

Protocols for working with children in art

Consultation draft: 13 November, 2008

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Introduction

The Australia Council for the Arts has developed a set of protocols to address the depiction of children in works, exhibitions and publications that are the recipients of government funding.

There is a growing awareness in this country and internationally of the importance of having laws and protections to safeguard children from exploitation and harm. At the same time advances in technology through online and mobile media have opened the way for mass access to images and written material. There is the potential for this material to be distributed, intentionally or unintentionally, well beyond the original audience. It is in this context that the whole community, including artists and arts organisations, must consider their legal and ethical obligations regarding the safety of children.

Statement of purpose and principle

The Australia Council has a legally established role to uphold and promote the rights of people to freedom in the practice of the arts. Underpinning this freedom in a civil society is the rule of law and the assumption that publicly funded activity must abide by the law. Laws in most states and territories impose a number of limits and constraints designed to protect children from exploitation and harm.

The following protocols have been developed through consultation with the arts sector, government partners and members of the general community. Their aim is to help artists and arts organisations understand existing laws that impact on any work they might do with children. They also determine the practices Australia Council funded artists and arts organisations should follow when involving children in the creation, exhibition or distribution of creative works¹.

The Australia Council's definitions and expectations outlined in these protocols are the minimum standards for those seeking and receiving our support. Where these are not surpassed by any definitions or regulations in a state or territory, the Council requirements will apply. Where the state or territory laws and regulations exceed the minimum requirements set by these protocols, the state or territory requirements prevail.

The standards we set through these protocols are minimum contractual obligations for those applying for and receiving Australia Council support. Adherence to the relevant laws and to these protocols will be a condition of funding for projects supported by the Australia Council.

¹ 'creative works' includes photography, painting, printmaking, performance, sculpture, written text, digital imagery, etc

Summary of obligations

Creation (working with children)

1. If you are working with anyone under the age of 18, you agree to abide by the relevant child employment laws in your state or territory.
 - You should note that states may require that you get permits and police checks to work with children of certain ages.
2. If you are working with anyone under the age of 15 in any state or territory, you have to declare to the Australia Council that you have the permission of the parent(s) or guardian(s).
3. If you are working with anyone under the age of 15 and they are to be fully or partly naked, this may be prohibited by state law. If it isn't, you have to send us the permission of the parent(s) or guardian(s) stating that you have explained the context for the work to the parent(s) or guardian(s) and the child, and:
 - they understand the nature and intended outcome of the work;
 - they commit to direct supervision of the child while the child is naked; and
 - they agree it is not a 'sexual or abusive context'.

Exhibitions and performances

1. If you are showing contemporary images of anyone under the age of 18 who is fully or partly naked, you will need to have a written declaration from the artist that they followed the relevant laws and regulations of the state they worked in when creating the image.
 - If the work was created with Australia Council funding after 1 January 2009, you will need to have a declaration from the artist that they followed our protocols as well as the relevant laws.
2. If you can't get that declaration, you will need to get the images reviewed by the Classification Board prior to exhibition.

Distribution

1. If you are distributing - by publication, in promotional material or through digital media – any contemporary images of anyone under the age of 18, you will need to have a written declaration from the artist that they followed the relevant laws and regulations of the state they worked in when creating the image.
 - If you do not have the declarations, you will need to get permission from the parent(s) or guardian(s) – or from the 'child' if they have since turned 18 – to use the image
 - If the work was created with Australia Council funding after 1 January 2009, you will need to have a declaration from the artist that they followed our protocols as well as the relevant laws.
2. If you are distributing – by publication, in promotional material or through digital media – any contemporary images of anyone under the age of 18 who is fully or partly naked, you will need to get the images reviewed by the Classification Board prior to publication.
 - images of infants less than 1 year old are excluded.

Protocols

Artists and arts organisations: the law and your practice

If you will employ children, with or without financial compensation, in the course of your creative work, there are five main areas of law that may be relevant:

1. Laws concerning the employment of children
2. Laws relating to child pornography and obscenity
3. Classification and censorship laws
4. Privacy laws and laws relating to the photography or filming of children
5. Other laws that may affect an artist working with children including: court proceedings; surveillance; public nuisance; use of an image; defamation and trade practices.

Importantly, the laws vary across the states and territories.

It is essential that you understand the nature of the laws that affect you. The Arts Law Centre of Australia, a community legal centre which provides advice to artists and arts organisations, has developed a set of fact sheets entitled *Children in the Creative Process: Information for Artists and Arts Organisations*. One of the fact sheets is an Australia-wide overview of relevant considerations and suggestions for artists working with children. There are also separate fact sheets covering the relevant laws in each state and territory. The fact sheets are available on the Arts Law website at www.artslaw.com.au/LegalInformation/ and via the Australia Council's website at www.australiacouncil.gov.au. Artists and arts organisations may also wish to seek independent legal advice.

Across the state and territories there are different age limits defining when a person is deemed to be a 'child'. Any artist or organisation making an application to the Australia Council for a project which involves a person under the age of 18, will need to be aware of the laws of the state or territory in which they will work. Applicants should be aware that some states and territories require formal permits and police checks prior to the employment of children.

There are three critical issues we have considered in the development of these protocols:

1. **Creation:** Ensuring that the rights of children are protected throughout the artistic process, based on informed consent about the process and the intended outcome of the artwork;
2. **Exhibition and performance:** Ensuring that artworks involving images of children have been produced and will be presented with due care and sensitivity; and
3. **Distribution:** Protecting images of children from being exploited, including use of the images beyond the original context of the creative work.

1. Creation of a work of art

When applying for funding

All applicants for Australia Council funding intending to employ a person under the age of 18, with or without financial compensation, will be required to certify that they have considered and will abide by the relevant laws and regulations as they apply in the state or territory in which they will make the work.

Applicants proposing to work overseas will need to consider the laws and regulations of the country or countries in which they will work. They may need to seek independent legal advice about the laws in those countries.

When funding has been approved

All recipients of Australia Council funding will confirm through their funding agreements that they will abide by the laws and regulations governing child employment as they apply in the state or territory in which they intend to make the work.

As a minimum standard for all funded applicants, the Australia Council also requires artists and arts organisations to declare in writing that the parent(s) or guardian(s) of every child under the age of 15 have consented to their child being employed in the project, with or without financial compensation. The Australia Council has set this age limit for these minimum requirements because it is the age limit most commonly specified in existing state and territory laws.

Nudity

Where there is no state or territory law prohibiting the child from being employed fully or partly naked² for an arts project, the Australia Council requires written confirmation from the parent(s) or guardian(s) of any child under the age of 15 that the artist has explained the context for the work to the parent(s) or guardian(s) and to the child, and:

- a) they understand the nature and intended outcome of the work;
- b) they commit to direct supervision of the child while the child is naked; and
- c) they agree it is not a 'sexual or abusive context'.

This confirmation will need to be provided prior to commencing the work. Where the approved grant application proposed that artists would be working with children who would be fully or partly naked, Australia Council grant monies will not be paid until the required consents have been secured. Artists and arts organisations should be aware that several states explicitly prohibit children of certain ages from being employed while naked.

² 'Partly naked' is defined as including bare genitals, buttocks or female breasts

2. Exhibition and performance

In line with the age limits defined within the National Classification Code, the Australia Council has defined public depictions of anyone under the age of 18 to be depictions of a child. Artists and arts organisations exhibiting or presenting depictions of children should refer to the laws governing indecency, obscenity and child pornography in their state or territory.³

Australia Council funded exhibitors or presenters displaying contemporary images⁴ of a child who is fully or partly naked are required to secure a written declaration from the artist that the work was created in line with the relevant state and territory laws and regulations. If the work was created with Australia Council funding granted after 1 January 2009, the artist would need to declare that these protocols were followed and the permissions and consents required were obtained.

Where it is not possible to secure this declaration for such an image or series of images, the exhibitor or presenter must apply to the Classification Board for these images to be reviewed and any requirements they impose must be followed prior to public presentation.

3. Distribution

As with exhibition and performance, the Australia Council defines distribution of depictions of anyone under the age of 18 to be depictions of a child.

Distribution of depictions of children includes visual material and text, published in printed form or through digital media. Given the ease with which images and written depictions can be distributed nationally and internationally, including in contexts not originally intended, obligations for those distributing depictions of children are greater than for exhibitors and presenters.

These protocols specifically cover three means of distribution: publication, promotion/marketing and online or mobile media. Where an artist or organisation pursues multiple means of distribution for one activity, only one set of permissions will be required if they mention all the means of distribution to be pursued.

Australia Council funded artists and arts organisations distributing - by publication, in promotional material or through digital media – any contemporary images of anyone under the age of 18, will need to have a written declaration from the artist that they followed the relevant laws and regulations of the state they worked in when creating the work. The artist's declaration would also need to confirm that the parent(s) or guardian(s) of the child gave permission for distribution of the image.

If the distributing artist or organisation cannot get an artist's declaration, they will need to get permission from the parent(s) or guardian(s) – or from the 'child' if they have since turned 18 – to use the image. If the work was created with Australia Council funding granted after 1 January 2009, the artist would need to declare that these protocols were followed and the permissions and consents required were obtained.

Where the material includes contemporary images of anyone under the age of 18 depicted fully or partly naked, application must be made to the Classification Board prior to distribution of the material and any

³ Please note that several states' laws refer to the depiction of anyone who is or who appears to be under a particular age.

⁴ 'Contemporary images' are defined as images or depictions created in the previous 25 years. Exhibition of the images can be through photographs, film and video, posters, projections, printmaking etc.

requirements they impose must be followed. Images of infants less than one year old are excluded from this requirement.

Written depictions

The age definitions of a child are not uniform across the states and territories. However, most have child pornography laws that include prohibitions of text depicting a child in an indecent sexual context or manner. Publishers of text depictions of a child should refer to the Arts Law fact sheets for their state or territory and may wish to seek legal advice.

Online and mobile media

Online and mobile media content is overseen by the Australian Communications and Media Authority (ACMA) under the *Broadcasting Services Act 1992*. As part of this responsibility, ACMA administers a mechanism where members of the Australian public can lodge complaints concerning online content that is, or may be, prohibited by law. ACMA is required to refer material to the Classification Board for a formal classification decision where the material is hosted in, or provided from, Australia and is likely to be prohibited.

Implementation

From 1 January 2009, grant applicants will be required to certify that they are aware of the special responsibilities and requirements associated with working with children as articulated in the Australia Council's *Protocols for working with children in art*, and agree to abide by those requirements in their nominated project. Those awarded project grants must provide evidence of compliance before any grant monies are paid. Organisations receiving annual or recurring funding must provide the required evidence prior to employing children, exhibiting depictions of children or publishing depictions of children. These requirements will form part of the funding agreement.

Samples of the (draft) certifications from the Australia Council application form and clauses from the funding agreement are attached.

Review

These protocols will be reviewed by the Australia Council after the first 12 months in operation.

Acknowledgements

The Australia Council acknowledges the work of the Arts Law Centre of Australia in the research and publication of the fact sheets on the legal requirements that apply for artists and arts organisations. We also acknowledge the valuable input of the many individuals and organisations who contributed to the debate on these issues and the development of the protocols.

References

Children in the Creative Process: Information for Artists and Arts Organisations, Arts Law Centre of Australia www.artslaw.com.au/LegalInformation/

Model Release Form, Arts Law Centre of Australia

Further Information

Arts Law Centre of Australia: www.artslaw.com.au

Classification Board: www.classification.gov.au

Disclaimer

These protocols were developed by the Australia Council for the Arts. The protocols do not represent legal advice. If you have any queries about your obligations, you should seek your own independent legal advice.

Attachment

Draft application form and funding agreement clauses.

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ATTACHMENT

Draft insert for grant application forms

(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 as articulated in the Australia Council's <i>Protocols for working with children in art</i> , and agree to abide by those requirements. I declare that there are no circumstances or reasons that might preclude my/any employee or relevant personnel of the organisation working with/near young people aged under 18.	<input type="checkbox"/>
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or

(2)	The organisation and/or project funded under this contract does not involve working with people aged under 18. However, if this changes during the course of the project, I/we will make myself/ourselves aware of the special responsibilities and legal requirements associated with working with children as articulated in the Australia Council's <i>Protocols for working with children in art</i> and agree to abide by those requirements and inform the Australia Council immediately of this change.	<input type="checkbox"/>
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I certify the accuracy of the above information. I am aware that the Australia Council reserves the right at any time to require me to provide evidence to verify the information provided.

Draft funding agreement clauses

General condition for all contracts

You agree that if you will be employing people under the age of 18 in this Project, with or without financial compensation, that you will comply with the Australia Council's *Protocols for working with children in art* as well as any relevant laws as they exist in the state or territory in which you will be working. This may include obtaining background checks, permits and parental consents. 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.

Clause for the exhibiting or distributing of images of children

Where your project involves the exhibition or distribution of images of children under the age of 18 years, you agree to comply with the Australia Council's *Protocols for working with children in art* as well as any relevant laws of the state or territory in which you will be working. If you fail to do so, we may immediately terminate our agreement with you and require you to return funding provided to you under this Agreement.

Extra condition for contracts where they know they will be working with children

You have indicated in your funding proposal that you will be employing people under the age of 18 in this Project, with or without financial compensation. It is a condition of this funding that prior to our payment of the approved amount, you confirm your compliance with the Australia Council's *Protocols for working with children in art*, including the relevant laws as they exist in the state or territory in which you will be working. Confirmation that the relevant permissions have been obtained must be forwarded to the Australia Council prior to engaging children in this Project.