

Police send child pornography charges to prosecutor

THE Bill Henson investigation is now in the hands of the Director of Public Prosecutions after police said they would pursue charges of creating and possessing child pornography as well as displaying an indecent image.

The referral means it could be weeks before a decision is made as to whether charges are laid.

Yesterday the Classification Board said it would be examining "online images of Bill Henson photographs" after the Australian Communications and Media Authority received complaints. It is possible the board will mark the photos "Refused Classification", meaning they will be unable to be displayed in Australia.

Meanwhile, an online forensic expert said it was very likely the controversial photos have made their way onto pedophile websites. He also criticised the Government and police for pursuing an investigation "with no end". "I'd be very surprised if the photos are not already [on pedophilia sites] and not already

being circulated. Extremely surprised," Ajoy Ghosh, a law academic and computer forensic examiner, said.
Dylan Welch

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I was getting fodder for a radio talkback show," says Phil Sylvester of 2GB. Bill Henson's exhibition was opening that night and he was looking for someone who could come on air, urgently, and explain the difference between art and porn. Sylvester failed to find anyone - which says a lot about this story - but he did set off the greatest art scandal of the decade.

A listener's email had drawn his attention to that morning's spirited attack on the celebrity photographer by this paper's Miranda Devine. The listener also sent a link to the gallery's website. When Sylvester saw the dozen images of the two children - particularly a couple of "full frontals" of the girl - he realised he had a "fantastic topic" for Chris Smith, his boss at the microphone. "What's art and what's porn is one of the great subjects, and here it was again."

It was 1.30pm on Thursday, May 22. After being shunted around a couple of Federal Government agencies and getting no reply from the child protection advocate Hetty Johnston, Sylvester sent the email through to Tony Ritchie, an old mate who is now media adviser to the NSW Commissioner of Police, Andrew Scipione.

As soon as he opened the gallery website at about 2pm, Ritchie forwarded the email to the Sex Crime Squad. An investigation that might have happened any time - and calmly - in the past 20 years was suddenly under way in a rush. The Sex Crime Squad focused on the website; the small police station at Rose Bay was called in to deal with the pictures on the gallery wall.

The clock was against them. In four hours an influential bunch of Sydney citizens would be gathering at its most contentious



Eye of the storm ... Bill Henson with images from his controversial show at Roslyn Oxley9 gallery in Sydney. Photo: Adam Hollingsworth

Not only is there a complete defence if Henson can show the material was intended to be used "for a genuine artistic purpose" but the very definition of pornography in the law is problematic. It speaks of images of children "in a sexual context". But is nudity enough? Yes, say Johnston, many sincerely outraged citizens and just about every politician except Malcolm Turnbull. No, say the lawyers.

Police sources have told the Herald they don't hold out much hope of convicting Henson as a child pornographer. That leaves the second far less dramatic possibility: a charge of publishing indecent articles, maximum penalty, 12 months in the clink. But again, Henson will be able to call witnesses to argue his photographs have artistic merit.

Before pressing on with either prosecution, Cowdery is going to have to decide if there is any reasonable likelihood of a conviction with press from around the world jamming the court room galleries; a queue of expert witnesses all the way out to the street; files full of reviews and prizes landing on the bench; and 30 years of photography brought into evidence.

If the prosecution collapses, Johnston pledges: "We'll be lobbying for the strengthening of the law so this doesn't happen again."

That still leaves the possibility of charges being laid over the images on the website which caused all the trouble in the first place. On day one, police sent them to the Australian Communications and Media Authority which polices the net. ACMA's investigations faces an almost insurmountable hurdle: the gallery's website is hosted on an overseas server. It's beyond the reach of Australian law.

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The clock was against them. In four hours an influential bunch of Sydney citizens would be gathering at its most prestigious contemporary art gallery to applaud one of the nation's most famous artists. A police source told the *Herald* they predicted what lay ahead: "Everyone knew it was not going to be a pretty scene."

Sylvester never found his expert, but 2GB had the story all to itself that afternoon. Chris Smith urged his listeners to ring the gallery. They did. When Phil Clark took over the microphone at 4pm he, too, hammered the story. Devine came on air and called for the gallery's website to be taken down. Sometime after 5pm, Clark told his listeners that police, protesters and art lovers were outside the gallery and the opening had been shut down.

As press operations go, this was a spectacular success. From breakfast, when Devine's column was first read across Sydney - and ignored by the police - to the doleful appearance of Superintendent Allan Sicard at Roslyn Oxley9 that evening to announce "the exhibition will be temporarily closed to allow further inquiries to be made", less than 10 hours had passed.

Henson was inside the gallery with its owners, Roslyn and Tony Oxley. They had been fielding calls from 2GB listeners all afternoon. "There are some crackpots out there," Tony Oxley said. "We have had threats to burn the building down."

Even before the Rose Bay police arrived, they were half-convinced the opening should be postponed. Sicard arrived at 4.30pm, and suggested they needed more security. He was worried about damage to the pictures. Henson said: "I'm worried about the people." In the end it was Henson who decided the opening should not go ahead that night. A notice was put on the door at 5pm and an hour later the images were removed from the gallery website.



Eye of the storm ... Bill Henson with images from his controversial show at Roslyn Oxley9 gallery in Sydney. Photo: Adam Hollingsworth

Full-frontal attack

Bill Henson's art has inflamed many passions, but the outcome satisfies no one, write **David Marr** and **Josephine Tovey**.

Controversy has always followed Henson's work. His use of children as models has been criticised and debated for 20 years or more. Asked a few days before the opening if a new media frenzy was boiling up about the sexualisation of children, Henson told the *Herald* "there is always something being boiled up. George Steiner once said that the media's only job is to create and maintain a state of emergency. About what," he added, laughing, "it doesn't matter."

The Oxleys were still confident no pictures would be seized. In the wake of the cancelled opening, they repaired to their house on the harbour to hold the Henson dinner that had always been planned. The media, meanwhile, had tracked down Morris Iemma in China. Next morning police leadership would read their boss's verdict in *The Daily Telegraph*.

"As a father of four I find it offensive and disgusting," said the Premier. "I don't understand why parents would agree to allow their kids to be photographed like this. The cornerstone of any civilised society is the protection of its kids and there can be no justification for some of these images. I'm all for free speech, but never at the expense of a child's safety and innocence."

Also that morning on Channel Nine's *Today Show*, the Prime Minister threw a

bucket of petrol on the fire. Karl Stefanovic showed Kevin Rudd five of the Henson images in about 20 seconds on a studio monitor. Black bars obscured nipples and genitals. As the pictures went to air they were headlined: "Outrage Over Child Porn Art". Rudd instantly declared them "revolting".

Had John Howard done so, it would have been regarded as par for the course. But this was the new scholar Prime Minister, the Mandarin man, the leader who had lately consorted with Cate Blanchett at the 2020

all from Rose Bay, the Child Protection and Sex Crimes squads - and their mood was very different from the night before. They were there to seize pictures.

Mark O'Brien, one of Sydney's toughest lawyers, who had been hired by the gallery and the artist, argued the pictures that concerned police could be stored and secured on the premises. Police refused. There was going to be a show.

They seized 12 pictures from the exhibition and another 20 from the storeroom -

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summit. He declared whether they were art or not didn't matter. "Whatever the artistic view or the merits of that sort of stuff, frankly I don't think there are any. Just allow kids to be kids, you know."

Later that morning the gallery announced it was withdrawing a number of works from the exhibition. But still the police came. This time the squad was huge - about 20 officers in

two of which were 25 years old. Gallery staff packed them in heavy boxes. From noon until after 4pm, television stations and press camped in the lane had evocative images of boxes being heaved into police vans to be carried off and locked safely where they still remain in Surry Hills police station.

Without the internet, none of this would have happened. Devine's criticisms of Henson

had been made before. But now the images themselves - or a net approximation of the artist's work - could be transmitted instantly around the press, the police, the public and child protection advocates. Images from the net excited 2GB, the police commissioner's press secretary, the Prime Minister and Johnston.

She had never heard of Henson until alerted by emails and 2GB. "This would have happened a long time ago if I'd known," she told the *Herald*.

Her fax to the gallery, cc'd to the commissioner put the central claim of Henson's adversaries absolutely clearly: "Pictures portraying sexualised imagery of young girls can never be called art. It is child pornography, child exploitation and it is a crime."

That claim is looking more tenuous by the day. Late yesterday afternoon, police sent a brief of evidence to the Director of Public Prosecutions Nick Cowdery QC asking if charges could be laid under the child porn and indecent publications sections of the NSW Crimes Act. Both are a headache for police.

First porn: section 91H provides jail terms for up to 10 years for producing or disseminating child pornography and up to five year term for possessing the stuff. The provision is only a few years old; what it means has never been scrutinised by the courts.

Not only is there a complete defence if Henson can show the material was intended to be used "for a genuine artistic purpose" but the very definition of pornography in the law is problematic. It speaks of images of children "in a sexual context". But is nudity enough? Yes, say Johnston, many sincerely outraged citizens and just about every politician except Malcolm Turnbull. No, say the lawyers.

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Nevertheless, the NSW police are trying to track down the Australian builder of the website and identify who uploaded the Henson images. That happened only a day or so before the exhibition was due to open. Until then, all the images from Henson's previous Roslyn Oxley9 exhibition in 2006 had had been up on the net - two years without a complaint.

Yesterday in Sydney police were uncrating the pictures seized from Roslyn Oxley9 so they can be classified by the Office of Film and Literature Classification. For the first time in Australia what's hitherto been considered fine art is being classified for the net under rules designed to assess film and television. The OFLC is also scrutinising Henson's on a number of media websites.

Despite growing doubts about the legal case against the man, Henson hunting continues with police being egged on as much by press inquiries as public complaints.

After police visits, the Albury gallery removed three prints from exhibition and the Newcastle Region Art Gallery took down four from its office walls. None was taken away by police.

Police have cleared prints on exhibition at the National Gallery of Victoria and the Art Gallery of NSW. But in Canberra, the Australian Federal Police went deep into the storage of the National Gallery and seized an unknown number of prints - but left them secured, on the premises for the time being.

The lawyer Mark O'Brien has advised his clients not to talk to the police. The Oxleys left Australia last week - with the full knowledge of the police - for the annual art fair in Basle and won't be back for a fortnight. Henson is said to be holding up well. "I may fall in a heap at some point," he told a friend the other day. "But not now."