Children in the creative process (NSW)

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 New South Wales 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 NSW 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 information sheet explains how the various federal laws operate. This information sheet explains how New South Wales 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 New South Wales.

The NSW Commission for Children and Young People (the **Commission**) is an independent statutory organisation established by the *Commission for Children and Young People Act 1998* that advocates for the children and young people of New South Wales and reports directly to the NSW Parliament. Its website is a useful source of information and links.

Child employment

The law relating to the employment of children varies between states and territories. In New South Wales, the *Children and Young Persons (Care and Protection) Act 1998* (the ***Children and Young Persons Act***) governs the employment of children under 15 years of age and under 16 years of age for any type of modelling.

The *Children and Young Persons Act* requires you to apply to the Office of the Children's Guardian (the "NSW Guardian") for an "employer's authority" in order to employ a child under the age of 15 years for entertainment, exhibition or still photography, or a child under 16 years of age for any type of modelling, unless you hold an Authority to do so or you can verify that you qualify for an exemption. The *Children and Young Persons Act* does not define "entertainment" or "exhibition" but the information published by the NSW Guardian on children's employment states that it includes activities such as any type of still photography, film, television, commercials and advertising, film / video or stills for the internet, any other production of images for broadcasting, radio and voice-overs, corporate events, such as conferences or launches, live performances, including theatrical, musical and circus performances, other live performances (e.g. shopping centre performances), any type of modelling, including catwalk modelling, and other exhibitions. Preparatory activities (e.g. rehearsals, wardrobe fittings, publicity) also require an authority.

An employer's authority will only be granted where the applicant can establish that the proposed employment will not put the child at risk of physical or emotional harm, or sexual abuse. A condition of the grant of the authority is that the employer must comply with the Code of Practice contained in the *Children and Young Persons (Care and Protection – Child Employment) Regulation 2015* (**the Code**). A copy of the Code must be given to the child's parents.

The Code imposes obligations including record keeping, insurance, notification requirements, schooling requirements, hours of work, breaks and supervision. The Code states that children employed to take part in photographic sessions, entertainments, exhibitions or recorded performances must not be cast in inappropriate roles or situations given the child's age, maturity, emotional or psychological development and sensitivity. Children should not be intentionally distressed. The employment of children when they are naked or when any other person is naked is specifically prohibited. There are special rules concerning babies less than 12 weeks old and children under 3.

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Breaches of the Code may result in extra conditions being placed on an employer's authority, the suspension or revocation of an employer's authority, fines, or prosecution.

Information for employers, parents, talent agents and children and the Code of Practice are available on the NSW Guardian's website.

Am I "employing" a child?

Under the *Children and Young Persons Act*, you are employing a child if you are employing a person who is under the age of 15 years (or 16 years in the case of a model).[1]

You will be regarded as "employing" that child if you provide any material benefit (including but not limited to money) to the child or another person (such as their parent) in respect of services rendered by the child. This could be a one-off monetary payment, or a non-monetary benefit such as copies of photographs of the child or tickets to performances. If the child is a student and the activity is occurring incidental to the child's studies (such as a secondary school student on work experience) you are considered to be providing a material benefit (however, no fee is payable for an authority in this case – see below).[2]

In other words, you may be considered to employ a child, whether or not you pay them, and whether or not your business is carried on for private profit. How much does an employer's authority cost?

As of December 2015, the fees applicable for an employer's authority to employ children are as follows:[3]

Duration of Authority	Entertainment and exhibition	Still photography and door-to-door sales
1 week	$200	$100
3 months	$1,830	$806
6 months	$2,040	$914
12 months	$2,400	$1,075

No fees are payable if the employer is a student directing children to perform tasks as part of their studies.

Child Safe Codes of Conduct

An employer holding an authorisation is required to develop a Code of Conduct which encourages child safe practices.[4] A copy of the employer's code needs to be provided to each employee, contractor, sub-contractor and volunteer, as well as to the child's parents so they can explain it to their child.

The website of the NSW Office of the Children's Guardian provides template Codes of Conduct which can be used as a starting point.

Exemptions

There are some circumstances where an employer is exempt from the requirement to obtain an employer's authority. If the child is more than 10 years old, no authority is required if the employment is outside school hours and no more than 10 hours a week. There are also limited exemptions relating to children that are nationals of foreign countries, as well as fundraising appeals and occasional entertainments or exhibitions where the net proceeds go to charity. A written exemption can also be obtained from the NSW Guardian; however, such exemptions are not common.

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Interference with physical or emotional well-being

The *Children and Young Persons Act* makes it an offence to:

1. employ, or allow a child to be employed, without an appropriate authority or in breach of the conditions of an employer's authority; or
2. cause or allow a child under the age of 15 to take part in any employment which puts the child's "physical or emotional well-being" at risk.[5]

The term "physical and emotional well-being" is not defined nor is there any guidance as to when a child will be considered at risk. Artists should consider risk on a case by case basis, and if there is any doubt about whether activities may constitute such a risk, should seek legal advice. It is the employer's responsibility to make such assessments to ensure that they are compliant with the Code. Just because you have an employer's authority does not mean that you will not be prosecuted; however, because obtaining such an authority involves an assessment of the risks involved in the employment project, the issuance of an authority means it is less likely that your project will be considered to place a child at risk.

Working With Children

The *Children and Young Persons Act* requires a WWC Check to be undertaken for anyone engaged in paid or unpaid child-related work.[6] The result of a WWC is either a clearance to work with children for five years, or a bar against working with children. Cleared applicants are subject to ongoing monitoring, and relevant new records may lead to the clearance being invoked.

Between 15 June 2013 and 31 March 2018, a new Working With Children (WWC) Check regime will be phased in in New South Wales. All people with an existing WWC Check (obtained under the previous system) will gradually fall under this regime.

The new WWC Check is a check of the relevant records of a potential employee and includes:

1. a check of the full, national criminal record of the person, and any relevant apprehended violence or child protection orders made against the person,

2. a probity check relating to the previous employment or other activities of the person,

3. an assessment of the risk to children arising from anything disclosed by such a check,

4. the disclosure of the results of such checks and assessments to the person responsible for making the employment decision.

The fee for paid workers is $80 for a five-year clearance. Unpaid workers are fee exempt. To find out more about applying for a WWC Check, go to the Office of Children's Guardian website.

What is "child-related work"?

Child-related work is defined as work that involves:

· face-to-face contact with children in a sector listed in sections 4 to 16 in the *Child Protection (Working With Children) Regulation 2013* (NSW), which includes work in cultural, recreational or sporting organizations providing programs for children (including educational, tuition and coaching services for children) and entertainment services for children.[7]

- a non-child-related role if certain criteria are met, such as access to confidential information regarding children.

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Exemptions

Certain workers are exempt from the requirement to undergo a WWC Check including children (under the age of 18), very short term work (max 5 days per year), visiting speakers/performers etc on a one-off occasion, parents or close relatives volunteering in connection with an activity in which their child is participating, health practitioners, and police officers.

Phasing in the new WWC system

If you already hold a WWC Check issued under the old system (prior to June 2013), you will be phased onto the new WWC Check between 15 June 2013 and 31 March 2018,[8] depending upon your industry sector.[9]

Employees starting a new job in child-related work who currently have no check are responsible for applying for their own WWC Check before starting work.[10] The WWC Check applies to volunteers as well as paid workers.[11] Existing workers and volunteers will be phased into the WWC system over the 5 year period. [12]

Self-employed artists who currently hold a "Self Employed Certificate" demonstrating their suitability and absence of a criminal record may continue to use it until it expires at which point they will need to apply for an individual WWC Check.[13]

If you are employing a person directly as an employee, or indirectly as an agency for "child-related employment", you are required to register on the WWC Check website and meet the following obligations:[14]

- ensure existing employees and all volunteers (new and current) apply for the new WWC Check in accordance with the phase in schedule;
- only hire new, paid, child-related workers who have a WWC Check clearance (or a completed application in progress);
- verify the status of every WWC Check online (paper evidence must not be accepted as proof of clearance);
- remove any unauthorised person from child-related work (including individuals who are barred or who do not hold a WWC Check clearance when required to do so).

Prohibited employment

A list of offences that automatically bar an applicant from working with children is contained in Schedule 2 of the *Child Protection (Working With Children) Act 2012* (NSW).

Criminal offences: physical, emotional or developmental harm; child pornography and obscenity

Several New South Wales laws make it an offence to use or deal with children in a way that is sexually exploitative or physically or emotionally damaging. The difficulties of identifying what pornographic material is and what constitutes a genuine artistic purpose have been highlighted in recent public debate in Australia.

Physical, emotional or developmental harm

The *Children and Young Persons Act* makes it an offence to intentionally take action that results or is likely to result in:

1. the physical injury or sexual abuse of a child or young person, or
2. a child or young person suffering emotional or psychological harm of such a kind that the emotional or intellectual development of the child or young person is, or is likely to be, significantly damaged, or
3. the physical development or health of a child or young person being significantly harmed.[15]

This offence is not restricted to circumstances where there is an employment relationship.

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Child pornography

Under the *Crimes Act 1900* (NSW) (**Crimes Act**), it is an offence to use a child under the age of 14 years for the purposes of the production of 'child abuse material'. This carries a maximum penalty of 14 years imprisonment.[16]

Separate offences prohibit the production, dissemination or possession of child abuse material which is defined as material that depicts or describes a child:

1. engaged in sexual activity, or
2. in a sexual context, or
3. in such a way that reveals the child's private parts, or
4. as the victim of torture, cruelty or physical abuse (whether or not in a sexual context) in a manner that would in all the circumstances cause offence to reasonable persons.[17]

'Child abuse material may include real children or events or actors or may be the product of imagination. It captures both visual and written expressions of thought and imagination. In determining what would "cause offence to reasonable persons," the literary, artistic, journalistic and educational merit (if any) of the material will be considered as well as community standards on morality, decency and propriety and the general character of the work.[18]

Sexual context

The broad scope of the provisions relating to child pornography mean that artists using or depicting children in their work should be very careful where sexual connotations or themes of violence or abuse are involved. The extent to which an artwork shows a child "in a sexual context" or as a victim of cruelty 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. The fact that the child depicted in a work was not actually the victim of any abuse or cruelty also appears to be irrelevant.

Defences and the role of artistic merit

It is a defence to a charge of 'producing' child pornography to show that the material has been classified other than RC (Refused Classification) under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).[19] However, classification of material as RC is not a defence to a charge of 'using' children for pornographic purposes under section 91G of the New South Wales *Crimes Act*. Note that only films, computer games and publications are eligible for classification.

As at 1 March 2013, genuine artistic purpose is no longer a defence to the offences of production, dissemination, and possession of material that depicts children pornographically. Artistic merit is instead used in evaluating whether the material is offensive, as discussed above.

Summary offences

There are various other offences that are not specifically directed at, but are still relevant to consider in relation to children. For example, it is an offence for a person to conduct themselves in an "offensive manner" in or near a public place or a school.[20]

Obscenity / indecency

There are also laws dealing with the publication of material that might be considered obscene which could be relevant to content involving children. The *Crimes Act* provides that a person who publishes an "indecent article" is guilty of an offence. The *Crimes Act* does not define "indecent article" but it does not include any film that has been classified (other than RC or

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X18+), a classified computer game (other than RC), a publication classified as Unrestricted, Category 1 restricted or Category 2 restricted or a film, computer game or publication that has a classification exemption.. Generally speaking, the judge or magistrate would need to find that an article was 'indecent' because it contravened accepted society standards of decency. In assessing the issue of indecency, the *Crimes Act* allows for expert evidence to be considered as to whether or not an article has any merit in the field of literature, art, medicine or science (and if so, the nature and extent of that merit).

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.

The amendments to the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) are aimed at making the process of obtaining classification substantially easier and more affordable. Commencing 11 September 2014, films, computer games and publications will be able to be classified using simple, accessible, and low cost classification tools that have been approved by the Minister. For example, the International Age Rating Coalition (IARC) has been developing a tool which simplifies the classification process by which developers of digitally distributed games can obtain ratings. Game developers answer a questionnaire concerning their product's content. The responses generate a classification rating for a range of jurisdictions including the US, Europe and Australia in accordance with the standards of those jurisdictions which the developer can then rely on.

The states and territories are responsible for enforcing the classification rules. Enforcement of classification rules in NSW is governed by the *Classification (Publications, Film and Computer Games) (Enforcement) Act 1995* (NSW).

It is an offence for a person to sell, deliver, show or leave in a public place, a publication which has been refused classification. It is an offence to sell or display for sale a submittable publication – that is, one that is likely to attract a Category 1 restricted, Category 2 restricted or RC classification.

Selling or exhibiting a film or computer game that has not been classified or has been classified as Refused Classification (**RC**) or X 18+ is prohibited. This attracts a penalty including imprisonment for up to 12 months.[21]

Specific offences apply when films, publications and computer games classified as unsuitable for minors are sold, publically exhibited or demonstrated, shown to or delivered to minors.[22]

Exemptions for galleries and film festivals

The requirement to seek a classification ruling for a publication extends to any form of recording where a visual image can be produced, including films and slides. This would apply, for example, to a multimedia artwork.

However, under New South Wales law, a person can apply in writing to the Director of the federal Classification Board for an exemption from classification in respect of any film, publication, computer game or advertisement. Conditions may be attached to the exemption.

There is also specific provision for exemptions to be granted to 'approved' organisations wanting to exhibit unclassified films at a specified event and for approved organisations engaged in educational cultural or artistic activities which seek exemption for all activities relating to films or computer games. These exemptions may be appropriate for an art gallery or film festival or gaming conference.

In deciding whether to approve such exemptions the following factors are relevant:

1. the purpose for which the organisation was formed;
2. the extent to which the organisation carries on activities of an educational, cultural or artistic nature;

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3. the nature reputation of the organisation in relation to the screening of films and
4. the conditions for admission to the screening of films.[23]

Note that a classification (or exemption) for a film or film event arguably applies only to that film or event. Check that you don't need to make a separate application for classification or exemption for an associated publication (for example an exhibition catalogue) that may be a 'submittable publication" – that is, one which is likely to attract a Category 1 restricted, Category 2 restricted or RC classification.[24]

For information on how to apply for classification or for an exemption from classification, see the Australian Government Classification Board website.

Privacy

While there is no general right to privacy in Australia, there are laws that affect the recording or photography of children. In New South Wales, 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.

Children in protection or in the criminal justice system

Various laws protect the identity of children involved in court proceedings or who are under protection.

The *Children and Young Persons Act* prohibits the publication of the "name" of children involved in proceedings in the Children's Court or who are involved in non-court proceedings.[25] "Name" is defined to include any picture or material that is likely to lead to the identification of the child. Publishing or broadcasting such information is an offence that can attract a fine or up to 2 years imprisonment.[26]

It is no longer prohibited to publish the name of a person involved in criminal proceedings (including as a witness) who was a child at the time of the offence; However the *Family Law Act 1975* (Cth) has a general prohibition in relation to naming any person who is a party, related to or associated with a party, or is a witness to proceedings.[27] A contravention is an indictable offence.

Surveillance devices

Surveillance device legislation is aimed at preventing the unauthorised 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 for using surveillance devices (including handheld cameras) if required.

The *Surveillance Devices Act 2007* (NSW) (the ***Surveillance Devices Act***) regulates the installation, use, maintenance and retrieval of surveillance devices. This legislation prohibits the use of a listening device to record private conversations.[28] An "optical surveillance device" is defined as a device capable of being used to record visually or observe an activity.[29] This definition could include a handheld, still or video camera or a mobile phone. Unauthorised installation, use or maintenance attracts a fine or up to 5 years imprisonment.

Note that this legislation does not prevent images being recorded if there is no interference with or trespass on private property; although the *Crimes Act* does prohibit filming people engaged in certain types of private acts without their consent. Best practice is get the permission of all people being recorded on film.

For more information see the information sheet Filmmaking with a Smartphone or Hidden Camera.

Stalking

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

For example, section 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) makes it an offence to stalk or intimidate someone with intent to cause fear of physical or mental harm or if you know the conduct is likely to cause such fear. "Stalking" includes following a person about, watching or frequenting the vicinity of a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity.[30]

The *Crimes Act* also makes it an offence punishable with 3 months' imprisonment to be in or near a building with intent to peep or pry upon another person.[31]

Bylaws and site specific acts

Many local government authorities and other authorities have bylaws requiring a permit to be purchased before engaging in activities such as filming or photography in public places or on council property. The costs of permits vary between the different authorities. Such permits can be used as a means of restricting the ability to photograph children in public places. For more information on restrictions on taking photographs in public see the Arts Law's information sheet on "Street Photographers 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 government authority or any other relevant authority, for information on whether a permit is required, how to apply and the costs involved.

Instructing children

The regulation of the education of children varies from state to state. In NSW there are restrictions on the number of children that may be taught in a class at schools. The maximum number of students that should be in a class from years 7 through to 12 is 30. This is not applicable to non-school education or extra-curricular activities.

However, if you are a drama teacher or dance instructor or other arts educator running classes for children outside the regular school system, you will need to consider the Workplace Health and Safety regulations that apply to you and what your responsibilities are to the children you are instructing. Workplace Health and Safety laws may have an impact on the number of children you should instruct at one time in the available space you are using. For further information about Workplace Health and Safety visit NSW WorkCover.

[1] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 221(1)..

[2] *Children and Young Persons (Care and Protection – Child Employment) Regulation 2015* (NSW) reg 4(1)(b).

[3] *Children and Young Persons (Care and Protection – Child Employment) Regulation 2015* (NSW) reg 8.

[4] *Children and Young Persons (Care and Protection – Child Employment) Regulation 2015* (NSW) reg 13.

[5] *Children and Young Persons (Care and Protection) Act 1998* (NSW) section 222.

[6] FACT SHEET 1: Overview of the Working With Children Check (October 2014) http://www.kidsguardian.nsw.gov.au/ArticleDocuments/191/FS1_overviewofthecheck_Oct2014.pdf.aspx

[7] FACT SHEET 5: What is child-related work? (July 2014)

[8] FACT SHEET 2: Phase in schedule for existing workers (September 2014) http://www.kidsguardian.nsw.gov.au/ArticleDocuments/191/FS2_phaseinschedule_September2014.pdf.aspx

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[9] FACT SHEET 3: Which sector do I belong to? (July 2014)
http://www.kidsguardian.nsw.gov.au/ArticleDocuments/191/FS3_WhichsectordoIbelongto_July2014.pdf.aspx

[10] FACT SHEET 1: Overview of the Working With Children Check (October 2014)
http://www.kidsguardian.nsw.gov.au/ArticleDocuments/191/FS1_overviewofthecheck_Oct2014.pdf.aspx

[11] FACT SHEET 22: Volunteers (October 2014)
http://www.kidsguardian.nsw.gov.au/ArticleDocuments/191/FS22_Volunteers_Oct2014.pdf.aspx

[12] FACT SHEET 1: Overview of the Working With Children Check (October 2014)

[13] FACT SHEET 1: Overview of the Working With Children Check (October 2014)

[14] FACT SHEET 7: Agencies and Contractors (July 2014)
http://www.kidsguardian.nsw.gov.au/ArticleDocuments/191/FS7_Agenciesandcontractors_July2014.pdf.aspx

[15] *Children and Young Persons (Care and Protection) Act 1998* (NSW) section 227.

[16] *Crimes Act 1900 (*NSW*)* section 91G.

[17] *Crimes Act 1900* (NSW) section 91FB(1).

[18] *Crimes Act 1900* (NSW) section 91FB(2).

[19] *Crimes Act 1900* (NSW) section 91HA(7).

[20] *Summary Offences Act 1988* (NSW) section 4.

[21] *Classification (Publications, Film and Computer Games) Enforcement Act* 1995 (NSW) section 6.

[22] *Classification (Publications, Film and Computer Games) (Enforcement) Act 1995* (NSW) sections 9-14, 24, 30, 30A, 31, 31A, 32, 34, 50.

[23] *Classification (Publications, Film and Computer Games) (Enforcement) Act 1995* (NSW) section 51(3).

[24] *Classification (Publications, Film and Computer Games) (Enforcement) Act 1995* (NSW) section 46.

[25] *Children and Young Persons (Care and Protection) Act 1998* (NSW) section 105(1).

[26] *Children and Young Persons (Care and Protection) Act 1998* (NSW) section 105(2).

[27] *Family Law Act 1975* (Cth) section 121.

[28] *Surveillance Devices Act* 2007 (NSW), section 7(1).

[29] *Surveillance Devices Act* 2007 (NSW), section (4).

[30] *Crimes (Domestic and Personal Violence) Act 2007* (NSW) section 8(1).

[31] *Crimes Act* 1900 (NSW) section 547C.

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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