

## CHILDREN IN THE CREATIVE PROCESS: INFORMATION FOR ARTISTS AND ARTS ORGANISATIONS - South Australia

This information sheet must be read in conjunction with the general information sheet 'Children in the Creative Process - Australia' since that fact sheet explains how the various federal laws operate. This information sheet explains how the South Australia laws relate to you as an artist working with children. It includes information about the employment of children, background checks, pornography and obscenity offences and the application of classification legislation in South Australia.

### Disclaimer

This fact sheet is provided solely to highlight possible legal issues arising in your work with children as an artist. You should not rely on them as legal advice. You can get legal advice from the Arts Law Centre of Australia (**Arts Law**) and are welcome to telephone for assistance on (02) 9356 2566 or 1800 221 457. This information sheet is current at the time of writing. Arts Law accepts no liability for losses caused by reliance on any of the materials it publishes.

### 1. Child employment

The law relating to child employment varies between individual states and territories. As at September 2008, there is no specific legislation in force in South Australia that generally governs the employment of children; however, it is proposed that new legislation be enacted to protect the rights of children who are engaged in employment. These laws have not yet been drafted. For more information on the proposed legislation see the Safework SA website at [www.safework.sa.gov.au](http://www.safework.sa.gov.au).

The *Fair Work Act 1995* (SA) provides the South Australian Industrial Relations Commission with the power to make awards that can determine special conditions under which children may work.<sup>1</sup> For example, it grants the Commission power to make awards that exclude children from certain kinds of work. You should check to see whether any industrial awards apply to your situation and whether there are specific terms dealing with children. Copies of the awards for various sectors including Actors and Musicians awards are available from the South Australian Industrial Relations website at <http://www.industrialcourt.sa.gov.au/>.

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<sup>1</sup> *Fair Work Act 1998* SA: s 98A

The *Education Act 1972* (SA) prohibits the employment of a child of compulsory school age during the hours where they would ordinarily be attending school.<sup>2</sup> The compulsory school age is above the age of 6 until the child turns 16 years.<sup>3</sup> Amendments to this law will come into effect in January 2009 which will effectively extend the 'compulsory education age' to when a child turns 17, allowing fulltime TAFE, traineeships, apprenticeships and other recognised tertiary institutions to be recognised as 'compulsory education'.<sup>4</sup> Artists who employ children need to be aware of these changes and ensure they do not employ children during the prohibited period.

## **Criminal record Checks**

At present South Australia has no statutory requirement that individuals working with children undergo a criminal record check. However some organisations have their own policies in this regard.

If you wish to obtain a National Police Check of your criminal record as evidence of your suitability to work with children you can do so by making an application at a South Australian Police Station. For more information on applications and costs and to download forms visit: [www.sapolice.sa.gov.au](http://www.sapolice.sa.gov.au)

## **2. Criminal Offences: child pornography and private acts**

There are a range of offences related to images of children.

Under the *Criminal Consolidation Act 1935* (SA) it is an offence to produce, disseminate or possess child pornography.

Child pornography is defined as anything that is intended or appears to be intended to excite or gratify sexual interest or a sadistic interest in violence or cruelty which:

- describes or depicts a child engaged in sexual activity; or
- contains the image of a child; or
- appears to have involved a child in the production of the material.<sup>5</sup>

A child is defined as a person under, or apparently under, 16 years old. Material covered by the provision is widely defined and includes written or printed material, pictures, drawings, paintings, sculpture, photographs, films and computer images.

### **'Apparently intended to excite'**

While most accept that there is a legitimate and genuine public interest in preventing the exploitation of children in the production of child pornography material the broad scope of these provisions mean that artists using or depicting children in their work should be very careful particularly where sexual connotations or themes of violence or abuse are involved.

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<sup>2</sup> *Education Act 1972* SA: section 78

<sup>3</sup> *Education Act 1972* SA: section 5

<sup>4</sup> Proposed Child Employment Legislation For South Australia, Discussion Paper; Safework SA- August 2008

<sup>5</sup> *Criminal Consolidation Act 1935* (ACT) s62.

The fact that the child depicted in a work was not actually the victim of any violence or cruelty or involved in sexual acts appears to be irrelevant. Whether a work is one which is apparently intended to excite or gratify sexual interest or sadistic interest in violence is a subjective assessment and it is difficult to know precisely how a court will approach that question.

## Defences

**Classification:** It is a defence to a charge involving child pornography material to show that the material has been classified (other than those which are refused classification (RC) under the *Classification (Publications, Films and Computer Games) Act 1995*. See below for more information on classification.

**Genuine artistic merit:** it is a defence to charges involving child pornography material if it is part of a work of artistic merit and there is no undue emphasis on the pornographic aspects of the work.<sup>6</sup>

## Indecent Material

It is an offence under the *Summary Offences Act 1953 (SA)* to produce or disseminate indecent or offensive material. Indecent material includes material of an indecent, immoral or abhorrent nature. Offensive subject matter includes violence, cruelty and revolting or abhorrent phenomena which would cause serious and general offence among reasonable adult members of the community.<sup>7</sup> Unlike the offences related to child pornography it does not matter if the material was not intended to excite or gratify sexual interest or a sadistic interest in violence or cruelty.

## Defences to a charge of producing or disseminating indecent or offensive material

**Classification:** While the fact that the work has been classified does not appear to be defence to a charges related to indecent material, the prosecutor must have regard to relevant decisions of the South Australian Classification Board when deciding whether to prosecute under the provision.

**Artistic Merit:** It is a defence to indecent material offences if it forms part of a work of artistic merit and the indecent or offensive aspects are not unduly emphasized.

## Indecent Acts and Children

It is an offence under the *Criminal Law Consolidation Act 1935 (SA)* to procure a child who is under, or is apparently under, 16 years old to perform an indecent act.<sup>8</sup>

It is also an offence to induce a child to expose part of his or her body or to take a photographic or other record of a child doing a private act, but only if it is for the purpose of sexual arousal or gratification. Private act includes undressing to the point of wearing only undergarments and nudity or the exposure of sexual organs including a female's breasts.

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<sup>6</sup> *Criminal Consolidation Act 1935 (SA)* s63C.

<sup>7</sup> *Summary Offences Act 1953 (SA)* s33.

<sup>8</sup> *Criminal Consolidation Act 1935 (SA)* s63B. 'Indecent Act' is not defined in this legislation.

### 3. Classification and Censorship

The classification rules and guidelines are Commonwealth legislative instruments. If you want to find out *how* something receives classification please read the general fact sheet on 'Children in the Creative Process - Australia'. For further information on how to apply for classification see the Australian Government Classification website at <http://www.classification.gov.au>.

The states and territories are responsible for enforcing the classification rules. Enforcement of classification rules in South Australia is governed by the *Classification (Publications, Films and Computer Games) Act 1995 (SA)*. The South Australian Classification Council established by this Act is empowered to make classification decisions that will prevail over any decision made by the Commonwealth Classification Board.

Exhibiting, selling or hiring a film which has not been classified or has been classified X18+ or RC is prohibited.<sup>9</sup> Selling or distribution of unclassified publications which are required to be classified or publications that have been classified RC is also prohibited.<sup>10</sup>

One of the reasons material might be classified RC is it 'describes or depicts a minor who is, or appears to be under 16 in a way that is likely to cause offence to a reasonable adult'. The courts have held that deciding if something is "likely to cause offence to a reasonable adult" involves a "judgment about the reaction of a reasonable adult in a diverse Australian society."<sup>11</sup>

There is no general requirement to seek classification for theatrical performances. However, under the *Classification of Theatrical Performances Act 1975 (SA)* any person can request that a theatrical performance be classified by the Classification of Theatrical Performances Board (**Board**). A theatrical performance includes any play, mime, ballet, dance, display or other entertainment. The Board will determine if the performance is offensive or unsuitable to be seen by children having regard to standards of morality, decency and propriety that are generally accepted by reasonable adult.<sup>12</sup> The Board may impose conditions on the theatrical performance.

#### Exemptions for Events

The requirement to have films classified extends to any form of recording where a visual image can be produced, including slides. This would apply, for example, to a multimedia artwork. An organization running an event such as a film festival or exhibition can apply to have particular films exempted from classification. Conditions may be attached to the exemption.

In deciding whether to approve the exemption the following are relevant:

- (a) the purpose for which the organization was formed;

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<sup>9</sup> *Classification (Publications, Films and Computer Games) Act 1995 (SA)* ss28, 30, 37, 38.

<sup>10</sup> *Classification (Publications, Films and Computer Games) Act 1995 (SA)* ss38

<sup>11</sup> *Adultshop.Com Ltd v Members of the Classification Review Board* [2007] FCA 1871 at [170] upheld in *Adultshop.Com Ltd v Members of the Classification Review Board* [2008] FCAFC 79.

<sup>12</sup> *Classification of Theatrical Performances Act 1975 (SA)* s11.

- (b) The extent to which the organization carries on activities of a educational, cultural or artistic nature;
- (c) The reputation of the organization in relation to screening films; and
- (d) The conditions for admission to the screening of films or demonstration of computer games.<sup>13</sup>

An organization cannot apply for a blanket exemption as is possible in some other states. The organization must apply for an exemption for each individual film for each individual event. An application specifying the event and including a synopsis of the film should be made by the organization to the Office Manager, SA Attorney-General's Department. See <http://www.agd.sa.gov.au> for contact details.

For more information about how the Classification Act interacts with your practice as an artist, see the Arts Law fact sheet entitled 'Classification and Censorship'.

#### **4. Privacy**

While there is no general right to privacy in Australia, there are laws which affect the recording or photography of individuals including children. In South Australia, there are laws concerning the surveillance or stalking of another person. In addition, various bylaws made by councils may affect the photography or filming of people in parks or at the beach.

#### **Surveillance and Trespass**

The *Listening Devices and Surveillance Act 1991* (SA) prohibits the use of a listening device to listen to or record a private conversation without the consent of all the parties to the conversation. This could include the sound recording facility of a film or video camera and would apply even if the conversation took place on public property if the circumstances indicate a wish for the conversation to be confined to the parties. The Act also restricts the communication or publication of information obtained through the use of a listening device without the consent of all the parties.

There is no specific prohibition on the use of optical surveillance devices in South Australia. However if you enter private property to use or install an optical surveillance device (such as a camera) you could be liable for trespass or guilty of the offence of criminal trespass.<sup>14</sup>

#### **Stalking**

While recording images of children in public may not be prohibited, the way in which the images are taken may constitute an offence such as stalking.

For example, section 19AA of the *Criminal Law Consolidation Act 1935* (SA) makes it an offence to stalk someone with the intent to cause harm, apprehension or fear. "Stalking" includes following a person about, watching or loitering in the vicinity of a person's home

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<sup>13</sup> *Classification (Publications, Films and Computer Games) Act 1995* (SA) s79.

<sup>14</sup> *Criminal Law Consolidation Act 1935* (SA) s170A.

or workplace or acting in any way that could reasonably be expected to cause apprehension or fear.

## **Bylaws**

Many local government authorities and other authorities have bylaws which require a permit to be purchased before engaging in activities such as filming or photography in public places or on their property. The costs of permits vary between the different authorities. Filming of infrastructure such as train stations may also be restricted.

You should ensure that you have the necessary permits in place before taking photographs or filming. Be aware that the application process can take weeks in some cases. Contact the relevant local government authority, or other relevant authority, for information on whether a permit is required, how to apply and the costs involved.

For more information on restrictions on taking photographs in public see the Arts Law Centre's information sheet "Street Photographers Rights" available at <http://www.artslaw.com.au> .

## **Getting legal advice or further information**

If you would like advice about whether the above information affects your practise as an artist, please contact the **Arts Law Centre of Australia** on (02) 9356 2566 or tollfree outside Sydney 1800 221 457. Arts Law's publications are available at [www.artslaw.com.au](http://www.artslaw.com.au) or by telephoning the number above.

The Arts Law Centre of Australia has been assisted by the Australian Government through the Australia Council, its arts funding and advisory body.

