiming that the leak

was “grossly irresponsible...and undermines efforts to improve cyber-safety”.<sup>1</sup> NAVA understands that the Government is now considering the inclusion of euthanasia, gambling and pornography sites in their blacklist.

Contributing to the debate is the concern around the accountability of those managing the lists. In his March media release, Senator Conroy, Minister for Broadband, Communications and the Digital Economy stated, “A final decision on the extent of the content filtering proposal will be determined after the conclusion of technical feasibility trials.” However, in the Report to Minister Conroy by the Australian Communications Media Authority (ACMA) in June 2008, it is stated that ACMA “was not asked as part of the trial, to assess the capability of ISP-level filtering technologies that filters only illegal content”. With the Government very aware of the risk the filter proposed to safe sites, NAVA is concerned about why this wasn’t incorporated into the trials.

NAVA and many others in the arts community remain unconvinced that the government will not be exercising undue intervention in what information consenting adults are able to access, and what inadvertent censoring might occur.

## **Conclusion**

Members of the public and special interest groups often use the tendency of artists (or their host galleries, publishers or funding bodies) to react in fear to any disapproval or threat, in order to achieve their objective to quell the expression of ideas that they disagree with. Sometimes the police respond conservatively in the absence of appropriate standardised protocols for how to judge the quality and intention of art. The media will often use an opportunity to create sensation without exercising judgement or responsibility. The consequence is the dumbing down of thought and the fostering of a climate of conservatism or intolerance.

Australia cannot be presumed to be free of abuse of power. History teaches us that complacency is the handmaiden of repression. Legislation cannot be predicated on governments’ assurances that they will not abuse their powers. A government may change its mind or another government may not be so benignly disposed. In Australia there have been times where people have been accused of working against the interests of the state when they were seen to have beliefs contrary to those in power either in government or in authoritative decision making positions.

Artists are often people who deliberately question certainties. At times of national confidence this is regarded as a strength, that ideas can be shown to withstand the test of rigorous interrogation. In times of rapid change or uncertainty, this ability to see the wisdom of tolerance of difference, is undermined. It is important that the citizenry retain the right to question the wisdom of the country being committed to wars or to embracing particular ideological positions. Examples of the suppression of dissent in the past include famously the Eureka Stockade and protests about the Vietnam war, the Iraq war, the spread of McCarthyism to Australia, the detention of asylum seekers etc.

There are laws and protocols now in force which are damaging to artists’ reputations and incomes and indeed to the public view of art as a whole. These reveal a climate of increasing aversion to risk and uncertainty.

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<sup>1</sup> [http://www.minister.dbcde.gov.au/media/media\\_releases/2009/014](http://www.minister.dbcde.gov.au/media/media_releases/2009/014)

In the belief that there is a need for some clarity of understanding of the scope of the existing laws and the best course of action for those affected by threats or real experiences of censorship, NAVA is finalising a set of guidelines for artists, galleries, publishers and funding bodies that can help them to plan ahead if there is an expectation of controversy and to respond appropriately to complaints or threats when they occur. This *Arts Censorship Guide* will be published in the second half of 2009.

## Recommendations

NAVA makes the following recommendations for inclusion of the right to freedom of expression into a National Charter of Human Rights.

### 1. Formulation of the Right

NAVA recognises that there are number of ways in which freedom of expression could be drafted. One example that appeals to us is that suggested by Geoffrey Robertson QC in his book *"The Statute of Liberty"* (2009) Vintage Books, at p 192 (with some additions in red):

- i) *"Everyone has the right to freedom of expression, which includes the right to hold and express opinions and to receive and impart information and ideas without interference from governments, the police or other enforcement officers, or other members of the community.*
- ii) *these rights shall be accorded special importance in any court proceedings in which they are properly invoked.*
- iii) *this right shall create a presumption in favour of production, display, publication or distribution in any form, rebuttable only if the restriction sought to be placed upon it is necessary in the interests of a democratic society to guard against intentional incitement to crime or disorder, or to safeguard national security, or to enable other citizens to stop lies being told about them or to protect their privacy or to preserve confidential information."*

NAVA notes that a similar formulation is used in s. 15 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*. The section allows for restrictions where it is "reasonably necessary" to have restrictions on grounds of "national security, public order, public health or public morality". NAVA notes that such restrictions are often used to restrict artists' freedoms and while noting the importance of the protection of vulnerable groups we assert that freedom of expression should be protected by the inclusion of a defence of artistic expression (to any relevant criminal charge concerning expression) and a requirement that the person seeking limitation must bear the onus of proving the limitation is justified. This will help address the problem discussed above, that artists are 'self censoring'.

Section 15 is set out below:

*"15. Freedom of expression*

*(1) Every person has the right to hold an opinion without interference.*

*(2) 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 Victoria and whether-*

- (a) orally; or*
- (b) in writing; or*
- (c) in print; or*
- (d) by way of art; or*
- (e) in another medium chosen by him or her.*

*(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary-*

- (a) to respect the rights and reputation of other persons; or*
- (b) for the protection of national security, public order, public health or public morality.*

## **2. Who has the right?**

All people should possess the right, not just artists. If freedom of expression is to be properly recognised as a *human* right then it cannot be restricted to particular categories of people.

## **3. Who should be required to respect the right?**

NAVA believes that the right should be respected by everyone, including individuals, companies and governments. While we realise that other human rights legislation in Australia only places an obligation upon governments to act compatibly with human rights<sup>2</sup> we believe that the rights should be recognised by all. While artists often have their freedom of expression restricted by a council or government department that funds the operation of a gallery or exhibition, or a funding authority that denies funding to an artist, arts project or group, the same may occur in the commercial world. While NAVA recognises the commercial realities of the art world we believe that freedom of expression should at least be considered before decisions are made to reject, restrict or withdraw an artist's work, and that such decisions should be made on genuinely commercial bases.

It is implicit in what NAVA has said above that all level of government – Federal, State and local – should be required to act compatibly with freedom of expression. As is evident from the examples we have set out, our main concerns are with the actions of the police, funding agencies, government authorities and government departments. Any formulation of the application of the right should aim to include all such bodies and individual officials.

## **4. Limitations Upon Freedom of Expression**

As we have set out in (1) above NAVA does not object to the reasonable exceptions limitation suggested by Geoffrey Robertson. We would not object to adoption of the formulation used in s. 7 of the Victorian Charter:

*“7. Human rights - what they are and when they may be limited*

*(1) This Part sets out the human rights that Parliament specifically seeks to*

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<sup>2</sup> Section 38 *Charter of Human Rights and Responsibilities Act 2006 (Vic)*



*protect and promote.*

*(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-*

- (a) the nature of the right; and*
- (b) the importance of the purpose of the limitation; and*
- (c) the nature and extent of the limitation; and*
- (d) the relationship between the limitation and its purpose; and*
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*


*(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.”*

## **5. How may the right be used?**

Freedom of expression should be able to be used in everything from education and community advocacy through to all relevant courts. If freedom of expression binds all government agencies then it must be used in the development and implementation of government policy. If the right is justiciable then it can be used in all courts, in both civil and criminal proceedings. Requiring all courts to interpret legislation compatibly with human rights means that freedom of expression will be recognised as the fundamental human right that it is.

### **A Final Note**

NAVA would welcome the opportunity to address the National Consultation Committee orally if the opportunity arises.



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