
CHILDREN IN THE CREATIVE PROCESS: VICTORIA

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

1. Child employment

The law relating to child employment varies depending on state or territory jurisdiction. In Victoria, the *Child Employment Act 2003 (Vic)* (**Child Employment Act**) governs the employment of children under 15 years of age. In order to employ a child under the age of 15 years (other than in a family business or under a work experience arrangement), you must obtain a "Child Employment Permit" and the written consent of the parent or guardian of the child.

The minimum employment age is 13 years for most types of employment although there is no minimum age limit for children employed in entertainment.¹ However it is an offence to employ a school-age child during school hours without applying to the Minister for an exemption from attendance at school under section 2.1.5 of the *Education and Training Reform Act 2006 (Vic)* (**Education Act**).

Entertainment is defined to include singing, dancing or acting; playing a musical instrument; appearing in a radio, television, film or Internet program or production, or any similar program or production (but not a news item); modelling; appearing in promotional events or advertising; working as a photographic subject, whether still or moving; working in a circus or other live entertainment; taking part in a performance that is recorded for use in a subsequent entertainment; working in musical theatre, plays, opera and other live entertainment, performing in a shopping centre. It includes preparatory activities other than screen tests and casting walk-ons².

Am I "employing" a child?

You will be regarded as employing a child if the child works pursuant to a written or unwritten contract for services or takes part in any business, trade or occupation you carry on for profit, irrespective of whether the child is paid or not and regardless of the type of arrangement you have with the child. For example, you will be an employer of a child who sings in your restaurant in return for a meal and tips or who poses as a photographic model in return for copies of photos. Children

¹ *Child Employment Act 2003 (Vic)* section 10(2).

² *Child Employment Act 2003 (Vic)* s 3; *Child Employment Amendment Act 2010 (Vic)* s 5.

participating in religious services, sporting activities or occasional school projects or entertainments to benefit their schools or performing for non-profit organizations are not regarded as being employed³.

Child employment permit

It is an offence under the *Child Employment Act* to employ a child without a permit. The employer is responsible for applying to the Secretary of the Department of State Development, Business and Innovation for a permit;⁴ with the online application for located on the [Business Victoria website](#). For work in entertainment, the employer may apply for a single permit to cover all the children working in the same type of entertainment or work (such as all child performers in a stage play).

The application process is reasonably straightforward and is intended to ensure that appropriate risk assessments have been completed and risks addressed. Child Employment Officers in the Employment Information and Compliance Unit are authorised to issue child employment permits.

A permit needs to be obtained before the child's employment commences. Merely having lodged the application is not sufficient. The time required to process an application can vary. Enquire with the Employment Information and Compliance Unit first to ensure you allow sufficient time for permits to be obtained when required.

The application must be signed by the child's school and their parent or guardian and must include statutory declarations and consents to police checks by each person who will supervise or have control of the child during the entertainment employment. While there is no cost for the permit, the applicant must bear the cost of any [Working With Children Check](#) required. Section 19 specifies obligations in respect of supervision. Other provisions concerning rest breaks and hours worked do not apply to children employed in entertainment.⁵

A permit will only be granted after clear police checks are obtained and the Secretary is satisfied that "the health, education and moral and material welfare of the child will not suffer from the proposed employment; ... the child is fit to be engaged in the proposed employment; and ... the child will not be subjected to any form of exploitation..."⁶ Once issued, the Secretary sends a copy of the permit to the employer and, if the employment will occur during school time, the child's school. It is valid for the period specified (no more than 12 months). Employers are required to keep records and documents in relation to the employment of children under Child Employment Permits.

The Mandatory Code

Employers must comply with the Mandatory Code of Practice for the Employment of Children in Entertainment⁷ ([Code](#)). A copy of the Code is available on the [Business Victoria website](#). The Code makes it an offence for an employer to contravene the conditions of a permit, or to employ a child in entertainment without a permit. It is also an offence for a parent to allow a child to be employed without the required permit⁸. Under the Code, children cannot be employed to work naked, unless

³ *Child Employment Act 2003* (Vic) s 4.

⁴ *Child Employment Act 2003* (Vic) s 13(1).

⁵ *Child Employment Act 2003* (Vic) s 28.

⁶ *Child Employment Act 2003* (Vic) s 16.

⁷ *Child Employment Act 2003* (Vic) s 32.

⁸ *Child Employment Act 2003* (Vic) ss 9, 17 & 23.

they are under the age of 12 months. If they are less than a year old, the Code requires that their parents are present and have consented to the work.

2. Working with Children

Background checks

The *Working With Children Act 1958* (Vic)⁹ prohibits people from engaging or volunteering in child-related employment without applying for and providing a valid assessment notice (also called a [Working With Children Check](#) or **WWC**). The purpose of the Working with Children Check is to protect children under 15 years who are employed or who are undertaking work experience under the *Education and Training Reform Act 2006* (Vic).

The Act provides for a system of mandatory WWC checks into the criminal record of any person who will be directly supervising a child in the workplace.

Employers

Unless an exemption applies, the employer must ensure that WWC checks have been conducted and a Notice of Assessment issued prior to allowing any person to supervise a child under 15 years of age. A new WWC check must be conducted whenever someone new becomes the child's supervisor.

Certain workers are exempt from the requirement for a WWC check including people who are supervising their own child or family members and teachers registered with the Victorian Institute of Teaching).

Employers must record the name and WWC check number of any person that supervises a child in employment and present these to a child employment officer on request.

Employers must ensure that each child is directly and adequately supervised at all times. A supervisor should be provided with appropriate training. In particular, the supervisor should be trained to recognise health and safety hazards including teasing, bullying and harassment.

There are additional requirements for the entertainment industry. The employer must ensure that the supervisor is not given other responsibilities that prevent them from providing direct supervision. There are also additional supervision requirements for babies under 12 weeks and children under 6 years.

Employees

If you intend to work in a business that falls within the definition of "child related employment" such as an art school, or children's dance troupe or choir, you are obliged to apply for a WWC. The application can either be made online at the [Working With Children Check website](#) or in paper form at Australia Post outlets in Victoria. If you are applying for a WWC from outside Victoria you must post your application directly to the Victorian Department of Justice. If you pass the check you will receive a card in the mail. If you have provided the department your current mobile number you will

⁹ *Child Employment Act 2003* (Vic) s 33.

receive a text message informing you that you have passed the check. Cards are valid for 5 years from the date you passed the WWC check. Your criminal history continues to be monitored during this time and your card may be suspended or revoked if you are charged with a relevant offence or new disciplinary findings are made against you. There are a number of exemptions from the requirement to obtain a WWC including parents volunteering in relation to activities in which their own children normally participate, teachers registered under the Education Act and children under 18.

The [Victoria Police](#) also provide a separate service to individuals and organizations in Victoria who wish to obtain [National Police Certificates](#) for employment, voluntary work and occupation-related licensing or registration purposes. This may be helpful if your business or proposed employment involves children but isn't strictly within the definition of "child-related employment" and a background check is still desirable or required by the employer.

3. Criminal offences: pornography and obscenity

There are a number of Victorian laws which make it an offence to use or deal with children in a way which is sexually exploitative or physically or emotionally damaging.

Child pornography

Section 68-70 of the *Crimes Act 1958* (Vic) (**Crimes Act**) makes it an offence to make, produce or knowingly possess child pornography or to invite, procure or otherwise cause a person under 18 to be involved in child pornography.¹⁰

The Crimes Act defines "child pornography" as a film, photograph, publication (which, includes written or pictorial matter) or computer game that describes or depicts a person who is, or appears to be, under the age of 18 engaging in sexual activity or depicted in an indecent sexual manner or context.¹¹ It may include real children and/or real events or may be the product of imagination and captures both visual and written expressions of thought and imagination.¹² It seems that material depicting a child in a sexual context that is not an "indecent" sexual context is not child pornography. Any material depicting minors who appear to be engaging in sexual activity falls within the definition of child pornography.

These provisions are broad, and artists using or depicting children in their work should be aware of them particularly where there is any sexual connotation. The extent to which an artwork shows a child "in an indecent sexual context" is an 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. Indeed, a parent who permits a child to be used for pornographic purposes may also be guilty of an offence.¹³

In 2014 Paul Yore was prosecuted by the Victoria Police for producing and possessing child pornography in respect of his exhibit in the Linden Gallery that included images that were collages of nude adults with children's faces attached to the bodies of the adults. The magistrate considered the evidence before dismissing all the charges.¹⁴ The decision of magistrate discussed the need to balance the purposes and objectives of the Parliament of Victoria in criminalising both the production

¹⁰ *Crimes Act 1958* (Vic) ss 68-70.

¹¹ *Crimes Act 1958* (Vic) s 67A defines "child pornography" and "minor", which means a person under the age of 18 years.

¹² *R v Quick* [2004] VSC 270 (27 May 2004) Justice Redlich.

¹³ *Crimes Act 1958* (Vic) s 69 creates an offence of inviting, procuring, causing or offering a minor for child pornography.

¹⁴ *Johnson v Yore*, Case D12709566 (Magistrates Court of Victoria at Melbourne (1 October 2014) Magistrate Amanda Chambers.

and possession of child pornography against the artist's freedom of expression that is stated in section 15(2)(d) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In reaching her decision the magistrate viewed the context of the artwork as a whole and noted that each image was created in a clearly artificial way and that it was apparent to any reasonable observer that each image was not that of a child but an adult juxtaposed with a child's face.¹⁵ The magistrate reached the conclusion that the collages (except for one) did not depict children "in an indecent sexual manner or context" so that the images did not constitute child pornography.¹⁶ In respect of the one image that could be considered to be within the definition of child pornography, the magistrate dismissed the charge as the classification defence applied to that image.¹⁷ The Australian Classification Board had assessed the exhibit as being Category 1 Restricted and the gallery had put up signs stating it was unsuitable for viewing by children. As the classification defence applied to that image, the magistrate did not have to consider whether the artistic merit defence applied to the possession of that image.¹⁸

Defences

There are limited defences to child pornography charges in Victoria. It is a defence to the above charges to show that the film, published photograph or computer game has been classified, or would be classified under the under the federal *Classification (Publications, Films And Computer Games) Act 1995* (Cth) other than as RC, X or X 18+.¹⁹

Artistic merit

If the child pornography shows a person who appears to be under 18 but is in fact 18 or over, it is a defence to a charge of possession if the material possesses "artistic merit", or is for a genuine medical, legal, scientific or educational purposes. The artistic merit defence is not available to a charge of making, or procuring minors to participate in, child pornography and is not available if the person depicted in the material is, in fact, under 18.²⁰

Performances

Child pornography is concerned with materials such as books, films and photos. Section 70AC of the *Crimes Act* focusses on performances, making it an offence punishable by up to 10 years imprisonment to invite, procure or cause a person under the age of 18 years to be in any way involved in a "sexual performance", which is defined to mean a "live performance that is, or could reasonably be considered to be, for the sexual arousal or sexual gratification of any person"²¹ in circumstances where there is payment or reward to the minor or to any other person in respect of the performance.²² It is not an offence if there is no payment or reward involved (although if the performance were recorded, it may then constitute the making of child pornography).

¹⁵ *Johnson v Yore*, [30].

¹⁶ *Johnson v Yore*, [30].

¹⁷ *Johnson v Yore*, [48] referring to *Crimes Act 1958* (Vic) s 70(2)(a).

¹⁸ *Johnson v Yore*, [48] referring to *Crimes Act 1958* (Vic) s 70(2)(b).

¹⁹ *Crimes Act 1958* (Vic) ss 68(1A) & 70(2)(a).

²⁰ *Crimes Act 1958* (Vic) ss 70(2)(b), & s 70(3).

²¹ *Crimes Act 1958* (Vic) s 70AB.

²² *Crimes Act 1958* (Vic) s 70AC.

Obscenity

Various pieces of legislation deal with material which regarded as obscene. *The Summary Offences Act 1966 (Vic)* makes it an offence to write, draw, exhibit or display obscene or indecent words, figures or representations in or near a public place or within view or hearing of any person passing there.²³

4. 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](#).

The states and territories are responsible for enforcing the classification rules. Enforcement in Victoria is governed by the *Classification (Publications) Enforcement Act 1995 (Vic)*. That Act makes it an offence to sell or exhibit a film which has not been classified, or which has been refused classification (RC) or is X 18+, will attract a penalty of up to two years imprisonment. It is also an offence to use an on-line information service to publish or transmit child pornography or to publish "objectionable material"²⁴ (which describes or depicts a person who is or looks like a minor engaging in sexual activity or depicted in an indecent sexual manner or context).

Exemptions for galleries and film festivals

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. Under Victorian law, an organisation such as an art gallery can apply in writing to the federal Classification Board for an exemption so that it does not have to apply for all its exhibits to be classified.²⁵ An organisation running an event such as a film festival can also apply to have particular films exempted from classification. Conditions may be attached to the exemption.

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 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.²⁶

Note that the exemption does not apply to publications so the organisation will still need to apply for classification of a publication (for example an exhibition catalogue) that is likely to attract a Category 1 restricted, Category 2 restricted or RC classification.

²³ *Summary Offences Act 1966 (Vic)* s 17(1)(b).

²⁴ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)* ss 57 & 57A.

²⁵ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)* s 64(2).

²⁶ *Classification (Publications, Film and Computer Games) (Enforcement) Act 1995 (Vic)* s 66A.

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 Victoria, 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 parks or at the beach, for example.

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 1999* (VIC) 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 an activity carried on outside a building or in circumstances where the parties ought reasonably expect it would be observed.²⁷ 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. This Act applies whether or not the surveillance device and/or person filmed is on public or private 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 prohibited²⁸ and attracts a fine or up to 2 years imprisonment.²⁹

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 the *Crimes Act* makes stalking an offence with a penalty of up to 10 years imprisonment. Stalking is widely defined and includes following the victim, publishing material on the internet relating to the victim, entering or loitering outside the victim's place of business or residence or keeping the victim under surveillance in a way that could reasonably be expected to arouse fear or apprehension for their safety. You may be liable if you have the intention to arouse apprehension or fear or if, in the circumstance, you ought to have understood that your actions were likely to cause apprehension or fear.

If you are taking images of children, you should be aware that they may easily become apprehensive or fearful. You should therefore consider getting permission from the child's parent or guardian and the child so that no misunderstandings occur.

²⁷ *Surveillance Devices Act 1999* (Vic) s 3.

²⁸ *Surveillance Devices Act 1999* (Vic) s 11.

²⁹ *Surveillance Devices Act 1999* (Vic) ss 6 & 7.

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 and photographing infrastructure such as railways may also be restricted. For example [Metro Trains Melbourne](#) requires all photographers, even amateur photographers, to apply for a permit before filming or taking photographs on their property. For more information on restrictions on taking photographs in public see the Arts Law's information sheet on "[Street Photographers Rights](#)".

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.

6. Instructing children

The regulation of the education of children varies from state to state. In Victoria there are restrictions on the number of children that may be taught in a class at a school. In Victoria the class size should be planned on the following basis: years P to 6 – an average of 26 provided that the average class size of P-2 is maintained at 21, and years 7 – 12, groups of up to 25 students. 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 [WorkSafe Victoria](#).

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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