

# Child Photographers, Not Child Pornographers

Suzanne Derry talks about the laws that apply when creating art involving children and the Australia Council protocols.

On 16 December 2008, the Australia Council for the Arts released protocols for working with children in art (the **Protocols**). The Protocols will apply to recipients of Australia Council funding from 1 January 2009.

This article looks at the laws that regulate artists' work with children and the Protocols.

Debate about the balance between child protection and artistic freedom was ignited last year by two incidents, both relating to the photography of naked children. The photograph of a naked teenage girl was published on invitations and exhibited by Australian photographer, Bill Henson, at a well known Sydney art gallery. Shortly afterwards, *Art Monthly Australia* magazine published a similarly controversial edition with the photo of a naked six year old girl on the cover taken by Polixeni Papapetrou.<sup>1</sup>

These events have highlighted the need for artists to be aware of the laws that apply to their practice when working with children. They also raise the questions: when is a child photographer a child pornographer? What laws regulate such an artist's practice? Do those laws accurately reflect societal standards? And lastly, what do the Protocols say and do they achieve their intended purposes?

## What laws apply to working with children in the Arts?

There are four main areas of law applicable to artists who work with children.

- employment laws;
- criminal laws relating to child pornography;
- classification laws; and
- proposed privacy laws.<sup>2</sup>

Other laws such as defamation, trade practices and surveillance devices legislation may also be relevant but go beyond the scope of this article.

## Employment laws

Employment laws in relation to children vary across jurisdictions. As a threshold issue, it is important to ask whether the young per-

son concerned is defined as a 'child' under the relevant State or Territory employment legislation. A 16 year old is not deemed a child under the *Industrial Relations (Child Employment) Act 2006* (NSW), but is under equivalent legislation in Queensland.<sup>3</sup>

## Employment of nude children

New South Wales,<sup>4</sup> Victoria<sup>5</sup> and Queensland<sup>6</sup> prohibit the employment of children who are nude. In Victoria and Queensland, exceptions exist for children under 12 months where the parents have given consent and are present.<sup>7</sup> In New South Wales,<sup>8</sup> Victoria<sup>9</sup> and Queensland,<sup>10</sup> there are also prohibitions on placing the child in danger-

ous or emotionally or physically harmful situations. Furthermore, New South Wales<sup>11</sup> and Victoria,<sup>12</sup> require a permit or authority to work with children in entertainment, while in Queensland a parent's consent form or special circumstances certificate is necessary.<sup>13</sup> In every State and Territory there are restrictions on children working during school hours.<sup>14</sup>

It is interesting to note that employment restrictions have not been cited in any of the recent public furore in relation to children and art. This perhaps indicates a preconception that photographs of naked children mean child porn. The public were exclusively concerned by the highly controversial issue of child pornography, but either unaware, or less concerned about child protection restrictions that address such matters in the everyday setting of employment law. It is also interesting that public comments about the law inadequately protecting children working with artists were only made in relation to child pornography and indecency offences under the *Crimes Act 1900* (NSW).

## Criminal laws relating to child pornography

State and Territory criminal legislation prohibits the use of children for pornographic purposes and the possession and/or distri-

bution of child pornography. In New South Wales, using a child under the age of 18 years for the purposes of the production of pornographic material is an offence under the *Crimes Act 1900* (NSW) carrying a maximum penalty of 14 years imprisonment.<sup>15</sup> The production or dissemination of child pornography is also prohibited.<sup>16</sup>

Child pornography offences are broadly defined in State and Territory criminal legislation and include offences for creating, publishing or disseminating pornography of children. For example, in the *Crimes Act 1900* (NSW) a child is used for pornographic purposes if:

- (a) engaged in sexual activity;
- (b) in a sexual context;<sup>17</sup> or
- (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context) in a manner that

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would in all the circumstances cause offence to reasonable persons,

for the purposes of the production of child pornography material.<sup>18</sup>

## The artistic purpose defence:

In many States and Territories, defences are available where a work has been classified, or produced for a particular purpose. For example, section 91H (4) of the *Crimes Act 1900* (NSW) states "It is a defence to any charge for an offence [of production, dissemination or possession of child pornography]:

- (a) ...
- (b) that the material concerned was classified (whether before or after the commission of the alleged offence) under the Classification (Publications, Films and Computer Games) Act 1995 of the Commonwealth, other than as refused classification (RC), or
- (c) *that, having regard to the circumstances in which the material concerned was produced, used or intended to be used, the defendant was acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose and the defendant's conduct was reasonable for that purpose...*"

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A recent report of the NSW Sentencing Council recommended that the defence set out in sub-section (c) be removed.<sup>19</sup> The Sentencing Council wrote:

*The council is concerned that material which would otherwise constitute child pornography and be such as to cause offence to reasonable persons, should then be defensible on the potentially controversial and uncertain ground that the defendant was acting for a genuine artistic purpose*<sup>20</sup>

Acting on recommendations of the Chair of the Sentencing Council, in late October last year the New South Wales Government announced its intention to remove the 'genuine artistic purpose defence' from the *Crimes Act 1900* (NSW).<sup>21</sup>

The other defences with which the 'genuine artistic purpose' defence is currently housed, including those relating to 'genuine child protection, scientific, medical, legal' or 'other public benefit purposes' remain

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unquestioned. It would seem that after the recent debates, a genuine artistic purpose is no longer seen as a balancing consideration. Discussions at the time of the Henson furore often reflected on 'why artists should be allowed to exploit children in the name of art' and highlighted the gap between what is deemed pornographic under the New South Wales *Crimes Act* and what is deemed so by the public. However, the narrowing of the defence with respect only to artists risks, if introduced, a 'legislated distrust' in the purposes of the artist on the assumption that any work in which a child is pictured naked or partially naked is pornographic.

### **Classification and censorship laws**

The National Classification Scheme applies to all films, computer games and submittable publications. The Classification Board has the role of classifying films, computer games and publications, as well as material available online (when referred to it by the Australian Communications and Media Authority). Under the National Classification Code which applies in all States and Territories, publications, films and computer games may be refused classification if they describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not). It is an offence under State and Territory classification legislation to sell or exhibit material that has been refused classification.<sup>22</sup>

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### **Proposed privacy laws**

There is currently no general right to privacy in Australia, nor is there a law specifically aimed at preventing the unauthorised recording or use of a child's image. The Australian Law Reform Commission (ALRC) has recommended the introduction of a statutory cause of action for invasion of privacy applicable to unauthorised photographs, with a public interest exception.<sup>23</sup> If such a right is introduced, it will be interesting to note how it applies to children.<sup>24</sup>

### **The Protocols**

The Australia Council introduced the Protocols on 16 December 2008. Compliance with the Protocols is a precondition to a grant of funding from the Australia Council. Artists are required to undertake that they

have complied or will comply with any relevant laws of their State or Territory and that they also have followed or will follow the Protocols.

The stated purpose of the Protocols is as follows:

*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 works.*<sup>25</sup>

The Protocols set a variety of 'standards' with which artists must comply, noting that:

*where these [standards] 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.*<sup>26</sup>

The Protocols therefore create an additional federal regulatory system where one did not previously exist for those artists who apply for government funding.

### **What do the Protocols regulate?**

The Protocols address three types of activities:

- 'creation of a work of art';
- 'exhibitions and performances'; and
- 'distribution (for instance, through marketing materials or digital media)'.<sup>27</sup>

As a very basic summary, the Protocols require that parental consent be obtained before an artist can work with a child under the age of fifteen. Australia Council funded exhibitors, presenters or distributors of artistic works must obtain a statement from the artist that the Protocols and any other relevant laws were followed before displaying or distributing an image of a child under 18 years old. The distribution of an artistic work depicting someone under the age of 18 is dependent on parental consent; and where the subject of a work is either fully or partially naked it can not ordinarily be distributed without first being classified.<sup>28</sup>

While the Protocols themselves make it clear that "Laws in most states and territories impose a number of limits and constraints designed to protect children from exploitation and harm"<sup>29</sup> they set minimum standards which often exceed those required at law. For example, under the Protocols, artists and arts organisations that distribute a 'contemporary image of a real child' under the age of 18 need parental permission to distribute the image.<sup>30</sup>

In this context, a 'contemporary image' is defined to mean an image taken in the last 18 years. The effect is that distribution of quite innocent images could become highly restricted. As put by David Marr, writing in the *Sydney Morning Herald*:

*Here's how silly it is: the photograph of a 17-year-old dressed from top to toe in hat, gloves, greatcoat and working boots can't be put on the net after January 1 by any artist or organisation taking Australia Council funding unless the parents or guardians of that overdressed model consent to the image being there. That the young person is old enough to drive and consent*

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*to have sex doesn't matter. Unless Mummy and Daddy say so, the picture can't go up.*<sup>31</sup>

The Protocols create some further difficult hurdles for government funded artists. For example, where children are to be employed or photographed fully or partly naked permission from the parent and child must be obtained (which sounds wholly reasonable). However, artists are to give confirmation to the Australia Council, prior to commencing the work, that both the child (irrespective of their age) and their parent has understood the nature and intended outcome of the work, the parent will supervise the child while the child is naked, and that they agree that it is not sexually exploitative.<sup>32</sup>

### Conclusion

The laws on working with children and ensuring they are protected from becoming victims of child pornography are vital. They already exist. The Protocols create a confusing web of stringent preconditions to funding which will stifle and complicate Australian artists' ability to contribute to society. They place additional burdens on artists, implying they cannot be trusted to abide by the laws which protect children. The Protocols and narrowing the defence of artistic purpose in New South Wales send very strong messages about our intention, or lack thereof as a society to uphold the rights of artists. It will be interesting to see whether, upon their review at the start of 2010, the Protocols have increased child protection effectively, and at what cost to the arts.

The Protocols are available at [www.austliacouncil.gov.au](http://www.austliacouncil.gov.au).

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(Endnotes)

1 *Art Monthly Australia* Issue 221 (July 2008).

2 There is currently no general right to privacy in Australia. For more information about privacy and the proposed cause of action for invasion of privacy, see the earlier *Communications Law Bulletin*, Volume 26, No. 4 July 2008, in particular, M Tilbury 'Reviewing Privacy in New South Wales'.

3 *Child Employment Act 2006* (Qld) s 5.

4 *Children and Young Persons (Care and Protection – Child Employment) Regulation 2005* (NSW) cl 19.

5 The Mandatory Code of Practice for the Employment of Children in Entertainment (the Mandatory Code) is given effect by section 32 of the *Child Employment Act 2003* (Vic). Clause 19 of the Mandatory Code prohibits the employment of children naked unless they

are under 12 months, and their parents have permitted the employer to employ them nude and will be present for the entire period.

6 Sub-Section 8A(1) of the *Child Employment Act 2006* (QLD) prohibits the employment of a child either naked or clothed in a way that the sexual organs, anus or breasts of a female over 5, are visible.

7 *Child Employment Act 2006* (QLD) s 8A(2); Mandatory Code of Practice for the Employment of Children in Entertainment (Vic) sub-cl 19 (2).

8 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 222.

9 Mandatory Code cl 18.

10 *Child Employment Regulation 2006* (QLD) s 12.

11 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 223.

12 *Child Employment Act 2006* (Qld) s 9(1).

13 *Child Employment Act 2006* (QLD) s 10(1).

14 See for example: *Children and Young Persons (Care and Protection – Child Employment) Regulation 2005* (NSW) schedule 1, cl 5(1); *Child Employment Act 2006* (Qld) s 11; *Child Employment Act 2003* (Vic) s 11. Exemptions can generally be obtained through the education minister for the State or Territory in which the child resides.

15 *Crimes Act 1900* (NSW) s 91G.

16 *Crimes Act 1900* (NSW) s 91H.

17 'Sexual context' is not defined in the *Crimes Act 1900* (NSW) and is a subjective assessment. It is noted in G Griffith and K Simon *Child Pornography Law* Briefing Paper No 9/08 (2008) at 29 that:

*it may encompass such things as pictures of naked children from legitimate nudist settings, where the actual depictions are found to dwell on these images and where, in all the circumstances, they cause offence to reasonable persons. The qualification that the material must 'in all the circumstances cause offence to reasonable persons' is a community standards test ... At any rate, it is left to the courts to decide what amounts to 'a sexual context' in any particular set of circumstances.*

18 *Crimes Act 1900* (NSW) s 91G.

19 See: NSW Sentencing Council *Penalties Relating to Sexual Assault Offences in New South Wales*, (August 2008) at [4.44 – 4.47].

20 NSW Sentencing Council *Penalties Relating to Sexual Assault Offences in New South Wales* (August 2008) at [4.46].

21 See: Hon. John Hatzistergos *Major Government Crackdown on Sex Offences* Media Release (25 October 2008) where it is stated that:

*The Child Pornography Working Party will also examine the artistic purposes defence in the context of child pornography involving the more general category of depicting children in a sexual context. The Government has supported in principle the report's recommendation to remove this aspect of the defence.*

22 See: *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW); *Classification (Publications, Films and*

*Computer Games) (Enforcement) Act 1995* (Vic); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT); *Classification of Computer Games and Images Act 1995* (Qld); *Classification of Publications Act 1991* (Qld); *Classification of Films Act 1991* (Qld); *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA); *Classification (Publications, Films and Computer Games) Act 1995* (SA); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas); *Classification of Publications, Films and Computer Games Act* (NT).

23 See: Australian Law Reform Commission *Review of Australian Privacy Law* Discussion Paper 72 (September 2007) at [59.112-118]; Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* Report 108 (August 2008) at [69.106-135].

24 See for example A Flahvin 'Murray v Big Picture UK Ltd: An Image Right for the Children of Celebrities?', (2008) *Communications Law Bulletin* 26(4), for discussion on the right to privacy in the UK and whether in recent case law that right transfers to the children of those who possess such a right due to their celebrity.

25 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 2.

26 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 2.

27 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 3-4.

28 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 6-8.

29 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 6-8.

30 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 7.

31 D Marr. 'Australia Council pulls the wool, hat and trench coat over our eyes' *Sydney Morning Herald* (19 December 2008)

32 Australia Council for the Arts *Protocols for Working With Children in Art* (December 2008) at 6.