Children in the creative process (NT)

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 the Northern Territory 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 NT 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 the Northern Territory 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 the Northern Territory.

Child employment

The law relating to child employment varies between individual states and territories. The Northern Territory's *Care and Protection of Children Act* 2007 *(NT)* contains provisions regulating the employment of children. Under these provisions it is an offence to require a child to perform work that involves exploitation of the child or is harmful, or likely to be harmful, to the child's physical, mental or emotional wellbeing. A child under the age of 15 years must not be required to work between the hours of 10:00 pm and 6:00 am. It is also an offence for a parent to permit their child to perform any of the work described above.

A child is defined as a person less than 18 years old or apparently less than 18 years old if their age cannot be proved.

Exploitation of a child includes sexual and any other forms of exploitation of the child. This includes involving the child as a spectator or participant of an act of a sexual nature or a pornographic performance. Harm includes sexual abuse or other exploitation or exposure to physical violence.

Screening for child related employment

Currently there are no legal requirements for people working with children to undertake a police check in the Northern Territory, however, organisations which require employees and/or volunteers to work with children may have their own policies in this regard.

Part 3.1 of the*Care and Protection of Children Act* requires people engaged in child-related employment to get a Working With Children Clearance. This requirement also applies to volunteers. For example an artist may need a valid clearance notice if they are engaged to work at a school or a club that has a significant child membership or if they provide photographic, entertainment or private tuition services for children.

An individual or employer can apply for a clearance notice from the Screening Authority. A clearance notice will remain valid for 2 years. A clearance notice will not be issued if the candidate has been convicted of an offence prescribed by the regulations or if the Screening Authority decides that the candidate poses an unacceptable risk of harm or exploitation of children.

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It is an offence to employ an individual in child related employment if the employee does not hold a valid Working with Children Clearance Notice. In the event a clearance notice hasn't been received before employment commences, it is the responsibility of the employer to request an exemption. Exemptions are granted by the Chief Executive of the Office of Children and Families and will normally apply for a period of 90 days. Workers under the age of 15 years are exempt from the requirement as are parent volunteers in certain circumstances. There are other limited exemptions including visitors to the Northern Territory volunteering for less than 14 days in any year.

For more information see the Working with Children website which also contains application forms for Clearance Notices and Exemptions.

Criminal offences: child abuse material and indecent articles

There is a range of offences related to producing and dealing with material involving children under the Northern Territory *Criminal Code*.[1]

A person who possesses, distributes produces, sells or advertises **child abuse material** is guilty of an offence and liable to up to 10 years imprisonment.[2] It is also an offence punishable by up to 2 years imprisonment to publish an **indecent article** .[3]

A person who procures a child for the production of child abuse material or for a **pornographic or abusive performance** is guilty of a crime and is liable to up to 14 year imprisonment.[4]

Child abuse material is defined as material that depicts, describes or represents a person who is, or appears to be, a child:

1. engaging in sexual activity,
2. in a sexual, offensive or demeaning context,
3. or being subject to torture, cruelty, or abuse.

An **indecent article** is defined as one which depicts, describes or represents a person (whether or not engaged in sexual activity) who is, or appears to be under the age of 16 in a manner that is likely to cause offence to a reasonable adult.[5]

A **pornographic or abusive performance** is defined as one which is likely to cause offence to a reasonable adult and involves a person:

1. engaging in sexual activity; or
2. in a sexual, offensive or demeaning context; or
3. being subject to torture cruelty or abuse.

Defences

Although there is a defence to possession of child abuse material based on legitimate medical or health research, there is no defence based on artistic merit. Artistic merit may, however, be a factor in deciding if something is "likely to cause offence to a reasonable adult".

The provisions do not apply to a film or publication that has been classified or granted an exemption under the *Classification of Publications, Films and Computer Games Act* (NT). See below for more information on the classification system and exemptions.

Context

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While most accept that there is a legitimate and genuine public interest in preventing the exploitation of children in the production of indecent, child exploitation or pornographic 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.

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. The fact that the child depicted in a work was not actually the victim of any abuse or cruelty also appears to be irrelevant in determining what child abuse material is.

Whether a work is "likely to cause offence to a reasonable adult" may also be difficult to determine exactly. 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."[6]

Classification and censorship

The classification rules and guidelines are Commonwealth legislative instruments. For more information on how the National Classification 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 National Classification Scheme. Enforcement of the classification rules in the Northern Territory is governed by the *Classification of Publications, Films and Computer Games Act* (NT) which establishes a Publications and Films Review Board for the Northern Territory. It has powers to require any material (film, computer game, advertisement or other publication) available or likely to be published in the Northern Territory to be submitted to it for classification.

Possessing, selling or distributing prohibited publications is an offence under the NT's *Classification Act*. Prohibited publications include publications that have, or would have if classified a category 1 restricted, category 2 restricted or RC classification. It is also an offence to sell or deliver to a child a category 1 or 2 publication.

Exhibiting in a public place or selling a film which has not been classified or has been classified as RC (Refused Classification) is an offence attracting a fine or imprisonment of up to 2 years.[7] It is also an offence to sell or deliver to a child a film classified RC or an unclassified film that would be classified RC.[8]

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 multi-media art work. An organisation 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.

An application should be made by the organisation to the Northern Territory Classification Board. The application must specify the event and include a synopsis of the film for which exemption is sought.

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

1. The purpose for which the organisation was formed.

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2. The extent to which the organisation carries on activities of an 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.[9]

An organisation can apply for exemption in relation to the exhibition of a particular film at an event or a more blanket exemption covering the activities or functions of the organisation that relate to films or computer games[10].

5. 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 the Northern Territory, these relate to general provisions concerning the surveillance or stalking of another person. In addition, various bylaws made by councils may affect the photography or filming of people in public spaces such as parks or at the beach.

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 2007* (NT) 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 circumstances where the parties ought reasonably expect would be observed.[11] 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 and using it to record private activity is prohibited even if you and the surveillance device are on public or your own 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 and attracts a fine or up to 2 years imprisonment.[12]

Stalking

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

For example section 189 of the *Criminal Code (NT)* makes it an offence to stalk someone with intent to cause fear or apprehension of physical or mental harm or if you know the conduct is likely to cause such fear or apprehension. "Stalking" includes following a person about, watching, keeping them under surveillance 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.

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 certain 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's information sheet on "Street Photographers Rights".

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Instructing children

The regulation of the education of children varies from state to state. In the Northern Territory, secondary schools aim for an average of 25 students per class for ages 12 – 15 years. This has no bearing on 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 NT WorkSafe.

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[1]The Criminal Code is incorporated into the *Criminal Code Act*(NT) , Schedule 1. Footnotes 3 – 6 refer to the Criminal Code as embodied in the *Criminal Code Act*.

[2]*Criminal Code*, s125B.

[3]*Criminal Code*, s125C.

[4]*Criminal Code*, s125E.

[5]*Criminal Code*, s125A.

[6]*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.

[7]*Classification of Publications, Film s and Computer Games Act* (NT) ss38, 45

[8]*Classification of Publications, Films and Computer Games Act*(NT) s50.

[9]*Classification of Publications, Film sand Computer Games Act* (NT) 100.

[10]*Classification of Publications, Film sand Computer Games Act*(NT) s 98

[11]*Surveillance Devices Act* 2007 (NT) s4.

[12]*Surveillance Devices Act* 2007 (NT) s15

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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