AUSTRALIA'S FAILURE TO ADDRESS THE HARMS OF INTERNET PORNOGRAPHY

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Abstract

Pornography is readily available via the internet and can be accessed effortlessly and most often free of charge. Pornography objectifies the women used in it, and in addition, women as a class of persons, sending a clear message of inequality which reinforces the social subordination of women in society. Australia's approach to the regulation of internet pornography, via Schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth) is one of censorship where members of the public can complain to the Australian Communications and Media Authority ('ACMA') about pornography they encounter on the internet and find offensive. Such an approach is premised upon pornography having the potential to harm the moral fibre of the viewer and of society. This paper argues that such an approach fails to recognise pornography's real harms including its harm to women's equality, and fails to provide redress to women harmed during the production, and as a result of the viewing of pornography. This paper suggests that, although there may be jurisdictional challenges to be overcome with respect to the international nature of the internet, Australia should adopt the civil rights ordinance drafted by law Professor Catharine A MacKinnon and feminist writer Andrea Dworkin. The ordinance is the only

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legal model which directly addresses these harms and directly empowers women to take action against pornographers.

I INTRODUCTION

Most Australians have effortless access to the internet. As at June 2010, 77% of the Australian population aged 14 years and over had internet access in their homes, 40% had access at work and 15 percent at other locations. Further, during June 2010, 13% had accessed the internet via their mobile phones.[1]

Women's suffering and inequality is continually trafficked on a global scale via the internet.[2] Women are used in pornography and their abuse and objectification is uploaded and immortalised on web sites depicting rape, incest, sexual abuse, torture, and other forms of pain and suffering forced upon them in a sexual context.[3] New technology helps to facilitate and perpetuate this degradation and exploitation by making it easy for men to become pornographers via their own pornographic web sites, or by uploading pornography to existing web sites.

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[1] Australian Communications and Media Authority, *Communications Report 2009-10 Series Report 1 – Australia in the Digital Economy: The Shift to the Online Environment* (11 November 2010), 2.

[2] For a discussion of pornography as trafficking see Catharine A MacKinnon, 'Pornography as Trafficking' in David E Guinn and Julie DiCaro (eds), *Pornography: Driving the Demand in International Sex Trafficking* (Captive Daughters Media, 2007), 31.

[3] For a description of the types of pornography available via the internet, see generally Michael Flood and Clive Hamilton, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects,* Discussion Paper 52 (The Australia Institute, 2003). Additional internet pornography is described in Michelle Evans, 'Censorship and Morality in Cyberspace: Regulating the Gender-Based Harms of Pornography Online' *Southern Cross University Law Review* 11 (2007), 1.

This paper argues that Australia is failing to adequately address the harms of internet pornography.[4] It will first outline the current legislative approach which attempts the almost impossible task of censoring the internet. It will then outline how this approach fails to address the real harms to those women forced to perform in pornography, and raped, harassed and assaulted because of the consumption of it. Finally, this paper suggests that Australia should adopt Catharine MacKinnon and Andrea Dworkin's civil rights ordinance (legislation) to regulate internet pornography as an issue of sex discrimination.[5] Unlike Australia's current approach, the ordinance addresses these harms and empowers women to fight back against the pornography industry and the inequality that it promotes.

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[4] This paper does not provide a detailed discussion of Australia's laws with respect to child pornography. The writer wishes to acknowledge that Australia is taking child pornography seriously by taking a zero tolerance criminal law approach to the possession, distribution and production of child pornography. Thus, Australia has strongly recognised the devastating harms to children used in child pornography and sexually and emotionally abused as a result of the viewing of it. However, there has been a reluctance to acknowledge that adult pornography is also harmful. These harms are detailed later in this paper in the section 'A failure to address pornography's harms'. In addition, there is a proliferation of internet pornography, regarded as adult pornography because of its use of women over the age of 18, which promotes the sexual abuse of children. For example, the genre of 'teen pornography' is readily available on the internet with titles such as 'barely legal', 'youngest teens on the net', 'Lolita' and 'Schoolgirl'. There are also numerous web sites that promote incest. See, Michael Flood and Clive Hamilton, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects,* Discussion Paper 52 (Canberra: The Australia Institute, 2003), 23 and 34.

[5] 'Model Anti-pornography Civil Rights Ordinance' in Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights A New Day for Women's Equality* (Organizing Against Pornography: 1988), Appendix D, 138. Sections of the ordinance referred to in this paper are from this version of the ordinance.

II WHAT IS AUSTRALIA DOING ABOUT INTERNET PORNOGRAPHY?

Australia's attempt to regulate internet pornography is contained in Schedule 5 and Schedule 7 to the *Broadcasting Services Act 1992* (Cth) ('the Act'). There is considerable overlap between the Schedules, with Schedule 7 adding to the content that can be regulated to include content accessible via mobile phones, links from one web site to another and live content available via the internet and mobile phones. The Act provides that an Australian resident can complain to the Australian Communications and Media Authority ('ACMA') about content that they have found and consider to be offensive.[6] The ACMA will then investigate[7] to determine whether the content is 'prohibited content' or 'potential prohibited content'.[8]

In Schedule 5, 'prohibited content' is defined by reference to by reference to the classification categories of 'RC', 'X 18+' or 'R 18+' and in terms of whether content is hosted in Australia or outside Australia.[9] Content that would be classified RC includes child pornography, bestiality and violent sexual material. Content classified as 'X 18+' includes real sexual activity. Material classified 'R' includes implied or simulated sexual activity. [10]

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[6] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 22(1) and 25; Schedule 7, clause 37 and 41.
[7] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 26(1); Schedule 7, 43(1).
[8] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(1) and (2); Schedule 7, clause 20 and 21.
[9] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 10(1) and (2).
[10] ACMA web page "Prohibited online content" located at <http://www.acma.gov.au/WEB/STANDARD/pc=PC_90102> accessed 8 December 2010.

In relation to Internet content hosted in Australia, prohibited content is that which has been classified RC or X 18+ by the Classification Board[11] or content that has been classified R 18+ by the Classification Board[12] if access to the Internet content is not subject to a restricted access system (for example, an age verification system).[13] Equivalent provisions are repeated in Schedule 7[14]. Schedule 7 additionally provides that prohibited content includes content hosted or provided from Australia[15] that has been classified MA 15+ if access is provided by a mobile phone service or any other service that provides access to audio or video content upon payment of a fee, if it is not subject to a restricted access system.[16]

Schedule 7 details the types of notices that the ACMA can issue if the content is prohibited content hosted within Australia. These depend on the nature of the content. If the content is provided by a ‘hosting service’ (stored internet content), the ACMA can issue a final take-down notice, demanding that the content is removed[17]; if the content is ‘live content’ (live video or audio content), a final-service cessation notice is issued directing the provider not to provide the live content[18]; and if the content can be accessed using a ‘links service’ (a link on a website to another web site), a final link-deletion notice can be issued, directing that the link is removed.[19]

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[11] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 10(1)(a).
[12] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 10(1)(b)(i).
[13] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 10(1)(b)(ii).
[14] *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 20(1)(a); Schedule 7, clause 20(1)(b)(i); Schedule 7, clause 20(1)(b)(ii).
[15] *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 3(1) and (2).
[16] *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 20(1)(c) and 20(1)(d).
[17] *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 47.
[18] *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 56.
[19] *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 62.

Additionally, Schedule 5 provides that if the Internet content is hosted outside Australia, it will be prohibited content if it has been classified RC or X 18+ by the Classification Board.[20] If the ACMA is satisfied that Internet content hosted outside Australia is prohibited content or potential prohibited content (discussed below), the ACMA must, if it considers the content to be of a sufficiently serious nature to warrant referral to a law enforcement agency in or outside Australia, notify the content to a member of an Australian police force.[21] In addition, the ACMA must also notify the internet service provider so they can take reasonable steps to block the prohibited content.[22] Internet service providers are required to provide filtering software[23], and so the ACMA must also notify makers and

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[20] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 10(2).

[21] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 40(1)(a)(i). Alternately, if there is an arrangement between the ACMA and the chief of an Australian police force under which the ACMA can notify another person or body, the ACMA can notify that other person or body (Schedule 5, clause 40(1)(a)(ii)).

[22] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 40(1)(b). See also section 19.2(b), 'Content Code 3: Providing Access to Content Hosted Outside Australia' in *Internet Industry Codes of Practice: Codes for Industry Co-Regulation in Areas of Internet and Mobile Content (Pursuant to the Requirements of the Broadcasting Services Act 1992),* May 2005, version 10.4.

[23] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 60(2)(d). See also section 19.3-19.6, and Schedule 1, 'Content Code 3: Providing Access to Content Hosted Outside Australia' in *Internet Industry Codes of Practice: Codes for Industry Co-Regulation in Areas of Internet and Mobile Content (Pursuant to the Requirements of the Broadcasting Services Act 1992),* May 2005, version 10.4. In addition to filtering software, the Australian government has recently launched a 'Cybersafety help button' which can be downloaded free of charge. The button can be double clicked while a person is using the internet to give them advice about cyber-bullying or other 'unwanted contact', 'inappropriate or offensive material', or 'scams or fraud' including the ability to talk to a counsellor. See Australian Government Department of Broadband, Communications and the Digital Economy Web page, 'Cybersafety help button – questions and answers' at <www.dbcde.gov.au/online_safety_and_security/cybersafetyhelpbutton_download/questions_and_answers#1> accessed 30 December 2010. The Cybersafety help button is

suppliers of filter software who are listed in a Registered Code of Practice so that they can include the content as content to be blocked by their filter software.[24] This means that unless pornography was for example, child pornography and contrary to the criminal law, little action can be taken to remove it from the internet. Schedule 7 also permits the ACMA to refer Australian content to law enforcement agencies if it is of a 'sufficiently serious nature'.[25]

The ACMA may determine that unclassified content hosted in Australia is 'potential prohibited content' if there is a substantial likelihood that if the content were to be classified by the Classification Board it would be classified 'RC' or 'X 18+'.[26] If content is potential prohibited content, the ACMA must issue a written notice called an 'interim take-down notice' to the provider of content provided by a 'hosting service'[27]; an interim service-cessation notice' to a live content provider[28]; or an interim link-deletion notice to a links service provider.[29] These notices are directions not to host or provide access to the content or link until the ACMA notifies the host or provider of the Classification Board's classification.[30] The ACMA must then request that the Classification Board classify the Internet

part of Australia's censorship regime and does not address the harms detailed later in this paper in the section 'A failure to address pornography's harms'.

[24] Section 19.2(a) 'Content Code 3: Providing Access to Content Hosted Outside Australia' in *Internet Industry Codes of Practice: Codes for Industry Co-Regulation in Areas of Internet and Mobile Content (Pursuant to the Requirements of the Broadcasting Services Act 1992),* May 2005, version 10.4.

[25] *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 69.

[26] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 11; Schedule 7, clause 21.

[27] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(2); Schedule 7 clause 47(2).

[28] *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 56(2).

[29] *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 62(2).

[30] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(2)(a)(i).

content.[31] After the Classification Board provides written notice to the ACMA of its classification, the ACMA must then give the Internet content host a written notice setting out the classification[32] and if the Internet content is prohibited content, issue a final take-down notice; an interim service-cessation notice, or a final link-deletion notice.[33]

It is not an offence for a provider to host prohibited or potential prohibited content. However, providers must comply with all notices 'as soon as practicable', or by 6pm the following business day at the latest.[34] The failure of a provider to comply with a notice is an offence[35] and may also be subject to civil penalties.[36]

III A FAILURE TO ADDRESS PORNOGRAPHY'S HARMS

Regrettably, the censorship approach adopted by Schedules 5 and 7 is inadequate for two reasons. Firstly, it is almost impossible to censor the internet. Secondly, and most significantly, a censorship approach does little to address the real harms women suffer due to pornography because it regards pornography's harm to be the corruption of morals instead of real harm to women and to equality.[37]

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[31] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(2)(a)(ii); Schedule 7, clause 47(2)(d); 56(2)(e), 62(2)(d) and 22.

[32] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(4)(a); Schedule 7, clause 47(4)(a), 56(4)(a), and 62(4)(a).

[33] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(4)(b); Schedule 7, clause 47(4)(b); 56(4)(b), and 62(4)(b).

[34] *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 53(1) and (2), 60(1) and (2), 68(1) and (2).

[35] *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 86, Schedule 7, clause 106.

[36] *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 107.

[37] Catharine A MacKinnon, 'Not a Moral Issue' in Drucilla Cornell, (ed) *Feminism and Pornography* (Oxford University Press, 2000), 170:

Leaving aside the fact that censorship has traditionally been used to censor women's speech including legitimate forms of sexual expression, and information about topics such as contraception,[38] at a basic level, the internet is a vast network of information (including pornography) which is simply too voluminous for censorship to have an impact on.[39] Even if the Act did have an impact on the hosting of internet pornography in Australia, there is still a vast network of pornography hosted overseas which can be readily viewed from Australia.

> Obscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance. The feminist critique of pornography is politics, specifically politics from women's point of view meaning the standpoint of the subordination of women to men. Morality here means good and evil; politics means power and powerlessness. Obscenity is a moral idea; pornography is a political practice. Obscenity is abstract; pornography is concrete. The two concepts represent two entirely different things.

MacKinnon refers to 'obscenity' in this quotation. 'Obscenity' has its origins in the criminal law and concerns the suppression of materials which are deemed to be indecent or obscene in accordance with prevailing community standards. 'Censorship' is a subset of obscenity which usually does not involve the criminal law but which, like obscenity, involves the classification of materials in accordance with their level of offensiveness with reference to prevailing community standards. Both censorship and obscenity involve the suppression of materials deemed to be harmful to both the individual and society's moral fibre.

See also Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), 196.

[38] See generally Varda Burstyn (ed) *Women Against Censorship* (Douglas & McIntyre, 1985).

[39] See Annabel Butler, 'Regulation of Content of On-Line Information Services – Can Technology Itself Solve the Problem it has Created?' (1996) *University of New South Wales Law Journal* 19(2), 193 at 209:

> The sheer volume of internet material, its transient nature and the rapidity of transmission make inspection of content almost impossible. The internet has doubled in size every nine months for the last ten years and currently has over 50 million participants. The quantity of information that passes through the internet every day cannot be visually scanned. Each day, over a million web pages appear, disappear or are subject to change.

In fact, the Act may even encourage Australian pornographers to move content that would contravene it overseas.[40] Even if a complaint is made to an overseas law enforcement agency, little could be done unless the pornography is unlawful in that country such as being child pornography. Also, if the ACMA issues a take-down notice directing an Internet service provider not to host specified pornography, there is nothing to stop a pornographer making the same pornography available through a different Internet service provider or web page.

Secondly, and most significantly, the censorship approach adopted by the Act fails to take into account address 'what pornography really is'[41] and what pornography *does*. That is, it fails to address the real harms of pornography to women that have been well documented by scientists, and have been recognised by courts and tribunals internationally. Instead, a censorship approach regards pornography as having the potential to harm the moral fibre of men, who may be depraved or corrupted by the sight of women's naked bodies.[42] Consequently, censorship serves to promote pornography by making it more 'sexy' and appealing because the viewer believes they are accessing something that is forbidden.[43]

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[40] Peter Chen, 'Pornography, Protection, Prevarication: The Politics of Internet Censorship' (2000) *University of New South Wales Law Journal*, 23(1) 221, 222. See also, Steven Siegloff Clark, 'The Broadcasting Services and Online Services Act 1992 (Cth)' (1999) *Flinders Journal of Law Reform*, 3(2) 299, 308.

[41] Testimony of Jaye Morra at the Massachusetts Hearings quoted in Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997), 414. Jaye Morra used the phrase, 'what pornography really is' in her testimony.

[42] Catharine A MacKinnon, 'Pornography's Empire' in *Are Women Human? And Other International Dialogues* (The Belknap Press of Harvard University Press, 2006), 112-113.

[43] Catharine A MacKinnon, 'Not a Moral Issue' in Drucilla Cornell (ed) *Feminism and Pornography* (Oxford University Press, 2000), 184-185.

Pornography's real harms have been attested to by many men, women and children who have suffered abuse at the hands of pornographers and those who use it. This evidence reveals that the pornography is 'not a moral issue'.[44] Rather, it is an issue of actual physical and psychological harm to the women who are forced to perform in it, and who are raped, assaulted, abused, discriminated against and insulted because of it.[45]

Scientific studies support the link between pornography and harm, in particular, where exposure to pornography has led to misogynistic and sexually callous attitudes toward women.[46] There is also recent Australian evidence of harm whereby the consumption of pornography in isolated aboriginal communities led to extensive sexual abuse of children in those communities.[47]

There has also been judicial recognition of the harm pornography causes, in the form of sexually violent behaviour that results from the viewing of

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[44] Catharine A MacKinnon, 'Not a Moral Issue' in Cornell, Drucilla (ed) *Feminism and Pornography* (Oxford University Press, 2000), 170. See also MacKinnon, Catharine A, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), 196.

[45] See Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997). See also, Linda Lovelace, *Ordeal* (Citadel Press, 1980) and Gloria Steinem, 'The Real Linda Lovelace' in Diana E.H. Russell, (ed), *Making Violence Sexy: Feminist Views on Pornography* (Teachers College Press, 1993), 23. For a detailed discussion of the ways in which pornography harms, see, Catharine A MacKinnon, *Sex Equality* (Foundation Press, 2001), 1532-1562.

[46] Some of this research is summarized in Edna F Einsiedel, 'The Experimental Research Evidence: Effects of Pornography on the 'Average Individual'' in Catherine Itzin (ed) *Pornography Women Violence and Civil Liberties A Radical New View* (Oxford University Press, 1992), 265-266.

[47] *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'* Report of the Northern Territory Board of Enquiry into the Protection of Aboriginal Children from Sexual Abuse (30 April 2007), 199; See also *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 333 per French CJ.

pornography. In *R v Butler* the Canadian Supreme Court noted, '...the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence.'[48]

As identified by MacKinnon and Dworkin, pornography is also an issue of inequality in which patriarchy is affirmed by the gender constructs created in it.[49] Pornography's role in maintaining inequality between men and women was recognised in the United States case of *American Booksellers Association Inc v Hudnut*[50] where Judge Easterbrook recognized that, 'Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets…'[51] Similar statements can be found in the Canadian Supreme Court case of *R v Butler* mentioned above.[52]

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[48] *Attorney General's Commission on Pornography Final Report* (US, 1986), Vol 1, page 326 ('Meese Commission Report') cited in *R v Butler* (1992) 1 SCR 452, 502 (Sopinka J).

[49] See generally, Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights A New Day for Women's Equality* (Organizing Against Pornography: 1988). See also Ann Russo, 'Feminists Confront Pornography's Subordinating Practices: Politics and Strategies for Change' in Gail Dines, Robert Jensen and Ann Russo, *Pornography: The Production and Consumption of Inequality* (Routledge, 1998), 9.

[50] *American Booksellers Association Inc v Hudnut* 771 F.2d 323 [7th Cir. 1985], cited in Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997), 465.

[51] *American Booksellers Association Inc v Hudnut* 771 F.2d 323 [7th Cir. 1985], cited in Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997), 465, 472.

[52] See, for example *R v Butler* (1992) 1 SCR 452, 496-497 (Sopinka J).

It was Catharine MacKinnon and Andrea Dworkin who first identified the link between pornography and inequality, in which pornography creates a hierarchy in which men are shown as superior and dominant and women are inferior, submissive and objectified. Dworkin stated that, in pornography we see, 'the active subordination of women: the creation of a sexual dynamic in which the putting down of women, the suppression of women, and ultimately the brutalization of women is what sex is taken to be...'[53] This subordination of women in a sexual context is carried through to negative social perceptions about women.[54]

There is also a substantial body of evidence about the role of pornography as an instruction manual for rape and sexual abuse in the home.[55] Rapists

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[53] Dworkin, Andrea, 'Against the Male Flood: Censorship, Pornography and Equality' (1985) 8 *Harvard Women's Law Journal*, 1, 9.

[54] Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), 197:

> Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality. In this perspective, pornography, with the rape and prostitution in which it participates, institutionalizes the sexuality of male supremacy which fuses the erotization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constructs the meaning of that sexuality. Men treat women as whom they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way.

Same sex pornography also perpetuates inequality. For a detailed discussion, see Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (UBC Press, 2004), 108. Kendall asserts that rather than being a source of liberation and a positive affirmation of gay male identity, gay male pornography can be as harmful as heterosexual pornography because it celebrates and sexualizes inequality by mimicking the hierarchies seen in heterosexual pornography. See also, Christopher N Kendall, 'The Harms of Gay Male Pornography: A Sex Equality Perspective' in David E Guinn and Julie DiCaro (eds) *Pornography: Driving the Demand in International Sex Trafficking* (Captive Daughters Media, 2007), 153.

[55] See Generally, Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997). See also Testimony of RMM at the Minneapolis Hearings quoted in Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997), 113-114:

have also been inspired by, and have used violent pornography as a manual for abduction and rape.[56] Women have also suffered substantial psychological harm and detriment as a result of having pornography forced upon them in male dominated workplaces. This is often accompanied by derogatory comments and verbal threats and intimidation[57], increased workload, stress and denial of opportunities for training and advancement[58], and was part of a series of events leading to rape by a co-worker[59].

IV WHAT SHOULD AUSTRALIA BE DOING?

Australia should take internet pornography seriously by adopting the civil rights ordinance drafted by MacKinnon and Dworkin. In fact, Mackinnon herself has noted that the ordinance would be 'well suited' to address the harms of internet pornography.[60] The ordinance could be incorporated into

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He would read from the pornography like a text book. In fact, when he asked me to be bound, when he finally convinced me to do it, he read in the magazine how to tie the knots, and how to bind me in a way that I couldn't get out. And most of the scenes that we – most of the scenes where I had to dress up or go through different fantasies – were the exact scenes he had read in the magazines.

[56] *State v Herberg* 324 N.W.2d 346, 347 (Minn. 1982) discussed in Pacillo, Edith L. 'Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography' (1994) 28 *Suffolk University Law Review* 123, 123. For a discussion of pornography as a cause of rape, see Diana E.H. Russell, *Dangerous Relationships: Pornography, Misogyny and Rape* (Sage Publications, 1998), 113-151.

[57] See for example, *Horne & Anor v Press Clough Joint Venture & Anor* (1994) EOC 92-556. See also *Ueckert v Australian Water Technologies Pty* Ltd (2000) EOC 93-104.

[58] *Thompson v Courier Newspaper Pty Ltd* (2005) EOC 93-382.

[59] *Lee v Smith v Ors* (2007) EOC 93-456 and *Lee v Smith & Ors (No 2)* (2007) EOC 93-465.

[60] Catharine A MacKinnon, 'Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace' [1995] 83 *Georgetown Law Journal,* 1959, 1966.

Schedules 5 and 7, and could also be inserted into existing sex discrimination legislation.[61]

The ordinance is 'up front' about pornography's harms and directly lists them in a 'Statement of Policy'. This states that 'pornography is a practice of sex discrimination'[62] and identifies pornography as 'a systemic practice of exploitation and subordination based on sex that differentially harms and disadvantages women.'[63] It also lists, in some detail, more specific physical harms caused by pornography[64] including rape and sexual abuse, as well as psychological harm. In doing so, the ordinance affirms that pornography's harms are specific harms to women in the form of sexual inequality, harassment, rape, sexual assault and discrimination to name a few.

The ordinance directly addresses pornography's harms by empowering those harmed in or by the production and distribution of pornography by allowing them sue the makers and distributors of pornography, to obtain damages, and to obtain injunctive relief to stop pornography being sold, exhibited and distributed.[65] MacKinnon and Dworkin made a deliberate decision to draft the ordinance from a civil rights perspective in order to

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[61] For a detailed analysis of Australia's existing sex discrimination legislation and of how the ordinance can better address the harms of pornography, see Michelle Evans, 'Pornography and Australia's Sex Discrimination Legislation: A Call for a More Effective Approach to the Regulation of Sexual Inequality' (2006) 8 *University of Notre Dame Law Review,* 81.

[62] Ordinance, section 1, clause 1.

[63] Ordinance, section 1, clause 2.

[64] Ibid.

[65] Catharine A MacKinnon, 'Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace' [1995] 83 *Georgetown Law Journal,* 1959, 1966; Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997), 4.

take the power of enforcement away from police and prosecutors, and into the hands of women harmed.[66] In addition, the range of damages available under the ordinance – including compensatory and punitive damages[67]- impacts on pornographers financially, hence directly impacting their motivation to abuse and exploit.[68]

Under the ordinance a woman has a cause of action if she is coerced into performing in pornography; has pornography forced on her (for example in the workplace by a work colleague); is assaulted or attacked due to pornography; or if she is defamed through pornography[69] (for example using a person's likeness in pornography to humiliate or ridicule them). The ordinance also makes it sex discrimination to sell, exhibit or distribute pornography.[70] This allows any woman to bring a complaint against pornographers and those who profit from pornography for harm to women as a class.[71]

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[66] Andrea Dworkin and, Catharine A MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Organizing Against Pornography, 1988), 54.

[67] Ordinance, section 5(2).

[68] Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Organizing Against Pornography, 1988), 55. See also, Gail Dines, 'The Big Business of Pornography' in David E Guinn and Julie DiCaro (eds) *Pornography: Driving the Demand in International Sex Trafficking* (Captive Daughters Media: 2007), 89.

[69] Ordinance, section 3.

[70] Ibid.

[71] Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Organizing Against Pornography, 1988), 45.

V JURISDICTIONAL ISSUES

There are of course challenges in applying this ordinance to the internet. The international nature of the internet raises jurisdictional issues as to whether a cause of action under the ordinance is within the jurisdiction of the Australian courts. However, jurisdictional problems are avoided where both the victim and perpetrator are located in Australia, regardless of where the internet pornography is made or uploaded. For example, if in Australia, a co-worker forces internet pornography on another co-worker; if a perpetrator rapes as a consequence of viewing internet pornography; or if a woman is forced to perform in pornography, she can sue the makers of that pornography and can apply for injunctive relief to prevent the pornography continuing to be available via the internet.

Difficulties arise when an Australian victim seeks to sue the makers, sellers or distributors of pornography who may be located overseas. However, in the case of *Dow Jones & Company Inc v Gutnick*[72] a plaintiff was successful in suing for internet defamation in the State of Victoria where his reputation was harmed, even though the material defaming him was uploaded in the United States. This case could be followed with respect to the defamation through pornography cause of action under the ordinance. Hence, a woman could bring a defamation claim in Australia where pornography using her likeness was viewed, even if the pornography was uploaded and hosted outside of Australia.

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[72] *Dow Jones & Company Inc v Gutnick* (2000) 210 CLR 575.

If Australia adopted the ordinance it could also negotiate agreements with other countries with respect to jurisdiction. Due to the international expanse of the internet this would be a challenging undertaking. However, international co-operation, with respect to illegal internet content, has been achieved before through the INHOPE Association ('INHOPE'). INHOPE's mission includes the establishment of internet hotlines around the world so that urgent action can be taken to report and prevent illegal activity on the internet, such as the trading of child pornography and publication of racist hate material. There is an international membership of INHOPE including governments and law enforcement agencies, the ACMA and other members from the internet industry around the world. Members co-operate to target illegal content and meet regularly to 'share knowledge and best practice'. [73] In light of this, an agreement between these members with respect to jurisdiction under the ordinance is not as far-fetched as it would at first appear.

VI CONCLUSION

MacKinnon once noted that pornography on the internet raises the same issues 'as pornography poses everywhere else: whether anything will be done about it.'[74] However, it is imperative that something *must* be done about it. The ordinance must be adopted in Australia because it directly addresses pornography's harms and empowers women to fight back against the pornography industry and the inequality that it perpetuates. Whilst there

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[73] INHOPE Web page, 'About INHOPE' located at <www.inhope.org/en/about/about.html> accessed 30 December 2010.

[74] Catharine A MacKinnon, 'Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace' [1995] 83 *The Georgetown Law Journal*, 1959, 1967.

are some difficulties in applying the ordinance to the internet, unless and until the ordinance is adopted, women will remain disempowered. Until the ordinance is adopted, the pornography industry will continue to flourish from the trade of objectification, abuse and suffering of women; women used in pornography will continue to be silenced and objectified, having no voice to speak out, and no ability to hurt their abusers back; and the harmful effects of pornography to women's equality will remain largely hidden. Andrea Dworkin once said of the ordinance:

> This law educates. It also allows women to do something. In hurting the pornography back, we gain ground in making equality more likely, more possible – some day it will be real. We have a means to fight the pornographers trade in women. We have a means to get at the torture and the terror. We have a means with which to challenge the pornography's efficacy in making exploitation and inferiority the bedrock of women's social status. The civil rights law introduces into the public consciousness an analysis: of what pornography is, what sexual subordination is, what equality might be...The civil rights law gives us back what the pornographers have taken from us: hope rooted in real possibility.[75]

[75] Dworkin, Andrea, 'Against the Male Flood: Censorship, Pornography and Equality' in Drucilla Cornell (ed), *Feminism and Pornography* (Oxford University Press, 2000), 38.