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Patrons:
Pat Corrigan AM
Professor David Throsby



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

29th January 2010

Dear Director

The National Association for the Visual Arts is pleased to provide this submission in relation to the Report of the Child Pornography Working Party. We appreciate being invited to respond and to attend the meeting between representatives from the NSW Attorney General's Department, the Australia Council for the Arts, the Arts Law Centre of Australia and ourselves to try to clarify the intention of the proposed changes and any concerns that might arise in relation to artists' freedom of expression.

National Association for the Visual Arts

The National Association for the Visual Arts (NAVA) is the peak body representing and advancing the professional interests of the Australian visual arts, craft and design sector. Since its establishment in 1983, NAVA has been very influential in bringing about policy and legislative change to encourage the growth and development of the visual arts sector and to increase professionalism within the industry. It has also provided direct service through offering expert advice, representation, resources and a range of other services.

NAVA undertakes advocacy and lobbying, research, policy and project development, data collection and analysis, professional representation and service provision. NAVA has over 3000 members and 1000 student affiliates. Its constituency includes visual arts, craft and design practitioners, other arts professionals including curators, agents, educators, arts writers and critics, arts administrators, art librarians & conservators, and a range of organisations including public, artist run and commercial galleries, arts agencies, arts service organisations, educational institutions, art publications, manufacturers and retailers. NAVA is acknowledged by the art industry and key decision makers as expert in the field of Australian visual arts and is often approached for strategic advice and opinion in this regard.

1. Need for Distinction Between Art and Child Pornography

In relation to the proposal to delete the 'artistic purposes defence' from the s91G Crimes Act 1900 (NSW) made by the Child Pornography Working Party (CPWP), NAVA agrees that the changes could be advantageous. In shifting the onus to the beginning of the process where a decision must be made about whether a charge should be laid, based on an assessment of 'artistic merit', NAVA would see this as a positive move provided the procedures recommended in clause 2 below are adopted. NAVA is encouraged by the fact that the CPWP acknowledged the need "to remove the defence without infringing on the rights of journalists and artists to depict valid situations involving children."

NAVA's purpose in this submission, therefore, is to suggest the adoption of practices which would reduce the likelihood of any unintended deleterious consequences for artists. Not the least of these is that art is a productive part of the NSW economy and legitimate artists' reputations and incomes should not be jeopardised. We make this submission mindful that there are already many laws and some funding protocols which cover the interactions between artists and the children they work with in the making of art products, as well as applying to the art industry's ability to distribute such images. In its submission to the Australia Council on the impact of the Artists Working with Children in Art protocols, NAVA further investigates some of these issues. Similar issues are also dealt with in NAVA's recently published Art Censorship Guide (copy already provided to the Attorney General).

NAVA takes it as self-evident that artistic freedom is an indispensable condition of a mature and civilised society. NAVA does not in any regard condone the production or consumption of child pornography, however, it does not want to see artists become the scapegoats for community concern over the widespread availability of this material on the internet and the increasing sexualisation of children in advertising. NAVA is concerned that the current increase in community anxiety over protection of the rights of children against abuse is resulting in the unfair representation of artists as perpetrators. To put things in proportion, as has been mentioned in the report of the CPWP, only one case was quoted of the use of the 'artistic defence' in a court case, and it seemed clear that the perpetrator was **not** an artist.

Under the CPWP's proposed changes to the law, NAVA understands that the onus would shift to the police and Director of Public Prosecutions (DPP) who would have to establish that the material was such "that reasonable persons would regard it in all the circumstances as offensive," even where the work had been created by an artist for a legitimate artistic purpose. If it was clear that the defendant was an artist, then the prosecutor would have to prove that notwithstanding the 'artistic merit' of the work/s in question, it was still offensive. Further, we understand that even if the prosecutor did this, the artist could still put on additional evidence in his or her defence to support an argument that the work had 'artistic merit'.

Because the threat and actuality of various constraints on artists' freedom of expression is already having a 'chilling effect' on legitimate artistic practice, NAVA is deeply concerned that the lack of a clear distinction between art and child pornography may be leading to the inappropriate branding of some artworks as child pornography. NAVA therefore proposes the following ways in which the art community can assist the police and DPP in drawing this distinction.

2. Proposed Procedures

NAVA proposes the following processes be adopted by police and the DPP in order to be assisted in making the decision about whether to lay a child pornography charge in a case where the work was claimed to be of 'artistic merit':

- establish an objective standard for 'artistic merit'
- establish a standing committee of art experts who would apply these standards.

2.1. Establish an objective standard for 'artistic merit'

NAVA proposes that a Memorandum of Understanding be established between NAVA and the State of NSW which sets out the following criteria for determining 'artistic merit' by the standing committee:

2.1.1 Establish whether or not the person is an artist.

By assessing his/her practice profile against the following arts industry criteria assess whether the person:

- is a known visual arts, craft or design practitioner (artist)
- has worked as an artist for some time
- makes regular efforts to bring their work to the public
- has displayed and/or sold work through galleries, art agents or online through art sites
- has had work acquired for public or private art collections
- has had exhibitions of the work reviewed in art industry recognised art publications
- is eligible for or has secured art grants, awards, prizes, residencies, sponsorship and/or philanthropy
- is recognized by art peers through having work reviewed or discussed in art contexts
- teaches or comments about art and/or art practice through courses, workshops, lectures, seminars, conferences, public talks, blogs or other on-line means
- has appropriate art educational qualifications
- is a member of a professional art association

Emerging artists may not yet be able to meet many of these criteria, so the judgement of the 'artistic merit' of the artwork by the proposed Standing Committee of Art Experts is an important safeguard (see 2.1.2 below).

2.1.2 Assess the works against criteria for artistic merit

In relation to the term 'artistic merit', the issue of whether the work has merit as good or bad art is irrelevant in this context. NAVA would suggest that the term be explained to make clear that image quality is not what is being assessed. Instead NAVA would recommend that 'artistic merit' be elaborated to include the following criteria against which evaluation could be made: intention, context and meaning.

Suggested draft assessment questions:

i) Intention:

- was the intention of the work to be understood to be for artistic purposes of eg research, critique, irony, parody, satire, challenge to community attitudes, and/or sampling and reuse?

ii) Context:

- was the work made available to the public through arts venues eg a gallery or artist run space, artist studio or workshop, art website or art publication?

iii) Meaning:

- what was the meaning of the work according to the interpretation by art experts
- was it part of an installation or structure, series, sequence, moving image work or other larger art entity which contributed to its meaning
- did the title of the work or text or other graphic devices used in the image or associated with it, contribute to the meaning of the work?

Because of time constraints in making this submission, NAVA recommends that this list be given further consideration by contemporary art experts before being adopted.

2.2. Establish a Standing Committee of Art Experts to advise on 'artistic merit'

NAVA proposes that the Memorandum of Understanding include the appointment of a Standing Committee of Art Experts who could be convened as necessary to advise the police and the DPP on 'artistic merit'.

NAVA would provide advice to the NSW Government about who should be appointed as members and chair of this ad hoc committee with the Government making the appointments. They would be likely to be drawn from amongst:

- senior curators at major art institutions
- art academics
- well established artists
- reputable gallery owners

This committee should be appointed immediately after the legislation is changed, to be ready to respond quickly when the provision of advice becomes necessary.

A precedent for this kind of advisory committee has been established in Western Australia by the WA Arts Department, following the Connie Petrillo case (see in Appendix A).

According to the CPWP report, the precedent for this exists in the Commonwealth Code defence provisions which would allow the admission of expert evidence to determine whether “the material has any merit in the relevant fields, and if so, the nature and extent thereof”. In removing the artistic defence and shifting the onus into the police and DPP prior to the charge being laid, it would seem wise to use the advice of experts at this point in the process. Ultimately the decision to charge will remain with the DPP and/or the police.

3. Defence if a Case Proceeds

In agreement with the Arts Law Centre of Australia, NAVA 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 artists to use classification as a complete defence where they had secured a rating other than RC (Refused Classification) either before or after the commission of the alleged offence. It also provides another safeguard especially for emerging artists whose professional practice is not well established. This offers an extra level of dispassionate judgement on whether the work could be offensive to a reasonable person under all the circumstances.

4. Public Benefit Test

If the defence of artistic merit is removed, the decision about whether an art image is child pornography may rest on whether “there is an overriding, definable and clear public purpose”. NAVA believes the terms of the ‘public benefit’ test are far too narrow to be useful in this regard. NAVA recommends that they be broadened to recognize legitimate artistic research and inquiry as being of public benefit.

The defence provisions in section 474.21 of the Commonwealth Code, point 2 include a definition of conduct which is of public benefit as “conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section”. NAVA recommends the inclusion of ‘artistic research’ here, along with scientific, medical or educational research. However, it would seem impractical to have to secure the Minister’s approval prior to the act of artmaking in light of the fact that artmaking is an open-ended process where the work usually evolves in the making. Perhaps, if there is doubt about whether the work might fit the public purpose definition but could possibly be breaking child pornography laws, the work could be submitted after it is made, for approval by the Minister in writing. Here again we would recommend that the Minister would first seek advice from the Standing Committee of Art Experts.

5. Real or Fictional Child

The CPWP report refers to Section 91H(6) dealing with altered images – “material which appears to depict or describe a person who is a child”. NAVA recognizes the virtue of the case made by the Attorney General in not wishing to allow makers or those in possession of child pornography images to escape the law, because the image has been altered or manipulated to disguise the identity of the perpetrator or victim in child abuse. However, in the case of art, we propose that if no real child was involved but rather an artist created images of fictional children in any medium (eg drawing, painting, printmaking, sculpture etc), the image may have a different significance. NAVA would still recommend that this be assessed against the artistic merit criteria as suggested in the Proposed Procedures section 2 above.

6. Use of CETS Scales

NAVA understands the value of internationally established scales being used by prosecuting authorities to assess the level of seriousness of child pornography images in order to sentence appropriately.

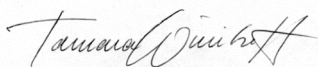
The issue NAVA wishes to raise here is that of child nudity, and whether in itself a representation of a nude child is pornographic (see case studies in Appendix A). It was noted by the CPWP that in considering the COPINE scale, in the case of *R v Oliver and others*, the Court of Appeal Criminal Division of England and Wales “were of the view that neither nakedness in a legitimate setting, nor the surreptitious procuring of an image, gives rise, of itself to a pornographic image”, and it proposed alternatives.

If it is intended, as recommended by the CPWP, that the CETS scale be adopted by the NSW Police Force, Australian Federal Police, the NSW Office of the DPP and the Commonwealth DPP in child pornography prosecutions, NAVA recommends a change to the CETs scale to remove nudity per se.

From the published scale used as Sentencing Council Guidelines, the inclusion of ‘nudity’ in category 1 implies that it is part of an offences scale when NAVA would maintain that child nudity is not in itself pornographic if the child is not engaged in sexual activity or is not in a sexual context. The inclusion of this and also elements of categories 7, 8 and 9 (including holiday snaps, family photos etc) in the CETS scale would seem to define them as offences that carry a sentence. NAVA recommends that these categories should not be included in any scale to be used in Australia.

In conclusion, The National Association for the Visual Arts thanks the NSW Government for the opportunity to provide this advice. We would be happy to work with appropriate government representatives to realize these recommendations, and to provide further advice or information if needed. We also would appreciate the opportunity to meet with the police and the DPP to propose appropriate protocols which might be followed in the case of a complaint about artworks.

Yours sincerely



Tamara Winikoff
Executive Director

Appendix A.

Case Studies

(taken from NAVA's Art Censorship Guide 2009, written by Evan Williams)

NAVA provides the following case studies to indicate, in the first instance what needs to be avoided in order to protect artistic practice, and secondly the level of confusion in public attitudes about whether child nudity is in itself offensive.

Case Study 1

Well before Bill Henson made headlines – as long ago as the late 1990s – a Western Australian photographic artist, Concetta Petrillo, then an art student and young mother, was charged by the WA police over a series of photographs she took of her children in poses familiar from the 'great masters'. The film processor at a photo lab had seen her photographs and informed the police. Ms Petrillo has supplied NAVA with a disturbing report of her experience. Her account has been slightly condensed in NAVA's Art Censorship Guide from which this is quoted.

"I was charged by the CIB and threatened with a 10-year gaol sentence. I was taken by force and extensively questioned and harassed by the police and had to go through the trauma of being treated like a criminal. All my work and equipment was confiscated and only some of it was returned ... Some artworks were never returned ... I also had a supply of photographic paper and this was destroyed when my home and studio were searched, without a warrant, and even some art books were taken.

"I was (tarred with the same brush) as Bill Henson, but as there was no precedent at the time, I had to go through a trial in order to set this precedent. During this illicit raid they also took family snaps of my children growing up – ones such as any mother or father would have in their family album. Both my home and studio were turned inside out – drawers pulled out and tipped onto the floor, etc, and at the trial both detectives swore on a Bible that this had never taken place ...

"I was told that the work apparently broke the law and I had committed a criminal offence ... I was told that I had committed the crime when I pressed the shutter release on my camera, as you are not allowed to take images of children under the age of 13. At the time I had no idea that I had broken the law. Or that any such law even existed.

"There was nothing that I could do ... Though petitions were signed and character references and other letters of support were submitted I was told that I would have to see it through. I was even placed in a gaol cell with other 'criminals' and treated like one myself ...

"When the works were eventually shown in court, the judge stated at the outset of the trial that she could not understand why this case had got this far. At the end of the trial, the same judge had the clerk of the court hold up my work for the public to see and declared that it was beautiful and should be admired. She also came to my exhibition when I eventually showed the works at the Perth Institute of Contemporary Art.

"At the end of the trial and after I had been found not guilty by a jury, I returned home to find I had been slapped with another charge. There was a second

summons waiting for me... I was now charged with possession of pornographic material* , which I found difficult to understand ... as a judge and jury had found my works to be not indecent. How could they be not indecent yet still pornographic? After countless appearances the case was eventually thrown out of court.”

art books, some borrowed from the college library

Case Study 2

In 2009 Subiaco Council library asked another Perth artist, Nicole Boenig McGrade not to display her artwork ‘Kids in Suburbia’. The two children in her photograph, a girl and boy aged three and 18 months respectively, were naked from the waist up. The work had been commissioned by the children’s parents. The library expressed concern that the image might cause offence to some people and contravene the Australia Council protocols (though the library was not an Australia Council client and therefore not bound by the protocols). The artist agreed to the request, but when the media publicised her case and public criticism was made about the absurdity of the decision, the artworks were included in the show which went ahead as planned.

Case Study 3

A bizarre incident occurred in October 2009, when the organisers of Sculpture by the Sea, an open-air exhibition at a Sydney beach suburb, were ordered by Waverley Council to put a pair of swimmers on a statue of a naked toddler, a work called ‘Little Boy Lost’ by Sydney artist Paul Trefry. After protests from the artist, supported by a child protection charity Child Wise, the council’s edict was reversed. “We’re becoming a nation where everything is censored,” Trefry told the Sydney Sun-Herald on 1 November. “I think it’s sad...” He might have added that toddlers can be seen on most Sydney beaches in summer without the benefit of swimming costumes and with no apparent damage to the moral standards or sensibilities of beach-going crowds. The community in this case seemed to be more liberal minded than the Council bargained for.