

ARTICLES

CENSORSHIP AND MORALITY IN CYBERSPACE: REGULATING THE GENDER-BASED HARMS OF PORNOGRAPHY ONLINE

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This paper is the second of a two part paper. Part one, ‘What’s Morality got to do with it?: The Gender-based harms of Pornography’, published in the previous volume of this journal, argued that Australia’s approach to regulating pornography, namely censorship, fails to specifically address the gender-based harms caused by the production and distribution of pornography. Part one argued that the preferable approach, which specifically addresses these gender-based harms, is the sex equality approach to regulation, first formulated by American feminists Catharine A MacKinnon and Andrea Dworkin in the form of a civil rights ordinance. The ordinance allows persons harmed by pornography to sue for those harms on the basis that pornography is an issue of sex discrimination.

This paper argues that although Australia should adopt the ordinance generally, the starting point for reform should be the internet for two main reasons. Firstly, the internet makes pornography accessible on a global scale, in particular in the home, a place in which the abuse of women and children occurs most frequently. Secondly, an examination of the types of pornography available via the internet reveals that increasingly violent and degrading pornography is readily available, most often free of charge. The *Broadcasting Services Act 1992* (Cth) which establishes a censorship regime to regulate ‘offensive’ materials on-line, fails to address the gender-based harms caused by the mass dissemination of pornography via

the internet. This paper argues that the ordinance must be applied to the internet to more effectively regulate these harms.

I INTRODUCTION

American feminist Catharine MacKinnon commented that the question pornography poses on the internet, ‘is the same as it poses anywhere else: whether anything will be done about it’.¹ Australia has attempted to do something about internet pornography through the enactment of the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) (*Online Services Act*)² which amended the *Broadcasting Services Act 1992* (Cth) (*Broadcasting Services Act*)³ by the insertion of a new Schedule 5 named, ‘Online Services’. Schedule 5 aimed to address ‘illegal and offensive material online’ including pornographic material and ‘material that is illegal or highly offensive, or may be harmful to children’.⁴ The *Online Services Act* received both Royal assent and commenced on 16 July 1999.⁵

These amendments continue the regime of morality-based regulation of pornography generally adopted throughout Australia, namely censorship. The *Broadcasting Services Act*’s basis in morality, evident from its objective to regulate ‘offensive’ and ‘highly offensive’⁶ material, is inadequate to address the gender-based harms of pornography identified in part one of this paper. On the other hand, the civil rights ordinance drafted by MacKinnon and

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¹ Catharine A MacKinnon, ‘Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace’ [1995] 83 *Georgetown Law Journal* 1959, 1967.

² *Broadcasting Services Amendment (Online Services) Act 1999* (Cth).

³ *Broadcasting Services Act 1992* (Cth).

⁴ Senator Richard Alston, Revised Explanatory Memorandum, Broadcasting Services Amendment (Online Services) Bill 1999 (Cth), <<http://scaleplus.law.gov.au/html/ems/0/1999/0/0642404224.htm>> at 26 August 2005. The Revised Explanatory Memorandum takes into account the amendments made by the Senate to the original Bill.

⁵ Notes to the *Broadcasting Services Act 1992* (Cth).

⁶ Revised *Explanatory Memorandum, Broadcasting Services Amendment (Online Services) Bill 1999* (Cth), above n 4.

Dworkin directly addresses these harms by making pornography specifically actionable as sex discrimination. Further, the ordinance can be applied to the internet with relatively minor amendment.

Aside from the problems with censorship generally,⁷ the international and technological nature of the internet makes censorship, the form of regulation adopted by the *Broadcasting Services Act*, redundant. Censored internet content can be easily removed from one part of the internet and replaced in another, or can be removed temporarily and reinstated later on. In addition, the internet is so vast that censored pornographic web pages can be quickly and easily replaced with new pornographic web pages. Censorship of the internet in the form of filtering software is also problematic because such software is easily circumvented and leaves responsibility for filtering internet content in the hands of adults, who may be pornographers or users of pornography themselves.

Consequently, Australia should adopt the ordinance as the means of regulating pornography distributed via the internet. As well as specifically addressing pornographic harms, the ordinance is an entirely different regulatory model to censorship and can therefore overcome many of the problems with censoring the internet, a vast communication network which is not amenable to censorship. In addition, the ordinance's sex discrimination approach to pornography can effectively address the real harms of pornography to women, in particular sexual inequality, something that a censorship approach that is premised upon morality cannot do.

Whilst it is this author's opinion that pornography in general should be regulated from a sex equality perspective rather than a censorship perspective, this paper argues that the starting point for reform in the form of the civil rights ordinance should be in the area of the internet. There are two reasons for this. Firstly, the internet makes pornography accessible on a global scale, particularly in the home, a place in which the abuse of women and children occurs most

⁷ Censorship has traditionally been problematic for women because it has historically been used to silence women in their struggle for equality and to silence legitimate forms of sexual expression, such as information about contraception and same sex relationships. See generally Varda Burstyn (ed), *Women Against Censorship* (1985).

frequently. Secondly, an examination of the types of pornography available via the internet reveals that increasingly violent and degrading pornography is readily available via the internet, most often free of charge.

II THE INTERNET AND THE WORLD WIDE WEB

The internet is a worldwide network of computers and computer programs which are connected via telephone networks.⁸ The internet does not come from a centralised source. Rather, it is a 'network of networks', which means that thousands of computer networks are connected to thousands of other computer networks in numerous countries.⁹ Hence, the internet is made up of thousands of 'academic, government, military, corporate and public computer systems dotted around the globe, connected to – and communicating with – one another over thousands of kilometres of telephone wire, cables and satellite systems.'¹⁰ When a person using the internet ('user') connects to the internet, they are said to be 'online'.¹¹ Although the network of computers that makes up the internet is comprised of thousands of different computers in different countries, the computers can communicate with one another because they share a universal method of communicating, called a 'protocol.'¹² A 'protocol' is defined as 'a standard or set of rules that computer network devices follow when transmitting and receiving data.'¹³

No one owns, controls or regulates the internet.¹⁴ This means that, 'no one person, group or country has the ability to censor or restrict access to the internet's resources.'¹⁵ Internet access is provided to

⁸ Gary B Shelley and Thomas J Cashman et al, *Discovering the Internet: Brief Concepts and Techniques* (2004) 4-5.

⁹ Revised *Explanatory Memorandum, Broadcasting Services Amendment (Online Services) Bill 1999* (Cth), above n 4. See also Mark Neely, *Australian Beginners Guide to the Internet* (1997) 20.

¹⁰ Neely, above n 9, 20.

¹¹ Shelley & Cashman et al, above n 8, 4.

¹² Ibid.

¹³ Ibid 4-5.

¹⁴ Ibid 5. See also Neely, above n 9, 22.

¹⁵ Neely, above n 9, 22.

homes and businesses through an Internet Service Provider (ISP).¹⁶ Persons wanting access to the internet can subscribe to an ISP for a monthly fee and can then access the internet through the ISPs network.

The internet is made up of several distinct parts, such as ‘the World Wide Web, e-mail and newsgroups’.¹⁷ The World Wide Web can be described as a ‘subset of the internet’.¹⁸ Access to the internet allows a user to access and search for information on the ‘World Wide Web’ which is also known as ‘the Web’ or abbreviated as ‘www.’¹⁹ The World Wide Web is made up of ‘a vast collection of documents that combine text with pictures, sound, and even animation and video.’²⁰ This vast collection of documents is comprised of ‘web pages’ which are stored in ‘web sites.’²¹ ‘A Website is a location managed by an individual, group, organisation or company that provides information about specific areas of interest, products, services, general knowledge and so on.’²² For example, a University will have a website which markets the University to prospective students, contains information about the University’s courses, degree structures and academic staff.

A user must use a ‘web browser’ software program to access and view websites such as ‘Microsoft Internet Explorer’ or ‘Netscape Navigator.’²³ The user can then search the web for specific information using a ‘search tool’ such as ‘Google’ which searches for websites containing specific words or phrases or ‘Yahoo!’ whereby information can be searched by category.²⁴

It is relatively easy for a person to set up their own website. One only needs to prepare the text and graphics that will form the

¹⁶ Shelley & Cashman et al, above n 8, 25.

¹⁷ John Cowpewart and Simon Flynn, *The Internet from A to Z* (2000) 43.

¹⁸ Shelley & Cashman et al, above n 8, 6.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid 6-7.

²² Cowpewart & Flynn, above n 17, 44.

²³ Shelley & Cashman et al, above n 8, 8.

²⁴ Ibid.

website on one's home computer, then upload them to a 'host server.'²⁵ A host server 'will take the form of a computer that is permanently connected to the Web' and in fact, many ISPs will assist a person to construct and upload a site and may provide free space for the website on the World Wide Web for those registered with them.²⁶ Having a website allows a person to communicate to thousands of people without the costs and logistical issues involved with printing, mailing and distribution.²⁷

A Restricting Access to the Internet

There have been a number of software programs developed for homes and businesses to restrict internet access to certain materials, or in other words, to censor the internet. Employers often utilise filtering software to stop such materials being accessed in the workplace by employees. In the home, these programs are usually utilised by parents to restrict their children's access to pornographic material via the internet. Recently, the Commonwealth government announced that it will spend \$116.6 million to provide free internet filtering software to Australian families to limit the likelihood of children encountering 'offensive' and 'illegal' material on the

²⁵ Ibid 50.

²⁶ Ibid.

²⁷ Cowpertwait & Flynn, above n 17, 49. Note that although this paper focuses on the internet and the World Wide Web, there are a number of other ways that information can be communicated via the internet. These include: electronic mail ('e-mail') whereby users can 'send messages and files over a local computer network or the internet': Shelley & Cashman et al, above n 8, 9-10; via an e-mail program such as 'Microsoft Outlook' or 'Outlook Express': at 9-10. Another is 'Usenet' (also known as 'newsgroups') where users can post messages to an electronic bulletin board: at 10.

internet.²⁸ The software will be available in approximately January 2007 and will be made available via a government website.²⁹

Despite this recent announcement from the Commonwealth government, there are many existing software programs that can filter or block certain internet content such as 'CyberPatrol', 'CyberSitter', 'Net Nanny', 'Safesurf' and 'Surf Watch.'³⁰ There are three main ways in which such filters can work. The first is through using 'black lists' which contain names of offensive sites which are then blocked from being viewed. The second is through the use of 'white lists' which list 'non-offensive' sites that can be accessed but block all other sites. The third is 'Content based filters' which look for offensive keywords and flesh coloured photos.³¹ These software programs are meant to restrict access to a much broader area than through adjusting the web browser as described below.³² These programs can monitor keywords and stop the user from searching or downloading certain material from the internet such as material containing swear words, picture, video or audio files, as well as preventing the user from accessing certain well known websites, such as the 'Playboy' website.³³ For example, the features of 'Net Nanny' include: recording every website, chat room and news group visited; preventing the giving out of personal information such as address, phone number and credit card information; a content filter to remove objectionable words and phrases; to block or control

28 *Families to receive free internet filter*, ABC News Online web page <<http://www.abc.net.au/news/newsitems/200606/s1668234.htm>> at 12 July 2006; *Aussie Taxpayers to fund porn filtering*, ZNet Australia web page <<http://www.zdnet.com.au/news/communications/0,2000061791,39260546,00.htm>> at 12 July 2006; *Long Wait for Porn Filters*, Australian IT web page <<http://australianit.news.com.au/articles/0,7204,19600685^15318^^nbv^,00.html>> at 12 July 2006.

29 *Long Wait for Porn Filters*, Australian IT web page <<http://australianit.news.com.au/articles/0,7204,19600685^15318^^nbv^,00.html>> at 12 July 2006.

30 Cowpertwait & Flynn, above n 17, 70.

31 Australian Government NetAlert Limited web page <<http://www.netalert.net.au/02826-How-do-Filters-Work.asp>> at 12 July 2006.

32 Cowpertwait & Flynn, above n 17, 69.

33 Neely, above n 9, 125.

access to newsgroups.³⁴ There are some problems with filters such as 'Net Nanny' such as sometimes allowing 'offensive' content through and on the other hand, sometimes prohibiting access to non-offensive material.³⁵

Another way that access to the internet can be restricted is by a user (such as a parent) adjusting their web browser so that the web browser filters out certain subjects.³⁶ This filtering system is available via the web browsers 'Microsoft Internet Explorer' or 'Netscape Navigator' mentioned above. This is a password based system whereby the user can set filter ratings to set the level of materials that can be accessed in the areas of '[l]anguage, nudity, sex and violence'³⁷ on a sliding scale of 0-4.³⁸ The filter ratings can be set by selecting 'tools', 'internet options', 'content' then 'enable'. This creates a box named 'content adviser' in which the four categories of language, nudity, sex and violence appear.³⁹ As an example, the ratings for 'sex' are: for Level 0, 'No sexual activity portrayed: Romance'; Level 1, 'Passionate kissing'; Level 2, 'Clothed sexual touching'; Level 3, 'Non-explicit sexual touching'; and Level 4, 'Explicit Sexual Activity'. The problem with this rating system is that the ratings can be easily altered by a user. One only has to adjust the ratings on the content advisor to be able to view a higher (and therefore more explicit) rating of material. So if a parent had set a Level 0 rating for one of the above categories of language, nudity, sex and violence, a computer proficient child could easily adjust the rating to Level 4. The rating system is also a system of self-regulation which relies on internet content providers voluntarily having their sites rated. As at 2000, more than 130 000 websites had been rated, including the top 100 websites which account for 80 per cent of all Web traffic.⁴⁰ However, this would obviously not include

³⁴ The 'Net Nanny' web page <<http://www.netnanny.com/>> at 31 July 2006.

³⁵ The Australian Government NetAlert Limited web page <<http://www.netalert.net.au/02828-Are-there-any-limitations-to-Filters.asp>> at 12 July 2006.

³⁶ Cowpertwait & Flynn, above n 17, 66.

³⁷ Ibid 67-8.

³⁸ Ibid.

³⁹ Ibid 67.

⁴⁰ Ibid 68-9.

many thousands of pornographic websites available via the World Wide Web.

These ways of restricting access to the internet have limited success in restricting children's access to internet pornography and other material deemed unsuitable for children to view. In fact, one response to the Commonwealth government's announcement to provide families with free internet filters was that filtering software does not go far enough to protect children, and instead, ISPs should be made responsible for filtering internet pornography.⁴¹ This will be discussed in more detail below. Indeed, these methods of restricting access make it the responsibility of the user, such as a parent, to restrict access to internet pornography. It will often be the user, such as the parent, who is also the abuser or even the pornographer.

III PORNOGRAPHY AND THE INTERNET

Each new technology raises anew the question of the adequacy of legal approaches... Just as the harms pornography does are no different on-line than anywhere else, the legal approach taken to them need be no different... In whatever form pornography exists, its harms remain harms to the equality of women, so it is through addressing these harms that pornography can be confronted. Civil rights legislation designed to remedy pornography's harms at their point of impact is well suited to this task.⁴²

The growth of the internet from an academic medium to an international information superhighway has been rapid and the proliferation of pornography on the internet has been exponential.⁴³ The majority of Australians have internet access in their homes and

⁴¹ *Free Internet Filter "half baked solution"*, ABC News Online web page <<http://www.abc.net.au/news/newsitems/200606/s1668611.htm>> at 12 July 2006. This criticism was made by opposition front bencher Lindsay Tanner.

⁴² MacKinnon, 'Vindication and Resistance', above n 1, 1966.

⁴³ 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, Canberra, 2003) 11-12.

businesses.⁴⁴ Pornography is not only easy to find on the internet (even when one is not looking for it)⁴⁵ but is frequently available free of charge,⁴⁶ and can be viewed in the privacy of the home. Consumers of pornography no longer have to attend adult bookstores, movie theatres or video stores to purchase or view it. Pornography can easily be accessed via the internet through subscribing to websites or even free of charge.

The prevalence and ease of access to pornography via the internet, including sexually violent pornography, pornography categorised as non-consenting, degrading or dehumanising⁴⁷ and the growth of the internet into homes and businesses requires a careful and serious reconsideration of the way the law regulates pornography available via the internet, and in particular, ways to prevent and redress the harms that result from its distribution and use. This ease of access is of particular concern to women because the home is most often the source of sexual and other violence against women and children by their male relatives, friends or partners.⁴⁸

⁴⁴ The latest statistics available from the Australian Bureau of Statistics web page only provide statistics regarding home internet usage up to 2004-05. These statistics do, however, indicate that in each year internet access and usage, particularly in the home, is increasing. See *8146.0 – Household Use of Information Technology, Australia, 2004-05*, Australian Bureau of Statistics web page <<http://www.abs.gov.au/Ausstats/abs@.nsf/0/acc2d18cc958bc7bca2568a9001393ae?OpenDocument>> at 12 July 2006. This report states that in 2004-05 56 per cent of Australian households had access to the internet with 97 per cent of those using the internet for 'personal or private purposes'. Fifty two per cent of adults (over 18 years) used the internet at home making the home the most popular site of internet use, followed by 29 per cent using the internet from work and 19 per cent accessing it from the home of a neighbour, friend or relative.

⁴⁵ See Flood & Hamilton, above n 43, 6-11 for a discussion of 'paths to exposure'. Flood & Hamilton (at 6-11) outline paths to exposure to internet pornography through the use of techniques such as 'pop-ups' and 'traffic forwarding' (also called 'mousetrapping'). 'Pop-ups' are unsolicited pornographic pictures which are often difficult for the viewer to close and often appear one after the other (at 9). 'Traffic forwarding' is where the viewer is automatically forwarded to another website and often prohibited from leaving it (at 9).

⁴⁶ Ibid 8.

⁴⁷ Ibid 30-5.

⁴⁸ For example, the majority of those who gave evidence at the Minneapolis and Indianapolis civil rights hearings were raped and sexually abused by men they knew in the home such as their fathers, brothers, husbands and partners. Of further concern, is the fact that, at the time of the civil rights hearings (1983, 1984, 1985 and 1992), the

The growth of internet pornography invites and incites sexual abuse in the home, together with inequality in the public sphere. New technology has also made it easy for anyone with a digital camera to post 'home made' pornography on the internet. As a result, pornography has moved even further into the private sphere. The internet not only makes pornography more readily available, it also allows more men to become pornographers with very little difficulty or expense. For example, there is a proliferation of pornography on the internet labelled 'amateurs'. Many of these amateur photographs are 'home made' and raise serious concerns about the extent, if any, of consent given by the women photographed. Consequently, the internet allows sexual abuse in the home to extend to a new level:

the lines between pornography consumers and pornography producers are more blurred on the Internet and there is far greater room for the domestic or amateur production of pornographic materials. Individuals produce their own pornographic websites by uploading sexually explicit images of themselves and others, set up web cams to provide live internet footage of their daily sexual lives and routinely exchange their favourite images or video clips. While printed pornographic magazines do include sections devoted to 'readers' wives' and 'amateurs', the production and exchange described on the Internet is on a much greater scale.⁴⁹

A Specific Pornography Available Via the Internet

In order to illustrate why the internet should be the starting point for legal reform in the form of a sex equality approach to regulating pornography, it is also necessary to examine the kinds of pornography available via the internet. Such an examination shows that increasingly violent and degrading pornography that sexualises inequality is readily available via the internet.

A detailed description of the availability and type of pornographic material on the internet was compiled by Flood and Hamilton from

internet was not as widely available in homes and businesses. See Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (1997).

⁴⁹ Flood & Hamilton, above n 43, 30.

the Australia Institute in February 2003.⁵⁰ This includes pornography that would appear on the shelves of adult book stores, and pornography that would not due to Australia's current censorship regime such as pornography involving bestiality, rape, torture and material taken without the knowledge of the woman photographed such as 'upskirts' or 'peeping Tom' photographs.⁵¹ I will analyse this pornography, as others such as Russell and Dworkin have done previously from a sex equality perspective to demonstrate how this pornography sexualises harm to women and inequality.⁵²

Reproduced below is Table 6 of Flood and Hamilton's report, which shows the types of pornography available via the internet.⁵³ Although Table 6 is extensive, Flood and Hamilton state that, 'the list was generated after four hours of Internet "surfing" among pornographic sites and is not exhaustive'.⁵⁴ If such a detailed list can be compiled after only four hours, it suggests a huge proliferation of internet pornography. Note that the majority of content categories are of pornography in which women are used:

⁵⁰ Ibid. See also Marty Rimm, 'Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces and Territories' [1995] 83 *Georgetown Law Journal* 1849. This was the first significant study of pornography on the internet. Rimm's study found that pornography on the internet was prolific and that the more violent the pornography, the more frequently it was downloaded.

⁵¹ Flood & Hamilton, above n 43, ix.

⁵² See Andrea Dworkin, *Pornography: Men Possessing Women* (1989); Diana E H Russell, *Against Pornography: The Evidence of Harm* (1993); Diana E H Russell, *Dangerous Relationships: Pornography, Misogyny, and Rape* (1998).

⁵³ Flood & Hamilton, above n 43, 27-9.

⁵⁴ Ibid 27.

Table 6: A sample of types of Internet pornography

Content categories	Forms of content listed
General groupings	Hardcore Softcore Heterosexual ('Straight') Gay (gay male) ⁵⁵ Bisexual
Particular sexual practices	Fellatio ('Blowjobs') Anal intercourse Oral sex ('Oral') Male ejaculation ('Cum shots') Sex involving multiple participants ('Group Sex', 'Gang bangs', 'Threesome', 'Orgy') 'MMF' (two men and one woman) 'FFM' (two women and one man) Cunnilingus ('Muff dives') Masturbation Sex toys and dildos ('Toys', 'Strap on', 'Dildo', 'Vibrator') Female ejaculation 'Spanking' 'Tit Fucking' Sexual activity involving urination ('Golden Showers', 'Water Sports', 'Pee', 'Pissing') Coprophilia or sexual activity involving faeces ('Scat') 'Fisting', 'Finger/Fist' Bondage and sadomasochism ('SM', 'Sado maso', 'Femdom', 'Fem domination', 'Male domination') Bondage and discipline ('Bdsm', 'Domination') 'Leather' Bestiality ('Zoo Fetish') 'Smothering' 'Incest' 'Rape'

⁵⁵ See Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (2004) 65 for a discussion of the types of gay male pornography available via the internet.

Particular body parts or bodily features	Breasts ('Tits') Big breasts ('Busty') Small breasts ('Small Tits') Buttocks ('Butts', 'Ass') Vulvas ('Pussy', 'Pussy Hole') Nipples ('Erect', 'Puffy', 'Abnormal', 'Oversized', 'Fetish', 'Bizarre') Shaved vulvas ('shaved') 'Legs and feet' Hairy vulva ('Hairy Pussy') 'Huge cocks' (in heterosexual sex) 'Tattoo' Piercing, body modification Amputees, women in casts and braces Menstruation
Particular categories of women	Young women ('Teen', 'Lolita', 'Schoolgirl', and further sub-categories) 'Babes' 'Blondes', 'Brunettes', 'Redheads' Transsexual ('Shemale', e.g. with both breasts and penis) Older women ('Mature', 'Grannies') 'Drunk girl' 'Cheerleaders' 'Lesbian'
Ethnic categories of women pictured or of participants	'Asian' 'Latina' 'Ethnic' 'Black', 'Ebony' 'Japanese' 'Indian' 'Interracial', 'BBW' (two black and one white participant)
Items of female clothing and underwear	Bikini Lingerie Thongs and g-strings Bras Underpants ('Panties') Stockings, Pantyhose Latex Leather Uniforms

Professional/ occupational status of women pictured	Celebrities ('Celebrity Nudes') 'Models' 'Softcore' and 'Centrefold' 'Babes' 'Pornstars' Strippers and prostitutes ('Whores', 'Hookers') 'Amateurs'
Women of particular body shapes (outside pornographic norms)	'Fat', 'Chubby Chicks' 'Anorexic', 'Skinny', 'Petite' 'Petite & Midgets' Amputees
How and where the image was taken	Voyeurism ('Voyeur', 'Upskirts', 'Spy') 'Exhibitionist', 'Nudists', 'Flashing', 'Public' 'Drunk', 'Bathing' Location (shower, bath, pool, office, outdoor, beach, dressing room)
General groupings of fetishistic or non mainstream sexual practices	'Fetish' 'Bizarre' 'Xtreme'
Characteristics of the men pictured with women	Older men
Men (gay male pornography)	'Hunks' 'Bears' (larger, older, hairier men)
Type of image or electronic medium	Video clip/ Movie Web cams 'Close Ups' (of genitals) Cartoons Anime and Hentai (Japanese-style pornographic cartoons) 'Vintage' (older pornography)
Other categories	'Teacher', 'Nurse', 'Secretary', 'Maid', 'Housewife'

As Flood and Hamilton note in relation to Table 6, most internet pornography is centred on women's bodies, 'either how they look or what can be done to and by them'.⁵⁶ This is evident from content

⁵⁶ Flood & Hamilton, above n 43, 29.

categories such as ‘particular body parts or bodily features’, ‘particular categories of women’, ‘professional/ occupational status of the women pictured’ and so on. On the internet we see a prevalence of pornography being made of women for men. Women are not human beings but are reduced to body parts or bodily characteristics. Women are shown in stereotypical roles such as ‘Models’, ‘Pornstars’, ‘Whores’ and ‘Hookers’.

In addition to women being objectified and stereotyped, there is a prevalence of ‘sexually violent content in pornography’ which is ‘non-consenting by definition’.⁵⁷ Flood and Hamilton note Barron and Kimmel’s study of 37 magazines, 50 videos and all stories in excess of 250 words posted in one month from internet newsgroup ‘alt.sex.stories’.⁵⁸ Barron and Kimmel’s study found that Usenet pornography contained ‘significantly more violence’ than videos or magazines and were also more likely to ‘show coercive rather than consensual sex, and dominant and submissive participants with men in the dominant position and women as the victims.’⁵⁹

Flood and Hamilton also cite the research of Harmon and Boeringer who analysed 200 postings to ‘alt.sex.stories’ over a two week period.⁶⁰ They found that ‘40.8 per cent of stories had themes of non-consent (including rape and child molestation), while 24 per cent had themes of bondage and discipline and 19.4 per cent concerned pedophilic sex.’⁶¹

Finally, Flood and Hamilton also cite a study of pornography on internet newsgroups by Bjornebekk and Evjen who found ‘a wide range of forms of violent pornography (where acts of force and

⁵⁷ Ibid 30.

⁵⁸ M Barron and M Kimmel, ‘Sexual Violence in Three Pornographic Media: Toward a Sociological Explanation’ (2000) 37(2) *Journal of Sex Research* 161-8 cited in Flood & Hamilton, above n 43, 31.

⁵⁹ Ibid.

⁶⁰ D Harmon and S B Boeringer, ‘A Content Analysis of Internet-Accessible Written Pornographic Depictions’ (1997) 3(1) *Electronic Journal of Sociology* <<http://www.sociology.org/content/vol003.001/boeringer.html>> cited in Flood & Hamilton, above n 43, 31.

⁶¹ Ibid.

physical harm are depicted in explicit sexual contexts)⁶²on Usenet newsgroups:

They include photographs of abuse of genitalia (such as the extreme widening of genitalia using bottles and tongs or the use of clips, clamps and hooks), females tied up and gagged and subjected to physical torture, people wrapped up in plastic or being strangled, child pornography, bestiality, defecation and urination and other violent acts in the sexual setting of the newsgroups (such as murder, dismemberment of bodies and mutilated and dead infants and embryos).⁶³

B A Sex Equality Approach to Internet Pornography

This paper will now outline and examine, from a sex equality perspective, several types of internet pornography, identified by Flood and Hamilton which are by definition violent and which also involve a lack of consent. Specifically, the analysis will focus on internet pornography in the categories of bestiality, rape, ‘Upskirts / Peeping Tom’ and teen pornography which sexualises young girls, often in an incestuous context. In addition, categories of pornography not identified by Flood and Hamilton, namely ‘feeders’ and ‘women and machines’ will be analysed from a sex equality perspective. This sex equality analysis will show that this pornography is premised upon inequality in which men are sexualised as dominant and powerful and women and children as submissive objects who enjoy pain, rape and humiliation at the hands of men, for men’s sexual gratification.⁶⁴ The internet is the

⁶² R Bjornebekk and T A Evjen, ‘Violent Pornography on the Internet: A study of Accessibility and Prevalence’ in Cecilia von Feilitzen and Ulla Carlsson (eds), *Children in the New Media Landscape: Games, Pornography, Perceptions* (UNESCO International Clearing House on Children and Violence on the Screen, Sweden, 2001) 185-206 quoted in Flood & Hamilton, above n 43, 31-2.

⁶³ Ibid 32.

⁶⁴ This kind of analysis has previously been done by Dworkin and Russell: see Dworkin, above n 52; Russell, above n 52. See also Catharine A MacKinnon, *Toward a Feminist Theory of the State* (1989) 197 who argues that pornography uses sexual hierarchies to promote systemic gender inequality.

vehicle by which this message of inequality is distributed on a global scale.

1 Bestiality

Flood and Hamilton identify that there are voluminous numbers of bestiality sites, which show sexual activity between women and animals. These sites ‘offer free photographs and movies of women (and occasionally men) engaged in masturbation, oral sex or intercourse with dogs, horses, snakes and other animals.’⁶⁵ Flood and Hamilton comment that bestiality is non-consenting because other species cannot consent to have sex with humans.⁶⁶ Whilst such a statement is nonsensical in itself, Flood and Hamilton subsequently note the more obvious harm of such pornography: ‘participation by women in such activity is likely to have been coerced and is degrading’.⁶⁷ Applying an equality based analysis, making a woman engage in sexual activity with an animal in front of a camera is certainly an incredibly degrading, often painful, and dangerous experience for the woman.⁶⁸ It reduces the women to the status of an animal. It perpetuates myths about women, such as the myth that women are so eager to satisfy men sexually that they are willing to have sex with animals. In other words, such pornography promotes women as sexually voracious, unequal citizens who are willing to be penetrated by anything (man, object or animal).⁶⁹

⁶⁵ Flood & Hamilton, above n 43, 33.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ See Linda Lovelace, *Ordeal* (1980) 110-14 where Linda describes how she was forced to make a film in which she was penetrated by a dog. Linda described the pain and degradation she felt (at 114): ‘Now I felt totally defeated. There were no greater humiliations left for me. The memory of that day and that dog does not fade the way other memories do. The overwhelming sadness that I felt on that day is with me at this moment, stronger than ever. It was a bad day, such a bad day.’

⁶⁹ See also Russell, *Against Pornography: The Evidence of Harm*, above n 52, 94-6 in which Russell analyses three examples of bestiality pornography.

2 Rape

Flood and Hamilton also discuss ‘rape-focused web sites’.⁷⁰ They cite the research of Gossett and Byrne who analysed 31 of these websites,⁷¹ and note that many of these sites boast that they are ‘real’.⁷² Gossett and Byrne found that of the 113 images on these sites, the following kinds of images were available free of charge:

the victims are usually tied with rope or other restraints, a weapon is shown as being used, and typically the victim’s face is depicted as screaming or expressing pain. Half the rape sites describe the victims as young, using such terms as ‘young’, ‘teen’, ‘schoolgirl’, and ‘lolita’. Accompanying text accentuates the violent nature of the images depicted or available for a fee, using such language as ‘rape’, ‘torture’, ‘abuse’, ‘brutal’ and ‘pain’.⁷³

The above quotation refers to websites in which rape is coupled with very young women being used as the victims. This shows a double hierarchy at work. Firstly, there is rape in which a man sexually assaults a woman without her consent. In rape pornography, women are objectified. Women are passive, less than human objects which the male can take and use as he wants. Secondly, the rape victim is described as a much younger woman. This is the second hierarchy of age. The older male sexually assaults the younger female. With age comes power and experience. With youth comes powerlessness and vulnerability. This kind of pornography sexualises these hierarchies, thereby making them acceptable to the viewer.

An example given by Flood and Hamilton of what can be viewed on a rape focused website is a photograph of a young woman who is bound, naked and in visible pain.⁷⁴ The narrative associated with the photograph reads as follows:

⁷⁰ Flood & Hamilton, above n 43, 32.

⁷¹ J L Gossett and S Byrne, ‘ “Click here”: A Content Analysis of Internet Rape Sites’ (2002) 16(5) *Gender & Society* 689-709 quoted in Flood & Hamilton, above n 43, 32.

⁷² Flood & Hamilton, above n 43, 32.

⁷³ *Ibid* 33.

⁷⁴ *Ibid*.

These teenagers' hell is your pleasure. They are stretched, whipped, raped, and beaten. Their tits are crushed, twisted, pierced, thrashed and tortured. Their cunts are opened, whipped, entered with HUGE objects, sewn up, torn, and ripped. Their asses are beaten until bloody, stretched with baseball bats, used as target practice for darts... they scream, cry and plead.⁷⁵

This is an example of hierarchies that perpetuate inequality at work. Here we see the complete disregard for the humanity of young teenage women. They exist solely to be used and abused for older males' sexual pleasure. The older, stronger, active male uses the younger, weaker, passive female for his sexual pleasure. In addition, Flood and Hamilton, in their discussion of violence in pornography, identify another website, 'Her first Gangbang' in which a gang rape is presented. The narrative accompanying this pornography is as follows:

We knew we had to split her cunt like a log, so we stuffed 2 big cocks in her tight pussy until she was stuffed like a butterball turkey!... I throat fucked her, while he split her cunt... Finishing with a brutal facial on her virgin face... Another girl, another first gangbang. It's all in a day's work, here at the office!⁷⁶

These narratives sexualise the infliction of pain, mutilation, sexual torture and degradation on non-consenting very young women. There is a strong gender hierarchy of the male as the dominant aggressor and the female as the submissive object to be used for male sexual pleasure. Women are less than human in these narratives. They are dart boards, targets, turkeys and logs. They are unidentified 'girls' and 'teenagers'. This failure to identify these young women as human beings further objectifies them as even less than second class citizens. Instead, they are objects to be used by men and acted upon by men such as being 'split', 'stuffed', 'stretched', 'whipped', 'raped', 'beaten', 'crushed', 'twisted', 'pierced', 'thrashed', 'tortured', 'sewn up', 'torn', and 'ripped'.

⁷⁵ Ibid.

⁷⁶ Ibid 32.

In the example immediately above, the woman victim is equated to an inanimate object. This inanimate object is a 'log' which the narrative describes as being 'split'. The woman is also described as another object, a 'butterball turkey' which they have 'stuffed'. Apart from the male subject, woman object hierarchy, there is also an extreme power hierarchy in the brute force of two men against one woman. The latter narrative also mentions 'the office'. Pornography in an office or workplace context sexualises and thereby legitimates sexual harassment and unequal treatment of women in the workplace.⁷⁷ It also sends women the message that they are not safe anywhere, whether in the workplace, at home, or in public.

3 *Upskirts and 'Peeping Toms'*

The third category of pornography identified by Flood and Hamilton is named 'upskirts.' These are photographs taken so the viewer can literally see up the skirt of a woman.⁷⁸ Flood and Hamilton state that some of these pictures appear to be taken with the consent of the woman. This is doubtful, as part of the appeal of these websites would seem to be the lack of knowledge and consent of the woman photographed. Flood and Hamilton do, however, acknowledge that some of the photographs appear to have been taken illicitly, without the women's knowledge.⁷⁹ They describe the narrative on one such site as follows:

Sexy Upskirts is a free site with sexy upskirt fetish showing panty pics. We have caught sexy upskirts of unexpected women. We have pics of sexy girls in hot panties and lingerie. Some of these women will be wearing short sexy dresses... We have nylon pics, leg pics, and even feet pics.⁸⁰

⁷⁷ See also Russell, *Against Pornography: The Evidence of Harm*, above n 52, 27-31 in which Russell analyses pornographic cartoons trivialising sexual harassment and assault in the workplace. See also Russell, *Dangerous Relationships: Pornography, Misogyny, and Rape*, above n 52, 42-6 in which Russell analyses the same pornographic cartoons, however they are described instead of reproduced.

⁷⁸ Flood & Hamilton, above n 43, 33.

⁷⁹ Ibid.

⁸⁰ Ibid.

A similar category called ‘peeping Tom’ is also identified. This category of pornography shows pictures of women showering, undressing, toileting, naked or having sex which appear to be taken through windows or using hidden cameras.⁸¹ Ortiz discusses another category of ‘voyeur web sites’ such as ‘VoyeurDorm.com’ in which six ‘sexy young college girls’ live in a house in which video cameras or web cams record their activities in the house, including showering, toileting and undressing.⁸² Flood and Hamilton also give the example of a website called, ‘sex spy’ which boasts ‘over 100,000 voyeur images!, live hidden cams!, 50,000 movies!’⁸³

In ‘upskirts’, ‘peeping Tom’ and voyeur websites it is women who are being watched and men who are watching. Men have power over women by watching women. Women do not have power because they do not know they are being watched and often have not consented to being watched. It is very likely that if women knew people were looking up their skirts, watching them showering, toileting or undressing, they would feel embarrassed, humiliated and violated. Watching another without consent is also a predatory act in which men obtain sexual pleasure from watching women without their consent.

4 Teen pornography

Despite the illegality of child pornography, the genre of ‘teen pornography’ with titles such as ‘barely legal’, ‘youngest teens on the net’, ‘Lolita’ and ‘Schoolgirl’ is readily available on the internet.⁸⁴ Women are dressed in school uniforms, pig-tails and other child-like clothing and hair styles so they appear child-like. There are numerous websites whose theme is ‘incest’ as listed above in Table 6. Flood and Hamilton also note that some ‘teen’ pornographic websites also have themes of ‘sexual predation’, and

81 Ibid.

82 Francesca Ortiz, ‘Zoning the Voyeur Dorm: Regulating Home-Based Voyeur Web Sites Through Land Use Laws’ (2001) 34 *U C Davis Law Review* 929, 933-4.

83 Flood & Hamilton, above n 43, 33.

84 Ibid.

give an example from the website ‘iinocent.com’: ‘[y]our neighbor’s daughter uncensored! You are seconds away from watching true Amateur Teens totally nude and spreading their young Twats! Some even get fucked!’⁸⁵

Internet pornography of very young women, including schoolgirls and incest is a further example of the inequality and the gendered hierarchies pornography promotes. A distinct hierarchy is created between the older male father figure who has power over the younger female (or the female child). This pornography sexualises inequality between man and child and promotes sexual abuse of children in the home. This is of particular concern given that the home is the most popular site of internet usage for Australians.⁸⁶

5 Feeders

Although Table 6 of Flood and Hamilton’s report identifies that there are websites showing ‘fat’ or ‘chubby chicks’, it does not mention the availability of websites dedicated to the overfeeding of women by men. The men are known as ‘feeders’, ‘fat admirers’ or ‘FA’s’ and the women as ‘feedees’. As one website explains:

a FEEDER is a person who enjoys encouraging and/or helping another person to gain weight. A FEEDEE is a person who enjoys gaining weight, especially when assisted by a feeder, and in the context of a sensual and/ or sexual relationship.⁸⁷

However, the reality of the feeder/feedee relationship is not as harmless as this quotation at first appears to suggest. The next paragraph on this web page states, ‘[m]y favourite sexual fantasy is to be grown to such enormous proportions that I am over a thousand pounds and can barely move.’⁸⁸ This is essentially the crux of the

85 Ibid 24.

86 See above n 44.

87 This quotation is from a web page named *Fat Admirers Haven* <<http://www.geocities.com/Area51/Zone/4984/fatadmirers.html>> at 11 July 2005.

88 Ibid.

feeder/feedee relationship. The aim of a feeder is to increase the weight of a woman to such an extent that she cannot move unassisted, or at all, and must rely solely on the feeder to feed, wash and clothe her, often to the extent that her health is in serious danger:

fat admirers... like their women very very large and some will go to any lengths to get them like that. As their women reach dangerously high weights, they become increasingly reliant on their FA partners – to the point where they cannot walk, stand, clean or help themselves in any way.⁸⁹

Feeders find the size of these women and, in particular, their powerlessness and dependence sexually attractive. Part of the appeal for a feeder is challenging social taboos on weight gain. As one web page explains:

Most women love to eat, there is a big diet problem though. This makes breaking the diet a naughty thing, a sexual thing. What a feeder dreams of is a person who just eats and eats. One who loves themselves fat, wants to get fatter and fatter. Such people exist.⁹⁰

Some of the websites devoted to the feeder/feedee relationship discuss and promote the surreptitious feeding of women, and even the force-feeding of women in order for them to gain so much weight that they become completely helpless. One site discusses strategies for surreptitiously ensuring that a woman overeats when taken out to a buffet dinner by continuously bringing the woman plates of food, manipulating her with flattering comments and by trying to distract her from noticing how much she is eating.⁹¹ Another website discusses the force feeding of women:

⁸⁹ *Fat fantasy or sexual abuse* <http://channel4.com/health/microsites/0-9/4health/food/ove_feeders.html> at 11 July 2005.

⁹⁰ *Feeder Profile* <<http://www.feeder.co.uk/profile.html>> at 11 July 2005.

⁹¹ *Ibid.*

Force-Feeding:

The feedee is 'abducted' or seized, tied down and then force fed. Usually feeding pulp is used as material. The hot thing is that the feeder is the only one that can control how much the feedee has to eat and he can overfeed her deliberately (you know that you are full and then some). Feedees that like this style are usually prone to heavy feeding and hard handling and get excited at being forced to fatten up.⁹²

This site also refers to force feeding in its definition of a feedee: '...some need the special kick to be treated as a feeding pig and being force fed like an animal.'⁹³ The 'feeding pulp' referred to in the quotation above is defined as follows:

Feeding pulp:

Liquid that is mostly made of fat. Is designed to fatten up the feedee with speed. Feedees that like feeding pulp usually prefer to fatten up considerably in short time or they do get excited at the prospect of having a high yield fat bomb in their gut that will in some days inflate their bellies. You could say it is sweet anticipation.

This web page also contained stories about overfeeding women. In one of these stories a woman is fed a fattening drug, developed by a scientist but previously only tested on pigs. The drug immediately bloats her to four times her normal size. She dies by being suffocated in her own fat, but not before having several orgasms as her size increases.⁹⁴

From an equality perspective, these websites are extreme examples of relationships of dominance and submission and power and

⁹² *Introduction to Feeding* <http://rubensfeeder.tripod.com/intro/newbie_intro_e.html> at 11 July 2005.

⁹³ Ibid.

⁹⁴ This story is located at <<http://go.to/fatten>> at 11 July 2005.

powerlessness. The preceding web page actually states the following as a reason why ‘feeding is fun and cool’:

The thrill of domination/submission (to control/ to be controlled).
The feedee is tied down like a prisoner and forced to eat, shown how she gets fat by pictures. It’s not the feedees intention to fatten up, but an erotic kick to be forced to do it.

Male feeders dehumanize and debilitate women into a state of extreme dependence and helplessness by encouraging excessive weight gain to an extent that could permanently harm the health of the woman and ultimately result in her death. These relationships constitute ‘...female helplessness – encouraged and engineered by male partners – that pushes fantasy over the border into abuse’⁹⁵ and where consent is questionable. Even if a woman initially consents to be a feedee, the feeder disempowers her to such an extent, and puts her in such a position of dependence that she is unable to withdraw it.⁹⁶

6 *Women and machines*

Another category of internet pornography not included in Table 6 of Flood and Hamilton’s report is pornography made of women and ‘fucking machines’. A ‘Google’ search of ‘women and fucking machines’ revealed 7 490 000 hits in 0.24 seconds, an exponential increase from a ‘Google’ search conducted 1 year earlier which revealed 1 250 000 hits in 0.31 seconds.⁹⁷

An example is www.fuckingmachines.com, which is a website devoted to women being penetrated by extremely large, cumbersome, industrial, robotic looking machines.⁹⁸ The machines have a large protruding dildo, of various colours and sizes that is

⁹⁵ *Fat fantasy or sexual abuse* <http://channel4.com/health/microsites/0-9/4health/food/ove_feeders.html> at 11 July 2005.

⁹⁶ *Ibid.*

⁹⁷ ‘Google’ is located at <www.google.com.au>. These Google searches were conducted on 12 July 2005 and 19 July 2006 respectively.

⁹⁸ *Fuckingmachines.com* <www.fuckingmachines.com> at 12 July 2005.

used to penetrate the women in a fast, thrusting motion. There are over 20 pages of free pornography of women being ‘fucked’ by these machines.⁹⁹ The machines have names such as, ‘the Predator’, ‘Fuck Rogers’, ‘the Trespasser’, ‘the Intruder 2’, ‘Crystal Palace’ and ‘CycloRock’.¹⁰⁰ There are also other machines used on the women including ‘titsuckers’ which are suction cups which are attached to the nipples and breasts. The suction on the ‘titsuckers’ looks very strong with some of the women’s breasts being entirely sucked into narrow cup like containers. These ‘titsuckers’ are always used in conjunction with a ‘fucking machine’. In fact, much of the pornography on this web page has a bondage component with women being tied up with ropes, chains and leather straps and hung upside down whilst being penetrated by a machine or machines. Women are also penetrated both orally and vaginally at the same time by machines.

This type of pornography debases and degrades women by showing they want sex so badly that they are willing to be aggressively penetrated by machines. Women are penetrated and pummelled by large machines, that can no doubt cause serious internal damage to the woman, and are shown as enjoying this treatment. There are even close up photographs of women’s vaginas that have been stretched from being pummelled by machines.¹⁰¹ For example, commentary above some of the pornography on this site states:

One look at this shoot, and you’ll see why Gia Paloma won AVN’s ‘Best New Starlet’ award. She force-gagged herself so hard on the 9 inch dong on the Mini-Mite, her slobber shorted out the pussycam! Next, I hung her inverted, with the Fuckall hanging between her legs, and an inflatable dildo-gag in her mouth. Finally, there’s a long ‘Chinese finger trap’ scene with the Hammer and the Intruder 2. She swaps back and forth between the

⁹⁹ These 20 pages of pornography are located at
<www.fuckingmachines.com/updates/full1.php> at 12 July 2005.

¹⁰⁰ The web page features details of 45 different ‘fucking machines’ and a link to a separate web page where these machines can be purchased at
<www.fuckingmachines.com/meetthemachines/> at 12 July 2005.

¹⁰¹ See <www.fuckingmachines.com/updates/full1.php> at 12 July 2005.

machines with a gag-fest of deep oral and A2M action with the big green dong.¹⁰²

Often, the women in the commentary are described as ‘intelligent’ or as professional women such as lawyers and nurses. The following is an example of commentary on this website that debases and dehumanises professional women. Note that this professional woman, an attorney, is debased and dehumanised by machines in her own office:

Nadia, a high-powered prosecuting attorney, has spent a long day poring over her briefs. When quitting time rolls around, her bureau transforms in a myriad of subtle ways – from the executive office to the executive orifice. She takes depositions from the rocker; the crystal palace; the snake; and the monster. We all know prosecuting attorneys do it hard and fast, and Nadia is no exception. But after an hour of vigorous machine fucking, Nadia decides it’s really quitting time after all. She gathers her papers and heads home to get some rest for tomorrow’s court appearance.¹⁰³

The message given by this website is that it does not matter who the woman is, or what her profession is, she, like all women, desires to be fucked by a machine. It is an example of pornography’s contempt for women and of the ability of the internet to expand and widely distribute new messages of inequality. As the above quotation indicates, women, regardless of their status in society, are rendered so worthless that their only means of existence is to enjoy being raped by machines to satisfy men sexually. Women are denied equal participation in society by being debased and dehumanised in their own workplaces. They are reduced from being credible professionals to debased and dehumanised sexual objects.

¹⁰² This is an example of the commentary provided at the beginning of each set of pornographic photographs and is located at www.fuckingmachines.com/updates/full1.php at 12 July 2005.

¹⁰³ Ibid.

C Summarising Pornography on the Internet

Pornography on the internet is prolific and, as Flood and Hamilton's report illustrates, is easy to find, whether one is looking for it or not. It is evident that the kinds of pornography available via the internet are predicated upon inequality and sexual hierarchy. The internet provides easy and often free access to a vast array of pornography, which is increasingly violent degrading and frequently premised upon a lack of consent, including pornographic websites devoted to rape and incest. It makes pornography accessible in the private sphere of the home, a place where women are most often sexually and physically abused.

IV THE *BROADCASTING SERVICES ACT*

Australia has adopted a censorship approach to pornography. Pornography available via books, magazines and videos, has traditionally been regulated by the Federal Office of Film and Literature under the *Classification (Publications, Films and Computer Games) Act 1995 (Cth) (Classification Act)* which provides that 'standards of morality, decency and propriety generally accepted by reasonable adults' should be taken into account in the classification of a publication, film or computer game by the Classification Review Board.¹⁰⁴ Furthermore, there is a *National Classification Code* in the Schedule to the Act that names and describes the classification categories that the Board applies.¹⁰⁵ This Code also contains references to morality, including standards of

¹⁰⁴ *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* s11(a).

¹⁰⁵ Section 9 of the *Classification Act* provides that, 'Publications, films and computer games are to be classified in accordance with the Code and the Classification Guidelines'. The definitions section of the *Classification Act*, s 5, defines 'Code' as 'the National Classification Code set out in the Schedule, or that Code amended in accordance with section 6.' The Schedule begins by stating several principles that Classification decisions must give effect to, including '(c) everyone should be protected from exposure to unsolicited material that they find offensive'. The Code then sets out three tables by which publications, films and computer games are to be classified. These Tables contain reference to 'the standards of morality, decency and propriety generally accepted by reasonable adults.'

‘morality, decency and propriety’.¹⁰⁶ There is a *National Classification Scheme* under which States and Territories are responsible for the enforcement of decisions of the Federal Classification Review Board.¹⁰⁷ In Western Australia, the relevant enforcement legislation is the *Censorship Act 1996* (WA) (*Censorship Act*).

This morality based approach has been carried through to the regulation of pornography distributed via the internet by the *Online Services Act*,¹⁰⁸ which, in 1999, amended the *Broadcasting Services Act*¹⁰⁹ to include a new Schedule 5, dealing with ‘online services.’¹¹⁰ The *Broadcasting Services Act* expands Australia’s morality based focus on regulation into the realm of the internet, relying on the categories for the classification of films to regulate internet content.¹¹¹

When Schedule 5 was originally enacted, the Australian Broadcasting Authority (ABA) was the authority responsible for administering the legislation and policing complaints concerning online content, such as pornography. However, the Act has recently been amended to make the Australian Communications and Media Authority (ACMA) the responsible authority. This is because as at 1 July 2005, the ABA merged with the Australian Communications Authority to form the ACMA.¹¹² The Act was therefore amended to

¹⁰⁶ Ibid.

¹⁰⁷ See *Censorship Act 1996* (WA) pt 9 ‘Enforcement’.

¹⁰⁸ *Broadcasting Services Amendment (Online Services) Act 1999* (Cth).

¹⁰⁹ *Broadcasting Services Act 1992* (Cth).

¹¹⁰ *Broadcasting Services Act 1992* (Cth) sch 5 ‘Online Services’.

¹¹¹ For a discussion of how this legislation failed to take the opportunity to adopt a sex equality approach which addresses the harms of pornography, and instead adopted a censorship/morality based approach see C Kendall, ‘Australia’s New Internet Censorship Regime: Is This Progress?’ (1999) 3 *Digital Technology Law Journal* <<http://www.law.murdoch.edu.au/dtlj/>>. Please note that this entire electronic journal has been deleted from this website and is consequently no longer accessible. I have obtained the author’s permission to cite this journal article.

¹¹² *Broadcasting Legislation*, Australian Communications and Media Authority web page <<http://www.acma.gov.au/ACMAINTER.2097430:STANDARD:1612043171:PC=90004>> at 18 July 2006.

reflect this change in administration.¹¹³ Unfortunately, these amendments are to the Act's administration and not to its content which is still premised upon protecting society from moral harm.

Senator Richard Alston's Revised Explanatory Memorandum to the *Broadcasting Services Amendment (Online Services) Bill 1999* (Cth)¹¹⁴ states that the legislation was in response to community concerns over the ease of access to illegal and offensive materials including pornography via the internet. Senator Alston provided the following overview of the Act:¹¹⁵

The main elements of the proposed framework are that:

- a complaints mechanism will be established in which any person can complain to the Australian Broadcasting Authority (ABA) about offensive material online;
- material that will trigger action by the ABA will be defined, on the basis of current National Classification Board guidelines for film, as material Refused Classification and rated X, and material rated R that is not protected by adult verification procedures;
- the ABA will be given powers to issue notices to service providers aimed at preventing access to prohibited material which is subject to a complaint if it is hosted in Australia or, if the material is sourced overseas, to take reasonable steps to prevent access if technically and commercially feasible;
- indemnities will be provided for service providers to protect them from litigation by customers affected by ABA notices;
- a graduated scale of sanctions against service providers breaching ABA notices or the legislation will apply;

¹¹³ *Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005* (Cth).

¹¹⁴ Senator Richard Alston, Revised Explanatory Memorandum, *Broadcasting Services Amendment (Online Services) Bill 1999* (Cth), above n 4.

¹¹⁵ Note that, as mentioned above, due to the merger of the Australian Broadcasting Authority (ABA) with the Australian Communications Authority (ACA), references to the ABA should now be replaced with the Australian Communications and Media Authority (ACMA).

- subject to the ability of the Minister to declare that a specified person who supplies, or proposes to supply, a specified Internet carriage service is an Internet service provider, the framework will not apply to private or restricted distribution communications such as ordinary e-mail; however, current provisions of the *Crimes Act 1914* (Cth) in relation to offensive or harassing use of a telecommunications service will apply in this context;
- a community advisory body will be established to monitor material, operate a 'hotline' to receive complaints about illegal material and pass this information to the ABA and police authorities, and advise the public about options such as filtering software that are able to address concerns about online content;
- the Commonwealth will be responsible for regulating the activities of Internet service providers and Internet content hosts and the Attorney-General will encourage the development of uniform State and Territory offence provisions complementing the Commonwealth legislation (including section 85ZE of the *Crimes Act 1914*) that create offences for the publication and transmission of proscribed material by users and content creators.

The central elements of the Act will now be examined to provide an overview of how the *Broadcasting Services Act* attempts to regulate internet content via censorship.

A Complaints Mechanism

The *Broadcasting Services Act* establishes a complaints system whereby a person can make a complaint to the ACMA regarding internet content. In effect, this means that the Act is largely reliant on members of the public complaining about materials, such as pornography, that they find on the internet and consider to be offensive. The relevant part of the legislation is Part 4 'Complaints to, and investigations by, the ACMA'. Part 4 establishes a

complaints process by which the ACMA can receive and investigate complaints about ‘internet content’.¹¹⁶

B Complaints about Prohibited Content or Potential Prohibited Content

A member of the public can make a complaint to the ACMA if they believe internet users (‘end-users’¹¹⁷) in Australia can access what is called ‘prohibited content’ or ‘potential prohibited content’.¹¹⁸ Consequently, if a person encounters pornography on the internet, they can make a complaint to the ACMA. The fact that the person believes other internet users will have access to (be exposed to) the internet content would appear to give the complainant the role of a preliminary censor.

‘Prohibited content’ is defined in terms of whether internet content is hosted in Australia or outside Australia.¹¹⁹ In relation to internet content hosted in Australia, prohibited content is that which has been

¹¹⁶ ‘Internet content’ is defined in cl 3, the definitions section, of sch 5 to the Act as follows:

Internet content means information that:

- (a) is kept on a data storage device; and
- (b) is accessed, or available for access, using an Internet carriage service; but does not include:
- (c) ordinary electronic mail; or
- (d) information that is transmitted in the form of a broadcasting service.

A ‘data storage device’ is defined in s 3, the definitions section of the Act, as ‘any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device.’

An ‘Internet carriage service’ is defined in cl 3 of sch 5 as ‘a listed carriage service that enables end-users to access the internet’.

‘Listed carriage service’ is defined in cl 3 of sch 5 as having ‘the same meaning as in the Telecommunications Act 1997’. The *Telecommunications Act 1997* (Cth) defines a ‘listed carriage service’ in s 16 as a carriage service between: a point in Australia or another point in Australia; a point or one or more other points where the first point is in Australia and at least one of the other points is outside Australia; and a point and one or more other points where the first point is outside Australia and at least one of the other points is in Australia.

¹¹⁷ ‘End-user’ is not defined, but appears to be a person using the internet.

¹¹⁸ *Broadcasting Services Act 1992* (Cth) sch 5, cl 22(1).

¹¹⁹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 10.

classified RC or X18+ by the Classification Board.¹²⁰ In addition, prohibited content is also defined as content that has been classified R18+ by the Classification Board¹²¹ if access to the internet content is not subject to a restricted access system.¹²² In summary, a restricted access system is one that restricts a child's access to internet content such as an age verification mechanism. So if internet content has been classified as R18+ but is not protected by a restricted access system, it is 'prohibited content'.

In relation to internet content hosted outside Australia, content will be prohibited content if the internet content has been classified RC or X18+ by the Classification Board.¹²³

The Act governs all types of internet content including pictures, words and film. The Act attempts to regulate internet films using existing classification categories for films.¹²⁴ If a film is available via the internet, and has already been classified by the Classification Board as a film under the *Classification Act*, the same classification will apply to the internet film.¹²⁵ If the film available via the internet has not been classified by the Classification Board under the *Classification Act*, the Classification Board must classify the internet film in the same way as if it were a film.¹²⁶

¹²⁰ *Broadcasting Services Act 1992* (Cth) sch 5, cl 10(1)(a).

¹²¹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 10(1)(b)(i).

¹²² *Broadcasting Services Act 1992* (Cth) sch 5, cl 10(1)(b)(ii). A 'restricted access system' is defined in cl 4(1) somewhat ambiguously as follows:

The ACMA may, by written instrument, declare that a specified access- control system is a restricted access system in relation to Internet content for the purposes of this Schedule. A declaration under this sub-clause has effect accordingly.

On its web page, the ACMA defines a 'restricted access system' as follows:

Restricted access systems are adult verification devices that allow only people who are 18 years or older to access adult material on the Internet. Restricted access systems protect children from exposure to material that may be unsuitable for them: *Adult verification systems (restricted access)*, Australian Communications and Media Authority web page

<http://www.acma.gov.au/ACMAINTER.1900860:STANDARD:1627293714:pc=P C_90158> at 18 July 2006.

¹²³ *Broadcasting Services Act 1992* (Cth) sch 5, cl 10(2).

¹²⁴ *Broadcasting Services Act 1992* (Cth) sch 5, cl 12.

¹²⁵ *Broadcasting Services Act 1992* (Cth) sch 5, cl 12(1).

¹²⁶ *Broadcasting Services Act 1992* (Cth) sch 5, cl 12(2).

Even if the internet content does not consist of a film or computer game, it will still be classified in the same way as a film under the *Classification Act*.¹²⁷ Senator Alston in his revised Explanatory Memorandum gives the example of an advertisement for a film or a computer game which could be classified under clause 13 as if it were a film.¹²⁸

By way of summary, the type of material that is prohibited content is summarised on the ACMA web page as follows:

The following categories of Internet content are prohibited:

Content which is (or would be) classified RC by the Classification Board

Such content includes:

- material containing detailed instruction in crime, violence or drug use;
- child pornography;
- bestiality;
- excessively violent or sexually violent material.

Content which is (or would be) classified X by the Classification Board

Such content contains:

- real depictions of actual sexual activity.

Content hosted in Australia which is classified R and not subject to a restricted access system which complies with criteria determined by ACMA

Content classified R is not considered suitable for minors and includes:

- material containing excessive and/or strong violence or sexual violence;
- material containing implied or simulated sexual activity;

¹²⁷ *Broadcasting Services Act 1992* (Cth) sch 5, cl 13.

¹²⁸ Senator Richard Alston, Revised *Explanatory Memorandum, Broadcasting Services Amendment (Online Services) Bill 1999* (Cth), above n 4.

- material that deals with issues or contains depictions which require an adult perspective.¹²⁹

A person may also make a complaint to the ACMA if they believe internet users in Australia can access what is called ‘potential prohibited content’. ‘Potential prohibited content’ is defined as internet content that has not been classified by the Classification Board¹³⁰ and if it were to be classified by the Classification Board, there is a substantial likelihood that it would be prohibited content.¹³¹ If the ACMA receives a complaint about internet content that they regard to be ‘potential prohibited content’, they will refer the content to the Classification Board to classify.¹³² So, in effect, the Act has adopted a complaints initiated censorship regime. As seen earlier in this paper, an examination of what is accessible via the internet reveals that such a complaints based system is ineffective to regulate the prolific amount of pornography available via the internet, or to deter internet pornographers. For example, if ‘real depictions of sexual activity’ are considered to be prohibited content, why do they remain extensively available via the internet?

C Complaints about Internet Content Hosts

The second category of complaints that can be made under the *Broadcasting Services Act* are complaints about internet content hosts.¹³³ An ‘Internet content host’ is defined as ‘a person who hosts Internet content in Australia, or who proposes to host Internet content in Australia.’¹³⁴ A person can also make a complaint to the ACMA if they have reason to believe that an internet content host is

¹²⁹ *Internet content complaints*, Australian Communications and Media Authority web page <http://www.acma.gov.au/ACMAINTER.1900860:STANDARD:1627293714:pc=PC_90103> at 18 July 2006.

¹³⁰ *Broadcasting Services Act 1992* (Cth) sch 5, cl 11(1)(a).

¹³¹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 11(1)(b).

¹³² *Broadcasting Services Act 1992* (Cth) sch 5, cl 30(2).

¹³³ *Broadcasting Services Act 1992* (Cth) sch 5, cl 22.

¹³⁴ *Broadcasting Services Act 1992* (Cth) sch 5, cl 3.

hosting prohibited content or potential prohibited content in Australia.¹³⁵ Again, this involves a person using the internet finding such material and then acting as a preliminary censor in making the complaint.

D Form of Complaint

Complaints about prohibited content or potential prohibited content must identify the internet content;¹³⁶ set out how to access the internet content;¹³⁷ if known, set out the name of the country or countries in which the internet content is hosted;¹³⁸ set out the reasons for believing the internet content is prohibited or potential prohibited content;¹³⁹ and such other information (if any) the ACMA requires.¹⁴⁰ The complaint must be in writing¹⁴¹ or by an electronic transmission approved by the ACMA.¹⁴² The complainant will not be entitled to make a complaint unless they are a resident of Australia;¹⁴³ a body corporate that carries on activities in Australia;¹⁴⁴ or the Commonwealth, a State or Territory.¹⁴⁵

E Complaints about Breaches of Registered Codes and Online Provider Rules

The Act encourages self-regulation by ISPs and internet content hosts by encouraging them to develop industry specific codes of

¹³⁵ *Broadcasting Services Act 1992* (Cth) sch 5, cl 22(2).

¹³⁶ *Broadcasting Services Act 1992* (Cth) sch 5, cl 22(3)(a).

¹³⁷ *Broadcasting Services Act 1992* (Cth) sch 5, cl 22(3)(b).

¹³⁸ *Broadcasting Services Act 1992* (Cth) sch 5, cl 22(3)(c).

¹³⁹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 22(3)(d).

¹⁴⁰ *Broadcasting Services Act 1992* (Cth) sch 5, cl 22(3)(e).

¹⁴¹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 24(1).

¹⁴² *Broadcasting Services Act 1992* (Cth) sch 5, cl 24(2).

¹⁴³ *Broadcasting Services Act 1992* (Cth) sch 5, cl 25(a).

¹⁴⁴ *Broadcasting Services Act 1992* (Cth) sch 5, cl 25(b).

¹⁴⁵ *Broadcasting Services Act 1992* (Cth) sch 5, cl 25(c). Note that cl 22(5) of sch 5 provides that a person cannot make a complaint about content occurring before 1 January 2000.

practice. It allows for a body or association who represents a particular section of the internet industry to develop an industry code which can be registered with the ACMA.¹⁴⁶ There is also provision for the ACMA to request that a body or association who represents a particular section of the internet industry to develop an industry code for submission to the ACMA.¹⁴⁷ The Internet Industry Association drafted the current industry codes which were registered with the ABA (now the ACMA) on 26 May 2005.¹⁴⁸ There are three codes of practice relating to the internet, developed by the Internet Industry Association.¹⁴⁹ The three codes are contained in the one document and are available to the public on the ACMA web page.¹⁵⁰ The three Codes are named: 'Content Code 1: Hosting Content within Australia', 'Content Code 2: Providing Access to Content Hosted within Australia' and 'Content Code 3: Providing Access to Content Hosted Outside Australia.' The codes provide guidelines for internet content hosts and service providers including requiring them to take steps to protect internet users from offensive content through the use of age verification systems, warnings and filtering software. The codes also provide procedures for responding to directions and notices given by the ACMA and other authorities.

A person may complain to the ACMA if they believe that an ISP or an internet content host has contravened a registered code.¹⁵¹ If the ACMA is satisfied that a person who is a participant in the internet industry has or is contravening an industry code, the ACMA can

¹⁴⁶ *Broadcasting Services Act 1992* (Cth) sch 5, cl 62.

¹⁴⁷ *Broadcasting Services Act 1992* (Cth) sch 5, cl 63.

¹⁴⁸ *Industry self-regulation*, Australian Communications and Media Association web page <http://www.acma.gov.au/ACMAINTER.1900860:STANDARD:1627293714:pc=PC_90162> at 19 July 2006.

¹⁴⁹ *Internet content codes*, Australian Communications and Media Association web page <http://www.acma.gov.au/ACMAINTER.2097430:STANDARD:401669673:pc=PC_90080> at 19 July 2006.

¹⁵⁰ *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)* (9 May 2002, version 10.4) (the Code) Australian Communications and Media Association web page <http://www.acma.gov.au/acmainterwr/aba/contentreg/codes/internet/documents/iaa_code.pdf> at 19 July 2006.

¹⁵¹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 23(a).

give written notice to the person to comply.¹⁵² When this notice is given the person must comply,¹⁵³ but until this time, compliance is voluntary.

In the alternative, a person may make a complaint to the ACMA if they believe that the ISP or internet content host has contravened an ‘online provider rule’ applicable to that host.¹⁵⁴ In summary, these online provider rules are those set down by the Act requiring compliance with various notices issued by the ACMA to remove offensive content.¹⁵⁵ For example, internet content hosts must comply with notices issued by the ACMA such as an interim take-down notice, a final take-down notice, a special take down notice and any undertaking they give to the ACMA.¹⁵⁶

F Investigation of Complaints by the ACMA

The Act also sets out the kinds of complaints that the ACMA must investigate. The ACMA must investigate complaints about prohibited or potential prohibited content¹⁵⁷ and must notify complainants of the results of the investigation.¹⁵⁸ However, the ACMA need not investigate if it is satisfied that the complaint is frivolous, vexatious or not made in good faith.¹⁵⁹ Similarly, the ACMA need not investigate if it is of the view that the complaint was made for the purpose of frustrating or undermining the efficient administration of Schedule 5.¹⁶⁰ The ACMA may also investigate matters on its own initiative if it thinks it desirable to do so.¹⁶¹ The

¹⁵² *Broadcasting Services Act 1992* (Cth) sch 5, cl 66(1).

¹⁵³ *Broadcasting Services Act 1992* (Cth) sch 5, cl 66(2).

¹⁵⁴ *Broadcasting Services Act 1992* (Cth) sch 5, cl 23(b).

¹⁵⁵ ‘Online provider rules’ are listed in cl 79, and include the notices and directions listed in cll 37, 48, 66(2), 72, 80.

¹⁵⁶ *Broadcasting Services Act 1992* (Cth) sch 5, cll 37(1), (2), (3), (4).

¹⁵⁷ *Broadcasting Services Act 1992* (Cth) sch 5, cl 26(1).

¹⁵⁸ *Broadcasting Services Act 1992* (Cth) sch 5, cl 26(3).

¹⁵⁹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 26(2)(a).

¹⁶⁰ *Broadcasting Services Act 1992* (Cth) sch 5, cl 26(2)(b).

¹⁶¹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 27(1).

ACMA has the power to conduct investigations as it sees fit¹⁶² and to obtain information from persons and make enquiries as it sees fit.¹⁶³

G Material that will Trigger Action by the ACMA

As mentioned above, a complaint about, or an investigation by the ACMA that finds that internet content is ‘prohibited content’ or ‘potential prohibited content’ may result in action being taken by the ACMA in the form of a ‘take-down notice’, discussed at I below.¹⁶⁴ For example, a complaint by a member of the public will result in the ACMA deciding that the content is ‘prohibited’ if it has already been classified by the Classification Board as RC, X18+ or R18+ without a restricted access system. Alternately, if the content is unclassified and is ‘potential prohibited content’, the ACMA will issue an interim take down notice to the internet content host and refer the content to the Classification Board to classify. The classification category awarded by the Classification Board may result in the ACMA censoring the content by issuing a take down notice if it falls within the category of ‘prohibited content’. As discussed above, what constitutes prohibited content and potential prohibited content is defined by reference to film classification categories.

H Power of the ACMA to Issue Notices to Service Providers

Division 3 of Schedule 5 sets out the action to be taken in relation to a complaint about prohibited content hosted *in* Australia, whilst Division 4 sets out the action to be taken in relation to a complaint about prohibited content hosted *outside* Australia. This action primarily involves issuing notices ordering the removal (censorship) of internet content.¹⁶⁵

¹⁶² *Broadcasting Services Act 1992* (Cth) sch 5, cl 28(1).

¹⁶³ *Broadcasting Services Act 1992* (Cth) sch 5, cl 28(2).

¹⁶⁴ *Broadcasting Services Act 1992* (Cth) sch 5, cl 10, 11.

¹⁶⁵ When serving notices under this division, the ACMA must sufficiently identify or describe the Internet content: *Broadcasting Services Act 1992* (Cth) sch 5, cl 38.

I Prohibited Content Hosted in Australia

The Act provides that if, during an investigation, the ACMA is satisfied that internet content hosted in Australia is ‘prohibited content’, the ACMA must give the internet content host¹⁶⁶ a written notice directing them not to host the prohibited internet content.¹⁶⁷ This is called a ‘final take down notice.’¹⁶⁸

If, during an investigation, the ACMA is satisfied that the internet content hosted in Australia is potential prohibited content and that there is a substantial likelihood that if the internet content were to be classified by the Classification Board it would be classified ‘RC’ or ‘X18+’, the ACMA must give the internet content host a written notice called an ‘interim take-down notice’.¹⁶⁹ This notice is to direct the Internet content host not to host the internet content until the ACMA notifies the host of the Classification Board’s classification of the internet content.¹⁷⁰ The ACMA must then request that the Classification Board classify the internet content.¹⁷¹

The ACMA must provide the Classification Board with sufficient information to classify the internet content or a copy of the content.¹⁷² The Classification Board must then classify the internet content and provide written notice to the ACMA of the classification.¹⁷³ 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

¹⁶⁶ ‘Internet content host’ is defined by cl 3 of sch 5 as ‘a person who hosts Internet content in Australia, or who proposes to host Internet content in Australia.’

¹⁶⁷ *Broadcasting Services Act 1992* (Cth) sch 5, cl 30(1).

¹⁶⁸ A ‘final take down notice’ is defined in cl 3 of sch 5 of the *Broadcasting Services Act 1992* (Cth) as ‘a notice under subclause 30(1) or paragraph 30(4)(b) of this Schedule.’

¹⁶⁹ ‘Interim take down notice’ is defined in cl 3 of sch 5 of the *Broadcasting Services Act 1992* (Cth) as ‘a notice under subparagraph 30(2)(a)(i) of this Schedule.’

¹⁷⁰ *Broadcasting Services Act 1992* (Cth) sch 5, cl 30(2)(a)(i).

¹⁷¹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 30(2)(a)(ii).

¹⁷² *Broadcasting Services Act 1992* (Cth) sch 5, cl 30(5)(a).

¹⁷³ *Broadcasting Services Act 1992* (Cth) sch 5, cl 30(3).

classification¹⁷⁴ and if the internet content is prohibited content, give the internet content host a final take down notice.¹⁷⁵

If a final take down notice has been issued to an internet content host in relation to internet content that is classified R18+ by the Classification Board and which is not subject to a restricted access system, the ACMA must revoke its final take down notice if the internet content host satisfies the ACMA that they have implemented a restricted access system and as a result the content ceases to be prohibited content.¹⁷⁶ The ACMA must then give the internet content host a written notice stating that the final take-down notice has been revoked.¹⁷⁷

Notices called ‘special take down notices’ can also be issued by the ACMA if an interim take down notice or a final take down notice has been issued to an internet content host. These notices will be issued if the ACMA is satisfied that the internet content host is hosting in Australia, or proposing to host in Australia, prohibited or potential prohibited internet content that is the same as or substantially similar to, the internet content identified in the interim take down notice or the final take down notice.¹⁷⁸ The special take-down notice is a notice not to host similar internet content at any time when the interim or final take down notice is in force.¹⁷⁹

An internet content host must comply with an interim take down notice, at the latest, by 6pm on the next business day after the notice was given.¹⁸⁰ The same applies to a final take down notice¹⁸¹ and a special take down notice.¹⁸²

In summary, the Act empowers the ACMA to censor the internet by requiring internet content hosts to remove prohibited content so it

¹⁷⁴ *Broadcasting Services Act 1992* (Cth) sch 5, cl 30(4)(a).

¹⁷⁵ *Broadcasting Services Act 1992* (Cth) sch 5, cl 30(4)(b).

¹⁷⁶ *Broadcasting Services Act 1992* (Cth) sch 5, cl 32(1).

¹⁷⁷ *Broadcasting Services Act 1992* (Cth) sch 5, cl 32(2).

¹⁷⁸ *Broadcasting Services Act 1992* (Cth) sch 5, cl 36.

¹⁷⁹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 36.

¹⁸⁰ *Broadcasting Services Act 1992* (Cth) sch 5, cl 37(1).

¹⁸¹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 37(2).

¹⁸² *Broadcasting Services Act 1992* (Cth) sch 5, cl 37(3).

cannot be viewed by internet users and consequently harm and corrupt society's moral fibre.

J Revocation of Take Down Notices

The Act provides that take-down notices should be revoked by the ACMA if the internet content is voluntarily withdrawn or reclassified.¹⁸³ So, for example, if an interim take down notice has been issued and before classification of the content the internet content host ceases to host the internet content, the ACMA may, after receiving a written undertaking from the host not to host the content, revoke the interim take down notice.¹⁸⁴ Also, if after a reclassification of internet content by the Classification Board, the internet content ceases to be prohibited content, the ACMA must revoke a final take down notice.¹⁸⁵ The same applies if the internet content is a film or computer game which has been reclassified by the Classification Board.¹⁸⁶

K Prohibited Content Hosted Outside Australia

If, during an investigation, the ACMA is satisfied that internet content hosted outside Australia is prohibited content or potential prohibited content, 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.¹⁸⁷ This means that unless pornography was, for example, child pornography and contrary to the criminal law, no action could be taken in relation to it.

¹⁸³ *Broadcasting Services Act 1992* (Cth) sch 5, cll 33, 34, 35.

¹⁸⁴ *Broadcasting Services Act 1992* (Cth) sch 5, cl 33.

¹⁸⁵ *Broadcasting Services Act 1992* (Cth) sch 5, cl 34.

¹⁸⁶ *Broadcasting Services Act 1992* (Cth) sch 5, cl 35.

¹⁸⁷ *Broadcasting Services Act 1992* (Cth) sch 5, cl 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 (sch 5, cl 40(1)(a)(ii)).

In addition to notifying a member of the Australian police force, the ACMA must also notify the ISP pursuant to the 'designated notification scheme'¹⁸⁸ in the applicable code or standard so the internet content can be blocked.¹⁸⁹ As mentioned above, there are three registered codes of practice available to the public via the ACMA web page. The applicable provision provides that such notification includes regular e-mail notification from the ACMA to ISPs and suppliers of family friendly filters of prohibited or potential prohibited content.¹⁹⁰

The ACMA must withdraw its notification to an ISP of prohibited or potential prohibited content if the internet content is reclassified by the Classification Board so that it ceases to be prohibited content.¹⁹¹

L *Indemnities*

A person who makes a complaint in good faith is protected from civil proceedings in respect of loss, damage or injury of any kind suffered by another person because they have made a complaint,¹⁹² made a statement or provided a document to the ACMA in connection with an investigation.¹⁹³

In addition, the Act protects ISPs against civil proceedings in respect of anything done in compliance with a registered code or standard.¹⁹⁴ Also, civil proceedings do not lie against an ISP for

¹⁸⁸ A 'designated notification scheme' is defined in sch 5, cl 3 as a scheme for substituted service under which the ACMA is deemed to have given notice to an Internet Service Provider. See also cl 19.2 of the Code, above n 150, as a 'direct notification, whether by means of e-mail or otherwise, by the ACMA to the Suppliers of IIA Family Friendly Filters of information by which the relevant Prohibited Content or Potential Prohibited Content can be identified', together with 'notification by e-mail from the ACMA to ISP's on a regular basis of Prohibited or Potential Prohibited Content'.

¹⁸⁹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 40(1)(c).

¹⁹⁰ Clause 19.2 of the *National Classification Code*, Office of Film and Literature Classification web page
<<http://www.oflc.gov.au/resource.html?resource=60&filename=60.pdf>> at 19 July 2006.

¹⁹¹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 42, 43.

¹⁹² *Broadcasting Services Act 1992* (Cth) sch 5, cl 29(a).

¹⁹³ *Broadcasting Services Act 1992* (Cth) sch 5, cl 29(b).

¹⁹⁴ *Broadcasting Services Act 1992* (Cth) sch 5, cl 88(1).

anything done to comply with a standard access prevention notice or a special access prevention notice.¹⁹⁵ Civil proceedings also do not lie against an internet content host in respect of anything done by the internet content host in complying with clause 37.¹⁹⁶ Clause 37 refers to compliance with rules relating to prohibited content such as an interim, final or special take down notice or an undertaking.

M A Graduated Scale of Sanctions

A person will be guilty of an offence if they engage in conduct that contravenes an online provider rule that is applicable to them.¹⁹⁷ ‘Online provider rules’ include rules relating to prohibited content, compliance with access-prevention notices, industry codes and industry standards and online provider determinations.¹⁹⁸ The penalty is 50 penalty units, which is the equivalent of \$5 500.¹⁹⁹ So, for example, an internet content host commits an offence if they fail to remove internet content identified in a final take-down notice.

If an ISP or an internet content host has or is contravening an online provider rule, the ACMA may give the provider or host a written direction requiring them to take specified action to ensure there is no contravention in the future.²⁰⁰ An example of the kind of direction that can be given to an internet content provider or host includes a direction that the provider or host implement effective administrative systems for monitoring compliance with an online provider rule.²⁰¹ Another example of the kind of direction that may be given by the ACMA to the provider or host, is that the provider or host implement a system so that their employees, agents or

¹⁹⁵ *Broadcasting Services Act 1992* (Cth) sch 5, cl 88(2).

¹⁹⁶ *Broadcasting Services Act 1992* (Cth) sch 5, cl 88(3).

¹⁹⁷ *Broadcasting Services Act 1992* (Cth) sch 5, cl 82(1). ‘Engage in conduct’ is defined as to ‘do an act’ or to ‘omit to perform an act’: *Broadcasting Services Act 1992* (Cth) sch 5, cl 82(2).

¹⁹⁸ *Broadcasting Services Act 1992* (Cth) sch 5, cl 79.

¹⁹⁹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 82(1). A ‘penalty unit’ is defined in s 4AA of the *Crimes Act 1914* (Cth) as follows: ‘**penalty unit** means \$110.’

²⁰⁰ *Broadcasting Services Act 1992* (Cth) sch 5, cl 83(1), (2).

²⁰¹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 83(3)(a).

contractors have a reasonable knowledge or understanding of the requirements of the online provider rule, to the extent that they affect the employees, agents or contractors concerned.²⁰² A person will be guilty of an offence if they engage in conduct (which includes an act or omission)²⁰³ which contravenes a direction with a penalty of 50 penalty units.²⁰⁴

The ACMA may also issue a formal warning to a person who contravenes an online provider rule under clause 84. The ACMA may also apply to the Federal Court for an order that the person cease supplying the internet carriage service or cease hosting that internet content, if the ACMA is satisfied that a person who is an ISP or an internet content host is supplying an internet carriage service or hosting content in Australia otherwise than in accordance with an online provider rule.²⁰⁵

A person who does not comply with an online provider rule or who contravenes a direction from the ACMA, is guilty of a separate offence for each day the contravention continues.²⁰⁶

N Framework Not Applicable to Private or Restricted Distribution Communications

The Act does not apply to e-mail communications or telecommunications such as the telephone. The aim of the Act is to monitor internet content, as evidenced by the definition of 'Internet content' in clause 3 which excludes 'ordinary electronic mail' and 'information that is transmitted in the form of a broadcasting service.' As mentioned in Senator Richard Alston's Revised Explanatory Memorandum, 'current provisions of the *Crimes Act 1914* (Cth) in relation to offensive or harassing use of a telecommunications service will apply in this context.'²⁰⁷

²⁰² *Broadcasting Services Act 1992* (Cth) sch 5, cl 83(3)(b).

²⁰³ *Broadcasting Services Act 1992* (Cth) sch 5, cl 83(5).

²⁰⁴ *Broadcasting Services Act 1992* (Cth) sch 5, cl 83(4).

²⁰⁵ *Broadcasting Services Act 1992* (Cth) sch 5, cl 85(1).

²⁰⁶ *Broadcasting Services Act 1992* (Cth) sch 5, cl 86.

²⁰⁷ Senator Richard Alston, Revised *Explanatory Memorandum, Broadcasting Services Amendment (Online Services) Bill 1999* (Cth), above n 4. The relevant provisions of

O *Community Advisory Body to Monitor Material*

The third component of the legislation's scheme for monitoring internet content is 'a range of non-legislative initiatives directed towards monitoring content on the Internet and educating and advising the public about content on the Internet'.²⁰⁸

This monitoring role is undertaken by the ACMA as part of its additional functions. These include monitoring compliance with codes and standards registered under the Act,²⁰⁹ to advise and assist parents in the supervision and control of children's access to Internet content,²¹⁰ to conduct and coordinate community education programs in connection with relevant consumer groups and government agencies,²¹¹ to conduct and commission research

the *Crimes Act 1914* (Cth) which concern internet offences are as follows: For harassing or threatening behaviour, Part VIIB of the *Crimes Act 1914* (Cth) which contained s 85ZE which prohibited the use of a 'carriage service' to menace or harass a person in an offensive manner has now been repealed by the *Crimes Legislation Amendment (Telecommunications Offences and other Measures) Act (No 2) 2004* (Cth). Telecommunications offences are now dealt with in Part 10.6 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*).

A 'carriage service' is defined in the Dictionary to the *Criminal Code* as having the same meaning as in the *Telecommunications Act 1997* (Cth). Section 7, the definitions section of the *Telecommunications Act 1997* (Cth), defines a 'carriage service' as 'a service for carrying communications by means of guided and/ or unguided electromagnetic energy.' This would include the internet, e-mail and the transmission of text and photographic messages via mobile telephone.

Section 474.15 makes it an offence to use a carriage service to make a threat ('threat' is defined in the Dictionary of the *Criminal Code* to include 'a threat made by any conduct, whether express or implied and whether conditional or unconditional') where the person making the threat intends the person threatened to fear that the threat will be carried out. This section includes threats to kill (*Criminal Code* s 474.15(1)) which are punishable by 10 years imprisonment and threats to cause serious harm (*Criminal Code* s 474.15(2)) which are punishable by 7 years imprisonment. It is also an offence, punishable by 10 years imprisonment to make a hoax threat 'with the intention of inducing a false belief that an explosive, dangerous or harmful substance or thing has been or will be left in any place'. Finally, s 85ZE of the *Crimes Act 1914* (Cth) was specifically replaced with s 474.17 which makes it an offence, punishable by up to 3 years imprisonment, to use a carriage service to menace, harass or cause offence 'in a way that reasonable persons would regard in all the circumstances as being menacing, harassing or offensive'.

²⁰⁸ *Broadcasting Services Act 1992* (Cth) sch 5, cl 1(4).

²⁰⁹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 94(a).

²¹⁰ *Broadcasting Services Act 1992* (Cth) sch 5, cl 94(b).

²¹¹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 94(c).

regarding issues relating to internet content and internet carriage services,²¹² and to liaise with regulatory bodies overseas about cooperative arrangements to develop multilateral codes of practice and internet content labelling technologies.²¹³ The ACMA also has the function of informing and advising the Minister on technological developments and service trends in the internet industry.²¹⁴

P Commonwealth Responsible for Monitoring the Activities of Internet Service Providers and Internet Content Hosts

By amending the *Broadcasting Services Act* to include Schedule 5, the Commonwealth government, via the ACMA, is now responsible for monitoring and regulating the activities of ISPs and internet content hosts. As mentioned above,²¹⁵ Senator Richard Alston's Revised Explanatory Memorandum states that the Attorney-General will be responsible for encouraging uniform State and Territory offence provisions that compliment the *Broadcasting Services Act*.

Q Summarising the Broadcasting Services Act

In conclusion, although this paper has gone through the Act in some detail, the crux of the legislative regime is to rely on members of the public, or the ACMA to find and report on internet content, such as pornography which they find to be offensive. The ACMA will then investigate the content, which is classified by the Classification Board in accordance with the classification criteria for films, to determine whether to issue a take down notice to remove (and therefore censor) the material from the internet. If the internet content is hosted outside Australia, little can be done to remove it, other than informing the police and advising ISPs so they can block access to the content. By attempting to safeguard society from moral harm, the Australian legislative regime has ignored the pornographic

²¹² *Broadcasting Services Act 1992* (Cth) sch 5, cl 94(d).

²¹³ *Broadcasting Services Act 1992* (Cth) sch 5, cl 94(e).

²¹⁴ *Broadcasting Services Act 1992* (Cth) sch 5, cl 94(f).

²¹⁵ Senator Richard Alston, Revised Explanatory Memorandum, *Broadcasting Services Amendment (Online Services) Bill 1999* (Cth), above n 4.

harms identified in part one of this paper. This sentiment is summarised by Kendall who writes of the *Broadcasting Services Act*:

The question that legislation of this sort poses is whether men are offended by what they see, rather than whether women are abused, violated and degraded as a consequence of the production and use of what these men see. By emphasising the corrupt effect of pornography on the consumer (usually male), laws of this sort ignore the fact that women are overwhelmingly pornography's victims.²¹⁶

The morality based censorship approach adopted by the *Broadcasting Services Act* does nothing to help women harmed by pornography, and does nothing to recognize pornography as a means of maintaining women's inequality. Unlike the ordinance, it does not empower these women to take any kind of action whatsoever in response to their abuse. The *Broadcasting Services Act* does not permit women to sue those who made or distributed the pornography, nor does it allow women to obtain injunctive relief to stop pornography made of them being distributed or sold, or to pursue a sex discrimination action when pornography is used to harass them, or is forced upon them. The *Broadcasting Services Act* ignores pornography's harm to women's equality and instead, treats women's bodies as offensive and potentially harmful to society's morals.

V THE ORDINANCE AND ITS APPLICATION TO THE INTERNET

Part one of this paper examined the civil rights ordinance drafted by Law Professor Catharine MacKinnon and feminist writer Andrea Dworkin. It outlined the background to the ordinance, and provided an overview of the main sections of it. It was argued in part one of this paper that the ordinance should be enacted into Australian law to regulate pornography generally because it is the only method of regulation that recognises pornographic harms. However, as

²¹⁶ Kendall, above n 111.

mentioned above, due to its ability to mass market inequality through distributing pornography on a global scale, the internet is the area that requires the most urgent reform. The following section of this paper will explore how the ordinance can be applied to the internet, together with some of the significant issues that must be overcome in order to do so, including jurisdictional and enforcement issues. It is not the purpose of this paper to definitively solve all of the potential technological issues in applying the ordinance to the internet. Rather, this paper seeks to demonstrate the ordinance's potential application to the internet, and some of the technological issues that need to be addressed in doing so.

A Applying the Ordinance to the Internet

MacKinnon and Dworkin first formulated the ordinance as a means of regulating pornography as an issue of sex discrimination in 1983.²¹⁷ There have been notable technological developments since this time, including the development and prolific expansion of the internet and the World Wide Web which has allowed pornography to flourish like never before and to be readily available in the home, often free of charge. The internet is best described as a 'borderless medium'²¹⁸ via which pornography can be distributed to multiple countries with different laws about pornography and internet content. It has also permitted more and more men to become pornographers, and to make pornography of women as part of their domestic abuse. For example, the internet allows anyone with a digital camera and internet access to become a pornographer and to post pornography on an internet web page. As a result, the message of sexual inequality is being extensively distributed and promoted and the need for the ordinance to specifically address this harm is required more urgently than ever before.

The significant question is whether the ordinance is sufficient to deal with these advances in technology and the inequality that they

²¹⁷ MacKinnon & Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings*, above n 48, 4.

²¹⁸ Richard Garnett, 'Regulating Foreign-Based Internet Content: A Jurisdictional Perspective' (2000) 23(1) *University of New South Wales Law Journal* 227, 227.

promote. The ordinance's recognition of pornography as a practice of sex discrimination which maintains gender inequality and 'harms and disadvantages women' in section 1 is unchanged by technological advances such as the internet. Arguably these definitions of what pornography is and does are even more relevant because the internet facilitates the mass distribution of inequality like never before.

In addition, as evidenced earlier in this paper by the overview of the types of pornography available via the internet, the definitions of pornography in section 2 remain applicable. In fact, they accurately describe and define much of the pornography available via the internet. The proliferation of violent and degrading material available via the internet is accurately described by the definition of pornography in section 2.

There is little difficulty with the application of the ordinance to sex discrimination or sexual assault perpetrated in Australia against a victim in Australia, regardless of where the internet content is made or uploaded. For example, if a perpetrator forces internet pornography on a victim in Australia (for example, a work colleague forces internet pornography on another work colleague, perhaps by e-mail), the victim will have a cause of action against the perpetrator under section 3, clause 2 of the ordinance, regardless of where the internet pornography originated from. In a similar manner, if a perpetrator views internet pornography which results in the perpetrator sexually assaulting a woman in Australia, the victim has a cause of action against the perpetrator under section 3, clause 3 of the ordinance, regardless of where the internet pornography was made or uploaded. If a woman is forced to perform in pornography in Australia for the purpose of being uploaded onto the internet, she can sue the maker of that pornography under section 3, clause 1, and would be able to obtain an injunction under section 5, clause 3 of the ordinance to compel the pornographer to remove the pornography from the internet.

B Jurisdiction, Enforcement and the Ordinance

On the other hand, problems regarding jurisdiction and enforcement of the ordinance to the internet become apparent when the defendant maker, distributor, seller and/or exhibitor of pornography is based overseas. So if, as noted in the preceding paragraph, a woman is sexually assaulted after the perpetrator views internet pornography, she may have a cause of action against the perpetrator under section 3, clause 3 because the offence occurred in Australia. However, section 3, clause 3 also permits the victim to sue the makers, sellers, distributors and exhibitors of the pornography, who may be based outside the Australian jurisdiction, for example, in the United States. In this type of situation it has been argued that in determining claims against overseas based defendants the Australian courts would be imposing their law on the citizens in another jurisdiction, which is of particular concern if the activity is legal in their jurisdiction.²¹⁹ This also brings with it problems in enforcing Australian law against citizens of another country.²²⁰

These concerns were raised by Simpson J of the Supreme Court of New South Wales in her Honour's judgment in *Macquarie Bank Limited & Anor v Berg*.²²¹ In this case, Simpson J refused to grant an injunction sought by Macquarie and another plaintiff, restraining an overseas based defendant, Berg, from publishing defamatory material on the internet concerning an industrial dispute between the parties which was the subject of litigation. Simpson J declined to grant the order firstly because she said the order was not enforceable against a defendant located outside the jurisdiction (in this case the United States), and would only become enforceable if and when the defendant voluntarily entered the jurisdiction of New South Wales. Secondly, her Honour stated that the injunction would effectively restrain the defendant from publishing the material anywhere in the world, something that would effectively superimpose New South Wales defamation law on the rest of the world, regardless of whether it was entirely legal to publish materials in some countries.

²¹⁹ Garnett, above n 218, 227.

²²⁰ Ibid.

²²¹ [1999] NSWSC 526 (2 June 1999). For a discussion of this case with respect to problems with enforcement and the internet, see Garnett, above n 218, 229.

To some extent, the principles regarding the publication of internet defamation from the case of *Dow Jones & Company Inc v Gutnick*²²² ('*Gutnick*') can be applied to resolve the issue of whether the Australian courts have jurisdiction to apply the ordinance to pornography originating from outside Australia.

Joseph Gutnick was a prominent Australian business person, whose business headquarters were based in Victoria, Australia. Gutnick also conducted business in several other countries including the United States of America. Gutnick commenced legal proceedings in Victoria, Australia, against Dow Jones & Company Inc ('Dow Jones'), a publishing company based in the United States who published the *Wall Street Journal* newspaper and a magazine called *Barron's*. Gutnick alleged that an article called 'Unholy Gains' published by Dow Jones in one of its magazines named *Barron's*, which contained several references to his honesty and integrity as a business person, defamed him. As well as being available in printed magazine form, the magazine was also available online to readers who paid an annual fee to access it via the Wall Street Journal website. The writ was served on Dow Jones in the United States.²²³

The tort of defamation requires the publication of a statement that would injure the reputation of the plaintiff or lower the estimation of the plaintiff in the opinion of others. Consequently, the central issue before the High Court of Australia in *Gutnick* was where the 'publication' of the alleged defamatory material occurred. Dow Jones argued that the Australian courts had no jurisdiction to determine the matter because the article was published in New Jersey in the United States where the article was uploaded. They also argued that if the Australian courts had jurisdiction, so too would other courts around the world, resulting in a potential indeterminate amount of legal proceedings against a publisher for the one article. Gutnick argued that the Australian courts did have jurisdiction because the article was published in Victoria, the place where it was read. Gutnick argued that the High Court should simply

²²² (2000) 210 CLR 575 ('*Gutnick*').

²²³ The facts of *Gutnick*, *ibid*, can be found at 576-85.

extend the traditional law of defamation, which provided that the publication occurs where the material is read, to the internet.

The High Court accepted Gutnick's argument and held that it did have jurisdiction to hear the matter because the place of publication was the place in which the internet defamation was downloaded and read. The majority of the High Court stated:

Mr Gutnick has sought to confine his claim in the Supreme Court of Victoria to the damage he alleges was caused to his reputation *in Victoria* as a consequence of the publication that occurred *in that State*. The place of commission of the tort for which Mr Gutnick sues is then readily located as Victoria. That is where the damage to his reputation of which he complains is alleged to have occurred, for it is there that the publications of which he complains were comprehensible by readers. It is his reputation *in that State*, and only that state, which he seeks to vindicate. It follows, of course, that substantive issues arising in the action would fall to be determined according to the law of Victoria. But it also follows that Mr Gutnick's claim was thereafter a claim for damages for a tort committed in Victoria, not a claim for damages for a tort committed outside the jurisdiction.²²⁴

Gutnick provides a useful point of reference in terms of the jurisdiction of the Australian courts to apply the defamation provision of the ordinance, section 3, clause 4 to the internet. This section makes it sex discrimination to defame a person 'through the unauthorised use... of their proper name, image and/or recognisable personal likeness'. For example, *Hustler* Magazine has used feminists in their 'Asshole of the Month' feature to discredit them by making them into pornography.²²⁵ This is done, for example, by superimposing these women's heads on the body of a naked, mutilated woman.²²⁶ Applying *Gutnick*, if the internet pornography

²²⁴ *Gutnick* (2000) 210 CLR 575, 608 per Gleeson CJ, McHugh, Gummow and Hayne JJ. Gaudron, Kirby and Callinan JJ were also in the majority, however gave separate judgments.

²²⁵ Catharine A MacKinnon, *Women's Lives Men's Laws* (2005) 534, fn 67.

²²⁶ See, for example, Russell, *Against Pornography: The Evidence of Harm*, above n 52, where she analyses pornography made by *Hustler* of feminist Gloria Steinem. Other feminists who were made into pornography in this way include Peggy Ault, Dorchen

that constitutes the defamation is published in Australia, the woman defamed could seek redress in the Australian courts. This cause of action is most likely to be taken by a woman who, like Gutnick, was an Australian citizen, with a reputation to protect in a particular Australian State.

However, the usefulness of *Gutnick* is questionable with respect to causes of action other than defamation under the ordinance. This is because the issues of jurisdiction in *Gutnick* were connected to the tort of defamation itself, in which the place of ‘publication’ was where the tort occurred, and therefore where the courts had jurisdiction to decide the matter. It is unlikely that the Australian courts would follow *Gutnick* in deciding they had jurisdiction to hear legal matters outside the law of defamation involving an overseas based defendant. It has been suggested that a possible solution could be for Australia to enter into an international treaty regarding the ‘choice of law’ for disputes involving the internet where the parties are located in different jurisdictions.²²⁷ However, such an agreement is unlikely to eventuate given the number of countries that will be required to reach agreement,²²⁸ each of which is likely to want their law to be the applicable forum. In fact, the *Broadcasting Services Act* circumvents these enforcement issues by limiting the scope of what it can enforce to content hosted within Australia. That is, if the ACMA is satisfied that content hosted within Australia is ‘prohibited content’, the ACMA will issue the internet content host with a final take down notice.²²⁹ Whereas, with respect to prohibited content hosted outside Australia, the ACMA has limited, if any, powers of enforcement. The ACMA is limited to

Leidholdt and Andrea Dworkin who unsuccessfully sued *Hustler* magazine for libel. See *Ault v Hustler Magazine Inc* 860 F 2d 877 (9th Cir, 1988); *Leidholdt v L F P Inc* 860 F 2d 890 (9th Cir, 1988); *Dworkin v Hustler Magazine Inc* 867 F 2d 1188 (9th Cir, 1989) cited in MacKinnon, *Women’s Lives Men’s Laws*, *ibid.* MacKinnon summarises the outcome of these cases (at 534, fn 67): ‘All three cases were held legally insufficient before reaching the facts, the courts holding in essence that pornography is unreal, hence not factual in nature, hence protected opinion.’

²²⁷ Garnett, above n 218, 228.

²²⁸ *Ibid.*

²²⁹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 30(1).

referring the content to a law enforcement agency²³⁰ and to notifying the ISP so they can block access to the content.²³¹ It is suggested that such an approach could be taken when enacting the ordinance until Australia is able to reach agreement with other countries with regard to these jurisdictional and enforcement issues.

C Internet Service Provider Liability

A further question that needs to be considered in a discussion of the application of the internet to the ordinance is whether the scope of defendants can extend to ISPs. It has been argued that ISPs are simply 'mail carriers' who provide access to content made by third parties, are generally unaware of the content that they store and deliver,²³² and should not be liable unless they have direct knowledge or participation in illegal activities.²³³ It has been argued that ISPs should not have the burden of inspecting all of the content they host, which for some ISPs could result in having to inspect 'hundreds of thousands of online messages every day.'²³⁴ An example provided by Coroneous is that a large ISP could host up to 80 000 sites which can be changed by the end user without the ISPs knowledge.²³⁵ In addition, once an ISP has inspected content, they may then have to exercise 'editorial judgment', including judgment as to whether content is lawful or not.²³⁶ It has been argued that if ISPs are mistaken in their judgment, they will either contravene the

²³⁰ *Broadcasting Services Act 1992* (Cth) sch 5, cl 40(1)(a).

²³¹ *Broadcasting Services Act 1992* (Cth) sch 5, cl 40(1)(b), (c).

²³² Peter Coroneous, 'Internet Content Control in Australia: Attempting the Impossible?' (2000) 6 *University of New South Wales Law Journal* <<http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/UNSWLJ/2000/6.html?query=internet%20content%20control%20in%20australia%20attempting%20the%20impossible>> at 12 July 2006.

²³³ Ibid. See also Philip Argy, 'Internet Content Regulation: An Australian Computer Society Perspective' (2000) 3 *University of New South Wales Law Journal* <<http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/UNSWLJ/2000/3.html?query=internet%20content%20regulation>> at 12 July 2006.

²³⁴ Robert Hamilton, '1998 Symposium: Constitutional Issues Involving Use of the Internet: Liability for Third-Party Content on the Internet' [Summer 1998] 8 *Seton Hall Constitutional Law Journal* 733, 739. See also Coroneous, above n 232.

²³⁵ Coroneous, above n 232.

²³⁶ Ibid. See also Hamilton, above n 234, 739.

law by hosting illegal content, or be liable to their customers for wrongfully removing material from the internet.²³⁷ It has been argued that this will result in ISPs having to divert their resources away from their main purpose, which is to host internet content, and will force ISPs to acquire new skills such as ‘the ability to review content’, resulting in administrative burdens and increased costs.²³⁸

An analogy between the ISPs of today can be made with the booksellers of yesterday who have claimed to be unaware of the content of the all the books they are selling, given that the contents are created by third party authors.²³⁹ This was a concern raised by booksellers who testified at the civil rights hearings.²⁴⁰ MacKinnon commented in response that pornography is just as harmful, regardless of whether it is purchased from a grocery store or a bookstore.²⁴¹ In addition, ISPs are the facilitators for the mass dissemination and distribution of pornography and sexual inequality. It therefore follows that ISPs should be required to take some responsibility for the content that they host. Arguably ISPs are the modern day distributors and exhibitors of pornography – an important role in the prolific distribution of pornography that is contemplated under the ordinance. If it was not for ISPs, pornography would not be able to be distributed via the internet at all. In addition, ISPs may argue that the application of liability under the ordinance would create financial hardship, but this is simply the same argument that pornographers would raise about the applicability of the ordinance to them, and this is the very point of the ordinance – to hit the pornographers where it hurts - financially. For women to achieve true empowerment pursuant to the ordinance, and for the ordinance to achieve a true educative effect in the modern world, the ordinance must be amended to apply to ISPs.

²³⁷ Coroneous, above n 232.

²³⁸ Brendan Scott, ‘Silver Bullets and Golden Egged Geese: A Cold Look at Internet Censorship’ (2000) 23(1) *University of New South Wales Law Journal* 215, 217.

²³⁹ Hamilton, above n 234, 742.

²⁴⁰ See, for example, the testimony of Jane Strauss at the Minneapolis Hearings in MacKinnon & Dworkin, *In Harm’s Way: The Pornography Civil Rights Hearings*, above n 48, 77.

²⁴¹ *Ibid* 79.

VI CONCLUSION

Given the nature of the internet as a means of mass communication of pornography and inequality, the ordinance is more applicable and relevant than ever before. The extent of violent and degrading pornography which is readily available on the internet makes the need for reform an urgent one. However, the global nature of the internet raises problems of jurisdiction, in relation to the forum for legal proceedings, the applicable law and enforcement, particularly against overseas based defendants. These difficulties did not stop legislators from attempting to regulate internet pornography in the form of Schedule 5 to the *Broadcasting Services Act* and should not stop legislators from adopting the ordinance, which can specifically address the harms of pornography and empower women to take action against those harms.