*REFERENCE: Cultural rights/2012/06/MB*

***QUESTIONNAIRE ON THE RIGHT TO ARTISTIC FREEDOM***

National Association for the Visual Arts (NAVA), Australia.

***1. Is the right to artistic freedom expressly protected under the Constitution in your country? If so, please provide the relevant provisions, or if needed, a translation of these provisions.***

Australia is the only Western democratic country with neither a constitutional nor legislative bill of rights, although there is ongoing debate in some Australian states. Victoria (in 2006) and the Australian Capital Territory (in 2004) are the only state and territory respectively to have a human rights bill.

In 2008, the Australian Government announced a National Human Rights Consultation on the 60th anniversary of the Universal Declaration of Human Rights. Freedom of expression provisions formed part of the set of recommendations. Disappointingly the recommendations were not adopted and Australia remains without national human rights legislation.

Australia is a signatory to the International Covenant on Civil and Political Rights (ICCPR), but (as mentioned above) is without national legislation which would give effect to its terms, although the Australian Human Rights and Equal Opportunity Commission Act gives limited effect to the ICCPR by requiring the Commission to investigate breaches including those related to freedom of expression. However, the Commission cannot enforce compliance or penalties but can only make recommendations to the Minister about any actions it considers appropriate.

A UN Human Rights Committee reviewing Australia’s compliance with the ICCPR and reporting in March 2009 commented on, among other things, the incompatibility of aspects of Australian counter-terrorism laws with fundamental human rights, the excessive use of force by police without adequate oversight, and the need to increase access to justice and legal aid.

For information about legislation applying to the Australian Classification Board and the Australian Communications and Media Authority, see answer to Q 11 below.

***2. If relevant, please provide a brief summary of important decisions relating to artistic freedom adopted by judicial authorities in your country over the last ten years.***

***3. Has your country adopted any official policy relating to art and artistic freedom? If so, please provide a summary of the main elements included in such a policy.***

**i) Sedition**

In 2005, an Anti-Terrorismbill was passed by the Australian Government in the wake of a series of terrorist attacks overseas. The legislation included ‘sedition’ clauses, which the arts and media sectors were concerned could be used to constrain freedom of expression, particularly in relation to being able to be critical of governments, the monarch or the constitution.

In 2006, the sedition offences in Section 80.2 of the Criminal Code were reviewed by the Australian Law Reform Commission (ALRC), at the behest of the national government. After a change of government, in September 2011, the [**National Security Legislation Amendment Act 2010**](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=LEGISLATION;id=legislation%2Fbills%2Fr4435_aspassed%2F0000;page=0;query=National%20Security%20Legislation%20Amendment%20Act%202010;rec=9;resCount=Default) became law. It included the repealing of the sedition clauses and their replacement with a new offence described as ‘Urging the overthrow of the Constitution or Government by force or violence’. This offence would be committed only if a person intentionally urged another person to overthrow by force or violence the Constitution, the Government of the Commonwealth, of a State or of a Territory, or the lawful authority of the Government of the Commonwealth, with the intention that force or violence would actually occur.

Now, matters to which a court may have regard when considering urging violence offences are whether the acts are done in good faith in relation to **artistic work,** for genuine academic or scientific purposes, or in the dissemination of news or current affairs.

**ii) Classification**  

In early 2011 there was an Australian Government Senate Inquiry into the Australian film and literature classification scheme which proposed that works of art could be subject to classification. The Attorney-General then asked the Australian Law Reform Commission (ALRC) to conduct a review of the National Classification Scheme, the first of its kind in 15 years.

Of particular pertinence to the visual arts sector were questions about whether it would be appropriate and feasible to extend this classification system to apply to art works, in all of their forms, before they were exhibited. However, though many changes to the national classification scheme were recommended, this was not one of them.

Currently, new legislation to update the Australian classification system is under consideration by parliament.**iii) Privacy**

In response to the Australian Law Reform Commission’s report to the Australian Government in relation to Australian privacy law and practice, the **Privacy Amendment (Enhancing Privacy Protection) Bill 2012** was passed in December 2012 and amends the Privacy Act 1988 to: replace the current privacy principles for the public and private sectors with a single set of privacy principles (the Australian Privacy Principles (APPs)); implement a comprehensive credit reporting system which includes five kinds of personal information; provide for codes of practice under the APPs and a credit reporting code, including powers for the Privacy Commissioner to develop and register codes that are binding on specified agencies and organisations; and clarify the functions and powers of the Information Commissioner and increase the commissioner’s ability to resolve complaints, recognise and encourage the use of external dispute resolutions services, conduct investigations and promote compliance. These privacy regulations may serve to constrain some aspects of freedom of expression. with

The next two examples are protocols adopted and enforced by The Australia Council for the Arts, which is the Australian Government’s arts funding and advisory body.

**iv) Indigenous Protocols**

From 2002, the Australia Council for the Arts has published protocols for producing Indigenous Australian music, writing, visual arts, media arts and performing arts. These act as a guide for the whole arts sector and should be adhered to by grant recipients.

The nine principles include secrecy and confidentiality; communication, consultation and consent; and attribution and copyright. The principles are accompanied by case studies from the arts that both help artists to know their rights, and anyone working with Indigenous heritage and culture to do the right thing.

To read the protocols go to: http://www.australiacouncil.gov.au/about/strategies-policies

**v) Protocols for Working with Children in Art**

In 2008, during the much publicised controversy over the use of representations of nude children in art by artist Bill Henson, the then Arts Minister instructed the Australia Council for the Arts to develop and apply ‘Protocols for Working with Children in Art’. These protocols provide a minimum common national standard for artists, arts organisations and art publishers whose artworks, projects or publications involve children, and must be adhered to by anyone who has secured Australia Council funding.

The protocols came into effect on 1 January 2009 and were reviewed in early 2010. To read them go tohttp://www.australiacouncil.gov.au/about/strategies\_2/children\_in\_art

***4. Is there a legal definition of “artist” in your country? If so, does this definition have any bearing on the status of artists, as well as their artistic freedom? Do organizations of artists agree with such definition?***

The various definitions provided below have bearing on certain conditions for artists.

**i) Art Industry**

After extensive consultation with its constituents, the peak national body for the Australian visual and media arts, craft and design sector - the National Association for the Visual Arts (NAVA) - uses the following combination of characteristics as a way of determining whether someone is a professional artist for eligibility for its grant and professional membership programs, noting that no single indicator is determinative:

“a professional artist is:

* seeking to build a reputation as a professional artist
* making regular attempts to bring his/her work to the public or relevant market
* having regular public exhibitions of his/her art work
* offering work for sale, or selling art work
* having work acquired for public or private collections
* securing work, commissions or consultancies on the basis of his/her professional expertise
* undertaking arts projects
* securing residencies, teaching, lecturing or giving public talks
* eligible to apply for or has been awarded government grants
* seeking philanthropic patronage or sponsorship
* carrying out work in a businesslike manner (e.g. keeping financial records, having formal written contracts or agreements, having a written business plan)
* regularly participating in activities designed to promote his/her work including establishing a website and other marketing activities
* achieving industry or peer recognition through published works, critical texts or media profile
* building industry contacts
* renting, leasing or owning space dedicated for art purpose
* professionally qualified or has equivalent experience typical of others in the industry
* a member of a professional association or union (like NAVA).”

**ii) Australia Council for the Arts**

The Australia Council for the Arts provides funding for professional, practising artists. Over 20 years it has commissioned a series of surveys by Professor David Throsby from Macquarie University looking at professional issues relating to Australian artists in all art fields. The definition used for [*Do you really expect to get paid? An economic study of professional artists in Australia*](http://www.australiacouncil.gov.au/resources/reports_and_publications/subjects/artists/artist_careers/do_you_really_expect_to_get_paid), the most recent report in the series, considered a number of factors relating to artists’ professionalism:

“This study defines practising professional artists as people permanently living in Australia and who either:

- have had an artistic achievement in their artform in the last five years …, or

- have been engaged in the last five years in creating a serious and substantial body of work in their artform, or

- have undertaken full-time training in their artform, or

- have received a grant to work in their artform.”

**iii) NSW Government - Arts NSW**

The following definition from Arts NSW is provided as an indication of the type of definition a state government agency applies.

“A professional artist:

- identifies him/herself as such on the basis of skill or experience;

- is accepted by peers or the arts industry as a professional; and

- may or may not earn income from artwork.”

The definition of professional artist is deliberately broad to take into account factors such as:

- artists from diverse cultural backgrounds whose artistic or cultural knowledge has been developed through oral traditions;

- professional artists who are self-taught;

- artists of professional calibre who must work outside the arts to generate income.

**iv) Australian Bureau of Statistics (ABS)**

The ABS doesn’t currently have a definition of a professional artist, however, for the paper Arts and Cultural Heritage in Australia: Key Issues for an Information Development Plan, released for discussion in 2006, it used the following to describe ‘creative participants’:

“Professional creative participants are broadly defined as creative participants who have a serious commitment to their arts practice and consider it a major aspect of their working life, regardless of their income or employment status.”

**v) The Australian Tax Office and Professionalism**

Australian peak national arts bodies worked with The Australian Tax Office (ATO) for several years and in 2005 it issued the ‘Taxation Ruling Income tax: carrying on a business as a professional artist (TR2005/1)’ which uses agreed arts industry criteria to differentiate between ‘professional artists’ and ‘hobbyists’ for income tax purposes.

In the ruling, the ATO lists a number of business indicators which it uses to determine whether an artist is running a business as a professional.

To access the Taxation Ruling Income tax: carrying on a business as a professional artist (TR2005/1) go to http://law.ato.gov.au/atolaw/view.htm?docid=TXR/TR20051/NAT/ATO/00001#P98

**vi) UNESCO**

The Australian arts sector respects the definition adopted at the 1980 UNESCO international conference on the status of the artist:

“Any person who creates or gives expression to, or recreates works of art, who considers his (sic) artistic creation to be an essential part of his life, who contributes in this way to the development of art and culture and who is or asks to be recognised as an artist, whether or not he is bound by any relations of employment or association.”

***5. Is there an official legal definition of ‘artisans’ and craftsmen/women? If so, which consequences does this definition have on the status of artisans and craftspersons in terms of their artistic freedom? Do organizations of artisans/craftswomen agree with such definition?***

To our knowledge there is no definition accepted across the sector. However, in Australia, work is underway to develop a Code of Practice for Creative Collaborations for the craft and design sector (in partnership with UNESCO, World Craft Council, International Council of Graphic Design Associations (ICOGRADA) and the National Association for the Visual Arts). The code is being developed out of the UNESCO publication ‘Designers Meet Artisans ‘ and attempts to provide a platform where fairness can produce added value for product development.

It concerns the growing practice of outsourcing artisanal processes so that urban based designers can have product handmade in villages or workshops, particularly in countries such as Vietnam, Indonesia and India. From the artisan point of view, such commissions provide the opportunity to give value to craft traditions that are otherwise threatened by globalisation. But given the cultural differences between the parties involved, collaborations have been plagued by misunderstandings and at times exploitation. The Code will be designed as a set of common standards for all parties, including producers, traders, designers and consumers.

***6. In your view, what are the main impediments encountered by artists in their work in your country?***

* Lack of recognition and respect by the general community, partly resulting from lack of educational preparation, poor quality and low level of mainstream media coverage and lack of political commitment.
* New cultural forms are being developed from a relatively recent multicultural base which lacks continuity and the embedded nature of long coherent cultural histories eg in Europe, Asia and Africa. The continuity of Indigenous cultures has been disrupted by settler cultures.
* Lack of continuous high quality arts education in school; and at tertiary level, access and choice is decreasing as courses are closing down or becoming unaffordable.
* Difficulty for artists of having a sustainable career; low income from art practice usually having to be subsidised from other forms of work.
* Lack of respect for artists’ rights, frequent exploitation and lack of access to justice for artists.
* Small, widely dispersed Australian population base means small markets for artwork purchase and commissions.
* Though there is national and international connection and interactivity through on-line platforms, Australian artists bear high costs for their travel and freight of art works.
* Relatively low levels of private sector and philanthropic support (though government funding is better than in many other countries).
* Conservative community attitudes can result for artists in censorship or self-censorship (though Australia enjoys relative freedom of expression compared with many other countries).

***7. In this regard, what measures are required to combat these impediments?***

The ecology of the arts in Australia needs to be strengthened in so many ways that it’s hard to be selective. However, as a start there needs to be:

* Provision of continuous high quality school arts education starting in preschool (this will be partially addressed through the government’s current work on preparation of a national arts curriculum for schools);
* Affordable, excellent, diverse and constantly evolving tertiary and vocational education options;
* A conducive legislative, policy and regulatory environment including status of artist legislation, taxation incentives, increased government funding, living wage provision for professional artists and mandatory minimum level of payment for services, improved social security and superannuation arrangements, copyright protection and other rights enforcement;
* Stimulation of new work opportunities for artists in creative and other industries, education and the public sector (eg: health, community development, urban design, cultural heritage interpretation etc);
* Better mainstream and arts specific media coverage;
* Public (and private) commitment by politicians and other key decision-makers;
* Increased targeted funding from all three levels of government for both artists and arts organisations (especially the small to medium sized organisations);
* Support for artistic risk taking and acceptance of ‘failure’;
* Better incentives to stimulate private sector support;
* Affordable urban-based living, studio and gallery/performance space accommodation for artists and organisations;
* Assistance to help artists and art organisations keep pace with technological change;
* Establishment of an Australian International Cultural Council and cultural staff in overseas embassies.

***8. What support is provided by State authorities, including public institutions and semi-autonomous bodies to artists, in particular financial support for artistic creations and exhibitions? What are the specific mechanisms to ensure that those benefiting from State support enjoy artistic freedom and that all artists compete equally for State resources, without discrimination based on, for example, gender, ethnic origin, location in State territories, political opinion or belief?***

Government funding is provided at national, state and local level. Two other major funds are the Australia Cultural Fund (encouraging private sector support for artists) managed by the Australia Business Arts Foundation and major support through the Cultural Fund managed by Copyright Agency. There is also slowly growing philanthropic support through private sector trusts.

Equity of access and anti-discrimination criteria are required to be observed by government funding assessors and there is regular monitoring of adherence. Positive discrimination is increasing for Indigenous artists, artists with disabilities, artists in regional and remote areas and young and emerging arts practitioners.

***9. Under national law, what kind of legitimate restrictions can be imposed on artistic freedoms? Please provide information on most recent relevant cases in your country, if any.***

Examples of Australian laws which may constrain artists are in the areas of:

Indecency, Obscenity, Child Pornography and Abuse, Blasphemy, Profanity, Sedition (now replaced by Incitement to Violence) Vilification and Incitement, Defamation, Public Order and Working with Humans, Human Remains, Children or Animals.

Many case studies are listed in NAVA’s ‘Art Censorship Guide’ published in 2009. The most famous recent case which caused huge public interest and debate was that of artist Bill Henson (mentioned above) who used nude pubescent children as models in his art practice.

***10. Are there any legal provisions or traditions in your country which restrict certain art forms, including the use of instruments and songs, or public display/performances? If so, do such restrictions apply to certain categories of people, for example on the ground of, gender, ethnic origin or age?***

See answers to question 3 above in relation to Indigenous protocols.

***11. Please indicate whether specific bodies or institutions, either state or non-state, are mandated to decide on possible restrictions to be imposed on artworks (e.g. film censor boards). If so please***

***(a) provide information about the membership, terms of reference and appointment procedures of these bodies****;*

***(b) indicate whether these bodies disclose information publicly and to what extent they are held accountable for their decisions and to whom; and***

***(c) indicate whether an appeal mechanism judicial, quasi-judicial or other, is in place.***

**i)** **The Australian Classification Board**

Under the [Classification (Publications, Films and Computer Games) Act 1995 (Cth)](http://www.comlaw.gov.au/comlaw%5Cmanagement.nsf/lookupindexpagesbyid/IP200401401?OpenDocument) in 1970, the Australian Classification Board was established by the Australian Government as a statutory classification body which classifies films, video games and publications for exhibition, sale or hire in Australia. Decisions made by the Board may be reviewed by the [Australian Classification Review Board](http://en.wikipedia.org/wiki/Australian_Classification_Review_Board).

This Act also provides a basis for the [National Classification Code](http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200508203?OpenDocument) which guides the Board’s decision making. As the State and Territory governments retain responsibility for enforcing censorship and could withdraw from or ignore the national classification scheme if they so wish, any changes to the national classification scheme must be agreed to by all the State and Territory Censorship Ministers (usually Attorneys-General). Despite this, South Australia still maintains a separate Classification Council which can override national classification decisions in that state.

The National Classification Code states that "adults should be able to read, hear and see what they want". The Classification Board does not directly censor material by ordering cuts or changes. However, they are able to effectively censor media by refusing classification and making the material illegal for hire, exhibition and importation to Australia.

For information go to <http://www.classification.gov.au/Pages/Home.aspx>

**ii)** **The Australian Communications and Media Authority (ACMA)**

ACMA is an Australian Government statutory authority within the Department of Broadband, Communications and the Digital Economy. The ACMA has responsibility for ensuring most elements of Australia's media and communications legislation, related regulations, and numerous derived standards and codes of practice operate effectively and efficiently, and in the public interest.

For further information go to http://www.acma.gov.au/WEB/HOMEPAGE/PC=HOME

***12. Please provide information on the possibilities for artists to perform street art and/or to use public spaces in general for their artistic performances, such as public gardens. What are the approval procedures for this?***

Approvals are required from the relevant local government authority and vary between them.

***13. Please provide a short summary of any public debates that may have taken place at the level of legal / policy making bodies relating to the impact of free market policies on artistic freedoms, and/or on achieving the balance between private / public sponsorship.***

The most influential recent discussions have been around Indigenous protocols, sedition, artists working with children, digital copyright and government subsidy.

***14. Does your country have an independent artists’ council, representing professional artists? If so, does the State consult the council on matters related to the status of artists or has the State developed channels of regular communication (through for instance consultations, debriefings, public hearings, etc.) between relevant authorities and independent organizations representing artists?***

ArtPeak is the confederation of 34 Australian national peak arts organisations. It is made up of artform specific organisations like the National Association for the Visual Arts (NAVA) which is the peak body representing the interests of the professional visual and media arts, craft and design sector in Australia. It also has as members, organisations that represent key areas of responsibility eg arts law, copyright, arts and disability, Indigenous arts, youth arts, regional arts etc. Both collectively and individually these organisations respond to government inquiries.

The organisations are both proactive and reactive in relation to matters of policy and legislation affecting the arts. Consultation is usually at the instigation of the arts organisations, though at times they may be invited to make submissions in response to government discussion papers and inquiries and arts policies.

***15. Are there any State or artists’ organizations in your country established to collect the income from artistic creations/performances for re-distribution to artists? What is the annual in-and outflow of money to and from such organizations?***

Copyright collection and distribution organisations are:

* Copyright Agency - http://www.copyright.com.au
* Viscopy - http://www.viscopy.org.au
* APRA/AMCOS - http://www.apra-amcos.com.au
* Screenrights - <http://www.screenrights.org>

Report submitted by: Tamara Winikoff

Executive Director, National Association for the Visual Arts (NAVA), Australia