

PORNOGRAPHY AND AUSTRALIA'S SEX DISCRIMINATION LEGISLATION: A CALL FOR A MORE EFFECTIVE APPROACH TO THE REGULATION OF SEXUAL INEQUALITY

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I ABSTRACT

In the case of Horne & Anor v Press Clough Joint Venture & Anor ('Horne'),¹ the Western Australian Equal Opportunity Commission recognised that the prolific display of pornography in a male dominated workplace amounted to sex discrimination and victimisation by the women's employer and trade union. The case is an example of how a sex discrimination approach to the regulation of pornographic harm allows women to take action against the discrimination pornography causes, while educating the public against discriminatory behaviour that, like pornography, is gender-based. This paper argues that these objectives can be further enhanced if the anti-pornography civil rights ordinances, drafted by American Law Professor Catharine A. MacKinnon and feminist writer Andrea Dworkin, are enacted into Australian law by way of amendment to existing sex discrimination legislation. As well as specifically recognising pornography as central to maintaining women's inequality in society, the ordinance provides a greater range of remedies to women harmed by pornography. These remedies allow women, such as the women in Horne, to obtain damages from those responsible for forcing pornography upon them, as well as their employers and trade unions. The ordinance also enables women to sue the makers and distributors of pornography, as well as to obtain injunctive relief to require the removal of pornography in the workplace.

II INTRODUCTION

Writing about the harms of pornography is a difficult business. The response by those who promote pornography as an issue of free speech is often: "what harm?"²

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¹ (1994) EOC 92-556, 77 057.

² See for example, Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (New York: Scribner, 1995) 183-184 where Strossen argues that pornography does not cause any provable harm. See also Philip D Harvey, *The Government vs. Erotica: The Siege of Adam and Eve* (New York: Prometheus, 2001), 'Ch 2: Is Pornography Harmful?' 36.

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Others tend to express an “if it offends you, don’t look at it” attitude towards it,³ whilst others see pornography as something that corrupts society’s moral fibre.⁴ These views ignore the extensive scientific⁵ and

³ See for example ‘Wantingseed’ web page, Jordan, *Strange World* (2003) Wantingseed <<http://wantingseed.com/sprout/2003/08/07/strange-world>> at 29 March 2006. This is a discussion web page, where a contributor named ‘Jordan’ stated:

“I’d love to say: grow up. Go away, and if it offends you, don’t look at it. There’s all sorts of things on the web that offend me, so if I find one, I *don’t go back*. I’m not sure what’s so difficult about that. I would understand if the situation were for something along the lines of child porn, or some illegal activities, but when we receive complaints for people swearing or just being ‘not nice’ to other people, that’s a little much. Get over it people. If you don’t like it, don’t go back. Welcome to the wonderful world of online freedom.”

⁴ This morality approach is the one adopted in Australia through legislation such as the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) in which publications are measured against ‘standards of morality, decency and propriety generally accepted by reasonable adults’. See for example the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 11(a). These standards also apply to the regulation of internet content under the *Broadcasting Services Act 1992* (Cth).

A regulatory approach premised upon ‘censorship’ or ‘morality’ was more traditionally referred to as ‘obscenity’. ‘Obscenity’ has its origins in the criminal law and concerns the suppression of materials which are deemed to be indecent or obscene in accordance with prevailing community standards. ‘Censorship’ is a subset of obscenity which usually does not involve the criminal law. Its foundations are in obscenity. Censorship involves a Censorship Board categorising materials in accordance with their level of offensiveness in accordance with prevailing community standards. Both censorship and obscenity involve a judgment being made about what is acceptable for reading or viewing in accordance with community standards. Both involve the suppression of materials deemed to be harmful to both the individual and society’s moral fibre.

For an example of the regulation of pornography through the criminal law (obscenity) see the Canadian Supreme Court cases of *R v Butler* (1992) 1 SCR 452 (*Butler*) and *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR 1120 (*Little Sisters Book and Art Emporium*). Both cases considered the interpretation of the definition of ‘obscenity’ in the Canadian Criminal Code. In both cases, the Canadian Supreme Court adopted a progressive approach to the interpretation of the obscenity provisions of the criminal code. For example, the Canadian Supreme Court in *Butler* rejected the idea that pornography is morally harmful, and instead recognised that pornography is harmful to women’s equality and equal participation in society. Whilst the court’s approach was, as previously stated, a progressive one, the court was confined by having to interpret the definition of obscenity in the Criminal Code which has its foundations in morality.

⁵ It is not the purpose of this paper to provide a detailed analysis of every study investigating the effects of exposure to pornography. The findings of these studies have been summarised by others. See for example Russell, Diana E H., *Against Pornography: The Evidence of Harm* (Berkeley; Russell Publications, 1993) and Edna F Einsiedel, “The Experimental Research Evidence: Effects of Pornography on the “Average Individual” in Catherine Itzin (ed), *Pornography: Women, Violence and Civil Liberties A Radical New View* (Oxford: Oxford University Press, 1992). See Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2003). Kendall (at 7-8) summarises “the literally thousands of

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empirical studies on this subject” relied upon by the Women’s Legal Education and Action Fund (“LEAF”) in the Factum it filed as an Intervener in *R v Butler*. Kendall quotes LEAF (at 7):

“LEAF, summarizing the groundbreaking work of experimental psychologists, noted that ‘when explicit sex and express violence against women are combined, particularly when rape is portrayed as pleasurable or positive for the victim, the risk of violence against women is known to increase as a result of exposure.’”

Kendall (footnote 34 of chapter 1) cites the following authorities relied upon by LEAF as evidence for this quotation:

“...E. Donnerstein, “Pornography: Its Effect on Violence against Women,” in N. Malamuth and E. Donnerstein, eds., *Pornography and Sexual Aggression* (New York:Academic Press, 1984), 53; N. Malamuth and L. Berkowitz, “Victim Reaction in Aggressive Erotic Films as a Factor in Violence against Women” (1981) 41 *Journal of Personality and Social Psychology* 710; N. Malamuth and J.V.P Check, “The Effects of Mass Media Exposure on Acceptance of Violence Against Women:A Field Experiment” (1981) *Journal of Research in Personality* 436; N Malamuth, “Factors Associated with Rape as Predictors of Laboratory Aggression against Women” (1983) 45 *Journal of Personality and Social Psychology* 432; N. Malamuth and J.V.P Check, “Aggressive Pornography and Beliefs in Rape Myths: Individual Differences” (1985) 19 *Journal of Research in Personality* 299; M. McManus, *Introduction to Report of Attorney General’s Commission on Pornography* (Nashville: Rutledge Hill Press, 1986), xviii; N. Malamuth and J.V.P.Check, “Penile Tumescence and Perceptual Responses to Rape as a Function of the Victim’s Perceived Reactions” (1980) 10 *Journal of Applied Social Psychology* 528; and D. Linz and J. Bryant, “Effects of Massive Exposure to Pornography,” in N. Malamuth and E Donnerstein, eds., *Pornography and Sexual Aggression* (New York:Academic Press, 1984), 115.”

See Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2003). Kendall (at 7) also quotes LEAF (at para 45) in relation to research on non-violent materials, “Referring to non-violent materials - that is, those that degrade and dehumanize women - the evidence demonstrates clearly that these materials also increase self-reported sexually aggressive behaviour.” Kendall (footnote 31 of chapter 1) cites the following authorities relied upon by LEAF as evidence for this quotation:

“J.V.P Check and TH Guloien, “Reported Proclivity for Coercive Sex Following Repeated Exposure to Sexually Violent Pornography, Nonviolent Dehumanizing Pornography and Erotica,” in D. Zillman and J. Bryant, eds., *Pornography: Research Advances and Policy Considerations* (Hillsdale, New Jersey; Erlbaum, 1989); D. Zillman and J. Bryant, “Effects of Massive Exposure to Pornography,” in N. Malamuth and E. Donnerstein eds., *Pornography and Sexual Aggression* (New York; Academic Press, 1984), 115; J.V.P.Check and N. Malamuth, “Pornography and Sexual Aggression:A Social Learning Theory Analysis” (1986) 9 *Communication Yearbook* 181; D. Zillman and J.B.Weaver, “Pornography and Men’s Sexual Callousness Toward Women,” in D. Zillman and J. Bryant, eds., *Pornography: Research Advances and Policy Considerations* (Hillsdale, New Jersey; Erlbaum, 1989), 45; D.E.H. Russell, “Pornography and Rape: A Causal Model” (1989) 9 *Political Psychology* 41; D. Zillman and J. Bryant, “Effects of Prolonged Consumption of Pornography on Family Values” (1988) *A Journal of Family Issues* 518; J.G. Buchman, “Effects of Nonviolent Adult Erotica on Sexual Child Abuse Attitudes” (paper presented at meeting of the American Psychological Association, Boston, August 1990).”

See also: Edna F Einsiedel, “The Experimental Research Evidence: Effects of Pornography on the “Average Individual” in Catherine Itzin (ed), *Pornography:*

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anecdotal evidence⁶ that pornography causes very real harm to women's equality interests;⁷ harm to the women used in the making and

Women, Violence and Civil Liberties A Radical New View (Oxford: Oxford University Press, 1992), 265-266 who summarised the findings of researchers as follows:

"In evaluating the results for sexually violent material, it appears that exposure to such materials (1) leads to a greater acceptance of rape myths and violence against women; (2) has more pronounced effects when the victim is shown enjoying the use of force or violence; (3) is arousing for rapists and for some males in the general population; and (4) has resulted in sexual aggression against women in the laboratory."

Diana EH Russell, *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993), 149-150, also summarises the research on the causal relationship between pornography and harm as follows:

- A high percentage of non-incarcerated rapists and child molesters have said that they have been incited by pornography to commit crimes;
- Pre-selected normal healthy male students say they are more likely to rape a woman after just one exposure to violent pornography;
- A high percentage of male junior high school students, high school students, and adults in a non-laboratory survey report imitating X-rated movies within a few days of exposure;
- Hundreds of women have testified in public about how they have been victimised by pornography;
- Ten percent of a probability sample of 930 women in San Francisco and 25% of female subjects in an experiment on pornography in Canada reported having been upset by requests to enact pornography;
- Many prostitutes report that they have experienced pornography related sexual assault;
- The laws of social learning must surely apply to pornography at least as much as the mass media in general. Indeed, I - and others - have argued that sexual arousal and orgasm are likely to serve as unusually potent reinforcers of the messages conveyed by pornography;
- A large body of experimental research has shown that the viewing of violent pornography results in higher rates of aggression against women by male subjects.

⁶ Dozens of women gave evidence at the civil rights hearings about the role pornography played in their physical and sexual abuse in the home by fathers, brothers and other family members and family friends, and by strangers. Women also testified about how they were coerced and forced to perform in pornography against their wills and the role pornography played in workplace discrimination and harassment. See generally Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1987) for the transcripts of these testimonies.

⁷ MacKinnon and Dworkin, above n6, argue that pornography is a principal means of maintaining inequality in society, by sexualising women's unequal position in society. Pornography constructs a gendered hierarchy between men and women with men at the top and women at the bottom. The hierarchy constructs men as dominant and women as inferior, with women shown to exist solely for the sexual pleasure of men. Men are active, women are passive. Men act upon, and use women for sexual pleasure. Women are shown to enjoy being used for male sexual pleasure. Women's perceived enjoyment of their objectification and humiliation creates the belief in the viewer of pornography that this inequality is natural and normal. See Catharine A MacKinnon 'Pornography as Defamation and Discrimination' (1991) 71 *Boston*

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production of pornography;⁸ and harm to those forced to view it or to perform the acts seen in it while sexually abused by family members at

University Law Review 793, 802, where MacKinnon argues that it is this inequality that makes pornography sexy:

“Inequality between men and women is what is sexy about pornography – the more unequal the sexier. In other words, pornography makes sexuality into a key dynamic in gender inequality by viscerally defining gender through the experience of hierarchical sexuality. On the way, it exploits inequalities of race, class, age, religion, sexual identity and disability by sexualising them through gender.”

Often, pornography shows men to have the power of sexual violence, which is then inflicted on women. Dworkin identifies the sexualisation of violence as part of the hierarchy that promotes inequality between men and women in society and which also promotes sexual abuse. See Andrea Dworkin, ‘Against the Male Flood: Censorship, Pornography and Equality’ (1985) 8 *Harvard Women’s Law Journal* 1, 9 who states that:

“The insult pornography offers, invariably, to sex is accomplished in the active subordination of women: the creation of a sexual dynamic in which the putting down of women, the suppression of women, and ultimately the brutalization of women is what sex is taken to be. ... Pornography ... crushes a whole class of people through violence and subjugation: and sex is the vehicle that does the crushing. ... Pornography, unlike obscenity, is a discrete, identifiable system of sexual exploitation that hurts women as a class by creating inequality and abuse.”

MacKinnon and Dworkin, above n6, argue that through the use of gender, pornography sexualises inequality. Subordination of women in a sexual context is carried through to a social context. Through hierarchy, pornography tells lies about women and their place in society. The sexualisation of women’s submission in pornography is then carried through to society’s perceptions about women. See Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Boston: Harvard University Press, 1989) 197, who states that:

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

⁸ See for example, Linda Marchiano (known in pornography as Linda Lovelace) who is famous for the pornographic film *Deep Throat* (1972). In her book *Ordeal* Ms Marchiano gave graphic details of how she was coerced into pornography by Chuck Traynor, her husband and pimp, and of the immense psychological and physical harm she suffered as a result: Linda Lovelace, *Ordeal* (New Jersey: Citadel Press, 1980). See also the Testimony of Linda Marchiano at the Minneapolis Hearings quoted in MacKinnon and Dworkin, above n 6, 61 and Gloria Steinem, ‘The Real Linda Lovelace’ in Diana EH Russell (ed), *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993) 23.

In addition, many women are forced to perform in pornography by abusive partners and family members. See, for example, the Testimony of Lierre Keith at the Massachusetts Hearings quoted in MacKinnon and Dworkin, above n 6, 400 as follows:

“My brother started sexually abusing me when I was 4 or 5 and pornography was a part of the abuse. To be specific, he would describe a certain pose that he had seen in Playboy or Penthouse, and he’d make me do it. Often he would compare

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home⁹ or by strangers.¹⁰ Many women, when confronted with pornography, feel uncomfortable, embarrassed or humiliated, yet are often not able to identify why pornography has this affect on them. Inequality, a source of silencing, does this to people. It stops us speaking when words are needed but left unsaid.

The sexual harassment and victimisation provisions of Australia's federal and state sex discrimination legislation have been held to prohibit the

my body to the pictures in a very detailed and graphic and humiliating way. He also became obsessed with a feature they have in Hustler. He told me it was called The Beaver Hunt, and men could send in photographs of their wives and their girlfriends... He thought that this was the greatest thing, that he could be a pornographer too, so he made me pose for The Beaver Hunt and took pictures."

- ⁹ See for example, Katherine Brady, 'Testimony on Pornography and Incest' in Diana EH Russell (ed), *Making Violence Sexy: Feminist Views on Pornography* (New York: Teachers College Press, 1993) 43-44 who testified of her abuse at the hands of her father:

"My father incestuously abused me for a period of 10 years, from the time I was 8 years old until I was 18. ... During the early stages of the molestation, my father used pornographic materials as a way of coercing me into having sex with him. ... My father used pornography for several purposes. First of all, he used it as a teaching tool - as a way of instructing me about sex and about what he wanted me to do with him. When he showed me the pictures, he would describe the acts in detail: 'This is fellatio', 'this is what you do with intercourse,' and so forth. Second, my father used the pictures to justify his abuse and to convince me that what we were doing was normal. The idea was that if men were doing it to women in the pictures, then it was OK for him to do it to me. Finally, he used the pornography to break down my resistance. The pornography made the statement that females are nothing more than objects for men's sexual gratification. How could I refuse my father when the pornography showed me that sex is what women and girls are for?"

- ¹⁰ See for example the American case of the *State v Herberg* 324 NW 2d 346, 347 (Minn. 1982) discussed in Edith L Pacillo, 'Note: Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography' (1994) 28 *Suffolk University Law Review* 123, which is a record of an horrific sexual assault and torture in which the perpetrator acted out content in several pornographic books including 'Violent Stories of Kinky Humiliation', 'Violent Stories of Dominance and Submission', 'Bizarre Sex Crimes', 'Shamed Victims' and 'Watersports Fetish: Enemas and Golden Showers'. Pacillo summarises the case as follows at page 123:

"On July 17, 1981, David Herberg forced a 14-year-old girl into his car, tied her hands with his belt, and pushed her to the floor. With his knife, he cut her clothes off, then inserted the knife into her vagina, cutting her. After driving a short distance, he forced the girl to remove his clothing, stick a safety pin into the nipple of her own breast, and ask him to hit her. He then orally and anally raped the girl. He made her burn her own flesh with a cigarette, defecated and urinated in her face, and compelled her to eat the excrement and to drink her own urine from a cup. He strangled her to the point of unconsciousness, cut her body several times, then returned her to the place where he had abducted her. In reviewing Herberg's criminal appeal, the Supreme Court of Minnesota noted that when Herberg committed these acts, he was 'giving life to some stories he had read in various pornographic books'. Officials seized these books from him during his arrest."

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display of pornography and the forcing of it on women¹¹ in their workplaces.¹² This recognition that pornography is a form of sexual harassment and victimisation is an important step forward and does much to recognise the primary harm of pornography: sexual inequality. However, the objectives of Australia's federal and state anti-discrimination legislation (in particular, the objective 'to promote recognition and acceptance within the community of the principle of

¹¹ This paper will not discuss the gender-based harms inflicted on some men, particularly gay men, and lesbian women, as a result of the production and distribution of same-sex pornography, although the writer supports the work of those who have argued this point elsewhere. See, in particular, the works of Kendall, above n 5; 'Gay Male Pornography and Sexual Violence: A Sex Equality Perspective on Gay Male Rape and Partner Abuse' (2004) 49 *McGill Law Journal* 877-923; 'Educating Gay Male Youth: Since When is Pornography a Path towards Self-Respect?' (2004) 43 (3 & 4) *Journal of Homosexuality* 83-128; 'Gay Male Liberation Post Oncale: Since When is Sexualized Violence Our Path to Equality?' in Catherine A MacKinnon and R B Siegel (eds), *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004) 201-221; 'Gay Male Pornography/Gay Male Community: Power Without Consent, Mimicry Without Subversion' in J Kuypers, *Men and Power* (Halifax: Fernwood Press, 1999); 'Gay Male Pornography after Little Sisters Book and Art Emporium: A Call for Gay Male Cooperation in the Struggle for Sex Equality' (1997) 12 *Wisconsin Women's Law Journal* 21-82; 'Gay Male Pornography and the Sexualization of Masculine Identity' in L Lederer and R Delgado (eds), *The Price We Pay: The Case Against Racist Speech, Hate Propaganda and Pornography* (New York: Farrar, Strauss & Giroux, 1995) 102-122; 'Gay Male Pornography and the Pursuit of Masculinity' (1993) 57 *Saskatchewan Law Review* 21-58. On the harms of lesbian pornography, see Sheila Jeffreys, *The Lesbian Heresy* (Melbourne: Spinifex Press, 1993); Irene Reti (ed), *Unleashing Feminism: Critiquing Lesbian Sadomasochism in the Gay Nineties* (Santa Cruz: Her Books, 1993); Sarah Lucia Hoagland, 'Sadism, Masochism and Lesbian-Feminism' in Robin Ruth Linden et al (eds), *Against Sadomasochism: A Radical Feminist Analysis* (San Francisco: Frog in the Well, 1982); Rose Mason, Darleen Pagano and Karen Sims 'Racism and Sadomasochism: A Conversation with Two Black Lesbians' in Robin Ruth Linden (ed), *Against Sadomasochism: A Radical Feminist Analysis* (San Francisco: Frog in the Well, 1982) 99-105. See also the analysis offered by the intervener Equality Now, in the case of *Little Sisters Book and Art Emporium*, Supreme Court of Canada, dated 3 September 1999, available from the Supreme Court of Canada, Ottawa, Canada.

¹² In addition to the case of *Horne*, which will be discussed in detail below, see for example *Thompson v Courier Newspaper Pty Ltd* (2005) EOC 93-382, a decision of the New South Wales Administrative Decisions Tribunal ('*the Tribunal*') delivered 7 March 2005. The complainant, Thompson, worked as a graphic artist for Courier Newspaper Pty Ltd. This case involved several incidences of sex discrimination, sexual harassment and victimisation, and the complainant eventually being dismissed from her job. One such incident was that the complainant had been exposed to pornography in the workplace. The Tribunal stated at para 74204:

"When another employee was moved to the afternoon shift and sat behind her [the complainant], she began seeing pornographic pictures of female anatomy on his computer screen. Her work required her to turn around in his direction to answer the telephone or collect work. At other times she witnessed groups of male employees looking at pictures on a computer screen. When she complained about this, no action was taken and the preoccupation of the other employees meant that her workload increased."

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equality of men and women')¹³ would be better promoted by amending current anti-discrimination legislation to incorporate specific provisions aimed at stopping the production and distribution of pornography. This could be achieved by adopting an approach to pornographic harm first articulated in a series of civil rights ordinances drafted by Law Professor Catharine A. MacKinnon and feminist writer Andrea Dworkin - legislation that specifically recognises pornography as an issue of sex discrimination and a means of promoting and maintaining sexual inequality in society.¹⁴ If adopted into Australian law, such an approach would not only permit women harmed by pornography to access a greater range of remedies, but would also play a broader role in correcting many of the misconceptions and mis-statements about pornography's systemic effects.

This paper will outline Australia's state and federal sex discrimination legislation - specifically, those legislative provisions pertaining to sexual

The Tribunal found at para 74205 that the complainant's employer had insufficient restrictions on employees internet access to such an extent that employees could download pornography onto their computer screens. The complainant was awarded damages of \$6,825 in total, including \$1,300 for exposure to pornography.

See also *Wilkinson v Buchan & Abre Pty Ltd* (2003) EOC 93-290 a decision of the Queensland Anti-Discrimination Tribunal ('*the Tribunal*') delivered 16 July 2003. The Tribunal awarded the complainant general damages of \$20,000, together with an order that the perpetrator provide the complainant with a written apology. The complainant worked as a property manager for a real estate agent. The Tribunal found that she has been subjected to sexual harassment by her manager who showed her pornography and made sexual insinuations. This conduct increased over time, and culminated in the complainant's manager assaulting her at a house inspection, which she reported to the police. The manager was charged with, and pleaded guilty to, 2 counts of indecent assault.

See also the United States cases of *Robinson v Jacksonville Shipyards, Inc.* 760 F. Supp. 1486 (MD Fla., 1991) ('*Robinson*') and *Johnson v County of L.A. Fire Department* 865 F. Supp. 1430, 1435-42 (1994) extracted in C MacKinnon, *Sex Equality* (New York: Foundation Press, 2001) 1621, 1641. In these cases the display of pornography in male dominated workplaces was held to constitute sexual harassment.

¹³ *Sex Discrimination Act 1984* (Cth) s 3(d). See also the legislation of the States and Territories: *Equal Opportunity Act 1984* (WA) s 3(c); *Discrimination Act 1991* (ACT) s 4(c); *Anti-Discrimination Act* (NT) s 3(a); *Anti-Discrimination Act 1991* (Qld) s 6(1); *Equal Opportunity Act 1995* (Vic) s 3(a). The following legislation does not expressly state any objects: *Equal Opportunity Act 1984* (SA), and *Anti-Discrimination Act 1998* (Tas). The following legislation has limited objects in relation to employment: *Anti-Discrimination Act 1977* (NSW) s 122C.

¹⁴ See Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997) 426-461 for the Minneapolis, Indianapolis and Massachusetts civil rights ordinances. Reference to the 'ordinance' in this paper is a reference to Catharine A MacKinnon and Andrea Dworkin, 'Model Antipornography Civil Rights Ordinance' in Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis: Organizing Against Pornography, 1988) Appendix D.

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harassment and victimisation. It will then outline the civil rights ordinance drafted by MacKinnon and Dworkin which specifically recognises pornography as an issue of sex discrimination. In order to demonstrate why the ordinance should be adopted into Australian sex discrimination legislation, this paper will use the case of *Horne* as a study to demonstrate how the ordinance could be applied. This will show that whilst equal opportunity legislation did provide a remedy for the women in *Horne*, the ordinance's approach to pornographic harm would be more effective in addressing sex discrimination and victimisation caused by the pornography now widely available in Australia.

III CURRENT LEGISLATIVE PROVISIONS REGARDING SEX DISCRIMINATION AND HARASSMENT

The Commonwealth *Sex Discrimination Act*¹⁵ came into operation on 1 August 1984¹⁶ as part of Australia's response to the *Convention on the Elimination of All Forms of Discrimination Against Women*,¹⁷ signed by Australia on 17 July 1980 and ratified on 28 July 1983.¹⁸ The federal Human Rights and Equal Opportunity Commission is responsible for administering and overseeing the Act,¹⁹ together with other federal anti-

¹⁵ *Sex Discrimination Act 1984* (Cth).

¹⁶ *Sex Discrimination Act 1984* (Cth) notes.

¹⁷ *Sex Discrimination Act 1984* (Cth) s 3(a).

¹⁸ See United Nations Inter-Agency Network on Women and Gender Equality, *Division for the Advancement of Women: CEDAW - States Parties* (2006) Women Watch: Information and Resources on Gender Equality and Empowerment of Women <<http://www.un.org/womenwatch/daw/cedaw/states.htm>> at 1 March 2006 which confirms the dates of signing and ratification of the States Parties to the Convention. When Australia ratified the Convention, it did so subject to a Declaration and Reservations.

These can be viewed within the same web page at United Nations Inter-Agency Network on Women and Gender Equality, *Division for the Advancement of Women: CEDAW - Declarations, Reservations and Objections to CEDAW* (2006) Women Watch: Information and Resources on Gender Equality and Empowerment of Women <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>> at 1 March 2006 accessed at 1 March 2006. See also United Nations Inter-Agency Network on Women and Gender Equality, *Division for the Advancement of Women: Directory of UN Resources on Gender and Women's Issues* (2006) Women Watch: Information and Resources on Gender Equality and Empowerment of Women <<http://www.un.org/womenwatch/asp/user/list.asp?ParentID=10360>> at 1 March 2006 to access the *Convention on the Elimination of all forms of Discrimination Against Women* and *Optional Protocol to the Convention*. Australia is not a party to the Optional Protocol.

¹⁹ The Human Rights and Equal Opportunity Commission is established by s 7(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). Section 11(1) outlines the functions of the Commission which include 'such functions as are

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discrimination legislation.²⁰ The Act makes discrimination on the ground of sex,²¹ marital status,²² pregnancy or potential pregnancy,²³ and family responsibility²⁴ unlawful in areas such as employment,²⁵ education,²⁶ accommodation²⁷ and in the provision of goods, services and facilities.²⁸

In a similar manner, the Act also deems sexual harassment²⁹ to be unlawful. Specifically, s 28A defines 'sexual harassment' as follows:

- (1) For the purposes of this Division, a person sexually harasses another person (the *person harassed*) if:

conferred on the Commission by the ... *Sex Discrimination Act 1984*...

20 The Human Rights and Equal Opportunity Commission is also responsible for overseeing and administering the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1975* (Cth), *Racial Discrimination Act 1975* (Cth), and the *Human Rights and Equal Opportunity Commission Act 1986* (Cth): See s 11(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). Note also s 209 of the *Native Title Act 1993* (Cth) also requires the Aboriginal and Torres Strait Island Social Justice Commissioner, established under s 46B of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), to prepare and submit a report to the Commonwealth Minister responsible for the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (see s 253 of the *Native Title Act 1993* (Cth) which defines the relevant Minister responsible), on the effect of the *Native Title Act 1993* (Cth) on the 'exercise and enjoyment of Human rights of Aboriginal peoples and Torres Straight Islanders'. The Human Rights and Equal Opportunity Commissioner can also refer a complaint, under s 46PW of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), that a person has done a 'discriminatory act under an industrial instrument', to the Industrial Relations Commission. The Industrial Relations Commission must then convene a hearing to review the award under s 554(2) of the *Workplace Relations Act 1996* (Cth), in which the Sex Discrimination Commissioner may intervene in the proceedings: *Workplace Relations Act 1996* (Cth) s 554(3)(b). A 'discriminatory act under an industrial instrument' is defined in s 46PW(7) as 'an act that would be unlawful under Part II of the *Sex Discrimination Act 1984* (Cth) except for the fact that the act was done in direct compliance with an industrial instrument'. Part II of the *Sex Discrimination Act 1984* (Cth) is named 'prohibition of discrimination' and makes sexual harassment, discrimination in work and other specified areas unlawful. 'Industrial instrument' is defined by s 46PW(7) to include a collective agreement, award, transitional award, and other types of agreements under the *Workplace Relations Act 1996* (Cth).

21 *Sex Discrimination Act 1984* (Cth) s 5.

22 *Sex Discrimination Act 1984* (Cth) s 6.

23 *Sex Discrimination Act 1984* (Cth) s 7. For a definition of 'potential pregnancy' see s 4B which defines potential pregnancy to include 'the fact that the woman is or may be capable of bearing children ... has expressed a desire to become pregnant ... is likely, or is perceived to be likely, to become pregnant'.

24 *Sex Discrimination Act 1984* (Cth) s 7A. For a definition of 'family responsibilities' see s 4A which states family responsibilities to include the responsibilities of an employee to 'care for or support' a child or 'any other immediate family member'.

25 *Sex Discrimination Act 1984* (Cth) s 14.

26 *Sex Discrimination Act 1984* (Cth) s 21.

27 *Sex Discrimination Act 1984* (Cth) s 23.

28 *Sex Discrimination Act 1984* (Cth) s 22.

29 *Sex Discrimination Act 1984* (Cth) s 28A.

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- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

(2) In this section:
conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

The Act contains specific provisions which make sexual harassment unlawful. These include: sexual harassment in employment,³⁰ education,³¹ accommodation³² and the provision of goods, services and facilities.³³ Specifically, s 28B makes sexual harassment in employment unlawful. Section 28B(1) provides that it is unlawful for a person to sexually harass one of their employees, or a person seeking to become an employee. It is also unlawful, under s 28B(2), for an employee to sexually harass another employee, or a person seeking employment with the same employer.

Victimisation³⁴ is also unlawful under the *Sex Discrimination Act* and attracts a penalty of \$2500 or 3 months imprisonment for a natural person, or a penalty of \$10 000 for a body corporate.³⁵ Victimisation occurs if a person 'subjects or threatens to subject' another 'person to any detriment' on several specified grounds, including that the other person: has made, or may make a complaint, under the Act;³⁶ is a witness to proceedings under the Act or the *Human Rights and Equal Opportunity Commission Act 1986* (Cth);³⁷ or has made an allegation of unlawful behaviour under Part 2 of the Act,³⁸ which deals with sex discrimination and sexual harassment.

In addition to federal anti-discrimination legislation, the respective states and territories have also enacted legislation prohibiting discrimination on the ground of sex. This legislation includes the *Anti-Discrimination Act 1977* (NSW), *Discrimination Act 1991* (ACT), *Anti-Discrimination Act* (NT), *Anti-Discrimination Act 1991* (Qld), *Equal Opportunity Act 1984* (SA), *Anti-Discrimination Act 1998* (Tas), *Equal Opportunity Act 1985* (Vic) and the *Equal Opportunity Act 1984* (WA). Subject to some

³⁰ *Sex Discrimination Act 1984* (Cth) s 28B.

³¹ *Sex Discrimination Act 1984* (Cth) s 28E.

³² *Sex Discrimination Act 1984* (Cth) s 28H.

³³ *Sex Discrimination Act 1984* (Cth) s 28G.

³⁴ *Sex Discrimination Act 1984* (Cth) s 94.

³⁵ *Sex Discrimination Act 1984* (Cth) s 94(1).

³⁶ *Sex Discrimination Act 1984* (Cth) s 94(2)(a).

³⁷ *Sex Discrimination Act 1984* (Cth) s 94(2)(e).

³⁸ *Sex Discrimination Act 1984* (Cth) s 94(2)(g).

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statutory exceptions, a person wanting to lodge a complaint may do so under the Commonwealth *Sex Discrimination Act* or under the legislation in their state.³⁹ For example, a complaint of sexual harassment by a Commonwealth body authority or employee should be made under the Commonwealth Act⁴⁰ whereas a claim of victimisation can be made under either state or federal legislation.⁴¹

The state legislation contains similar provisions regarding sex discrimination⁴² and sexual harassment.⁴³ For example, Division 2 of

³⁹ *Sex Discrimination Act 1984* (Cth) s 9(2) provides that subject to some exceptions, 'this Act applies throughout Australia'. Furthermore, s 9(3) provides that the Act also applies to 'acts done within a Territory'. In addition, s 10 named 'Operation of State and Territory Laws' also addresses the issue of jurisdiction. Section 10(3) provides that: 'This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act'. See also s 11(3) which states: 'This Act is not intended to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act'. Bourke and Ronalds comment that such a statement was inserted into the *Sex Discrimination Act 1984* (Cth), together with other Commonwealth Anti-Discrimination statutes, to address the issue of inconsistency in s 109 of the Commonwealth Constitution: Juliet Bourke and Chris Ronalds, 'Discrimination Laws' in James T Macken et al, *The Law of Employment* (Sydney: Lawbook Co, 2002) 593, 601-602. Section 109 provides that a state law will be invalid to the extent that it is inconsistent with a federal law. Section 10(5) expands on the co-existence of the State and Federal legislation, providing that if a person commits an offence that would contravene both state and federal sex discrimination legislation, the person may be prosecuted and convicted under either Act, but not both.

However, a notable exception to a complainant being able to lodge a complaint in either the state or federal jurisdictions is contained in ss 9(5), 9(8) and 9(9). Section 9(5) states that s 28B ('sexual harassment in employment') has effect in relation to Commonwealth employees or persons seeking to become Commonwealth employees. This is expanded on in ss 9(8) and 9(9) which restrict the operation of the sexual harassment provisions contained in div 3 of Part II, to sexual harassment by persons exercising power on behalf of the Commonwealth or a Commonwealth body or authority (*Sex Discrimination Act 1984* (Cth) s 9(8)); or 'by a person who is a Commonwealth employee ... or ... a member of the staff of an educational institution established by a law of the Commonwealth' in *Sex Discrimination Act 1984* (Cth) s 9(9). Consequently, a complainant can only lodge a complaint under the sexual harassment provisions of the *Sex Discrimination Act 1984* (Cth), if the perpetrator of the harassment is a Commonwealth body, authority or employee. If the perpetrator is not a Commonwealth body, authority or employee, they must bring their complaint under state sex discrimination legislation.

⁴⁰ *Sex Discrimination Act 1984* (Cth).

⁴¹ Sections 9, 10 and 11 of the *Sex Discrimination Act 1984* (Cth), discussed above n 23, do not limit the jurisdiction of s 94 which makes victimisation unlawful.

⁴² *Anti-Discrimination Act 1977* (NSW) s 24; *Equal Opportunity Act 1984* (SA) s 29; *Equal Opportunity Act 1984* (WA) s 8; *Discrimination Act 1991* (ACT) ss 7 and 8; *Anti-Discrimination Act* (NT) ss 19 and 20; *Anti-Discrimination Act 1991* (Qld) ss 7 and 8; *Equal Opportunity Act 1995* (Vic) ss 6 and 7; *Anti-Discrimination Act 1998* (Tas) s 16.

⁴³ *Anti-Discrimination Act 1977* (NSW) s 22A; *Equal Opportunity Act 1984* (SA) s 87; *Equal Opportunity Act 1984* (WA) ss 24, 25 and 26; *Discrimination Act 1991* (ACT) s 58; *Anti-Discrimination Act* (NT) s 22; *Anti-Discrimination Act 1991* (Qld) ss 118, 119, 120; *Equal Opportunity Act 1995* (Vic) s 85; *Anti-Discrimination Act 1998* (Tas) s 17.

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Part 4 of the *Equal Opportunity Act 1984* (WA) makes sexual harassment in employment,⁴⁴ education⁴⁵ and accommodation⁴⁶ unlawful. Specifically, s 24, defines sexual harassment in employment as '...an unwelcome sexual advance, or an unwelcome request for sexual favours...or...other unwelcome conduct of a sexual nature...'. To contravene s 24, this conduct must take place in connection with a reasonable belief on the part of the person being harassed that a rejection of the conduct would disadvantage them in connection with their employment or work, or alternately, as a result of the rejection the person objecting to the harassment is disadvantaged in connection with their employment, or work.

In addition, the state and territory legislation contains provisions which make victimisation unlawful.⁴⁷ For example, s 67 of the *Equal Opportunity Act 1984* (WA) makes it unlawful for a person (the 'victimiser') '...to subject, or threaten to subject, another person...to any detriment...' on certain specified grounds. These grounds include that the person being victimised has made, or is going to make a complaint under the Act;⁴⁸ brings, or proposes to bring proceedings against the victimiser;⁴⁹ or otherwise asserts or proposes to assert any of their rights under the Act.⁵⁰

Both federal and state legislation contain vicarious liability provisions, pursuant to which a complainant's employer may be deemed vicariously liable for the actions of their employees. For example, s 106 of the *Sex Discrimination Act 1984* (Cth) provides that an employer will be vicariously liable for an act of their employee or agent that contravenes the act, as if they had also done the act.⁵¹ The employer will be able to escape liability if they can establish that they 'took all reasonable steps

⁴⁴ *Equal Opportunity Act 1984* (WA) s 24.

⁴⁵ *Equal Opportunity Act 1984* (WA) s 25.

⁴⁶ *Equal Opportunity Act 1984* (WA) s 26.

⁴⁷ *Anti-Discrimination Act 1977* (NSW) s 50; *Equal Opportunity Act 1984* (SA) s 86; *Equal Opportunity Act 1984* (WA) s 67; *Anti-Discrimination Act 1991* (NT) s 23; *Anti-Discrimination Act 1991* (Qld) ss 129, 130, 131; *Equal Opportunity Act 1995* (Vic) ss 96, 97; *Anti-Discrimination Act 1998* (Tas) s 18.

Note *Discrimination Act 1991* (ACT) s 68 which is awaiting commencement. This act has recently been amended by the *Human Rights Commission Legislation Amendment Act 2005* (ACT) A2005-41 sch 1 pt 1.2. Section 2(2) of the *Human Rights Commission Legislation Amendment Act 2005* (ACT) provides that the commencement date of these amendments is the day the *Human Rights Commission Act 2005* (ACT) commences. The *Human Rights Commission Act 2005* (ACT) is currently awaiting commencement.

⁴⁸ *Equal Opportunity Act 1984* (WA) s 67(a).

⁴⁹ *Equal Opportunity Act 1984* (WA) s 67(b).

⁵⁰ *Equal Opportunity Act 1984* (WA) s 67(e).

⁵¹ *Sex Discrimination Act 1984* (Cth) s 106(1).

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to prevent the employee or agent from doing [the] acts'.⁵² There are equivalent vicarious liability provisions in state and territory sex discrimination legislation.⁵³

The various state Equal Opportunity Tribunals have numerous remedies available to them under state legislation. For example, s 127 of the *Equal Opportunity Act 1994* (WA) empowers the Western Australian Equal Opportunity Tribunal to dismiss the complaint, or to find the complaint is substantiated.⁵⁴ If the Tribunal finds the complaint is substantiated they can make a number of orders. The Tribunal can order that the respondent pay the complainant up to \$40 000 damages by way of compensation;⁵⁵ order that the respondent refrain from continuing or repeating the unlawful conduct;⁵⁶ order the respondent perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;⁵⁷ order that an agreement or contract that contravenes the act is void;⁵⁸ or decline to take any further action.⁵⁹ The other state legislation has similar provisions.⁶⁰

IV THE CIVIL RIGHTS ORDINANCES: PORNOGRAPHY AS SEX DISCRIMINATION

A Background

In 1983, Catharine A. MacKinnon and Andrea Dworkin were approached by residents of two working class areas of Minneapolis, in the United States, to help them draft a zoning ordinance to stop the distribution of pornography in their neighbourhoods. When MacKinnon and Dworkin were first approached, they were asked to draft a zoning ordinance which would only permit pornography to be sold in other specified low

⁵² *Sex Discrimination Act 1984* (Cth) s 106(2).

⁵³ *Anti-Discrimination Act 1977* (NSW) s 53; *Equal Opportunity Act 1984* (SA) s 91; *Equal Opportunity Act 1984* (WA) s 161; *Anti-Discrimination Act 1991* (NT) s 105; *Anti-Discrimination Act 1991* (Qld) ss 132, 133; *Equal Opportunity Act 1995* (Vic) ss 102 and 103; *Anti-Discrimination Act 1998* (Tas) s 104. Note the *Discrimination Act 1991* (ACT) s 108I, which is awaiting commencement. See above n 47.

⁵⁴ *Equal Opportunity Act 1984* (WA) s 127(a),(b).

⁵⁵ *Equal Opportunity Act 1984* (WA) s 127(b)(i).

⁵⁶ *Equal Opportunity Act 1984* (WA) s 127(b)(ii).

⁵⁷ *Equal Opportunity Act 1984* (WA) s 127(b)(iii).

⁵⁸ *Equal Opportunity Act 1984* (WA) s 127(b)(iv).

⁵⁹ *Equal Opportunity Act 1984* (WA) s 127(b)(v).

⁶⁰ *Anti-Discrimination Act 1977* (NSW) s 108; *Equal Opportunity Act 1984* (SA) s 96; *Equal Opportunity Act 1984* (WA) s 67; *Anti-Discrimination Act* (NT) s 88; *Anti-Discrimination Act 1991* (Qld) s 209; *Equal Opportunity Act 1995* (Vic) s 136; *Anti-Discrimination Act 1998* (Tas) s 89. Note *Discrimination Act 1991* (ACT) s 102 which is awaiting commencement. See above n 47.

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income neighbourhoods.⁶¹ However, MacKinnon and Dworkin suggested that, instead of drafting a zoning ordinance, the ordinance should adopt a sex equality approach. MacKinnon and Dworkin argued that restricting the sale of pornography to certain areas would continue to legitimise pornography, whereas a sex equality approach would allow victims of pornographic abuse and discrimination to obtain redress for those harms. In addition, Mackinnon and Dworkin argued that a civil rights ordinance, as opposed to a zoning ordinance, would allow the victims of pornography to sue the makers and distributors of that pornography, to obtain injunctions to stop the sale and distribution of pornography made of them, and to claim damages.⁶²

The ordinance represented the first attempt to regulate pornography as an issue of sex inequality.⁶³ The Minneapolis ordinance was enacted but was vetoed by the Mayor, Donald M Fraser.⁶⁴ In 1984, Indianapolis passed a similar ordinance as legislation.⁶⁵ It was later held to be unconstitutional as a violation of the right to freedom of speech guaranteed by the US Constitution.⁶⁶ As we do not have such constitutional limitations in Australia, the ordinance could be incorporated as an amendment to Australian equal opportunity legislation, a point addressed in more detail below.

B Outline of Sections of the Ordinance

Section 1, clause 1 of the ordinance recognises pornography as 'a practice of sex discrimination' which has the effect of 'threatening the health, safety, peace, welfare, and equality of citizens in our community.' This is an important statement about what the ordinance is and does. Specifically, the ordinance provides a means of recognising the harms caused by pornography, including maintaining systemic gender inequality and the harms inflicted on women who are forced to perform in pornography, who are sexually assaulted due to pornography or who have pornography forced upon them - for example, in the workplace.

Section 1, clause 2 contains more detail about what pornography is and does. It identifies pornography as 'a systemic practice of exploitation

⁶¹ See generally MacKinnon and Dworkin, above n 14. See also Kendall, above n 5, 183-184 for a summary of the history of the ordinance.

⁶² A copy of the ordinance can be found in MacKinnon and Dworkin, above n 14, Appendix D.

⁶³ MacKinnon and Dworkin, above n 14, 3-7.

⁶⁴ MacKinnon and Dworkin, above n 14, 17.

⁶⁵ See generally, MacKinnon and Dworkin, above n 14, ch 1; See also, Kendall, above n 5, 183-184.

⁶⁶ *American Booksellers Association v Hadnut* 771 F.2d 323 (7th Cir. 1985) in MacKinnon and Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (1997) above n 14, 462-482.

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and subordination based on sex that differentially harms and disadvantages women.’ It also lists, in some detail, the harms of pornography. These include physical harms such as rape and sexual abuse, as well as psychological harms such as ‘psychic assault’. The harms listed also include lessening women’s ability to participate in society as equal citizens by diminishing ‘opportunities for equal rights in employment, education, property, public accommodations and public services’ and exposing those forced to perform in pornography to ‘contempt, ridicule, hatred, humiliation and embarrassment’.

Section 2, clause 1 contains a detailed definition of pornography which defines pornography as ‘the sexually explicit subordination of women through pictures and/or words’ which includes one or more of the characteristics listed in sub-paragraphs (a) through to (h). Although the definition of pornography in s 2, clause 1 specifically refers to women, clause 2 provides that ‘the use of men, children, or transsexuals in the place of women....is also pornography...’.

Section 3 outlines causes of action that a ‘person’⁶⁷ can take pursuant to the ordinance. Section 3, clause 1, named ‘coercion into pornography’, provides that ‘it is sex discrimination to coerce, intimidate, or fraudulently induce ... any person into performing for pornography’. Section 3, clause 1 also provides that damages and injunctions can be sought against the ‘maker(s), seller(s), exhibitor(s) and/or distributor(s)’ of that pornography. The fact that the ‘person is a woman’; ‘is or has been a prostitute’; or any of numerous other factors listed in s 3, clause 1 from sub-paragraphs (a) through to (m), does not prevent a finding of coercion.

Section 3, clause 2 makes it ‘sex discrimination to force pornography on a person in any place of employment, education, home or any public place’. Section 3, clause 3 provides that ‘it is sex discrimination to assault, physically attack, or injure any person in a way that is directly caused by specific pornography’. It is also ‘sex discrimination to defame any person through the unauthorized use of pornography of their proper name, image, and/or recognizable personal likeness’. Section 3, clause 5 provides that ‘it is sex discrimination to produce, sell, exhibit, or distribute pornography, including through private clubs’; but (in sub-paragraph (a)) exempts public and university libraries ‘in which pornography is available for study’.

The defences available under the ordinance are set out in s 4. Section 4, clause 1 provides that ignorance of the fact that materials are

⁶⁷ ‘Person’ is defined in MacKinnon and Dworkin, above n 14, Appendix D: Ordinance, s 2, clause 3 to ‘include child or transsexual’ as well as a woman. An overview of the ordinances use in a gay male context is found in Kendall, above n 5.

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pornography or sex discrimination is no defence. Section 4, clause 2 provides that no damages or compensation can be recovered under s 3, clause 5 ('trafficking in pornography') 'unless the defendant knew or had reason to know that the materials were pornography'. Similarly, if there is an assault or physical attack against a person due to pornography, actionable under s 3, clause 3, damages or compensation can only be sought against the 'perpetrator of the assault or the attack' 'unless the defendant knew or had reason to know that the materials were pornography'. In addition, s 4, clause 3 provides that no damages or compensation can be sought against the makers, distributors, sellers or exhibitors of pornography which occurred prior to the date of the ordinance.

Section 5 of the ordinance contains the enforcement provisions. Section 5, clause 1 provides that if a person has a cause of action under the ordinance, they can seek relief in a civil court. This is a further recognition of pornography as a civil rights violation against women. Section 5, clause 2(a) provides that if a person has a cause of action they can seek (or their estate can seek) 'nominal, compensatory, and/or punitive damages without limitation, including for loss, pain, suffering, reduced enjoyment of life, and special damages, as well as for reasonable costs, including attorneys' fees and costs of investigation'. Section 5, clause 2(b) provides that no damages or compensation can be sought against the makers, distributors, sellers or exhibitors of pornography which occurred prior to the date of the ordinance.

Section 5, clause 3 permits a person who has a cause of action under the ordinance to apply for injunctive relief. However, under s 5, clause 3(a), a 'temporary or permanent injunction' cannot be issued prior to a court deciding that the 'challenged activities' contravene the ordinance. In addition, under s 5, clause 3(b), the injunction is limited to the pornography described in the order of the court and must not 'extend beyond' the pornography specified in the order. Finally, s 5, clause 5 provides that if a person obtains legal relief under the ordinance they are not precluded from seeking any other form of civil or criminal relief.

In order to demonstrate how the ordinance empowers women to take action against pornography in a manner that enhances the more general approach taken by current sex discrimination legislation, the case of *Horne* will now be examined in detail. This case will be used to illustrate how a sex discrimination approach which specifically addresses pornography is more beneficial to women harmed by pornography. This is because such an approach can go significantly further than Australia's current equal opportunity laws in the causes of action and remedies it provides.

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CASE STUDY: HORNE & ANOR V PRESS CLOUGH JOINT VENTURE & ANOR ('HORNE')

Horne is a decision of the Western Australian Equal Opportunity Commission which found in favour of two women employed as cleaners on a male dominated construction site. The two women complainants were the only female employees on the site.⁶⁸ The case recognised that the prolific display of pornography in the women's workplace amounted to sex discrimination and victimisation by the women's employer and trade union. The case is an example of how a sex discrimination approach is an effective one in such a situation. However, the women could have been assisted and empowered even further by MacKinnon's and Dworkin's civil rights ordinance.

In several of the rooms that the women were required to clean, there were posters and pictures of naked and semi-naked women, described in the judgment as 'soft porn'.⁶⁹ The complainants felt uncomfortable with these pictures but tolerated them as 'incidental to their work' on a male dominated construction site.⁷⁰

One day, the second complainant went into the site supervisor's office to clean it and 'was confronted by a totally explicit poster of a nude woman'.⁷¹ She complained to the site supervisor but instead of the poster being removed a sticker was placed over the genitals of the woman in the pornography.

Later, a pornographic poster showing 'a man and a woman engaged in a sexual act'⁷² was displayed on a wall of another of the rooms that one of the complainants had to clean. After 'an angry confrontation with the owner of the poster',⁷³ it was removed. From this time forward, the number of pornographic posters being displayed around the construction site increased. Several weeks later, the complainants found that one of the crib huts that they were required to clean had 'particularly offensive posters on the walls'.⁷⁴

The complainants spoke to the site organiser of their union, the Metals and Engineering Workers' Union (*MEWU*), Mr D, about these 'particularly offensive posters'. The complainants took these posters down after Mr D agreed that they could remove them. The response that

⁶⁸ The facts are set out at *Horne* (1994) EOC 92-556, 77 057-77 059.

⁶⁹ *Horne* (1994) EOC 92-556, 77 057.

⁷⁰ *Horne* (1994) EOC 92-556, 77 057.

⁷¹ *Horne* (1994) EOC 92-556, 77 057.

⁷² *Horne* (1994) EOC 92-556, 77 057.

⁷³ *Horne* (1994) EOC 92-556, 77 057.

⁷⁴ *Horne* (1994) EOC 92-556, 77 057.

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the complainants received from the male workers on the construction site after taking down the posters was an extremely angry one.⁷⁵ Mr D then asked the complainants to speak to him in his office, telling them, “that it was very unfortunate they had taken the attitude they had towards the posters and that if they maintained that position, it would make them very unpopular on site”.⁷⁶ The women were told by Mr D that their actions could cause the men to go on strike; that they did not have the support of the MEWU; and that there was a “computer blacklist” on which the complainants may find themselves listed as troublemakers. The complainants felt intimidated, threatened and that they had no support from their union.⁷⁷

Later, the complainants were confronted by men demanding that they return the posters. When the complainants tried to explain why the posters were wrong, they were told, “[i]t was a male workplace and that the women had no right to bring a woman’s perspective into it”.⁷⁸ The judgment then explains that: “[t]he men said they were lucky to have their jobs and if they wanted to work in a male environment they would just have to “cop it”.⁷⁹

After this, more posters, increasingly explicit and more discriminatory, began to be displayed around the workplace. The first complainant then attended a training course in Perth and spoke to the State Secretary of the MEWU, Mr F, about the posters. She asked the union to intervene and suggested that the shop stewards and union officials should attend equal opportunity courses as they appeared not to be aware of their responsibilities under the equal opportunity legislation. Mr F refused, saying that ‘he could not force people to undergo equal opportunity courses if they did not want to’.⁸⁰

Approximately a month later, the second complainant entered a crib hut and was confronted by ‘a number of pornographic and sexually explicit posters displayed on the wall, including pictures of women masturbating’.⁸¹ She approached the Health and Safety Representative and Assistant Shop Steward, Mr R, and told him she wanted the posters removed. Mr R agreed to do something although ‘he would not be very popular with the men’.⁸² Instead of the posters being removed, ‘a curtain of rubbish bags was placed over the display, with a note saying it

⁷⁵ *Horne* (1994) EOC 92-556, 77 057.

⁷⁶ *Horne* (1994) EOC 92-556, 77 057.

⁷⁷ *Horne* (1994) EOC 92-556, 77 057.

⁷⁸ *Horne* (1994) EOC 92-556, 77 057-77 058.

⁷⁹ *Horne* (1994) EOC 92-556, 77 058.

⁸⁰ *Horne* (1994) EOC 92-556, 77 058.

⁸¹ *Horne* (1994) EOC 92-556, 77 058.

⁸² *Horne* (1994) EOC 92-556, 77 058.

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was to protect the “virginal morality” of the second complainant’.⁸³ The judgment goes on to state that

[t]here was also a note pinned to the wall to the effect that if the complainants did not like it they should get out; that they were working in a male environment; that they were holding jobs that should have gone to men and generally containing personal abuse directed to them.⁸⁴

When the second complainant told the first complainant about this incident, the first complainant approached the MEWU shop steward, and later five MEWU health and safety representatives, but the posters were still not removed. The next morning the first complainant went to the MEWU office and told Mr D and others in the office ‘that it was about time they “got their act together and started acting like a union”’.⁸⁵

The posters were eventually taken down, but not the note. When the first complainant told the foreman that she feared a ‘backlash’ from the male workers, asking what could be done to prevent it, the foreman said nothing could be done and that he was leaving the note in place because it was ‘fair comment’.⁸⁶ The first complainant also went to see the Industrial Relations and Personnel Manager who would not take any action because the posters had been removed.

The judgment states that the number of posters started to increase, as did their ‘hard-core’ content. As a consequence

[t]he complainants’ relationship with the male workforce deteriorated even further. They were subjected to more personal abuse and offensive remarks. They felt threatened and intimidated.⁸⁷

Several weeks later several incidents occurred that were intended to intimidate the women. Firstly, the first complainant entered a hut to clean and was ‘confronted by a full length female nude poster which had been used for dart practice, and had also been violently stabbed through the heart, head and genitals’. It was reported that the first complainant felt ‘very frightened and distressed by this’.⁸⁸ Secondly, when the second complainant went into the site office of the union to clean it, she saw ‘a very explicit poster of a naked woman’ above the MEWU Convenor’s desk and felt that the union was condoning the material and ‘attacking’ her with the material instead of representing her interests.⁸⁹ She took this poster down, and spoke to the Trade Union Training Authority to

⁸³ *Horne* (1994) EOC 92-556, 77 058.

⁸⁴ *Horne* (1994) EOC 92-556, 77 058.

⁸⁵ *Horne* (1994) EOC 92-556, 77 058.

⁸⁶ *Horne* (1994) EOC 92-556, 77 058.

⁸⁷ *Horne* (1994) EOC 92-556, 77 058.

⁸⁸ *Horne* (1994) EOC 92-556, 77 058.

⁸⁹ *Horne* (1994) EOC 92-556, 77 059.

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obtain information about equal opportunity courses. She gave this information to the Assistant Secretary of the MEWU but never heard from him again. Thirdly, the second complainant went to clean a new crib hut and 'she saw that all four walls and the ceiling were covered with hard-core pornographic material'.⁹⁰

Fourthly, two weeks later the men had Christmas drinks the day before the Christmas holidays during which there was a lot of 'horseplay'. The first complainant heard one of the men yell, "Get Heather", and she ran to the storeroom to hide. The first complainant's supervisor told the men to leave her alone, and she later became aware that her supervisor had been 'attacked'. She was also told: "you should see what they had planned for you".⁹¹

The first complainant made a final attempt to do something about the pornography inflicted on her by organising a meeting with the personnel manager. Afterwards, she was approached and intimidated by two MEWU shop stewards. She then had an accident at work and did not return to the workplace. The judgment stated that, prior to her accident

she had been so stressed by the situation at work that she became ill. As she recovered from her injury she said the prospect of having to return to the site became increasingly distressing. She suffered a mental and emotional decline and eventually could not cope with the prospect of returning at all.⁹²

The second complainant went on annual leave but, on her return, was again subjected to verbal abuse. She was told there was 'graffiti drawings of an offensive and disgusting nature of her and the first complainant in the male toilets'.⁹³ She took photos at night of this graffiti and, upon seeing the photos developed, explained that she was 'physically ill, frightened and disgusted'. She eventually left her job, finding it impossible to work in safety.⁹⁴

The complainants' claim was based on s 160 of the *Equal Opportunity Act 1984* (WA).⁹⁵ Their complaint was that the MEWU 'through its employees or agents, caused, instructed, induced, aided or permitted the

⁹⁰ *Horne* (1994) EOC 92-556, 77 059.

⁹¹ *Horne* (1994) EOC 92-556, 77 059.

⁹² *Horne* (1994) EOC 92-556, 77 059.

⁹³ *Horne* (1994) EOC 92-556, 77 059.

⁹⁴ *Horne* (1994) EOC 92-556, 77 059.

⁹⁵ Section 160 of the *Equal Opportunity Act 1984* (WA) is named 'Liability of persons involved in unlawful acts' and provides that:

A person who causes, instructs, induces, aids, or permits another person to do an act that is unlawful under this Act shall for the purposes of this Act be taken also to have done the act.

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employer [Press Clough Joint Venture] to discriminate against them on the ground of their sex'. The complainants argued that MEWU did this in two ways.⁹⁶ Firstly, by its employees and agents failing and refusing to support them in having the pornography removed from the workplace. Secondly, the women argued that MEWU employees or agents were responsible for the display of a pornographic poster in the union site office. The complainants also claimed victimisation under ss 67 and 161 of the *Equal Opportunity Act 1984* (WA). The Tribunal held on behalf of the complainants on both grounds.

In the subsequent reported decision of *Horne & Anor v Press Clough Joint Venture & Anor*,⁹⁷ delivered on 21 April 1994, the Equal Opportunity Tribunal considered the women's case against their employer, Press Clough Joint Venture. The complainants alleged that the presence of pornography in their workplace amounted to sex discrimination; that their employer knew of the presence of the posters and was therefore directly liable under the Act; that their employer was liable for victimisation and that their employer had failed to take reasonable steps to prevent the discrimination and victimisation. The Tribunal found in favour of the women against their employer. The women were awarded damages of \$92 000.⁹⁸

VI APPLICATION OF THE ORDINANCE TO HORNE

Although a victory for those harmed, this paper will now outline how the ordinance could have further assisted and empowered the women

⁹⁶ *Horne* (1994) EOC 92-556, 77 062.

⁹⁷ *Horne v Anor v Press Clough Joint Venture & Anor* (1994) EOC 92-591.

⁹⁸ Public Hearings were conducted in Minneapolis in 1983, Indianapolis in 1984, Los Angeles in 1985 and Massachusetts in 1992, in the United States in response to the proposed introduction of the ordinance drafted by MacKinnon and Dworkin by way of amendment to existing sex discrimination legislation. Many women spoke of the pornography played in their sexual abuse, harassment and discrimination. One such woman was Ms B, who testified at the hearings of workplace discrimination and victimisation as a result of the display of pornography in her male dominated workplace:

... I, for the past six years, have been in training to be a plumber. ... I got stuck on a job that was almost completed but not quite. ... When I got on the job ... it was a real shock when I walked in, because three of the four walls in the room were completely decorated with pictures out of various magazines, Hustler, Playboy, Penthouse, Oui, all of those. Some of them I would have considered regular pinups, but some of them were very, very explicit, showing women with their legs spread wide and men and women performing sex acts and women in bondage. ... I put up with it for about a week. ... I felt totally naked in front of these men. ... I got pissed off one day and ripped all the pictures off the wall. Well, it turned out to be a real unpopular move to do. I came back in at lunch time and half the pictures were back up again. ... I began to eat my lunch at other places in the building and was totally boycotted at work. The men wouldn't talk to me. I was treated like I had just done something terrible.

Testimony of Ms B quoted in MacKinnon and Dworkin, above n 14, 121-122.

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in *Horne*. Notably, the ordinance goes further than Australian equal opportunity legislation by specifically identifying pornography as sex discrimination which contributes to women's unequal position in society.⁹⁹ Recognition of this fact in law is vital in educating and gradually changing attitudes about what pornography is and does.

Firstly, the pornography that the women were subjected to in their workplace would satisfy the definition of pornography in s 2 of the ordinance. The judgment avoids describing the pornography in detail with the exception of 'a poster depicting a man and a woman engaged in a sexual act';¹⁰⁰ 'pictures of women masturbating';¹⁰¹ 'a full length female nude poster which had been used for dart practice, and had also been violently stabbed several times through her heart, head and genitals';¹⁰² and 'graffiti drawings of an offensive and disgusting nature of her [the second complainant] and the first complainant in the male toilets'.¹⁰³ These would constitute 'the graphic sexually explicit subordination of women through pictures and/or words' pornography under several subsections of the definition of pornography in the ordinance. These are: clause (a) 'women are presented dehumanized as sexual objects, things or commodities'; clause (d) 'women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt'; and clause (e) 'women are presented in postures or positions of sexual submission, servility or display'. The judgment's reference to the pornography as 'sexually explicit', 'offensive' and 'hard core pornography', whilst appearing to have its basis in morality, should not be unfairly criticised because it is the language used by the women to attempt to describe the pornography to which they were subjected. There is no doubt that the pornography went way beyond offending the women's moral sensibilities; it made the women feel 'intimidated and threatened';¹⁰⁴ 'very frightened and distressed';¹⁰⁵ and 'physically ill, frightened and disgusted',¹⁰⁶ causing the first complainant to have a mental breakdown and both women to be too afraid to return to work. In addition, the second complainant, on being confronted with an 'explicit poster of a naked woman' in the union site office felt that the union was "'attacking" her with this material'.¹⁰⁷

⁹⁹ MacKinnon and Dworkin, above n 14, Appendix D: Ordinance, s 1, 'Statement of Policy'.

¹⁰⁰ *Horne* (1994) EOC 92-556, 77 057.

¹⁰¹ *Horne* (1994) EOC 92-556, 77 058.

¹⁰² *Horne* (1994) EOC 92-556, 77 058.

¹⁰³ *Horne* (1994) EOC 92-556, 77 059.

¹⁰⁴ *Horne* (1994) EOC 92-556, 77 057.

¹⁰⁵ *Horne* (1994) EOC 92-556, 77 058.

¹⁰⁶ *Horne* (1994) EOC 92-556, 77 059.

¹⁰⁷ *Horne* (1994) EOC 92-556, 77 059.

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The women in *Horne* would also have several specific causes of action under the ordinance, which more specifically address their experiences, instead of simply confining them to sexual harassment and victimisation. Significantly, the women would have a claim under s 3, clause 2 of the ordinance. This clause makes it 'sex discrimination to force pornography on a person in any place of employment, education, home or in any public place'. The women clearly had pornography repeatedly forced upon them in their workplace to such an extent that they could not do their cleaning jobs without being confronted with it. Of benefit to the women in *Horne* is the second sentence of this clause which states: '[c]omplaints may be brought only against the perpetrator of the force and/or the entity or institution responsible for the force'. This means that under the ordinance the women could have sued the individual men in their workplace who were responsible for forcing the pornography on them as well as their employer and union. This is illustrative of the educational and deterrent effect of the ordinance. In other words, the prospect of a direct prosecution may have fostered some feelings of individual responsibility in the women's male co-workers to remove the pornography after the women complained, or not to put it up in the first place.

As mentioned above, the second complainant was told that there were 'graffiti drawings of an offensive and disgusting nature of her and the first complainant in the male toilets'.¹⁰⁸ The judgment states that the second complainant 'went into the male toilets at night and took photos of the graffiti, which when she saw them developed, made her feel physically ill, frightened and disgusted'.¹⁰⁹ The judgment does not contain specific details of the graffiti; however, such graffiti could constitute defamation through pornography pursuant to s 3, clause 4 which states that: '[i]t is sex discrimination to defame any person through the unauthorized use in pornography of their proper name, image, and/or recognizable personal likeness'. As the graffiti was of the two women, probably to discredit or damage their credibility due to their complaints about the pornography, and probably in a sexual context, the graffiti would be likely to contravene this clause.

In addition, the women would also have a cause of action against s 3 of clause 5 of the ordinance, named 'trafficking in pornography'. This clause states that: '[i]t is sex discrimination to produce, sell, exhibit, or distribute pornography'. The women in *Horne* would have a claim not only for the exhibition of pornography in their workplace, but also for the distribution of pornography by their male co-workers.

¹⁰⁸ *Horne* (1994) EOC 92-556, 77 059.

¹⁰⁹ *Horne* (1994) EOC 92-556, 77 059.

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Pursuant to the ordinance, the women in *Horne* would be able to initiate civil proceedings themselves in a court of law.¹¹⁰ The women could have applied for injunctive relief under s 5, clause 3 of the ordinance, but only after a final determination is made by the court that the ordinance has been violated. What would have been more beneficial is if the women could have obtained an interim injunction which would take effect until the matter could have been finally determined by the court. However, a permanent injunction could be sought by the women to restrain their union and employer from displaying pornography in the workplace indefinitely.

In addition, the women could apply for 'nominal, compensatory, and/or punitive damages without limitation, including for loss, pain, suffering, reduced enjoyment of life, and special damages, as well as reasonable costs including attorney's fees and costs of investigation'.¹¹¹ This scope for awarding damages and costs is somewhat broader than the costs awarded to the women in *Horne*. In *Horne*, the women were each awarded \$12 000 for 'humiliation, nervous and emotional distress, embarrassment, hurt feelings and fear' they experienced in their workplace for over twelve months.¹¹² The women also felt that they could not continue in a similar kind of employment in a male dominated workplace and were each awarded \$4 000 for 'loss of amenity and lost opportunity'.¹¹³ The women were also awarded \$25 000 and \$35 000 respectively for lost wages, resulting in the first complainant being awarded \$41 000 and the second complainant being awarded \$51 000. The scope of the damages provisions in the ordinance indicates that the women could have received additional compensation, particularly in the form of punitive damages in order to financially punish the individual men, union and employer responsible for their harassment and victimisation.

Finally, the women would be able to pursue other relevant civil or criminal relief under s 5, clause 5 of the ordinance, such as a claim in negligence against their employer and union for failing to provide a safe workplace, free from harassment.

VII CONCLUSION

Australian legislators must, if they take the rights of women seriously, adopt MacKinnon and Dworkin's sex equality approach to inequality by amending existing sex discrimination legislation to address the systemic

¹¹⁰ MacKinnon and Dworkin, above n 14, Appendix D: Ordinance, s 5, clause 1.

¹¹¹ MacKinnon and Dworkin, above n 14, Appendix D: Ordinance, s 5, clause 2a.

¹¹² *Horne* (1994) EOC 92-591, 77 179.

¹¹³ *Horne* (1994) EOC 92-591, 77 180.

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biases caused by pornography. The ordinance is the only method of regulation that specifically addresses pornography and empowers women with a broader range of remedies than current sex discrimination legislation. More specifically, the ordinance can further the objectives of Australia's sex discrimination legislation by educating all Australians as to the harmful effects of pornography to women's equality. In the words of Andrea Dworkin:

This law educates. It also allows women to do something. In hurting the pornography back, we gain ground in making equality more likely, more possible - some day it will be real. We have a means to fight the pornographers' trade in women. We have a means to get at the torture and the terror. We have a means with which to challenge the pornography's efficacy in making exploitation and inferiority the bedrock of women's social status. The civil rights law introduces into the public consciousness an analysis: of what pornography is, what sexual subordination is, what equality might be... The civil rights law gives us back what the pornographers have taken from us: hope rooted in real possibility.¹¹⁴

¹¹⁴ Andrea Dworkin, 'Against the Male Flood: Censorship, Pornography and Equality' (1985) 8 *Harvard Women's Law Journal* 1.