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NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.
Patrons: Pat Corrigan AM
Janet Holmes à Court AC
Professor David Throsby



The Executive Director
Australian Law Reform Commission
By email: privacy@alrc.gov.au

9th May 2014

Dear Sir/Madam

The National Association for the Visual Arts (NAVA) is pleased to comment on the Serious Invasions of Privacy in the Digital Era Discussion Paper (**Discussion Paper**).

NAVA is the peak industry body representing and advancing the professional interests of the Australian visual and media arts, craft and design sector. Since its establishment in 1983, NAVA has been influential in bringing about policy and legislative change to encourage the growth and development of the visual arts sector. It also sets best practice standards for the industry. In addition NAVA provides a number of direct services to its constituents, helping to increase artists' professionalism and offering career development opportunities. NAVA works on behalf of all visual artists including photographers and media artists.

In relation to the proposals in the Discussion Paper, NAVA is concerned that the absence of an express right to freedom of expression or speech in Australia, means that unless artistic expression is specifically identified as an interest which is to be balanced against any right to privacy, artistic expression is at risk both through the exercise of the law and through self censorship by the arts sector itself.

In relation to any proposed privacy legislation, more discussion is needed about the rights of artists - especially photographers and film makers - and their particular circumstances. That is, their art practice is directly concerned with story telling, societal commentary and interpretation through using images of people and thus representing our culture and documenting our moment in history.

NAVA notes that the ALRC's most recent proposal outlines a statutory cause of action in a tort that has five elements. Each of these five elements must be satisfied for the plaintiff to have a cause of action. NAVA welcomes the ALRC beginning its discussion by noting the importance of freedom of expression and its utility in forming the framework of the proposed tort. However, for the protection of visual arts practitioners, this needs amplification.

This submission supports the one made by the Arts Law Centre of Australia. Like Arts Law, NAVA welcomes the relatively narrow construction of the recommended cause of action by the ALRC which could limit the potential scope for liability under such a cause of action, the damages sought, and unmeritorious claims being brought. However, NAVA asserts that the following sections need further address.

Proposal 7-1

The fourth element outlines a fairly high threshold highlighted by the fact that 'the court must consider that the invasion of privacy was 'serious' and have regard to the effect of the invasion as 'highly offensive, distressing or harmful'. It goes beyond, therefore, mere offence and offers an objective test for this element to be satisfied. This goes some way towards mitigating the dampening effect on artists, however, further protection needs to be included.

Proposal 8-1

The fifth element places the onus on the plaintiff to persuade the court that their interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest in the defendant's conduct.

NAVA strongly supports the 'up-front' inclusion of freedom of expression in formulating any cause of action for serious invasion of privacy. However freedom of expression is not defined as 'artistic or creative expression'. If this is included, it could provide some protection for artists.

Furthermore, 'public interest' is not given any artistic capacity that would be paramount when considering the context of 'artist's conduct'. The fifth element, therefore, is problematic and unclear but provides some potential for protection of artists.

NAVA is concerned and notes the ambiguity and lack of consideration given to 'freedom of expression' given the vital role its characterisation plays in working out what is in our public interest. NAVA believes that 'freedom of expression' ought to expressly include 'artistic expression' so a court is specifically required to consider that freedom in any claim.

NAVA therefore supports Arts Law's recommendation for the 'up-front' inclusion of freedom of expression in formulating any cause of action for serious invasion of privacy which places the onus on the applicant and not on the artist.

Proposal 8-2 (a)

NAVA also agrees with Arts Law's proposal that to make clear the broad scope of freedom of expression, the list of public interest matters which a court may consider should be amended as follows:

Freedom of expression, including political communication and artistic expression

Proposal 9.1

NAVA concurs with Arts Law that it is essential that any forum which deals with complaints is funded and properly educated in the importance of maintaining freedom of artistic expression.

Proposal 10-6

NAVA agrees the new Act should provide for a defence of fair report of proceedings of public concern. Added should be the need for this to be understood to include artistic representations including those made through the use of any visual media.

Proposal 13-3

NAVA like Arts Law, strongly opposes the current proposal as it could make unlawful those activities of legitimate artists including media artists, film makers and photographers in numerous situations and therefore could restrict photo media and filming activity.

In the event that “surveillance” or “private activity” is not defined, NAVA agrees with Arts Law that though not ideal, a specific defence in relation to artistic activity should be included as in 13-4 for journalistic investigation. However, this would place the onus on the artist to prove their activities were defensible as ‘artistic’ in responding to a potentially serious criminal charge.

Question 13-2

NAVA believes that empowering local councils to regulate the installation and use of surveillance devices risks serious irregularities and inconsistencies in application. Councils and their rangers are not well equipped to understand how to deal with this appropriately. Many artists have experienced very subjective interpretations of the regulations by local council staff and their appointed officers and have been prevented from carrying out their legitimate cultural and reporting activities.

Question 15-2

NAVA agrees with Arts Law that where a regulator is given the power to order the removal of information from an online platform it is essential that the poster of the material be given the opportunity to respond to the removal request within a reasonable time prior to any order for removal. There should be consideration of freedom of artistic expression in assessing the public interest.

Conclusion

NAVA's position remains the same as that of Arts Law in that we are generally unsupportive of the introduction of a cause of action for invasion of privacy. We believe that the issues in the current law can be solved through more specific remedies. The narrow construction in the proposal is more protective of artists’ legitimate work, but further clarification and development is required particularly of the fifth element in relation to how ‘freedom of expression’ and ‘public interest’ are construed.

NAVA is very concerned that without adoption of our recommended changes, artists could face serious legal threats and a ‘chilling effect’ of self censorship would result from the introduction of a cause of action for invasion of privacy. Australia needs to foster the documentation of and commentary on its culture provided by artists rather than put barriers in their way which would cause them unnecessary anxiety, cost and waste of time, damage to their artistic reputations and possible legal conviction.

Yours sincerely



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Executive Director