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Legal issues associated with the study of sexual content on the internet in Australia

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Abstract

Scholarly recognition of the research potentials of the Internet has resulted in a growing interest in using computer-mediated communication to study different aspects of human sexuality. Although there is a growing literature on the ethical issues associated with Internet-based research¹, little attention has been given to the legal issues associated with conducting scholarly research on Internet sexual content. This lacuna stands in contrast to the growing public debate about the legal issues associated with attempts by authorities to restrict adult access to Internet content through filtering services and age-restricted access technologies. These measures appear to be focused on three issues – controlling access to sexually explicit content in order to protect children from accessing sexually inappropriate material; restricting the production and dissemination of child pornography; and addressing national security concerns by blocking content related to the promotion of terrorism and cybercrime. In Australia, critics of laws designed to restrict Internet content focus their discussion on the dangers of censorship and the associated undermining of freedom of speech.² But within the scholarly community there has been little concomitant interest in addressing the impact that Australian Commonwealth and State legislation related to Internet content has on academic research.

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LEGAL ISSUES ASSOCIATED WITH THE STUDY OF SEXUAL CONTENT ON THE INTERNET IN AUSTRALIA

*Lenore Lyons, Sophie Williams and Michele Ford**

Scholarly recognition of the research potentials of the Internet has resulted in a growing interest in using computer-mediated communication to study different aspects of human sexuality. Although there is a growing literature on the ethical issues associated with Internet-based research¹, little attention has been given to the legal issues associated with conducting scholarly research on Internet sexual content. This lacuna stands in contrast to the growing public debate about the legal issues associated with attempts by authorities to restrict adult access to Internet content through filtering services and age-restricted access technologies. These measures appear to be focused on three issues — controlling access to sexually explicit content in order to protect children from accessing sexually inappropriate material; restricting the production and dissemination of child pornography; and addressing national security concerns by blocking content related to the promotion of terrorism and cybercrime. In Australia, critics of laws designed to restrict Internet content focus their discussion on the dangers of censorship and the associated undermining of freedom of speech.² But within the scholarly community there has been little concomitant interest in addressing the impact that Australian Commonwealth and State legislation related to Internet content has on academic research.

These issues have received some — albeit limited — attention internationally. In 1994, the University of Waterloo in Canada restricted access to a number of alt.sex newsgroups on the grounds that the university had been advised that it was an offence under the Canadian Criminal Code for ‘anyone to publish or distribute obscene material, and the University is running a risk of

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¹ For an overview see Ess Charles and AoIR ethics working committee *Ethical Decision-Making and Internet Research: Recommendations from the AoIR Ethics Working Committee* (2006) Available at: www.aoir.org/reports/ethics.pdf.

² Walton Michael *Submission to the Senate Environment, Communications, Information Technology and the Arts' Inquiry into the Provisions of the Communications Legislation Amendment (Content Services) Bill 2007* New South Wales Council for Civil Liberties (2007); Walton Michael *Submission to the Australian Communications and Media Authority (ACMA) on the Draft Restricted Access Systems Declaration 2007* New South Wales Council for Civil Liberties (2007); Libertus.net *Australia's Internet Censorship System* (2008) Available at: <http://libertus.net/censor/netcensor.html>; Electronic Frontiers Australia *Submission on Communications Legislation Amendment (Content Services) Bill 2007* (2008) Available at: <http://www.efa.org.au/Publish/efasubm-seticac-contentbill2007.html>.

prosecution if it knowingly receives and distributes obscene material'.³ In the same year, Carnegie Mellon University (CMU) in the United States also restricted computer user access to alt.sex newsgroups.⁴ CMU's decision to censor sexual content on usergroups accessed through the university's server was the subject of some criticism, but this critique became overshadowed by debate about the ethical issues associated with conducting research on online sexual communities.⁵ The CMU decision was sparked by concerns about a student project (commonly referred to as the Rimm study) which used data obtained from alt.sex newsgroups. The Rimm case led to the creation of a series of laws in the US (most of which were later overturned) which attempted to censor offensive material on the web.⁶

The issue of restricting academic access to sexually explicit material was raised in the US again in 1998, 1999 and 2003 when the federal courts were asked to review restrictions placed on public library access to pornographic Internet sites and state laws restricting state employees from accessing sexually explicit material on state-owned or state-leased computers. In *Urofsky v. Gimore* (1999), six public college and university professors in Virginia challenged state laws that restricted access to sexually explicit material on the grounds of First Amendment rights of academic freedom. They argued that they needed to access such sites because they were work-related and that 'denial of access would substantially interfere with their ability to perform their jobs'.⁷ Although the court initially ruled in favour of the professors, the judgement was later overruled thus raising concerns about the dilution of academic freedom.⁸ Academic involvement in the distribution of so-called 'obscene material' also became a matter of concern in Taiwan when in 2003 an international campaign was launched in support of Josephine Ho, a prominent sexualities researcher and activist, who was charged with 'disseminating obscenities' on the Sexuality Databank website of the Center for the Study of Sexualities, National Central University, Taipei. The charge related to the inclusion of materials on bestiality as part of the publicly-accessible website.⁹

Writing about the intersection between academic freedom and attempts to control access to Internet content, Robert O'Neil states that:

³ Rosenberg Richard 'Free Speech, Pornography, Sexual Harassment, and Electronic Networks: An Update and Extension' in Mackaay Ejan, Poulin Daniel, and Trudel Pierre (eds) *The Electronic Superhighway: The Shape of Technology and Law to Come* Kluwer Law International The Hague 1995 p 131.

⁴ O'Neil Robert *Academic Freedom in the Wired World: Political Extremism, Corporate Power, and the University* Harvard University Press Cambridge 2008 p 191.

⁵ Faucette Jeffrey 'The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship on Sex on the Internet' (1995) 44 *Duke Law Journal* 1155. Thomas Jim 'When Cyberresearch Goes Awry: The Ethics of the Rimm "Cyberporn" Study' (1996) 12 *The Information Society* 189.

⁶ Spinello Richard *Cyberethics: Morality and Law in Cyberspace* Jones and Bartlett Publishers Boston 2003.

⁷ Roberds Stephen 'Technology, Obscenity, and the Law: A History of Recent Efforts to Regulate Pornography on the Internet' in Waskul Dennis (ed.) *Net.Sexxxx: Readings on Sex, Pornography and the Internet* Peter Lang Publishing New York 2004 p 309.

⁸ O'Neil above note 4; Roberds above note 7.

⁹ Wang Ping 'The Prosecution of Taiwan Sexuality Researcher and Activities Josephine Ho' (2004) 12 *Reproductive Health Matters* 111.

A repressive administration may, for example, curtail student and even faculty access to certain categories of materials — either by barring such access directly or by refusing to subscribe to certain research sources or data banks that are not automatically available to every Internet user. Or ...[the] government may bar the use of public computer equipment and networks to access certain categories of electronic or digital materials — thus ushering in a host of new challenges in the Internet era.¹⁰

He notes that although universities also exercise some degree of control over the management of their print library collections, the potential for limitation or denial of access over Internet content is vastly greater because the institution usually maintains and therefore controls the gateway to the Internet.

In order to consider the implications of these issues for sexuality scholarship in Australia, this paper examines the legal obstacles that we have encountered in the process of collecting data using the Internet to study sex tourism. Our experiences point to the increasing impact that government regulation of the Internet is having on the conduct of social research in Australia. The paper begins with a brief overview of the project aims and research methodology, followed by a discussion of the legal issues affecting our research. Our research demonstrates that all Australian-based scholars who use the Internet to conduct research on sexuality are potentially required to seek approval from the Commonwealth government to undertake that research. This requirement raises concerns about the possibility of censoring academic research and the potential for increased levels of scrutiny and surveillance of academic research.

1.0 BACKGROUND TO PROJECT

In the Shadow of Singapore: The Limits of Transnationalism in Insular Riau is a research project that examines how understandings of national identity and the nation are constructed and negotiated by individuals who live and work on the Indonesian islands of Batam, Bintan and Karimun (the Riau Islands), which form the borderlands between Singapore and Indonesia.¹¹ Our interest is in the ways in which those who live within the border zone, as well as those who cross the border for work and/or pleasure, engage in the dual processes of reconstructing the boundaries of the nation-state and establishing their own sense of national identity and belonging. The Riau Islands are an important case study for the analysis of cross-border interaction in Southeast Asia because notions of citizenship and nationality are complicated by the presence of significant numbers of transnational subjects. These consist of commuters who travel regularly across the Singapore-Indonesia border to work; migrant workers from other parts of Indonesia, who either come to the islands looking for employment or are passing through on their way overseas; and tourists, including couples and families who visit resorts, but also male clients of Indonesian sex workers.

¹⁰ O'Neil above note 4 at 181.

¹¹ The project was funded by an Australian Research Council (ARC) Discovery Project Grant (DP0557368). Lenore Lyons and Michele Ford are the chief investigators on the project. Sophie Williams is a PhD candidate associated with the project, funded by a University of Wollongong scholarship.

The project relies on a combination of research methods, including thematic analyses of Internet content. We are interested in the ways that the Riau Islands are represented in website content and how gender, race and nationality intersect in shaping the virtual life of the islands. The use of the Internet as a source of data is particularly important for our research on the commercial sex industry since some segments of the sex tourism industry rely on the Internet to market the islands and facilitate communication between the commercial sex industry and its clientele. Male sex clients are notoriously difficult to contact using other research techniques and observation of online sexual communities thus also provides us with a means to observe and access sex client communities in ways that would otherwise be impossible. As Sanders argues:

Previously, buyers and sellers of sex communicated only a private and individual basis whereas now, through CMC [computer mediated communication], these interactions have entered the public domain. Observing relationships between those who buy and those who sell sex has been practically impossible before the advent of CMC ... Through the Internet the researcher can now be privy to other aspects of sexual behaviour that have been hidden and largely clandestine.¹²

Internet research provides other benefits for scholars. For example, interviews conducted via e-mail may allow for greater clarification of concepts and involvement and empowerment of the participants than face-to-face interviews.¹³ They may also provide a forum for respondents to be more forthcoming about their experiences and feelings. Studies have shown that some people are more open online than they are in person, in part because of false expectations about privacy.¹⁴ Internet research also provides a means to protect the physical safety of the researcher, a particular concern when studying groups involved in criminal behaviour or living in situations marked by civil or political unrest.

Our Internet research is guided by a belief that although virtual communities have the potential to (re)configure themselves in a radical and transformative manner, they are also just another form of spatialised social relations that are embedded within existing normative discourses. In other words, online communities are constituted in a manner similar to communities in the offline world and can contain a 'richness equivalent to that of a "traditional" social grouping'.¹⁵ As cyberspace interactions are embedded within normative discourses of gender, race and sexuality, we expect that sex tourism websites reflect (and contribute to) wider networks of meaning that intersect with discourses about male dominance and solidarity, as well as female sexuality. Singaporean men's conversations about their plans for and experiences of sex tourism provide us with both insights into their experiences as sex tourists and a means to

¹² Sanders Teela 'Researching the Online Sex Work Community' in Hine Christine (ed.) *Virtual Methods: Issues in Social Research on the Internet* Berg Oxford 2005 p 70.

¹³ Murray Craig and Sixsmith Judith 'E-Mail: A Qualitative Research Medium for Interviewing?' (1998) 1 *International Journal of Social Research Methodology* 103.

¹⁴ Reid Elizabeth 'Informed Consent in the Study of on-Line Communities: A Reflection on the Effects of Computer-Mediated Social Research' (1996) 12 *The Information Society* 169; Frankel Mark S. and Siang Sanyin *Ethical and Legal Aspects of Human Subjects Research on the Internet* American Association for the Advancement of Science New York 1999.

¹⁵ Fox N. and Roberts C. 'GPs in Cyberspace: The Sociology of a 'Virtual Community' (1999) 47 *The Sociological Review* 643 at 647.

examine how they engage with and negotiate hegemonic masculinities. Through the analysis of sites constructed for and by these men, we are able to better articulate both normative and potentially idealised notions of masculinity and heterosexuality, regardless of whether or not they are materially practiced and thus representative of the ‘truth’ of their experiences in the Riau Islands.¹⁶ It is this potential of the Internet that motivated our interest in using it to explore the experiences of male sex clients.¹⁷

To gain insight into the online performance of Singaporean sex client masculinities, we divided the project into three stages. Stage 1 involved thematic analysis of website content relating to the commercial sex industry in the islands, including travel websites, commercial sites produced by hotels and entertainment venues, blogs, electronic noticeboards and archives of online forums.¹⁸ Stage 2 involved real-time non-participant observation of public-access and subscription-based chat rooms; and Stage 3 involved online interviews in chat rooms and/or via email using a semi-structured interview technique. The following discussion of Internet regulation refers to our interaction with regulatory and legal frameworks and processes during all three stages of the research.

2.0 REGULATION OF SEXUAL CONTENT ON THE NET

It has long been acknowledged that technological innovation creates ‘deviant’ as well as ‘respectable’ possibilities.¹⁹ For this reason advances in technology always pose a range of challenges to existing bodies of law. What are today regarded as ‘traditional’ modes of communication such as the telephone, radio and television all made the spread of sexual content possible. As Stephen Roberds argues, ‘In this sense, the Internet is just one more new technology that gets caught up in a much broader political, ethical, and economic controversy’.²⁰ What makes the Internet the subject of such strong public and government concern, however, is the unprecedented levels of access to sexually explicit material. As the Internet has grown and new platforms and technologies have been developed, the courts have been called upon to regulate content and distribution. In the case of sexually explicit material, they have typically responded by building on early efforts to regulate non-Internet pornography. As this discussion will show, in the Australian case, the regulation of sexual content has built on existing laws designed to classify and restrict film and print-based materials.

¹⁶ Williams Sophie, Lyons Lenore, and Ford Michele ‘It’s About Bang for Your Buck, Bro: Singaporean Men’s Online Conversations About Sex in Batam, Indonesia’ (2008) 32 *Asian Studies Review* 77.

¹⁷ For a discussion of the ethical issues associated with conducting this research see as above.

¹⁸ These sites were identified using a search strategy that employed multiple search engines and a combination of search terms that relate specifically to the sex industry (e.g. ‘prostitute/prostitution’, ‘sex’, and ‘brothel’) and to the Riau Islands. Only English-language content has been analysed.

¹⁹ Waskul Dennis (ed.) *Net.Sexxxx: Readings on Sex, Pornography and the Internet* Peter Lang Publishing New York 2004.

²⁰ Roberds above note 7 at 302.

A number of regulatory and legal frameworks impact on the conduct of the Internet-based components of our research.²¹ Like many public institutions, the University of Wollongong (where the project on sex tourism was based) has developed a set of regulations and guidelines governing the use of its IT facilities. The *IT Acceptable Use Policy* stipulates that the University's IT facilities must be used in 'an honest, ethical and legal manner and with regard to the privacy, rights and sensitivities of other people' and that 'use must be in accordance with University policies and all relevant federal and state legislation'.²² The University monitors Internet usage by staff and students and is required to report activity that contravenes federal or state legislation.

2.1 Classification and Regulation of Internet content — Federal Law

Schedules 5 and 7 of the *Broadcasting Services Act 1992 (BSA)* constitute the framework within which Internet content is classified and regulated in Australia. The regulatory framework is based on the premise that what is illegal offline should also be illegal online. Under that Act, it is not illegal for an Internet Service Provider (ISP) to make content available online unless they have been notified by the Australian Communications and Media Authority (ACMA) that particular content has been determined to be 'prohibited content' or 'potential prohibited content' as defined in the legislation. Prohibited content is content that *has* been so classified by the government-appointed Classification Board, whereas 'potential prohibited content' is content that *has not* been classified by the Classification Board but in ACMA's opinion there is a 'substantial likelihood' that it would be prohibited content if classified (s21, sch7, BSA). The regulatory system, referred to as the Online Content Co-regulatory Scheme, is complaints based. ACMA is responsible for receiving and investigating complaints under the *BSA*. Once it receives a complaint about online content, the ACMA is required to make a determination as to whether the content is prohibited.

The meaning of 'prohibited content' is outlined in Section 20, Schedule 7 of the *BSA*:²³

(1) For the purposes of this Schedule, content (other than content that consists of an eligible electronic publication) is ***prohibited content*** if:

- (a) the content has been classified RC or X18+ by the Classification Board; or
- (b) both:
 - (i) the content has been classified R18+ by the Classification Board; and
 - (ii) access to the content is not subject to a restricted access system; or
- (c) all of the following conditions are satisfied:
 - (i) the content has been classified MA15+ by the Classification Board;
 - (ii) access to the content is not subject to a restricted access system;

²¹ Material contained in this paper should not be interpreted as legal advice. We would advise anyone planning to conduct research which involves sexual content to seek advice from a legal practitioner before starting the project.

²² University of Wollongong 'University of Wollongong It Acceptable Use Policy' (2005) ITS.PY.001 (V1.0.03) p 6.

²³ In 2007, when this research commenced, Schedule 5 contained the Internet censorship provisions. However, effective from 20 January 2008, some of the provisions in Schedule 5 were moved into the new Schedule 7 by the *Communications Legislation Amendment (Content Services) Act 2007* which also extended the censorship regime to various types of content services not previously covered. Significantly, when our research began, prohibited content did not include material classified M15+, and distinguished between Australian hosted content and overseas hosted content.

- (iii) the content does not consist of text and/or one or more still visual images;
- (iv) access to the content is provided by means of a content service (other than a news service or a current affairs service) that is operated for profit or as part of a profit-making enterprise;
- (v) the content service is provided on payment of a fee (whether periodical or otherwise);
- (vi) the content service is not an ancillary subscription television content service; or
- (d) all of the following conditions are satisfied:
 - (i) the content has been classified MA15+ by the Classification Board;
 - (ii) access to the content is not subject to a restricted access system;
 - (iii) access to the content is provided by means of a mobile premium service.

Section 21, Schedule 7 of the BSA stipulates that:

- (1) For the purposes of this Schedule, content is ***potential prohibited content*** if:
 - (a) the content has not been classified by the Classification Board; and
 - (b) if the content were to be classified by the Classification Board, there is a substantial likelihood that the content would be prohibited content.

The Classification Codes referred to in the BSA are specified in the *Commonwealth Classification (Publications, Films and Computer Games) Act 1995* which establishes a National Classification Scheme. Almost all Internet content other than the entire unmodified contents of a film, a computer game, or an eligible electronic publication is required to be classified by reference to the Classification criteria for Films/Movies, not for Publications, even if the content consists solely of text and/or non-moving images (s25, Sch. 7, BSA). Transitory content (such as online chat) was a grey area under the classification system until late 2007 when revisions to the BSA were passed. Schedule 5 of the BSA defines ‘internet content’ as ‘information’ that is kept on a data storage device and is accessed, or available for access, using an internet carriage service. It does not include email or information transmitted in the form of a broadcasting service. ‘Information/content’ is defined as text, data, speech, music or other sounds, visual images, ‘whether in any other form; or whether in any combination of forms’ (s3, sch 5, BSA, and s2, sch7, BSA).²⁴

The *National Classification Code 2005* and the *Guidelines for the Classification of Films and Computer Games 2008* establish the principles upon which classification decisions for films, computer games and certain publications are made. There are three main classifications of relevance to our study of sexual behavior on the Internet:

²⁴ By contrast, in the United States, text is constitutionally protected under freedom of speech laws. See for example the study of child pornography by Jenkins in which he turned off the ability to read images online but was able to analyse the text. We want to thank Mark McLelland for bringing this to our attention. Jenkins Philip *Beyond Tolerance: Child Pornography on the Internet* New York University Press New York 2003.

- RC (Refused Classification) which may include material containing detailed instruction in crime, violence or drug use, child pornography, bestiality and excessively violent or sexually violent material;
- X18+ which may include real depictions of actual sexual activity but no depiction of violence; and
- R18+ which may deal with issues or contain depictions that require an adult perspective.

For the purposes of the National Classification Code, a child is deemed to be a person under the age of 18 years.

Under the *BSA*, Australian Internet Content Hosts (ICHs) are prohibited from hosting material that has been classified (or could potentially be classified) as RC and X18+. In addition, they may not host material classified R18+ and MA15+ that is not subject to age verification procedures. The prohibited categories for overseas hosted content are the same. However, the regulation mechanisms for Australian and overseas content are different. Australian ICHs are subject to ‘take down notices’ of any prohibited or potentially prohibited content, whereas content hosted outside Australia is subject to a ‘standard access-prevention notice’ whereby ISPs must take ‘all reasonable steps to prevent end-users from accessing the content’ (s.40. sch.5. *BSA*). Prohibited content is referred to ‘scheduled’ filter program vendors for inclusion on their blacklists.²⁵ In the current environment the opportunities to access overseas hosted content that is or could potentially be prohibited using an Australian ISP are high because such content is constantly being created and ACMA can only refer such material to filter program vendors if it has been reported under the Online Content Co-regulatory Scheme. Although the Online Content Co-regulatory Scheme appears to be successful in addressing complaints received about inappropriate Internet content, there is widespread recognition that attempts to regulate sexual content on the web are failing²⁶

The *BSA* regulates access to prohibited or potentially prohibited content on the Internet, but not its possession. Under Commonwealth law, it is not illegal to access or possess RC material for personal/private use unless that material relates to sexual content involving minors. For the purposes of determining prohibited Internet content, the *BSA* must therefore also be read in conjunction with the *Commonwealth Criminal Code Act 1995* and the *Commonwealth Crimes Act 1914*. The *Criminal Code (Cth)* ss 474.19–21 stipulates that it is an offence to use a carriage service (i.e. the Internet) for access to and storage of child pornography material. The fault elements under the Act are intention or recklessness (s 474.19(2)) with a penalty of imprisonment for up to 10 years. In addition to Commonwealth laws regarding child pornography, laws related to child sex tourism are also potentially relevant. The *Commonwealth Crimes Act 1914* ss 50DA–50DB stipulates that it is an offence to benefit from or encourage an offence involving child sex tourism. It is important to note here that offences committed under the *Criminal Code Act* relate to

²⁵ Use of a filter by Internet users is voluntary and ISPs are not required to block any content on the ACMA blacklist. In 2007, the Rudd Labor government recommended the introduction of a mandatory ‘clean-feed’ filtering system for all homes, schools and public computers which will screen all Internet content. Although such a system has yet to be implemented, it remains government policy. The implications of such a system on the conduct of research is outside the scope of this article but deserves sustained attention.

²⁶ Flood Michael and Hamilton Clive *Regulating Youth Access to Pornography* The Australia Institute Sydney 2003.

accessing prohibited material using an Australian-based ISP. Although our study relates to Internet content hosted overseas, the issue is not whether the material is deemed offensive and/or illegal in the country where the ICH is based, but that it is illegal to access and store the material in Australia.

Furthermore, the *Commonwealth Crimes Act 1914* s 85ZE stipulates that it is an offence to intentionally use a carriage service in a manner that is menacing, harassing or offensive. In its 2004 review of the *Broadcasting Services Act 1992*, the Department of Communications, Information Technology and the Arts stated that such behaviour could include the distribution of pornography or paedophile activity.²⁷

2.2 Classification and Regulation of Internet Content **— *New South Wales state law***

It is important to recognise that in relation to the regulation of Internet content States and Territories are responsible for enforcement of classification decisions within their own jurisdictions. Therefore, what is prohibited under one jurisdiction's laws may not be under another. As Penfold notes in relation to accessing and storing child pornography, the problems with harmonization of Australian state and commonwealth laws means that researchers in each state or territory are subject to a different set of laws.²⁸ For the purposes of our research, the relevant New South Wales legislation is the *Classification (Publications, Films and Computer Games) Enforcement Act 1995*. The New South Wales law does not yet contain a specific section relating to online content.

As with the Commonwealth law, at a state level it is also important to take into consideration the offences related to the possession of child pornography. The *Crimes Act 1900 (NSW)* S91H(1) as amended by *Crimes Amendment (Child Pornography) Act 2004 (NSW)* stipulates that it is illegal to produce, possess or disseminate

Material that depicts or describes, in a manner that would in the circumstances cause offense to reasonable persons, a person under (or apparently) under the age of 16 years: (a) engaged in sexual activity; (b) in a sexual context; or (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).

Under the New South Wales *Crimes Act* Clause 91C 'material' is defined as 'any film, printed matter, electronic data, or any other thing of any kind'. McLelland argues that this definition,

leaves no space for fantasy outside the law and could, conceivably, be applied to diary entries or other transcribed thoughts — in essence, it equates to a kind of "thought crime". Human-rights advocates have pointed out that since the Australian legislation applies equally to

²⁷ DCITA *Review of the Operation of Schedule 5 to the Broadcasting Services Act 1992* Commonwealth Department of Communications, Information Technology and the Arts (2004) 32.

²⁸ Penfold Carolyn 'Child Pornography Laws: The Luck of the Locale' (2005) 30 *Alternative Law Journal* 123at 40.

written as well as visual depictions of child sex, it exceeds by far, international human rights standards.²⁹

In the context of Internet-based research, such material includes any text and/or images accessed via the web, including transitory content such as text, images and audio transmitted in online chat rooms.

2.3 Risk Assessment for our Project

In conducting a risk assessment of the legal issues associated with our project, it was determined that it is not illegal under Commonwealth or New South Wales state law to access or possess Internet content that is classified R18+ or X18+, but it could be an offence to access or possess material that has been classified or could potentially be classified RC. Given that all the websites in our study are hosted outside Australia and therefore not subject to an ACMA directed take-down notice or industry code, and that ISPs are unable to block all prohibited content, we were advised that there was considerable risk of offending in relation to Commonwealth and New South Wales state laws regarding access to and/or storage of RC material, particularly sexually violent material or child pornography.

As discussed above, our project uses the Internet as one source of data to examine the sexual behaviour and practices of Singaporean men who use the services of Indonesian sex workers. Paedophilia and child sex tourism are *not* the focus of our research but it was quite conceivable that we would access material related to these topics using our existing search strategies for two reasons. First, the common practice of 'page jacking' in which the sex industry uses false key word descriptions and other technologies to misdirect users to pornographic websites, means that RC material is frequently accessed using neutral search terms.³⁰ Second, there is sufficient evidence to suggest that a proportion of the sex workers in the Riau Islands are minors. The Islands have been identified as a hub for the trafficking of children, many of whom end up in the sex industry in Indonesia or in neighbouring countries.³¹ Our discussions with staff in Indonesian non-government organisations (NGOs) that work on HIV/AIDS or anti-trafficking projects support the view that there are a significant number of 'under-age girls' working in the local sex industry.³² In addition, both the Singaporean and Indonesian media frequently report instances of Singaporean male sex clients deliberating seeking out teenage girls in the mistaken belief that they are free of sexually transmitted diseases or that sex with teenage girls will enhance a man's virility.³³

²⁹ McLelland Mark 'The World of Yaoi: The Internet, Censorship and the Global 'Boys' Love' Fandom' (2005) 23 *The Australian Feminist Law Journal* 61 at 66.

³⁰ Hughes Donna 'The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children' in Waskul Dennis (ed.) *Net.Sexxxx: Readings on Sex, Pornography and the Internet* Peter Lang Publishing New York 2004.

³¹ Rosenberg Ruth (ed.) *Trafficking of Women and Children in Indonesia* International Catholic Migration Commission and the American Center for International Labor Solidarity Jakarta 2003.

³² Ford Michele and Lyons Lenore 'Making the Best of What You've Got: Sex Work and Class Mobility in the Riau Islands' in Ford Michele and Parker Lyn (eds) *Women and Work in Indonesia* Routledge London 2008..

³³ Tan Theresa 'It's Saturday — 600 Spore Men Hit Batam for Sex' *The Straits Times* 22 March 2004.

Given our knowledge of the sex tourism industry in the islands, and choosing to err on the side of caution, we acknowledged that our project may involve accessing material that is deemed to constitute child pornography under both Commonwealth and NSW State law. Although the cross-cultural dimension to our research makes it difficult to discern the age of individuals appearing in images, and therefore to determine whether those images are of persons under 18 years of age, we could not rule out that some of the Internet sites in Stage 1 (analysis of website content) of our study could contain images or text that would be classified as ‘child pornography’. Stage 2 (non-participant observation of chat rooms) and Stage 3 (online interviews in chat rooms) posed additional complexity from a legal perspective because they both involved the use of ‘transitory content’ which was not included in the definition of ‘content’ used to classify Internet hosted material under the *BSA* at the time this project commenced in 2005. Such content was, however, included in NSW state legislation. It is possible that users of online chat rooms may discuss sexual acts or fantasies involving children as thus constitute an offence under the *Criminal Code (Cth)* ss 474.19–21. Academic research about child sex tourism could also conceivably be viewed as a form of ‘benefit’ under the *Crimes Act*, and asking questions about child sex could encourage an offence involving child sex tourism.

Because we could not rule out the possibility of accessing child pornography during the course of our research, we were instructed by the University’s Legal Unit to seek permission under s 474.21 of the *Criminal Code Act 1995* from the Federal Minister of Justice and Customs before beginning the research. This section of the Act provides for statutory defence ‘if the conduct is a) of public benefit; and b) does not extend beyond what is of public benefit’.³⁴ This includes: ‘conducting scientific, medical or educational research that has been approved by the Minister in writing’.³⁵ Ministerial approval for the project was granted on the 21 January 2007, nine months after we submitted our application to the Minister’s office. In seeking Ministerial approval, we also specifically asked whether ‘raising questions with interview or survey respondents about child sex tourism’ constitutes an offence under the *Crimes Act 1914*. Rather than addressing this issue, the Minister encouraged us to seek legal advice on the matter.

In granting approval under paragraph 472.21(2)(d) of the *Criminal Code Act* to conduct the research, the Federal Minister alerted us to a requirement to ‘track and report all instances of internet sites with child sex content to the Australian Federal Police’. The relevant department within the Australian Federal Police (AFP) is the Online Child Sex Exploitation Team (OCSET). ISPs and content hosts have a similar responsibility under the *Crimes Act* to refer details of offences to the Australian Federal Police with threat of punishment via fines if they do not meet this obligation in a timely manner.³⁶ At the Minister’s request, we informed the National Coordinator of OCSET about our project and were advised to contact them as soon as we accessed material containing images or text related to child sex. The University of Wollongong

³⁴ *Criminal Code Act* Telecommunications offences Division 474.

³⁵ Given that section 474 of the *Criminal Code Act* comes under Chapter 10 National Infrastructure, Part 10.6 Telecommunications Services, we were also advised that the Minister for Communications, Information Technology and the Arts should be consulted.

³⁶ *ACMA Development in Internet Filtering Technologies and Other Measures for Promoting Online Safety* Australian Communication and Media Authority (2007) 97.

has a similar responsibility to report child pornography to the AFP when it is known or suspected that a staff member or student has accessed such content using the University's server.³⁷ We were advised by the AFP to look at 'open source material' and to be 'conscious of your search criteria when conducting online research'. The AFP has warned, however, that complying with their request will not guarantee that our research is not monitored by international policing agencies.

The Federal Minister also advised that notwithstanding his approval, there was a possibility of committing offences in other jurisdictions and we were urged to write to the Attorney General of New South Wales to indicate our intentions and seek further information regarding any offences associated with the possession of pornography. In responding to our request for advice regarding the conduct of our study, the Attorney General of New South Wales advised that it is a defence under the *Crimes Act 1900* (Possession of Child Pornography) Section 91H(4)(c) to use the material for 'genuine child protection, scientific, medical, legal, artistic or other public benefit purpose'. The Attorney General noted that unlike the *Criminal Code (Cth)* there is no requirement in New South Wales to obtain ministerial approval to conduct research for a public benefit purpose.

3.0 SEX AND THE NET: CHALLENGES FOR INTERNET RESEARCHERS

The Australian government is not alone in its push to regulate sex on the Internet. In recognition of the 'borderless' world of the Internet and the difficulties involved in identifying and prosecuting content providers, the *Criminal Code Act 1995* represents an attempt to protect children from sexual abuse by prosecuting individuals involved in the promotion and dissemination of child pornography. McLelland has noted that Australian legislation relating to child pornography adopts a 'zero-tolerance' policy in which there is no concession to freedom of speech or the right of privacy.³⁸ For scholars interested in any aspect of teenage sexuality on the Internet the law is very clear — such research is illegal under existing Commonwealth law and potentially under state law.³⁹ While there is a concession for public benefit, the requirement to seek permission from the relevant Federal Minister to access and store content related to child sex on the Internet raises a number of issues that should be of concern to Australian-based scholars.

The first issue relates to the impact of existing law on all forms of research that involve the study of online sexual content and behaviour. In the case of our research on Insular Riau we anticipate that some content may constitute child pornography under the Act because of what we

³⁷ The University's Legal Unit advised us that if child pornographic content became a significant component of the study and the AFP becomes involved in close monitoring of the research, that the University may withdraw its support for the study and would no longer agree to be associated with the project.

³⁸ McLelland above note 29 at 66.

³⁹ McLelland and Yoo point out that the creation of online sexual content and the exchange of online sexual communication by teenagers is also a criminal offence. McLelland Mark and Yoo Seunghyun 'The International Yaoi Boys' Love Fandom and the Regulation of Virtual Child Pornography: The Implications of Current Legislation' (2007) 4 *Sexuality Research and Social Policy* 93.

know about the sex tourism industry in the islands. Therefore, we cannot exclude the possibility that we will access material that is deemed to constitute child pornography in Australia. Even though our research does not intend to examine the phenomena of child pornography or of child sex tourism in the islands, the broad scope of our study of human sexuality means that it is likely that such content will be included in our proposed data sets. It is likely that other scholars studying aspects of adult sexuality on the Internet will face a similar dilemma.⁴⁰ Consequently, it would appear that almost anyone seeking to study online sexuality must necessarily comply with section 474 of the *Criminal Act Code* 1995 (Cth), and thus with the decisions of Federal Government Ministers regarding the definition of ‘public benefit’. In an environment where increasingly narrow, conservative views of the public or national good prevail, opportunities to study sexual behaviour which is deemed ‘offensive to any reasonable adult’ may become increasingly limited. What is important to note here is that it is the *use* of an Internet carriage service to communicate, store, access or disseminate content that is at issue. Other means of research (paper-based surveys, face-to-face interviews) are not regulated in the same way.

Equally worrying, is the requirement to involve policing agents in the conduct of the study. We recognise that the Australian Federal Police are required under law to monitor Internet traffic related to accessing, distributing and storing child pornography and child sex tourism. The requirement to advise the AFP of content that may constitute child pornography as soon as it is accessed places an additional burden on all researchers involved in the project. In our discussions with the Faculty’s IT Manager at the University of Wollongong we were advised to ensure that additional security measures were in place. It is common practice for graduate students and some research assistants to share computing facilities because of resource constraints. As other staff and graduate students may be offended by some of the online content, we were advised to minimise the likelihood that they would stumble across the websites and print-outs. This necessitated the allocation of a dedicated computer with secure password access and a designated Internet Protocol (IP) Address. We were also advised that the AFP should be notified of this IP address so that they could better track our online activities and exclude them from their investigations. Although we complied with these requirements, for some researchers, this level of scrutiny and quasi-policing may be so unacceptable that it renders the research project unviable.

The possibility that research participants may reveal criminal behaviour involving sex with minors presents us with further problems associated with the tension between ethical requirements to maintain privacy, confidentiality and anonymity on the one hand, and legal requirements to report incidences of criminal behaviour involving children on the other. Within the Internet studies community there is considerable debate about what constitutes ‘public’ Internet content. Those researchers who argue that electronic noticeboards and chat rooms constitute a public domain claim that because such spaces are open to anyone to join, informed consent is not required to access and use this material but that anonymity should be ensured.⁴¹

⁴⁰ These restrictions do not only apply to studies of sexuality. In our project we are also interested in examining the wider question of how the online representations of an entire community are tainted by the overwhelming volume of sexual content on sites associated with that geographical referent.

⁴¹ Hewson Claire et al. *Internet Research Methods: A Practical Guide for the Social and Behavioural Sciences* Sage Publications London 2003 p 53.

Others suggest that ‘what is public or private is defined not by the technology, but by the perception of privacy and inclusion that is maintained by the participants’.⁴² These tensions are heightened when working in an online environment because of the ease with which policing authorities, as well as the University’s IT staff, can access computer-mediated communication between the researchers and study participants. Even ‘private’ conversations (in a separate chat room to which users are invited) are potentially public because relevant authorities have the ability to obtain this information under the Telecommunications Act. As Phillips and Cunningham note, ‘online, one is never sure who is watching us’.⁴³

In relation to Stage 2 of our study (non-participant observation of online chat), the University’s Human Research Ethics Committee (HREC) adopted a liberal view of what constitutes public and private in the online world. It determined that the issue is not whether the material is publicly accessible, but whether the site itself contains any confidentiality clauses. The conditions governing our ethics approval state that we must determine whether entry into a chat room requires an obligation of confidentiality, and if there is no such statement that we could reasonably determine that the site is in the public domain. If a site does contain reference to a confidentiality clause we are required to obtain permission from the site owner or manager prior to using any part of the online chat as research data. However, with regard to observing potential criminal behaviour, the HREC made a distinction between our legal obligations under the *Crimes Act* (i.e. all suspected illegal behaviour must be reported to the AFP) and the need to maintain the confidentiality of research subjects if they request it. They made it clear that our need to maintain confidentiality does not extend to concealing illegal activity online.

For Stage 3 (online interviews) we are obliged to ensure that research participants provide informed consent. This raises further issues with relation to the discussion of potentially criminal acts. The *National Statement on Ethical Conduct in Human Research* states that:

Clause 4.6.6 In research that may foreseeably discover illegal activity but is not designed to expose it, researchers should explain to participants as clearly as possible:

- (a) the likelihood of such discovery and any resulting legal obligation of disclosure the researcher may incur; and
- (b) the extent to which the researcher will keep confidential any information about illegal activity by participants or others, and the response the researcher will make to any legal obligation or order to disclose such information.⁴⁴

In order to meet these requirements, the HREC requested a two-stage process to obtain informed consent. The first stage requires us to contact the site owner/manager and request permission to conduct research via online interviews in the chat room. If that permission is granted, then we can proceed to the second stage, which is posting a ‘Note of Introduction’ in the

⁴² Anderson Terry and Kanuka Heather *E-Research: Methods, Strategies and Issues* Pearson Education, Inc. Boston 2003 p 68.

⁴³ Phillips David J. and Cunningham Carolyn ‘Queering Surveillance Research’ in O’Riordan Kate and Phillips David J. (eds) *Queer Online: Media, Technology and Sexuality* Peter Lang New York 2007 p 36.

⁴⁴ NHMRC, ARC, and AVCC *National Statement on Ethical Conduct in Human Research* National Health and Medical Research Council, Australian Research Council and Australian Vice-Chancellors’ Committee (2007) 68.

chat room outlining our research goals and requesting the opportunity to engage in an online interview. The Note of Introduction acts as a combined Consent Form and Participant Information Sheet. These forms are typically used for interviews or surveys of human research subjects.⁴⁵ The Note of Introduction must specify the potential risks that participants may encounter if they consent to being involved in the project. Given our obligations to report suspected criminal behaviour involving sex with minors to the AFP, we were required to insert the following paragraph:

Some countries have mandatory reporting requirements for ISPs and Internet users in the case where the Internet is used to transmit information related to alleged criminal activity. For example, Australia has laws which require the mandatory reporting of Internet sites that contain material related to child sex tourism. Countries like Australia also have extra-territorial legislation that provides for prosecution of Australian citizens who engage in child sex tourism while abroad. Singapore does not yet have such legislation. Participants need to be aware that all instances of Internet sites with child sex content will be reported to the Australian Federal Police. We therefore urge you to protect your anonymity while online and be careful not to reveal personal information so that your identity can be protected.

Given that the Federal Minister would not comment on whether asking sex tourists questions about child sex constituted an offence under the *Crimes Act 1914*, and because child sex tourism is not the focus of our research, we decided not to include questions related to sex with minors as part of our interview schedule for online interviews. In addition, where the topic of child sex was raised by an interview respondent, we decided not to pursue the topic by asking follow-up questions about this issue. If a respondent continued to engage in a discussion of child sex, we decided we would remind them of the potential for content related to child sex to be reported to the AFP.

4.0 CONCLUSION

Studies of the Internet are growing in popularity, due in part to the unique opportunities that the worldwide web provides in accessing data and subjects, but also because of the emergence of new online communities that are themselves the object of investigation. Our research raises a number of issues for scholars investigating the role of the Internet in the construction and performance of sexuality. As discussed, the broad scope of the Australian Commonwealth legislation and the penalties involved present Internet researchers with considerable legal dilemmas with regard to the design of their research questions and methodologies, as well as the conduct of their research projects. These issues have attracted little scholarly discussion or debate. The aim of this article is to draw on our own experiences to stimulate further discussion about the implications of the current legal and regulatory environment on academic research.

⁴⁵ As above.

We acknowledge that the possession of child pornography is illegal under both Commonwealth and State laws, and that these laws have been put in place to protect children. Scholars wishing to study child pornography (an important topic of research that deserves sustained analysis) would be wise to seek permission from the relevant Commonwealth Minister in relation to their project. Similarly, researchers investigating child sex tourism or other forms of 'restricted content' (including sexually violent material and bestiality) are cautioned to seek legal advice. We support these measures as necessary not only to protect children, but the scholars themselves.

Our concern is not with content that has been or could potentially be classified RC, but with the study of all other forms of human sexual behaviour. Under present Commonwealth legislation, studying any form of adult sexual content on the Internet could potentially result in an offence. The issue arises in part because of the nature of the Internet. Attempts to control the spread of sexual content (of any classification) on the Internet have failed not only in Australia but internationally. Our study demonstrates that the legal issue is not whether the behaviour under study is (potentially) illegal, but whether the technologies used to collect data are capable of protecting researchers from accessing prohibited material. In the absence of an effective filtering technology, any researcher is capable of *inadvertently* accessing prohibited content. The law clearly stipulates that intention and recklessness are fault elements, and therefore Ministerial approval to conduct scientific research is necessary.

The requirement to seek Federal Ministerial approval raises serious concerns about the possibility of censoring academic research. Sexuality scholars are well versed in the skill of arguing for the benefit of scholarly research on topics that may be deemed distasteful or morally unacceptable by certain segments of society. These debates often take place within the academic community itself, primarily at the point of decision-making in regard to ethics approval or grant funding. Occasionally these issues spill over into the public arena, most notably in relation to claims about the 'public benefit' of university research activities and the right of the tax-payer to determine how public funding is allocated.⁴⁶ However, such research is rarely subject to legal sanction. We are worried that the legal requirement to seek Ministerial approval to conduct research on human sexuality on the Internet may restrict opportunities to examine issues which do not meet the prescribed values of a particular Minister or government. In this regard, the current NSW legislation is preferable because although it too allows a defence on the basis of scientific research for public benefit in relation to the possession of child pornography, it does not require prior approval to be obtained. In both cases, however, the measure of what is considered 'public benefit' remains unclear.

The University requirement to subject our research to monitoring and surveillance by the Australian Federal Police is also worrying to us. We acknowledge that the Australian Federal Police and their counterpart agencies overseas engage in regular monitoring activities in relation to Internet content that involves sex with minors and child sex tourism. The Ministerial

⁴⁶ For example, R.W. Connell's significant work on masculinities in Australia (which was funded by the national grant agency the Australian Research Council) was subject to a federal parliamentary 'Wastewatch Committee' of the Liberal and National Parties as a conspicuous waste of public funds. Connell R. W. *Masculinities* Allen and Unwin St Leonards 2005 p 92.

requirement to notify the AFP about our research provides one means to ensure that our activities can potentially be excluded from these activities, and we believe that this is an appropriate action. However, providing the AFP with an IP address that links specific individuals with particular search strategies opens us up to an entirely different level of surveillance. While the University may regularly monitor IP address activity by staff and students, providing an external policing agency with the same level of access in relation to topics and issues unrelated to the project which has received Ministerial approval is an invasion of personal privacy.

Like us, the majority of researchers do not have a background in legal studies and many have limited access to professional legal advice. In our experience, university employed lawyers also have limited experience in dealing with these issues. Their primary role is to protect the university from risk and this shapes their interpretation of the potential benefits that accrue from university-funded research. Institutional ethics committees may also adopt a conservative approach to risk management in relation to the design of research projects and veto topics that are deemed too risky from a legal perspective. Individual researchers are often left with one of two options — forgoing the research on the grounds that the legal risks are potentially too great (as we have done in relation to online interviews about child sex tourism), or embark on the difficult and time-consuming task of trying to interpret the law. An alternative, and more worrying trend, is for researchers to conduct their research in ignorance of the law.

These issues not only apply to research on sexuality and the Internet. The recent introduction of legislation in relation to the publication of material on terrorism raises a range of concerns about censorship of academic research as well as government control over access to material and content that is of interest to scholars.⁴⁷ Shortly after coming to power in 2007, the Labor government proposed the introduction of ‘clean-feed’ filtering technologies. This technology also poses a range of issues that may impact on researchers’ abilities to use the Internet as an effective research tool. These, and other, issues deserve wider discussion within the academic community. They should be of concern not just to individual scholars, but to professional associations, unions, grant agencies, and institutional research and ethics committees. New technologies open up new ways of doing research as well as new topics of research. We believe that the challenge facing the scholarly community is to take a more active role in shaping public policymaking that can impact on the conduct of e-research. ●

⁴⁷ O’Neill Margot ‘Terror Research under Threat from Australian Law’ *Lateline* Australian Broadcasting Commission 11 September 2006.