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## **The National Association for the Visual Arts (NAVA) Submission re: Proposed reforms to the *Racial Discrimination Act 1975 (Cth)***

NAVA welcomes the opportunity to respond to the proposed reforms to the *Racial Discrimination Act 1975 (Cth)* (RDA) outlined in the Exposure Draft of the Freedom of Speech (Repeal of S. 18C) Bill 2014.

NAVA is the peak body representing and advancing the professional interests of the Australian visual and media arts, craft and design sector, comprising an estimated 25,000 practitioners, other art professionals, galleries and other art support organisations. Since its establishment in 1983, NAVA has worked to promote appropriate policy and legislative changes to encourage the growth and development of the sector and to increase professionalism within the industry.

### **Background**

The Government approved amendments to the RDA on the 25<sup>th</sup> March 2014. This included an Exposure Draft outlining the proposed reforms and seeking submissions from all stakeholders.

The Exposure Draft details the intention to repeal ss. 18B – E and supports new provisions that:

- Confine racist behaviour to 'vilification' and 'intimidation'
- Provides a different standard to determine the effect of 'vilification' and 'intimidation' ie. according to the 'standards of an ordinary reasonable member of the Australian community'
- Broadens the scope of exemptions
- Removes the requirements of good faith, reasonableness, public interest, genuine belief and fair and accurate reporting
- Significantly, it removes s18D (a) and (b) that specify exemptions for artists in the performance, exhibition or distribution of their work.

## **NAVA urges two alternative courses of action:**

- that the Government should not proceed with the proposed amendments, as the RDA already establishes an equitable balance between upholding freedom of speech and maintaining protections against racial discrimination, or
- that the ambiguity evident in the proposed amendments to the Act be clarified by the inclusion of the current s18D (a) and (b) to provide an explicit protection of artists' rights to freedom of expression. Moreover, the requirements of artistic work to be done reasonably and in good faith should be retained.

## **Balance between artistic expression and racial discrimination**

NAVA identifies itself as the representative body ensuring that artists' rights are protected and keeps a watching brief on likely impacts of any proposed legislative or policy changes such as the ones being proposed here.

We argue that the proposed reforms would not adequately protect the right of freedom of expression for artists within this particular context. The proposed reforms expose artists to legal action and prosecution under the RDA. Moreover, the reforms weaken the protections from racial discrimination previously held by marginalised and vulnerable groups in Australia. While this is not core to NAVA's interests, it the issue for which a reasonable balance needs to be found with freedom of expression.

NAVA is concerned to ensure that the law does not inhibit artists' entitlement to exercise their democratic right to represent, discuss and critique ideas, through their artwork or other forms of public or private expression. They should remain free to continue to challenge current orthodoxies. This often includes comments on culture, race relations and national values.

Because artists' work is often oblique, using metaphorical imagery, quotation or allusion and satire, many meanings can be drawn from it. Under the proposed amendments, artists could be held liable under 18C for inciting hatred or causing fear of physical harm based on race through the performance, exhibition and distribution of their art.

### Self-censorship

NAVA believes the proposed amendments will have the effect of artists, galleries, art magazines and other art organisations imposing self-censorship. For fear of possible misinterpretation of their work artists, galleries and art magazines will be under pressure. The possibly unintended consequence is the curtailment of freedom of expression that is paramount to artists' practice and their role in society. This is clearly not the desired effect of the proposed changes.

## **NAVA's proposal rationale**

NAVA's recommendations propose the maintenance of the strength of the laws required to ensure that vulnerable people are protected from harm while at the same time ensuring freedom of expression for artists when they work reasonably and in good faith

as the visual commentators on the social and cultural mores of our time and place. Our response is specific to the removal of s 18D (a) and (b) and their ambiguous appropriation into the proposed sub-section (4) of the new amendment. We also oppose changes to the proposed amendments in sub-sections (1) and (2).

#### Sub-Sections (1) and (2)

These subsections set a weaker threshold for discrimination than the current RDA. It has been changed from 'offend, insult, humiliate or intimidate' to 'vilify' or 'intimidate'. The Government's view is that this increases protections against racial discrimination. However, racial vilification is implicitly unlawful in the Act's current form as noted in *Eatock v Bolt*.<sup>1</sup> 'Vilify' is defined in the amendments as 'to incite hatred against a person or a group of persons' which is a shift from the court's interpretation of 'racial vilification' in *Eatock v Bolt* that stated 'racial vilification will usually involve negative attacks on another person, not based on what that person has said or has done but principally because of negative characteristics which are ascribed to a group to whom that person belongs'.<sup>2</sup> The new definition can be construed as encompassing only extreme acts of racial vilification. It can also be seen as placing the burden of proof on the victims of racial discrimination to prove that the discriminator aimed to 'incite hatred' – a matter of causation rather than a harm threshold. Therefore, the effect of the discrimination on the victim bears less weight and the intention of the discriminator is focused upon.

The second term included is 'intimidate'. This is defined as 'causing fear of physical harm to a person, or to the property of a person or to the members of a group of persons'. This is a narrow definition concerned principally with physical harm. Neither vilification nor intimidation are concerned with the impact of racial discrimination on victims' mental wellbeing, reputation and equal standing in society. This reflects a shallow understanding on the Government's behalf of racial discrimination and undermines the purpose of the RDA. Racial discrimination affects the mental health and wellbeing of those affected in various ways such as through anxiety and depression. Moreover, the proposed amendments ignore this and the more obvious tenet that citizens must be treated equally.

#### **NAVA recommends:**

- that 'offend, insult and humiliate' be retained and s 18C be left unamended.

#### Sub-section (4) - Importance of maintaining s18D (a) and (b)

Currently s18D Exemptions states that:

'Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest;

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<sup>1</sup> [2011] FCA 1103, 28 September at para. 224.

<sup>2</sup> Ibid.

This section adequately protects artists from legal action under s18C in regard to artistic work done reasonably and in good faith. This section exists to maintain democratic and positive conditions for access to art. It acknowledges the context of art and art as an institution that occupies a critical role in society, which must be protected from censorship and government intervention. NAVA urges the Government to include this provision within its amendments.

### **Problems and ambiguity with the exemptions added to s18C**

The proposed reforms remove the exemptions in s18D. However, a clause is added to section 18C (4):

‘This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.’

The construction of this section is unclear and ultimately, ambiguous. The intention of the Government, according to the Attorney General and Minister for the Arts, Senator Brandis, is to ‘remove provisions which unreasonably limit freedom of speech’ whilst strengthening the ‘Act’s protections against racism’. The proposed section broadens and strengthens the exemptions from s 18C. However, artists’ rights have been neglected, and then incorporated into a general amalgamation of ‘matters of public discussion’. It is therefore no longer clear whether artists’ work in terms of ‘performance, exhibition or distribution’ is protected.

#### *Does artistic work come within the scope of the proposed subsection (4)?*

It could be construed that artistic work is communicated in the course of participating in the public discussion of an artistic matter ie. that artistic works are predominantly ‘images’ that communicate in an abstract form of public discussion. However, it is more likely that ‘artistic work’ falls outside the proposed amendment as it is a form of communication that not only may be referenced through participation in the public discussion of ‘any political, social, cultural, religious, artistic, academic or scientific matter,’ but also can communicate directly through being accessed and viewed by individuals and groups. The clause relies upon a particular interpretation of the phrase ‘public discussion’. The phrase suggests the use of the spoken word in terms of forums, conferences, etc. ‘Images’ may be involved however they need to be part of participating in the public discussion which remains undefined and open to interpretation. The performance, distribution or exhibition of artworks would then predominantly fall outside the scope of this sub-section.

Such ambiguity is the effect of the proposed amendments. This leaves artists vulnerable and exposed where they were previously protected. NAVA proposes that if the amendments proceed, the section 18D (a) be included in the amendments or that ‘public discussion’ be defined to include the performance, exhibition or distribution of an artistic work.

*Reasonably and in good faith*

The proposed sub-section also removes the requirement of reasonableness and good faith previously found in section 18D. NAVA contends that these requirements must be retained. Good faith implies the absence of 'spite, ill-will or other improper motive'.<sup>3</sup> The meaning of reasonableness is subsumed to a degree by the meaning of good faith however it also implies 'immoderate or inflammatory conduct' that reflects the RDA's concern with incivility in terms of both content and form. These requirements are pertinent to public discussion about political, social, cultural, religious, artistic, academic or scientific matters. Removing them allows for disingenuous dialogue that perpetuates inequality and racial discrimination without accountability. Moreover, it provides a defence for media outlets in their various forms to racially vilify people in the discussion of a 'social' matter.

NAVA contends either that the proposed amendments should not be enacted or that section 18D (a) should be added to the amendments to clarify sub-section (4) and the requirement of reasonableness and good faith should be included. NAVA's recommendations seek to clarify and strengthen freedom of speech and expression in Australia - a notion commensurate with Senator Brandis' intentions under the proposed law - but would ensure that it is done with a legitimate purpose which will not cause harm to vulnerable people. We are committed to promoting an artistic environment in Australia that rejects the notion that bigotry is to be condoned. It is often this very attitude that artists will be commenting on or critiquing but which can be open to misinterpretation. We want to strengthen our industry in a way that promotes accountable and fair discourse and communication of ideas and opinions.

Yours sincerely



Tamara Winikoff OAM  
Executive Director.

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<sup>3</sup> Jones [2000] NSWADT 102 [122].