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Australian Law Reform Commission's Review of Sedition Laws Discussion Paper 71

Response by The National Association for the Visual Arts (NAVA)

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The National Association for the Visual Arts (NAVA) welcomes the opportunity to respond to the *Review of Sedition Laws* Discussion Paper written by the Australian Law Reform Commission (ALRC).

NAVA is the peak body representing and advancing the professional interests of the whole Australian visual arts and craft sector, comprising an estimated 20,000 professional practitioners, 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 and craft sector and to increase professionalism within the industry. It has also provided direct service to the sector as a whole and to its 3000 paid members and 1000 student affiliates through offering expert advice, representation, resources and a range of other services.

NAVA's response

Overall, NAVA broadly supports the changes as proposed by the ALRC in its *Review of Sedition Laws* Discussion Paper, and urges the Government to adopt these changes, and to use appropriate means to influence the States and Territories to change their relevant laws in the same way, to achieve harmonisation.

NAVA's additional recommendations:

- 1. Change the subtitle from 'Sedition' to 'Offences Against Political and Social Liberty'**
- 2. Exempt Artists**
- 3. Legislate Freedom of Expression**
- 4. Develop Guidelines & Conduct an Education Campaign**

General Agreement

NAVA strongly supports the ALRC's recommendation that the Australian Government remove the term 'Sedition' from federal criminal law for all the reasons cited in NAVA's previous submission to the ALRC.

In particular NAVA supports the principle that any offence must always be linked to force or violence and:

- Proposals 8-1 and 8-3 that for a person to be guilty of any offence under s 80.2 of the *Criminal Code (Cth)* (*Criminal Code*), the person must intend that the urged force or violence will occur and the word 'intentionally' should be inserted in s80.2(1), (3) and (5) of the *Criminal Code* before the word 'urges'.
- Proposal 8-9 dealing with treason offences in 80.1(1)(e)-(f) where the conduct must 'materially' assist an enemy to engage in armed hostilities or war with Australia, going beyond mere rhetoric or expressions of dissent.

However, in addition NAVA wishes to make a few further comments and recommendations in relation to key issues pertinent to the visual arts and craft sector as follows:

1. Appropriate Terminology

NAVA agrees with replacing the term "Sedition" in Part 5.1 and Division 80 of the Criminal Code (Cth), with 'Treason and Offences against Political Liberty'.

However, NAVA has a reservation in relation to the proposed change to the heading of s 80.2 to "Offences against political liberty and public order". The concern is with the words 'public order'. There have been times in Australia's political history when claims of preserving public order have been used repressively, for example, laws preventing the right of freedom of public association enacted by Jo Bjelke-Peterson in Queensland to prevent public demonstrations, by limiting the number of people who could meet together on the street.

There is some question of whether the clauses in s80.2 (5) and (6) dealing with vilification and contention between community groups (which actually can be distinguished not only by ethnicity, national origin, race, religion or belief, but also by gender or sexual preference, class, age or any other distinguishing characteristic) belong in this area of the law.

If this remains the case, NAVA contends that some other term is required which defines the need for community wellbeing and respect between different groups to be ensured. NAVA believes this should be achieved without restricting communal or individual rights to temporarily disrupt public order eg using civil disobedience, for the purposes of challenging the current orthodoxies and bringing about change.

Artists on occasion have been the deliberate or unwitting cause of such disruptions of public order. An example, is the furore which erupted over the Andres Serrano work "Piss Christ" which the artist claimed was the result of a misreading by representatives of the Catholic Church of the intended meaning of the work. There were public demonstrations and threats against the work itself and the gallery attendants at the National Gallery of Victoria where the work was exhibited. In fact the work was viciously attacked and defaced. At times it is in the nature of art to cause such contention.

Since the term 'political liberty' adequately covers s80.2 (1), (2), (3), and (4) and sections (7), (8) and (9) are being recommended for repeal, it is s80.2 (5) and (6) that are in need of a covering term in the heading. NAVA would suggest that the heading become '*Offences against political and social liberty*'.

2. Exemption for Artists

Most importantly Proposal10-2 should go further than simply being taken into account as the background circumstance to conduct. An **exemption** from any charge or penalty should apply if a person's conduct was done in the research and development (this condition should be added to the list), performance, exhibition or distribution of an artistic work or in the course of any statement, publication, discussion, debate, report or commentary made or held for any genuine artistic purpose.

While NAVA agrees with the proposition in section 10 in relation to the "good faith" defence, it proposes some further consideration of the issue. NAVA notes the AGD's concern that exemptions might allow terrorists to use education, arts or journalism to shield their activities. Determining when a person is acting with a genuine artistic purpose presents challenges. The aim would be to distinguish between terrorists and genuine artists, and to prevent charges being laid against artists when they are undertaking legitimate artistic activities.

If the current good faith arrangements were to remain, the very act of artists having to defend themselves against a charge and find the financial means to gain adequate legal representation to prove that they acted in good faith, could be a very effective form of silencing them. It could be used repressively to quell their criticism, satire or comment. With 50% of visual artists living below the poverty level, this is a very real threat.

Identification of Professional Artists

There is no definition in this area of the law of 'art' or 'artistic purpose' and the definition in the Copyright Act is too narrow. With art practice being so diverse, any definition must embrace its full scope. In the case where someone may be at risk of being charged with an offence, especially such serious ones as are being dealt with here, a definition may be necessary to guide the actions of those contemplating bringing such a charge. Such a definition should be based on **artistic intention** as well as medium or mode of expression, site of performance or exhibition, and mode of distribution. Because it has been recognised that an artist's intention is open to interpretation, when in doubt, the advice of a number of (at least three) widely respected professional contemporary art experts should be sought before any charge is laid.

It also should be possible to identify whether the person has been working as a professional artist. The Australian Tax Office (ATO)'s Taxation Ruling TR2005/1 *Income tax: carrying on business as a professional artist* provides valuable guidelines that are based on the nature of professional practice in the arts industry and were devised in consultation with arts industry representatives.

3. Freedom of Expression

NAVA recognizes that freedom of expression goes beyond the terms of the ALRC's review. However, in the absence of a statutory human rights framework in Australia, NAVA remains concerned that even the modified laws as proposed by the ALRC still do not provide any guarantee of Australian people's right to legitimate freedom of speech and other forms of expression. To counterbalance the restrictions contained within these laws under discussion by the ALRC, and other existing related legal restrictions on certain forms of expression, a federal Bill of Rights

needs to be legislated, similar to that provided in most comparable foreign countries and to those currently being considered by the majority of Australian state and territory governments (ACT, Victoria, NSW, Tasmania and Western Australia).

4. Guidelines and Education Campaign

NAVA knows of many cases of censorship of artists, almost always without legal justification. It is very concerned that more recently, the incidence of threatened and actual censorship or intimidation by security officials and police and all three levels of government has increased markedly. It is also the case that in this environment, artists are censoring themselves and we are seeing “the chilling effect” in action.

The danger is that legitimate forms of cultural expression are being discouraged or prevented in a country that has prided itself on its tolerance and commitment to democratic and human rights principles. To counter this presumably unintended affect, NAVA again urges the ALRC to recommend that the Australian Government should work with arts experts like NAVA to provide authoritative guidelines and an educational campaign to inform the police, security staff, community interest groups, cultural institutions and government departments about what is the appropriate course of action when a complaint is made by members of the community about an artist or an artwork or when there is some doubt about whether an artwork or arts event is possibly breaking the law. NAVA would be keen to collaborate and provide advice and assistance for this purpose.