**Working Paper No.…**

# Visual Arts Industry Guidelines Research Project

## FREEDOM OF EXPRESSION

**Final Draft Report, Jenny Lovric, 21 June 2001**

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## Introduction

### Aims

This research was undertaken in 2001 with the aim of identifying some of the issues involved in censorship and restrictions on the freedom of expression in the visual arts in Australia. The report identifies some of the laws and policies which inform the freedom of expression in the visual arts, articulates some of the issues and concerns, and compares some of the current Australian and international laws and debates. The report also suggests some recommendations on policy and legislation in the area of freedom of expression.

### Methodology

The report is based on an analysis and comparison of the current laws and policies which inform art practice and restrictions on freedom of expression. Information was also gathered from interviews with people from various public and private arts organisations including policy officers, artists, gallery proprietors or directors, lawyers and academics. A survey of a random mix of national public and private galleries was also conducted to get an idea of the current practices employed when dealing with contentious or controversial art work. The report also uses case studies and court decisions to illustrate some of the problems which arise when artists are censored and galleries are challenged for producing provocative artwork.

### Target Audience

This issues paper is designed to assist **artists** by providing an overview of the laws which may affect their art practice, including their exposure to liability the event that their work is challenged. It also provides a reference list of referrals for specific advice.

It will similarly assist **gallery and museum directors** to have an idea of their responsibilities in relation to the display of controversial artworks, and to

articulate the roles which galleries and curators may chose to play in any discussion or advocacy about censorship or freedom of expression.

### A note on language

- Much of the information in this brief is of a technical nature. The principles of plain-english language have been used wherever possible. However, in some cases when outlining the technicalities of the legislation or reasoning of judgments, it is impossible to be precise and legally correct without using some technical/legal terminology.
- Some of the language used when talking about censorship sometimes sounds (unintentionally) laden with value-judgements. For example, the words “obscene”, “offensive”, “indecent” and “controversial” do not necessarily mean that artworks so described are in fact the things those words connote or imply. This is perhaps part of the problem when talking about restrictions on the freedom of expression.

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## RESTRICTIONS ON FREEDOM OF EXPRESSION

*In 1996, Karen Lindner, in a collaborative project involving the Victorian College of the Arts (VCA) and Transfield Obayashi construction company, created an artwork for Melbourne's City Link Tunnel. The artwork displayed the text "Why do you control?" "Why are you afraid of your vulnerability?" "Your superiority is an illusion". No objections were raised by the VCA or Transfield. However, the then Kennett government ordered that the artwork be covered during its fourth anniversary celebrations, a government spokesman commenting that "…it is not an artwork – at this stage we are only seeing a series of questions". Kennett responded to the outcry: "… if the art community want, as they do, corporate sponsorship, they must decide whether to bite the hand that feeds them".*

*In January 2001, police attended an art bookshop in Adelaide following an anonymous complaint to Crime Stoppers (a police policy initiative which encourages the community to speak up about crime, or perceived crime). The complaint to police was about alleged pornographic images of children in a book. The bookshop assisted police in trying to locate the publication meeting the description in the complaint without success. Finally, the police officers came across the Robert Mapplethorpe book titled "Pictures' Despite the book clearly not being the subject of the complaint the Mapplethorpe book was seized by police and submitted to the OFLC for classification.*

*The OFLC Board unanimously decided the book was a "bona fide artwork" and by reference to the Guidelines found that the book should not be restricted. Noting that the book may offend some sections of the adult community, but that it does not "offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that [it] should not be classified" and was "authentically set in [a] particular historical or cultural context."*

*However, the South Australian police sought a review of that decision, and on 9 March 2001, the Classification Review Board determined that the publication was now to be given a restricted categorisation – requiring it to be sealed and marked as restricted. The review board again acknowledged the artistic merit of Mapplethorpe's work, but in applying the guidelines it considered that the book's content required an adult perspective and that exposure to many of its images could disturb minors and was therefore unsuitable for viewing by those under 18 years of age.*

*The proactive police actions were not unnoticed. Parliament noted that while clearly the police have the right to have a publication reviewed under the classification legislation, perhaps there is a better use of police time and resources than pursuing this kind of matter. It was also commented that South Australia is now the only place in the world where the book Pictures has a restricted classification (see Hansard, SA Legislative Council, 14 March 2001).*

*Polish artist Wodiczko proposed a slide projection of US and Soviet missiles in a plaza in a New York park (The Grand Army Plaza Projection ). The park had an agreement with the local community board, stating that any cultural or artistic event that brings politics to the park are to be excluded. In essence, the message was that any work should not be politically explicit. Despite these initial reservations, the projections proceeded. Sometime later, Wodiczko proposed to show a reconstruction of this project, at a gallery in Poland. His idea was presented to the relevant censorship board. The artist was told that it would be impossible to present the work because it would violate a provision of the censorship code, which says that under no circumstances are weapons of the US and Soviet Union to be visually depicted as of equal weight, volume or quantity.*

The above real scenarios are just a few examples of the possible restrictions an artist may innocently encounter when going about their day-to-day business of making art. Unlike the United States, Australia has no constitutional right of self-expression – Australia only an implied guarantee of freedom of political communication about governmental or political matters. This implied right does not extend to commercial speech such as parody, satire or artistic expression. While governments espouse adherence to the liberal democratic spirit which fosters and encourages freedom of expression, those apparent freedoms are in fact fettered by many laws. While few of these laws are specifically made to restrict or regulate the creation of artworks, many of those laws have the potential to impact on artists' practice. These include laws relating to blasphemy, obscenity, libel and defamation, anti-discrimination and anti-vilification laws, trade practices laws (prohibiting misleading and deceptive conduct), internet publication and copyright restrictions, and classification regimes which prohibit and restrict a broad range of communications and publications.

**What is "artistic expression"?**

When discussing the fetters on the freedom of artistic expression, it may be thought to be useful to define what exactly *is* artistic expression. However, the scope of this paper cannot possibly hope (and possibly, nor is it desirable) to define what artistic expression, or indeed, what is art. Instead, this paper focuses on the *instances* where artistic expression is impugned.

Generally, there are no restrictions on artistic expression until it enters particular domains (the sacred, the pornographic or the unlawful). And just what it is that distinguishes acceptable artistic expression from the unacceptable (and thus worthy of restriction) is not always straightforward; and is certainly subjective (see, Fox, *The Concept of Obscenity*, (Law Book Co., Sydney, 1967), p 5).

What also must be stressed is the importance of issues of culture, class, gender and politics in the operation of any restrictive (including legislative) regime. The laws relating to freedom of expression are not a discrete or unified area of law – there is no unified system nor any over-arching principles. Nor are the laws the result of some kind of logical social consensus

– many of the laws which impinge on artistic expression are a residue of antiquated laws still sitting in the statute books. Furthermore, the considerable discretion that can be exercised in the process of law enforcement must be emphasised.

## Freedom of expression versus regulation

The points where artistic expression and regimes of legal regulation intersect are problematic. Artistic expression is not commonly overseen or regulated by specific, purpose-built legislative regimes; thus when matters are fought in the courts it is often a case of fitting square pegs in round holes. Artistic practice (by definition the exercise of unfettered creativity) and regulation, make uncomfortable adversaries. While sometimes seen as avant-gardists, artists are not traditionally seen at the cutting edge of any *law* reform agenda. It is perhaps unsurprising then that the law thus far has been an unsatisfactory vehicle to protect the needs of artists, or to adapt to the constantly changing modes of art practice.

Furthermore, the financial disadvantage endured by most artists (see D Throsby and B Thompson, *But what do you do for a living?: A New Economic Study of Australian Artists* (Australia Council, Redfern 1994) at 25) means that they are not often in a position to legally enforce their rights, nor defend their actions. Nor are impecunious artists the ideal choice of litigant to be sued for damages. This means that the legal regimes which may affect artistic practice are not often tested or expanded. Nonetheless, the threat of expensive litigation, and the coercive powers available through the courts (such as injunctions prohibiting conduct or the continuation of an exhibition) may have some impact on restricting artistic practice by over-cautious self-censorship by artists and galleries.

Notwithstanding the above, it is perhaps naïve to think that art should be immune from the myriad of legal regimes which impinge on everyday life, of which artistic expression is one facet. Is there a good reason for supposing that art should be exempt or protected from all regulation by the legal system? Conversely, should those who are defamed, offended, or vilified by an "offensive" artwork not be allowed to express their concerns? Just how a society chooses what warrants special legislative protection raises big questions about the purpose and function of regulation, and whether society considers some people or some situations too vulnerable to unfairness to leave them to fend for themselves. Laws are sometimes made to protect the vulnerable from hurtful attacks, offensive conduct and violence. In the arts, the effect of these laws can result in censorship.

"Best practice" guidelines in relation to freedom of expression may assist by anticipating situations in which public disquiet or censorship of an artwork may arise. Agreed policies and procedures could be used, and adapted, on a case by case basis. This may include a label or warning which further explains the artwork, and places it in context for the viewer. However, a fair criticism of this approach may be that this operates as a "domestication", or worse still, a taming or "dumbing down" of the artwork. Some galleries feel that policies or

guidelines are inappropriate for experimental art (see Survey outcomes below). It is arguable that well-researched, reasoned and educative public discourse in the face of controversy enhances public understanding of art. This may not challenge the viewer or encourage active appreciation, but it may at least foster tolerance and acceptance (surely a better outcome than the resort to violence which (allegedly) lead to the gallery-endorsed total censorship of an exhibition which occurred in the case of Serrano's *Piss Christ* exhibition at the National Gallery of Victoria).

**"Something the courtroom was never designed to be"**
(D Lipstadt *Denying the Holocaust* (NY Free Press 1993, at 220)

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.

What legal criminalisation of opinion or creative expression does, when redress is sought in the courts, is force the courts from a legal forum into an historical arena. In obscenity cases, the court is asked to analyse literary and artistic works; in blasphemy case the courts are asked to adjudicate on religious sensibilities. When the courts are forced to render a decision not on a point of law, but of history, art or literature the court becomes "something the courtroom was never designed to be." And when (often outdated) censorship regimes (which were not designed for adjudicating art) are applied to the arts, courts are using legal powers for purposes other than those originally intended by the legislator.

With the above presently unsolvable dilemmas in mind, the following is an overview of the laws which may affect visual art practice. Australia has a range of laws which potentially encroach upon freedom of expression which may affect *how* art, and *what* art, is communicated to and seen by the public.

The first section of this brief looks at legal regimes which restrict indecent, obscene, objectionable and offensive material, including classification schemes. The second section gives a brief overview of how defamation law, and defences to defamation operate in relation to the visual arts. The third section will look at anti-discrimination and anti-vilification legislation. The fourth section looks briefly at how copyright law, including the recent moral rights amendments, may both protect and restrict artistic expression; and the last section will look at other, non-legal forms of restriction which operate in the art world including institutional restrictions relating to sponsorship and funding.

## OBCENITY, INDECENCY, IMMORALITY, OFFENSIVENESS

***Human Earrings***

*An example of archaic offences being levelled against artists occurred in the English case of Gibson & Sylveire [1990] 2 QB 619 where the artists were charged with the common law offence of outraging public decency. The artwork, titled Human Earrings, was a model's head with two real freeze-dried human foetuses. The court found the artist and the gallery curator guilty. While some legislation has a defence of "artistic merit", the common law offence of outraging public decency does not: thus the case was conducted without reference to the fact that the work was an artwork and without considering the relevance of artistic intention. The Court of Appeal upheld the convictions.*

Most Australian states and territories have legislation which regulates indecent, offensive or obscene behaviour or conduct, or legislation which restricts the publication of obscene or indecent material. Because the laws are vague and unclear (and the fact that each state has different laws or models), there is great potential for restriction and artists may be particularly susceptible to attack on these grounds (see Shane Simpson, *The Visual Artist and the Law* (LBC, Sydney 1989).

Legal regulation of obscenity is imposed by the common law (the law made in courts) and statute law (the written law as made by Parliament). Some of the legislation relating to obscenity or indecency gives police wide-ranging powers to control public space by intervening in situations where there is no actual "victim" of the offensive or indecent behaviour. The provisions are vague and open-ended: characterisation of offensive behaviour or conduct is left to the discretion of the police and the court which ultimately adjudicates the offence.

A definitive characterisation of what is obscene, indecent or offensive is not possible. The laws relating to obscenity have their origins in earlier concepts of depravity and the corruption. The inherited English definition of obscenity is known as the Hicklin test of 1868: "whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall" (see *R v Hicklin* (1868) LR 3 QB 360 at 371). By 1948, the concept of obscenity as decided by the courts had moved away from the corrupting or depraving susceptible people, and towards a that which is used to describe things which are offensive to current standards of decency (see Fullagher J in *R v Close* [1948] VLR 445). In 1968, the High Court considered obscenity and indecency and said (per BarwickCJ) that material was indecent if, having regard to the manner and circumstances in which is was presented, it would offend the modesty of the average man or woman in sexual matters; and whether (per Windeyer J) the material transgresses the contemporary standards of decency of the Australian community (see *Crowe v Graham* (1968) 121 CLR 375). In the 1970s and 1980s most states began introducing their own classification schemes. The test used in these was generally the "reasonable adult" test: a measure of community standards and an acknowledgment that adults have different personal tastes. The "community standards" test refers to the "standards of morality, decency and propriety generally accepted by reasonable adults." (see The Hon Daryl Williams AM

QC, “From Censorship to Classification” in (1997) 4(4) *Murdoch University Electronic Journal of Law.*) These “standards” now form the basis of various censorship and classification regimes.

Without going into the detail of the various laws (which is done better elsewhere: see Shane Simpson, *The Visual Artist and the Law,* Sydney, Law Book Company (1989) and Simpsons Solicitors website http://www.simpsons.com.au) it is sufficient to note the following general points.

- Most legislation refers to a reasonable adult or recognised community standards test, while others continue to refer to material that tends to deprave or corrupt;
- The majority of cases brought under indecency or obscenity provisions concern sexually explicit material or religion;
- In testing the parameters of the legislation, the court adopts some of the language of the earlier decisions (such as whether a picture is an “affront to modesty” from *Crowe v Graham* (1967) 121 CLR 375, but takes account of current community values and the manner and place in which the article was displayed – thus an artwork may be indecent if exhibited at a school, but the same work would not be indecent if found in an art gallery – see *In the Appeal of Marsh* (1973) 3 DCR 115). However, some legislation problematically deems that the circumstances of the exhibition, among other things, is *not* relevant to determining indecency or obscenity (see s 33(4) of the *Summary Offences Act 1953* (SA)) implying that some material is inherently indecent or obscene! (see *Phillips v SA Police* (1994) 75 A Crim R 480);
- on the scale of severity of offence, indecent is at the lower end while obscenity is at the higher end.

Attitudes, sensibilities and sensitivities are not immutable, and statute books are slow to change. The odd case that comes before the courts has to struggle to accommodate the outdated concepts of those old laws.

One argument is that any prosecution of an artist for obscenity is misconceived (see Paul Kearns, “The Regulation of Art by English Obscenity Law” in (1999) 4(4) *Media and Arts Law Review* 229. The argument goes like this: viewers of an artwork create their own interpretation of it; art requires a meditative, as opposed to a moral response. Obscenity can only result from a moral, not artistic, perspective: it is the viewer who makes it obscene. However, this argument relies on the assumption that art inhabits a unique cultural space which is inherently obscenity-free: “it does not play host to obscenity in its distinctive ontological mechanism”, says Kearn (at 230-231).

The following briefly outline some of the common law obscenity offences:

**Obscene libel**

The prosecution must prove:

- that the thing has been published ie, communicated to another person,

- be obscene (whether the work is offensive according to current standards of decency and calculated or likely to deprave and corrupt. ie, the "Hicklin" test referred to above) The nature of the work and the manner and place of its exhibition are relevant.
- be published with a criminal intention to corrupt public morals. It is rarely used, possibly because of the legal difficulty in proving intent to deprave or corrupt.

**Blasphemous libel**.
Blasphemous libel is the publication of material that is likely to outrage Christian believers (see *R v Chief Metropolitan Stipendary Magistrate; ex parte Choudhury*. It remains part of the law in Australia but it is rarely used (though it was argued by the Catholic Church in the *Piss Christ* case in 1997, though the court there did not have to decide the issue on those grounds).

**Blasphemy**
Australian legislation has its origins in *Lord Campbell's Act* of 1857, an old English law which reflects a concern for community standards of decency. Modern permutations of the principles in more recent legislation accepts the rights of adults to see, hear and read what they want, while protecting the public from unwanted exposure to material considered to offend accepted community standards.

Federal legislation relating to obscenity or indecency includes:

- the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (discussed in further detail below);
- the *Customs Act 1901* (Cth) which controls the importation of indecent or obscene articles;
- the *Post and Telegraph Act 1901* (Cth) which controls the transmitting of indecent or obscene material through the postal system; and
- various acts relating to broadcasting – the most recent being the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) (discussed further below).

State and Territory legislation tends to refer to indecent as opposed to obscene material. These include various Crimes Acts, Summary Offences Acts, Police Acts, Censorship Acts or legislation relating to indecent articles and publications.

In the recent well-known case of *Pell v Council of Trustees of the National Gallery of Victoria* ([1998] 2 VR 391) the court was asked by the Catholic Church to find Andres Serrano's *Piss Christ* (a photograph of a crucifix immersed in urine) obscene, indecent and blasphemous, and that the gallery breached a criminal law by exhibiting or displaying an indecent or obscene representation. The church sought an order that the gallery be restrained from exhibiting the work. The court decided the matter on a technical point – that a civil court will not exercise the powers of a criminal court, and the court refused to use a civil restraining order to stop a possible illegal act (for a detailed discussion of this case see K Gilchrist, 'Does Blasphemy Exist?' (1997) December, *Art Monthly).* However, the court did discuss the role of the

courts when they consider art and community standards. Despite this, the gallery closed down the show, citing public and staff safety concerns after the work was viciously attacked and defaced.

**Artistic merit exemptions**

Some of the legislation and common law offences have a variety of "artistic merit" defence or exemptions. This means that the court (or arbitrator) must (if the legislation allows it) consider the work's artistic merit, or its bona fide artistic purpose. This is usually done by looking at the manner of the work and the place of display. However, the defence is not absolute, and the fact that a work has artistic merit, does not mean that it will not be found to be indecent or obscene. (see footnote this: see Colin Manchester, "Obscenity, Pornography & Art", (1999) 4(2) *Media & Arts Law Review* 65 at 71-76)

***artist purpose does not necessarily mean no indecency***

*Two photographers were charged and convicted of committing various acts of indecency with a person under the age of 16. The photographers had photographed an 11 year old girl, and defended their work on the basis that the photographs were taken for the purposes of making a political and artistic protest about the abuse of women. They were convicted and given non-custodial sentences but appealed their convictions. The Court of Appeal held that the fact that conduct is engaged in for political or artistic purposes does not mean it is immune from a finding of illegality or indecency. In other words, a finding of positive artistic merit is not mutually exclusive from a finding of indecency.*

*R v Manson and Stamenkovic* (1993) NSWCA, unreported, 16 February 1993

Leaving the issue of artistic merit to the courts to assess is problematic, and this has been recognised by judges. See, for example, comments made by Harper J in the *Piss Christ* case referring to the court's role as art critic, which "would take the court into places in which it has no business to be. "

This difficulty is also reflected in some legislation which allows the admissibility of expert evidence of artistic merit for the purposes of defending a charge of an offence.. (see, for example, s 578C(6) of the *Crimes Act 1900* (NSW) which provides for the opinion of an expert as to whether an artwork (among other things) has merit when defending a charge of publishing an indecent article)

Historically, the regulation of offences relating offensive or indecent conduct, and other "public order" offences occurred under legislation modelled on English legislation which prohibited activities such as beating a carpet, flying a kite in a public place and carrying uncovered meat (see, for example, the *Police Offences Act 1901* (NSW)). In recent history, a rhetoric of "tough on crime" law and order campaigns is familiar in every State pre-election. What is significant about this law and order rhetoric is that the offences under this kind of legislation rely heavily on police initiative and discretion. Vague

offences relating to undefined “offensive” behaviour or conduct, which takes place “in”, “near” or “within view of” a “public space” mean there is a greater opportunity of police intervention which may be inappropriate in many circumstances. (ref: Brown, Farrier, Egger, McNamara, *Criminal Laws* (3rd Ed, 2001, Federation Press, Sydney)

The *Summary Offences Act 1988* (NSW) provides an offence for “offensive conduct” (section 4), prohibiting a person from conducting himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school. A “public place” means a place open to the public, whether or not the place is being used by the public. A defence to a prosecution under this section is if the defendant satisfies the court that they had a reasonable excuse for conducting himself or herself in the manner alleged.

*The film-maker was filming a scene for a film which involved a cast of men having sex with eachother. All the cast and crew were over 18 and nobody apart from cast and crew present or within sight. All were charged under the Summary Offences Act with offensive behaviour taking place within 500m of a public place or school (in this case a hotel on the North Coast).*

So how should the laws relating to indecency, offensiveness or obscenity which affect freedom of expression of art be changed? A blanket exemption of art from those laws is neither practicable, politically viable or socially desirable.

**RECOMMENDATION**

One workable suggestion for reform is that there be a presumption, enshrined in legislation, that a work of art exhibited in a bona fide art gallery, be presumed to be not indecent, offensive or obscene. The gallery would have to be a genuine art gallery – to counter the suggestion that porn vendors would open galleries to legally peddle their goods. The presumption would be in addition to a defence of artistic merit so that the work could be considered in its proper context. (see Shane Simpson, *Visual Artist and the Law* at p ???).

**Classification/Censorship Regimes**

The current federal/state co-operative legislative scheme regulating censorship and classification came into effect in 1996. Under the scheme, the Commonwealth is responsible for classifying publications, films and computer games and the States and Territories are responsible for enforcing those decisions.

Classification decisions are made by the Classification Board located in the Office of Film and Literature Classification (“the OFLC”) by reference to National Classification Code (“the Code”) determined under the *Classification (Publications, Films and Computer Games) Act 1995* (“the Classification Act”). The Code contains general principles which form the basis of the

Classification Guidelines ("the Guidelines"). Classification decisions are to give effect, as far as possible, to the following principles:

(*a) adults should be able to read, hear and see what they want;*

*(b) minors should be protected from material likely to harm or disturb them;*

*(c) everyone should be protected from exposure to unsolicited material that they find offensive;*

*(d) the need to take account of community concerns about:*

*(i) depictions that condone or incite violence, particularly sexual violence; and*

*(ii) the portrayal of persons in a demeaning manner.*

The Code names and broadly describes four classification categories for publications: Unrestricted; Category 1 – Restricted; Category 2 – Restricted; RC (Refused Classification). Under the Code, publications that describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime or cruelty, violence or revolting or abhorrent phenomena in such as way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults should be classified as Refused Classification (RC). Publications that promote, incite or instruct in matters of crime or violence are also to be given a RC classification (see the *Rabelais* case where a student magazine titled "the Art of Shoplifting" which was classified by the Review Board as RC on the basis that it allegedly instructed in a matter of crime (*Brown v Members of the Classification Review Board of the Office of Film and Television Classification* (1998) 154 ALR 67). An appeal to the High Court which challenged the Federal Court's finding that the words "instruct[s] in matters of crime" must also encourage the illegal activity was refused – Jenny check HC special leave).

Decisions are primarily made by two boards administered by the OFLC (the Classification Board and the Review Board). Reviews of decisions of the Review Board are available in the Federal Court – but such reviews are only for an error of law, or an error of the Review Board to appropriately exercise the powers conferred on it. The administrative/legal framework of the OFLC has been described as "a de facto ministry of cultural standards" (see Gareth Griffith, *Censorship Law: Issues & Developments*, NSW Parliamentary Library Research Service, Briefing Paper 3/99)

The Classification Act has different procedures for the classification of film and publications. Films to be shown in public must be submitted for classification. Photographs or pictures fall under the definition of a publication. The Guidelines refer to 'bona-fide artworks" which are not generally required to be submitted for classification. Thus, artworks (including pictures or catalogues) will not be scrutinised under the classification scheme unless they are sent to the OFLC or a complaint is made. Bona fide artworks which may offend some sections of the (adult) community may be given an "unrestricted" classification category when authentically set in an historical or cultural context.

The Guidelines describe the scope and limits of material suitable for each category. (Separate guidelines exist for film and videos, and computer games.) Both the Code and the Guidelines are agreed to by the respective Commonwealth, State and Territory ministers. The Guidelines are available on the OFLC website at http://www.oflc.gov.au.

The Board must apply both the Code, the Guidelines and take into account matters set out in section 11 of the Classification Act. The relevant parts of section 11 of the Classification Act state:

"*The matters to be taken into account in making a decision on the classification of a publication include:*

> *(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and*
>
> *(b) the literary, artistic or educational merit (if any) of the publication; and*
>
> *(c) the general character of the publication, including whether it is of a medical, legal or scientific character; and*
>
> *(d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.*"

## Online regulation

An area of intense regulation and restriction is in relation to the internet. New on-line legislation (the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) ("the Online Services Act"), prescribes that all content must be suitable to children (under 18): something that traditional art spaces have never had to consider (see K Gilchrist, 'Millennium Multiplex: Art, The Internet and Censorship', Vol 6(1) *UNSW Law Journal Forum*). A significant policy initiative behind this legislation is the well-founded alarm about the proliferation of child pornographic material. However, whether it will restrict prohibited internet content and in the process over-regulate and restrict other legitimate artistic material (as well as the logistics of its operation) are areas of concern.
In the USA, a similar regime of online regulation (the *Communications Decency Act 1996*) was stuck down as unconstitutional in 1997 in *Reno v American Civil Liberties Union* (1997) 117 S Ct 2329.

The Online Services Act makes provision for individuals to complain to the Australian Broadcasting Authority ("the ABA") about an allegedly offensive website. The ABA can investigate the site, and if it decides the material therein falls within an R or X rating, it can issue a "take-down notice" to the internet provider hosting the site. The legislation also sets up a regime whereby the internet provider must take reasonable steps to restrict access to that site or face penalties. The scheme has been heavily criticised in that the logistics of implementing it are unworkable (see Delia Browne, 'The Curtain Falls Online" 4(2) *Artlines* 9; Niranjan Arasaratnam, "Brave New (Online) World", (2000) 23(1) *UNSWLJ* 205; Brendan Scott, "Dawn of a New Dark Age", (1999) 38 *Comp&L* 39; Melinda Jones, "Free Speech and the 'Village Idiot'" (2000) 23(1) *UNSWLJ* 274).

## DEFAMATION

The aim of defamation law is to strike a balance between protecting reputations and promoting freedom of expression. However, many argue that defamation in effect muzzles free speech. Actions in defamation are is procedurally very technical and expensive to run or defend and to makes things even more complicated, there are different procedures for defamation actions throughout the different states and territories of Australia. Publications available simultaneously nationally and internationally online raise complex matters (such as where a case should be run, and under which state's laws a defamatory comment should be determined) further confuse this area of law. This paper gives only a brief overview of the ways defamation may impinge on freedom of expression in the visual arts. For a more detailed analysis, see Shane Simpson, *The Visual Artist and the Law* (LBC, Sydney, 1989).

To bring a defamation action, the plaintiff must prove that (1) there has been a publication (or a "communication") to at least one other person; which (2) identifies the plaintiff; and (3) defames them. Once this is established, the court will consider whether there is any protection to be had from any of the available defences. Generally, a defamation action is brought to get financial compensation for the injury, loss, damage, hurt etc associated with the defamation. Everyone involved in the defamation can be liable: in the visual arts context this may mean that not only artists, but also agents and galleries should be aware that if they exhibit a defamatory work they become a participant in the defamation, and should thus exercise caution.

When claiming defamation, a plaintiff must show that the publication contained an 'imputation' which is calculated to bring them into hatred, contempt or ridicule (and thus causing injury) whether by direct statement, irony, caricature of any other means. A judge decides whether each separate imputation is capable of arising, and a jury then decides whether in fact those imputations arise, and whether they are defamatory.

A defendant must raise a defence to each and every imputation. There are several defences, but the one of importance for artists, reviewers, critics and satirists is that of "fair comment". To prove fair comment, a defendant must show first that the communication is a *comment* – as in an opinion, rather than a statement of fact. Secondly the defendant must that the comment is based on facts that are true and are plainly stated or widely known. Thirdly, the defendant must show that the comment was on a matter of public interest or concern.

In the visual arts, defamation may most commonly arise in the contexts of art criticism, satire and social or political comment. Below are local examples of each.

### a. Art criticism

In *Meskanas v Capon,* artist Vladas Meskanas submitted a portrait in the Archibald Prize. Edmund Capon, the Director of the gallery exhibiting the

work, was reported in the press as saying “It’s simply a rotten picture…I looked at the picture and thought ‘Yuk’!…The hand’s all wrong, so are the eyes.” Meskanas claimed that Capon’s comments imputed that the artist was an inferior and incompetent artist who painted a second-rate picture. Capon said that his comments were directed towards the painting and not the artist. Nonetheless, the jury found that Capon’s comments were defamatory (in that they imputed that Meskanas was an inferior artist) but awarded Meskanas a mere $100 damages!

**b. Satire**
In *Hanson v ABC* Pauline Hanson successfully obtained an injunction against the ABC restraining it from broadcasting performer/comedian Pauline Pantsdown’s song ‘Back Door Man’. Hanson claimed that lyrics including “I’m a homosexual” and “I’m a back door man for the Ku Klux Klan” gave rise to defamatory imputations which exposed her to ridicule and contempt. This was despite an explicit disclaimer by ABC announcers before they played the song that it was “satirical and not to be taken seriously”. The ABC applied to have the matter heard by the High Court, which declined to hear the matter.

**c. Social/Political Comment**
In *Seidler v John Fairfax*, architect Harry Seidler unsuccessfully sued the newspaper which published a satirical cartoon captioned “Harry Seidler Retirement Park.” The cartoon depicted ten roofless structures. Heads of the occupants were just visible from the tops and through slots of the structures. One occupant was being fed through a slot, and at the rear of another box an attendant was removing excreta. Despite finding the cartoon defamatory, the jury found that the defence of fair comment applied – the cartoonist was merely expressing an opinion.

It is worth noting that as with most litigation, the use of defamation law is generally weighted heavily in favour of wealthy corporate entities or individuals who can use the laws to suppress dissent or criticism by a comparatively disadvantaged defendant; or alternatively use their massive resources to defend against less well-heeled plaintiffs. And as the *Meskanas v Capon* case reveals, even if a relatively indigent artist is successful in running a defamation action, they may be held in pitiful esteem as reflected by the meagre damages award. (Compare this with the damages of $350,000 originally awarded by a jury to sports identity Andrew Ettinghausen for defamation arising from publishing an unauthorised nude photograph.)

Further information on defamation can be obtained from the Arts Law Centre (see their online infosheets) and Shane Simpson’s *Visual Artist and the Law*.

**Defamation on-line**
An interesting twist to the censorship and internet debate is the issue of when and where a libel takes place in cyberspace. Currently, the Supreme Court in Victoria is hearing argument about whether an alleged defamation said to have taken place against businessman Joseph Gutnick by the US company Dow Jones is libellous in the place the offending material was placed onto the

internet (in the USA) or where it was read (in Victoria, Australia). As at the time of writing, there was no court decision.

## DISCRIMINATION/VILIFICATION and LIMITATIONS ON EXPRESSION

A number of Australian jurisdictions have enacted legislation over the last decade making it unlawful to discriminate or publicly vilify individuals or groups on the basis of race (which includes ethnicity and national origin).

Anti-vilification laws generally protect against any act that happens publicly as opposed to privately, and that could incite (encourage, urge or stir up) others to hate, have serious contempt for, or severely ridicule someone, or a group of people, because of race, nationality, descent, ethnic or ethno-religious background, homosexuality, someone living with HIV or AIDS or if they are transgender (transsexual). This includes vilification because a person is thought to be, or imputed to be, lesbian, gay, living with HIV or AIDS or transgender.

Provisions in the states and territories which have (or are considering) analogous legislation exempts acts that are done “reasonably and in good faith” for academic, artistic, scientific, research or other purposes in the “public interest”. For example, section 18C of the *Racial Discrimination Act 1975 (Cth)* (“the RDA”) provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely to offend, insult, humiliate or intimidate another person of a group of people, and the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group. But section 18D of the RDA provides the exemption: “section 18C does not render unlawful anything said or done reasonably and in good faith…in the performance, exhibition or distribution of an artistic work”. So, where an artist, for example, claims a defence under s 18D, the onus is on the artist to satisfy the adjudicator (usually a Commissioner from the Human Rights and Equal Opportunity Commission; or a Federal Court judge) that the making and exhibiting of the work is “an act done reasonably and in good faith”. See also, for example, s 20C(2)(c) of the *Anti-Discrimination Act 1977* (NSW) which excludes an act done reasonably and in good faith for artistic purposes (amongst other purposes) or for purposes in the public interest.

These kinds of exemptions have not been received with unanimous support. At the time of writing, the Victorian parliament was debating the proposed Racial and Religious Tolerance Bill which contains similar “artistic” exemption provisions to other jurisdictions (see the following from Parliamentary Debates (Hansard) Leg Assembly 5 June 2001 “what if a person goes to a concert where an artist tells a joke that vilifies someone and he repeats it outside; will that person be charged where others are not? That is a major concern, and maybe the minister might take that on board ...). And one academic has argued that the special status accorded to the exempted acts is “a clear manifestation of the social reality that racist acts of social elites are privileged, even though the harm occasioned by such acts may be more pervasive than

that arising from a crude act" (see Margaret Thornton, *The Liberal Promise* (Oxford University Press, 1990) at 50.

The other argument which challenges vilification and free speech debates is that only advantaged or well-organised groups have the power and freedom to express their ideas by virtue of their greater share of power and wealth (see Proff Kathleen Mahoney, *Hate Vilification Legislation with Freedom of Expression: Where's the Balance?* (Ethnic Affairs Commission, 1994, Sydney)).

These laws are relatively untested in relation to artistic expression, but it is possible that some artworks could be rendered unlawful by these provisions – the laws implicitly recognise that sometimes there are countervailing interests that take precedence over freedom of expression

Interestingly, there is no reason why criminal legislation could not be used to prohibit racial hate speech – but it is a matter again of whether police use their discretion to take action under the crime laws. It has been commented that "whilst [the Summary Offences Act] *could* be used as an anti-racial-hatred law, it has actually been overwhelmingly used by police *against* Aborigines" (W Sadurski, *Freedom of Speech and Its Limits* (1999 at 116).It may seem curious that it is a criminal offence to tell someone to "fuck off" (offensive language under the summary offences legislation), yet a complaint of discrimination or vilification (for example hate speech targeting a particular ethnic group) attracts what seems to be lesser legal reprimand.

The recent case of *Bryl and Kovacevic v Louis Nowra and Melbourne Theatre Company* [1999] HREOCA 11 (21 June 1999) discusses some of the issues that are to be considered when an complaint of discrimination is brought under s 18C of the RDA. In that case, the complainants alleged that the characters in Louis Nowra's play *Miss Bosnia* (produced and staged by the Melbourne Theatre Company ("MTC")) were portrayed in an offensive manner on account of their national and ethnic origin. The complainants alleged that this offended, insulted, humiliated and intimidated a group of about 40 people "loyal to the lawful republic of Bosnia-Herzegovina." The respondents (Nowra and MTC) claimed an exemption under s 18D of the RDA on the basis that the play is an artistic work which was written and produced reasonably and in good faith. In finding that there was no case, the Inquiry Commissioner considered the purpose of the legislation and found that the provisions should be interpreted broadly in favour of artists and freedom of artistic expression.

The Inquiry Commissioner considered that freedom of expression is a fundamental tenet of the common law (judge-made law); and that incursions by statute law into that fundamental freedom should not be lightly assumed; and any legislation which purports to do so should be strictly construed. In deciding what is "reasonable", the Commissioner considered that the exemption in section 18D reflects a recognition of the peculiar value placed on artistic expression, and here quoted a passage from a United States First Amendment case which considered the constitutional guarantee of freedom of speech. The Commissioner found the following statement from see *New York*

*Times v Sullivan* (1964) 274 US 357 at 375 consistent with the intent of section 18D:

> "it is precisely because of [their] capacity to remind us, again and again, that a [transient] world view is not the only view that makes a free society's artists among its most important democratic practitioners. It is thus precisely in art where it is particularly hazardous to discourage thought, hope and imagination"

The Commissioner concluded that a fair degree of artistic licence is permitted before something reaches the point of being beyond what is reasonable, "even where hurt, outrage, insult or controversy is the result. The balance is tilted towards freedom of artistic and performative expression". In deciding whether the work was done in "good faith" the Commissioner found that there would need to be something approaching dishonesty, fraud or an intent to mislead or injure to find a lack of good faith: and that there was nothing in the materials to draw an inference of lack of good faith.

## COPYRIGHT AND MORAL RIGHTS

While not strictly seen as a restriction on freedom of expression, copyright law has the potential to affect or inhibit some forms of artistic practice. The governing legislation is the *Copyright Act 1968* (Cth). The following are a few examples of how copyright laws may be relevant to art practice.

### Appropriation

Some post-modern critical art practices (eg appropriation or pastiche) may innocently constitute prohibited copying of another person's work. The intellectual intent of the appropriator is irrelevant – the court will look to (among other things) the objective similarity between the original work and the "copied" work to determine whether someone's copyright has been infringed.

Although no Australian cases have reached the courts, the following US case is of interest in this regard. In 1992, a photographer (Rogers) successfully sued artist Jeff Koons for copyright infringement and damages. Koons had appropriated one of his postcard images and had made a series of sculptures named "String of Puppies." Koons (and a vocal artistic community) argued that restrictions on appropriation would irreparably limit artists engaged in the critical art practice of appropriation. Koons argued that he was a "highly regarded artist" whose work was of repute compared to Rogers' "mundane" postcard. The court found that Koons' copying was deliberate, that Koons had attempted to use his significant position in the art business world to deny that he had simply plagiarised a less well-known artist's work, and that he infringed Rogers' copyright in the photograph.

### Moral rights

Recent amendments to the *Copyright Act* have introduced provisions for the protection of "moral rights" (see Part IX of the Act). Moral rights have been enshrined in legislation in various countries, with considerable variation. The

English, US, New Zealand and Australian regimes provide for the right to claim authorship of a work, and the right to object to distortions, mutilations or other derogatory actions taken in respect of a work which would be prejudicial to the author's honour or reputation.

The amendments had a difficult passage through parliament. Moral rights include many different media including literary, dramatic, musical, cinematographic as well as artistic works. One of the main sticking points concerned the film and television industry's proposed "waiver" provisions which would allow parties to contract out of their moral rights. An outcome was negotiated which ensured that all parties were satisfied that the waiver provisions (relating to co-authorship agreements in the film and television industry where the financial stakes are seen to be much higher) would not, without good reason, be applied to sectors outside that industry.

Moral rights have been described as "personality rights", in that they are based on the concept or assumption that an artist's or author's work is an extension of their personality (see see Law Report, 18/4/01, ABC Radio National online at www.abc.net.au/rn/talks/8.30/lawrpt/stories/s278801.htm). The legislation goes some way to ensure that when work is reproduced or exhibited or made available to the public, the honour and reputation of the artist is not diminished or harmed.

In relation to visual arts, this includes the right of artists to have their work properly attributed. The more controversial amendment is the right of integrity of the artwork: an artwork is not to be given derogatory treatment which includes distortion, alteration or destruction of the artwork, or the exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs, or the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation. This is the case whether or not the artist has assigned their copyright in a work. So, for example, if an artist has been commissioned and paid by a corporation to make an artwork for a building lobby, the artist retains the moral rights in the work (despite the fact that the corporation owns the artwork). If the lobby changes, and the artwork no longer fits, the artist has certain rights in relation to the artwork being changed (see the procedures to ensure the appropriate treatment of the integrity of the artwork set out in section 195AT of the Act).

Defences to moral rights infringement (see sections 195AR and 195AS) provide that there will be no infringement if it was reasonable in the circumstances not to attribute the author or subject the work to derogatory treatment. The court is to look at a number of factors to determine the "reasonableness" including the nature and context of the work, whether it was commissioned or created in the course of employment.

Somewhat bizarrely, it has been contended that moral rights may extend to any kind of work, as the court has a fairly low threshold for determining what constitutes an artistic work as an "original work" under the legislation. The name of "primadonna syndrome" has been coined to describe those in a

workplace who have such a high regard for their abilities to regard their output as “artistic works”. Whether this may lead to an action for infringement under the *Copyright Act* is yet to seen, but it would, at the very least, lead to workplace inconvenience (see Law Report, 18/4/01, ABC Radio National)

An artist who makes a successful claim for infringement of their moral rights may have a variety of remedies. These include financial compensation (damages), an order to prevent or stop a certain activity (an injunction), a declaration that a moral right has been infringed, an order that the defendant make a public apology for the infringement or an order that any false attribution of authorship, or derogatory treatment of the work be reversed or removed. (for further information on moral rights, see the Australian Copyright Council website at http://www.copyright.org.au).

The moral rights amendments have not yet been tested in the courts, but they may have significant implications for artists and galleries in the way that artworks are exhibited. Consider, for example, the 1985 incident at the Art Gallery of NSW, where part of Anne MacDonald’s artwork was covered up by the gallery after complaints by staff and visitors. Does these amendments mean artists could now invoke their moral rights to avert these kinds of situations? There are rumours that the legislation may be tested in a dispute over the Director of the National Gallery of Australia’s proposed plans to alter architect Colin Madigan’s original design. The current plans on the table add a multi-glass enclosure, and the issue is whether such alterations constitute a diminishing of the architect’s reputation, and whether the “good faith” requirements of the new legislation were properly adhered to (that is, whether Madigan was given specific notices of the proposed changes, and then adequate or requisite consultation with the architects).

Recent overseas cases which have enacted similar moral rights provisions, exemplify what may be in store:

**moral rights cases**

- In the French case of *Buffet v Fersing* (1962) D Jur 570 (Fr), the court held that an artist could recover damages when his artwork which comprised painting on six panels of a refrigerator was taken apart and sold as six separate panels.
- In *Huston v la Cinq*, Cass Civ Ire 1991 Bull Civ 1, No 172; the Cour de Cassation, the film-maker’s heirs successfully sued on the basis of infringement of the right of integrity of the film-maker when Huston’s original black and white film (The Asphalt Jungle) was colourised and broadcast on television.
- A French court found a stage director liable for an infringement of Beckett’s “Waiting for Godot” when the director cast women to play the two lead roles instead of men, contrary to the playwright’s stage directions (see TGI Paris 3e ch Oct 15, 1992 Revue Int’l du Droit d’Auteur (1993)).
- In the Netherlands, a cabaret singer who altered a song-writer’s lyrics during her performance of the song was prevented from doing so in the future on the basis that her low humour had destroyed the atmosphere

of the song and in doing so infringed the writer's integrity. (see Patricia Loughlan, "Moral Rights: A View from Town Square" in (2000) 5(1) *Media & Arts Law Review* 1 at 2

Patricia Loughlan argues that moral rights *may* constitute another regime which could (possibly inadvertently) restrict freedom of expression. that if one sees the purpose of moral rights legislation as preserving and consecrating the artist and his/her intention as sole repository of his/her artefact's meaning and truth, then moral rights legislation may in fact interfere and inhibit the political or transformative power of art. Such an interpretation may leave little scope for interpretation, appropriation, political comment or parody, because control of the artwork is firmly bound up in the artist-as-creator.

And while it seems that some sections of the art world are enthusiastic about these amendments, it may yet be the case that some provisions prove to be unexpectedly restrictive for some artists, notably those who in appropriating or quoting the work of others may be giving that other artist's work derogatory treatment. However, an artist practising appropriation may be able to rely on the defence that it was reasonable in their particular circumstances to subject the work being appropriated to "derogatory treatment" by arguing that appropriation constitutes "any practice, in the industry in which the work is used, that is relevant to the work or the use of the work." (see 195AS(2)(e) of the Act).

## INDIGENOUS ART: PRACTICE AND PROTOCOLS

While not in itself a reason for censorship, there are particular issues to consider when looking at Indigenous art and practice for both Indigenous and non-Indigenous artworkers. Some of the main concerns are about various uses of Indigenous heritage including the appropriation of Indigenous arts and cultural expression, unauthorised use of secret/sacred material and the appropriation of cultural objects and images, inappropriate display of images which may offend (such as displaying images or names of deceased people), Indigenous biodiversity knowledge, without informed consent or knowledge of the owners of that material.

Another important consideration concerns the different concepts of authorship which inform indigenous art practice: Indigenous art does not necessarily emphasise original creative individuals or assign them responsibility as author. Concepts of plagiarism and forgery are also different. Further, there are customary rules relating to a general ban on seeing or naming deceased persons within a certain period after their death which impacts on displaying art and portraying artists (see Marcia Langton, in '*Well, I heard about it on the radio and I saw it on the television…*' (Australian Film Commission Sydney 1993); Eric Michaels, *Primer on Restrictions on Picture-Taking in Traditional Areas of Aboriginal Australia;* and Michael McMahon, 'Indigenous Cultures, Copyright And The Digital Age' *Indigenous Law Bulletin* (1997), and Stephen Gray, 'Freedom or Fossilisation: Proposed Legislative 'Protection' for the Work of Aboriginal Artists' (Conference Paper, Cross Currents:

Internationalism, National Identity & Law 1995)). These issues raise important questions in relation to trying to fit Indigenous art and practice, and breaches of customary law into the already difficult Anglo-Australian legal categories and frameworks which impinge on art practice.

In the case of *John Bulun Bulun & Anor v R & T Textiles Pty Ltd* [1998] 1082 FCA a substantial part of an Indigenous artistic work was reproduced onto a t-shirt without the permission of the traditional owners of that image. The court held that "having regard to the evidence of the law and customs of the Ganalbingu people under which Mr Bulun Bulun was permitted to create the artistic work, I consider that equity imposes on him obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work. "

In the case of *Yumbulul v Reserve Bank of Australia and Others* (1991) 21 IPR 481, Terry Yumbulul, a successful traditional artist from north-east Arnhem Land, brought an action against the Reserve Bank and an artist's agent, Anthony Wallis, complaining about the reproduction of his ceremonial "Morning Star Pole" on the Bicentennial $10 note. Yumbulul's sculpture was an artwork which he was authorised to create under traditional law. The matter was settled as against the bank, but the agent contested the claim relying on an agreement entered into between the applicant and the agent whereby permission to reproduce an image of the sculpture. Yumbulul argued in reply that he had been deceived into entering the agreement by the agent's misrepresentations, that it was entered into by mistake, and as a result of the agent's unconscionable conduct. Although it appears that the judge was generally sympathetic both to Yumbulul's claim and to the situation of traditional Aboriginal artists, and although he was aware that the agent's defence would not have been valid under the traditional law of Yumbulul's own community, these arguments were not accepted the court decided the case in accordance with the narrow established categories of Anglo-Australian law.

As mentioned above, this is not censorship, but more an issue of appropriate and culturally sensitive practices which may mean some kind of modification or adaptation of procedures.

**Case Study – Infringement of copyright by Indigenous artist**

The survey of galleries and museums elicited one response in relation to freedom of expression and Indigenous art. In that case, an issue arose when an Indigenous artist used an image owned by another Indigenous artist's community without permission causing upset to that community and a request that the offending work be removed from exhibition. The complaint arose at the opening of the exhibition. The gallery's response was to immediately remove the work, and contact the artist. The artist then attended

the complainants' community, and the matter was resolved positively – the artist came away with a better understanding of the sensitivities.

The National Indigenous Arts Advocacy Association (NIAAA) is a national Indigenous arts and cultural service and advocacy association which advocates for the continued and increased recognition and protection of the rights of Indigenous artists. NIAAA also provides culturally appropriate advice, information, referrals and support services to Indigenous artists and organizations. The NIAAA's work involves advocating for the greater recognition and acceptance of the legal and cultural rights of Indigenous artists; and supporting initiatives for raising awareness and protecting Indigenous artistic and cultural expression.

It is important that Aboriginal and Torres Strait Islander people have control over the development of their own forms of artistic and cultural expression, as well as its interpretation and use by others, NIAAA strongly urges non-Indigenous artists, writers and performers to respect the cultural and spiritual significance of Indigenous people and refrain from incorporating elements derived from Indigenous cultural heritage into their works without the informed consent of the traditional custodians. (footnote this??? This is in line with international developments concerning the rights of World Indigenous peoples, specifically the principles and guidelines of the Special Rapporteur of the United Nations Economic and Social Council's Sub-Commission on Prevention of Discrimination and Protection of Minorities). For further information about NIAAA, visit their website: http://www.niaaa.com.au

It may be thought that copyright laws protect against unlawful copying or appropriation of Indigenous artwork. However, the laws have particular limitations. Some of these have been discussed in a far-reaching report titled "Our Culture Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights" by Terri Janke & Michael Frankel (1998, Institute of Aboriginal and Torres Strait Islander Studies) which sets out a blueprint for the better recognition and protection of Indigenous cultural and intellectual property.

The limitations of these protections include:

- Commercial interests are protected under copyright law, rather than interests pertaining to cultural integrity.
- There is no right of attribution for Indigenous communities over works that include or incorporate aspects of their cultural heritage.
- Rights are valid for a limited period and then become freely available, whereas under Indigenous laws, they exist in perpetuity.
- Individual notions of ownership are recognised, rather than the Indigenous concept of communal ownership.

"Our Culture Our Future" proposed the following amendments to the Copyright Act. It may be that any Code of Practice endorse these recommendations.

The recommendations in relation to copyright include:

- 'The enactment of a specific Act which protects all Indigenous Cultural and Intellectual Property is preferred over amendments to the *Copyright Act*. The specific Act should recognise Indigenous cultural ownership in Indigenous visual arts, craft, literary, music, dramatic works and Indigenous knowledge; and provide rights in that material which allow Indigenous people the rights of prior consent and to negotiate rights for suitable use.
- While a specific Act is favoured, if this option is not pursued amendments to the proposed moral rights provisions set out below should be further considered.

*Moral rights for Indigenous custodians*

- Further consideration should be given to amending the *Copyright Act 1968* to include moral rights for Indigenous custodians which provide the Indigenous cultural group whose tradition is drawn upon to create a copyright work with rights of attribution, false attribution and cultural integrity.
- Introducing a new type of work˜ "an Indigenous cultural work" defined as "a work of cultural significance to Aboriginal and Torres Strait Islander people"˜ should be considered. Where ownership of an Indigenous cultural work is communal, as opposed to individual, then the "Indigenous owners" should be given a right of attribution, a right of false attribution and the right of cultural integrity. However, this might only cover Indigenous cultural works within the copyright period and will not refer to Indigenous material currently considered in the public domain.

*Collecting fees for use of Indigenous cultural works*

- A compulsory licensing system such as that which sets up a copyright agency limited (CAL) is not appropriate for Indigenous cultural works. Any Indigenous collecting society or societies should be voluntary or set up under *sui generis* legislation. The authorisation of materials should be based on the premise of prior consent and rights should be given to the society under licence rather than as an assignment of rights

*Performers' rights amendments*

- A full performers' copyright should be generally supported for all performers. A general performer's copyright will protect Indigenous performing works such as ceremony and dance. Indigenous people need to be included in discussions about adopting a full performers' copyright".

Further information about 'Our Culture, Our Future' and recommendations, you can visit the Report's online site at http://www.icip.lawnet.com.au

The National Association of Visual Artists (NAVA) commissioned the Indigenous Visual Arts Protocols report. The report is designed to be used as a resource to assist in the education of non-Indigenous arts organisations and art professionals in culturally appropriate protocols for use in dealings with Indigenous artists and communities. The Protocols Kits will be available from NAVA later this year (2001). For further information, visit NAVA's website at http://www.visualarts.net.au/Web/nava

For an extensive reading list dedicated to Indigenous intellectual and cultural property, see the following bibliography on ATSIC's website at http://www.atsic.gov.au/library/reading_list/property.htm.

**RECOMMENDATIONS**

- That the recommendations of the 'Our Culture Our Future' Report be endorsed, and legislative reform advocated in the arts community at large.
- That galleries and museums formulate and adopt policies, guidelines or protocols in relation to the exhibition and display of Indigenous artworks that address issues such as collaboration, originality and identity (which also include specific guidelines or procedures, such as warnings, in relation to images or references to deceased people).

## INSTITUTIONAL CENSORSHIP and FUNDING

While explicit limitations or restrictions on freedom of expression in the visual arts may be troubling, perhaps a more sinister side of censorship it that which is covert: for example, restrictions arising from institutional politics.[i] It is important to note the role of "informal" methods of regulation which serve just as effective a role in restricting perceived offensive or obscene conduct or artworks. By this, I mean the role that public and private galleries, and artists themselves, censor artwork.(see Shane Simpson, *The Visual Artist and the Law* page ???) As part of the research, I am surveying a random mix of public and private galleries to get a better understanding of perception and extent of the problem.

In 1999 the much awaited 'Sensation' exhibition's visit to Australia (previously hosted in London and New York amidst much controversy) was suddenly cancelled. The reasons given were "museum ethics" – the exhibition was regarded as being tainted by shady commercial dealings and overbearing sponsorship interventions (see Hansard, Parliamentary Debates (Cth), Senate Estimates Committee, 25 May 2000, for an elucidating account by National Gallery of Australia Director Brian Kennedy on the reasons for the cancellation of the show). Kennedy considered 'Sensation' to be inappropriate for a public gallery such as the NGA. It was also revealed that Kennedy had forwarded copies of the exhibition catalogue to various Government ministers. Kennedy claimed that this was a "common sense" move: his office, and the relevant Ministers' offices had been flooded with letters condemning the exhibition - it made sense for them to have something to respond to the letters with. Kennedy denied that he was soliciting objections to the show's content. The arts community responded with greater concern over the perceived censorship on the basis of the controversial *content* of the exhibition, than on the cancellation on the basis of museum ethics. Whichever was the decisive factor, the power of a public institution to dictate what the public should or shouldn't see is alarming. Similarly disturbing is the NGV's closure of the Andres Serrano exhibition. Interestingly, in London it was the portrait of child killer Myra Hindley which caused public outrage; whereas in New York, it was Chris Ofili's *Holy Virgin Mary*, a black Madonna daubed in elephant dung which stirred controversy. In Australia, real controversy was averted apart from heated speculation about the reasons behind the show's cancellation.

Also worth considering is the acquisitions strategy of galleries (and in particular if looking to government support of the arts, public gallery strategies). A dominant criteria for increased gallery funding (and directors' salary size) is public access (see Tim Bonyhady, 'Hang the Expense', *SMH*, June 2-3, pp1, 10-11). Museums and galleries must demonstrate the success of their acquisitions, exhibitions and extensions to justify their funding claims – thus there is a heavy reliance on performance targets and high audience attendance. And one side-effect of focusing on increasing attendances may be an unadventurous exhibition. Famous names trump lesser-known experimental artists (who apparently don't draw attendances: the audience is exposed to decreasing diversity and less challenge. This may result in a generally more restrictive climate: art on display is predictable, safe and market-tested (and sometimes politician-tested – consider *Sensation*) and brings home the bacon.

**FUNDING**

Funding may not be seen strictly as a live censorship issue, but it has potential to become one especially in times of rising and regressive conservatism, and the ever-decreasing pool of government and corporate funding for the arts. The decline of government funding, conditions attached to grants or funding, combined with the diminishing investment in privately-sponsored art prizes (such as the *Seppelt* and *Moet et Chandon* art prizes) translates into less opportunity, more uncertainty and possibly tricky restrictions for contemporary artists.

The issue is of government arts funding has been controversial in the USA – in particular the debates surrounding the NEA – the National Endowment for the Arts. While freedom of expression versus state censorship is clearly the main issue, the debates are interesting in that they are couched in terms of the public's right to have a say in, or at least oversee, the way governments spend the tax revenue (see Carl F Stychin, "A 'Timid Esthetic'?: Performance Art in the United States Supreme Court, (1999) 4 *Media and Arts Law Review* 4).

When the NEA was founded in 1965 it was intended to be free from political influence in its grant-making decisions which were based upon the recommendations of peer review panels. The controversies have arisen in the (predictable) outrage when certain politicians discovered that NEA was responsible for funding Mapplethorpe and Serrano (of *Piss Christ* fame) exhibitions. This lead to the requirement that funding recipients certify that no funds would be used to promote material that could be deemed to be obscene (with the focus being on homoeroticism), and that "general standards of decency and respect for the diverse beliefs and values of the American public" were considered in funding decisions. This eventually lead to a constitutional challenge in the Supreme Court when a group of performance artists were denied funding, despite recommendations of the relevant review panel (see *National Endowment for the Arts v Karen Finlay* (100 F 3d 671). The artists argued that the "general standards of decency" were too vague and too broad to be constitutionally valid, and that it violated the First

Amendment's prohibition on view-point based restrictions on protected free speech. The case went through a lengthy appeal process and concluded with the majority of the Supreme Court (the highest US Court). The majority of the Supreme Court decided that there was no *direct* prohibition on the funding of artistic works which defied the impugned decency standards and thus there was no compromise of the First Amendment values. Those standards simply informed the assessment of artistic merit.
However, the Court cautioned that if the NEA were to disproportionately fund on the basis of particular criteria and penalise disfavoured viewpoints, then it may offend the First Amendment .

In Australia, unlike the USA, government arts funding has not been an area of overt censorship. The Australia Council is Australia's principal arts funding and advisory body. The Council's functions are defined under the *Australia Council Act 1975* (Cth), including the formulation and carrying out of policies designed "to uphold and promote the rights of persons to freedom in the practice of the arts" (section 5).

In 1991, the *Australia Council Act* was amended to oblige the Council to have regard to Commonwealth Government policies and, where practicable, to the policies of State and local governments. The amendments were introduced as a rationale for streamlining ministerial policy in relation to the arts. The resulting "at arm's length – but not out of reach" provisions reflect a degree of ambiguity. When the amendments were debated in Parliament, the government acknowledged the task of distinguishing how much regard the Council should have to the wishes of governments, but affirmed the policy of arm's length funding. The Council should have freedom to make up its own mind and be able, within the broad realms of Government policies, to distribute money to particular groups. The amendments (ss6A and 6B) are headed "Directions by Minister". It states that where the Minister is satisfied that it is desirable and in the public interest to do so, the Minister may give the Council a direction with respect to the performance of its functions or exercise of its powers. Compliance with such a direction is mandatory. Parliamentary debates indicate that the addition of this provision "is intended to assist in ensuring that the Council is in no doubt as to the Government's intentions and expectations with regard to the policies which are to guide its operations". However, it seems clear that the power of ministerial direction "is not to apply to decisions on individual grants" (see 2nd Reading Speech, Parliamentary Debates, 7 November 1990).

## Moral indignation and funding

In New York Mayor Rudy Giuliani recently vowed to set up a "decency taskforce" to set "decency standards" for publicly funded art exhibitions in the wake of another "outrage" at the Brooklyn Museum of Art. The latest incident follows the mayor's unsuccessful legal challenge to the Sensation exhibition, also staged at the Brooklyn Museum of Art which he lost on First Amendment grounds. The source of the mayor's ire this time is black photographer Renee Cox's *Yo Mama's Last Supper* – a colour photograph depicting the Last Supper, with the photographer, nude and arms outstretched, as Jesus Christ.

The photograph, produced in 1996, had previously been displayed in other galleries without incident (including a 16th century church during the 1999 Venice Biennale). Interestingly, another photograph in the earlier Sensation exhibition by English photographer Sam Taylor-Wood depicted Jesus Christ as a white topless woman in a photograph titled *Wrecked* – but this caused little controversy, raising questions about whether it was the title, the amount of bare flesh, or the colour of the skin that raised the mayor's rancour .

Referring to *Yo Mama*, Giuliani commented "if you want to display viciousness, hatred, ignorance, anti-Catholicism, racism or anti-Semitism, then you must go find a private museum that wants to pay for it…you cannot use taxpayers' dollars". The mayor has stated that he is considering mounting another court challenge based on an earlier ruling that endorsed "decency standards" for the National Endowment for the Arts. However, in that case the court did not uphold decency standards for the exhibition of art in publicly funded museums (stating that to do so would amount to breaches of the First Amendment). It did, however, uphold a Congressional decency test for awarding federal art grants. While Giuliani threats legal action, the publicity has assured near-record numbers attending the show.

The controversy raises important issues about the conditions and contingencies which may attach to public funding of exhibitions; including whether the ideals of exhibitions are on the bargaining table when it comes to public funding of public institutions that display works that some consider unacceptable.

## OFFICIAL CULTURE, MARGINALISATION AND SELF-CENSORSHIP

### *Case Study: Trevor Fry's My Favourite Things*

*During the 2001 Sydney Gay & Lesbian Mardi Gras, Festival Director David Fenton refused to exhibit a video montage by artist Trevor Fry. Fry had been invited to contribute work to the annual 'Nude Salon', and Fry produced a montage showing masturbation, ejaculation, coprophagy and fisting – juxtaposed with still shots of found photographs of naked childrens' bottoms. Lamenting the "corporate institutionalising of gay culture", reviewer Bruce James notes: "so traumatised now, apparently, are gays and lesbians by the spectre of paedophilia, and so deeply entrenched has it become as a negative impetus in the formulation of principles, policies, philosophies and even of art, that a tendency to self-regulation has burgeoned into outright self-censorship" (see Arts Today, 1 March 2001, Radio National ABC)*

It seems that a certain amount of independence is afforded to the practice of culture so long as culture refrains from interaction with other social activity (in relation to some Eastern Bloc countries, see Crimp, 'A Conversation with Krzysztof Wodiczko' in Ferguson et al, *Discourses: Conversations in Postmodern Art and Culture* (New Museum of Contemporary Art and MIT Press, 1992) at 312). This operates as a kind of self-imposed marginalisation which of course begs the question of whether this kind of ad hoc approach

guarantees freedom of expression. Wodiczko compares the different categories of censorship in creating politically sensitive works of art in the West compared to the East (at 314). While in the West there is a generally a greater possibility for working in public, there is a need for more complicated strategies to deal with the complexities of institutional, corporate, state and community restrictions. And because censorship by the state can be pervasive, and because the state (or private corporations) may own the images, artists who want to comment on social reality sometimes resort to metaphor rather than direct statement. Herein lies a problem in Australia – freedom of expression is limited to political statements – if the statement is not overtly political, but is translated into the metaphoric, will the expression be immune from restriction? This may well be more of a theoretical than apparent problem: the instances of state intervention in public art in Australia are relatively rare.

Another issue surrounding "self-censorship" arises from the debates about the "elitism" of the Australian art scene. The Australia Council recently commissioned Saatchi & Saatchi to report on how Australians see and value the visual arts. The report has not been universally accepted as credible (it has been criticised for roughly advocating a "dumbing down" of aesthetic and artistic excellence). The report aims to be populist and (perhaps unsurprisingly, given that Saatchi & Saatchi, while supporters of the arts are a marketing firm) , focussed on appropriate marketing of the arts as a product. Whether these kinds of influences have a direct effect on censorship is difficult to trace. However, it could be said that a populist or anti-elitist approach to the arts, can indirectly foster a climate of mediocrity or conformity, and for the selective screening out of difference. (see Marci Hamilton, "Art Speech" , in (1996) 49 Vand.L.Rev 73, at 96ff).

Much censorship occurs at a local level – but perhaps has global implications. Institutional policies (for example, public spaces, libraries) may have policies which disallow certain artworks (for example, recently a public library in Long Island NY cancelled an exhibition of an artist's work because the show contained three paintings of abstractions of nudes – library policy. The artist sued the library for violating her First Amendment right – and won). However what could be alarming is the attitude that this does not amount to censorship; and self-censorship, in order to get an exhibition, may become a modus operandi, in essence, a domestication of expression is fostered; and in turn rewarded.

## SURVEY FINDINGS

As part of the inquiry into how issues relating to freedom of expression affect artworld practice, a questionnaire was sent to a random and national selection of private and public galleries. The response from the private sector (with one notable exception) was disappointing. However, this may simply indicate that these galleries do not see restrictions on freedom of expression in the visual arts as a pressing issue.

## RESULTS
### – who complains?

Unlike freedom of expression which is a privilege, the prosecution of an offence against the law is a right. Unfortunately, regressive conservatism can encourage moral activism.

It is interesting here to take note of the identity of the "whistleblowers" who instigate complaints on the basis of blasphemy, indecency or obscenity. Recent public incidents suggest the emergence of "puritan vigilantes" (see Kate Gilchrist, 'Does Blasphemy Exist?', (1997) December, *Art Monthly*) who unilaterally take on the role of policing art. Some examples include the complaints and litigation in relation to Serrano's *Piss Christ,* Mayor Guiliani's religious outrage in New York over the Sensation exhibition and more recently the Mayor's complaints about Renee Cox's *Yo Mama's Last Supper* - a photograph of the Last Supper, depicting a nude, black, female Jesus; not to mention the regular reactions to Mapplethorpe's photographs.

A survey of institutions who have been subject to some kind of inquiry on the basis of an offensive exhibit reveals that amongst those who reported the complaint include:

- Gallery staff
- Members of the public
- security attendants,
- police (acting on or without a complaint),
- gallery cleaners who complained to building management (ie, not the gallery)
- couriers
- schools "(catholic)"

In one case, a public gallery reported 1200 written complaints (sent to the gallery, the police and the Attorney General's office) asserting defamatory text in relation to an artist's work about the Pope – more likely than not a well organised campaign ,of complaints from a religious lobby group. The gallery did not remove the work.

### - curator's role

When asked what they saw as the gallery or curator's role in any debate about exhibiting challenging or "dangerous" artwork, the following responses were received:

"*Facilitators and "educators" – offering opportunity to artistic freedom of expression*"

"*Must have a clear rationale to justify inclusion of controversial work and make other staff aware of possible repercussions"*

"*Our role is as an advocate for artists"*

*“Negotiations and liaison between artists and exhibitors, work or resolve the problems as best [as] possible”*

*“we are there to assist artists to do what they want”*

*“Make decisions about relevance of work to the project – no point in making gratuitous offence. Once decided, stick with it!”*

In response to questions about what kind of action was taken to address concerns about controversial artwork, the following responses were elicited:

*“additional textual information provided to augment display”*

*“aspects of the exhibition were amended due to health and safety issues that arose during the exhibition period”*

**is there a need for guidelines, policies or procedures?**

Some respondents to the survey did advocate the utility of policy or procedure guidelines for their organisations. Some approach any controversy if, and as, it arises. Responses which did not advocate a policy included the following statements:

*“[e]ach situation is best dealt with on its specificity, ie no situation is ever the same.”*

*“A policy is too concrete for experimental art”*

*“Legislation and community attitudes change”*

Some galleries have formal or semi-formal procedures in place, depending on the situation. Many adopt the procedure of installing signs warning the viewer about the potentially offensive artwork.

One public gallery purposely decided against adopting a policy on censorship (as they feel concerns raised by the public occur infrequently) but instead has a procedure in place to ensure that any issues or public complaints that arise are dealt with in a co-ordinated, efficient and timely manner. The procedure involves:

- sighting the work by the gallery curator and public relations staff
- briefing key members of the gallery’s Board
- seeking an opinion from a relevant statutory authority (which may result in removing the artwork, and/or seeking legal opinion from lawyers as to its continued display, or providing additional text to elaborate on the context of the work and its display)
- nominating a designated gallery spokesperson
- briefing gallery staff
- contracting security staff
- briefing relevant government press officers
- responding to complaint.

This gallery has reported a good outcome in the complaints – in all cases the above procedures were observed and the contentious artwork remained. This is a clearly a more positive outcome than that which occurred in the *Piss Christ* exhibition.

## AN INTERNATIONAL COMPARISON

As mentioned above, Australia has no constitutionally entrenched freedom of expression. In countries which have the guarantee of freedom of expression enshrined in legislation (the USA has the First Amendment, Canada has the *Canadian Charter of Rights and Freedoms*, New Zealand has the *New Zealand Bill of Rights Act 1998*, and the United Kingdom has the *Human Rights Act 1998*), the right to freedom of expression has been argued in the courts with varying success. While few cases have been specifically about freedom of expression in the arts, those laws have potential to be applied to artistic expression.

Many of the cases which invoke the guarantee involve the court balancing conflicting legal rights (such as someone's copyright or a person's right to privacy with a right to freely express). See for example the recent case of *Douglas v Hello! Ltd* ([2001] 2 All ER 289; [2001] 2 WLR 992) where the Court of Appeal was required to balance rights of privacy and freedom of expression under the *European Convention on Human Rights and Fundamental Freedoms 1950* when a magazine surreptitiously obtained Michael Douglas wedding photos. The court held that English law recognises, and will protect, right of privacy drawn from value of personal autonomy. In Canada there is also some argument that defamation laws may be inconsistent with the guarantee of freedom of expression under the Charter (see Grant Huscroft, 'Defamation, Damages and Freedom of Expression in Canada' (1996) 112 *LQR* 46), and in New Zealand, a defendant unsuccessfully argued that the court-imposed bond to keep the peace breached the Bill of Rights.

Such arguments are unlikely to arise in Australia, given Parliament's historical reluctance to legislate a Bill of Rights.

In the USA, the First Amendment has resulted in courts finding that racial vilification laws are unconstitutional. Canadian courts have recognised that obscenity laws and anti-vilification laws interfere with the Charter guarantee of freedom of expression but departed from the US approach by focusing instead on the likelihood of harm and the threat to inequality which flows from the circulation of obscene or pornographic material. Thus Canadian courts have upheld anti-vilification laws by overriding freedom of expression under the Charter, and freedom of expression will be restricted in the appropriate case.

See for example the Canadian cases of *R v Butler* (1992) 8 CRR (2d)*, R v Kegestra* (1990) 3 SCR at 744-749 and *Aubry v Editions Vice-Versa* [1998] 1 SCR 591.

In *Butler,* the court upheld obscenity laws by recognising a direct relationship between pornography, harm and sex inequality. The court recognised that the obscenity law interfered with the Charter-based freedom of expression but found that interference justifiable. The court was careful to note that in itself, sexually explicit depictions are protected by the Charter, as long as it does not involve sex, violence, degradation or children. The court also stated that artistic work was at the heart of freedom of expression, and that courts are to be generous when characterising work as art, and "any doubt must be resolved in favour of expression". In an interesting follow up to *Butler,* a regional court in Canada held that prohibiting nude dancing in certain venues with a liquor licence did not violate freedom of expression. The court there found that when used as a marketing tool, rather than as theatre or art, nude dancing did not count as freedom of expression. (see *Saskatchewan Ltd v Liquor and Gaming Licensing Commission* (1999), 181 Sask. R. 189 (Q.B.); see also Karen Busby, 'LEAF and Pornography: Litigating on Equality and Sexual Representations' (1994) 9 *Can JL & Society* 165).

In *Keegstra*, James Keegstra, a high school teacher who was teaching anti-semitic propaganda to his students, was charged which publishing a pamphlet espousing an anti-semitic denial of the Holocaust, and challenged the law on the basis that it violated his constitutional right of freedom of expression).

And in *Aubry v Editions Vice-Versa*, a photographer took a photo of a teenager in a public place without her consent, and published that photograph in an arts magazine without her consent. The Supreme Court (by majority) affirmed the decisions of the lower courts and found that the photographer and magazine infringed the teenager's right to her image, and her right to privacy. It found that the right to privacy includes the ability to control the use made of one's image. The court looked to the balancing of rights of freedom of expression (as espoused in the Charter), the public's right to information, and the right to have one's privacy respected. This balancing will depend on the circumstances of the case. In some circumstances the public's right to information, supported by freedom of expression, places limits on the right to respect one's private life. The Court held that in this case, the artistic expression of a photograph cannot justify the infringement of the right to privacy it entails. An artist's right to publish his or her work is not absolute and cannot include the right to infringe, without any justification, a fundamental right of the subject whose image appears in the work.

Other international cases which relate to freedom of expression have looked at laws applying to material posted on the internet in other countries. In particular, cases which look at difficult questions of censorship of global media and neo-Nazi propaganda and hate speech (see Greg Heaton, 'Nazis on the Net: Free Speech Versus World Police' (2000) 3(8) INTLB 109; (2001) 39(4) *LSJ* 64).

## WHERE TO GO FOR ADVICE OR FURTHER INFORMATION

If you want to get further advice or information about any of the above areas, please see the contact details below.

The **Arts Law Centre of Australia** may be able to help you with a problem, or refer you to a lawyer in your area who can assist you. The first advice session is free, but for any subsequent follow up advice you will need to become a subscriber. The website has info sheets and articles covering many areas of law and the arts.
Telephone: freecall 1800 221 457 (for calls outside Sydney) or (02) 9251 3166
email: info@artslaw.com.au
website: http://www.artslaw.com.au

**The Artslaw Centre of Queensland** is a part-time advice and referral service.
Telephone: (07) 321 3628
email: artslawq@powerup.com.au

Victoria has **The Arts Law Referral Service** can refer callers to lawyers who may be able to answer simple questions for no cost. You will have to pay for more complex consultations.
Telephone: (03) 9696 5085

**Simpsons Solicitors** has a website with an impressive online library with many articles relating to artists' legal rights and information.
Telephone: (02) 9247 3473
email: info@simpsons.com.au
website: http://www.simpsons.com.au

For information on copyright issues (including moral rights and information on the copyright and the internet) see **Australian Copyright Council**
Telephone: (02) 9318 1788
email: info@copyright.org.au
website: http://www.copyright.org.au

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**RECOMMENDATIONS**
**To be completed**

That art institutions (including public and private galleries) endorse freedom of expression by participating in public discourse and promoting an artist whose practice is being impugned under restrictive suppression of expression rhetoric.

That art institutions develop a charter of practice for addressing freedom of expression which would include anticipating public outcry, in the event of such disquiet. This could take the form of:

- Endorsing a statement of principles in relation to support for an artist's right to artistic expression
- Putting in place consultation or reference groups to encourage informed and public debate
- Galleries develop guidelines and practices which can be called upon, if required, to address anticipated public concern about the content or form of an exhibited artwork – this could short circuit the outcry and unsatisfactory ad hoc censorship which occurs in exhibitions such as that which occurred in relation to Serrano's 'Piss Christ'.
- Galleries be encouraged to support and foster art which is may be considered risky

That Australia implement legislation similar to the *Status of the Artist Act* in Canada:

***Status of the Artist Act - Canada***

*PART I GENERAL PRINCIPLES*
*Proclamation and Policy concerning the Status of the Artist*
*Proclamation*
*2. The Government of Canada hereby recognizes*

*(a) the importance of the contribution of artists to the cultural, social, economic and*
*political enrichment of Canada;*

*(b) the importance to Canadian society of conferring on artists a status that reflects*
*their primary role in developing and enhancing Canada's artistic and cultural life, and*
*in sustaining Canada's quality of life;*

*(c) the role of the artist, in particular to express the diverse nature of the Canadian*
*way of life and the individual and collective aspirations of Canadians;*

*(d) that artistic creativity is the engine for the growth and prosperity of dynamic*
*cultural industries in Canada; and*

*(e) the importance to artists that they be compensated for the use of their works,*
*including the public lending of them.*

*PART I GENERAL PRINCIPLES*
*Proclamation and Policy concerning the Status of the Artist*
*Policy statement*
*3. Canada's policy on the professional status of the artist, as implemented by the*
*Minister of Canadian Heritage, is based on the following rights:*

*(a) the right of artists and producers to freedom of association and expression;*

*(b) the right of associations representing artists to be recognized in law and to*
*promote the professional and socio-economic interests of their members; and*

*(c) the right of artists to have access to advisory forums in which they may express*
*their views on their status and on any other questions concerning them.*

**RECOMMENDATIONS**

- That galleries, art centres, academics and all art workers consciously use neutral language, as opposed to the inflammatory language of the censors, when describing artworks. Contentious words such as “pornographic”, “obscene” or “sexually explicit” are terms employed by censors to devastating effect: this language tends to obscure any real issues that may be controversial. Rather, the use of specific and concrete descriptive terms to not risk falling into the abstraction which inflames the rhetoric of outrage used by censors. (see Leanne Katz “Censorship and the Arts in the United States Today” in Susan Tiefenbrun *Law and the Arts* (Greenwood Press/Hofstra University, Westport, 1999 at 21).

## ARTICLES
## To be completed

Marcia Hamilton, ‘Art Speech’ (1996) 49 *Vanderbilt Law Review* 73 (try Westlaw)

Colin Manchester, ‘Obscenity, Pornography & Art’, (1999) 4:2 *Media and Arts Law Review* 65

T Francis, ‘Victorian Internet Censorship Legislation: Is it Constitutionally Valid?’ in (1997) 16(2) *Communications Law Bulletin* 7

Carl Stychin, ‘A Timid Esthetic’?: Performance Art in the United States Supreme Court’, in (1999) 4 *Media and Arts Law Review* 4

Marcus Clayton and Toby Borgeest ‘Free Speech and Censorship after the Rabelais Case’, in (1998) 3 *Media and Arts Law Review* 193

Jennifer Ford ‘Everything You Always Wanted to Know about Pornographer Liability…”, in (1997) *Drake Law Review 233* (try Westlaw)

Bede Harris, “Should Blasphemy Be a Crime? The ‘Piss Christ’ Case and Freedom of Expression’, in (1998) 22 *Melbourne University Law Review* 217

Andrew Kenyon, ‘Speech and Respect’, in (1997) 3 *Law/Text/Culture* 279

Robert M O’Neil, ‘Free Speech on the Internet: Beyond ‘Indecency’’ (1998) 38 *Jurimetrics* 617

Special Issue ‘Censorship and Pornography’ (1998) 12:1 *Continuum: Journal of Media and Cultural Studies*

Richard L Abel, ‘Public Freedom: Private Restraint’, in (1994) 21 *Journal of Law and Society* 374

Frederick Schauer, ‘Principles, Institutions and the First Amendment’ in (1998) 112 *Harvard Law Review* 84 (try Westlaw)

*University of NSW Law Journal* Forum No. 6

Jennifer Craik, ‘The Potential and Limits of Cultural Policy Strategies’, in (1996) 7:1 *Culture and Policy* 177

Fenella Crichton, “Blood and Soil’ (1998) 220 Art Monthly 7 (re Hermann Nitsch)

## BOOKS

Shane Simpson, *The Visual Artist and the Law* (LBC, Sydney 1989)

Robert C Post (ed) *Censorship and Silencing: Practices of Cultural Regulation*, (Los Angeles, The Getty Research Institute for the History of Art and the Humanities, 1998)

Des Butler and Sharon Rodrick, *Australian Media Law* (Sydney LBC 1999)

David Marr, *The High Price of Heaven* (Sydney, Allen & Unwin, 1999)

Australian Centre for Contemporary Art, *Moral Censorship and the Visual Arts in Australia* (1989) 8 – see Alison Carol "A History of Moral Censorship and the Visual Arts in Australia

Paul Kearns, *The Legal Concept of Art* (Oxford, Hart 1998)

Tony Bennett, Michael Emmison and John Frow, *Accounting for Tastes: Australian Everyday Cultures* (Cambridge University Press, 1999) - see in particular ch 9, at p 226

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### On Criticism and Law of Defamation

Hon.Justice Peter Heerey, 'The Biter Bit – Literary Criticism and the Law of Defamation", in (1992) 11 *University of Tasmania Law Review* 17

Duncan & Neill on Defamation, 2nd ed at 57

Georgina Waite, 'Edmund in Wonderland', in (1994) (April) *A &ER Law Review* 28

(1993) 20 *Gazette of Law and Journalism* 13 – casenote on *Meskenas v Capon* District Court of NSW, Christie DCJ and jury, 28 September 1993

'*The Defamation Issue'* (1996) Sept/Oct Artlines

Andrew Kenyon, 'Defamation, Artistic Criticism and Fair Comment' (year?) 18 *Sydney Law Review* 193

L Cohen, 'Beyond Silberman v Georges: Shielding the Artist from Claims of Libel', (year?) 17 *Columbia Human Rights Law Review* 235

### Books

P M Gibson and R Gibson, *Dirty Looks: Women, Pornography, Power* (British Film Institute 1993) – see, in particular, Linda Williams, “Second Thoughts on Hard Core: American Obscenity Law and the Scapegoating of Deviance”.

Kearns, *The Legal Concept of Art*, (Oxford Hart Publishing 1999)

Herbert N Foerstel, *Free Expression and Censorship in America: An Encyclopedia* (Westport Connecticut, Greenwood Press, 1997)

**Articles on Serrano**

Damien Casey, “Sacrifice, *Piss Christ*, and Liberal Excess”, in (2000) 5.1 *Law Text Culture* 1

Michael Casey, Anthony Fisher OP, Hayden Ramsay, “After Serrano: Ethics, Theology and the Law of Blasphemy”, in (2000) 5.1 *Law Text Culture* 35

**On censorship v anti-censorship see:**

Rolando Gaete, ‘Desecration, Law and Evil’, in (2000) 5.1 *Law Text Culture* 377
(*discusses censorship in light of neo-nazi discourse*)