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Senate Legal and Constitutional Affairs Committee
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Submission to Inquiry into current and proposed sexual consent laws in Australia

Thank you for the opportunity to make a submission to the Inquiry into current and proposed sexual consent laws in Australia.

I'm an Associate Lecturer within Criminology and Justice Studies at RMIT University, having previously worked as an independent consultant in "vice" regulation as well as a criminal defence lawyer.

This submission focuses narrowly on the topic of consent within BDSM relationships. Given the opportunity afforded by this national inquiry, it is pertinent to note some of the glaring inconsistencies in the treatment of BDSM and consent under the criminal law in Australia.

The submission will explore how the legacy of doctrines around "consent to assault" have criminalised some consensual BDSM activities whilst, at the same time, limiting the protections available for victims of non-consensual BDSM.

BDSM in Australia

BDSM (an acronym for Bondage, Discipline, Sadism and Masochism) refers to a number of sexually motivated practices including the use of restraints, pain/sensation play, power exchange, impact play, piercing, leathersex and role-playing. [1]

Most BDSM is limited to discrete play sessions between partners, but some people engage in "full-time" or "24/7" relationships involving dominance and submission.

Although national surveys are limited, a 2008 study found that around 1.8% of sexually active adults in Australia (2.2% men and 1.3% women) regularly engage in a BDSM activities. [2]

Whilst BDSM has previously been stigmatised as a sexual perversion, or as inherently abusive, BDSM imagery and fantasies now appear regularly in popular literature and media, reflecting a growing acceptance of the practice as a valid form of sexual expression.

Research has consistently shown that participating in BDSM is not an indication of psychology pathology, [3] nor is an interest in BDSM a recognised risk factor for sexual offending. [4]

Despite being a not uncommon sexual practice in Australia, the criminal law has generally taken a negative, and in some cases paternalistic, view of BDSM.

Laws Regarding Consensual BDSM

Despite clearly being pursued for sexual gratification, police and prosecutorial practices have tended to construe BDSM and consent within the legal authority of “consent to assault” and not “sexual consent”.

Since the infamous House of Lords decision of *R v Brown*,¹ also known as the *Spanner case*, BDSM activities which result in actual bodily harm are open to prosecution even if fully consensual under the common law.

In *Brown*, the House of Lords upheld the conviction of a group of gay men who engaged in BDSM activities resulting in injuries to their bodies. A range of consensual assaults occurred as part of the discrete play sessions between the men including assaults amounting to actual bodily harm, wounding and grievous bodily harm.

These sessions were recorded on a series of VHS tapes, which were uncovered as a result of a police operation which ran throughout the 1980s called *Operation Spanner*, targeting obscenity. The tapes depicted whipping, wax play and (much discussed in the tabloids) the nailing of one man’s foreskin to a block of wood. All of these acts were freely consented to and there was no complainant in this case.

There is long standing authority that “an assault with consent is not an assault at all”,² meaning the House was asked to determine whether BDSM activities which result in occasioning actual bodily harm or more serious injuries are an exception to the rule.

The majority distinguished the unique harms of consensual BDSM from a wide range of other harmful activities where consent has been recognised, including surgery, authorised sporting activities and corporal punishment. Sadomasochistic desire was found to have no social utility, as there was a real fear it would incentivise behaviours contrary to the public interest. As Lord Templeton (at [9]) famously stated:

Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.

In dissent, both Lord Mustill and Lord Slynn could find no authority to justify the finding that consensual acts done in private which do not result in serious bodily harm fit within the purview of the criminal law. In the exasperated words of Lord Mustill:

I ask myself, not whether as a result of the decision in this appeal, activities such as those of the appellants should cease to be criminal, but rather whether

¹ [1992] UKHL 7.

² *R v Schloss and Maguire* (1897) 8 QJL 21.

the Act...should in this new situation be interpreted so as to make it criminal. Why should this step be taken? Leaving aside repugnance and moral objection, both of which are entirely natural but neither of which are in my opinion grounds upon which the court could properly create a new crime...

Yet this “new crime” was created, and imparted across to the antipodes.

The application of *Brown* in Australian case law has largely been within the context of involuntary manslaughter where risky BDSM results in death.³ However, limitations on consent to BDSM are still very much part of the law, particularly in the “non-Code” jurisdictions of Victoria and NSW. Just recently, *Brown* was applied to a case involving an amateur “tummy tuck” by a body modification practitioner.⁴

The legal status of BDSM activities causing actual bodily harm in other jurisdictions range from explicitly legal to possibly legal to clearly criminalised.

The brilliant and extensive report *Consensual Assault* prepared by Dylan Richards for the Tasmania Law Reform Institute, is a comprehensive overview of the inconsistencies across the law in Australia, even within Code jurisdictions. [5] Some relevant findings include:

- The definition of assault under s182 of the Tasmanian *Criminal Code* appears to allow consent as a defence to assault (including causing injury), however goes on to muddy this interpretation by stating consent is irrelevant if the act is “*otherwise unlawful, and the injury is of such a nature, or is done under such circumstances, as to be injurious to the public, as well as to the person assaulted, and to involve a breach of the peace*”.
- The ACT appears to defer to common law principles in its drafting of assault and injury offences under the *Crimes Act 1900* (ACT), meaning the principles of *Brown* are likely to apply.
- The near identical offences under s245 of the Queensland *Criminal Code* and s222 of the Western Australian *Criminal Code* appear to depart drastically from the common law in allowing for consent to assaults occasioning harm. In the Queensland case of *Lergesner v Carroll*,⁵ the Queensland Court of Criminal Appeal unanimously held that consent could be a defence to an assault occasioning actual bodily harm, however possibly not to cases of wounding or grievous bodily harm.
- The Northern Territory also appears to require lack of consent as an element to the offence of assault under s187 of the NT *Criminal Code*. Absence of consent is expressly spelled out in the offence to include situations in which apparent consent is obtained by force, threats or fraud.
- South Australia, despite being a “non-Code” jurisdiction has clarified that consent is an element of an “assault” under s20(1) and “assault causing harm” under s20(4) of the *Criminal Law Consolidation Act 1935* (SA).

³ See: *R v Toyer* [2021] NSWDC 69, *R v Stein* [2007] VSCA 300, *R v McIntosh* [1999] VSC 358.

⁴ *R v Russell* [2021] NSWDC 782 at [30].

⁵ [1991] 1 Qd R 206.

In short: Victoria, NSW and the ACT still retain *Brown* as an authority meaning consent is not a barrier to prosecution to BDSM activities causing actual bodily harm. In other jurisdictions, consent seems to act as a defence, with the caveat that assaults resulting in wounding or grievous bodily harm likely constitute an offence regardless of consent.

Further questions are raised when the *Human Rights (Sexual Conduct) Act 1994* (Cth) is considered. Passed by the Keating government to ensure sex between men was fully decriminalised throughout Australia, the Act reads:

Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

Should the Act be interpreted to prohibit current laws limiting consensual BDSM? Some scholars, such as Professor Theodore Bennett from the University of WA, believe that it should. [6] However, given the lack of guidance on the Act, and the potential varied interpretations of such curly terms such as “sexual conduct”, “arbitrary interference” and “privacy” – this is purely speculative.

Moreover, an appeal of *Brown* to the European Court of Human Rights on the basis of Article 8 of the European Convention on Human Rights, which specifically protects the right to privacy, found that such prosecutions may be justified to preserve public health and wellbeing.⁶ It’s unclear whether similar reasoning would be applied by Australian courts.

On the best legal analysis available, many BDSM activities are criminalised in some parts of Australia if they result in actual bodily harm (NSW, VIC and ACT) and are likely criminalised in all parts of Australia if they result in wounding or more serious injury.

Current Criminalisation of BDSM Activities

It's important to note that the principles of *Brown* do not apply to harms which exist below the threshold of causing actual bodily harm. BDSM activities can constitute a range of behaviours from a potential battery (due to the use of restraints) to a possible offence of wounding (should caning or whipping draw blood).

Determining the threshold of “actual bodily harm” for BDSM is not assisted by vague wording in existing authorities. Judicial guidance that actual bodily harm is “more than merely transient or trifling”⁷ or that it is “calculated to interfere with the health or comfort of the victim”⁸ has done little to clarify this distinction.

Given authority that actual bodily harm includes scratches and bruises,⁹ the infliction of minor injuries within the context of BDSM “impact play” including spanking, caning, flagellation and slapping may be criminalised in some jurisdictions even if consensual.

⁶ *Laskey, Jaggard & Brown v. the United Kingdom*, ECHR, 19 February 1997.

⁷ *R v Lardner* (unrep, 10/9/98, NSWCCA).

⁸ *McIntyre v R* [1965] VR 593.

⁹ *McIntyre v R* (2009) 198 A Crim R 549 at [44].

Should the impact play result in blood being drawn, the criminalisation of consensual activities would extend further.

A similar rationale applies to biting or piercing; or the use of fetish toys including suction cups, nipple clamps or electroshock devices.

The legal status of the use of gags, restraints, hoods or chokeholds during BDSM would depend greatly on the method used and the degree of care taken by practitioners. In *R v Stein*,¹⁰ a sex worker and her “pimp” tied up a client and put a gag in his mouth seemingly all with his full consent. The client died soon after the application of the gag, although a definitive cause of death wasn’t determined. Applying *Brown*, Kellam JA wrote:

[E]ven though it might be accepted that the deceased had consented to bondage activity, the application of a gag to his mouth, whether or not he had consented, involved exposure to the risk of serious physical injury to him... Once the gag had been placed on him, he was totally in the hands of the applicant. Once that had occurred in circumstances where a risk of serious injury arose, the issue of consent became irrelevant.

Recently, a Queensland sex worker was found guilty of manslaughter for restraining her client face down on a bed with a gag in his mouth and a hood over his head, an act prosecutors called “inherently dangerous”. [7] The client died as a result of a lack of oxygen to the brain, which prosecutor’s alleged reflected Lewin’s carelessness towards her client’s safety.

At the same time, recent laws passed to provide for a separate offence of non-fatal strangulation, have in some instances taken into account the potential for sexual choking to form part of consensual sexual activity.

For example, the introduction of a separate offence under s315A *Criminal Code 1899* (Qld) in 2016 for non-fatal strangulation in a domestic setting was explicitly drafted to read:

- (a) the person unlawfully chokes, suffocates or strangles another person, without the other person’s consent; and*
- (b) either—*
 - (i) the person is in a domestic relationship with the other person; or*
 - (ii) the choking, suffocation or strangulation is associated domestic violence under the Domestic and Family Violence Protection Act 2012*

Attorney General Hon Yvette D’Ath addressed the inclusion of “lack of consent” in the offence during her second reading speech by stating:[8]

The requirement for lack of consent in the offence reflects the necessity not to criminalise the consensual touching of the body. The requirement of a lack of consent is a safeguard for people who engage in behaviours that, whilst not considered mainstream, are nonetheless consensual.

¹⁰ [2007] VSCA 300.

In contrast, the fresh offence under s298 of the *Criminal Code Compilation Act 1913* (WA), introduced in 2020, states:

A person commits a crime if the person unlawfully impedes another person's normal breathing, blood circulation, or both, by manually, or by using any other aid —

(a) blocking (completely or partially) another person's nose, mouth, or both; or

(b) applying pressure on, or to, another person's neck.

This offence is notable for avoiding general language such as “choking” or “strangulation” in favour of specific wording focused on partial or complete obstruction of breathing or blood circulation. This offence is arguably dealing with more aggressive forms of strangulation and choking than the offence in Queensland.

In the second reading speech for this offence WA Attorney General, the Hon John Quigley, noted that the choice to avoid reference to consent was made to protect victims from having to give evidence at trial:[9]

This offence also differs from that in other Australian jurisdictions in that it does not include as an element that the offence occurred without the consent of the victim. Including lack of consent as an element would require victims to give evidence in every trial, even when the offence was witnessed.

For people who incorporate BDSM activities into their sex lives in Australia, the current state of law is confusing and contradictory.

In some instances, there is a recognition that some forms of BDSM can be freely consented to, however there is always a limit upon which consent is irrelevant. This limit varies by State or Territory and by the potential charge chosen by police or prosecutors. It is a situation that requires deeper reflection and national attention to rectify.

BDSM Activities and The Law of Consent

In discussing the application of sexual consent laws within the context of BDSM, it's important to note that the standard of consent applied to such activities is completely determined by choice of charge.

The traditional approach of treating consensual BDSM activities as a case of an assault occasion harm has left the interpretation of consent to its “ordinary meaning” or particular legislative wording for assault and injury offences. Descriptions of consent to assault or injury lack the nuance and detail of those given to the consent elements of sexual offences.

As Dylan Richards notes in *Consensual Assault* regarding the Tasmanian offence of assault:

The reference to the putative victim's consent in the context of the consensual infliction of violence in fact encompasses various gradations of consent. Consent may refer to the express agreement to the infliction of the injury which was in fact inflicted. It may refer to the express agreement to the infliction of some harm but not to the harm actually caused. It may be consent to the risk of harm which in fact results

or it may be consent to the risk of some harm but not to the risk of harm as serious as that which actually results.

BDSM activities which occur without consent could (and should) be charged as a sexual offence, whether that is sexual touching, sexual assault or rape. However, police and prosecutors appear reluctant to take this approach.

It's possible that this stems from a false belief that the norms of the criminal law regarding sexual consent are counter to the dynamics of BDSM practice. Whilst it may be the case that some variations of "affirmative consent" do not translate well to BDSM, high standards of consent awareness are seen within the BDSM community.

The values and practices of people within the "BDSM subculture", that is people for whom BDSM is not merely a discrete bedroom activity but as an alternative lifestyle, tend to reflect a high valuation of consent.

Within this subculture, consent is seen as a critical distinction between "actual BDSM" and abuse.[10]. Dunkley and Brotto (2019) note that:[11]

The desire to engage in consensual [somasochism] rather than coercive [somasochism] distinguishes BDSM practitioners from psychiatric patients...Likewise, consent distinguishes a shared enjoyment of somasochistic acts from violence and assault.

Unlike other sexual activities, BDSM is more structured, often revolving around a "scene" or "play session". Because BDSM is formalised (and carries unique risks of injury) there are greater, more explicit conversations around boundaries prior to sexual activity.

Many BDSM practitioners have developed their own models of consent to manage the unique dynamics of BDSM. Within formalised BDSM subcultures there is a clear emphasis on explicit negotiation before things begin. This can incorporate prescribed "sign offs" including the use of consent checklists, a practice pioneered by the porn industry.

Another safeguard implemented during BDSM practices is the use of a "safeword". A "safeword" is an agreed upon verbal code to end or alter all BDSM activities. Sometimes this is done in the form of a "traffic light code" where the submissive responds with a traffic light colour depending on how they are doing in the scene (Green, Yellow, Red).

It is widely recognised that it is the responsibility of the "dominant" in the scene to check-in and be mindful of the "submissive" throughout BDSM activities. This reflects the principles of recent consent reforms, which implore parties to obtain continuous verbal consent throughout sexual encounters.

Williams *et al* (2014) have expanded on the longstanding BDSM mottos of "safe, sane and consensual" and "risk-aware consensual kink" to develop their own model of BDSM consent structured around the "4Cs" – Caring, Communication, Consent and Caution. Consent under this model is broken down into multiple components including:[12]

- Surface consent: which is described as a basic “yes” or “no” by both the submissive and dominant.
- Scene consent: which involves the submissive and dominant negotiating the parameters of the scene beforehand; and
- Deep consent: which involves the dominant being aware of the submissive’s ability or mental capacity to use a safeword during a scene.

A component of some BDSM relationships and play sessions which can cause confusion for prosecutors and police is the use of “slave contracts” to signify a degree of obedience of one person to another.

A “slave contract” is a fetishised document which involves a set of obligations owed by the submissive partner to the dominant partner, either in a discrete “scene” or as part of an ongoing relationship.

From a legal perspective a “slave contract” is pure fantasy. Such “contracts” are not legally enforceable and their existence will not act as a shield to charges of rape or sexual assault.

Whilst the existence of such contracts may appear on the surface to be a high risk of abuse, particularly coercive control, surveys with participants in 24/7 BDSM relationships describe contract dynamics as one of playing out a fantasy for mutual gratification [13].

Nevertheless, BDSM activities like all other sexual activities, carry a risk of abuse. It should be noted that it’s unclear how extensively the values and practices of the formalised BDSM subculture translate to more “amateur” BDSM in the community.

Partially the result of exposure to online pornography,[14] there is a growing interest in BDSM activities outside more subcultural environments. Certain activities, such as sexual choking and power play, could be seen as borderline mainstream, particularly amongst young people.[15]

It could be that this increased interest in BDSM has also increased awareness and adoption of the virtues of consent, or it could be that BDSM activities outside of BDSM venues and social events are being practiced absent key subcultural values.

The law has the potential to reinforce appropriate norms of consent when it comes to BDSM. This can occur by recognising BDSM as a sexual activity, requiring the considerations and standards of sexual consent.

Final Notes

This submission shouldn’t be read as necessarily supportive of a uniform approach to consent law reform, nor is it arguing in favour of any particular model of consent.

However, it does wish to highlight some of the inconsistencies and confusions regarding BDSM and consent in Australia. This inquiry should look further into possible reforms to ensure national consistency in law as well as police and prosecutorial approaches to consent within BDSM.

Consensual BDSM activities between adults which do not endanger the life of the participants or cause grievous bodily harm, should not carry the risk of a criminal prosecution. Moreover, where possible, violations of consent within the context of BDSM should be treated by police and prosecutors as a sexual offence, with an appropriate definition of sexual consent applied.

There is real opportunity as part of this inquiry to rectify a longstanding set of inconsistencies under the criminal law when it comes to BDSM and consent, that are not in keeping with community expectations.

Thank you for the opportunity to provide feedback on this Inquiry. Please do let me know if I can assist further.

Yours sincerely,

Mr Jarryd Bartle

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