The Right to Sexual Privacy, Sado-masochism and the Human Rights (Sexual Conduct) Act 1994 (Cth)

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Introduction: Trouble in Tasmania

The criminal law has played, and continues to play, a significant role in the repression and stigmatisation of homosexuality. Under the English common law, anal intercourse between consenting males was a felony punishable by death.[2] In Australia, the common law was translated into statutory form, and expanding codes of homosexual offences were enacted to penalise so called "unnatural acts" or "acts against the order of nature". The modernisation of sexual offences in Australia over the last two decades has removed many of the repressive and discriminatory aspects of those laws dealing with homosexual behaviour.[3] Indeed, every jurisdiction except Tasmania has repealed or amended its laws prohibiting homosexual activity between consenting adults in private.[4] In Tasmania, it remains an offence for males to engage in "unnatural sexual intercourse" or "acts of gross indecency" whether these acts occur in public or private.[5] Together these provisions have the effect of criminalising most forms of sexual activity between homosexual men, regardless of their age or consent.

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2 At common law, buggery was defined as sexual intercourse *per anum* by a man with another man or a woman; or sexual intercourse by a man or a woman with an animal: see M Hale, *The History of the Pleas of the Crown* (1736), Vol 1, p 669.

3 The common law is discriminatory in the sense that the offence of buggery prohibits anal penetration, but does not prohibit sexual activity between females. Indeed, the different legal status of male and female homosexual conduct is entrenched in the modern law, for example, in New South Wales "homosexual intercourse" is defined exclusively in male terms: see *Crimes Act* 1900 (NSW), s 78G.

4 In Western Australia and Queensland, the provisions of the *Criminal Code* dealing with carnal knowledge against the order of nature were abolished by the *Law Reform (Decriminalization of Sodomy) Act* 1989 (WA) and *Criminal Code and Another Act Amendment Act* 1990 (Qld) respectively. Western Australia, however, has adopted a higher age of consent for homosexual intercourse than for heterosexual intercourse, discussed infra at text to n 39.

5 *Criminal Code Act* 1924 (Tas), ss 122 and 123. Under s 122 unnatural sexual intercourse is an act of intercourse "against the order of nature", which has been interpreted narrowly as penile penetration per anum: *Stingel v R* [1989] Tas R 282 (Tas CCA).

The criminalisation of homosexuality undoubtedly impedes public health programmes designed to combat HIV/AIDS.[6] Notwithstanding repeated calls for State and Territory governments to review and amend their legislation dealing with homosexual offences, attempts to change the law in Tasmania failed.[7] The failure of domestic reform initiatives led Nick Toonen, a member of the Tasmanian Gay and Lesbian Rights Group, to refer a complaint to the United Nations Human Rights Committee in order to determine whether the existence of these offences violated his right to privacy under the International Convention on Civil and Political Rights (ICCPR).[8] Toonen also argued that prohibiting certain sexual acts only between males drew distinctions based on sex and/or sexual orientation, and thus constituted discrimination contrary to Article 26 of the ICCPR. In April 1994, the Human Rights Committee handed down its decision on the merits upholding the complaint.[9] The Committee found that the existence of the offences in Tasmania constituted an arbitrary interference with Toonen's privacy, even though no prosecutions had been brought for nearly a decade.[10] In the opinion of the Committee, an effective remedy for this violation of Article 17 would be the repeal of the relevant offences in Tasmania. The Human Rights Committee therefore felt it unnecessary to consider the arguments based on Article 26 raised in Toonen's complaint. However, this view was not universally shared within the Committee, and in a separate opinion Bertil Wennergren upheld the complaint on the *alternative* ground that the Tasmanian offences made distinctions based on sex and sexuality which infringed Article 26.[11]

The Federal Response: Human Rights (Sexual Conduct) Act 1994 (Cth)

Following *Toonen*, with no immediate prospect of the introduction of legislation in Tasmania to repeal the offending sections, the Federal Government moved to provide the applicant with the "effective remedy" required by the Human Rights Committee. The Federal Government put forward the *Human Rights (Sexual Conduct) Bill* 1994, which was passed in the last session of Parliament in 1994. The legislation came into effect on the 19 December 1994.

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6 *National HIV/AIDS Strategy: A Policy Information Paper* (Department of Community Services and Health, Canberra, 1989) at p 47. The Legal Working Party of the Intergovernmental Committee on AIDS recommended that criminal penalties for homosexual activity between consenting adults in private should be abolished: *Final Report* (1992) at p 43.

7 The Tasmanian Law Reform Commission recommended the repeal of the homosexual offences in the Code in its *Report and Recommendation on Rape and Sexual Offences* (1982), however, these recommendations were rejected by the Legislative Council. In 1991 the Legislative Council rejected the HIV/AIDS Preventive Measures Bill which aimed to repeal ss 122 and 123 of the *Criminal Code*.

8 Australia ratified the ICCPR in 1980, and in September 1991 signed the First Optional Protocol.

9 *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, 4 April 1994.

10 *Ibid* at para 8.2. The Human Rights Committee found that the DPP's policy not to initiate criminal proceedings in respect of homosexual conduct does not guarantee that no actions will be brought in the future: id.

11 The individual opinion was appended to the Committee's views.

The *Human Rights (Sexual Conduct) Act* 1994 (Cth) (hereafter the "Act" or "Commonwealth Act") aims to provide individuals with a shield against Commonwealth, State and Territory laws which arbitrarily interfere with their sexual privacy. The only substantive provision of the Act is section 4, which provides:

> 4(1) 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.
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> Note: Article 17 of the International Covenant on Civil and Political Rights is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act* (Cth) 1986.
>
> (2) For the purposes of this section, an adult is a person who is 18 years old or more.

Although protecting only one aspect of the right to privacy under Article 17 of the ICCPR, it is generally accepted that the Act is a valid exercise of the Commonwealth's legislative power under the external affairs provision in the Constitution.[12]

The Right to Sexual Privacy under International and Australian Law

Section 4 of the Act invalidates any law which constitutes an arbitrary interference with privacy as it relates to "sexual conduct involving only consenting adults acting in private". In this context, privacy is defined by reference to Article 17 of the ICCPR. Privacy in respect of sexuality or sexual life is not expressly protected by Article 17, although a wider conception of the right to privacy has emerged in international human rights jurisprudence. As the Commonwealth Act is intended to give effect to a provision of an international treaty, it is likely that the Australian courts would have regard to the views of the Human Rights Committee and other international human rights jurisprudence relevant to the interpretation of Article 17.[13] The decisions of the European Court of Human Rights on the meaning and scope of the right to privacy under Article 8 of the European Convention on Human Rights (ECHR) are particularly instructive. The right to respect for private life

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12 Report by the Senate Legal and Constitutional Committee, *Human Rights (Sexual Conduct) Bill* 1994 (December 1994) at para 1.72.

13 Revised Explanatory Memorandum, Notes on Clauses, at para 4. There is increasing judicial recognition in Australia that international human rights law is a "legitimate and important influence on the development of the common law": *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J. See also *Dietrich v R* (1992) 177 CLR 292. For extra-curial statements on the judicial use of international human rights law to strengthen the common law see: Kirby M, "The Australian Use of Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 *University of New South Wales Law Journal* 363.

under Article 8 is interpreted broadly to include "to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality".[14] The European Court of Human Rights accepted this broader conception of privacy in *Dudgeon v United Kingdom*.[15] In this case, a complaint was made to the Court that the laws in Northern Ireland criminalising buggery and gross indecency between consenting males, whether in public or in private, infringed Article 8 of the ECHR. The majority of the Court concluded that the continuing existence of these offences interfered with the individual's right to respect for private life (which includes sexual life) within the meaning of Article 8.[16]

International human rights law does admit some restrictions on privacy rights. In *Dudgeon*, the Court found that some degree of regulation of homosexual conduct, specifically concerning the age of consent, may be "justified as necessary in a democratic society".[17] The terms of Article 17 of the ICCPR and the Commonwealth Act only affect laws which constitute an "arbitrary interference" with privacy. In *Toonen v Australia*,[18] the Human Rights Committee recalled that the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event reasonable in the circumstances".[19] Reasonableness in this context means that the measure which interferes with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.[20]

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14 Decision of the European Commission of Human Rights, Application No 6825/74 in *Decisions and Reports*, Vol 5 at p 87. The Commission plays an important role in the enforcement of human rights in Europe, receiving and examining complaints about human rights violations under the ECHR. However, it is the European Court of Human Rights which adjudicates complaints and issues authoritative rulings on the interpretation of the ECHR.

15 (1981) 4 EHRR 149; see also *Norris v Ireland* (1989) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485.

16 To comply with the judgment, the law in Northern Ireland was amended by the *Homosexual Offences (Northern Ireland) Order* 1982 (UK). The age of consent for homosexual intercourse in the United Kingdom remained 21 years until s 145 of the *Criminal Justice and Public Order Act* 1994 (UK) lowered the age of consent to 18 years of age.

17 *Supra* n 15 at para 62. The Act's potential impact on Australian laws governing the age of consent is discussed supra at text to n 40.

18 *Supra* n 9.

19 *Ibid* at para 8.3, referring to an earlier view expressed on Article 17 in General Comment 16 (32), Doc CCPR/C/21/Rev 1 (19 May 1989). The Report by the Senate Legal and Constitutional Legislation Committee on the Human Rights (Sexual Conduct) Bill 1994 concluded that it is appropriate to give the courts a discretion to determine what constitutes, in each particular case, an "arbitrary interference" with privacy, at para 1.75.

20 *Ibid*. The proportionality test used to determine whether a law which interferes with privacy is "arbitrary" is one which is familiar to domestic courts. See, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth (No 2)* (1992) 177 CLR 106.

Arbitrary interference is not defined either in the ICCPR or in the Commonwealth Act. However, criminal laws which interfere with sexual privacy will not be arbitrary where they are justified and reasonable in the circumstances: "[t]he individual's right to privacy is not absolute or unlimited and must be balanced with the needs of the community and with other rights".[21] The Explanatory Memorandum asserts that the Bill "will not affect laws such as those, for example, dealing with incest, sexual conduct involving a person with an intellectual disability, sexual conduct involving animals, regulation of the sex industry, sexual conduct amounting to professional misconduct, the possession or use of child pornography and sexual conduct in prisons where the interference with privacy is justified and reasonable".[22] While extrinsic material in the form of an Explanatory Memorandum lacks legislative force, the courts do have the power to refer to such materials in order to ascertain the meaning and purpose of the provision.[23] Although extrinsic material provides cogent evidence of the purpose or object of the Act, from the perspectives of clarity and certainty, qualifications or restrictions to the privacy "shield" envisaged by the Federal Government should have been outlined in the legislation itself, and ought not simply be "explained" in the accompanying Memorandum.

The right to privacy in the Commonwealth Act is restricted to sexual conduct involving only consenting adults acting in private. Although "sexual conduct" is not defined in the Act, the Revised Explanatory Memorandum provides some guidance on the meaning of the term. The possible impact of the Act on the laws governing certain activities, specifically abortion, pornography and incest, generated much debate and speculation. The Revised Explanatory Memorandum attempted to quell these concerns by including the following statement on the meaning of "sexual conduct":

> 5. The term 'sexual conduct' is intended to cover the physical expression of sexual desire. The term does not mean conduct which is incidental to sexual conduct such as the termination of pregnancy or the production or distribution of pornographic material.

In addition to unduly limiting the potential scope of the Commonwealth Act, the distinction drawn between sexual conduct as the physical expression of sexual desire and conduct which is merely "incidental" to sexual conduct may prove to be illusory. For example, do laws restricting prostitution interfere with sexual conduct or is the activity involved merely incidental? The scope of the Act will not be

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21 Revised Explanatory Memorandum, Notes on Clauses, at para 9.

22 *Ibid* at para 10. Although laws which *regulate* prostitution may not infringe the terms of the Act, laws which *prohibit* prostitution and associated activities, may constitute an arbitrary interference with sexual privacy: see discussion below at text to n 34.

23 *Acts Interpretation Act* 1901 (Cth), ss 15AA and 15AB. See also D Pearce and RS Geddes, *Statutory Interpretation in Australia* (Butterworths, Sydney, 1988) at pp 45-49.

determined solely by reference to *core* or *conventional* meanings of words. Indeed, an expansive interpretation of "sexual conduct" may find favour with Australian courts, particularly since the trend in human rights jurisprudence is toward a broad construction of fundamental rights which are then qualified by those restrictions which are necessary in a democratic society.[24] Under this approach, the scope of protection conferred by the Commonwealth Act would depend on whether the particular law which abridges sexual privacy is "arbitrary" in the circumstances.

Privacy Rights versus Equality Rights

The scope of the protection accorded by Article 17 of the ICCPR and the Commonwealth Act rests upon the public/private dichotomy drawn in liberal theory. According to this theory, areas of "private" activity cannot legitimately be subject to state intervention or regulation. This philosophy, classically associated with the writings of JS Mill, has been influential in achieving the liberalisation of laws governing homosexuality and prostitution.[25] However, the division between the public and the private has played, and continues to play, a significant role in concealing and legitimating the subordination of certain groups in society. Indeed, the private sphere of the "family" remains the site for female subordination.[26] Wayne Morgan has argued that the juridical discourses of privacy, including those employed in *Toonen*, conceal and contribute to the subordination of homosexuality by constructing this sexuality as powerless, dangerous and deviant.[27] By perpetuating distinctions between homosexuality and heterosexuality, this conception of privacy contributes to the discrimination and violence against homosexuals. He advances equality as the preferable basis for protecting and extending gay and lesbian rights.

It is important, however, to appreciate the limitations of equality-based "rights discourse".[28] Equality rights similarly rest on the public/private dichotomy drawn in liberal theory, and the conception of equality that has emerged in anti-discrimination law fails to address the structural causes of disadvantage affecting particular groups, especially where that disadvantage lies in the private sphere. Indeed, it is in

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24 This approach has been adopted for the interpretation of fundamental rights under the ECHR and the *Canadian Charter of Rights and Freedoms*: see Wilcox M, *An Australian Charter of Rights?* (Law Book Company, Sydney, 1993), p 45.

25 JS Mill, *On Liberty* (1859). Mill provided the philosophical basis for the Wolfenden Committee's proposals for reform of the criminal law governing homosexuality and prostitution: *Report of the Committee on Homosexual Offences and Prostitution* (HMSO, London, 1957).

26 See generally O'Donovan K, *Sexual Divisions in Law* (Weidenfeld and Nicolson, London, 1985); and Graycar R and Morgan J, *The Hidden Gender of Law* (Federation Press, Annadale, 1990), Chapter 1.

27 Morgan W, "Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations" [1994] 19 *Melbourne University Law Review* 740.

28 For an excellent review of the "critique of rights" debate in this context see Morgan J, "Equality Rights in the Australian Context: A Feminist Assessment" in Alston P (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, Canberra, 1994), p 123.

relation to disadvantage in the private sphere that equality rights yield to privacy rights. Disadvantage takes many forms, and in addressing discrimination against homosexuality the job for the legal community is not to identify the *preferable* "rights discourse", but rather to identify the causes of disadvantage, and to embrace a broader, contextual approach to those rights which may remedy that disadvantage.

With respect to privacy and equality rights, it should be recognised that the boundaries between the spheres of public and private are neither immutable nor universal. As Margaret Thornton observes, "the public/private dichotomy of liberal thought, far from constituting two analytically discrete realms, is a malleable creation of the public realm".[29] The dichotomy is both functional and ideological. Therefore, it is possible, working within this traditional framework, to reconceptualise privacy in a more meaningful way in order to provide individuals with greater freedom to express and fulfil their emotional needs.

The meaning of the phrase "acting in private" is not defined by the Commonwealth Act, and the Revised Explanatory Memorandum simply reiterates that "[t]he Bill only protects activity which is conducted in private".[30] A strict interpretation of the phrase "acting in private" would limit protection under the Act to sexual conduct that takes place on private premises in seclusion from other members of the public. Such an interpretation would exclude sexual conduct that occurs on private premises within public view or on premises to which members of the public may have access under certain conditions, such as brothels or clubs. Indeed, this restrictive interpretation is supported by the Revised Explanatory Memorandum which states that the Act will not affect existing laws relating to the regulation of the sex industry.[31]

By contrast, international human rights jurisprudence has developed a broader conception of privacy which recognises that the right to respect for private life "includes to a certain degree the right to establish and to *develop* relationships with other human beings".[32] This approach extends beyond the *negative* conception of privacy as freedom from unwarranted state intrusion into one's private life, to include the *positive* right to establish, develop and fulfil one's own emotional needs.[33] By reconceptualising privacy in this way, the scope of "private" sexual conduct is redefined to include some types of "public" behaviour. This expanded private sphere would offer protection against laws which unreasonably interfere with sexual activity in brothels and clubs.[34] It may even afford some degree of

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29 Thornton M, "The Public/Private Dichotomy: Gendered and Discriminatory" [1991] 18 *Journal of Law and Society* 448 at 459.

30 Revised Explanatory Memorandum, Notes on Clauses, at para 7.

31 *Ibid* at para 10.

32 *Op cit*, n 14 (emphasis added).

33 It has been suggested that the state should assume a greater role in *promoting*, rather than simply protecting, the right to respect for private life under Article 8: Connelly AM, "Problems of Interpretation of Article 8 of the European Convention on Human Rights" (1986) 35 ICLQ 567 at 574-575.

34 For example, in Queensland, while sex work is no longer illegal, the law seeks to discourage large-

protection to public displays of homosexuality, conduct which may be prosecuted under existing indecency and offensive conduct offences.[35] Such an approach could have considerable practical significance since empirical research in Australia indicates that, even before the decriminalisation of homosexual activity in private, the bulk of prosecutions for homosexual activity concerned public acts of some kind.[36]

Privacy jurisprudence has the potential to protect many facets of an individual's sexuality, however it is unlikely that this potential can be fully realised under the Commonwealth Act given the restrictive wording of section 4 which limits its protection to individuals "acting in private".

Sexual Privacy and Sexual Offences

In Tasmania, the shield created by the Commonwealth Act would operate in the following way. In the event that adult males engaging in consensual sexual activity in private are prosecuted for "unnatural sexual intercourse" or "acts of gross indecency", applying general constitutional principles, the relevant sections in the Criminal Code are invalid to the extent of the inconsistency with the Commonwealth Act.[37] Invalidity in this context does not mean that the offending sections in the Tasmanian Code cease to exist, rather they are simply rendered inoperative to the extent of the inconsistency. Thus, the sections dealing with "unnatural sexual intercourse" and "acts of gross indecency" would still apply to sexual conduct between males which (i) occurs without consent, (ii) involves parties under the age of 18 years, or (iii) occurs in public.[38]

The Commonwealth Act may also impact on laws which regulate the age of consent for homosexual activity. In Australia, the age of consent for sexual activity varies from one jurisdiction to another. Within some jurisdictions the age of consent varies according to the type of sexual activity involved.[39] The most extreme difference is in

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34— *Continued*
scale prostitution by prohibiting a person from participating in the provision of prostitution by another person: *Criminal Code* 1899 (Qld), s 229H, as amended by the *Prostitution Laws Amendment Act* 1992 (Qld). Prohibiting sex workers from offering their services from the same premises may constitute an arbitrary interference with the sexual privacy of both sex workers and clients. Laws which prohibit advertising sexual services, consorting with prostitutes and living off the earnings of prostitution raise similar concerns.

35 In England, the Divisional Court has held that a homosexual couple kissing and cuddling at 1.55am in Oxford St, London, could be convicted of insulting behaviour likely thereby to cause a breach of the peace: *Masterson v Holden* [1986] 1 WLR 1017.

36 New South Wales Bureau of Crime Statistics and Research, *Statistical Report* (1978), Series 2, No 9, p 38.

37 The *Commonwealth of Australia Constitution Act* 1900 (UK), s 109.

38 The extent to which homosexual acts in public are be protected under the Act is considered infra at text to n 46.

39 A feature of the law in New South Wales, Queensland and the Northern Territory is that the age of consent for homosexual intercourse is fixed at a higher age than for heterosexual intercourse.

Western Australia where age of consent for heterosexual intercourse is 16 years but 21 years for homosexual intercourse.[40] The question then arises whether preventing a person from engaging in homosexual activity until the age of 21 constitutes an arbitrary interference with privacy. This restriction appears, prima facie, to be in conflict with the Commonwealth Act which protects sexual privacy only in respect of "consenting adults" — adult being defined in section 4(2) as a person who is 18 years old or more.[41] However, such a restriction, whilst interfering with privacy, may not constitute an *arbitrary* interference.

In *Dudgeon*,[42] the European Court of Human Rights concluded that preventing a person from having sexual relations with young males under 21 years of age could be justified as necessary for the protection of the rights of others:

> The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth.[43]

Arguably, laws which fix the age of consent for homosexual activity at 21 years could be regarded as arbitrary, being disproportionate to the aim of protecting young people from exploitation or corruption; in Australia individuals do not have to wait until they are 21 years old to participate in other forms of lawful sexual activity (including access to sexually explicit material and prostitution). In this country, the social and legal expectation is that person who is 18 years of age is possessed of sufficient maturity to make decisions concerning matters of sexual morality (including sexual preference). Accordingly, there is a strong argument that fixing the age of consent for homosexual activity at 21 years of age in Western Australia goes beyond that which is strictly necessary to protect young people from the risk of sexual exploitation.

Some restriction on the right to privacy may be justified in order to protect others from harm. The state is legitimately entitled to restrict forms of sexual expression which are likely to interfere with the rights of others and this can include restrictions imposed simply to protect morals, without any need to establish harm to others.[44] It has been argued that causing offence to others' deeply held moral beliefs can be

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40 A male who sexually penetrates a "juvenile male" (that is, a male aged between 16 and 21 years) or who procures or permits a juvenile male to sexually penetrate him is guilty of an offence: *Criminal Code* (WA), s 322A, as amended by the *Acts Amendment (Sexual Offences) Act* 1992 (WA).

41 The Senate Legal and Constitutional Legislation Committee did express the view that "[t]he Bill *may* have the effect of lowering the age of consent": supra n 12, at para 1.44.

42 (1981) 4 EHRR 149.

43 *Ibid* at para 62.

44 Restricting human rights in order to protect morality has attracted strong criticism: see Feldman D, *Civil Liberties and Human Rights in England and Wales* (Clarendon Press, Oxford, 1993), p 523.

regarded as a form of personal harm and therefore justifiably restricted.[45] Engaging in explicit sexual activity in a public place may cause serious affront and distress to others, and may therefore be properly regarded as harm.[46] But milder forms of sexual expression in public (either homosexual or heterosexual) may not cause such harm within the community since standards of decency, particularly toward public displays of sexual behaviour, have changed in recent years.[47] Moreover, emotional upset caused by the mere knowledge that a particular sexual activity is practised by others in private should not be regarded as personal harm. This type of moral offense, however disturbing to some individuals, is simply too remote from the offensive conduct to be regarded as harm. The question as to whether harm to others or the protection of morals can justify the restriction of an individual's right to sexual privacy, also arises in discussions about the legality of sado-masochistic violence.

Sexual Privacy, Sado-masochism and the Limits of Consent

In most jurisdictions in Australia, the law governing the consent defence for offences against the person is based on common law principles.[48] The common law restricts both the *type* and *degree of harm* to which a person can validly consent.[49] The specific issue of consent as a defence to bodily harm inflicted in the course of sado-masochistic activity has recently been addressed in the House of Lords decision *R v Brown*.[50] In the absence of any substantive judicial consideration of the rules governing consent for assault and related offences against the person in Australia, this English decision (though not binding) merits careful consideration.

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45 See, generally, Feinberg J, *Offense to Others* (Oxford University Press, New York, 1985).

46 In all jurisdictions in Australia it is an offence to engage in an act of indecency in public. In Western Australia and the Northern Territory there are aggravated offences dealing with acts of gross indecency in public between males which carry significantly higher penalties: *Criminal Code Act* 1913 (WA), s 184; *Criminal Code Act* 1983 (NT), s 127. Whether an act is indecent is determined according to ordinary standards of morality and decency within the community: see *Harkin v R* (1989) 38 A Crim R 296 (NSW CCA).

47 A change perhaps typified by the wider community's acceptance and interest in the Gay and Lesbian Mardi Gras held in Sydney (and televised nationally) each year.

48 Cf, the Criminal Codes of the Northern Territory and Queensland which fix the degree of harm to which a person can lawfully consent at a higher level than the common law: a person can consent to bodily injury which is not intended to kill or cause grievous bodily harm: see Kell D, "Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a Reappraisal?" [1994] 68 *Australian Law Journal* 363.

49 By ruling that a person could not validly consent to the risk of death or grievous bodily harm, the English courts effectively outlawed the dangerous practices of duelling and prize-fighting: *Coney* (1882) 8 QBD 534. In *Donovan v R* [1934] 2 KB 498, the Court of Criminal Appeal had considered the legality of caning for the purposes of sexual gratification. The Court held (at 509) that unless the conduct fell within one of the well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.

50 [1993] 2 WLR 556, affirming the Court of Appeal [1993] 2 WLR 441.

As with homosexuality and sex work, the law constructs sado-masochism as dangerous and deviant. Decisions such as *Brown* reflect and reinforce the construction of sado-masochism as a "sexual disorder" that involves gaining sexual pleasure from the infliction of pain on oneself or on others.[51] Significantly, the decision itself concerned a group of homosexual men who, in order to enhance their mutual sexual pleasure, actively and enthusiastically participated in a range of sado-masochistic behaviour including violent caning, branding, body piercing and blood-letting. This activity came to police attention because it had been videotaped and the tape later distributed. None of the participants had complained to the police about the injuries inflicted on them or had sought medical treatment as a result of these activities. The participants were charged and convicted of various offences including wounding and assault occasioning actual bodily harm under sections 20 and 47 of the *Offences against the Person Act* 1861 (UK). They appealed against their convictions on the ground that the trial judge had wrongly excluded consent as a defence.

The majority of the House of Lords in *R v Brown* held that where conduct causes or is likely to cause actual bodily harm, the consent of the other person cannot be raised as a defence *unless* the activity falls within one of the well established exceptions which include, inter alia, properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions.[52] As Lord Lowry held that,

> [I]t is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason and that it is an assault if actual bodily harm is caused (except for good reason).[53]

The majority concluded that the public interest would not be served by allowing consent to be raised as a defence to sado-masochistic activity involving actual bodily harm.

The majority's question as to whether sado-masochism makes a *positive* contribution to family life or the welfare of society is misdirected. The court should not focus on the perceived lack of social utility of sado-masochism, but rather should identify the precise harm (if any) that this behaviour poses to family life or the welfare of society. The physical danger to the community posed by the risk of HIV transmission through sado-masochistic activity is not convincing; the danger in

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51 It has been argued that judgments in *Brown*, through the language of addiction, seduction and contagion, construct gay male sexuality in negative terms: Stychin C, "Unmanly Diversions: The Construction of the Homosexual Body (Politic) in English Law"(1994) 32 *Osgoode Hall Law Journal* 503. The significant role of psychiatry in pathologising sexual sadism and masochism is reviewed in Freckleton I, "Sado-masochism, Repeated Self-mutilation and Consent" (1994) 2 *Journal of Law and Medicine* 48 at 56.

52 See *Attorney-General's Reference (No 6) of 1980* [1981] 1 QB 715 at 719.

53 *Supra* n 50 at 581-582.

this context is no different from the danger in other activities which involve exposure to another person's blood (such as in boxing) or bodily fluids (such as in unprotected sexual intercourse).

The minority (Lords Mustill and Slynn) disagreed with the majority's proposition that the authorities established a general theory of consensual violence. Lord Mustill held that it is the public interest which determines whether certain types of violent conduct are unlawful, *irrespective* of the level of harm inflicted or the presence of consent.[54] Casting the law in these terms, the question becomes whether the public interest requires the prohibition of sado-masochistic activity causing bodily harm notwithstanding the participants' consent. Both judges expressed reluctance to invade the defendants' rights to privacy unless there were compelling public interest arguments to the contrary; the activities in question were done in private, concerning questions of private morality, and thus should fall outside the scope of the criminal law.[55]

Following *Brown*, consent operates as a defence *only* where the judiciary permits it; in effect a complete inversion of the consent defence.[56] More fundamentally, the decision has been criticised for undermining the important liberal values of individual autonomy and the right to be free from unwarranted state intrusion into one's private life.[57] Both values, whilst important, are not absolute. Indeed, there is considerable danger that within this zone of privacy, violence and sexual abuse within the private sphere of the family are protected and legitimated.[58] As Susan Edwards warns in a recent comment on *Brown*:

> In our desire to preserve privacy, individual liberty, and freedom from state intervention we are in danger of missing what lies at the heart of sado-masochism — its potential for violence. Why is it that for some the prefix "sex" functions as a protective shield? We need to recognise, as we move increasingly into a world of sexual violence, the dangers of placing this so-called "sex" beyond the rule of law.[59]

Violence should not be protected by law simply because it is sexually motivated and occurs in private. But it does not follow however that sado-masochistic violence

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54 *Ibid* at 597. Lord Slynn also departed from the majority's view, but only as to the degree of harm to which consent operates as a defence: "... other than for cases of grievous bodily harm or death, consent can be a defence": at 606.

55 *Ibid* at 599-600; 607-608.

56 For a review of the impact of *Brown* on consent as a defence to activity involving the risk of HIV transmission see Bronitt S, "Spreading Disease and the Criminal Law" [1994] *Criminal Law Review* 21 at 31-32.

57 These issues are further explored in Freckleton, op cit. One of the defendants convicted in *Brown* has made an application to the European Commission of Human Rights alleging that his rights under Article 8 have been infringed: Application by Colin Laskey (PG 0281 of 1993).

58 See above at text to n 25 for a discussion of the public/private dichotomy.

59 Edwards S, "No Defence for a Sado-masochistic Libido" (1994) *New Law Journal* 406.

ceases to be "sexual conduct".[60] The physical expression of sexuality takes many different forms, and this may include sado-masochistic violence. The role for the State is to determine what safeguards are necessary in order to protect the participants in sado-masochism from harm. The present law offers some degree of protection by setting limits on the *degree of harm* to which a person can validly consent — a person cannot consent to the infliction or likely infliction of grievous bodily harm or death. However, the rule that consent to actual bodily harm in the course of sado-masochistic activity is not a defence may not be justified. It could be argued that this restriction on the defence of consent is neither necessary or reasonable, particularly since the present law permits consent to operate as a defence to actual bodily harm in the course of other activities which serve no obvious social value, such as rough horseplay and dangerous pastimes.[61] Adopting this approach, the restrictions on consent in *Brown* may constitute an arbitrary interference with privacy within the terms of the Commonwealth Act, and thus ought not to apply in the common law in Australia.

This approach to consent would not, however, prevent the judiciary or the legislature from developing alternative safeguards for participants in sado-masochistic activity which causes, or is likely to cause, bodily harm. The nature and quality of consent in sado-masochistic relationships requires careful consideration. The present law governing consent offers only limited protection to those individuals in relationships where there is "fundamental inequality or dependency".[62] Admittedly, the common law offers some degree of protection through its rules governing vitiation of consent — consent obtained by force, threats, duress or fraud is not effective.[63] However the existing rules offer little (if any) protection to those individuals who are especially vulnerable because of youth, inexperience or dependency. There is no age of consent for assault and related offences,[64] although

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60 Indeed, Lord Templeman in *Brown* accepted the sexual dimension of the defendants' activities: "[S]ado-masochism is not only concerned with sex. Sado-masochism is also concerned with violence": supra n 50 at 564.

61 See *R v Aitken* [1992] 1 WLR 1006, recognising the legality of serious violence inflicted in the course of "rough horseplay" between RAF officers. However, Lord Mustill has noted that our legal tolerance to forms of brutalisation in the school playground, barrack-room and workplace cannot be adequately explained in terms of consent: supra n 50 at 594.

62 See Edwards, *op cit*, at 407. Her concern extends beyond participants in sado-masochistic activity and includes relationships between teacher/student, employer/employee and doctor/patient. But from a psychiatric perspective, sado- masochistic relationships may not be characterised as relationships of fundamental inequality; research suggests that the condition is bi polar, meaning that individuals exhibit traits of both sexual masochism and sadism at different times: Freckleton, *op cit* at 56.

63 The common law rules are however restrictive; for example, fraud will only vitiate consent where it relates to the nature of the act or the identity of the person who does the act: *Clarence* (1888) 22 QBD 23 at 43.

64 Cf, the age of consent provisions for sexual offences prohibiting sexual intercourse or an act of indecency with a minor are offences irrespective of consent: *Crimes Act* 1900 (ACT), ss 92E and 92K, respectively.

in some jurisdictions rules do exist in relation to the medical treatment of minors.[65] The general position is that provided the person is sufficiently mature to understand the nature of the relevant act or risk, consent operates as a complete defence. By contrast, the law governing rape in many Australian jurisdictions, following recent reforms, offers greater protection to vulnerable parties. In the Australian Capital Territory, for example, consent to sexual intercourse is negated where it is caused by, inter alia, threats of public humiliation, the effect of intoxication, abuse of a position of authority or the person's physical helplessness or mental incapacity.[66] In the context of offences against the person, similar rules should be developed to ensure that the consent of the parties is given freely, without constraint. This could involve the adoption of a positive consent standard for sado-masochistic activity which involves the risk of bodily harm to participants.[67]

Conclusion

The primary aim of the *Human Rights (Sexual Conduct) Act* 1994 (Cth) is to legalise, throughout Australia, homosexual activity between consenting adult males in private. The Act, however, does far more than this. The right to privacy created by the Act has the potential to protect sexual expression beyond the range of sexual conduct envisaged by the Federal Government. We should not expect that privacy discourse can eradicate sexuality-based discrimination, but it does open new strategies for reform. What is "private" and what is "sexual" are malleable social and legal constructs. The courts should adopt a broad construction of both concepts that is consistent with the recognition in international law that the right to privacy extends beyond the *negative* conception of privacy as freedom from unwarranted state intrusion into one's private life, to include the *positive* right to establish relationships in order to develop and fulfil one's emotional needs. Reconstructing the private sphere in this way will undoubtedly stimulate arguments about the application of the Act to the sex industry (in particular to pornography and prostitution) and perhaps even to abortion.[68]

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65 See for example *Minors (Property and Contracts) Act* 1970 (NSW).

66 *Crimes Act* 1900 (ACT), s 92P(1). In Victoria, consent for the purposes of rape and other sexual offences is defined as "free agreement": *Crimes Act* 1958 (Vic), s 36, as amended by the *Crimes (Rape) Act* 1991 (Vic). For an excellent analysis of the potential impact of the "free agreement" standard see McSherry B, "Legislating to Change Social Attitudes: The Significance of Section 37(a) of the Victorian Crimes Act 1958" in Easteal P (ed), *Without Consent: Confronting Adult Sexual Violence* (Australian Institute of Criminology, Canberra, 1993).

67 For such a proposal in the context of rape law see "Editorial: The Direction of Rape Law in Australia: Toward A Positive Consent Standard" (1994) 18 *Criminal Law Journal* 249.

68 The Federal Government has rejected suggestions that abortion constitutes "sexual conduct" under the Act, see discussion infra at text to n 24. However, the general right to privacy in Article 17 of the ICCPR *could* provide the legal basis for enacting Commonwealth legislation to guarantee women the right to choose to have an abortion. In the United States, the Supreme Court has held that the right to privacy under the Constitution is broad enough to encompass a woman's decision whether or not to terminate her pregnancy: *Roe v Wade* 410 US 113 (1973).

The shortcomings of the right to privacy embodied in the Act must also be appreciated. It can offer no protection against the indecency and offensive conduct laws which continue to restrict the public expression of homosexuality. The right to privacy is not absolute, and the state is permitted to impose legal restrictions on sexual activity occurring between consenting adults in private. This includes measures for the protection of people who are vulnerable because of youth, inexperience or emotional dependency. However, restrictions which interfere with privacy must not be "arbitrary". It has been argued that some of the existing restrictions, laws which fix the age of consent for homosexual activity at 21 years and place limits on consent as a defence for sado-masochistic activity, may not be necessary or justified.

Areas of law which impinge on sexual expression in all its diverse manifestations must now be considered in light of the right to sexual privacy established in the *Human Rights (Sexual Conduct) Act* 1994 (Cth). The incorporation of this aspect of the right to privacy under Article 17 of the ICCPR into domestic law is yet further evidence of the importance of international human rights norms on legal development in Australia.