Children in the creative process (QLD)

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 Queensland 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 QLD 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 in Australia" since that information sheet explains how the various federal laws operate. This information sheet explains how the Queensland 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 Queensland.

Child employment

The law relating to child employment varies between individual states and territories. In Queensland, the *Child Employment Act 2006 (Qld)* and the *Child Employment Regulation (Qld)* governs work performed by children under 18 years of age.

The Act sets out general restrictions applying to minimum age and hours that children can work; however children working in the entertainment industry are exempted from many of these provisions. For example, the Regulations state that generally the minimum age for employment is 13 years but this restriction does not apply to the entertainment industry. In other words, there is no minimum age for children working in the entertainment industry. However to ensure the protection of young children, there are greater supervisory conditions stipulated for children working in the entertainment industry.

What is "working in the entertainment industry"?

Working in the entertainment industry is defined as work "that is performing" which includes for the purpose of advertising and includes acting, dancing, miming, singing and modelling. Live entertainment includes theatre, opera, circus entertainment, fashion parades, performances in a shopping centre and promotional events. Recorded entertainment includes film, television, radio, photographic modelling, a performance recorded for later entertainment or exhibition and any other entertainment which is not live entertainment.[1] It is not clear whether or not it includes children modelling for a painter or sculptor as opposed to a photographer.

Am I "employing"a child?

You are the employer of a child if you engage a child, or arrange for a child to perform work at your direction "whether the child works for gain or reward or on a voluntary basis". Work covered by the Act and Regulations includes work under a contract for labour only, or substantially for labour only, as well as unpaid work.[2]

Parental consent form

Written parental consent is required to employ young or school-aged children. A school aged child is a child under 16 years old who is required by law to be enrolled for an educational program. A parent's consent form must be on an approved form. The forms are available from the Department of Employment and Industrial Relations website.A parent's consent form is not

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required if the employer is one of the child's parents.

Special circumstances certificate

The Director-General of the Queensland Department of Employment and Industrial Relations may grant a special circumstances certificate to allow a child to work under circumstances where parental consent is not possible or where the child would ordinarily not be allowed to work due to restrictions imposed by the Regulations. The Director-General can grant a certificate if satisfied on reasonable grounds that the work will not interfere with the child's schooling or well-being.[3]

Child employment guide

The Department of Employment and Industrial Relations has issued a Child Employment Guide which outlines the requirements and restrictions associated with work performed by children in both the entertainment and other industries. A copy of the guide must be made available at the child's place of work and parents of young or school-aged children must be informed of the existence of the guide and provided with a copy if asked.[4] Failure to do so is an offence.

Nudity and inappropriate situations

It is an offence to allow any child under 18 years old to work while nude or wearing sexually provocative clothing. This includes allowing the breasts of a female over 5 years old to be visible. This prohibition does not apply to work in the entertainment industry if the child is under 12 months old and a parent consents in writing and supervises.[5]

A young or school-aged child must not be put into a role or situation that is inappropriate for the child, having regard to the child's age, emotional and psychological development, maturity and sensitivity. In particular, such children must not be exposed to scenes or situations likely to distress or embarrass them, or which deliberately distress them to obtain a more realistic depiction of an emotional reaction or which require them to be present when another person is nude or semi-naked.[6] The employer must ensure there are facilities for the child to dress and undress in private.[7]

Supervision

Special supervisory conditions are imposed on employers who employ young and school aged children in the entertainment industry. Children must be supervised directly by a parent or a person with appropriate child-care qualifications. Babies under 12 weeks old must also be supervised by a registered nurse or midwife if they are working for more than one hour. It is prohibited to employ a baby under 12 weeks old who was born prematurely or who is not in good health.

Hours of work

The hours a child is permitted to work in the entertainment industry varies depending on whether they are involved in a recorded or live performance. The permitted working hours are prescribed in the Regulations and are outlined in the Child Employment Guide. The restrictions on hours and shifts do not apply to a child working in a family business.

Other duties

The Regulations impose additional duties on employers of young and school aged children in the entertainment industry. These include duties about collection and travel home and requirements to provide food and drink and to provide recreation and rest facilities.

Offences

Failure to obtain written parental permission when required or to comply with any of the duties above is an offence punishable by a fine.

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Working with children: blue cards and checks

The *Commission for Young People and Child Guardian Act* 2000 (Qld) requires a person intending to work, in a paid or voluntary capacity, or to carry on a business in certain regulated child-related areas to have a blue card. A "blue card" is issued by the Commission for Young People and Child Guardian after carrying out a Working with Children Check and determining that a person is eligible to work in the particular area of child-related work.

Arts related activities which are mainly directed at children such as teaching in schools, conducting activities for children in cultural clubs or associations or the private tuition of children are likely to constitute areas of "regulated child related employment". There are certain exemptions that apply under each category of regulated employment and business. For more information about who requires a blue card, application forms and any possible applicable exemptions please refer to the blue card website.

If you intend to work in a regulated environment such as a school or an association you may need a blue card. Paid employees must apply for a blue card if they work, or are likely to work, in a regulated environment for at least:

1. eight consecutive days; or
2. once a week, each week, over four weeks; or
3. once a fortnight, each fortnight, over eight weeks; or
4. once a month, each month, over six months.

If you operate a business, or employ workers, within a regulated category of child-related employment (for example, a children's art school or a children's dance troupe), you are required to ensure that all non-exempt employees and volunteers have valid blue cards.

Application for blue cards

A person carrying on a regulated business must apply for their own blue card as well as being responsible for ensuring that each person working for them has a blue card if required. In other words, the employer is responsible for applying for a blue card on behalf of any person who is, as a usual function of their employment, providing regulated child related services or conducting regulated child related activities, regardless of whether the person is a paid employee or volunteer, or whether there is a written agreement to carry out the work.

An application generally takes 28 days to process where the application is completed in full and there is no police or disciplinary information. Applications for paid employees and persons carrying on a regulated business must be accompanied with the prescribed application fee; however an application for a volunteer or student is processed free of charge.

A paid employee may start working once an application has been lodged. A volunteer or a person carrying on a regulated business must not commence working until the application has been approved and a blue card has been issued.

Blue cards are valid for two years and must be renewed to retain validity. Once a blue card has been issued, it is transferable for work with other child related employers. For example, if an employee already has a blue card for their volunteer work with another organisation they can use the same blue card for their paid employment with your organisation. If a new employee already has a blue card you must check the expiry date and ensure the name and signature on the card matches that of other identification documents provided. You should also complete an "Authorisation to confirm a valid blue card/application" form. This form allows the Commission to advise you of the employee's current blue card status and entitles you to any relevant notifications concerning the status of the person's blue card under the Act, for example, if the blue card holder/applicant has a change in their criminal history which is relevant to their child related employment.

Disqualified persons

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It is an offence for a disqualified person to apply for a blue card. A person is disqualified if they:

1. have been convicted of a disqualifying offence (including a child-related sex or pornography offence, or murder of a child)
2. are a reportable offender with current reporting obligations
3. are subject to a child protection prohibition order, or
4. are subject to a disqualification order from a court prohibiting them from applying for, or holding a blue card.

An employer must warn potential applicants that it is an offence for a disqualified person to apply for a blue card. Failure to warn the applicant is also an offence.

Working with children check

The Commission for Children and Young People and Child Guardian will undertake a Working with Children Check to determine whether a person is eligible for a blue card.

The Working with Children Check, also known as the blue card check, is a detailed criminal history checking including:

1. any charge or conviction for an offence, whether or not a conviction is recorded.
2. whether a person is a respondent to or subject to an application for a child protection prohibition order, or
3. disqualification order, or
4. whether a person is subject to reporting obligations under the *Child Protection (Offender Reporting) Act* 2004.

The Commission also considers disciplinary information held by certain professional organisations for:

1. teachers
2. child care service providers
3. foster carers
4. nurses
5. midwives, and
6. certain health practitioners

In addition, information from police investigations into allegations of serious child related sexual offences will be taken into account, even if no charges were laid because the child was unwilling or unable to proceed.

Can I apply for my own blue card if I am looking for work, self employed or a volunteer?

You cannot apply for a blue card unless you have an agreement to work in regulated employment (paid or voluntary) or you are carrying on a prescribed business.

If you are unable to apply for a blue card yourself, but are required to provide evidence that you have not been found guilty of an offence relating to children, it is possible for Queensland residents to apply for a Police Certificate from any Queensland police station.

Risk management strategy

If you are running a business that is regulated by the *Commission for Young People and Child Guardian Act* or you employ people in regulated child related activities, you must have a written risk management strategy in place which complies with certain specified minimum requirements.[8] This strategy must be reviewed annually. The risk management strategy must

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include the following eight elements:

1. a policy with a statement of commitment to the safety and well-being of children and the protection of children from harm
2. a Code of Conduct for interacting with children and young people
3. recruitment training and management procedures for staff (including appropriate employment screening – ie blue cards and registers of staff who hold blue cards)
4. reporting guidelines and directions for handling disclosures or suspicions of harm
5. consequences of staff not complying with policies
6. policies and procedures for meeting requirements of the Act
7. risk management plans for high risk activities and special events, and
8. strategies for communication and support such as
    1. information for staff, volunteers and parents about policies, procedures and Codes of Conduct, and
    2. Training manuals and strategies to help staff, volunteers and parents identify risks of harm.

The website for the Commission for Children and Young People and Child Guardian contains a Risk Management Toolkit to help you develop a suitable Risk Management Strategy.

Criminal Offences: indecent and obscene material, child exploitation and child abuse material

There are a range of offences in the Queensland Criminal Code relating to the creation and use of images of children.[9]

It is on offence to take **indecent photographs** or record any indecent visual image of a child under 16 years old without a legitimate reason.[10]

It is an offence to sell, distribute or publicly exhibit **obscene material** including books, pictures, photographs, models or "any other object tending to corrupt morals".[11] If the obscene material depicts a child under the age of 16 years old harsher prison sentences may be imposed (up to 10 years if the child depicted is under 12 years old). "Obscene" is not defined in the Code.

Under the Queensland Criminal Code, it is a crime to make, distribute or possess child**exploitation material** or involve a child in the making of child exploitation material.[12] Child exploitation material is defined to include material that describes or depicts a child under 16 years old in a sexual, offensive or demeaning context or being subjected to abuse, cruelty or torture in a way that is likely to cause offence to a reasonable adult.[13] Penalties of up to 10 years imprisonment apply.

It is an offence under the *Classification of Publications Act 1991* (Qld) and *Classification of Films Act* 1991 (Qld) to make, possess, exhibit, sale, distribute or advertise photographs, publications or films containing child abuse material.[14] **Child abuse material** is defined as something that depicts or describes a person who is, or who looks like, a child under 16 years (whether the person is engaged in sexual activity or not) in a way that is likely to cause offence to a reasonable adult person.[15] It is also an offence to procure a minor (a person under 18 years old) to be any way involved in the creation of an RC publication, photograph or child abuse material or an objectionable film.[16]

Defences

It is a defence to a child exploitation offence under the Criminal Code if the conduct was for a genuine artistic purpose or for public benefit and the conduct was reasonable in the circumstances. Genuine artistic purpose does not appear to be a defence to charges involving obscene material or the taking of indecent photographs or images of children

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It is also a defence to a child exploitation charge if the material has been classified as something other than RC (Refused Classification) under the *Classification (Publications, Films and Computer Games) Act* 1995 (Cth).[17] However that defence does not appear to be available to other Criminal Code charges involving obscene material or the taking of indecent photographs or images of children.

Context

Despite the legitimate and genuine public interest in preventing the exploitation of children in the production of obscene, child exploitation or child abuse material, the broad scope of these provisions means 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 prove 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.

Whether a work is "likely to cause offence to a reasonable adult" may also be difficult to anticipate with certainty. 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."[18]

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 federal classification rules. Enforcement in Queensland is governed by the *Classification of Films Act* 1991 (Qld), *Classifications of Publications Act* 1991 (Qld) and the *Classification of Computer Games Act* 1995 (Qld).

Exhibiting a film in a public place which has not been classified is prohibited and attracts a fine or imprisonment of up to 2 years.[19]

In addition to the offences concerning child abuse material discussed above, it is an offence under Queensland's classification laws to possess, sell or distribute prohibited publications (films, computer games or other publications).Prohibited publications include publications that are, or would be, classified as category 1 restricted, category 2 restricted or RC.

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. Every film festival or community screening in Queensland needs to be granted an exemption in order to screen any film that is not already classified. Conditions may be attached to the exemption.

Since April 2013, applications for exemption are no longer made to Department of Justice and Attorney-General, Queensland but must be made to the Director of the Commonwealth Classifications Board either by post: Locked Bag 3 Haymarket, New South Wales, 1240; by fax: +61 2 9289 7101; or by email: via their online enquiry form accessible through the National

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Classification Board's website. 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.
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.[20]

In Queensland, an organisation cannot apply for a blanket exemption as is possible in some other states. The organisation must apply for an exemption for each individual film for each individual event.

Privacy

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

Invasion of privacy

The *Invasion of Privacy Act* 1971 (Qld) prohibits the use of a listening device to listen to or record a private conversation where the person is not a party to the conversation.[21] This could include the sound recording facility of a film or video camera. The Act also restricts the communication or publication of information obtained through the use of a listening device without the consent of all the parties.

There is no specific prohibition on the use of optical surveillance devices in the Queensland Act. However if you entered a private house without consent to use or install an optical surveillance device (such as a camera) you may be liable for trespass and the offence of Unlawful entry of a dwelling house.[22]

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.

Section 359E of the Queensland *Criminal Code 1899* (Qld)makes it an offence to stalk someone in a way that would cause apprehension or fear to reasonably arise in the circumstances.[23] "stalking" includes following a person about, watching or loitering in the vicinity of a person's home or work or where they visit or doing an intimidating act towards the person, whether or not it involves the threat of violence. It is a defence to stalking if the act was reasonable conduct in the course of the person's trade, business or occupation.

If you are taking images of children, you should be aware that they may easily become apprehensive or fearful. It is crucial to get 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 of infrastructure such as train stations may also be restricted.

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

Instructing children

The regulation of the education of children varies from state to state. In Queensland there are restrictions on the number of children that may be taught in a class at a school. In Queensland the maximum number of students that should be in a class is 25 or 28, depending on the year group. 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 Queensland WorkSafe.

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[1]*Child Employment Regulations 2006 (Qld)* Schedule 3

[2]*Child Employment Act* 2006 (Qld), s8.

[3]*Child Employment Act* 2006 (Qld), s12(4).

[4]*Child Employment Regulations 2006* (Qld), ss8 and 18.

[5]*Child Employment Act 2006* (Qld).s 8A.

[6]*Child Employment Regulations 2006* (Qld), s12.

[7]*Child Employment Regulations 2006* (Qld), s22.

[8]*Commission for Children and Young People Regulation* 2011 (Qld) section 3

[9]The Criminal Code is incorporated into the *Criminal Code Act* 1899, Schedule 1. Footnotes 9 – 13 refer to the Criminal Code as embodied in the *Criminal Code Act* 1899.

[10]*Criminal Code Act* 1899 (Qld) s 210(f).

[11]*Criminal Code Act* 1899 (Qld) s 228.

[12]*Criminal Code Act* 1899 (Qld) ss 228A, 228B, 228C, 228D.

[13]*Criminal Code Act* 1899 (Qld) s 207A.

[14]*Classification of Publications Act 1991* (Qld) Part 3; *Classification of Films Act* 1991 (Qld) ss 41, 42.

[15]*Classification of Publications Act 1991* (Qld) Part 3; *Classification of Films Act* 1991 (Qld) s3.

[16]*Classification of Publications Act 1991* (Qld) s18; *Classification of Films Act* 1991 (Qld) s43.

[17]*Criminal Code Act* 1899 (Qld) s 228E..

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[18]*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.

[19]*Classification of Films Act* 1991 (Qld) s21.

[20]*Classification of Films Act* 1991 (Qld), s56.

[21]*Invasion of Privacy Act*1971 (Qld) s43.

[22]*Invasion of Privacy Act*1971 (Qld) s48A.

[23]*Criminal Code* 1899 (Qld) s359B defines stalking.

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