

Submission to the Senate Inquiry

into the Australian film and literature classification scheme

responding to sections **e** and **k** of the terms of reference

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Summary

This submission outlines how Australian art has been unnecessarily impoverished by artists avoiding children in their works. It raises problems in current interpretations of the law and reveals the discouraging effects that misapplied laws have on artists. I also argue that the decisive issue in classification must be the intention of the artist rather than artistic merit.

In a separate section, the submission deals with the problem of community perception and attempts to sort out the sense amid much chaotic and capricious demagoguery that has occurred through the media. The text looks at the real and imaginary risks to children and distinguishes genuine community opinion from artificially generated community opinion. It describes three fallacious claims against naked children in art and invokes, instead, the necessity of conducting scientifically premised risk evaluation in order to judge the harmfulness of works of art.

Finally, the submission turns to the matter of freedom of expression, not to claim that artists can do whatever they like but to reveal how the community must not use two standards in computing risk in art and computing risk in other areas; because any discrepancy of standard amounts to chauvinism against artists. The submission concludes with a plea to the Senate Inquiry to bring reason to the field which is overrun by emotional reactions of no philosophical substance.

1 The legal and artistic context

This section explains how the deficit of children in contemporary art is the consequence of badly interpreted bodies of law. The argument goes directly to the moral basis for decisions in classification and expresses scruples over defences that depend on artistic merit.

1.1 My reasons for writing

Judging the national art scene as a critic, I sense that photographers and painters have more or less abandoned the depiction of naked children and indeed seldom even include clothed children in their work, unless as incidental noise in the background. There is a dense network of discouragements, from the red tape of legal requirements to potential media uproar; and with the exception of the defiant establishment figure of Bill Henson,¹ creative artists are evidently reluctant to take on the risks.

It concerns me greatly that Australia's legal framework—or the way that it has been interpreted—has effectively banished children in art, which is clearly unhealthy and unnatural. In the response below, I attempt to outline how the unwholesome exile of children in art has occurred for no good reason. As a critic and parent, I feel that a childless art history is a bleak symbol of cultural sterility. The trend, which now has a mistaken legal expression, gravely affects our cultural patrimony.

I am grateful to have the opportunity to represent to the Senate Inquiry the special logic that applies to the visual arts. My submission answers the terms of reference under section e) the application of the National Classification Scheme to works of art and the role of artistic merit in classification decisions; and the discussion also touches on k) the effectiveness of the National Classification Scheme in preventing the sexualization of children. I should also express my thanks that the Inquiry could accept a late submission. The first that I heard of

¹ The identification of Henson with the privileged classes was declared by the Sydney art critic John McDonald, who describes being at Henson's opening with 'the cream of Melbourne's legal and medical professions... a show of force by the Melbourne establishment. Even the dinner afterwards was held at the Australia Club.' *The Age*, 9 April 2011

the Inquiry was when it was reported in the newspaper two days ago.² I have prepared this submission as quickly as I could.

The purpose of the submission is to explain the unique predicament of the visual arts and to appeal to the Senate Inquiry to create special provisions under the law to prevent children being expunged from Australian iconography. In the aftermath of the Henson controversy, the Australia Council introduced Protocols which have had a further withering effect on the inclusion of children in art. This negative consequence was repeatedly predicted and warned about, alas to no effect.³

1.2 The problem with current interpretation of the law

Before the intervention of the Australia Council, visual artists (like photographers and painters who exhibit in galleries) did not believe that state child-employment laws had application to art, because they had never thought of themselves employing the people in their pictures.⁴ The Arts Law Centre of Australia had already pondered the problem: 'Whether or not the law considers that you are "employing a child" will vary depending on where you reside. Importantly, you may be subject to these laws even if you are not actually paying a child to work.' For Victoria, it says: 'You will be regarded as employing a child if the child takes part in any business, trade or occupation carried on for profit, irrespective of whether the child is paid or not and regardless of the type of arrangement you have with the child.' If I make a loss, it seems that I am not employing a child, whereas if I net \$5, I become an employer, even though the nature of the product is identical in both cases. This is legal nonsense, and the protocols, which supposedly guide artists, contribute no clarity.

² Wendy Frew, 'Artists may face classification to counter nudity', *The Age*, 18 April 2011, <http://www.theage.com.au/entertainment/art-and-design/artists-may-face-classification-to-counter-nudity-20110417-1djrv.html>

³ The Australia Council sought feedback on its draft protocols and its website records prophetic submissions by writers like Stephanie Britton, <http://www.australiacouncil.gov.au/news/items/pre-2010/?a=42406>. No notice was taken.

⁴ Some of the paragraphs below come from my article 'No sense treating children who pose for artists as employees', *The Age*, 26 February 2010

To the crucial question 'do the employment laws apply to me as an artist who includes a child in a picture?', the protocols provide neither an answer nor a method for reaching an answer, in the same way that they provide no guidance as to definitions of exploitation. Australian law generally does not run counter to common sense. Up to 2008, artists believed common sense would prevail. As noted above, laws are defined around intentions. If you do not intend to employ a child—but just to paint a picture of one—you ought logically to be seen in the same way as a poet who writes a poem about a child. Artists seldom have the intention of employing their subject matter. If your friend agrees to sit for a portrait, it is not to be employed but to be in an artwork. If anything, you could say that the model employs the artist, not the other way around. When both parties simply want the artwork to happen, the relationship is clearly not intended to be employment. So, too, a parent might approach an artist and ask for a child to be painted or photographed. Parent, child and artist would then make a picture without conceiving of the event as employment. The term employment offends the very nature of the relationship and the art.

The state laws on child employment did not contemplate spontaneous artistic production any more than they did happy snaps. The laws were not formulated around disinterested intellectual image-making but were designed to cover commercial activity such as advertising, where models may be industrially exploited. These important legal distinctions have been obscured by the assumptions within the Australia Council protocols. To paint your picture, you now have to inform the ministry and get police checks and contact school principals, specify dates and other things that only big-business entertainment would have the administrative resources to manage. Once you have booked all these people in, you have to hope that the weather will be good and no one has a sore throat, because you are not at liberty just to select another day of your choosing: that would break the law. Unless you have legal training, you will give up. Further, interpreted in the way that is now accepted, the law in the populous states forbids employing a child in the nude; so no naked child can ever appear in art again in Victoria, NSW, Queensland and WA.

For all these reasons, I am hoping that the Senate Inquiry can recommend appropriate mediation and declare that artists who have no intention of employing children when they simply want to include a child in an artistic work are not deemed to be employing a child.

1.3 Artistic intention rather than artistic merit as a criterion

Although arts organizations are fond of artistic merit as a defence of imagery, I am not asking for artistic merit to be invoked in any classification decisions. Rather, I am asking for artistic intentions to be the key criterion in all matters of classification. Artistic merit is very subjective, since we will always be divided as to which works have what degree of artistic merit. In principle, however, if a work is indeed malevolent in its intention, artistic merit compensates for nothing. It may be technically very refined and propose ingenious fantasies with rich subject matter and, in at least those senses, it could be considered to have high artistic merit. But that does not mean that it is not responsible to its intentions; and if these involve purveying disgusting abuse, we are justified in not excusing them by artistic merit. Within a statement of fascism or bigotry, artistic merit will have no redemptive appeal. It is ethically inadmissible to suggest that the aesthetic should trump the moral, because otherwise we would vouchsafe anything beautiful doing any amount of harm. Instead, in the law, intention is always a critical factor; and however difficult it may be to establish artistic intention, it is much safer and more reliable than merit. In all other circumstances, the law makes decisions about the intentions of a suspected felon; and no one is found guilty unless he or she possess an evil mind (*mens rea*) over the evil deed. I cannot see how art and its legal or classificatory evaluation operate differently and see no basis for appealing to artistic merit as some kind of moral disclaimer.

However, I do sympathize when arts organizations call for artistic merit to be taken into account. They mean, more or less, that the intentions to create something artistically rigorous are reflected the merit which one detects aesthetically. I suspect that we are essentially saying the same thing: I just wish that we could settle on artistic intention rather than artistic merit.

2 The analysis of community perceptions

I would now like to turn to the matter of substance which has been driving all of the legislative concerns and which has resulted in extensive damage to Australian iconography. The link between child imagery and child abuse is often assumed in public perceptions; but it does not stand up to scrutiny.

2.1 Real and imaginary risks

There are real risks to children in two circumstances, one horrific and the other a little bit unsettling but still worth taking seriously. The first is sexual abuse, which is usually perpetrated by someone known to the family; and the second is a more general condition which has been described, I think correctly, as the sexualization of children. It may not cause any direct physical harm but possibly robs children of an aspect of their childhood. There is a massive projection of teen sexuality upon younger children and you could imagine that many parents could be concerned, as well as confused, about the appropriateness of this premature eroticism. Aside from issues of clothing, which can perhaps be controlled, each weekend any parent could witness their tiny daughters emulating the erotic moves on television that their pumping teenage role-models promiscuously exhibit to loud thumping music. At times proudly and at times uneasily, parents often feel that they have to go along with this emulation and admire their daughters for such precocity. The sexualization of children is endemic throughout our culture (with nothing to do with art) and remains powerfully promoted by the commercial interests that shape popular culture and seduce the very young—especially girls—to gaze, act and dance with a sexual body language.

The problem with both of these very different but genuine concerns is that they are very hard to handle positively. The sexual abuse of children is strictly against the law but it seems to go on in spite of the law; and more sophisticated strategies for policing families and friends of families—where the bulk of abuse takes place—seem hard to reconcile with privacy and civil liberties. And with the more general sexualization of children, though also an understandable fear, we do not have a heart to censor the dance moves of adolescents or somehow to

isolate them from younger children; and we therefore cannot reasonably prevent the premature imitation of sexual behaviours by the very young, who sometimes covetously absorb the pout, the coquettish game with eyebrows and narcissistic body language of their sexually aware bigger siblings.

From the very serious to the somewhat serious, society has little to answer our fears but the production of further fear. We cannot conquer the source of our fear and so we replicate the expression of the fear. In terms of action, all that society can do vociferously is pursue an interdiction against nude images of children in the hope that this constitutes a defined and determined measure to protect children. It is a perfect contemporary case of a real fear being substituted by an imaginary fear, where attention is directed to anything but the basis of risk and instead consists of an inflationary and somewhat shameless marketing of fear.⁵

2.2 Distinguishing genuine from artificial community standards

Community standards and public values and opinion are often invoked to encourage greater censorship or red tape to control imagery or production; but they are both so heavily shaped by the media that it seems necessary first to examine how the media handle the issues.

For the media, the naked child in art became what Anna Munster has recognized as a *meme*. Writing about the Bill Henson affair that arose only months before her article in *Continuum*, Munster analysed the mass-movement against Henson's picture of a 12 year old girl in terms of media momentum: 'a meme is typically understood', she says, 'to be a rapidly replicating transfer of ideas, behaviours or skills from person to person, more typically taking hold across populations'.⁶

⁵ Some of the paragraphs here derive from my article 'Naked Fear: A New Chapter in the History of Anxiety', *antiTHESIS* (Fear), vol. 20, 2010, pp. 73–90.

⁶ Anna Munster, *Continuum*, vol. 23, Issue 1, February 2009, pp. 3–12, available online at <http://www.informaworld.com.ezp.lib.unimelb.edu.au/smpp/section?content=a908315485&fulltext=713240928> (accessed 3 March 2009)

The pondering of risk or scientific identification of causes carries no weight against a meme and attracts no interest. Finally, when the issues already become last week's news, there is even less opportunity for reflection on the basis of fear because a meme cannot be resuscitated for a postmortem any more than a bushfire can be reignited over burnt land for the purpose of scientific observation.

2.3 The three fallacious claims against naked children in art

During the naked children controversy of 2008, I noticed that three claims emerged. First, nudity in pictures strips children of their innocence and children need protection from such a violation. This was the argument that Kevin Rudd used to project his hatred of an image of a naked girl. Rudd urged, from within his 'deeply held personal beliefs', that the protection of the innocence of children should be stepped up. On one level, who can deny that children's innocence should be protected? It is a truism, but applied illogically to the circumstance. It seemed necessary to ask how innocence can be lost by the body being seen in a photograph, a question that I posed in *The Age* and which Rudd did not answer.⁷ The Prime Minister had all the passion to make the claim but none of the patience to justify it. I argued that a loss of innocence can only occur if the consciousness of the child is corrupted, that is, if adult consciousness somehow intrudes upon and displaces the clean mind of the young one. It seemed unclear when and how this could occur in an artistic picture. No one, as far as I know, ever helped Rudd out with this question.

Second, the image increases the risk of sexual crime against the child. I repeatedly called for evidence of this claim and it has not, to my knowledge, been forthcoming. The overwhelming majority of sexual crimes committed against children occurs within families by people known to the family. Such horrible people already have access to the child. They have no need of artworks of that child. I am not aware that there has ever been a case of a sexual crime against children being caused by an artwork. The exposure to significant

⁷ 'Critics opt for slogans not evidence', *The Age*, 8 July 2008, <http://www.theage.com.au/national/critics-opt-for-slogans-not-evidence-20080707-34er.html>

paedophilic risk is unsubstantiated and, based on the statistics, is exceedingly unlikely. If the image is a genuine artwork, it will be thoughtful—presumably a total turn-off for a paedophile—and will avoid that pure objectification which is supposed to make someone lust after a targeted individual. And even if the image is not thoroughly thoughtful, the link between literal exposure and exposure to risk is still missing. So there would be two steps that you would have to take to mount the case: (a) that a thoughtful artwork can act as a sexual stimulant and (b) that an image of any kind causes sexual crime against its subject.⁸

When we see children on TV, in theatre, dance and film, any given child would be subject to the same exploitative exposure, because (while not exactly nude) the child is nearly always projected as lovely and cute in its body as well as mind, inviting quite as much undesirable attention by perverts who could arrive to watch the child by the advertising associated with the event. So unlikely is a crime against such children that the public endorses these child spectacles with full confidence. We are all complicit in their creation as consumers of the film or theatrical production when we buy the ticket. By the criteria now applied to art, if ever you have watched a film or play or dance with an adorable child in it, you have supported child exploitation. This is self-evidently silly. Having a child seen as gorgeous in the public view involves negligible risk and zero moral problem along the lines of exploitation. And that is why you continue to buy your ticket, uninhibited by such scruples.

Third, it has been argued that other children are exposed to greater risk by virtue of one child being seen naked in an artwork. Never mind the model, who may remain safe with vigilant parents minding him or her under lock and key. It is other children in less secure environments who become subject to predators as a result of the artistic encouragement by artists. I call this the induction of vulnerability argument. It basically says that if culture accepts nude pictures of children in one circumstance, kids become vulnerable in another circumstance.

⁸ See my article distinguishing art from pornography, which was published after the Henson controversy, 'Saving Art's Face', *Arena Magazine*, no. 95, June–July 2008, pp. 45–46. It can be read online at http://arena.org.au/archives/Mag_Archive/Issue_95/features95_nelson.htm (accessed at the time of writing).

The suggestion is that if we allow naked child pictures to proliferate, we valorize a kind of laying bare of children's flesh for adult delectation and hence precipitate a lustful predisposition toward children in these offenders. Again, this argument only holds if the pictures can truthfully be described as pornographic.

Leaving aside the need for that proof, there is a fault in logic. Let us also leave aside the obvious question: why would you not consider it nobler to cultivate a society where children's nudity is seen as natural? Unless we can return to this, we promulgate adult hang-ups, project anxieties upon children and induce destructive fears into our relationship with children. We move toward an epoch in which guardians now feel remiss in letting their children's bodies be seen; and this taboo in turn encourages children to be ashamed of their bodies. And so we go headlong into a culture of shame, creating transgenerational repression of something that ought to be natural.

The induction of vulnerability argument also comes without any evidence or reason. No image has these inductive powers. An image cannot create evil lust where none existed beforehand; nor can it justify illicit lust or promote a crime against the knowledge that the crime is wrong. Even if you count the image as totally objectifying (*i.e.* porn rather than art) the causal link between the image and the crime lacks credibility. We have other serious crimes: for example, the rape of women. The rape of women is absolutely unacceptable. There is no degree to which we can say: raping women is more acceptable than some other crime, even if the other crime hurts more people. The offence of rape is absolute. So do we ban pornography which objectifies women on the basis that it normalizes a rapist's designs and assuages his guilty conscience? No, we do not, because the community does not fundamentally believe that there is a causal link between the image and the crime. And rightly so. Impugning the image on this basis presupposes a direct connexion between visual fantasy and actual felony; and this is an unfounded assumption in which nobody in our community really believes; otherwise we would criminalize adult pornography forthwith. Pornography is tolerated on a massive scale, presumably on the basis that it is more likely to help desperate men manage their lust than cause them

to convert their desires into crime. We know full well that pictures do not make rapists or paedophiles. Neither logic nor evidence has been brought to the induction of vulnerability argument. It is a furphy.

Even if one day an artwork is found among a child rapist's possessions (among all the thousands of cases where none has been detected) the causal link in that hypothetical instance would still remain weak. There is no greater demonstration of agency in the picture than if, say, a gunman is found to have had violent movies in the house or an axe-murderer is known to have possessed splatter flicks. These items of artifice neither create nor justify nor normalize criminality, because bitter and twisted people do not become bitter and twisted through representations but a horrible prior cycle of abuse, humiliation and repression. The artworks or films neither provide a cue nor a justification nor a motif of escalation. You could just as easily say that the male killer committed the murder because the movies failed him; they were no longer effective in keeping the angry outlet within his fantasy. The argument that pictures of any kind—much less pictures authorized by the chastity of art—cause these enormities does not stand up to scrutiny.

2.4 The logical primacy of risk evaluation

During the controversy, these arguments were unwelcome because the controversy was built around fear and the analysis which would dispel the fear would have wrecked the newsworthiness of the story. It is a pattern that repeats itself every time the topic comes up in the media and an attempt is made to make it newsworthy. In all such cases, no one in the media wants the analysis. On the few occasions where I managed to mount such arguments in 2008, I would find that the accusations defaulted to an unspecified claim that pictures of a naked child nevertheless constitute a form of child exploitation. Usually, exploitation means that there is an unfair reward for a controlling party at the expense of a controlled party, that someone therefore sustains harm in some way, is diddled or suppressed or gets ripped off. If this must be considered a legitimate fear in all human undertakings, I sought to know what

damage is alleged. Again, no one could really give a compelling example.⁹ David Marr valiantly continued to ask this question of the Australia Council when it published its clumsy and retrograde *Protocols*.¹⁰ His article most amusingly rehearses the circular nature of the anti-exploitation discourse, in which it appears a bureaucrat never needs to say in what way a person may be damaged or diddled in order to invoke the term 'exploitation'.

During the controversy, I attempted on a number of occasions to reassure the public that there is a scientific way to understand fear, which goes by the industrial term of risk evaluation. To know if a fear is worthy and significant, the recognized method is to conduct a risk evaluation. In the case of letting a child be seen naked in an artwork, I argued that it is necessary to compare the risks involved with those in other areas of life where parents subject their children to certain risks.

The concept of risk is more or less quantifiable according to the OHS culture that we now know in every workplace throughout the developed world. Risk is computed as the severity of any possible damage multiplied by the likelihood of the event occurring. We judge, for example, that driving a car or riding a bike is an acceptable risk. We say this even though the possible damage is extremely severe. You can be killed. There is proof, because lots of people get killed on the roads each week. But given the number of total motor journeys, it isn't very likely that you will have a serious accident on any given day. So you declare the risk worth taking and drive (with children in the cabin) or ride the bike every day. The risks to a child seen naked in an artwork are similarly low and fall well within acceptable limits.

⁹ The most cogent point was that perhaps at a later point in life, the child may regret participation in the artistic project that leaves him or her permanently and irreversibly exposed. I answered this argument on BBC World Service and in extensive debate with Guy Rundle in *Arena Magazine*, that the child would have equal reason to be proud of the achievement and that we ask kids to do a lot of things in life which they may either be proud of or reproach us for. We have not heard of a case of an artistic child model complaining about an image in the way that is suggested. My article is 'Paternalism revisited: Robert Nelson responds to Guy Rundle', *Arena Magazine*, no. 97, October–November 2008, pp. 47–48.

¹⁰ David Marr, 'Arts council pulls the wool, hat and trench coat over our eyes', *The Week*, 19 December 2008, <http://www.brisbanetimes.com.au/news/opinion/arts-council-pulls-the-wool-hat-and-trench-coat-over-our-eyes/2008/12/18/1229189797519.html>

2.5 How risk seems greater if unusual

The incitement to paedophiles (or perhaps loss of privacy, if that is the problem) caused by nude children in an artwork needs to be compared with other risks. It should be compared with sport, for example; because though seen as a kind of archetype of health and youth, implanted in us as wholesome from early education, sport is in fact the source of permanent injury, where people wreck their knees, break necks and spines and encounter other corporal disasters that cripple them for life. Every weekend yields a fresh harvest in our hospitals. Notwithstanding, children in our community face immense pressure—not just from parents but also teachers and junior associations—to entertain the sporting spirit in a fierce degree, to strive to win with all energy, to take on feverish enthusiasm, overcome all fear of risk, and trounce the opposition. I am personally relieved that our son has rejected Australian rules football for this reason, because I feel sure that one day, were he to be a football player, he would return home via the surgery, as I once did in competition sport, with a permanent disability.

So as not to be too culturally elitist in targeting sport, consider ballet. This beautiful and understandable artistic enthusiasm is also incubated under massive parental pressure and manipulation: ‘you’re so pretty in your tutu’, girls are encouraged. They are indoctrinated by their parents, with the typical blend of hope, ambition and vanity that all parents project on their kids. The parent is hugely gratified to see a daughter move gracefully on the stage to public applause. Yet this same reward may also yield anorexia and arthritis, risks well known to any psychiatrist or even any soul with balletic experience.

The physical and psychological damage to the child in these instances is not just likely but widespread. In any given street, each family is likely to be affected, because the massive societal endorsement makes sport unavoidable and artistic activities like ballet compellingly attractive. So on a social level, these activities are a much greater worry, because the serious damage that they cause is constant and ubiquitous.

Parents make decisions on their children's behalf, either by forcing them, brow-beating them, shaming them, or (we hope) by lovely encouragement and sweet blandishments to implore them benignly. Yet the result is the same: we expose them to risk. So why not institute some super-parental discouragement? Why not invoke anti-football protocols and demand identification for when it is ethically appropriate for children to be allowed to participate in these tangibly damaging activities? The only reason we do not think this way in relation to sport—but do when it comes to nudity in art—is just that sport is common, usual, accepted. It is valorized by custom and, because it is mainstream, it is unchallenged. Parents absolutely enjoy the right to decide and bring on these risks for their children. Yet according to certain commentators, and without analysing the reasons, the risks to a child being seen naked in an artwork are unacceptable. Without the authority of reason, we cannot define community standards by mere intuition.

The reason nudity in art is singled out among all these parental prerogatives (in spite of negligible risk attaching to the artwork) is that it is unusual: it is a minority activity. The majority regularizes. The risk to kids is accepted if institutionalized and maintained by custom. Art is ratbag and deviant because individual. It is based on individual choice rather than convention in a way that makes the responsibilities more conspicuous. It seems easier to accuse the parental influence of being irresponsible, even though it exposes children to much lower levels of risk than socially normalized leisure activities. While other forms of risk-taking are programmed in conformity to expectations, art is not. So it is targeted.

3 Being fair to artists

I want to turn now to matters of freedom of expression, not to claim that artists can do absolutely whatever they like but to reveal how the community must not use two standards in computing risk in art and computing risk in other areas; because a discrepancy of standard means chauvinism. The submission concludes with a plea to the Senate Inquiry to bring reason to the field which is overrun by emotional reactions of no philosophical substance.

3.1 Community standards must not traffic chauvinism

Through all of the targeting of artists, we witness the great discourse against *difference* playing itself out in the realm of art. You might cast a glance at the vocabulary used by the popular psychologist Michael Carr-Gregg speaking out against a child model who defended her image: he called the 11 year-old 'mouthy'. The implication behind this gratuitous insult is that the child must not stand out. Parents are irresponsible if they let their children be identified in any way as different, because this will lead to bullying at school. Instead of helping to bring dignity to difference, Carr-Gregg finds difference a liability which is dangerous to let out. Let us leave aside the hypocrisy of a psychologist so piously looking after children against bullying while at the same time fomenting strife for the young model with an abusive intervention in the media which may as well be designed to shame her with the quality of difference.

Perhaps a more benign interpretation of the hatred of parental prerogative in art matters—but not in conformist matters like sport and traditional ballet—would be the sentiment associated with the possible damage. Maybe the community feels more strongly about risks to children through artistic nudity (as few as they are) just because it would involve crime (a sexual assault inspired by the artwork) where other forms of risk can be put down to accident? The worst outcome is not an 'innocently' broken spine which you put down to accident but a heinous deed perpetrated upon a child by human will. The fact that the possible damage is criminal obscures from public consciousness that risk is risk and damage is damage, irrespective of the source of the harm and whether or not it involves volition. To focus on a danger just because there is a criminal narrative within it creates an irrational promotion of the danger in public consciousness. Subjecting a child to risk seems okay if the risk can be seen as 'natural'—as if there is anything natural about football or ballet!—but it inspires exponential horror when the risk has a human element of malevolence and perversion. The criminality entails a cocktail of emotion and blame that are not taken care of through apparently guilt-free terms like 'accident'. The scene is set for emotion to prevail over reason.

3.2 The legacy that artists have to deal with

It seemed sad to the nation's artists and art lovers and intellectuals that Henson's photographs and an issue of *Art Monthly Australia* (which contained images of naked children) had to be classified by the Australian Film and Literature Classification Board. However, at least the action cleared the air. The Board was fair and found that there was nothing offensive in the works. Artists are hugely grateful for the consistent and principled judgements by the Board, which follow reasonable criteria. Alas, Australian demagogues did not accept the umpire's decision; and so the forces against children in art had to resort to other tactics.

When the Australia Council produced its lugubrious *Protocols for working with children* in early 2009 on Kevin Rudd's command,¹¹ artists—who had never thought of themselves as employing their models—were effectively defined as child employers and hence subject to child employment laws. As described in 1.2 above, child employment laws have already existed in Victoria since 2004, which would effectively deem as illegal all of Bill Henson's nude photographs since that date, because it could be held that the artist employed a child in the nude, which is unlawful in any circumstances. An image of a naked child is legal if made prior to 2004, because it was created before the law was enacted. The subsequent pictures by Henson of children in the nude, I guess, must be considered illegal if we begin from the supposition that he employed the children.

Fear, like anger, is contagious. In the case of photographs of naked children, the fear spread from the tabloids and television to the Australia Council where the fear is now officially institutionalized; and from there, it spreads to the gallery system, where in most cases the exhibition of photographs with naked children will no longer be tolerated. We were shocked again when an image by Del Kathryn Barton representing her son—who had his pants on—was rejected

¹¹ See my monitory submission to the Australia Council at http://www.australiacouncil.gov.au/the_arts/features/draft_children_in_art_protocols_available_for_comment/submissions_on_draft_protocols/robert_nelson (accessed at the time of writing). When finally these dire protocols were released, I summarized their withering effect on art, 'We're being treated like suspected criminals', 7 January 2009, <http://www.theage.com.au/opinion/were-being-treated-like-suspected-criminals-20090106-7b4w.html?page=2>

from a fundraising exhibition for the Sydney Children's Hospital on the basis that it was at variance with the visual protocols of the institution.¹² Henson may exhibit naked children in commercial galleries and, given that they are not deemed pornography, it seems unlikely that anyone will seek to stop him, even if technically they are against Victorian law. But the government-supported systems will only be able to show his work if created prior to 2004; otherwise, a gallery will not be able to sign off on the paperwork that the creation of the image has observed the relevant laws. It would be very difficult to fudge the paperwork and penalties apply for slack practice, as if it were fraud. All of this, as Stephanie Britton observed, has the consequence of censoring the artistic interpretation of children.¹³

The three levels of government have little but garbage to say to one another over these fear-grown artefacts of policy. The legislative part of government has introduced laws which are inappropriately linked to art-making. The executive part of government has provided no moderation and is full of fear over public interpretation, having meekly followed a Prime Minister's prejudice and fitting in with the most vulgar assumption that child models need to be protected against the abusive potential of artists, thus strongly discouraging the inclusion of children in art, whether naked or not. Finally, the judiciary has remained silent, because no one has dared bring this fearful humbug to the courts, where I suspect it would be angrily tossed out because of its manifest foolishness.

The meme of fear ravages the terrain, discouraging critical discussion; and then it passes, leaving desolation in its path and sterilizing the ground where scrupulous argument ought to have been cultivated. Finally, in the aftermath, we are left with a legislative ghost of fear, an anxious legal precipitate of reactive moralizing, possibly motivated by sanctimony, possibly by political expedience, or possibly by an abiding philistinism or suspicion of artists and their

¹² See my opinion piece 'Knee-jerk fear seems the rule in matters of children and art', *The Age* and also the *Sydney Morning Herald*, 6 January 2011.

¹³ Stephanie Britton AM, the editor of *Artlink*, letter to Australia Council, Thursday 27 November 2008: 'Thus the depiction of young people in art, which is in fact already very little, in future will dwindle to almost none.' http://www.australiacouncil.gov.au/the_arts/features/draft_children_in_art_protocols_available_for_comment/submissions_on_draft_protocols/stephanie_britton_am (accessed at the time of writing)

freedoms, who knows? The new legal framework is a kind of conceptual corpse that lays its dead bureaucratic hand upon any artistic endeavour that might involve children in art, all for zero benefit to anyone and ultimately denying the legitimate artistic representation of childhood.

3.3 Conclusion

The child in art has become fraught, with numerous ill-informed and emotional reactions apparently guiding our view of legislation. The one bastion of sanity has been the Film and Literature Classification Board, undeviatingly guided by sage principles. I am appealing to the Senate Inquiry to show the leadership in the field and provide a judgement which (a) supports the Board in its independent wisdom to accept children, naked or otherwise, in unrestricted art, (b) disentangles the inclusion of children in art from child employment and thus (c) takes the onus off artists to go through prohibitive child employment procedures every time they want to make a work that includes children.

If this could be achieved, there is hope that Australian art history can have its children back.

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