



ARTS LAW CENTRE OF AUSTRALIA

ACN 002 706 256 / ABN 71 002 706 256

3 February 2010

Ms Kathy Keele
Chief Executive Officer
Australia Council for the Arts
PO Box 788
Strawberry Hills NSW 2012
By Email: comms@australiacouncil.gov.au

Dear Ms Keele,

Re: Protocols for working with children in art (Protocols)

Thank you for the opportunity to comment on the Protocols a year from their implementation. We attach a copy of the information sheets which Arts Law drafted on the existing laws which apply when working with children, along with an article written for our clients which aims to point out what artists need to do to comply with the Protocols for your reference.

About the Arts Law Centre of Australia (Arts Law)

Arts Law was established in 1983 and is the national community legal centre for the arts in Australia. Arts Law provides legal advice, publications, education and advocacy services each year to over 4000 Australian artists and arts organisations operating across the arts and entertainment industries.

About our clients

Many of our clients are engaged in various art forms involving children as subjects, students or co-creators. These clients include a number of artists and arts organisations who are the recipients of Australia Council funding, or those who work with or for recipients of Australia Council funding.

Generally, our clients not only reside in metropolitan centres, but also contact us from regional, rural and remote parts of Australia, and from all Australian states and territories. Our client base is multi-cultural, and both Indigenous & non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them.

The comments that Arts Law makes in this submission are informed by our clients' profile, which is that they are:

- generally on low incomes/ with limited funds;
- new, emerging artists or established arts practitioners or arts organisations;
- significant number of Indigenous artists and art organisations;
- creators of their own material and users of other artist's work;
- operating arts businesses;
- operating in all arts sectors;
- working in both traditional and digital media;
- needing to be self-reliant in business;
- limited in their ability to enforce rights; and
- eager for accessible legal information, although they typically have limited legal education; and
- are eager to comply with laws which apply to them and their work.

Our comments

Our overall view of the Protocols is that they create an unnecessary burden for artists and arts organisations. Last year, Arts Law commented in detail on the Protocols in numerous discussions with Australia Council and raised this as a concern in our correspondence with the Australia Council. Arts Law seeks to redraw your attention to our concerns, and to illustrate by way of some real case examples, how the Protocols have detrimentally affected artists and arts organisations we have advised.

- 1. The Protocols are an unnecessary burden on artists and set a benchmark for a greater level of regulation across the arts**

As indicated in our information sheets, there are multitudes of pre-existing laws which operate in the interests of protecting children from harm. Arts Law supports the existence of these laws in the interests of child protection. It does not, however, support the imposition of additional and unnecessary regulations as a precondition for limited funding. Arts Law urges the Australia Council to consider the ramifications of restricting Australian artists further by requiring compliance with contractual terms which prohibit legitimate artists from creating or exhibiting legitimate works of art. In our experience, the unnecessary burden placed on artists can be exemplified below:

Example: A key arts organisation was very concerned that the Protocols created additional obligations which they had to implement and 'pass on' to the artists they fund and support. They asked whether there needed to be changes to the contracts that they have drawn up with the artists they work with, and Arts Law advised that they would, so that the organisation could ensure *its* compliance with the Protocols. They thought it unlikely that a number of the artists they work with could comply with the requirements of the Protocols. This highlights the trickle down effect of the Protocols, which affect a far greater group of artists than those funded by the Australia Council. The Protocols require not only compliance by the Australia Council funded entity, but in many cases those with whom the funded entity works. The result is that the Protocols have a far reaching effect which affects even to those who do not receive Australia Council funding.

Arts Law is deeply concerned that due to the reputation of the Australia Council as a federal funding body that the Protocols have set a funding standard that other State and Territory funding bodies will follow, leading to an increasingly restricted spectrum of funding options for artists. Arts Law has already received correspondence from some of the State and Territory arts funding bodies informing us that they wish to set up a set of similar Protocols. Aside from the federal, State and Territory funding bodies, arts organisations themselves have had to make changes to their funding criteria so that they are compliant with the Protocols.

2. Undertakings with respect to 'contemporary images'

Arts Law remains opposed to the requirement that artists give a written undertaking that their image, if created within the last 18 years, complied with the laws of the country in which it

was created, at the time of its creation¹. Requiring that artists provide a written declaration that they have been compliant when creating the image could require that artists trace their steps back for up to 18 years of artistic work to assess whether they were compliant. Getting legal assistance in order to trace back for such an extended period of time is difficult if not impossible, and time consuming. Arts Law, and most legal practices cannot give advice on the laws of other countries.

Example: Arts Law was contacted by a prominent Australia Council funded arts organisation, seeking to exhibit a number of film works. The film maker concerned had filmed a number of innocuous images of children in a foreign jurisdiction, filmed over a decade ago. Most of the children were clothed, but some were what the Protocols define as 'partially naked'. The organisation was concerned that the film maker was incapable of giving the undertaking in the Protocols requiring them to warrant that the work was compliant with all the laws in that foreign jurisdiction many years ago. This was largely due to the inability of lawyers in Australia to advise on the laws in that foreign jurisdiction, and the artists inability to secure free advice in that foreign jurisdiction in relation to laws which were now 'out of date'. The arts organisation sought advise as to whether they could still show the works, given there was too little time to have the works classified.² In addition neither the arts organisation nor the artist could afford to pay the fee associated with classification. As a result, the arts organisation had to take the risk of breaching the Protocols, or removing prominent works from a collection, neither of which are acceptable outcomes.

We conclude that this requirement is unworkable for artists and arts organisations, and recommend that in the event our other recommendations (see 5 below) are not adopted, that this requirement at least, is removed.

3. The Protocols have created a chilling effect on the arts community and have led to confusion amongst artists and arts organisations about which regulations they are subject to.

Many artists and arts organisations who are not subject to the Protocols have contacted us, seeking advice about what changes they have to make to their practice. These entities have been under the false impression that the Protocols apply to them. This problem is

¹ Protocols for working with children in art, Page 7, fn 5

² At the time of writing, classification can take on average 20 working days (ie one month) and costs a minimum of \$520 for publications and \$990 for films.

compounded because of the trickle down effect of the Protocols, described above, where artists who are not subject to a funding agreement with the Australia Council wish to work with an organisation who is. Because of the lack of clarity in the Protocols, individual artists and arts organisations are confused about whether the Protocols apply to them or not.

Example: A photographer contacted us for advice after a work she had created was removed by the organisation hosting the exhibition, because the organisation did not think that the work complied with the Australia Council Protocols. This attracted significant media attention. The work was then replaced in the exhibition once the organisation had reconsidered whether it could be part of the exhibition, and whether the organisation was subject to the Protocols at all. The artist was unable to tell us whether the organisation was Australia Council funded (and as a result Arts Law was unable to advise whether the Protocols applied to the organisation, or in turn, the artist). When speaking with the artist about whether the Protocols applied, the artist indicated that he/she would opt not to show certain innocuous works of children again because of the difficulties that the removal and replacement of the work had caused. Arts Law could not advise her that the Protocols would not affect her, because she may in future seek to exhibit with an Australia Council funded organisation, in which case she might be required to comply with certain aspects of the Protocols as a result.

Although the information sheets which Arts Law prepared have gone some way to clarifying the complex legal issues involved in working with children, the Protocols are, in parts very vague and it is difficult for the artist to know how, for example, to document their compliance with the Protocols.

4. There are inadequate resources allocated to dealing with the Protocols

The Protocols have put a greater strain on the already limited legal resources allocated to the arts community. Artists will need a greater level of legal assistance in ensuring that they are compliant with each and every law as it applies to their practice if they are to give the declarations described in the Protocols and are likely to turn to Arts Law for this assistance. As the Australia Council is aware, Arts Law is already under-resourced to deal with the level of service needed by the arts community.

Example: Arts Law was contacted by an artist who sought urgent advice about the documents she would need to evidence compliance for a project funded by the Australia Council. We advised her in relation to the requirements which applied to her, but were unable to draw up the documents she requested due to our limited resources. We advised her that some of the documentation she required could be drafted based on our Models release, but that amendments should be made. She had no experience in legal drafting and felt overwhelmed by all the additional requirements she was subject to, and limited resources we had to deal with her need for new documents to be drafted. As a concluding comment, she indicated that while she had found it helpful to get some advice about the applicability of the Protocols to her work, she indicated she would consider changing the nature of her work to exclude children as subjects.

We are particularly concerned by the concluding comments of our client above. In our experience comments like these are represented across the board for clients who are subject to the Protocols.

5. Recommendations for change

Arts Law believes that the imposition of the Protocols exceeds what is necessary to protect children from harm in the creation of art, and is misdirected at legitimate artists rather than child pornographers. The recent Report of the Child Pornography Working Party, identified that the New South Wales Department of Public Prosecutions (NSW DPP) was aware of only one instance in which the defence of artistic purpose had been relied upon.³ This should suggest to the Australia Council that there are:

- a. very few artists who are child pornographers; or
- b. few artists who seek to rely on their status as an artist, or the purpose of their work, as a defence to child pornography.

In other words, the laws dealing with child pornographers are sufficient (when child pornographers are caught) in establishing the commission of the alleged offence and the punishment they will be subject to.

Recommendation 1

³ New South Wales Department of Justice and Attorneys General, Report of the Child Pornography Working Party, page 22

Our first recommendation is that the Protocols are redrafted so that they require the artist or arts organisation to undertake that they have complied with the Federal and State or Territory laws with respect to working with children for their project. We recommend that the current requirement that artists and arts organisations comply with an additional set of rules is removed.

Recommendation 2

Our second recommendation is that the current clauses to be inserted into the funding contracts of those who receive Australia Council funding be redrafted so that they reflect our first recommendation. They should to read:

Artist/Arts organisation (you) have familiarised yourself with the laws which apply to working with children in art. You acknowledge the information available on the Arts Law website on working with children in the arts and that the both Federal and State or Territory laws apply to you. You undertake to comply with the laws, where relevant, with respect to:

- a. The employment of children in the arts;*
- b. The prohibitions against using a child for a pornographic purpose, or producing, disseminating or possessing child pornography;*
- c. Classification and censorship;*
- d. Filming or photographing children in public and in private;*
- e. The representation of children generally in art, including with respect to:*
 - i. Court proceedings;*
 - ii. Surveillance;*
 - iii. Public nuisance;*
 - iv. Defamation; and*
 - v. Consumer protection laws.*

You undertake to comply with these laws and understand that a failure to comply with the relevant laws may result in the withdrawal of Australia Council funding.

In the alternative, if you wish to retain the current form of the clauses drafted by the Australia Council, we suggest the use of this version of your attachment to the Protocols.

ATTACHMENT

Insert for grant application forms

Applicants are asked to tick either (1) or (2)

(1)	This activity is likely to involve personnel working with people under the age of 18. I am/the organisation is aware of the special responsibilities and requirements associated with working with children under Federal and State or Territory legislation and agree to abide by those requirements. I/we declare that I/we will comply with the relevant laws and that no person required or allowed to work on the project has been convicted of a child sex offence and that the relevant working with children checks have been done.	<input type="checkbox"/>
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or

(2)	I/ the organisation funded under this contract will not be working with people aged under 18 as part of the funded project. However, if this changes during the course of the project, I/we will make myself/ourselves aware of the legal requirements associated with working with children according to the applicable Federal and State or Territory laws and inform the Australia Council immediately if this change.	<input type="checkbox"/>
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I certify the accuracy of the above information.

New funding agreement clauses

General condition for all contracts

Artist/arts organisation (you) agree that if your Project involves:

(a) employing people under the age of 18 with or without financial compensation;

or


(b) the exhibition or distribution of depictions of children under the age of 18 years, then you will comply with the legal requirements associated with working with children according to the applicable Federal and State or Territory laws. This may include obtaining checks and authorities from relevant state and federal agencies, copies of which will be provided to the Australia Council if requested. If you fail to do so, we may immediately terminate our agreement with you and require you to return the funding provided to you under this Agreement.

Extra condition - contracts for those working with fully or partly naked children

You have indicated in your funding proposal that you will be employing people under the age of 15 in this Project, with or without financial compensation, and that they will be naked or partly naked as a part of the project. It is a condition of this funding that prior to engaging children in this Project, and prior to our payment of the approved amount, you forward to us copies of the checks and authorities you are required by law to obtain.

Thank you for considering our input on the Protocols and their potential effects on Australian artists. Please feel free to contact Robyn Ayres or me to discuss any of the above further on (02) 9356 2566.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'Robyn Ayres'.

Robyn Ayres
Executive Director
Arts Law Centre of Australia

A handwritten signature in cursive script, appearing to read 'Suzanne Derry'.

Suzanne Derry
Solicitor
Arts Law Centre of Australia