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## CHILDREN IN THE CREATIVE PROCESS: TASMANIA

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This information sheet must be read in conjunction with the general information sheet "[Children in the Creative Process: Australia](#)" since that information sheet explains how the various federal laws operate. This information sheet explains how the Tasmanian specific laws relate to you as an artist working with children. It includes information about the employment of children, background checks, child exploitation material and obscenity offences and the applications of classification legislation in Tasmania.

### 1. Child employment

The laws regulating the employment of children vary between individual states and territories. There are currently few laws in Tasmania aimed at restricting or controlling the employment of children in the arts or generally.

The *Education Act 1994* (Tas) prohibits the employment of a child of compulsory school age during the hours where they would ordinarily be attending school, except as authorised by the Secretary of the Education Department.<sup>1</sup> The compulsory school age is above the age of 5 until the child turns 16, with the Act allowing education to be provided in an approved learning program such as TAFE, traineeships, apprenticeships and other recognised education or vocational training institutions.

### Public entertainment

The Minister has discretion to declare a class of public entertainment to be "restricted public entertainment" in respect of children who have not attained a certain age. Public entertainment is defined to include any entertainment open to the public, whether or not an admission is charged and includes both live and recorded entertainment that is broadcast on radio or television. Written permission from the Secretary of the Department of Health and Human Services is required for a child to take part in a restricted public entertainment.<sup>2</sup> At the date of writing this information sheet the Minister had not declared anything to be a restricted public entertainment.

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<sup>1</sup> *Education Act 1994* (Tas) section 82.

<sup>2</sup> *Children Young Persons and Their Families Act 1997* (Tas) s 93.

## 2. Criminal record checks

At present Tasmania has no statutory requirement that individuals working with children undergo a criminal record check. However some organizations may have their own policies in this regard.

Should you wish to apply for a [National Police History Record Check](#) this can be done through the Tasmanian Police Department for a fee. If you are a volunteer you can receive a discount by obtaining an authorisation from the volunteer organization for which you intend to work.

Tasmanian Police Record Checks are provided free for Tasmanian residents once every twelve months. However these do not cover offences recorded in other states and are therefore usually insufficient for employment related checks.

## 3. Criminal offences: child exploitation material and indecent acts

There are a range of offences related to the creation and publication of images of children.

Both the *Criminal Code Act 1924* (Tas) and the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) prohibit the making, reproduction, possession, accessing, exhibition, sale, or distribution of **child exploitation material**.<sup>3</sup> Child exploitation material is defined as something that depicts or describes in a way that would be offensive to a reasonable person a person who is, or who looks like, a child under 18 years:

1. engaged in sexual activity;
2. in a sexual context; or
3. as the subject of torture, cruelty or abuse (whether or not in a sexual context).<sup>4</sup>

It is also an offence to invite or involve a child under 18 years to be involved in the making of child exploitation material.<sup>5</sup> Offences are punishable by a fine or up to 3 years imprisonment.

### Context

Most accept that there is a legitimate and genuine public interest in preventing the exploitation of children in the production of child exploitation material. The broad scope of the Tasmanian legislation 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 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. Whether a work is one which a reasonable person would regard as being offensive is a subjective test incorporating continuously changing community standards and it is difficult to predict how it will be applied by a Court.

<sup>3</sup> *Tasmanian Criminal Code* ss 130-130G; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) ss 72A, 73A, 74A.

<sup>4</sup> *Criminal Code* s 1A; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 71.

<sup>5</sup> *Criminal Code* ss 130 & 337C; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 73.

## Defences

**Classification:** It is a defence to a charge involving child exploitation material to show that the material has been classified (other than RC) under the federal *Classification (Publications, Films and Computer Games) Act 1995* (Cth).<sup>6</sup>

See below for more information on classification.

**Genuine artistic purpose:** it is a defence to charges involving child exploitation material to establish that the circumstances in which the artist produced the work demonstrate that he or she acted for a genuine artistic purpose and that the artist's conduct was reasonable for that purpose.<sup>7</sup>

**Other defences:** It is also defence if the sexual activity depicted in the material is not an unlawful sexual act;<sup>8</sup> or the material came into the accused person's possession unsolicited and that person took reasonable steps to dispose of the material.<sup>9</sup>

## Indecent acts and children

It is an offence under the Tasmanian *Criminal Code* to procure a child under 17 years old to perform an indecent act or to procure someone to commit an indecent act towards a child under 17 years old.<sup>10</sup> This applies whether the act is committed in Tasmania or elsewhere. It is also an offence to do an indecent act with or directed at a child under 17 years old.<sup>11</sup> An "indecent act" is not defined. It can include exposing a child to a naked body and in one Tasmanian case, showing sexual images via e-mail to a child under 17 was found to be capable of being an indecent act.<sup>12</sup> The consent of the child is not a defence to these charges unless the child was over 15 years old and the accused was less than five years older than the child, or, if the child is over 12 years old and less than 15, the accused was not more than 3 years older.<sup>13</sup> It is a defence if the person believed on reasonable grounds that the child was over 17 years old.

## 4. 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](#).

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

<sup>6</sup> *Criminal Code* ss 130E(1)(a); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 74B(1)(a).

<sup>7</sup> *Criminal Code* ss 130 E(1)(b); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 74B(1)(b).

<sup>8</sup> *Criminal Code* ss 130 E(2); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 74B(2); in relation to a charge relating to material that depicts sexual activity between the accused person and a person under the age of 18 years.

<sup>9</sup> *Criminal Code* ss 130 E(3); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 74B(3).

<sup>10</sup> *Criminal Code* s 125C(3).

<sup>11</sup> *Criminal Code* s 125B.

<sup>12</sup> *Tasmania v Baker* [2006] TASSC 74.

<sup>13</sup> *Criminal Code* s 125B(c), s 125C(4).

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 Tasmania is governed by the *Classification (Publications Films and Computer Games) Enforcement Act 1995* (Tas). Tasmania does not have its own separate Classification Board but relies on classifications issued by the federal Classification Board.

Exhibiting, selling or delivering a film which has not been classified or has been classified X18+ or RC is prohibited attracting a fine or imprisonment of up to 2 years.<sup>14</sup> Possessing, selling or distribution of unclassified prohibited or objectionable publications are offences attracting a fine or imprisonments up to 2 years.<sup>15</sup> Prohibited publications include publications that have received an RC classification. If a film, computer game or publication involves children it will receive an RC classification if it

"describe[s] or depict[s] 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)"<sup>16</sup>.

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."<sup>17</sup>

## 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 organization 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 for exemption should be made to the federal 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 organization was formed.
2. The extent to which the organization carries on activities of an educational, cultural or artistic nature.
3. The reputation of the organization in relation to screening films.
4. The conditions for admission to the screening of films or demonstration of computer games.<sup>18</sup>

Note that an organization cannot apply for a blanket exemption as is possible in some other states. The organization must apply for an exemption for each individual film for each individual event.

## 5. Privacy

There is no general right to privacy in Australia; however there are laws which affect the recording or photography of people including children. In Tasmania, there are laws concerning the surveillance or

<sup>14</sup> *(Publications, Films and Computer Games) Enforcement Act 1995* (Tas) ss 20, 22, 32, 36.

<sup>15</sup> *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) ss 17 and 18.

<sup>16</sup> National Classification Code paragraph 2 item 1(b).

<sup>17</sup> *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.

<sup>18</sup> *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas), s 69.

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, for example.

## Surveillance, trespass and peeping

The *Listening Devices Act 1991* (Tas) 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.<sup>19</sup> This could include the sound recording facility of a film or video camera. This Act also restricts the communication or publication of information obtained through the use of a listening device without the consent of all the parties.<sup>20</sup>

There is no specific prohibition on the use of optical surveillance devices in the Tasmanian Act. However a 'listening device' has a broad meaning as it "means any instrument, apparatus, equipment or device capable of being used to overhear, record, monitor or listen to a private conversation simultaneously with its taking place".<sup>21</sup>

In addition you could be guilty of the offence of 'unlawful entry on land' if you enter or remain on any land, building or vehicle (without reasonable or lawful excuse) and without the consent of the owner, occupier or person in charge of that land, building or vehicle.<sup>22</sup> It is also an offence to peep or peer into the window or door of a dwelling house or to lurk, loiter or hide on the land around a dwelling house.<sup>23</sup>

## Stalking

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

For example, section 192 of the Tasmanian *Criminal Code* makes it an offence to stalk someone with the intent to cause harm or apprehension or fear. 'stalking' includes following a person about, watching or loitering in the vicinity of a person's home or work or acting in any way that could reasonably be expected to cause apprehension or fear. You are taken to have intended to cause apprehension or fear if you ought to have known that the conduct would cause apprehension or fear.

If you are taking images of children, you should be aware that children can 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 Tasmanian 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 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.

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<sup>19</sup> *Listening Devices Act 1991* (Tas) s 5.

<sup>20</sup> *Listening Devices Act 1991* (Tas) s 9.

<sup>21</sup> *Listening Devices Act 1991* (Tas) s 3.

<sup>22</sup> *Police Offences Act 1935* (Tas) s 14B.

<sup>23</sup> *Police Offences Act 1935* (Tas) s 14A.

## 6. Instructing children

The regulation of education of children varies from state to state. In Tasmania there are currently no direct restrictions on the number of children that may be taught in a class. However, there is a recommendation for primary and secondary schools that classes should not exceed 25 pupils. 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 [Tasmania WorkCover](#).

### Need more help?

Contact Arts Law if you have questions about any of the topics discussed above

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

Also visit the [Arts Law website](#) for more articles and information sheets

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