

Trustees

Derek Cohen (Secretary)

Ian Gurnhill (Treasurer)

John Lovatt (Legal officer)

John Pandal (Chair)

the SPANNER TRUST

KNOW THE LAW ● HELP CHANGE THE LAW

admin@spannertrust.org

Response of the Spanner Trust to the Scottish Law Commission Discussion Paper No 131 on Rape and Other Sexual Offences January 2006

The Spanner Trust responds with respect to the call for comment upon the review of sexual offences by the Law Commission of Scotland.

The Spanner Trust was created in 1995 to support the 17 gay men who were prosecuted in England for assault on each other even though they all consented, required no medical treatment and engaged in the activities purely for their own sexual pleasure. They were convicted and at first instance the harshest sentence imposed was four and a half years. They were victimless crimes. The police investigation leading up to the charges lasted four years and involved 14 of the 43 police forces in England and Wales and it is estimated cost £4m. Hundreds of men were interviewed and a token 17 were prosecuted for assault on themselves. No prosecutions for any sexual offences could be brought because they were time-barred. It is believed that the authorities brought the prosecutions in an attempt to justify the huge and costly police investigations. The sixteen men concerned had their careers and lives wrecked and some lost their families and their homes and, like Oscar Wilde and Alan Turin, went to an early grave.

Sadomasochism (SM) is very widely practised throughout the UK. Basically, the principle is that pain and/or injury is inflicted by one sadomasochist on the other (it is very difficult to inflict pain without inflicting injury) and the result is that the sexual pleasure is increased. To an extent it is true to say that the greater the pain the greater the increase in sexual pleasure. The majority of people engaging in it will use only mild or moderate pain/injury but a smaller number go to more extremes. In the same way as many people engage in jogging a smaller number will choose to run marathons. It is difficult to estimate the numbers engaging in the more extreme forms of SM (or marathons) but the Trust believes it will run into thousands in Scotland alone.

Provided there is consent between the parties then, although there may be a physical injury, the trust submits it is SM and there is no harm. If there is no consent then it is not SM but sadism or violence and then harm is caused and quite rightly it would and should be an assault under the criminal law. The situation with conventional sex between two persons is similar; if there is consent then it is love-making and if there is no consent it is rape.

The Trust argues that SM should be accepted by society as a legitimate expression of sexuality just as homosexuality now is. Like homosexuality, SM is totally harmless to those who practise it and does no harm whatsoever to others. Some people may find them both to be vile and repugnant and possibly also contrary to their religious views but in neither case is that a good reason for the criminal law to intervene. The criminal law should only intervene when there is harm being caused.

The Trust would like to extend its whole-hearted support to the terms of proposal 67; "The offence of assault should not be constituted by any activity to which all of the parties have given their consent for purposes of sexual gratification."

The Trust appreciates that European authority requires to be applied uniformly throughout the European Union. However, the Trust believes that the Scots Courts must interpret European Community law in a way which does not simply copy the mistakes made by the English Courts. Especially mistakes which arguably have arisen from police error and the interpretation of elderly and inflexible English statute, and which therefore have been avoided to date by Scots prosecutors following Scots common law and principle.

It is the view of the Trust that the current law in England and Wales on consensual sado-masochism, as established by *R v Brown* and *ors* [1994] 1 AC 212, is incompatible with the Human Rights Act 1998.

It should be noted that the decision by the House of Lords to uphold this conviction was reached only by a 3 to 2 majority. It should further be noted that although the decision by the ECHR in *Laskey v UK* (1997) 24 EHRR 39 was unanimous, the decision of the European Commission that conviction was justified was not. Eminent European lawyers have agreed that the decision in *R v Brown* is in breach of Article 8 of the European Convention on Human Rights, and was not a justified breach of Convention Rights, and was not necessary in a democratic society for the protection of health and morals.

Moreover, for the margin of appreciation of the State to be acceptable justification, it must not be arbitrary or lead to inconsistencies. The decision of the ECHR in *Laskey* included the contention that the burning and permanent scarring of a wife by a husband in a consensual sm sexual act, was a trifling injury, and far less serious than the slight injuries caused by one man to another in a consensual sm sexual act in the facts of *R v Brown*. Yet notwithstanding that in the absence of consent the "branding" of the wife would certainly have given rise to charges of assault occasioning grievous bodily harm, the defendants in *R v Brown* were convicted of no more than causing actual bodily harm. The Trust argues that this demonstrates a clear breach of Article 14 of the Convention by the European Court in this judgment. It is discriminatory on the grounds of gender or sexuality.

It is the view of the Trust that current EC authority is contrary to Convention Rights and thus the Human Rights Act 1998, incorporated into Scots law by the Scotland Act 1998. The Trust obtained a Joint Opinion from Ben Emmerson QC and Rabinder Singh QC and a copy is enclosed for your reference.

It is the view of the Trust that following current Scots authority and principle, it is clear that consent can be a defence to a charge of assault; and it is contrary to Scots authority and principle to create an offence of assault where there is consent to other than serious injury or death, on the ground that the reason that consent was given was for sexual gratification.

With regard to related proposal 68, the Trust would refer to the Report by the Law Commission (England and Wales) on Consent in Sexual Offences (1992) and concur with the conclusions therein.

It is noted that in Scots Law consent would not be a defence to assault, even indirect assault, causing serious injury or death. The Trust has no objection to this. However, it would be inappropriate to, in effect, create a new offence of assault, in the circumstances where the assault, which did not lead to serious injury/grievous bodily harm or death, was consented to for sexual gratification.

The Trust submits that if the proposed law were enacted it would be very damaging because it would, inter alia, have the following effects:

(1) In England and Wales over the last 16 years SM organisations which have wanted to conduct lectures and workshops to educate people how to engage in SM activities safely have been deterred from doing so because they could be accused of aiding and abetting the commission of criminal offences. The result has not been that people have refrained from engaging in SM activities but that they have had accidents and caused unintended injuries.

For example, in bondage classes the first lesson which some-one would be taught is that if they tie a man's hands behind his back and then turn him on his front that he should be watched CONSTANTLY to make sure that he can and is still breathing. The reason is that when restrained in that position it is possible for a man, and particularly a heavy man, to have some difficulty in inflating his lungs. There have been several deaths in police custody in England when men were hand-cuffed behind their backs and then left on their stomachs in police cells but now the police are trained as above about the danger. Sadly, ambulance crews were not so trained and a few months ago a man was sectioned under the Mental Health Act by police officers at his home, handcuffed behind his back, and put into an ambulance. The ambulance crew put him face down. No police officers travelled in the ambulance. When they arrived at the hospital he was dead. Ambulance crews are now trained. The Trust would like to see SM practitioners in Scotland continue to be trained.

(2) As with the law against homosexuality which led to some men committing suicide if they were prosecuted and also led to some men being exposed to blackmail threats such a law as proposed could have a similar effect.

(3) The Spanner Investigation in England 16 years ago (which was referred to at the beginning) was triggered by the accidental finding of a video which the North Wales police believed showed a murder being committed and launched a murder investigation. It was scaled down after two days but if such a law existed in Scotland then overzealous police officers might, if a similar set of circumstances arose, embark on a similar crusade with the same devastating consequences.