
CHILDREN IN THE CREATIVE PROCESS: SOUTH AUSTRALIA

This information sheet must be read in conjunction with the general information sheet "[Children in the Creative Process: Australia](#)" since that fact sheet explains how the various federal laws operate. This information sheet explains how the South Australia 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 South Australia.

1. Child employment

The law relating to child employment varies between individual states and territories. As at 1 October 2014, there is no specific legislation in force in South Australia that generally governs the employment of children.¹

The *Fair Work Act 1994* (SA) provides the South Australian Industrial Relations Commission (**Commission**) with the power to make awards that can determine special conditions under which children may work.² For example, it grants the Commission power to make awards that exclude children from certain kinds of work. You should check to see whether any industrial awards apply to your situation and whether there are specific terms dealing with children. Copies of the awards for various sectors including Actors and Musicians awards are available from [South Australian Industrial Relations](#).

The *Education Act 1972* (SA) prohibits the employment of a child of compulsory school age during the hours where they would ordinarily be attending school.³ The compulsory school age is above the age of 6 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 tertiary institutions.

¹ The Government introduced the *Child Employment Bill 2011* to the Legislative Council on 10 March 2011. In December 2011, however the Bill lapsed due to the prorogation of Parliament.

² *Fair Work Act 1998* (SA) section 98A.

³ *Education Act 1972* (SA) section 78.

2. Criminal record checks

Under the *Children's Protection Act 1993* (SA) the responsible authority for an organisation must ensure that a person to be employed in a prescribed position must first pass a criminal history check.⁴ This requirement applies to government organisations as well as non-government organisations that provide health, welfare, education, sporting or recreational, religious or spiritual, childcare services or residential services that apply to children.

If you wish to obtain a National Police Check of your criminal record as evidence of your suitability to work with children you can do so by making an application at through the [South Australian Police](#).

3. Criminal offences: child pornography and private acts

There are a range of offences related to images of children.

Under the *Criminal Law Consolidation Act 1935* (SA) it is an offence to produce, disseminate or possess child pornography.⁵

Child pornography is defined as material that is intended or apparently intended to excite or gratify sexual interest or to excite or gratify a sadistic or other perverted interest in violence or cruelty, which:

1. describes or depicts a child engaged in sexual activity; or
2. contains the image of a child; or
3. appears to have involved a child in the production of the material.⁶

A child is defined as a person under, or apparently under, 17 years old. Material covered by the provision is widely defined and includes written or printed material, pictures, drawings, paintings, sculpture, photographs, films and computer images.

Apparently intended to excite

While most accept that there is a legitimate and genuine public interest in preventing the exploitation of children in the production of child pornography 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 fact that the child depicted in a work was not actually the victim of any violence or cruelty or involved in sexual acts appears to be irrelevant. Whether a work is one which is apparently intended to excite or gratify sexual interest or sadistic interest in violence is a subjective assessment and it is difficult to know precisely how a court will approach that question.

⁴ *Children's Protection Act 1993* (SA) s 8B.

⁵ *Criminal Consolidation Act 1935* (SA) ss 63 & 63A.

⁶ *Criminal Consolidation Act 1935* (SA) s 62.

Defences

Genuine artistic merit: it is a defence to charges involving child pornography material if it is part of a work of artistic merit and there is no undue emphasis on aspects of the work that might otherwise be considered pornographic.⁷

Classification: It is a defence to a charge involving child pornography material to show that the material has been classified (other than those which are refused classification (**RC**) under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).⁸ See below for more information on classification.

Indecent material

It is an offence under the *Summary Offences Act 1953* (SA) to produce or disseminate indecent or offensive material. Indecent material includes material of an indecent, immoral or abhorrent nature. Offensive subject matter includes violence, cruelty and revolting or abhorrent phenomena which would cause serious and general offence among reasonable adult members of the community.⁹ Unlike the offences related to child pornography it does not matter if the material was not intended to excite or gratify sexual interest or a sadistic interest in violence or cruelty.

Defences to a charge of producing or disseminating indecent or offensive material

Artistic merit: It is a defence to indecent material offences if it forms part of a work of artistic merit and the indecent or offensive aspects are not unduly emphasized.¹⁰

Classification: While the fact that the work has been classified does not appear to be defence to a charges related to indecent material, the prosecutor must have regard to relevant decisions of the South Australian Classification Board when deciding whether to prosecute under the provision.¹¹

Indecent acts and children

It is an offence under the *Criminal Law Consolidation Act 1935* (SA) to procure a child who is under, or is apparently under, 17 years old to perform an indecent act.¹²

It is also an offence to induce a child to expose any part of his or her body or to take a photographic or other record of a child doing a “private act”, but only if it is for a “prurient purpose” of sexual arousal or gratification.¹³ A “private act” is defined to mean a sexual act; or an act involving an intimate bodily function such as using a toilet; or an act or activity involving undressing to a point where the body is clothed only in undergarments; or an activity involving nudity or exposure or partial exposure of sexual organs, pubic area, buttocks or female breasts.¹⁴

⁷ *Criminal Consolidation Act 1935* (SA) s 63C (3).

⁸ *Criminal Consolidation Act 1935* (SA) s 63C (4).

⁹ *Summary Offences Act 1953* (SA) s 33(2).

¹⁰ *Summary Offences Act 1953* (SA) s 33(5)(b).

¹¹ *Summary Offences Act 1953* (SA) s 33(6) & (7).

¹² *Criminal Consolidation Act 1935* (SA) s 63B(1)(a); ‘indecent act’ is not defined in this legislation.

¹³ *Criminal Consolidation Act 1935* (SA) s 63B(1)(b).

¹⁴ *Criminal Consolidation Act 1935* (SA) s 62.

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 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 National Classification Scheme. Enforcement of classification rules in South Australia is governed by the *Classification (Publications, Films and Computer Games) Act 1995* (SA) (**Classification Act**).

Films

Exhibiting, selling or hiring a film which has not been classified or has been classified X18+ or RC is prohibited.¹⁵ Selling or distributing unclassified publications which are required to be classified or publications that have been classified RC is also prohibited.¹⁶

One of the reasons material might be classified RC is it "describes or depicts a minor who is, or appears to be under 16 in a way that is likely to cause offence to a reasonable adult". 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."¹⁷

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 multimedia artwork.

The South Australian Classification Council established by this Act is empowered to make classification decisions that will prevail within South Australia over any decision made by the Commonwealth Classification Board.

Exemptions for events

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.

¹⁵ *Classification (Publications, Films and Computer Games) Act 1995* (SA) ss 28, 30, 37, 38.

¹⁶ *Classification (Publications, Films and Computer Games) Act 1995* (SA) ss 38

¹⁷ *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.

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 a educational, cultural or artistic nature;
3. The reputation of the organization in relation to screening films; and
4. The conditions for admission to the screening of films or demonstration of computer games.¹⁸

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. An application specifying the event and including a synopsis of the film should be made to the [South Australian Classification Council](#) GPO Box 464, Adelaide SA 5001 or email: agd@agd.sa.gov.au.

Theatrical performances

There is no general requirement to seek classification for theatrical performances. However, under the *Classification of Theatrical Performances Act 1978* (SA) any person can request that a theatrical performance be classified by the Classification of Theatrical Performances Board. A theatrical performance includes any play, mime, ballet, dance, display or other entertainment. The Board will determine if the performance is offensive or unsuitable to be seen by children having regard to standards of morality, decency and propriety that are generally accepted by reasonable adult.¹⁹ The Board may impose conditions on the theatrical performance. The Classification of Theatrical Performances Board can be contacted at GPO Box 464, Adelaide SA or 08 8207 1972 or by email agd@agd.sa.gov.au

5. Privacy

While there is no general right to privacy in Australia, there are laws which affect the recording or photography of individuals including children. In South Australia, there are laws concerning 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.

Surveillance and trespass

The *Listening Devices and Surveillance Act 1972* (SA) prohibits the use of a listening device to overhear, record, monitor or listen to any private conversation without the consent, express or implied, of all the parties to the conversation.²⁰ This could include the sound recording facility of a film or video camera and would apply even if the conversation took place on public property if the circumstances indicate a wish for the conversation to be confined to the parties. 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.²¹

There is no specific prohibition on the use of optical surveillance devices in the Act. However a 'listening device' has a broad meaning as it means "an electronic or mechanical device capable of being used to listen to or record a private conversation or words spoken to or by any person in

¹⁸ *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 79.

¹⁹ *Classification of Theatrical Performances Act 1975* (SA) s 11.

²⁰ *Listening and Surveillance Devices Act 1972* (SA) s 4.

²¹ *Listening and Surveillance Devices Act 1972* (SA) s 5.

private conversation (whether or not the device is also capable of operating as a surveillance device)". In addition, there are separate offences of criminal trespass in relation to entering a place (other than a place that is open to the public) or a non-residential building or place of residence.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.

For example, section 19AA of the *Criminal Law Consolidation Act 1935 (SA)* makes it an offence to stalk someone with the intent to cause harm, apprehension or fear; "stalking" includes following a person about, watching or loitering in the vicinity of a person's home or workplace or acting in any way that could reasonably be expected to cause apprehension or fear.

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.

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 "[Street Photographers Rights](#)".

6. Instructing children

The regulation of the education of children varies from state to state. In South Australia, primary and secondary schools aim to have an average of between 26 and 30 students in a class, depending on the year group. 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 [South Australia WorkCover](#).

²² *Criminal Law Consolidation Act 1935 (SA)* ss 168, 169, 170 & 170A.

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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The Arts Law Centre of Australia has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.



Australian Government

