SUBMISSION TO THE SENATE STANDING COMMITTEE

ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO CURRENT AND PROPOSED SEXUAL CONSENT LAWS

Dr Anthony S Marinac

Lecturer in Law

College of Business, Law and Governance, James Cook University

Overview

In Australia, as elsewhere in the common law world, it is unlawful for a person to consent to bodily harm in the course of sexual activity. This means that Australians who voluntarily, freely and enthusiastically participate in BDSM (bondage and discipline, dominance and submission, sadism and masochism) have no protection against prosecution for that conduct.

At the same time, BDSM cannot be allowed to become a convenient defence for perpetrators of intimate partner violence.

This submission proposes that BDSM sexuality should be lawful, but that the law should be premised on a sophisticated approach to consent. In many cases, this sophisticated approach is already in widespread use among BDSM communities. Indeed, there is much that the mainstream community could learn from the BDSM community about negotiating consent, and then maintaining the requirement for consent at the forefront of sexual activity.

Specific recommendations are made for an approach to consent which will allow free and willing BDSM, while protecting those who might be forced, coerced, or otherwise unreasonably influenced into such activity.

The Author

I am a lecturer in the College of Business and Law at James Cook University (Bebegu Yumba campus, Townsville) and am a solicitor admitted to practice before the Supreme Court of New South Wales, and holding a practicing Certificate in Queensland.

In 2011 I completed a Master of Laws thesis entitled *Sex, Violence and Consent: A Dworkinian Perspective*. A copy of the thesis can be made available to the Committee on request, or can easily be downloaded from the national theses database.

The central argument of that thesis was that the British case *R v Brown* (1993) 2 WLR 556, in which three gay men in England were jailed for their participation in consensual sadomasochistic sexual activity, was inconsistent with the principles underlying sexual laws in Australia, *but only* if such activity were undertaken in accordance with an advanced

consent regime, which includes specific safeguards to protect (in particular) women from nonconsensual violence, particularly in the context of intimate partner violence.

This submission draws substantially on that research, updated to take account of the development of the law since that time.

I make this submission in the explicit awareness that I am an academic, approaching the topic from an academic perspective. I am also a straight cis male. I have no lived experience of being a woman, a gender-diverse person, or an LGBTIQ+ person existing in Australian society under current consent laws. I have no lived experience as a victim of sexual violence or of coerced or nonconsensual sex. I acknowledge the limitations of my experience and do not seek to assert my own views over those of others. I certainly do not intend to extinguish the views of anyone with lived experience. I am certain the Committee will be careful to take account of all voices, and will not unduly privilege mine.

Having written academically about BDSM, I have found that interlocutors occasionally speculate about my own personal sexuality. It may be helpful for me to state up front that this is none of anybody's business, and that just as a person may study Clownfish or Dinosaurs without being one, a person may study BDSM regardless of their sexuality.

Finally, I have attempted to keep this submission relatively free from academic footnotes, in order to maximise its readability and utility to the committee. My earlier research, however, is extensively footnoted.

I am available, and would be most enthusiastic, if my appearance as a witness were considered helpful to the Committee.

The underlying principle of sexual laws in Australia

One of the key propositions of the legal philosopher Ronald Dworkin[1] is that all laws have a relationship with *social principles*, and that laws have a tendency to cohere to those social principles. Different societies, with different cultures, have different underlying principles, which results in different sets of laws. As a basic proposition, this typically seems quite instinctive to most people, and is a proposition which has been approved of in fora as senior as the High Court (for instance, during Justice Edelman's swearing in speech in the High Court of Australia in 2017).[2]

As a general rule, the more that a law moves away from those general principles, the more uncomfortably that particular law will sit within the corpus of law as a whole. As a result, when making law – particularly in an area as fraught as sexuality – it is helpful to begin by considering what underlying principles regulate law in Australia.

In my earlier research, I examined a wide range of Australian laws which relate, in one fashion or another, to sex: from criminal laws to laws regulating pornography and sex work, laws relating to access to sexual health and contraception, through to the changing treatment

[1] Particularly in *Law's Empire* (1986), but the concept was originally set out in Chapter 4 of his 1977 work *Taking Rights Seriously*.
[2] [2017] HCA Trans 8

given by the law to LGBTIQ+ sexual activities, and the changing legal nature of adultery (which now has essentially no legal consequences).

From that analysis, I formed, and I submit, the view that the key principle underlying all sexual law in Australia is that *people should have the maximum possible level of sexual self-expression that is consistent with the protection of the vulnerable.*

In other words, sexual activity should allow consenting adults with no other relevant vulnerabilities to do, essentially, whatever they please for their own sexual pleasure, provided their sexual activity does not impose itself on nonconsenting others.

The key, however, is the definition of vulnerability. This concept appears throughout our laws relating to sexuality:

- A nonconsenting person is vulnerable, and the law prohibits sexual activity they do not wish to participate in, observe, or otherwise be exposed to;

- A bystander is vulnerable, and law protects them from overt and obscene public displays of sexual activity that they do not wish to see, including public imaging, and including the requirement for certain minimal standards of dress in public;

- Children, above all others in our society, are vulnerable, and sexual activity relating to children is rightly considered among our most despicable crimes;

- Laws relating to sex work are perhaps most notable, particularly in my own state of Queensland, for their *failure* to address the vulnerabilities of sex workers, and they are criticized as a result;

- A person who has consented to having visual images taken of them during sexual activity is in a vulnerable position, and so our laws relating to revenge pornography address that; and

- Sex between people of the same gender (and, particularly, sex between or among people who have a penis) is <u>no longer</u> unlawful, because society, and then the law, came to realise that there was no vulnerability to protect, in situations where two adults of whatever gender or gender-identification choose to have sex.

This list, of course, is far from comprehensive, but even from this list it is not difficult to identify the pattern whereby the law trends towards maximizing free sexual expression while seeking to afford protection to the vulnerable.

From a principled perspective, in consequence, the most effective way to commence considering sexual laws in Australia is to begin by inquiring who might be vulnerable to harm arising from any sexual activity; what the nature of that harm might be; and what protection they require from the law.

Consent, in this conception, becomes one of the most powerful tools to protect the vulnerable. A person who is incapable of consent is vulnerable, and sexual activity involving them must be unlawful. A person who is capable of consent but who does not consent, is

vulnerable and sexual activity involving them must be unlawful. A person who consents, but then withdraws that consent, becomes vulnerable at the moment they so withdraw, and the continuation of sexual activity with them must be unlawful.

One area in which these principles have never been applied by Australian law, relates to the practices broadly known as BDSM – Bondage, Discipline, Dominance, Submission, Sadomasochism, Masochism.

BDSM in Australia: the law since *R v Brown*

R v Brown (1993) 2 WLR 556, also commonly known in popular culture as the "Spanner Case" due to the name of its police operation, "Operation Spanner", is perhaps one of the most-studied British cases of the late 20th century. It has led to literally hundreds of academic papers, including my own small contribution.

In this case three appellants - Brown, Laskey and Jaggard – were among a larger group of men who had participated (freely and enthusiastically) in sadomasochistic group sex activities in the late 1980s. The group was composed entirely of men, and there is some suggestion that they were engaging in sadomasochistic sexual activity as an alternative to more conventional homosexual penetrative sex, given that 1987 was at the height of the HIV/AIDS crisis in the UK, and the disease was, at that time, inevitably fatal.

At some point during the activities of this group, a videocassette was made. This cassette was discovered by police, who mistakenly believed that it was a record of serious crimes. Ultimately ,more than a dozen of the participants were charged; Brown, Laskey and Jaggard were the last three standing when the matter reached the House of Lords. Essentially the question before the court was whether it was lawful for a person to consent to the infliction of actual or grievous bodily harm for the purpose of sexual pleasure. If it was lawful, then the men would be acquitted; if unlawful, they would be convicted.

The court's judgment was, by today's standards, outrageous for its tone of antagonism towards the men for being homosexual. It is difficult to escape the conclusion that Their Lordships began with the perspective that the men were sexually depraved, and then reasoned from there. Be that as it may, the House of Lords identified the fact that there are a range of activities where actual and grievous bodily harm, or the risk of such harm, can be consented to: lawful combat, contact sport (particularly boxing and similar fighting sports); tattooing; and surgery. Their Lordships refused to recognize sexual activity as a further circumstance in which consent could be relevant. The defendants were jailed.

The decision in *Brown* led to an extended (and still current) argument as to whether *Brown* was good law. No case on similar facts has ever been decided in Australia. While *Brown* is not binding on Australian courts, in the absence of anything clearer, it is understood to state the law for Australia.

The opposing views in relation to *Brown* largely fall into two camps: a liberal camp which argues that people should be entitled to consent to harm in the course of sex; and a strong feminist voice which makes the indisputable point that wherever sex and violence are combined, there are terrible risks for the safety of women. Cheryl Hanna's 2001 paper, *Sex is Not a Sport: Consent and Violence in Criminal Law*, would be my choice as the leading

paper representing that position. Although more than two decades old, the paper's arguments have stood the test of time.

Coincidentally, just before *Brown*, Nicholas Toonen complained to the United Nations Human Rights Council about Tasmanian laws which made criminal his sexual activity as a homosexual man. In the judgment in *Toonen v Australia*[3] the Council upheld Toonen's complaint, and in consequence the Keating government passed the *Human Rights (Sexual Conduct) Act 1994*. The operative provision of that legislation was that "Sexual conduct involving only consenting adults acting in private is not to be subjected … to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights."

Some authors have argued that this provision overturns *Brown* in Australia, and would prohibit state laws which restrict BDSM between consenting adults in private.

In my view, unfortunately this is not so. Setting aside the fact that this legislation was clearly directed towards Toonen's case and that the parliament simply never turned its mind to the implications for BDSM, any application of the provision to BDSM activities would be restricted by the requirement that the participants be "consenting".

If, as was held in *Brown*, one cannot validly consent to BDSM involving the infliction of actual or grievous bodily harm, then it seems to follow that one cannot be "consenting" for the purposes of the *Human Rights (Sexual Conduct) Act 1994*.

Since that time, BDSM has been in a legal grey zone in Australia. Reliable studies are unavailable, but there are indicators that many Australians enjoy, or at least occasionally experiment with, BDSM activities. Adult Shops in Australia invariably carry BDSM paraphernalia. The book *Fifty Shades of Grey* and its sequels, and its film adaptations, sold more than 3 million copies in Australia and carried BDSM, at least conceptually, into the Australian mainstream.[4] BDSM oriented websites such as *Fetlife* have a strong contingent of Australian users, and organized social groups and skills workshops throughout the country.

The law has not kept pace: perhaps because of the nature of the topic, and perhaps because there are few public advocates for the BDSM community. Both of these arise from social taboos about the discussion of sex, and in particular taboos about the discussion of unusual sexual activities. Given these taboos, and the consequent absence of voices, the author is distinctly aware of the potential for his own public reputation to be impacted by making this submission – but someone must do it.

Since the passage of the *Human Rights (Sexual Conduct) Act 1994*, BDSM has typically been discussed by the law in very few, usually criminal contexts.[5] The most common of these is where a person dies in the course of BDSM activities. In the decided cases, this has most

---

[3] *Toonen v Australia*, Human Rights Committee Communication 488/1992

[4] A discussion of this mainstreaming effect in relation to the impact of Fifty Shades in the USA can be found in "Nonbinding Bondage", *Harvard Law Review*, Dec 2014, 713.

[5] It is crucial that I carefully limit this claim. It is likely that BDSM activities, or alternatively criminal intimate partner violence cloaked as BDSM activities, are a feature of domestic violence matters, but for sensible and proper reasons these matters almost never result in judgments on the record and available to the public. It is also highly likely that BDSM between partners becomes central to the inevitable "mud-slinging" of parenting matters under the *Family Law Act 1975* but such matters are very unlikely to weigh on the Court's mind in making, for instance, parenting orders, and they do not emerge in the reported cases.

commonly occurred in the course of activity which was alleged to be *erotic asphyxiation*, where a ligature is placed around the neck of a participant. This allegedly had the impact of increasing arousal, whether mechanically or due to the body's reaction to danger.[6] A defendant implicated in the death of another person in these circumstances is inevitably (and properly) convicted of manslaughter.

On one recent occasion the Court has, at least implicitly, seemed to move towards a much more liberal approach to BDSM than was evident in *Brown*.

In *R v Leigh Pattinson* [2022] NSWDC 475, the offender was charged with a range of offences including the infliction of actual bodily harm, and intentional choking on his then-partner. All but one of those charges was dismissed. Buscombe DCJ found that they had been in "an intermittent sexual relationship in which the offender was the dominant partner and the victim the submissive partner." He then gave examples of the fact that their sexual conduct had included violence. His Honour then found that during the events which led to the charge, the victim had used a "safe word", but the offender had continued the choking.

["Safe words" will be discussed further below; at this point it is sufficient to note that a safe word is a means by which a submissive partner can withdraw their consent to whatever activity is occurring.]

His Honour acquitted the offender in relation to all of the activity that occurred prior to the victims's use of the safe word, and convicted the offender in relation to the choking after the use of the safe word. This appears to be a judicial recognition that consensual BDSM, including consent to the infliction of actual bodily harm, is lawful. The presence or absence of consent was at all times the crucial factor. However with all sincere respect to His Honour, this is a novel decision by a single judge in the New South Wales District Court. It is no substitute for proper parliamentary consideration of this issue. This case does, however, graphically demonstrate the significance of having legal consent arrangements in place in relation to BDSM activities, in order to protect the vulnerable.

At the end of the day, despite the passage of 30 years since *R v Brown*, it remains the clearest and most authoritative statement of the law in relation to BDSM in Australia. The Honourable Committee's consideration of sexual consent laws presents an opportunity to remedy this deficiency, and to provide both freedom and protection to Australians participating in BDSM.

Consent models for BDSM

In this section of this submission, and those which follow, I will use the term "BDSM community". I do so cautiously, for a number of reasons. First, there are no boundaries to the community. Nobody is required to buy a membership card. BDSM encompasses everyone from conventional people having conventional sex with the occasional use of a blindfold, through to people for whom BDSM activity is the essence of their relationship. Second, the BDSM community is embedded in, and not separate from, the rest of the community. The person next to you on the bus; the person who pours your coffee; the

[6] See, for instance, *R v Toyer* [2021] NSWDC 69; *R v McIntosh* [1999] VSC 358; *R v Stein* [2007] VSCA 300 (which related to a gag rather than a ligature).

Senator who barely makes it into the Division before the doors are locked; the TV anchor; and the sports star; all have (and are entitled to) their private sexualities. None of us know who are the BDSM participants walking amongst us. The BDSM community should not be seen as an "other" or a thing apart.[7]

Having said that, the approach of the BDSM community to consent is extraordinarily advanced compared to the approach of the general community to consent.

It must be.

The essence of all BDSM activities is imbalance of power. Where one party takes a dominant role and the other a submissive role; where one party binds and the other is bound; where one party serves and the other commands; where one party suffers and the other party inflicts; the imbalances of power are patent.

More to the point, during consensual BDSM activities, both parties want that power exchange.[8] However, there are hundreds of papers available to the committee – and entire schools of feminist theory – that make the undeniable point that consent is *always* fraught when it is given in circumstances of power imbalance.[9] Indeed, in all Australian jurisdictions, sexual crimes are aggravated if they are conducted by someone who was in a position of power or authority over their victim. Other laws, such as the suite of sexual harassment laws, are designed to enable complaints to be made by someone lower in a hierarchy, against a person higher in that hierarchy: a fact that reflects the potential for hierarchy to result in procured, as opposed to genuine, consent.

The BDSM community responds to this challenge in various ways, all of which should be instructive for more general models of consent: these relate to consent as a dynamic *before*, *during*, and *after* sexual activity.

Consent before sexual activity

One of the great hazards of Australia's (and the West's generally) current socially-conventional methods of meeting and mating is that consent is often not negotiated at all. Rather, consent is often implied through the acquiescence of one party to incremental increases in intimacy by the other party (often in the context of at least some level of intoxication). Two people meet at a party. They seem to hit it off, and they enjoy chatting. Later they find themselves dancing. Along the way there is incidental touching, and perhaps significant eye contact. At some point one might increase the intimacy by taking the other's hand. They might later kiss. One might invite the other home (without explicitly stating that

[7] Having said this, a reasonable primer or point of entry, written from the perspective of psychologists, can be found in David Ortmann and Richard Sprott's book *Sexual Outsiders: Understanding BDSM Sexualities and Communities*.

[8] This idea will seem counterintuitive to many, particularly those who conceive of sexual conduct only as procreative or as an expression of love. However, the dynamic has been well studied. Consider, for instance, Faccio, Casini and Cipolletta, "Forbidden games: the construction of sexuality and sexual pleasure by BDSM 'players'", *Culture, Health and Sexuality*, 16, 7/8, 752; Newmahr "Power Struggles: Pain and Authenticity in SM Play" *Symbolic Interaction*, 33.3, 389;

[9] A good entry point to this discussion, other than the Hanna article already mentioned, is Carolyn Bronstein's article "Revisiting the Feminist Sex Wars" *Feminist Studies*, 41.2 (2015), 437, but I have no doubt the Committee will receive extensive evidence on this point from those with far more knowledge than I.

the invitation is intended to lead to sex). They might kiss more intimately during the ride home. At home, in private, there might be deeper intimate touching, and the removal of clothing, and ultimately sexual activity.

In short, it is entirely possible, and I would suggest hardly unusual, for two people in conventional society to have entirely consensual sex without ever explicitly discussing the fact that they intend to do so, and certainly without any discussion as to precisely what they intend to do.[10]

The BDSM community goes in an entirely different direction with consent, by the use of (at least) five tools: checklists, vanilla meetups, limits, discussions, and contracts. Each of these will be briefly discussed below, and their prevalence can easily be confirmed by appropriate internet searches (though one wonders what the parliamentary internet servers will think of those searches!)[11]

Checklists

One of the first challenges for BDSM is that the range of activities is so very broad. Two people might equally describe themselves as submissive; however for one of those that might simply mean that during sex they like their partner to take the initiative; for the other it might mean that they want to spend hours immobile at a sex party being whipped and humiliated. And both of these are valid choices which should be entirely open to any consenting adult.

Consequently, there are extensive checklists available online, which list literally dozens upon dozens of BDSM activities.[12] The checklists are arranged in such a way as to allow the person completing the checklist to indicate, against each of the activities, whether they are aroused by an activity, repulsed by it, or something in between. Many of the checklists also include space for the person completing the checklist to indicate their level of experience, or to include additional notes and context.

The practice is that once two people have met, usually online, they can exchange their checklists, to determine (in the community's language) whether their kinks play well together. If bondage is a fascination for one party, but unacceptable to the other, then it is perhaps less likely they will play together; however if they do, they both know the score from the outset: there will be no bondage.

Contrast this with the absolute lack of discussion during the conventional approach to sex. Two people who are having sex for the first time might well have established their mutual consent to sex. However are they likely to have discussed, ahead of time, questions of

---

[10] Some authors will vehemently oppose me in this position. For instance Vandevort, in her article "Sexual Consent as Voluntary Agreement: Tales of "Seduction" or Questions of Law, *New Criminal Law Review*, 16.2 (2013), 143, would argue that I was unfairly referring to "cultural paradigms and narratives based on the concept of "seduction" and related assumptions and attitudes about "normal sexual behaviour" to affect conclusions about voluntariness and affirmative agreement." While I stand by my position that such cultural narratives emerge from reality, the Committee should not automatically assume that my view necessarily has consensus, or even majority support.

[11] An academic treatment of this negotiation process may be found in Dunkley and Brotto, "The Role of Consent in the Context of BDSM", *Sexual Abuse*, 32.6.

[12] An example can be found as an Appendix to my thesis, *Sex Violence and Consent*.

contraception? Of whether oral or anal sex are of interest? Of whether their intention is to have gentle and loving sex or hard and fast sex? There is no reason at all why a person might not consent to some of these things but not others. The use of a BDSM checklist avoids that disconnect.[13]

Recommendation 1: Evidence of the use of a BDSM checklist by the parties to BDSM activities should be considered by any Court considering whether BDSM activity was, or was not, consensual. However if a person indicates, in a checklist, enthusiasm for a particular activity, it should not be inferred from this that they consented to that activity on any particular occasion.

Vanilla meetups

It is commonplace in the BDSM community for people who are meeting for the first time, to meet in an environment where there is no BDSM context whatsoever, thus "vanilla": for a coffee or a drink or a meal, just as in any other dating situation. It is also usual for anyone going to such a meeting to have informed at least one friend of where they were going, who they were meeting, and when they could be expected to make further contact. All of this is a necessary safeguard against the abuse of the BDSM dynamic by people whose true intention is to perpetrate harm.

In many cases, the refusal by a (particularly a dominant) participant to meet in a vanilla environment prior to meeting for sexual activity would be sufficient to ensure there was no further contact between the two. It would be, in the vernacular, a significant "red flag".

Perhaps more importantly, vanilla meetups and similar communications, allow the parties to get to know one another and to develop concord between them. The mere fact that a person loves to be tied up, does not mean they are happy to be tied up just by anyone. They might be very selective. They might <u>not</u> be very selective, but still might say "no" to specific individuals.

The purpose, then, of vanilla meetups is to remove the power imbalance of BDSM from this aspect of the "getting to know you" phase between two (or more) people.

Of course, meeting for coffee or a meal is entirely normal for conventional sex as well – however this is under challenge, and in many cases has never been true at all. Two people who meet at a club and "hook up", or two people who meet on a dating app and who explicitly agree they want to get straight to the sex, are not participating in anything similar to a vanilla meetup.

Before moving on from this topic, I recognize that the comments I have made above might be misread as me casting judgment upon those who prefer to get straight to sex. I make no such judgment. Every person of every gender should be free to be as promiscuous as they jolly well please. My point is merely that in the context of BDSM, which involves power exchange, an important part of the process of negotiating consent is to meet in an

[13] To my surprise, despite their prevalence in the BDSM community, the use of checklists has not attracted much academic attention. The best I could find was the treatment of BDSM activities in Richards and Barker, *Sexuality and Gender for Mental Health Professionals: A Practical Guide*, Sage, London.

environment where there is no power imbalance, and the willingness of a party to meet in such a preliminary way is a positive indicator of a healthy approach to consent.

Limits

Within the BDSM community, a "limit" has a particular significance. There are generally two types: hard limits, and soft limits. Both dominant and submissive participants will have limits.

A hard limit is something that the person will not participate in. Not now, not ever, it's not on the table. So, for instance, a person might indicate that being blindfolded is a hard limit. If that is so, then any use of a blindfold on them, ever, is understood to be against their will, and makes the entire scene nonconsensual. Even further, once hard limits are known, they are not open to negotiation. Merely asking a partner, let alone badgering them, to compromise a hard limit is not merely rudeness, but is inherently manipulative and almost certainly abusive.

Soft limits are just as important as hard limits are *now*, but by nominating an activity as a soft limit, the person is saying that they are not prepared to do this yet, but that may change, for instance once they develop more confidence in the skills of the other person. Or, perhaps, a soft limit might be an activity that the person is somewhat curious about, but not ready to try.

Once nominated, a soft limit is as important as a hard one. For a partner to do something known to be a soft limit, would result in the entire scene being nonconsensual. For the dominant partner to manipulate a submissive partner to remove or amend those soft limits would, as with a hard limit, be inherently manipulative and almost certainly abusive. Any removal of, or amendment to these limits ought to be spontaneous, by the person expressing the limit.

Limits often emerge from checklists; however they are so significant that they are often discussed separately, for instance during scene negotiation, to which I turn next.

Finally, limits are always restrictive and are *never permissive*. The mere fact that a person, say, has not nominated whipping as a limit, does not mean that their sexual partners automatically have permission to whip them. Again, this is a matter for scene negotiation.

Recommendation 2: Evidence of the nomination of a "limit" prior to BDSM activity should be taken, by a court considering whether BDSM activity was, or was not consensual, to be a conclusive denial of consent for the activity nominated as a limit.

Scene Negotiation

We now reach the point where, ideally, two[14] people have exchanged their checklists, discussed their limits, and met in a vanilla context. Within the BDSM community, they are *still* not at the point where sufficient consent has been established to enable them to

[14] Or more, but even within the BDSM world pairings are most common. The choices of polyamorous people can still however be celebrated.

commence sexual activity. The final step in the process is *scene negotiation*. Any BDSM encounter is commonly referred to as a scene.

Assume, then that two people are aware of one another's limits and interests, and they have a spark between them which results in them agreeing to a scene. It is inherently unlikely, given the breadth of the "menu" of BDSM activities, that they are going to do everything on the list, in any one scene. It is also common, and common sense, for people who are new to one another to start out slowly.

All of this leads to the need for a discussion before a scene. Discussion before a scene will often include:

- Basic safety rules for the scene (for instance, that neither party is intoxicated by drugs or alcohol; that the submissive party will not be left alone for more than brief periods; that safety scissors are available and have been sighted by anyone who is to be bound; that first aid arrangements have been made; that instruments for "impact play" such as canes have been inspected to ensure they are undamaged);

- A general outline of the scene to follow. Often this will not be meticulously detailed, as the surprise can be part of the fun. However it might be as simple as "You can expect to be bound and spanked by the open hand, and we are going to limit penetrative sex to oral sex only". This gives each participant the capacity to voice concerns, and to engage in the activity with reasonable expectations of the other person;

- A discussion of the relative "intensity" of the activities, particularly where those activities are likely to involve harm. There is a substantial difference between a brief light spanking with an open hand, and an intense whipping. Both might be wonderfully attractive to individuals, but the establishment of these expectations should not be left to chance;

- A review of limits, and of safe words; and

- Often a final request for reassurance, by the dominant party (who carries all the legal risks) that the submissive party really does want the scene.

The number of sexual encounters in the mainstream community preceded by anything like a scene negotiation would be vanishingly small. Within the BDSM community they are commonplace. Often, and thankfully for the purpose of evidence law, these negotiations might be had by means of text message or other online communications, leaving a paper trail for the protection of the scrupulous, and the prosecution of the abusive.

Recommendation 3: Evidence of the negotiation of a specific session of BDSM activity by the participants in that activity, should be admissible before a court considering whether the BDSM activity was, or was not consensual, but not in such a way as to infer that the negotiation led to any form of irrevocable consent.

Contracts

In the popular television show *The Big Bang Theory* the principal protagonist, Sheldon Cooper, is notable for his insistence that everyone from his room-mates to his wife sign "relationship agreements". In the television show the device is comedic, but there is no inherent reason why two people ought not to sit down and agree, in writing, to a document setting out the dynamics of their relationship. This is not to suggest that such a document would be binding as a matter of contract law, of course.

Within the BDSM community, the use of contracts[15] provides an opportunity for two (or more) people in an ongoing relationship to discuss the dynamics of that relationship. It might include a wide range of matters which would not necessarily be relevant in non-BDSM relationships (whose power cues come from broader social expectations). A contract might, for instance, include:

- Statements of the philosophy of the relationship (for instance, perhaps, "We intend to enjoy our dominant and submissive dynamic in the privacy of our own home, in a way that it not detectable to our families, colleagues, or to the broader community");
- BDSM activities, limits and safewords;
- Mutual understandings as to whether the relationship was to be monogamous, open, or some other variation in relation to fidelity;
- Mutual understandings as to whether any BDSM dynamic was to remain in the bedroom or whether it was to extend into other aspects of the relationship, such as:
    - Division of household labour;
    - Allocation of financial responsibility within the relationship; and
    - The extent to which non-intimate matters such as clothing, were to be controlled.

I do not mention contracts in the context of this submission to suggest that such contracts ought ever to become prevalent in the general community. Sheldon Cooper I am not. However for current purposes, there are two important matters arising from the use of BDSM contracts within the BDSM community.

First, where two people <u>have</u> chosen to establish the basis of their relationship in writing, and where free consent to that agreement can be authenticated, there is no reason why the law ought not to consider that document, if it is relevant, in relation to a legal dispute. It would not be binding, of course, and anything consented to in the course of a contract could be whisked away by the use of a safe word. However the document itself, as a meaningful attempt by people to establish the power dynamics in their relationship, ought to be capable of reflection by the court. At the very least, if two people had concluded a BDSM contract

[15] Again, an example can be found as an appendix to my earlier thesis. Further discussion of contracts can be found in "Nonbinding Bondage", *Harvard Law Review*, Dec 2014, 713

which permitted the infliction of certain levels of harm by one upon the other, and the inflicting party was then charged with assault, in circumstances where both parties still actively support the terms of their relationship as expressed in that contract, the contract should be capable of supporting (but not concluding) the court's confidence in the consent.

Second, the existence of a contract should be capable of being taken into account by any court required to determine whether the behaviour of one party to a relationship amounted to coercive control. Again, great caution is required here. Nothing in the BDSM community can be allowed to become camouflage for the conduct of intimate partner abusers. However it is at least logically clear that in a relationship of dominance and submission, and particularly where such a relationship extends beyond activities of the bedroom, the dominant party is likely to be acting in ways which appear to an objective onlooker to be coercive control, but which are in fact a genuine expression of the relationship. In these circumstances, any court required to consider issues of coercive control ought to be entitled to give consideration to any contract in existence.[16]

Recommendation 4: In the context of an ongoing relationship characterized by BDSM features, evidence of a contract established by the participants in that activity, setting out the boundaries and parameters of their relationship, should be considered by a court considering whether the BDSM activity was, or was not consensual, but not in such a way as to infer that the contract led to any form of irrevocable consent, and not in circumstances where the court forms the view that the contract itself, or the continuation of the contract, was procured coercively.

Before moving on from a discussion of consent in a BDSM context, it is worth comparing, again, the likely consent scenarios between two BDSM participants and two participants in more conventional casual sex. The BDSM participants are likely to have engaged in extensive communication and negotiation, not just in relation to their willingness to have a sexual encounter, but also in relation to the specific activities they agree to participate in, and the circumstances in which those activities will occur. These discussions are typically held ahead of time, in an environment where the participants are not "in the moment" or intoxicated or under social pressure, but rather have time for reflection.

While I will not make this a formal recommendation, I will stand by the observation that if the mainstream community had anything *even close* to the sophisticated consent regime in place in the BDSM community, the entire Australian community would be much better off.

Consent during sexual activity: the utterly crucial capacity to withdraw consent.

At the outset of this submission I referred to the perspective, advanced by authors such as Cheryl Hanna, that BDSM activities, which involve sex and violence intertwined, present inherent dangers, particularly (but not only) for women. It might simply be too easy,

[16] Let us be clear, however: a court might still find that the contract itself was the result of coercion by one party; and the court might also find that consent to the contract had been withdrawn by the relevant time. The capacity to withdraw consent and to have that withdrawal instantly respected, is crucial and will be discussed below.

depending on the legal position, for a perpetrator of intimate partner violence to pass their conduct off as BDSM.

A substantial part of my earlier research was therefore devoted to isolating consensual BDSM from intimate partner violence. In consequence of that research, I would argue that the crucial question is whether each participant has, at all times, the genuine capacity to withdraw consent.

The profound significance of this point can easily be demonstrated by an example. Consider two couples involved in sexual activity involving some low-level BDSM activity (say, one partner using their physical strength to pin the other's wrists to the bed). One of those couples is engaged in consensual BDSM, and the other couple are the perpetrator and victim of intimate partner violence. The person with their wrists pinned in a BDSM context must know, that at any time, for any reason, without repercussions, they can call for the conduct to cease, and it will immediately cease. The other person, however, knows that they have no capacity (or at least limited capacity) to demand that the conduct stop. They are being abused (and criminally so).

The withdrawal of consent, or the capacity to withdraw consent, is therefore crucial. Within the BDSM community, the withdrawal of consent is typically accomplished by the use of *safe words* or *safe gestures*.[17]

The notion of a safe word is no longer confined to the BDSM world; it is commonly understood in the general community. A safe word is a word, typically without a sexual context, which if spoken brings all sexual activity to an end. A common safe word system is the "traffic lights" system, where the person in the submissive role might use the term "green" to indicate that they remain comfortable and are enjoying whatever activity is underway; "yellow" to indicate that they are now uncomfortable but do not want the activity to cease (yet); and "red" to indicate that they withdraw their consent to continue.

A safe gesture is precisely the same as a safe word, but it can be deployed by a person who is for whatever reason unable to speak, similar to a wrestler "tapping out" to indicate that they concede defeat and wish for a bout to stop.

Within the BDSM community, additionally, unconsciousness also acts as a safe word. It should not be necessary to explain that an unconscious person cannot continue to maintain their consent.

The notion of safe words, however, goes beyond this relatively simple idea. To work effectively, safe words must operate in an environment where their use is encouraged and where there are no negative consequences arising from the use a safe word. In the well known *Fifty Shades* novels, there are examples where participants essentially threaten the end of relationships, or other consequences, in the event that a safe word is used. From the moment such a threat is uttered, consent is irretrievably compromised.[18] Any person in a

[17] Safewords are discussed in Faccio, Casini and Cipolletta, "Forbidden games: the construction of sexuality and sexual pleasure by BDSM 'players'", *Culture, Health and Sexuality*, 16, 7/8, 752 however in reality the more detailed treatment may be in my previous thesis.

[18] An excellent analysis of the deep issues with consent in the Fifty Shades books may be found in Barker (2013) "Consent is a Grey Area? A Comparison of Understandings of Consent in *Fifty Shades of Grey* and on the BDSM Blogosphere." *Sexualities* 16.8

submissive role must know that they have the absolute freedom to use a safe word and to be supported after doing so.

There is no equivalent, in mainstream sex, to a safe word. There is no mechanism that a participant can use which they absolutely know will stop the activity. And yet, for the reasons set out above, a person who lacks the capacity to immediately end the sexual activity or sexual violence being perpetrated upon them, is being abused.

Finally, within any practice of safe, sane and consensual BDSM, the dominant participant is expected to maintain an awareness of the ongoing consent of the submissive participant. Questions such as "Do you remember your safe word?" can be asked quickly and unobtrusively even in the context of a BDSM scene, providing the dominant participant with reassurance that consent remains; and providing the submissive participant with reassurance that their consent is actively being considered.

Recommendation 5: If a person is before the courts in relation to BDSM activities, the existence of a mutually-understood safe word, and the provision of an environment in which that safe word could be freely used, should be relevant to the status of consent between the parties.

Consent following sexual activity: aftercare

Before making a final observation in relation to consent and BDSM, I should make it clear that I am aware of the misnomer in the section title. It is clear, or at least is should be clear, that consent can never be obtained retrospectively. The key question must always be the current consent of a person at the time of an activity. Nothing in my submission changes that.

However, within the BDSM community, there is an expectation that just as the parties communicate and discuss before a scene, they should also do so afterwards. At the end of activity, it is common for there to be discussions between participants about what worked, and what did not; whether the specific activities are ones the couple wishes to repeat; what might need to be changed next time; and so forth. These discussions are also a strong opportunity for the dominant partner to emphasise that the use of safe words is always encouraged.

Lessons for mainstream sex

The Committee's focus, of course, is not on BDSM. The Committee's focus is on the far broader and much more subtle question of how consent can operate in the general community.

In my submission, the general community has much to learn from the BDSM community.

It might seem artificial to those in the general community to have detailed discussions before sexual activity about what, in detail, was intended, what was expected, and what was forbidden. And yet such discussions do in fact occur in the BDSM community.

It might seem artificial to those in the general community to establish clear, explicit and ongoing boundaries within a relationship, as to what sexual activity will and will not occur between the members of the relationship. And yet such discussions do in fact occur in the BDSM community.

It might seem artificial to those in the general community to have mechanisms to constantly *maintain* an awareness of consent during sexual activity. And yet such awareness is expected and demanded in the BDSM community.

It might seem artificial to those in the general community to have clear mechanisms for the withdrawal of consent. In fact, sadly, to many in the general community it might seem artificial to have methods of withdrawing consent at all. And yet such methods are demanded in the BDSM community.

Conclusion and recommendations

The overall recommendation of this submission is straightforward:

Adults who consent to participate in BDSM sexual activities in private should be able to consent to that sexual activity, even in circumstances where they are consenting to actual or grievous bodily harm analogous to the harm which might be experienced in the course of contact sports.

However, it is conceded that BDSM should not, and must not, ever be allowed to become camouflage for intimate partner abuse. If the law is amended to allow for consensual BDSM, the law should be premised on sophisticated forms of consent involving detailed communication, many of which are already practiced in the BDSM community.

To that end, I have proposed the following recommendations:

Recommendation 1*: Evidence of the use of a BDSM checklist by the parties to BDSM activities should be considered by any Court considering whether BDSM activity was, or was not, consensual. However if a person indicates, in a checklist, enthusiasm for a particular activity, it should not be inferred from this that they consented to that activity on any particular occasion.*

Recommendation 2*: Evidence of the nomination of a "limit" prior to BDSM activity should be taken, by a court considering whether BDSM activity was, or was not, consensual, to be a conclusive denial of consent for the activity nominated as a limit.*

Recommendation 3*: Evidence of the negotiation of a specific session of BDSM activity by the participants in that activity, should be admissible before a court considering whether the BDSM activity was, or was not consensual, but not in such a way as to infer that the negotiation led to any form of irrevocable consent.*

Recommendation 4*: In the context of an ongoing relationship characterized by BDSM features, evidence of a contract established by the participants in that activity, setting out the boundaries and parameters of their relationship, should be considered by a court considering whether the BDSM activity was, or was not, consensual, but not in such a way as to infer that the contract led to any form of irrevocable consent, and not in circumstances where the court forms the view that the contract itself, or the continuation of the contract, was procured coercively.*

Recommendation 5*: If a person is before the courts in relation to BDSM activities, the existence of a mutually-understood safe word, and the provision of an environment in which that safe word could be freely used, should be relevant to the status of consent between the parties.*

I am grateful to the Committee for the opportunity to raise these issues. I recognize that they may be tangential to the Committee's primary purpose, but it remains the case that there are many good, decent Australians whose sexual self-expression is currently (technically) unlawful. This should change.

Dr Anthony S Marinac

James Cook University