Children in the creative process (VIC)

When artists work with children, whether as part of a community project or an educational workshop, or where children are actors, performers or models, specific legal obligations and duties arise.

This information sheet outlines the legal issues artists or arts organisations in Victoria should consider when they contemplate working with or using children in any part of the creative or artistic process. It covers the duties of employers and the requirements for police and working with children checks.

It also summarises VIC laws relating to child pornography and obscenity.

National laws as well as State and Territory laws are relevant. It is important to read this information sheet in conjunction with the information sheet Children in the creative process – Australia.

This information sheet must be read in conjunction with "Children in the creative process: Australia" since that fact sheet explains how the various federal laws operate. This information sheet explains how the Victoria specific 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 applications of classification legislation in Victoria.

Child employment

The law relating to child employment varies depending on state or territory jurisdiction. In Victoria, the *Child Employment Act 2003 (Vic)* (**Child Employment Act**) governs the employment of children under 15 years of age. In order to employ a child under the age of 15 years (other than in a family business or under a work experience arrangement), you must obtain a "Child Employment Permit" and the written consent of the parent or guardian of the child.

The minimum employment age is 13 years for most types of employment although there is no minimum age limit for children employed in entertainment.[1] However it is an offence to employ a school-age child during school hours without applying to the Minister for an exemption from attendance at school under section 2.1.5 of the *Education and Training Reform Act 2006* (Vic) (**Education Act**).

Entertainment is defined to include singing, dancing or acting; playing a musical instrument; appearing in a radio, television, film or Internet program or production, or any similar program or production (but not a news item); modelling; appearing in promotional events or advertising; working as a photographic subject, whether still or moving; working in a circus or other live entertainment; taking part in a performance that is recorded for use in a subsequent entertainment; working in musical theatre, plays, opera and other live entertainment, performing in a shopping centre. It includes preparatory activities other than screen tests and casting walk-ons[2].

Am I "employing" a child?

You will be regarded as employing a child if the child works pursuant to a written or unwritten contract for services or takes part in any business, trade or occupation you carry on for profit, irrespective of whether the child is paid or not and regardless of the type of arrangement you have with the child. For example, you will be an employer of a child who sings in your restaurant in return for a meal and tips or who poses as a photographic model in return for copies of photos. Children participating in religious services, sporting activities or occasional school projects or entertainments to benefit their schools or performing for non-profit organizations are not regarded as being employed[3].

Child employment permit

It is an offence under the *Child Employment Act* to employ a child without a permit. The employer is responsible for applying to the Secretary of the Department of State Development, Business and Innovation for a permit.[4] For work in entertainment,

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the employer may apply for a single permit to cover all the children working in the same type of entertainment or work (such as all child performers in a stage play).

The application process is reasonably straightforward and is intended to ensure that appropriate risk assessments have been completed and risks addressed. Child Employment Officers in the Employment Information and Compliance Unit are authorised to issue child employment permits.

A permit needs to be obtained before the child's employment commences. Merely having lodged the application is not sufficient. The time required to process an application can vary. Enquire with the Employment Information and Compliance Unit first to ensure you allow sufficient time for permits to be obtained when required.

The application must be signed by the child's school and their parent or guardian and must include statutory declarations and consents to police checks by each person who will supervise or have control of the child during the entertainment employment. While there is no cost for the permit, the applicant must bear the cost of any police checks required ($34.70 – $144 depending upon the extent of the check as at November 2013). Section 19 specifies obligations in respect of supervision. Other provisions concerning rest breaks and hours worked do not apply to children employed in entertainment. [5]

A permit will only be granted after clear police checks are obtained and the Secretary is satisfied that "the health, education and moral and material welfare of the child will not suffer from the proposed employment; … the child is fit to be engaged in the proposed employment; and … the child will not be subjected to any form of exploitation…"[6] Once issued, the Secretary sends a copy of the permit to the employer and, if the employment will occur during school time, the child's school. It is valid for the period specified (no more than 12 months). Employers are required to keep records and documents in relation to the employment of children under Child Employment Permits.[7]

The Mandatory Code

Employers must comply with the Mandatory Code[8] (**Code**). A copy of the Code and a Guide to the Employment of Children in the Entertainment Industry is available on the Business Victoria website: (www.business.vic.gov.au). The Code makes it an offence for an employer to contravene the conditions of a permit, or to employ a child in entertainment without a permit. It is also an offence for a parent to allow a child to be employed without the required permit[9]. Under the Code, children cannot be employed to work naked, unless they are under the age of 12 months. If they are less than a year old, the Code requires that their parents are present and have consented to the work.

Working with Children

Background checks

The *Working With Children Act 1958* (Vic)[10] prohibits people from engaging or volunteering in child-related employment without applying for and providing a valid assessment notice (also called a Working With Children Check or **WWC**). The purpose of the Working with Children Check is to protect children under 15 years who are employed or who are undertaking work experience under the *Education and Training Reform Act 2006*.

The Act provides for a system of mandatory WWC checks into the criminal record of any person who will be directly supervising a child in the workplace.

Employers

Unless an exemption applies, the employer must ensure that WWC checks have been conducted and a Notice of Assessment issued prior to allowing any person to supervise a child under 15 years of age. A new WWC check must be conducted whenever someone new becomes the child's supervisor.

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Certain workers are exempt from the requirement for a WWC check including people who are supervising their own child or family members and teachers registered with the Victorian Institute of Teaching).

Employers must record the name and WWC check number of any person that supervises a child in employment and present these to a child employment officer on request.

Employers must ensure that each child is directly and adequately supervised at all times. A supervisor should be provided with appropriate training. In particular, the supervisor should be trained to recognise health and safety hazards including teasing, bullying and harassment.

There are additional requirements for the entertainment industry. The employer must ensure that the supervisor is not given other responsibilities that prevent them from providing direct supervision. There are also additional supervision requirements for babies under 12 weeks and children under 6 years.[11]

Employees

If you intend to work in a business that falls within the definition of "child related employment" such as an art school, or children's dance troupe or choir, you are obliged to apply for a WWC. The application can either be made online (http://www.workingwithchildren.vic.gov.au/home/applications/lodging+your+application/) or in paper form at Australia Post outlets in Victoria. If you are applying for a WWC from outside Victoria you must post your application directly to the Victorian Department of Justice. A fee is payable ($102.70 as at November 2013). If you pass the check you will receive a card in the mail. If you have provided the department your current mobile number you will receive a text message informing you that you have passed the check. Cards are valid for 5 years from the date you passed the WWC check. Your criminal history continues to be monitored during this time and your card may be suspended or revoked if you are charged with a relevant offence or new disciplinary findings are made against you. There are a number of exemptions from the requirement to obtain a WWC including parents volunteering in relation to activities in which their own children normally participate, teachers registered under the Education Actand children under 18.

See the Business Vic Website for more information on the WWC checks. The WWC website of the Victorian Department of Justice also contains details about the requirements of the *Education Act* and the application process.

The Victoria Police also provide a separate service to individuals and organizations in Victoria who wish to obtain national police certificates for employment, voluntary work and occupation-related licensing or registration purposes. This may be helpful if your business or proposed employment involves children but isn't strictly within the definition of "child-related employment" and a background check is still desirable or required by the employer.

Criminal offences: pornography and obscenity

There are a number of Victorian laws which make it an offence to use or deal with children in a way which is sexually exploitative or physically or emotionally damaging. The difficulties of identifying the limits of what is and isn't pornographic material and what is and isn't a genuine artistic purpose were highlighted in recent public debate in Australia.

Child pornography

Division 13 of the *Crimes Act 1958* (Vic) (**Crimes Act**) makes it an offence to make, produce or knowingly possess child pornography or to invite, procure or otherwise cause a person under 18 to be involved in child pornography[12].

The Crimes Act defines "child pornography" as a film, photograph, publication (which, includes written or pictorial matter) or computer game that describes or depicts a person who is, or appears to be, under the age of 18 engaging in sexual activity or depicted in an indecent sexual manner or context. It may include real children and/or real events or may be the product of imagination and captures both visual and written expressions of thought and imagination[13]. It seems that material depicting

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a child in a sexual context that is not an "indecent" sexual context is not child pornography. Any material depicting minors who appear to be engaging in sexual activity falls within the definition of child pornography.

These provisions are broad, and artists using or depicting children in their work should be aware of them particularly where there is any sexual connotation. The extent to which an artwork shows a child "in an indecent sexual context" is a subjective assessment on which opinions may vary widely. It is not a defence to point to consent either by the child or the child's parents. Indeed, a parent who permits a child to be used for pornographic purposes is also guilty of an offence.

Defences

There are limited defences to child pornography charges in Victoria. It is a defence to the above charges to show that the film, published photograph or computer game has been classified, or would be classified under the under the federal *Classification (Publications, Films And Computer Games) Act 1995 (Cth)* other than as RC, X or X 18+.

Artistic merit

If the child pornography shows a person who appears to be under 18 but is in fact 18 or over, it is a defence to a charge of possession if the material possesses "artistic merit", or is for a genuine medical, legal, scientific or educational purposes. The artistic merit defence is not available to a charge of making, or procuring minors to participate in, child pornography and is not available if the person depicted in the material is, in fact, under 18.[14]

Performances

Child pornography is concerned with materials such as books, films and photos. Section 70AC of the *Crimes Act* focusses on performances, making it an offence punishable by up to 10 years imprisonment to invite, procure or cause a person under the age of 18 years to be in any way involved in a "live performance that is, or could reasonably be considered to be, for the sexual arousal or sexual gratification of any person" in circumstances where there is payment or reward to the minor or to any other person in respect of the performance. It is not an offence if there is no payment or reward involved (although if the performance were recorded, it may then constitute the making of child pornography).

Obscenity

Various pieces of legislation deal with material which regarded as obscene. *The Summary Offences Act 1966 (Vic)* makes it an offence to write, draw, exhibit or display obscene or indecent words, figures or representations in or near a public place or within view or hearing of any person passing there.[15]

Classification and censorship

The National Classification Scheme is set up under Commonwealth law. For more information on how the Scheme works, please read Arts Law's general fact sheets on "Children in the Creative Process – Australia"and Classification and Censorship. For further information on how to apply for classification see the Australian Government Classification website.

In April 2013, the Standing Council on Law and Justice agreed in principle with recommendations by the Australian Law Reform Commission that the way exemptions for film are granted under the current national classification scheme required streamlining and simplification. The bill effecting this change (amongst others) is being drafted by the Attorney General's department and is predicted to be before the federal Parliament by the end of March 2014.

The states and territories are responsible for enforcing the classification rules. Enforcement in Victoria is governed by the *Classification (Publications) Enforcement Act 1995* (Vic). That Act makes it an offence to sell or exhibit a film which has not been classified, or which has been refused classification (RC) or is X 18+, will attract a penalty of up to two years imprisonment. It is also an offence to use an on-line information service to publish or transmit child pornography or to publish

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"objectionable material"[16] (which describes or depicts a person who is or looks like a minor engaging in sexual activity or depicted in an indecent sexual manner or context).

Exemptions for galleries and film festivals

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 multi-media art work. Under Victorian law, an organisation such as an art gallery can apply in writing to the federal Classification Board for an exemption so that it does not have to apply for all its exhibits to be classified.[17] An organisation running an event such as a film festival can also 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: :

1. The purpose for which the organisation was formed.
2. The extent to which the organisation carries on activities of a educational, cultural or artistic nature
3. The reputation of the organisation in relation to screening films or demonstrating computer games.
4. The conditions for admission to the screening of films or demonstration of computer games.[18]

Note that the exemption does not apply to publications so the organisation will still need to apply for classification of a publication (for example a exhibition catalogue) that is likely to attract a Category 1 restricted, Category 2 restricted or RC classification.

Privacy

Note that while there is no general right to privacy in Australia, there are laws which affect the recording or photography of children. In Victoria, these apply to 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, for example.

Surveillance devices

Surveillance device legislation is aimed at preventing the unauthorized recording of people's private activity. The legislation applies equally to children and adults. You should be aware of how the legislation operates and get permission if required.

The *Surveillance Devices Act* 1999 (VIC) prohibits the installation, use and maintenance of listening devices and optical surveillance devices to record private activities without the express or implied consent of each party to that activity. "Private activity" does not include an activity carried on outside a building or in circumstances where the parties ought reasonably expect it would be observed.[19] An "optical surveillance device" is defined as a device capable of being used to record visually or observe an activity. This definition could include a hand-held still or video camera. This Act applies whether or not the surveillance device and/or person filmed is on public or private property.

Knowingly publishing or communicating a recording or report of private conversation or activity which results from the use of a surveillance device is also prohibited[20] and attracts a fine or up to 2 years imprisonment.[21]

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 the *Crimes Act* makes stalking an offence with a penalty of up to 10 years imprisonment. Stalking is widely defined and includes following the victim, publishing material on the internet relating to the victim, entering or loitering outside the victim's place of business or residence or keeping the victim under surveillance in a way that could reasonably be

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expected to arouse fear or apprehension for their safety. You may be liable if you have the intention to arouse apprehension or fear or if, in the circumstance, you ought to have understood that your actions were likely to cause apprehension or fear.

If you are taking images of children, you should be aware that they may easily become apprehensive or fearful. You should therefore consider getting permission from the child's parent or guardian and the child so that no misunderstandings occur.

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 and photographing infrastructure such as railways may also be restricted. For example Connex Melbourne Trains requires all photographers, even amateur photographers, to apply for a permit before filming or taking photographs on their property. For more information on restrictions on taking photographs in public see the Arts Law's information sheet on "Street Photographers Rights" available at https://www.artslaw.com.au.

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.

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[1]Ibid section 10(2)

[2]Id section 3and *Child Employment Amendment Act 2010 (Vic)* section 5

[3]Id section 4

[4]Ibid Section 13(1)

[5]Id section 28

[6]Id section 16

[7]http://www.business.vic.gov.au/operating-a-business/employing-and-managing-people/employing-children

[8]Id section 32

[9]Id sections 9. 17 and 23.

[10]Id section 33

[11]http://www.business.vic.gov.au/operating-a-business/employing-and-managing-people/employing-children/police-check

[12]*Crimes Act* 1958 (Vic) sections 68-70

[13]*R v Quick* [2004] VSC 270

[14]*Crimes Act* 1958 (Vic) ss 70(2)(b), and s70(3).

[15]*Summary Offences Act* 1996 (Vic) s17(1)(b).

[16]*Classification (Publications, Films and Computer Games) (Enforcement) Act* 1995 (Vic) ss 57 and 57A.

[17]*Classification (Publications, Films and Computer Games) (Enforcement) Act* 1995 (Vic) s64(2).

[18]*Classification (Publications, Film and Computer Games) (Enforcement) Act* 1995 (Vic) s66A.

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[19]*Surveillance Devices Act* 1999 (Vic) s3..

[20]*Surveillance Devices Act* 1999 (Vic), s11.

[21]*Surveillance Devices Act* 1999 (Vic) ss6 and 7.

Disclaimer

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