Children in the creative process (WA)

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 Western Australia 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 WA 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 the general information sheet "Children in the creative process: Australia" since that explains how the various federal laws operate. This information sheet explains how the Western Australia 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 application of classification legislation in Western Australia.

Child employment

The employment of children in Western Australia is governed by two pieces of legislation, the *Children and Community Services Act2004* (WA) (**Children and Community Services Act**) and the *School Education Act 1999* (WA).

When am I employing a child

The *Children and Community Services Act* deems a child to be employed when he or she carries out any work, regardless of whether the child is paid or given some other form of reward. Whether the child is actually an employee, independent contractor or volunteer in the strict legal sense is irrelevant. A child means a person who is under 18 years of age.

At what age can a child that is attending school be employed?

Generally children need to be at least 15 years of age to be employed in part-time, casual or holiday jobs in an occupation carried on for profit. There are some exemptions when younger children can be employed, requiring certain conditions to be met. These conditions may include the parent accompanying the child in the work or providing permission for the child to be employed, working between certain hours of the day, and having only discrete areas of work where the child can be employed. For instance, with their parents written permission, a child who is at least 13 years of age can work in a shop, retail outlet or restaurant, deliver newspapers and collect trolleys from shopping centres outside school hours, between the hours of 6.00 am and 10.00 pm.

There are certain situations in the arts where children of any age can work including work with a not-for-profit organisation or in a dramatic or musical performance as discussed below.

Employment as a performer or entertainer

Children of any age are allowed to work in dramatic or musical performances or any other form of entertainment and in the making of advertisements. This allows artists to employ children under the age of 15 years in a variety of situations even if their business is set up with a view towards making a profit.

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However, children of any age cannot be employed to perform or participate in any form of entertainment, exhibition or advertisement that subjects them to anything indecent, obscene or pornographic. Any person, including the parents of a child, who allows a child to be exposed to such an environment, commits a crime punishable by up to 10 years in prison. A child performing in this way cannot be recorded for later visual or audible presentation for the person employing the child or for any audience, nor can it be viewed on the Internet or in any other way.

If it is considered that the work is harmful to the child's wellbeing, including their health and safety, the Chief Executive Officer of the Department for Child Protection can issue a notice to the child's parent/s and employer, stopping the child from working or placing limits on what work the child is allowed to do. If a parent and/or employer continues to knowingly allow the child to work after a notice has been issued, the parent / employer could be fined up to $36,000 and imprisoned for up to 3 years. An incorporated employer could be fined up to $180,000.

Employment that would be likely to attract criminal charges could involve getting a child to engage in acts of a sexual nature or a child working in the presence of another person who is engaging in acts of a sexual nature. Having a child pose in a way that gives prominence to their genitalia, the anus or breasts (for girls only) would also be illegal.

More information on the employment of children in Western Australia can be found on the Department of Commerce website (http://www.commerce.wa.gov.au) or the Department for Child Protection and Family Support website: (http://www.dcp.wa.gov.au).

School Attendance

Children are required to attend school from the age of six years until the end of the year they turn 17, unless they have an exemption from attending school. Children of compulsory school age cannot be employed during the hours the child is required to either attend school, or take part in an educational program, except where a school exemption exists.

Working with children criminal record checks

Under the *Working With Children (Criminal Record Checking) Act 2004* (WA) (**WWC Act**) a Working with Children Criminal Record Check (**WWC Check**) is mandatory for people employed in child-related work in Western Australia. The Working with Children Screening Unit, part of the Department for Child Protection, is responsible for administering the WWC Checks.

What constitutes "child related work"?

"Child related work" is work conducted by paid employees, contractors, volunteers, unpaid and self-employed people where the usual duties of the work involve, or are likely to involve, contact with children in connection with a number of categories set out under section 6 of the legislation. Included in the categories are: clubs; associations or movements of a cultural nature with significant membership or involvement of children, children's entertainment or party services and coaching or private tuition services.

Some flexibility is provided to allow employers to deliver services in unforeseen circumstances (such as the illness of a worker) and the legislation provides a defence for people who undertake child-related work on no more than 5 days in a calendar year without having applied for a WWC Check. Although they are not required to get a WWC Check in these circumstances, their work with children is still regulated by the WWC Act. If proceedings are initiated for failing to get a WWC Check, employment for less than 5 days is a defence.

There are many work situations where a person has occasional contact with children, or where the customers may be children, including the general retail industry, the local deli or the cinema. Screening of people in these general work situations is not required.

Exemptions

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There are exemptions that allow certain persons to engage in activities with children without a WWC Check that would otherwise fall under the definition of “child related work”. Some of the most common exemptions are:

1. volunteers under the age of 18 years;
2. parents volunteering in connection with their child’s activity (not including overnight camps);
3. employers of children and people who work alongside children as fellow employees, (unless otherwise doing child-related work);
4. short term visitors engaged in child-related work are also exempt for two weeks from their arrival, for no more than two weeks in any 12 month period.
5. in relation to a children’s entertainment or party service:
    1. where the performances are open to the general public and not involving physical contact with children, (whether or not on payment of a fee),
    2. where the service only involves the provision of equipment, food or avenue, and no other children’s entertainment or party service.

If you intend to work in or operate a business that falls within the definition of child related work, such as an art school, dance or music tuition services, you must check your obligations in regard to WWC Checks. Forms can be obtained from Australia Post Outlets in Western Australia and must be lodged at the Post Office. A fee of $50 for employees and self-employed people applies and the cost is $10 for volunteers.

The Western Australian WWC Check website contains details of the categories of individuals who require checks, information on exemptions and how to go about applying for a check: www.checkwwc.wa.gov.au

Offensive material and indecency

Under the *Criminal Code Act 1913* (WA)(**Code**) it is a crime to show offensive material to children under the age of 16 years. The definition of what is considered offensive material extends to objects and visual images including films and computer games (but not written materials) which describe, express or deal with matters of sex, drug misuse or addiction, crime, cruelty or violence or revolting or abhorrent phenomena in a manner likely to cause offence to a reasonable adult.

There are various offences under the Code relating to sexual behaviour and children.A person who incites or encourages a child to commit an indecent act or who indecently records a child can be guilty of a crime punishable by up to 10 years imprisonment. The offences carry substantial prison sentences that can vary depending on the age of the child, the relationship between the accused and the child and the circumstances of the alleged offence.

Censorship and classification

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.

The states and territories are responsible for enforcing the classification rules. In Western Australia, *the Classification (Publications, Films and Computer Games) Enforcement Act* 1996 (WA) (**Classification Act**) governs the enforcement procedures to ensure the federal classification codes are upheld classification in relation to publications, films, computer games and advertisements in Western Australia.

Offences under the Classification Act do not apply to publications, films and computer games that have been classified or to approved advertisements. An artist working in one of these areas whose work is classified (or in the case of advertisements, approved) will not be in breach of this Act.

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Child pornography offences

The *Child Pornography and Exploitation Material and Classification Legislation Amendment Act 2010* (WA) creates offences relating to child pornography. Child pornography is defined as material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is or appears to be a child engaging in sexual activity or in a sexual context.

This broad definition could potentially include a wide range of artistic works depicting young people. The courts will assess whether it constitutes child pornography by reference to its understanding of a reasonable adult's response – which may or may not be the same as to the views of the artistic community, art connoisseurs and the child's family.

Offences relating to material deemed to be child pornography include distribution, publication, displaying or exhibiting and possession or copying of material deemed to be child pornography. The penalties for being found guilty of these offences can range from fines to imprisonment for up to 7 years. It is a defence if a person accused of committing an offence contain in Part 2 of the *Child Pornography and Exploitation Material and Classification Legislation Amendment Act 2010* (WA) can demonstrate that the article is of recognised literary, artistic or scientific merit and the court is satisfied that publication of the article is for the public good.

Indecent or obscene articles

There are a number of offences created by the Classification Act that relate to "indecent or obscene articles". The Classification Act does not specifically define what it means by "indecent or obscene"; however, the following articles are excluded:

1. a publication that is classified Unrestricted, Category 1 restricted or Category 2 restricted;
2. a film that is classified G, PG, M, MA 15+, R 18+ or X 18+;
3. a computer game that is classified G, PG, M or MA 15+; or
4. an approved advertisement.

It is an offence to possess with intent to sell or copy an indecent article, and to sell or supply (including making offers to sell or supply) an indecent or obscene article. The display, exhibition or demonstration of an indecent or obscene article in a public place is also an offence. Both offences are punishable by $10, 000 fines. A number of other offences can attract fines up to $5000 such as the possession of a copy of an indecent or obscene article or displaying the article so that it is visible in a public place.

These offences may be of concern to artists who create artworks that cannot be classified under the Act. A sound recording is taken to be indecent or obscene if the words or sounds capable of being reproduced from the sound recording are indecent or obscene. For the purposes of the Act a sound recording is deemed to have been published when it is supplied to any person or when it is played within the hearing of any person.

Offences relating to computer services and "objectionable material"

The Classification Act also creates significant offences relating to the use of computer services in dealing with "objectionable material". Objectionable material can include a range of material such as films classified with a restricted classification or other material that describes or depicts content that would be likely to cause offence to a reasonable adult.

Offences include transmitting, obtaining possession, demonstrating, requesting the transmission and advertising the availability or transmissions of objectionable articles through a computer service. Penalties for any of these offences include fines of up to $15,000 or imprisonment for 18 months.

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It is a defence for these offences if you can successfully prove that the offending act was committed in relation to an article that is of recognised literary, artistic or scientific merit or a bona fide medical article and the offending act was justified for the public good.

Classification exemptions for events

An “approved organisation” may apply to the Minister or Director of the Classification Board to have events planned by their organisation exempt from some of the offences listed in Part 7 of the Classification Act. These exemptions could apply to events such as the screening of a film festival. Approved organisations are those who make successful applications to the Minister or Director of the Classification Board and receive notice of their approval through the Government Gazette or Commonwealth of Australia Gazette respectively. In the application process the organisation must outline their purpose, the extent to which they carry out activities of a medical, scientific, cultural or artistic nature, their reputation in relation to the screening of films and the conditions of admission at the proposed event.

Once an organisation has been approved it is then necessary to gain approval for an exemption to screen the particular film at the particular event. This should be made by the approved organisation, in writing, describing the films to be screened (including a brief synopsis of events depicted in the film) and should be accompanied by the proscribed fee. Applications for exemptions and more information can be found at can be found at the Classification Board (www.classification.gov.au):

These exemptions from classifications only apply to films. There is scope for the Minister to provide exemptions in writing for publications, computer games, advertisements and other articles but the Act does not explain the process for applying or approval for these specific areas.

Privacy

While there is no general right to privacy in Australia, there are laws which affect the recording or photography of children. In Western Australia, 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 public places managed by the council such as parks or the beach.

Surveillance

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 Device Act 1998* (WA) makes it illegal to install, use or maintain a listening device or optical surveillance device to record, monitor or listen to a private conversation or activates without the consent of the parties to the conversation or activity. It is also an offence to cause a listening device or optical surveillance device to be installed, used or maintained for the purposes of recording or monitoring a private conversation without consent. The penalty for committing such an offence can be a $5000 fine and imprisonment for up to 12 months for an individual and a $50,000 fine for a body corporate.

Knowingly publishing or communicating a private conversation or activity, or a report of a private conversation or activity is an offence punishable by fines of up to $5000 and imprisonment for up to 12 months for an individual and a $50,000 fine for a body corporate. For the purposes of these offences listening devices and optical surveillance device can include a very wide range of devices such as mobile phones and handheld cameras. A private conversation or activity is usually where the circumstances suggest that the parties desire to keep the conversation or activities to themselves. A conversation or activity would generally not be regarded as private where the circumstances would lead the parties to reasonably expect the activity or conversation to be overheard or seen.

Stalking

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While recording images of children in public may not of itself be prohibited, the manner in which the recording or images is taken may constitute the offence of stalking.

Under the Code there are various offences relating to stalking, some of which could potentially apply to an artist photographing a child in public in certain circumstances. More serious stalking offences are those where the offender repeatedly follows the victim, repeatedly contacts them or appears at their home or a place that they would ordinarily expect them to be. Generally this is not relevant where a photographer simply takes a few photos of children in public: but artists should take care that that their behaviour is not intimidating or frightening. For example a person who pursues another person in a manner that could reasonably be expected to intimidate that other person (or a third party) and the other person (or third party) is actually intimidated can be guilty of an offence carrying up to 12 months imprisonment and a $12,000 fine.

When taking images of children you should always be aware that they can become fearful or intimidated very easily. Offences such as those listed above could occur even if you have the best intentions. To avoid misunderstandings it is always advisable to attempt to get permission from the parents or guardian of the child, along with the child themselves, to prevent misunderstandings from occurring.

Bylaws

Many local councils 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.

For more information on restrictions on taking photographs in public see the Arts Law's information sheet on Street photographer's rights.

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 council or authority for information on whether a permit is required, how to apply and the costs involved.

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