

Protocols for working with children in art

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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. They support the Australia Council's longstanding commitment to encouraging young people's and children's involvement in the arts, both as participants in the creative process and as members of an audience. They are designed to help artists and arts organisations understand their legal obligations and to establish responsible steps for artists when they are involving children in the creation, exhibition or distribution of creative works¹.

The protocols do not affect an applicant's eligibility to be considered for funding and they have no impact on the Australia Council's assessment of artistic excellence through the peer review process.

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, drawing and digital imagery

Summary of obligations

All applicants for Australia Council funding

1. If you plan to work with anyone under the age of 18, you indicate your agreement to abide by these *Protocols* and any relevant laws and regulations in your state or territory.
 - Note that some states and territories require that you get special permits and police checks before working with children of certain ages.
 - Note that before you commence your work the Australia Council will require that you have parental consent for employing children under the age of 15.

All recipients of Australia Council funding

2. In signing your funding agreement you commit to getting any permits and permissions required by relevant state or territory law as well as the consents required by these *Protocols*.
 - The Australia Council may ask for a copy of required permits or consents.
3. When you submit the acquittal report at the conclusion of your funded activity, you will confirm that you did get all the consents, permits and permissions required by state or territory law and by these *Protocols*.

Creation of a work of art (refer to page 6)

4. If you are working with anyone under the age of 15 the Australia Council requires that you have the consent of their parent(s) or guardian(s) before you commence the work.
 - The Australia Council does not require parental consent for images that include children who happened to be in a public space, where the children were not employed by the artist and where they took no directions from the artist in the creation of the image.
5. 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 prohibited, you will need to get and send to us evidence of 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, exploitative or abusive context'.

Exhibitions and performances (refer to page 7)

6. If you are showing contemporary images involving a real child under the age of 18 who is fully or partly naked, you will need a written statement from the artist that they followed the laws and regulations in force where they worked when creating the image.
 - If the work was created with Australia Council funding after 1 January 2009, the artist would confirm that they followed these *Protocols* as well as the relevant laws.
7. If you can't get that written statement from the artist, you will need to have those images classified by the Classification Board prior to exhibition.

- Images documenting activity in a public space, where the children were not employed by the artist and they took no directions from the artist in the creation of the image, are excluded.

Distribution (refer to pages 7 – 8)

8. If you are distributing - by publication, in promotional material or through digital media – contemporary images involving a real child under the age of 18, you will need a written statement from the artist that they followed the laws and regulations in force where they worked when creating the image.
 - If you can't get that written statement from the artist, you will need to get permission from the parent(s) or guardian(s) – or from the 'child' if they have since turned 18 – to distribute the image.
 - If the work was created with Australia Council funding after 1 January 2009, the artist would confirm that they followed these *Protocols* as well as the relevant laws.
 - The Australia Council does not require parental consent for distribution of images that include children who happened to be in a public space, where the children were not employed by the artist and where they took no direction from the artist in the creation of the image.
 - Organisations whose websites host images that are independently uploaded by artists or registered members will be required to have a web policy as detailed in these *Protocols*.
9. If you are distributing – by publication, in promotional material or through digital media – any contemporary images involving a real child under the age of 18 who is fully or partly naked, you will need to get the images classified by the Classification Board prior to publication.
 - Images of infants less than 1 year old are excluded.
 - Images documenting activity in a public space, where the children were not employed by the artist and they took no directions from the artist in the creation of the image, are also excluded.

Protocols

Artists and arts organisations: the law and your practice

If you employ children in the course of your creative work, with or without payment to the children, or if you present or distribute depictions of children, 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 is a community legal centre which provides advice to artists and arts organisations. It 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 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.

All applicants for Australia Council funding will be asked to indicate whether they intend to involve a person under the age of 18 in their activity. If you do intend to involve children in your activity, you will need to abide by these *Protocols* and by the relevant laws and regulations of the state or territory in which you will work. Applicants should be aware that some states and territories require formal permits and police checks prior to the employment of children.

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.

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.

- **Creation of a work of art**

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 work. This may require certain permits and formal permissions, depending on the state or territory and the age of the children involved.

As a minimum standard for all funded applicants working with children, the Australia Council requires that the parent(s) or guardian(s) of every child under the age of 15 consents to their child being employed in the project, with or without financial compensation². While anyone under the age of 18 may be considered to be a child, the Australia Council has set 'under 15' as the age limit for parental consent because it is the age limit most commonly specified in existing state and territory child employment laws.

At the conclusion of their funded activity, grant recipients will be asked to confirm that they had the consents and permits required for working with children. Grant recipients will agree to provide a copy of any required consents and permits to the Australia Council, if requested.

The Australia Council does not require parental consent for the creation of images that include children who happened to be in a public space, where the children were not employed by the artist and where they took no directions from the artist in the creation of the image. Various bylaws and regulations may apply, however. Artists can refer to the Arts Law Centre's Fact Sheet "Street Photographers Rights" at www.artslaw.com.au/LegalInformation/.

Nudity

Artists and arts organisations should be aware that several states explicitly prohibit children of certain ages from being employed while naked.

Where there is no state or territory law prohibiting the child from being employed fully or partly naked³ 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, exploitative or abusive context'.

This confirmation will need to be provided to the Australia Council 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 would not be paid until the required consents have been secured.

² For these Protocols, a child is considered to be 'employed' when he or she contributes to the work by carrying out tasks at the direction of the artist or their representative, regardless of whether the child is paid or provided another form of reward.

³ 'Partly naked' is defined as including images of bare genitals, buttocks or female breasts

- **Exhibition and performance**

These *Protocols* set no special requirements regarding the exhibition or presentation of depictions of children in general. In line with age limits defined within the National Classification Code, the Australia Council defines depictions of children as depictions of anyone under the age of 18.

However, artists and arts organisations exhibiting or presenting depictions of children who are fully or partly naked should refer to the laws governing indecency, obscenity and child pornography in their state or territory.⁴

Australia Council funded exhibitors or presenters displaying contemporary images of a real child⁵ who is fully or partly naked are required to secure a written statement from the artist, accepted in good faith, that the work was created in line with the state or territory laws and regulations in force where they worked when creating the image. If the work was created with Australia Council funding granted after 1 January 2009, the artist would need to state that these protocols were followed and the required permissions and consents were obtained.

Where it is not possible to secure the artist's statement for such an image or series of images, the exhibitor or presenter must have the images classified by the Classification Board and any requirements they impose must be followed prior to public presentation. Images documenting activity in a public space, where the children were not employed by the artist and they took no directions from the artist in the creation of the image, are excluded.

- **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 is required if it mentions 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 a real child under the age of 18, will need to secure a written statement from the artist, accepted in good faith, that the work was created in line with the state or territory laws and regulations in force where they worked when creating the image. If the work was created with Australia Council funding granted after 1 January 2009, the artist would need to state that these protocols were followed and the required permissions and consents were obtained. The artist's statement would also need to confirm that the parent(s) or guardian(s) of the child gave permission for distribution of the image.

⁴ Please note that some states' laws refer to the depiction of anyone who is or who appears to be under a particular age.

⁵ 'Contemporary images of a real child' are images created in the previous 18 years representing the involvement of a person under the age of 18. Exhibition of the images can be through photographs, film and video, posters, digital projections, printmaking, sculpture.

If the distributing artist or organisation cannot get an artist's statement, they will need permission from the parent(s) or guardian(s) – or from the 'child' if they have since turned 18 – to use the image.

The Australia Council does not require artists or organisations to secure parental consent for distribution of images that include children who happened to be in a public space, where the children were not employed by the artist and where they took no directions from the artist in the creation of the image.

Where the material includes contemporary images of anyone under the age of 18 depicted fully or partly naked, the images must be classified by the Classification Board prior to distribution of the material and any requirements they impose must be followed. Images of infants less than one year old are excluded from this requirement. Images documenting activity in a public space, where the children were not employed by the artist and they took no directions from the artist in the creation of the image, are also excluded

Written depictions

These *Protocols* set no special requirements regarding the presentation or distribution of written depictions of children. However, artists and arts organisations are reminded that child pornography laws 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 apply to the Classification Board for a formal classification decision where material is hosted in, or provided from, Australia and it is likely to be prohibited.

Some funded organisations host websites that support images independently uploaded by artists or registered members. These organisations should have a Web or Code of Conduct policy which prohibits the upload of material that violates the rights of others or is unlawful, defamatory or obscene, and which gives the organisation authority to remove material that violates those standards. These organisations are asked to add provisions in their Web policy clarifying that by uploading images of children under the age of 18 the artists or members warrant that:

- images were created in line with relevant state or territory laws and regulations in force at the time
- parental consent was given for distribution of contemporary images of any child involved in making the work
- images of fully or partly nude children have been classified by the Classification Board

Implementation

From 1 January 2009, grant applicants will be asked to indicate whether they plan to work with anyone under the age of 18. Applicants who do work with children will need to be aware of the special responsibilities and requirements articulated in these *Protocols*. All grant recipients will be asked to comply with these *Protocols* as well as the relevant state or territory laws and regulations. In certain cases evidence of compliance will be required before grant monies will be paid. Organisations receiving annual or recurring funding will be sent a notice asking them to confirm their agreement to the obligations set out in these *Protocols*.

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

Review

The Australia Council will monitor the implementation of these *Protocols* during the first year of implementation. The *Protocols* will be reviewed 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.

Further Information

Arts Law Centre of Australia - www.artslaw.com.au/LegalInformation/
Children in the Creative Process: Information for Artists and Arts Organisations
Model Release Form
Street Photographers Rights

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

Samples of the certifications from the Australia Council application form and clauses from the funding agreement

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 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.

New funding agreement clauses

General condition for all contracts

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 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 you obtaining permits and parental consents, 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 required permissions as detailed in the *Protocols for Working with Children in Art*.