Children in the creative process (Australia)

Federal, State and Territory laws all impact on how an artist works with children as part of the creative or artistic process. This information sheet looks at Australia's national laws relevant to working with children including the censorship regime related to the classification of films, computer games and other publications.

This information sheet must be read together with the information sheet that is specific to the state or territory in which the artist is working.

Introduction

Freedom of expression is a fundamental principle in the arts. However there are a number of aspects where that freedom is limited by law, and where the interests of an artist and the interests of the children they work with must be balanced according to the legislation. Where the artistic and creative process involves children, the law imposes a number of limits designed to protect children from exploitation or harm. If you are contemplating working with or using children in any part of the creative or artistic process, it is important that you understand the legal rules that apply. Ensure that you read this information sheet, and then the one which applies specifically to your state or territory.

General

There are four main types of laws likely to be relevant and these may vary in their application depending on the jurisdiction. This sheet outlines those first and then speaks about the potential for other laws which might affect your practice as an artist, as well as best practice models which should be considered but are not mandatory. This sheet covers these issues:

1. Laws concerning the employment of children and working with children
2. Laws relating to child pornography and obscenity / indecency
3. Classification and censorship laws
4. Proposed privacy laws and laws related to the photographing or filming of others (including children)
5. Other laws which may affect an artist working with children
6. Best practice for artists working with children

Child employment

Each state and territory in Australia places prohibitions or restrictions on employment of children – whether it be in relation to the age of the child, the nature of the work or the authorisation required in order to employ a child. A number of states and territories also have certain requirements with respect to employing children in the entertainment industry, which extends to their use in still photography and films. Whether or not the law considers that you are "employing a child" will vary depending on where you reside. Importantly, you may be subject to these laws even if you are not actually paying a child to work.

Employment issues such as rates of pay, and workplace safety are outside the scope of these fact sheets. You should check what occupational health and safety laws apply and also check with the Australian Industrial Relations Commission(**AIRC**) whether there are further laws applying to you in terms of employment.

In some states and territories there are prohibitions against the employment of children while they are nude or portrayed in a sexual context. There are some exceptions for children under 12 months where the parents have given consent and are present. Furthermore, in NSW and Victoria, a permit or authority is required to work with children in entertainment, while in

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Queensland a parent's consent form or special circumstances certificate is necessary. In NSW, Victoria and Queensland, there are also prohibitions on placing the child in dangerous or emotionally or physically harmful situations. There are restrictions in every state and territory on children working during school hours.

If you are an artist, you should clarify the following (see the fact sheet relevant to your jurisdiction):

a) Am I employing a child, or is that child doing "work"?

b) Do I need a permit or "authority" to do so given the work?

c) Do I fall under any of the exemptions in my state or territory Act?

d) Do I need to get a background, or working with children check?

e) Are the children going to be naked and if so, do relevant provisions apply? or

f) Does my state or territory have specific legislation relating to the employment of children in the entertainment industry?

Child pornography and obscenity / indecency

If the children involved in your project will be nude, or placed in a sexual or threatening context, the laws with respect to pornography and obscenity may apply. The difficulties of identifying the limits of what is and is not pornographic material and what is and is not a genuine artistic purpose have been highlighted in recent public debate in Australia. In Victoria, case law has referred to dictionary definitions of "indecent" and "obscene" which tended toward ideas of sexual depravity rather than anti-religious sentiment and had regard to contemporary standards.

The various state or territory criminal legislation prohibit the use of children for pornographic purposes (some describe these purposes more broadly than others), or the possession and/or distribution of this material. Varying defences apply depending on your jurisdiction, including classification of the material by the Classification Board.

Classification

The Arts Law Centre publishes a free information sheet entitled Classification and Censorshipwhich details how these schemes operate in Australia.

The National Classification Scheme applies to all films, computer games and publications. The Classification Board has the role of classifying all films, computer games and publications, as well as material available online (when referred to it by the Australian Communications and Media Authority(**ACMA**)).

All films and computer games must be classified before exhibition or sale. There are some exemptions from this requirement, eg. for films which are a record of a family, sporting, or community event, or of any live performance. Exempt films and computer games do not have to be classified prior to sale or exhibition, on the condition that they do not contain material which would cause them to be rated M or higher (i.e. they must be films or games which are likely to be classified G or PG).

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.

By contrast, other publications (defined as "any written or pictorial matter") do not need to be submitted for classification unless they fall within the definition of a 'submittable publication".

"Submittable publication" means an unclassified publication that, having regard to section 9A of the *Classification (Publications, Films And Computer Games) Act 1995*(Cth) of the or to the National Classification Code and the classification

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guidelines to the extent that they relate to publications, contains depictions or descriptions that:

a) are likely to cause the publication to be classified RC (refused classification); or

b) are likely to cause offence to a reasonable adult to the extent that the publication should not be sold or displayed as an unrestricted publication; or

c) are unsuitable for a minor to see or read.

It is an offence to sell or deliver, leave or display in a public place a publication classified RC, or a submittable publication. It is an offence to sell or publicly exhibit an unclassified or RC film, or to sell or publicly demonstrate an unclassified or RC computer game.

Under the National Classification Code which applies in all states and territories, publications, films and computer games may be refused classification if they describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not). *The Classification (Publications, Films And Computer Games) Act 1995*(Cth) states a number of matters are to be taken into account when classifying material, including the literary, artistic or educational merit (if any) of the publication, film or computer game. Internet content is indirectly regulated by this scheme when online content is referred by the ACMA for classification. The Publications Guidelines and the Film and Compute Games Guidelines also provide further detail on what may be considered RC. The Guidelines can be found on the Australian Government's Classification Board website.

Privacy

There is currently no general right to privacy in Australia, nor is there alaw specifically aimed at preventing the unauthorised recording or use of a child's image. There are, however, a number of laws which regulate the taking of photographs or films (of adults and children), and the ways in which those works may be used. The Australian Law Reform Commission (**ALRC**) has recommended the introduction of a statutory tort of invasion of privacy applicable to unauthorised photographs, with a public interest exception[1].

5. Other laws which may affect an artist working with children include:

a) **Court proceedings:** Various legislation protects the identity of children involved in court proceedings or who are under protection.

b) **Surveillance:** some states and territories have 'surveillance device legislation" which is aimed at preventing the unauthorised recording of people's private activities. The legislation applies equally to children and adults. An artist should be aware of how the legislation operates in their particular state or territory and get permission for their activities if they may be deemed 'surveillance".

c) **Public nuisance:** 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 or public nuisance.

d) **Use of the image:** Although there is no general law preventing the unauthorised use of a child's image, the areas of law described below can be used to prevent unauthorised use of a person's image in some circumstances. They are not specific to the use of children's images but could be applicable to an artist who has featured children in their work.

e) **Defamation:** The unauthorised use of the image may give rise to an action for defamation if it either lowers the public's estimation of the person, exposes the person to hatred, contempt or ridicule, or causes the person to be shunned or avoided. Unless the child is well known and has a significant reputation, it may be difficult and expensive for a child to succeed in an action for defamation.

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f) **Trade practices issues:** Sections 18 and 20 of the *Australian Consumer Law* and the equivalent sections of the state Fair Trading Acts prohibit commercial conduct which misleads or deceives consumers. To prevent the unauthorised use of an image under this law it is necessary to show that the use of the image would mislead or deceive consumers – for example, to say that a particular film had been classified when it had not, and to sell it on that basis would be an infringement of the state or territory and/or Federal Acts. The mere use of a person's image is unlikely to be found to mislead or deceive under this area of law unless that person is a celebrity or well known endorser of products, in which case the unauthorised use of their image in connection with a product may constitute misleading and deceptive conduct. This is because the public would be led to believe that the celebrity is endorsing the product. An example of this would be to use images of a child celebrity in a advertisement for children's clothing without that child's endorsement of or affiliation with those items.

g) **Passing off:** The law of passing off is similar to the law of misleading and deceptive conduct. It is designed to protect the goodwill or reputation that a trader has in relation to their business. Passing off has also been used to protect professional reputation. To succeed in an action for passing off the complainant must have a reputation and there must be a misrepresentation by the defendant in relation to the business which causes damage or the likelihood of damage to the business. Because a reputation is required to successfully establish passing off, this law generally won't protect the "average person in the street".

Best Practice for artists working with children

These are practices which are not required by law, but which are useful for the artist and/or their subject in ensuring that they develop a professional and trouble free practice.

a) Generally, photographers do not have to seek permission from their subjects to photograph them. You could ask permission to take photographs of or film children if you think that is appropriate in the circumstances and would make the child and their guardians feel more comfortable.

b) Use a Model's release to authorise the intended use of the child's image. Both the parent or guardian and the child should be asked to sign. A sample Model's release is available for purchase from Arts Law. You may wish to include an additional clause in the release, dealing with the release of the images on the internet.

c) For those works containing images of children which will be published online, digital rights management techniques can be employed in order to make it more difficult for the images to be copied or manipulated by third parties. For more information see Arts Law's information article on "Displaying visual art on the net".

d) All state and territory legislation requires that children are at school during school hours, usually with a provision of "reasonable excuse" if this is not possible. This is an obligation on the parents or guardian of the child. An artist could assist in providing information about the reason for absence for the parents to ensure that they comply.

What does the law in my state or territory say?

Ensure that you read the Arts Law information sheet relating to your jurisdiction.

Children in the creative process: NSW

Children in the creative process: VIC

Children in the creative process: ACT *

Children in the creative process: NT

Children in the creative process: WA

Children in the creative process: SA *

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Children in the creative process: TAS *

Children in the creative process: QLD

**Arts Law is currently in the process of updating these Information Sheets. If you need legal assistance relating to your arts practice, you can submit a query here.*

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[1]ALRC Discussion Paper 72: Review of Australian Privacy Law para 59.112-118 of and ALRC Report 108: For Your Information: Australian Privacy Law and Practice para 69.106-135

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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