

Sadomasochism under the Human Rights (Sexual Conduct) Act 1994

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Abstract

This article argues that a broad range of sadomasochistic activities are protected in Australia by the privacy right embedded in s 4 of the *Human Rights (Sexual Conduct) Act 1994* (Cth) (*HRSC Act*). Building on early academic work in this area, this article draws together recent domestic case law and European human rights law developments in order to demarcate clearly to what extent and in what contexts sadomasochistic activities are protected. In doing so it is revealed that current Australian common law and Code law restrictions on sadomasochistic activities derogate from this privacy right and will therefore be partly inoperative because of their inconsistency with the *HRSC Act*.

I Introduction

Sadomasochism¹ has traditionally been considered to be a ‘deviant’ sexual practice. Alongside other forms of sexual expression such as transvestism, homosexuality, prostitution and fetishism, sadomasochism has been marginalised as a form of “‘bad” sex”.² Sadomasochists in Western society have historically been subjected to social disapprobation,³ pathologisation by medical authorities,⁴

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¹ ‘Sadomasochism’ is a portmanteau noun created from the words ‘sadism’, meaning the taking of sexual pleasure in inflicting pain, and ‘masochism’, meaning the taking of sexual pleasure in receiving pain. The use of ‘sadomasochism’ and ‘sadomasochistic activities’ in this article always imports consensuality. Sadomasochism is also referred to in other sources variously as ‘SM’, ‘S/M’, ‘S&M’, and ‘sado-masochism’. Quotations from sources that use these alternate references have not been altered.

² Gayle Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in Henry Abelove, Michele Aina Barale and David Halperin (eds), *The Lesbian and Gay Studies Reader* (Routledge, 1993) 3, 12–15.

³ 37.5 per cent of respondents to a survey conducted by the National Coalition for Sexual Freedom reported that they ‘had either been discriminated against, had experienced some form of harassment or violence, or had some form of harassment or discrimination aimed at them’ on the basis of their involvement in sadomasochism and its associated sexual practices: Susan Wright, *Second National Survey of Violence and Discrimination against Minorities*, National Coalition for Sexual Freedom, 2008, 7 <https://nccsfreedom.org/images/stories/pdfs/BDSM_Survey/2008_bdsm_survey_analysis_final.pdf>.

and prosecution by legal authorities.⁵ However, Chatterjee has identified that sadomasochism is now at a 'critical juncture', where it is poised 'on the cusp of a new understanding'.⁶ The possibility for this new understanding is signalled in a number of areas. The increasing visibility of sadomasochistic themes in popular culture has mainstreamed representations of sadomasochistic practice and aesthetics.⁷ The newly released fifth edition of the influential *Diagnostic and Statistical Manual of Mental Disorders* revised the diagnostic categories of 'sexual sadism' and 'sexual masochism' in order to ensure that a person can 'engage in consensual atypical sexual behaviour without inappropriately being labelled with a mental disorder'.⁸ A recent wave of ethnographic academic work has illuminated the contemporary sadomasochistic subculture,⁹ and there is an increasing push for sadomasochism to be accepted as a form of legitimate 'sexual citizenship'.¹⁰

Accompanying these shifts in the cultural terrain, there has been a broadening of the jurisprudence around sadomasochism. Sadomasochistic activities and identities are now recognised as intersecting not only with the criminal law, but also with laws around child welfare, the family, zoning, censorship, discrimination, defamation, and so on.¹¹ In particular, the intersection

⁴ Sadism and masochism have long been considered disorders of sexual development: see generally the extensive collection of psychological and psychoanalytic texts in Margaret Hanly (ed), *Essential Papers on Masochism* (New York University Press, 1995).

⁵ See, eg, *R v Brown* [1994] 1 AC 212 ('Brown'); *R v Emmett* [1999] EWCA Crim 1710; *Commonwealth v Appleby*, 380 Mass 296 (1980); *People v Samuels*, 250 Cal App 2d 501 (1967).

⁶ Bela Bonita Chatterjee, 'Pay v UK, the Probation Service and Consensual BDSM Sexual Citizenship' (2012) 15 *Sexualities* 739, 740.

⁷ See, eg, Kathy Sisson, 'The Cultural Formation of S/M: History and Analysis' in Darren Langdridge and Meg Barker (eds), *Safe, Sane and Consensual: Contemporary Perspectives on Sadomasochism* (Palgrave Macmillan, 2007) 10; Andrea Beckmann, 'Deconstructing Myths: The Social Construction of "Sadomasochism" Versus "Subjugated Knowledges" of Practitioners of Consensual "SM"' (2001) 8(2) *Journal of Criminal Justice and Popular Culture* 66. It has been argued that mainstream representations of sadomasochism tend selectively to 'normalise certain "kinky" practices whilst policing against "real perversions"'': Meg Barker, Camelia Gupta and Alessandra Iantaffi, 'The Power of Play: The Potentials and Pitfalls in Healing Narratives of BDSM' in Darren Langdridge and Meg Barker (eds), *Safe, Sane and Consensual: Contemporary Perspectives on Sadomasochism* (Palgrave Macmillan, 2007) 197, 198. However, '[t]he fact that mild SM now forms a "normal" part of popular culture is a substantial change': Eleanor Wilkinson, 'Perverting Visual Pleasure: Representing Sadomasochism' (2009) 12 *Sexualities* 181, 184.

⁸ American Psychiatric Association, *Paraphilic Disorders* (2013) <<http://www.dsm5.org/Documents/Paraphilic%20Disorders%20Fact%20Sheet.pdf>>. These categories were relabelled 'sexual sadism disorder' and 'sexual masochism disorder' in order to embed a distinction between paraphilias and paraphilic disorders, and make it clear that sadistic or masochistic sexual interests 'are not *ipso facto* mental disorders' and do not 'automatically justify or require clinical intervention': American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013) 816. This change has been claimed as a victory for sadomasochists: National Coalition for Sexual Freedom, *The DSM-5 Says Kink is OK!* (22 June 2013) <<https://ncsfreedom.org/press/blog/item/the-dsm-5-says-kink-is-ok.html>>.

⁹ See, eg, Staci Newmahr, *Playing on the Edge: Sadomasochism, Risk and Intimacy* (Indiana University Press, 2011); Margot Weiss, *Techniques of Pleasure: BDSM and the Circuits of Sexuality* (Duke University Press, 2011); Danielle J Lindemann, *Dominatrix: Gender, Eroticism, and Control in the Dungeon* (University of Chicago Press, 2012).

¹⁰ See Chatterjee, above n 6; Darren Langdridge, 'Voices from the Margins: Sadomasochism and Sexual Citizenship' (2006) 10 *Citizenship Studies* 373.

¹¹ See, eg, Christopher White, 'The Spanner Trials and the Changing Law on Sadomasochism in the UK' in Peggy Kleinplatz and Charles Moser (eds), *Sadomasochism: Powerful Pleasures*

between sadomasochism and privacy law has recently been highlighted in the cases of *Pay v United Kingdom*¹² and *Mosley v News Group Newspapers Limited*.¹³ These developments provide a strong impetus for the re-evaluation of the current law regarding sadomasochistic activities in Australia. This issue has more than merely hypothetical value. With a recent study showing that 1.8 per cent of sexually active Australians had engaged in sadomasochistic activities in the previous year,¹⁴ it is clear that sadomasochistic activities comprise a significant aspect of the Australian sexual repertoire.

In setting out the legal status of sadomasochistic activities in Australia, this article focuses specifically on whether, and to what extent, sadomasochism is protected by the right to privacy contained in the *Human Rights (Sexual Conduct) Act 1994* (Cth) ('*HRSC Act*'). Soon after the passage of the *HRSC Act*, this issue was considered by Simon Bronitt in two articles published in 1995. One article, entitled 'The Right to Sexual Privacy, Sado-masochism and the *Human Rights (Sexual Conduct) Act 1994* (Cth)', concluded ambivalently that the *HRSC Act* has the potential to cover sadomasochism.¹⁵ The other article, entitled 'Legislation Comment: Protecting Sexual Privacy under the Criminal Law — *Human Rights (Sexual Conduct) Act 1994* (Cth)',¹⁶ concluded more strongly that the *HRSC Act* has the 'potential' to cover sadomasochism to the extent that it might invalidate certain legal restrictions on sadomasochism but not others.¹⁷ This line of thought has not been revisited in detail since.¹⁸ The intervening years have seen developments in European international law around privacy rights and sadomasochism, and developments in domestic case law around the interpretation and application of the *HRSC Act*. This article builds on these developments in order to establish a firmer and more detailed argument that the privacy protections in the *HRSC Act* cover a broad range of sadomasochistic activities.

This article works through this argument in three parts. Part II sets out the content of the *HRSC Act* and the context of its passage. Part III explains and justifies the relevance of international law to the analysis of the *HRSC Act*. Part IV

(Harrington Park, 2006) 167; Matthew Weait, 'Sadomasochism and the Law' in Langdridge and Barker (eds), above n 7, 63; Theodore Bennett, 'A Polyvocal (Re)Modelling of the Jurisprudence of Sadomasochism' (2012) 36 *University of Western Australia Law Review* 199.

¹² (2009) 48 EHRR SE 2.

¹³ [2008] EWHC 1777 (QB) ('*Mosley*').

¹⁴ Juliet Richters et al, 'Demographic and Psychosocial Features of Participants in Bondage and Discipline, "Sadomasochism" or Dominance and Submission (BDSM): Data from a National Survey' (2008) 5 *Journal of Sexual Medicine* 1660.

¹⁵ Simon Bronitt, 'The Right to Sexual Privacy, Sado-masochism and the *Human Rights (Sexual Conduct) Act 1994* (Cth)' (1995) 2(1) *Australian Journal of Human Rights* 59.

¹⁶ Simon Bronitt, 'Legislation Comment: Protecting Sexual Privacy under the Criminal Law — *Human Rights (Sexual Conduct) Act 1994* (Cth)' (1995) 19 *Criminal Law Journal* 222.

¹⁷ *Ibid* 228.

¹⁸ Bronitt has very briefly revisited this topic in subsequent works. In 2002, in a two-page comment on the *HRSC Act*, he concluded differently that it was 'highly unlikely' that the *HRSC Act* would cover sadomasochistic activities: Simon Bronitt, 'Privacy Defences: The *Human Rights (Sexual Conduct) Act 1994* (Cth)' (2002) 14(3) *LegalDate* 9. In 2010, in a broader discussion of the intersection of privacy and sexual offences, Bronitt and McSherry mention that 'it is doubtful' that the *HRSC Act* could be used to reframe the legal restrictions on sadomasochism, at least in cases involving 'the infliction of significant injury': Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 621. These arguments will be dealt with below.

engages with and analyses the four key phrases within s 4 of the *HRSC Act* — ‘sexual conduct’, ‘involving only consenting adults’, ‘in private’ and ‘arbitrary interference’ — in order to demarcate the extent to which sadomasochistic activities are protected by the right to privacy under the *HRSC Act*. The analysis within Part IV has regard to international law principles on sadomasochism and privacy, domestic case law interpreting the *HRSC Act*, and the current criminal law restrictions on sadomasochism within Australia.

II The Human Rights (Sexual Conduct) Act 1994

In 1994 the United Nations Human Rights Committee (‘HRC’) concluded its consideration of Communication No 488/1992.¹⁹ This Communication had been submitted by Nicholas Toonen,²⁰ a gay male Australian citizen who claimed that a number of his rights under the *International Covenant on Civil and Political Rights*²¹ were being violated by provisions of the *Tasmanian Criminal Code* that criminalised consensual homosexual male sex. The HRC adopted the view that the Tasmanian laws violated Toonen’s right to privacy under art 17 of the ICCPR and recommended repealing the offending sections of the *Tasmanian Criminal Code*²² as an effective remedy.²³

The Tasmanian government initially refused to alter the *Tasmanian Criminal Code*, a position it was legally entitled to take because decisions of the HRC are not binding within Australian law. However, their refusal placed them at odds with the position taken by the federal government, which responded to the HRC by passing the *HRSC Act* through Parliament. The *HRSC Act* contains one substantive provision, s 4, which reads:

- (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.
- (2) For the purposes of this section, an adult is a person who is 18 years old or more.

Section 4 of the *HRSC Act* appeared to implement the HRC’s decision by making the offending sections of the *Tasmanian Criminal Code* inconsistent with

¹⁹ HRC, ‘Individual Communication under the *Optional Protocol to the International Covenant on Civil and Political Rights*’, Communication to the Human Rights Committee in *Toonen v Australia*, 4 April 1994, CCPR/C/50/D/488/1992 (‘*Toonen Communication*’).

²⁰ Australia became a party to the *Optional Protocol to the International Covenant on Civil and Political Rights* on 25 September 1991. This Protocol allows the HRC to hear complaints from individuals who allege that a member state has violated their rights under the Covenant: UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, New York, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

²¹ *International Covenant on Civil and Political Rights*, New York, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

²² *Criminal Code Act 1924* (Tas) sch 1 (‘*Tasmanian Criminal Code*’).

²³ *Toonen Communication*, above n 19.

Commonwealth law, and thus inoperative because of s 109 of the *Australian Constitution*.²⁴ Although it did not specifically state it, the *HRSC Act* appeared to ‘provide a defence in court for any gay man arrested under Tasmania’s anti-gay laws ... without directly invalidating any State legislation’.²⁵ Despite this development, the Tasmanian government maintained its refusal to alter the *Tasmanian Criminal Code* until proceedings were instituted in the High Court to challenge the Code directly on the basis of this inconsistency.²⁶

Although the *HRSC Act* has already achieved its ultimate purpose — the removal of the offending *Tasmanian Criminal Code* provisions — the broad way that s 4 was drafted suggests that it could have a wider application beyond the decriminalisation of homosexuality. The right of privacy is not phrased as a right attaching to specific homosexual sexual activities or even homosexuality generally; it is broadly phrased as applying to ‘sexual conduct’. Determining whether or not the right to privacy contained in the *HRSC Act* protects sadomasochistic activities requires close scrutiny of the specific wording of s 4.

III Relevance of International Law

During the course of the analysis of s 4, reference will be made to both domestic sources of law and international legal principles. While it is self-evidently unproblematic to refer to domestic case and statute law to determine the meaning of the *HRSC Act*, some further explanation and justification of the relevance of international law is required. The *HRSC Act* constitutes the partial implementation of Australia’s existing international human rights obligations under the ICCPR.²⁷ Specifically, it partially implements art 17 of the ICCPR, which reads:

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.

International law that expands on and interprets the meaning of art 17 of the ICCPR is thus clearly important to the meaning of s 4 of the *HRSC Act*.

This article will also draw on international law beyond the ICCPR. In particular, it will draw on the jurisprudence around art 8 of the *European*

²⁴ This was what the *HRSC Act* was ‘clearly designed’ to do: Megan Davis and George Williams, ‘A Statutory Bill of Rights for Australia? Lessons from the United Kingdom’ (2002) 22(1) *University of Queensland Law Journal* 1, 18.

²⁵ Rodney Croome, ‘Sexual (Mis)Conduct’ (1995) 20 *Alternative Law Journal* 282, 282.

²⁶ Whether or not there was actually any legal inconsistency between the then *Tasmanian Criminal Code* and the *HRSC Act* has never been judicially determined on the merits of the case. However, in *Croome v Tasmania* (1997) 191 CLR 119, the High Court refused the Tasmanian government’s application to set aside proceedings begun on this basis, and was poised to determine the matter substantively when the *Tasmanian Criminal Code* was finally changed.

²⁷ Australia ratified the ICCPR on 13 August 1980, and the ICCPR entered into force for Australia three months later on 13 November 1980.

Convention on Human Rights.²⁸ Article 8 also provides a right to privacy but does so in slightly different terms:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Despite its differences with art 17 of the ICCPR, the right to privacy under the ECHR is still an important consideration for a number of reasons. First, given the absence of any specific consideration of sadomasochism under art 17 of the ICCPR, the jurisprudence about sadomasochism built up under art 8 of the ECHR provides the only comparable source of judicial analysis and interpretation of the issue. Second, the ECHR has already been addressed by Australian courts as a relevant consideration in the interpretation of the *HRSC Act*.²⁹ Third, the ECHR has been identified by academics as a useful source for the analysis of both the *HRSC Act* and privacy protections under the ICCPR.³⁰ Because of their ‘very similar terms’,³¹ developments under the ECHR should be considered ‘relevant to understanding the obligations in the ICCPR’.³² While Heinze argues that ‘[h]uman rights instruments cannot be mixed and matched without recognition of their specific contexts’, he still acknowledges, in relation to the right to privacy, that ‘[t]he jurisprudence of ECHR Article 8 provides ... important insight into the interpretation of corresponding provisions in international instruments’.³³ For these reasons, this article will also draw on international jurisprudence relating to the ECHR in the course of interpreting and working through s 4.

At the outset it is important to note a key distinction within the jurisprudence on art 8 of the ECHR about the obligations owed by states as a result of privacy rights. Moreham identifies the European Court of Human Rights as interpreting art 8 to provide certain ‘freedoms from’ (such as the freedom from interference with physical and psychological integrity) as well as certain ‘freedoms to’ (such as the freedom to live one’s life in a manner of one’s choosing).³⁴ In order to guarantee these freedoms, states have a “negative” obligation to avoid

²⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘ECHR’).

²⁹ See *Griffiths v Rose* (2011) 192 FCR 130, 143.

³⁰ See generally Bronitt, above n 15; Bronitt, above n 16; Fiona David and Jake Blight, ‘Understanding Australia’s Human Rights Obligations in Relation to Transsexuals: Privacy and Marriage in the Australian Context’ (2004) 9 *Deakin Law Review* 309; John Kidd, ‘Can International Law Protect Our Civil Rights? The Australian and British Experience Compared’ (1995) 18 *University of Queensland Law Journal* 305; Alison Duxbury and Christopher Ward, ‘The International Law Implications of Australian Abortion Law’ (2000) 23(2) *University of New South Wales Law Journal* 1.

³¹ Bill Swannie, ‘Toonen, 20 Years On’ (2011) 36 *Alternative Law Journal* 269, 269.

³² See David and Blight, above n 30, 310.

³³ Eric Heinze, *Sexual Orientation: A Human Right* (Martinus Nijhoff, 1995) 175–6.

³⁴ N A Moreham, ‘The Right to Respect for Private Life in the European Convention on Human Rights: A Re-Examination’ (2008) 1 *European Human Rights Law Review* 44, 46.

interfering with' privacy rights as well as a "positive" obligation to take active steps to protect' privacy rights.³⁵ International legal developments on sadomasochism can be broadly grouped under these headings, with some cases considering negative-obligation claims against governments that have criminalised sadomasochistic activities,³⁶ and other cases containing positive-obligation claims against governments for failing to institute laws to protect the privacy of sadomasochists.³⁷ Because of the wording of s 4 of the *HRSC Act*, the international law cases that most closely parallel the Australian situation are those that fall within the former category. Nevertheless, those cases that fall within the latter category are still valuable and will be addressed because they gesture towards the broad intersection between sadomasochism, human rights and privacy claims.

IV Do Privacy Protections Extend to Sadomasochistic Activities?

There are four key elements in s 4 that need to be addressed here. Sadomasochistic activities must (a) constitute 'sexual conduct', (b) involve only 'consenting adults', and (c) occur 'in private', before (d) they will be protected by the *HRSC Act* from legal restrictions that constitute 'arbitrary interference'.

A Sexual Conduct

The term 'sexual conduct' is not defined in the *HRSC Act*. When the *HRSC Act* was considered as a Bill before Parliament, the then Secretary of the Attorney-General's Department explained that this was a deliberate drafting choice made in order to 'bring in the ordinary meaning of those words'.³⁸ Subsequent courts were not left entirely without guidance, however, as the Explanatory Memorandum to the *HRSC Act* notes that:

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.³⁹

Even though the Explanatory Memorandum does not form part of the *HRSC Act* itself,⁴⁰ it was adopted wholeheartedly in *Cannavan v Lettvale Pty Ltd*.⁴¹ In

³⁵ Ibid. This was also recognised in European Court of Human Rights, 'Case of *Mosley v the United Kingdom*', Application no 48009/08 (10 May 2011) [106].

³⁶ See, eg, *Laskey, Jaggard and Brown v UK* (1997) 24 EHRR 39 ('*Laskey*') (the appeal from *Brown* [1992] 1 AC 212); European Court of Human Rights, 'Chamber Judgement: *KA and AD v Belgium*', Application nos 42758/98 and 45558/99 (17 February 2005).

³⁷ See, eg, *Pay v United Kingdom* (2009) 48 EHRR SE 2, 23; *Mosley* [2008] EWHC 1777 (QB) and the subsequent European Court of Human Rights case of *Mosley v the United Kingdom*, Application no 48009/08 (10 May 2011)

³⁸ Peter O'Keefe, 'Parliament, Sex and Conscience: A Case Study of Australia's Human Rights (Sexual Conduct) Bill 1994' (1995) 76 *The Parliamentarian* 195, 197.

³⁹ Replacement Explanatory Memorandum, *Human Rights (Sexual Conduct) Act 1994* (Cth) [5].

⁴⁰ An explanatory memorandum, however, is extrinsic material that is capable of being considered by a court to assist in the ascertainment of the meaning of a provision of the Act to which it applies: *Acts Interpretation Act 1901* (Cth) s 15AB(1) and (2)(e).

that case, a shopkeeper charged with distributing pornography was held to be unable to rely on the right to privacy under the *HRSC Act* because ‘any ambiguity attending the expression “sexual conduct”’ was ‘eradicated’ by the Explanatory Memorandum and its focus on the physical expression of sexual desire.⁴²

In order to interpret the *HRSC Act* in terms of its purpose and intended scope,⁴³ it is pertinent to turn to the consideration of sadomasochism in the formulation of the *HRSC Act* and its passage through Parliament. Sadomasochism was explicitly considered at these early stages. Indeed, the concern that the *HRSC Act* ‘might protect other forms of sexual conduct such as bestiality, sadomasochism and, most notably, incest’ was ‘[o]ne of the great fears in the debate surrounding the *Human Rights (Sexual Conduct) Act 1994*’.⁴⁴ O’Keefe recounts that a number of lawyers who addressed the Senate Legal and Constitutional Legislation Committee on the *HRSC Act* raised concerns that the ‘blanket of privacy conferred by such an undefined concept’ could encompass a variety of acts including ‘prostitution, incest, abortion, pornography, sadomasochist [sic] acts, medical professional misconduct, prisons (and also federal military discipline)’.⁴⁵ It was even specifically submitted to the Committee that whipping, an archetypal sadomasochistic act,⁴⁶ could constitute ‘sexual conduct’ under the *HRSC Act*.⁴⁷ The Attorney-General did not alter the proposed wording of the *HRSC Act*, but instead responded to these concerns by issuing the Explanatory Memorandum that defined sexual conduct very broadly as ‘the physical expression of sexual desire’. Such concerns about ‘deviant’ sexual acts receiving privacy protection were left to be addressed by the proviso built into s 4 that only ‘arbitrary interference’ with sexual conduct was prohibited by the *HRSC Act*. The Explanatory Memorandum specifically identified that this proviso meant that the *HRSC Act* would:

[N]ot 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.⁴⁸

Despite being explicitly raised before the Committee, sadomasochism is notably absent from this list. This absence strongly suggests that there was no legislative intention to exclude sadomasochism from the operation of the *HRSC Act*, and that it remains open to interpret its privacy protections in a way that covers some sadomasochistic activities.

Given that sadomasochism is not specifically excluded from the *HRSC Act*, we need to return to the general interpretation of the meaning of ‘sexual conduct’.

⁴¹ [2003] QCA 528 (28 November 2003).

⁴² *Ibid* [6] (de Jersey CJ).

⁴³ *Acts Interpretation Act 1901* (Cth) s 15AA.

⁴⁴ Brett Mason, *Privacy Without Principle: The Use and Abuse of Privacy in Australian Law and Public Policy* (Australian Scholarly Publishing, 2006) 103.

⁴⁵ O’Keefe, above n 38, 197.

⁴⁶ See generally Niklaus Largier, *In Praise of the Whip: A Cultural History of Arousal* (Zone Books, 2007).

⁴⁷ O’Keefe, above n 38, 198.

⁴⁸ Replacement Explanatory Memorandum, *Human Rights (Sexual Conduct) Act 1994* (Cth) [10].

We are left with the question of whether sadomasochistic activities constitute the ‘physical expression of sexual desire’.⁴⁹ Sexuality is an integral part of sadomasochism. Indeed, the very words ‘sadism’ and ‘masochism’ were originally coined by Richard von Krafft-Ebing as categories of sexual ‘deviation’.⁵⁰ However, it may be the ‘deviant’ quality of sadomasochistic sexuality that has led to questions being raised about whether sadomasochistic activities should be regarded as being sexual in nature. Mains notes that:

In the human world sexual play is modulated by and measured against a variety of symbolic and emotional contexts including the perceived roles of the sexual partners, and the cultural views of love and pleasure. A society that conceives of all love as gentle and affectionate finds difficulty in perceiving pain as enjoyable.⁵¹

Similarly, given that Western society typically conceives of sexual activities as gentle and affectionate, there may be conceptual difficulty in perceiving painful sadomasochistic activities as being sexual in nature.⁵² This difficulty plays out in the decrial from some legal commentators that sadomasochistic activities constitute ‘violence’ rather than sexual expression.⁵³ Bronitt rightly rejects this line of thought on the basis that just because sadomasochism involves the infliction of pain in addition to sexual pleasure it does not logically follow therefore that ‘sado-masochistic violence ceases to be “sexual conduct”’.⁵⁴

In *Mosley*,⁵⁵ the Court considered inter alia whether the undercover videorecording and subsequent newspaper exposé of Max Mosley’s sadomasochistic activities violated his right to privacy under art 8 of the ECHR. The Court addressed the sadomasochistic activities in question as ‘sexual conduct’ and recognised that ‘[e]veryone is naturally entitled to espouse moral or religious beliefs to the effect that certain types of *sexual behaviour* are wrong or demeaning to those participating’.⁵⁶ Further, the European Court of Human Rights accepted the proposition that the sadomasochistic activities in *Laskey* — including flogging, whipping, branding, caning and the application of hot wax — were for the ‘purposes of sexual gratification’, and described them as ‘sexual activities’.⁵⁷

⁴⁹ Ibid.

⁵⁰ Richard von Krafft-Ebing, *Psychopathia Sexualis* (Arcade, first published 1885, 2008 ed).

⁵¹ Geoffrey Mains, *Urban Aborigines: A Celebration of Leathersexuality* (Daedalus, 3rd ed, 2002) 68.

⁵² Grigolo contends that the sadomasochism case of *Laskey* (1997) 24 EHRR 39 ‘offers a clear example of the difficulty of conceiving sexual activity and sexuality outside dominant behavioural and moral standards’: Michele Grigolo, ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’ (2003) 14 *European Journal of International Law* 1023, 1033.

⁵³ There is a legal tradition dating back to at least the majority decision in *Brown* [1994] 1 AC 212 that sadomasochism is conceptualised as violence rather than sex. There is, however, a legal tradition dating back to the dissenting opinions in the same case that conceptualises sadomasochism as a form of sex: eg, Lord Mustill wrote that *Brown* ‘should be a case about the criminal law of private sexual relations, if about anything at all’: at 257.

⁵⁴ Bronitt, above n 15.

⁵⁵ [2008] EWHC 1777 (QB).

⁵⁶ *Mosley* [2008] EWHC 1777 (QB) [127] (emphasis added). Though obviously this is not a legal pronouncement on whether sadomasochism constitutes ‘sexual conduct’ for the particular purposes of s 4 of the *HRSC Act*, the manner in which the conduct in question is addressed by the Court here is telling.

⁵⁷ *Laskey* (1997) 24 EHRR 39 [36].

There is a clear and self-evident reason why sadomasochism has been unhesitatingly judicially recognised in these cases as being sexual in nature. It is the same reason why sadomasochism is engaged with in academic articles appearing in journals with names like *Sex Roles*,⁵⁸ *Archives of Sexual Behavior*,⁵⁹ the *Journal of Sex Research*,⁶⁰ and *Sexualities*,⁶¹ and why it has been a topic of sexological study for decades at the Kinsey Institute for Sex, Gender and Reproduction.⁶² It is widely known and accepted that sadomasochism is intrinsically connected with sexuality.⁶³ Sadomasochistic activities should be regarded as being the physical expression of sexual desire, and will therefore constitute ‘sexual conduct’ under s 4 of the *HRSC Act*.

B Involving Only Consenting Adults

The privacy protections in s 4 of the *HRSC Act* extend to sexual conduct ‘involving only consenting adults’. The Explanatory Memorandum states that s 4 ‘does not, therefore, cover conduct involving children or non-consensual conduct or conduct which results, for example, in physical harm to which the parties involved did not or could not validly consent’.⁶⁴ This raises three possible issues with regard to the privacy protection given to sadomasochistic activities by the *HRSC Act*: non-coverage of minors, non-coverage of autoeroticism, and limitations on the consent given by the masochist.

First, it is clear and unequivocal from the wording of the *HRSC Act* that its privacy protections do not extend to sexual activities involving people under 18 years old.⁶⁵ Therefore, the Commonwealth, states and territories are not prohibited from imposing even arbitrary interference on sadomasochistic activities where a minor is involved. Because of the use of the wording ‘only consenting adults’ in s 4, these privacy protections will not cover sadomasochistic activities

⁵⁸ See, eg, Denise Donnelly and James Fraser, ‘Gender Differences in Sado-Masochistic Arousal among College Students’ (1998) 39(5/6) *Sex Roles* 39.

⁵⁹ See, eg, Brad Sagarin et al, ‘Hormonal Changes and Couple Bonding in Consensual Sadomasochistic Activity’ (2009) 38 *Archives of Sexual Behaviour* 186; Kurt Ernulf and Sune Innala, ‘Sexual Bondage: A Review and Unobtrusive Investigation’ (1995) 24 *Archives of Sexual Behavior* 631; Richard Green, ‘(Serious) Sadomasochism: A Protected Right of Privacy?’ (2001) 30 *Archives of Sexual Behavior* 543.

⁶⁰ See, eg, Roy Baumeister, ‘Masochism as Escape from Self’ (1988) 25 *The Journal of Sex Research* 28.

⁶¹ See, eg, Gary Taylor and Jane Ussher, ‘Making Sense of S&M: A Discourse Analytic Account’ (2001) 4 *Sexualities* 293.

⁶² See, eg, Paul Gebhard, ‘Fetishism and Sadomasochism’ in Martin Weinberg (ed), *Sex Research: Studies from the Kinsey Institute* (Oxford University Press, 1976) 156.

⁶³ There appears to be some implicit legal recognition of this point with regard to the regulation of pornography in Australia. Such regulation places strict and explicit limitations on pornography containing sadomasochistic themes: see Bennett, above n 11, 215–19. Fetish material, including ‘body piercing, application of substances such as candle wax, “golden showers”, bondage, spanking or fisting’, is specifically addressed as a relevant factor for the classification of pornography under the *Guidelines for the Classification of Films 2012*.

⁶⁴ Replacement Explanatory Memorandum, *Human Rights (Sexual Conduct) Act 1994* (Cth) [6].

⁶⁵ An ‘adult’ is defined by s 4(2) of the *HRSC Act* as ‘a person who is 18 years old or more’. This blanket federal age standard for sexual privacy contrasts with the differing nature of the ages of consent to sexual activity under state and territory laws. The age of consent typically varies from 16 years to 18 years old, depending on the jurisdiction, the type of sexual activity and the nature of the relationship between the parties: see Bronitt and McSherry, above n 18, 677–8.

where at least one of the parties involved is under 18 years old, regardless of the age of the other participants.

Second, privacy protections possibly do not cover autoerotic sadomasochistic activities. This type of limitation was suggested by the Federal Court in *Griffiths v Rose*,⁶⁶ where a right to privacy under the *HRSC Act* was claimed by a man whose employment had been terminated inter alia on the basis that he viewed pornography on his employer's laptop.⁶⁷ While the Court did not consider the argument in detail (as it was not actively pursued by the parties), for the sake of completeness they briefly addressed s 4 of the *HRSC Act*. The Court suggested that the words 'involving only consenting adults' may possibly require 'some form of activity to which the notion of consent is meaningful'.⁶⁸ Without expressing a conclusive view, the Court raised the question of 'whether a person viewing pornography on a computer screen is engaged in consensual sexual activity in that sense'.⁶⁹ The intimation here is that because consent seems to be an irrelevant consideration with regard to solo sexual activities, such as viewing pornography or masturbation, s 4 may only apply to sexual conduct either between or including more than one person. Only where another adult is somehow involved does s 4's reference to consent become a 'meaningful' reference. However, as a matter of law, when interpreting a statutory section 'words in the plural number include the singular'.⁷⁰ The phrase 'involving consenting adults' should be interpreted as encompassing situations involving a single 'consenting adult' as well as multiple 'consenting adults'. This principle of statutory interpretation would arguably run counter to any requirement that the sexual conduct being engaged in involve more than one person. As a result, autoerotic sadomasochistic activities, such as self-bondage and self-flagellation, would not be excluded from the operation of s 4.

Third, the extent to which sadomasochistic activities receive privacy protection relies heavily on the specific consent given by the masochist. Because the phrase 'involving only consenting adults' does not extend to 'physical harm to which the parties involved did not ... validly consent',⁷¹ sadomasochistic activities that go beyond the level of consent given by the masochist will not be protected. Standard sadomasochistic practice is for the parties to sadomasochistic activities to negotiate their 'limits' before the activities take place — that is, the sadist and masochist will typically clearly and explicitly discuss and agree what activities will and/or will not occur during the scene.⁷² It is also standard sadomasochistic

⁶⁶ (2011) 192 FCR 130.

⁶⁷ His claim to privacy protection was bolstered by the fact that such viewing took place at his own house and outside of office hours, and that the pornography was accessed through his personal internet account: *ibid* 132.

⁶⁸ *Ibid* 142.

⁶⁹ *Ibid*.

⁷⁰ *Acts Interpretation Act 1901* (Cth) s 23(b).

⁷¹ Replacement Explanatory Memorandum, *Human Rights (Sexual Conduct) Act 1994* (Cth) [6].

⁷² See, eg, Jay Wiseman, *SM 101: A Realistic Introduction* (Greenery Press, 2nd ed, 1998); Philip Miller and Molly Devon, *Screw the Roses, Send me the Thorns: The Romance and Sexual Sorcery of Sadomasochism* (Mystic Rose Books, 1995). The actual prevalence of these theoretical safeguards in real-life sadomasochistic activities has been confirmed by recent ethnographic studies

practice for the parties to agree a ‘safe word’ that calls an immediate end to the sadomasochistic activities when spoken/indicated by either the sadist or the masochist.⁷³ If the sadomasochistic activities exceed the ‘limits’ set by the masochist or if the sadist continues the activities after the masochist invokes the ‘safe word’, those activities would lack the relevant consent and would not be covered by the privacy protections contained in s 4. This interpretation of the *HRSC Act* is in line with the decision of the European Court of Human Rights in *KA and AD v Belgium*.⁷⁴ The claim was made there that the sadomasochistic activities in question were covered by art 8 of the ECHR, but this was rejected because the facts of the case suggested that the sadist had disregarded the limits of the consent given by the masochist:

Although individuals could claim the right to engage in sexual practices as freely as possible, the need to respect the wishes of the ‘victims’ of such practices — whose own right to free choice in expressing their sexuality likewise had to be safeguarded — placed a limit on that freedom. However, no such respect had been shown in the present case. The applicants’ undertaking to intervene and put an immediate stop to the practices in question when the ‘victim’ no longer consented did not appear to have been honoured.⁷⁵

In addition to not covering physical harm to which the parties involved *did not* validly consent, the Explanatory Memorandum also states that s 4 does not cover ‘physical harm to which the parties involved *could not* validly consent’.⁷⁶ Given the historical treatment of sadomasochism under the common law, this is potentially a very important limitation. The Australian common law position on sadomasochism follows the seminal precedent of *Brown*⁷⁷ from the common law of England and Wales.⁷⁸ In that case, the House of Lords held that an assault that causes an injury amounting to at least bodily harm is unlawful regardless of the consent of the injured party. The House of Lords identified ‘exceptions’ to this rule, such as ‘[r]itual circumcision, tattooing, ear-piercing and violent sports including boxing’,⁷⁹ but the majority excluded sadomasochism from this list on the basis of a policy assessment that this was not in the public interest.⁸⁰ Following this authority, the argument might be made that the physical harm inflicted in the

of sadomasochistic communities: see, eg, Newmahr, above n 9; Weiss, above n 9; Lindemann, above n 9.

⁷³ See, eg, Wiseman, above n 72; Miller and Devon, above n 72; Newmahr, above n 9; Weiss, above n 9; Lindemann, above n 9. This was referred to as a ‘code word’ by Lord Jauncey in *Brown* [1994] 1 AC 212, 238.

⁷⁴ European Court of Human Rights, ‘Chamber Judgement: *KA and AD v Belgium*’, Applications nos 42758/98 and 45558/99 (17 February 2005).

⁷⁵ *Ibid.* The full judgment is available only in French, so this quote is extracted from the English Press Release issued by the Registrar that summarises the key facts and findings of the case.

⁷⁶ Replacement Explanatory Memorandum, *Human Rights (Sexual Conduct) Act 1994* (Cth) [6] (emphasis added).

⁷⁷ [1994] 1 AC 212.

⁷⁸ See *R v McIntosh* [1999] VSC 358 (3 September 1999); *R v Stein* (2007) 18 VR 376.

⁷⁹ *Brown* [1994] 1 AC 212, 231 (Templeman LJ).

⁸⁰ *Ibid.* Lord Jauncey had ‘no doubt that it would not be in the public interest that deliberate infliction of actual bodily harm during the course of homosexual sado-masochistic activities should be held to be lawful’: at 246. Lord Lowry held that ‘[s]ado-masochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society’: at 255.

course of sadomasochistic activities cannot be ‘validly’ consented to, because the sadist remains criminally liable despite the consent of the masochist. However, the common law position on sadomasochism should not be read as equating to the contention that injurious sadomasochistic activities cannot be ‘validly’ consented to. In *Brown*, the House of Lords did not proceed on the basis that the masochists had not freely given their consent. They had not been induced to participate by duress or been fraudulently tricked into participating. Indeed, the masochists were described as ‘willingly and enthusiastically participating’ in the sadomasochistic activities.⁸¹ *Brown* should be properly read as merely placing a legal limit on the exculpatory effect of otherwise ‘valid’ consent in the context of an injurious sadomasochistic assault. Thus, sadomasochistic activities should not, as a general rule, be considered as failing to fulfil the consent requirement under s 4 within common law jurisdictions. However, specific cases where sadomasochistic activities are engaged in by parties who could not freely give consent, perhaps such as where the masochist is unconscious during the course of the activities,⁸² will fall outside the privacy protection of the *HRSC Act*.

C *In Private*

The concept of privacy is ‘a problematic idea’.⁸³ It has long been ‘the site of semantic battles between rival conceptions and interpretations’ and ‘its theoretical foundations are uncertain and its practical limits ill-defined’.⁸⁴ Legal rights to privacy have proven amorphous and politically loaded,⁸⁵ even sometimes repressive.⁸⁶ It has been argued that these conceptual difficulties have led to the development of ‘shambolic’ jurisprudence around privacy in countries like the United States.⁸⁷ Privacy rights have proven to be particularly broad-ranging under

⁸¹ *Brown* [1994] 1 AC 212, 213.

⁸² This situation occurred in the Canadian case of *R v JA* (2011) SCC 28. The argument was raised in that case that the masochist had earlier given consent while she was conscious to the activities that later took place while she was unconscious. The Court here split 2:1 in its application of Canadian statute and common law. The majority, Simmons JA with Jurianza JA agreeing, held that the state had the obligation in sexual assault cases to prove the absence of consent and found that this could not be proven where ‘a person consents in advance to sexual activity expected to occur while unconscious and does not change their mind ... [because] [t]he only state of mind ever experienced by the person is that of consent’: *R v JA* (2011) SCC 28 [77]. LaForme JA, dissenting, held that consent ‘is an ongoing state of mind’, and that any advance consent that is given is rendered inoperative by unconsciousness because the unconscious person is ‘incapable of making a rational choice to consent to sexual activity at the time it occurs’: *R v JA* (2011) SCC 28 [122], [131]. Whether or not this kind of advance consent would constitute ‘valid’ consent for s 4 of the *HRSC Act* is a legally troublesome question that would require more room to address fully than is available here.

⁸³ Paul Roberts, ‘Privacy, Autonomy and Criminal Justice Rights: Philosophical Preliminaries’ in Peter Alldridge and Chrisje Brants (eds), *Personal Autonomy, the Private Sphere and the Criminal Law* (Hart, 2001) 49, 51.

⁸⁴ *Ibid.*

⁸⁵ See, eg, Margaret Thornton, ‘The Public/Private Dichotomy: Gendered and Discriminatory’ (1991) 18 *Journal of Law and Society* 448.

⁸⁶ See, eg, Emma Henderson, ‘Of Signifiers and Sodomy: Privacy, Public Morality and Sex in the Decriminalisation Debate’ (1996) 20 *Melbourne University Law Review* 1023.

⁸⁷ Mason, above n 44.

the ECHR.⁸⁸ For example, the right to respect for ‘private life’ under art 8 of the ECHR has been interpreted to include not only personal characteristics such as ‘gender identification, name and sexual orientation and sexual life’, but also social considerations such as the ‘right to identity and personal development, and the right to establish relationships with other human beings and the outside world’, including ‘activities of a professional or business nature’.⁸⁹ However, these general theoretical and legal concerns about the concept and scope of ‘privacy’ are not particularly problematic for this article. Both Mason and Bronitt recognise that these broad international legal and jurisprudential models of privacy are unlikely to prove relevant to the interpretation and application of the *HRSC Act*.⁹⁰ This is due to the wording of s 4, which ‘does not provide a general guarantee of freedom from interference with privacy. It deals only with privacy in relation to sexual conduct involving only consenting adults acting in private’.⁹¹ There is a much narrower scope for the interpretation and application of privacy when it is employed in this particular sense.

So what is the meaning of ‘in private’ in the context of s 4 of the *HRSC Act*? The Queensland District Court in *R v Marchant*⁹² was confronted with this question. The case involving a woman charged under indecent act provisions who argued that her conduct was covered by the privacy protections in the *HRSC Act*. On the facts, an undercover police officer paid money to enter a room, on private premises, which contained the woman in question, where she then performed the indecent sexual acts. Initially only the undercover police officer and the woman were inside the room, but the door to the room was left unlocked and once or twice during the commission of the indecent acts a second undercover police officer opened the door and entered the room for brief periods of time. The Court noted that it was reasonable to interpret the phrase ‘in private’ in s 4 in terms of being ‘in contrast to something which happens in public, and something which happens in a place to which there is public access which is being exercised as such is obviously not happening in private’.⁹³ The Court further commented that ‘a place to which the public are permitted to have access as the public’ would ‘necessarily not be “in private” in the sense in which that expression is used’ in s 4.⁹⁴ The decision in this case is in keeping with the ‘restrictive approach’ that Bronitt predicted to be the likely interpretation of the *HRSC Act*, and would seem to limit ‘protection under the Act to sexual conduct that takes place on private premises and is secluded from other members of the public’.⁹⁵ As a result, sadomasochistic activities that take place in ‘private clubs or brothels, which are places that members of the public

⁸⁸ Indeed, the ‘interests protected by Article 8 are not only wide in themselves but have been interpreted widely by the Court’: Colin Warbrick, ‘The Structure of Article 8’ (1998) 1 *European Human Rights Law Review* 32, 33.

⁸⁹ *Pay v United Kingdom* (2009) 48 EHRR SE 2, 23.

⁹⁰ Mason, above n 44, 96; Bronitt, above n 16, 224.

⁹¹ Replacement Explanatory Memorandum, *Human Rights (Sexual Conduct) Act 1994* (Cth) [6].

⁹² [2001] QDC 325.

⁹³ *Ibid* [30].

⁹⁴ *Ibid*.

⁹⁵ Bronitt, above n 16, 224.

may have access to under certain conditions’,⁹⁶ will not be occurring ‘in private’ in terms of the application of s 4.

This restrictive approach to privacy marks a point of divergence between Australian law and international law. For example, in *Pay v United Kingdom*,⁹⁷ a case concerning art 8 of the ECHR, a parole officer had his employment terminated after it came to the attention of his employer that he also ran a business (‘Roissy’) selling sadomasochistic equipment and frequently appeared in performances at sadomasochistic clubs. The Court there held that:

The mere fact that his activities did not take place in an entirely private forum could not be sufficient to constitute a waiver of his art 8 rights. Nor was the fact that Roissy was a commercial enterprise sufficient to bring his activities outside the scope of art 8, since that provision protected the right to establish and develop relationships with other human beings, including entering into relationships of a professional or business nature.⁹⁸

Given the narrower wording and interpretation of s 4 of the *HRSC Act*, it is highly doubtful that an Australian court would make a similar finding. There is no evidence available about the extent to which sadomasochistic activities occur in brothels in Australia, but sadomasochistic parties, clubs and gatherings that are open to the public run on a regular basis in a number of Australian capital cities.⁹⁹ Sadomasochistic activities that occur at these types of events will not be protected by the *HRSC Act*.

Even though international jurisprudence around the concept of ‘privacy’ might not provide a useful guide for the interpretation of the meaning of ‘in private’ under the *HRSC Act*, sadomasochism cases involving privacy rights may still flag some important issues for consideration. In *Laskey*,¹⁰⁰ the sadomasochistic activities in question involved the regular gatherings of 40–50 members, ‘the recruitment of new “members”’, the provision of specially equipped premises, and the distribution among the men of video recordings of the activities.¹⁰¹ While this may be taken as raising questions about the ‘private’ nature of the sadomasochistic activities, this point was not disputed by the parties and this argument was not examined by the Court.¹⁰² Similarly, *Mosley*¹⁰³ involved sadomasochistic activities engaged in by a group of five people, four of whom were paid for their participation. The Court noted that ‘one is usually on safe ground in concluding that anyone indulging in sexual activity is entitled to a degree of privacy — especially if it is on private property and between consenting adults (paid or unpaid)’,¹⁰⁴ before invoking the very broad European approach to privacy that

⁹⁶ Ibid.

⁹⁷ (2009) 48 EHRR SE 2.

⁹⁸ Ibid 22–3.

⁹⁹ Such as ‘Hellfire’ in Brisbane, ‘Club Freak’ in Perth, ‘Chains’ in Melbourne, and ‘Oz Kink Fest’.

¹⁰⁰ (1997) 24 EHRR 39.

¹⁰¹ Ibid [36].

¹⁰² Green, above n 59, 547. Warbrick confidently supposes that ‘it is clear that the Court in *Laskey* ... would have decided that the conduct of the applicants did not fall within the scope of their “private life”, if such an argument had been put by the Government’: see Warbrick, above n 88, 34.

¹⁰³ [2008] EWHC 1777 (QB).

¹⁰⁴ Ibid [98].

‘covers not only sexual activities but personal relationships more generally’.¹⁰⁵ While these cases may be easily identified as falling within the broad privacy protection offered by art 8 of the ECHR, it is less obvious that they would fall within the narrower privacy protection offered by s 4 of the *HRSC Act*. It is not yet clear exactly how focused the ‘restrictive approach’ to privacy under s 4 is, so this article will not offer any definite conclusions; suffice it to note that it may be open to Australian courts to find that sadomasochistic activities are not occurring ‘in private’ where they involve group participation, commercial participation, proselytisation or the intended future distribution of video recordings of the activities.

D *Arbitrary Interference*

As detailed through the course of the analysis conducted above, sadomasochistic activities will generally constitute ‘sexual conduct involving only consenting adults that occurs in private’ — with the exceptions of cases where minors are involved, where the consent given by the masochist is invalid or has been exceeded, or that take place within public areas. As such, under s 4 of the *HRSC Act*, sadomasochistic activities are ‘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’. It is important to note that the *HRSC Act* ‘does not directly make the relevant behaviour lawful’;¹⁰⁶ instead it acts indirectly by placing limits on the legal regulations that can be lawfully imposed on sadomasochistic activities.¹⁰⁷ Determining the extent of these limits requires close attention to the meaning of the term ‘arbitrary’.

The Explanatory Memorandum to the *HRSC Act* notes that the protection in s 4 against ‘arbitrary interference’ means that ‘interference provided for by law must be justified and reasonable in the circumstances’.¹⁰⁸ This draws on the wording from UN General Comment No 16, which explains that art 17 of the ICCPR is:

[I]ntended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.¹⁰⁹

The Explanatory Memorandum also notes that the right to privacy ‘is not absolute or unlimited and must be balanced with the needs of the community and with other rights’, and that ‘any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case’.¹¹⁰ This

¹⁰⁵ Ibid [101], see also [99]–[104].

¹⁰⁶ *R v Stringer* (2000) 116 A Crim R 198, 218.

¹⁰⁷ But see *R v Marchant* [2001] QDC 325, which raises some doubts about the exact effect of this limitation, and whether a contravening State or Territory law would actually be invalidated by the operation of the *HRSC Act*.

¹⁰⁸ Replacement Explanatory Memorandum, *Human Rights (Sexual Conduct) Act 1994* (Cth), [9].

¹⁰⁹ HRC, *General Comment No 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art 17)*, 32nd sess (4 August 1988) [4].

¹¹⁰ Replacement Explanatory Memorandum, *Human Rights (Sexual Conduct) Act 1994* (Cth) [9].

passage draws on the wording of the *Toonen Communication*, in which the HRC interpreted ‘the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case’.¹¹¹ Thus, for example, if legal regulations are based on ‘mere capricious prejudice’ they will be ‘arbitrary’.¹¹² As discussed, the Explanatory Memorandum also specifies that legal restrictions on a number of sexual activities such as incest, bestiality and the possession of child pornography are not ‘arbitrary’ under the *HRSC Act*.¹¹³ With regard to other sexual activities that are not specified, such as sadomasochism, ‘the question of whether an interference with privacy is justifiable requires a balancing of the circumstances’.¹¹⁴ To apply the principle of ‘arbitrary interference’ in s 4 to the specific issue of sadomasochistic activities, a number of questions must be posed. What ends are sought by the criminal regulation of sadomasochism? What level of regulation is proportionate to these ends?

Answering these questions requires taking a step backwards to address the legal restrictions on sadomasochistic activities that already currently exist in domestic law. As discussed, Australian common law has adopted the common law position in England and Wales — found in cases such as *Attorney-General’s Reference (No 6 of 1980)*,¹¹⁵ *Brown*,¹¹⁶ and *R v Emmett*¹¹⁷ — that sadomasochistic activities that cause injuries amounting to at least bodily harm are unlawful, regardless of the consent of the masochist.¹¹⁸ As a result, consensual sadomasochistic activities that cause injuries that at a minimum interfere with the health or comfort of the masochist and are more than merely transient or trifling, such as noticeable bruising, will be unlawful in common law jurisdictions.¹¹⁹ Conversely, the general operation of the Griffith Code States of Western Australia and Queensland seems to have broken with this common law tradition and instead criminalises sadomasochistic activities where they cause injuries that amount to at least wounding, regardless of the consent of the masochist.¹²⁰ As a result, sadomasochistic activities that break both layers of skin (the dermis and the

¹¹¹ *Toonen Communication*, above n 19, [8.3].

¹¹² In *Rv Stringer* (2000) 116 A Crim R 198, Adams J found that ‘the prosecution of sexual behaviour involving adult men that is not criminal if performed by women or heterosexuals’ was arbitrary under the *HRSC Act* because it is based solely on ‘capricious prejudice’: at 219.

¹¹³ Replacement Explanatory Memorandum, *Human Rights (Sexual Conduct) Act 1994* (Cth) [10].

¹¹⁴ David and Blight, above n 30, 317.

¹¹⁵ [1981] 1 QB 715.

¹¹⁶ [1994] 1 AC 212.

¹¹⁷ [1999] EWCA Crim 1710.

¹¹⁸ See *R v McIntosh* [1999] VSC 358 (3 September 1999); *R v Stein* (2007) 18 VR 376, and the discussion of the common law and consensual assault offences more generally in Bennett, above n 11.

¹¹⁹ The traditional common law definition of ‘bodily harm’ only covered injuries that interfered with health or comfort and that were ‘more than merely transient and trifling’: *R v Donovan* (1934) 2 KB 498, 509. However, the latter element of this test has since been broadened to cover injuries that are ‘more than merely transient or trifling’: *R v Morris (Clarence Barrington)* [1998] Cr App 386. Whether or not a merely transient physical effect of sadomasochistic activities — such as unconsciousness caused by erotic asphyxiation — passes the *de minimis* threshold, is ultimately a question for the jury in any resulting case: Bronitt and McSherry, above n 18, 577.

¹²⁰ See *Lergesner v Carroll* [1991] 1 Qd R 206; *R v Raabe* [1985] 1 Qd R 115, and the discussion of Griffith Code law and consensual assault offences more generally in Bennett, above n 11.

epidermis) and lead to free bleeding,¹²¹ such as a cut, will be unlawful in Griffith Code jurisdictions. These regulations on sadomasochism have never been justified or argued towards at a policy level in any detail in Australia, either by courts or by legislatures. Thus, in order to determine whether they are ‘arbitrary’, we should seek guidance from the justifications and policy considerations that have been raised under international law dealing with the regulation of sadomasochism.

While the broad protection against ‘arbitrary and unlawful interference’ under art 17 of the ICCPR has the effect of ‘leaving the issue wide open to interpretation’, the wording of art 8 of the ECHR focuses on specific justifications for regulation such as the ‘interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.¹²² Brants identifies that in cases involving ‘sexual autonomy’ the debate usually centres around morals and crime, although ... the issue of health can play an important part’.¹²³ Indeed, in the *Toonen Communication*, when Tasmanian authorities sought to defend the *Tasmanian Criminal Code* restrictions on homosexual sex on the basis of moral and public health grounds, the HRC ‘found that arguments based on these considerations are relevant to the reasonableness test and whether the interference with the right to privacy is arbitrary in the circumstances’.¹²⁴ These twin conceptions of morality and of public health will be the focus of the analysis here.

Since as early as 1967 in the United States, the ‘immoral or revolting nature of sadomasochistic relationships’ has been flagged as a relevant consideration when determining the legal status of sadomasochistic activities.¹²⁵ Pa argues that ‘moral condemnation under the guise of statutory interpretation’ has long given the judiciary ‘free reign’ to determine the legal status of sadomasochistic activities.¹²⁶ Moral considerations played a clear underpinning role in the ‘emotive language about public policy’ in *Brown*.¹²⁷ Lord Templeman explicitly condemned ‘[p]leasure derived from the infliction of pain [as] an evil thing’,¹²⁸ and Lord Lowry described sadomasochistic sexual desires as being ‘perverted and depraved’.¹²⁹

¹²¹ This is the legal definition of ‘wounding’: *R v Devine* (1982) 8 A Crim R 45; *Vallance v The Queen* (1961) 108 CLR 56.

¹²² Chrisje Brants, ‘The State and the Nation’s Bedrooms: The Fundamental Right of Sexual Autonomy’ in Peter Alldridge and Chrisje Brants (eds), *Personal Autonomy, the Private Sphere and the Criminal Law* (Hart, 2001) 117, 123.

¹²³ *Ibid.*

¹²⁴ Bronitt, above n 16, 226 n 31.

¹²⁵ (Author Unknown) ‘Assault and Battery. Consent. Consent of Masochist to Beating by Sadist Is No Defense to Prosecution for Aggravated Assault. *People v Samuels*, 58 Cal Rptr 439 (Ct App 1st Dist 1967)’ (1968) 81 *Harvard Law Review* 1339, 1340.

¹²⁶ Monica Pa, ‘Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex’ (2001) 11 *Texas Journal of Women & the Law* 51, 81.

¹²⁷ Ian Freckelton, ‘Masochism, Self-mutilation and the Limits of Consent’ (1994) 2 *Journal of Law and Medicine* 48, 68.

¹²⁸ *Brown* [1994] 1 AC 212, 237.

¹²⁹ *Ibid* 255.

For all the bluster about the ‘immorality’ of sadomasochism and sadomasochists in *Brown*, morality was not actively pursued by the government of the United Kingdom as a legitimate basis for the regulation of sadomasochistic activities during the course of the case’s appeal to the European Court of Human Rights in *Laskey*.¹³⁰ This is perhaps due to the permissive view on moral matters previously displayed by the Court during its consideration of the criminalisation of homosexual sex in Northern Ireland in *Dudgeon v The United Kingdom*.¹³¹ In that case, the Court pronounced that:

Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.¹³²

While this statement was made in 1981 with regard to homosexuality, its sentiment and force are equally applicable with regard to sadomasochism today. The Court sidestepped the issue of morality in its ultimate decision in *Laskey*. When dealing with the submission that sadomasochism ‘formed part of private morality which is not the State’s business to regulate’, the Court concluded that it was ‘not persuaded by this submission’.¹³³ The submission was held to have failed not because of any clear and overwhelming evidence of the ‘immorality’ of sadomasochism, but rather because ‘sado-masochistic activities involved a significant degree of injury or wounding’.¹³⁴ Despite the fact that the European Court of Human Rights has typically afforded states ‘a wide margin of appreciation’ when it comes to balancing moral issues like this,¹³⁵ the Court here failed to address morality arguments against sadomasochism directly and ultimately responded by addressing public health concerns.¹³⁶

On the basis of concerns about the ‘immorality’ of sadomasochism, it is difficult to see what, if any, legal restrictions on sadomasochistic activities would be in accordance with the *HRSC Act* s 4. Indeed, it is questionable from the outset whether sadomasochistic activities should be considered ‘immoral’. Moran has argued strongly that sadomasochism is an ethical practice because the orthodox ‘etiquette’ around sadomasochistic activities — such as negotiating ‘limits’ and agreeing a ‘safe word’ beforehand — is characterised by consensuality, open communication, mutuality, and risk-aversion.¹³⁷ It is also questionable whether

¹³⁰ (1997) 24 EHRR 39.

¹³¹ European Court of Human Rights, ‘Case of *Dudgeon v the United Kingdom*’, Application no 7525/76 (22 October 1981).

¹³² *Ibid* 60.

¹³³ *Laskey* (1997) 24 EHRR 39 [45].

¹³⁴ *Ibid*.

¹³⁵ Kathleen Kavanaugh, ‘Policing the Margins: Rights Protection and the European Court of Human Rights’ (2006) 4 *European Human Rights Law Review* 422, 427.

¹³⁶ *Laskey* (1997) 24 EHRR 39. The Court failed to make any finding on the issue of morality, and concluded that it was not ‘necessary to determine whether the interference with the applicants’ right to respect for private life could also be justified on the ground of the protection of morals’: at [51]. In his concurring separate judgment Judge Pettiti did somewhat consider this point when he argued that: ‘The protection of private life means the protection of a person’s intimacy and dignity, not the protection of his baseness or the promotion of criminal immoralism’: annexed opinion.

¹³⁷ Leslie Moran, ‘Violence and the Law: The Case of Sado-Masochism’ (1995) 4 *Social & Legal Studies* 225, 237–8.

there is any clear social consensus that sadomasochism is ‘immoral’. In addition to the increasing prevalence and mainstreaming of sadomasochistic themes and imagery in popular culture,¹³⁸ there is evidence that contemporary community attitudes are quite tolerant towards representations of sadomasochism in pornography.¹³⁹ The European Court of Human Rights has itself admitted that ‘it may be correct’ to think that sadomasochism ‘is increasingly accepted and understood in mainstream British society’.¹⁴⁰ Even if we adopt the proposition that sadomasochism is ‘immoral’, it is still difficult to see why the current criminal law regulations constitute a necessary and proportionate response. Concerns that sadomasochists will spread their ‘cult of violence’ if left unchecked,¹⁴¹ and that sadomasochistic activities may weaken the general moral barriers that hold back a tide of possible violent acts,¹⁴² seem fanciful and appear to lack any factual basis.¹⁴³ Taken at face value, however, such concerns about the corruption of public morality seem merely to justify prohibitions on public displays of sadomasochism, which already fall outside the scope of protection afforded by the *HRSC Act* in any event. In contrast, current regulations in Australia criminalise even private sadomasochistic activities between consenting adults where all that results is noticeable bruising or a cut. Such activities appear to be the concern of nobody but the sadist and masochist involved, and when conducted in private they cannot be regarded as impinging on any broader public morality. The mere fact that other members of the public may disapprove of such activities wherever they take place does not make their legal regulation a necessary or proportionate response. As Fellmeth recognises, ‘privacy can hardly be called a “human right” or “fundamental freedom” if its invasion is sanctioned whenever private conduct is socially unpopular’.¹⁴⁴ Current domestic legal restrictions on sadomasochistic activities are ‘arbitrary’ under s 4 of the *HRSC Act* because they are not reasonable with regard to moral concerns about sadomasochism.

¹³⁸ See Sisson, above n 7; Beckmann, above n 7; Wilkinson, above n 7.

¹³⁹ The Australian Law Reform Commission’s pilot study on community attitudes towards film content found that a majority of participants did not consider clips containing bondage to be offensive: Urbis, *Community Attitudes to Higher Level Media Content: Community and Reference Group Forums Conducted for the Australian Law Reform Commission* (7 December 2011) 47–50 <<http://www.alrc.gov.au/publications/community-attitudes-higher-level-media-content-community-and-reference-group-forums-con>>. Similarly, an English jury recently acquitted a man charged with violating obscenity laws for publishing sadomasochistic pornography: Alex Antoniou, ‘*R v Peacock*: Landmark Trial Redefines Obscenity Law’ (13 January 2012) *Law, Justice and Journalism* <<http://lawjusticejournalism.org/2012/01/13/r-v-peacock-landmark-trial-redefines-obscenity-law/>>.

¹⁴⁰ *Pay v United Kingdom* (2009) 48 EHRR SE 2 [26].

¹⁴¹ *Brown* [1994] 1 AC 212, 237 (Templeman LJ).

¹⁴² See, generally, Julie Bradwell, ‘Consent to Assault and Dangers to Women’ (1996) 146 *New Law Journal* 1682. See also Hanna’s arguments against relaxing legal restrictions on sadomasochism on the basis that law has evolved to ‘control ... male violence’: Cheryl Hanna, ‘Sex is Not a Sport: Consent and Violence in Criminal Law’ (2001) 42 *Boston College Law Review* 239, 254.

¹⁴³ These arguments seem markedly similar to the groundless conjecture raised in earlier decades by defenders of the criminalisation of homosexual sexual activities, ie that loosening legal restrictions will lead to widespread homosexuality and a torrent of lewd and licentious homosexual behaviour to the moral detriment of society.

¹⁴⁴ Aaron Fellmeth, ‘State Regulation of Sexuality in International Human Rights Law and Theory’ (2008) 50 *William and Mary Law Review* 797, 904.

The critic of sadomasochism has a more solid legal basis to raise concerns about public health. In *Brown*, Lords Templeman, Lowry and Mustill all paid specific attention to the medical risks they saw as attaching to sadomasochistic activities, such as the possibility for the infection of cuts, urinary tract infection, septicaemia and the transmission of blood-borne pathogens such as HIV/AIDS.¹⁴⁵ When upholding this decision on appeal in *Laskey*, the European Court of Human Rights concluded that ‘the State is unquestionably entitled to ... seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm’,¹⁴⁶ and that the level of regulation that can be legitimately imposed is informed inter alia by ‘public health considerations’.¹⁴⁷ Even though none of the masochists suffered any permanent injury or required medical treatment as a result of their participation in the sadomasochistic activities in question,¹⁴⁸ the Court was satisfied that the mere ‘attendant risk of harm’ was a sufficient public health concern.¹⁴⁹ The Court decided ultimately that the United Kingdom was ‘entitled to consider that the prosecution and conviction of the [sadomasochists was] necessary in a democratic society for the protection of health’.¹⁵⁰ In her recent study, *Sexual Health and Human Rights in the European Region*, Westerson identifies this decision as having ‘significant problems’ from ‘the perspective of sexual health and sexual self-determination’.¹⁵¹ She argues that the reasoning here is out of step with previous decisions that have protected privacy rights around homosexual sexual activity, and takes issue with the fact that the Court ‘allowed the invasion of privacy in the name of protection of bodily integrity’ where the activities had been ‘fully consented to’.¹⁵² Indeed, the concept of bodily integrity is deployed counter-intuitively here: instead of being used to protect a person from an unwanted physical threat, it is being used to prevent a person from participating in a desired, consensual physical activity.

It is apparent that public health concerns will justify some level of legal regulation of sadomasochistic activities as not being ‘arbitrary’ under the *HRSC Act*. The key issue is determining what amount of regulation is justified. It was submitted in *Laskey* that ‘the line beyond which consent is no defence to physical injury should only be drawn at the level of intentional or reckless causing of serious disabling injury’,¹⁵³ but the Court rejected this proposition and held instead that ‘the potential for harm inherent in the acts in question’ was also a relevant consideration.¹⁵⁴ Bronitt concludes, therefore, that reasonable interference with the privacy of sadomasochistic activities is not limited solely to situations where ‘the physical harm inflicted ... is serious or permanent’.¹⁵⁵ He goes on to suggest that

¹⁴⁵ *Brown* [1994] 1 AC 212, 236 (Templeman LJ), 255–6 (Lowry LJ), 274 (Mustill LJ).

¹⁴⁶ *Laskey* (1997) 24 EHRR 39 [43].

¹⁴⁷ *Ibid* [44].

¹⁴⁸ *Ibid* [8].

¹⁴⁹ Fellmeth, above n 144, 903.

¹⁵⁰ *Laskey* (1997) 24 EHRR 39 [50].

¹⁵¹ Johanna Westerson, *Sexual Health and Human Rights in the European Region* (International Council on Human Rights Policy, 2012) 35.

¹⁵² *Ibid* 36.

¹⁵³ *Laskey* (1997) 24 EHRR 39 [39].

¹⁵⁴ *Ibid* [46].

¹⁵⁵ Bronitt, above n 18, 10.

on this basis it is ‘highly unlikely’ that the *HRSC Act* will protect anyone ‘who perpetrate[s] mutual consensual assaults for the purpose of sexual gratification’.¹⁵⁶ But it is not the case that just because regulations can legitimately prohibit sadomasochistic activities that cause, or carry the risk of causing, serious or permanent injury, restrictions can legitimately prohibit all sadomasochistic activities. It should be remembered that the sadomasochistic activities in the factual matrix underlying *Brown* and its appeal decision in *Laskey* have been described as involving ‘activities that were extremely dangerous’.¹⁵⁷ Many, if not most, sadomasochistic activities carry the risk of causing some minor injury, but only very few sadomasochistic activities could properly be described as carrying any risk of serious injury. For example, spanking may cause bodily harm through bruising and discomfort, but it would be absurd to suggest that it carries any conceivable risk of causing serious injury. While it remains ‘doubtful whether the federal sexual privacy shield could be invoked ... in cases where the infliction of significant injury [has] occurred’,¹⁵⁸ not every sadomasochistic activity will cause, or carry a realistic risk of causing, this level of injury — even where it may nevertheless cause some minor injury. The blanket legal restrictions on all sadomasochistic activities that cause bodily harm/wounding is therefore disproportionate: it fails to take into account the specific risk profiles associated with different sadomasochistic activities and how these sadomasochistic activities are carried out. It is the equivalent of placing a blanket restriction on all sports, including, for example, badminton and netball, on the basis of the physical risks associated with the most dangerous contact sports, such as boxing or rugby.

To take this reference another step further, all contact sports carry with them some inherent potential risk for serious harm and yet remain lawful,¹⁵⁹ as do many other activities such as ‘rough horseplay and dangerous pastimes’,¹⁶⁰ tattooing, piercing, skydiving, bungee jumping and so on. In the context of the lawfulness of these risky activities, we are left wondering why the health risks associated with some sadomasochistic activities are treated differently to the health risks associated with these other activities.¹⁶¹ As Anderson recognises, there has been a ‘general failure’ within law to explain why harmful consensual activities like sport are treated in a different way to harmful consensual sadomasochism.¹⁶² The specific singling out of sadomasochism for strict criminal law regulation in order to ‘protect’ public health is unreasonable: it appears to be the result of mere capricious prejudice and is therefore ‘arbitrary’ in both the legal and non-legal sense of the word. Further, while some sadomasochistic activities may carry a high

¹⁵⁶ *Ibid.*

¹⁵⁷ *Mosley* [2008] EWHC 1777 (QB) [116].

¹⁵⁸ See Bronitt and McSherry, above n 18, 621.

¹⁵⁹ Indeed, in relation to boxing it has been observed that ‘[t]he nature of the sport and the range and degree of injuries sustained underpin the contention that really serious harm ... occurs in all boxing matches’: Jack Anderson, *The Legality of Boxing: A Punch Drunk Love?* (Routledge, 2007) 90.

¹⁶⁰ Bronitt, above n 15.

¹⁶¹ Freckelton notes that ‘Objectively speaking, [sadomasochistic activities] are dangerous and run the risk of inflicting permanent ill-effects, the more so now in that they involve the risk of transmission of a range of diseases including AIDS. However, if adults are to be allowed autonomy in the conduct of their lives, those risks, like many others, may be ones that they choose to run’: Freckelton, above n 127, 73.

¹⁶² Anderson, above n 159, 105.

risk of harm if performed by an inexperienced or reckless sadist, they may carry very little risk of harm if performed by an experienced, careful sadist.¹⁶³ Blanket regulations imposed on sadomasochistic activities on the basis of the risks involved therefore may also be unnecessary. In cases involving competent sadomasochists such risks may already have been managed, minimised and contained.¹⁶⁴

For the reasons given above, the current domestic legal restrictions on sadomasochistic activities are ‘arbitrary’ under s 4 of the *HRSC Act* because they cannot be justified by public health concerns. Public health concerns will only provide a reasonable basis for blanket criminal law restrictions prohibiting sadomasochistic activities that cause serious disabling harm — that is, grievous bodily harm. Concerns about the general ‘riskiness’ of sadomasochistic activities will only justify regulations covering ‘extremely dangerous’ sadomasochistic activities or sadomasochistic activities performed by inexperienced or careless sadists, and the current blanket ban on all sadomasochistic activities that cause bodily harm/wounding is not proportionate to address the actual risks involved in sadomasochism more generally.

V Conclusion

This article does not argue that there is a specific human right to engage in sadomasochistic activities. It argues that the general right to privacy enshrined in Australian law under s 4 of the *HRSC Act* has been drafted in a way that protects a broad range of sadomasochistic activities. While working through the key elements of s 4, this article has built up two conjoined propositions. First, legal regulations prohibiting sadomasochistic activities in Australia will not be inconsistent with the *HRSC Act* in cases where a minor is involved, where the consent given by the masochist is invalid or has been exceeded, where the activities take place within areas accessible by the public as members of the public, or where the regulations are restricted to sadomasochistic activities that cause, or carry a realistic risk of causing, serious and disabling harm. Second, privacy protections under the *HRSC Act* will cover sadomasochistic activities that occur in all other circumstances. These privacy protections place limits on the extent to which sadomasochism can be legitimately regulated by domestic Australian law. The current blanket restrictions that criminalise all sadomasochistic activities where they cause injuries that amount to at least bodily harm (in common law jurisdictions) or wounding (in Griffith Code jurisdictions), are inconsistent with these protections and thus with the *HRSC Act*.

While consensual sadomasochistic activities are not typically actively policed or prosecuted, the case history in Australia and the United Kingdom is instructive of the fact that the authorities do utilise such laws in situations where

¹⁶³ Most guide and instruction books devote entire sections to explaining the risks involved with particular activities and how to minimise them: see, eg, Wiseman, above n 72; Miller and Devon, above n 72.

¹⁶⁴ There are two popular acronyms in the sadomasochism subculture that describe how responsible and consensual sadomasochists should approach sadomasochistic activities: ‘Risk Aware Consensual Kink’ (RACK) and ‘Safe, Sane and Consensual’ (SSC). These slogans emphasise the key importance of safety and of being aware of and managing the risks involved.

sadomasochistic activities are directly brought to their attention,¹⁶⁵ or where sadomasochistic activities accidentally result in more serious consequences than the participants intended.¹⁶⁶ The lack of active policing and prosecution of sadomasochism does not detract from the argument in this article. This situation is similar to that underlying the *Toonen Communication*, where the capacity for the prosecution of homosexuals under the *Tasmanian Criminal Code* was itself actionable even though ‘the Tasmanian police ha[d] not charged anyone’ under the relevant sections ‘for several years’.¹⁶⁷ The long shadow cast over sadomasochists by the threat of prosecution, and the chilling effect this can have on sadomasochistic activities, warrants treating this as a live issue. The inconsistency of common and Code laws with the *HRSC Act* will not directly invalidate such laws, but a sadomasochist charged under them may use their inconsistency with the *HRSC Act* as a legal defence to the charges. Moving into the future, these privacy protections also place limits on the extent to which new case law or statute law developments can legitimately seek to impose any further regulation on sadomasochistic activities.

Many Australians take part in sadomasochistic activities, and many more do not. Both groups should take comfort in the fact that the right to privacy with regard to sexual conduct is enshrined in Australian law. Privacy rights are important because they provide each person with:

The cognitive, emotional and moral space to contemplate which of the available options might suit one’s temperament, tastes and talents, to experiment with new activities and experiences on a trial basis and without fear of ridicule or censure, and to pursue one’s chosen projects and commitments without being exposed to avoidable risks of victimisation or unreasonable demands to account for oneself before the galleries of public opinion.¹⁶⁸

The right to privacy is especially important when it comes to opening up space for the exploration of sexual interests, because sexuality is ‘a fundamental aspect of being human’.¹⁶⁹ Like homosexuality, sadomasochism may only have a niche appeal to the sexual interests of a small minority of Australians. But this makes it no less worthy of legal protection under the auspices of the right to privacy. Heinze observes that ‘[h]uman rights law ... loses credibility if, preferring issues that are safe and popular, it ceases to apply its own principles consistently’.¹⁷⁰ Applying the principles in s 4 consistently with recent developments in domestic and international law, a broad range of sadomasochistic activity is covered by the privacy protections contained in the *HRSC Act*.

¹⁶⁵ In *Brown* [1994] 1 AC 212, the police investigation was launched after police came into possession of a videorecording of some of the sadomasochistic activities in question. In *R v Emmett* [1999] EWCA Crim 1710 the prosecution was based on a complaint from a masochist’s treating doctor.

¹⁶⁶ See, eg, the trio of manslaughter cases: *Q v Meiers* (Unreported, Supreme Court of Queensland Trial Division, Lyons J, 8 August 2008); *R v McIntosh* [1999] VSC 358 (3 September 1999); *R v Stein* (2007) 18 VR 376.

¹⁶⁷ See HRC, above n 19 [2.3].

¹⁶⁸ Roberts, above n 83, 62.

¹⁶⁹ Ignacio Saiz, ‘Bracketing Sexuality: Human Rights and Sexual Orientation — A Decade of Development and Denial at the UN’ (2004) 7(2) *Health and Human Rights* 51, 66.

¹⁷⁰ Heinze, above n 33, 22.