



CONSENT, POWER, AND THE LAW



Section 14 of 17 (pp164-167)

from the joint submission responding to the QLRC
'A framework for a decriminalised sex work industry
in Queensland' Consultation Paper WP 80'



CHAPTER 18: FRAUDULENT PROMISE TO PAY A SEX WORKER FOR A SEXUAL ACT

- Q53** In a decriminalised sex work industry, are Queensland’s criminal laws adequate to deal with circumstances where there is a fraudulent promise by a person to pay money to a sex worker in exchange for a sexual act? Why or why not?
- Q54** If no to Q53, what changes (if any) should be made to the Criminal Code to address this issue? For example, should the Criminal Code be changed:
- (a) to widen the list of circumstances in section 348(2) that negate consent (and if so, in what way); or
 - (b) in some other way?
- Q55** What other factors should we consider (if any) in recommending changes to the criminal law on this issue?

No, Queensland’s criminal laws, specifically consent laws in section 348 (2), are not adequate to deal with circumstances where there is a fraudulent promise by a person to pay money to a sex worker in exchange for a sexual act. They are also not adequate to deal with the non-consensual removal or tampering with a condom during sex.

Consent

In sex work, one of the factors upon which consent is based is agreed payment for negotiated services. In the ACT, courts have found that when a person refuses or withdraws the agreed payment for sex the act constitutes rape, because consent for the sexual act was obtained fraudulently.¹⁷¹ Equally, if a condom is non-consensually removed or tampered with consent is negated in any sexual interaction including sex work. The ACT has also introduced a provision related to the non-consensual intentional removal or tampering with a condom.

Fraudulent promise to pay Criminal Code 348(2)(e)

The Queensland Criminal Code section 348(2)(e) states that consent is not ‘freely and voluntarily given’ if it is obtained ‘by false and fraudulent representations.’ However, unlike the ACT legislation, this subsection is limited to ‘the nature or purpose of the act’, and while this should include non-payment in a sex work setting police seem to believe it does not and have been reluctant to take action in these cases. It is the experience of sex workers who have attempted to report cases of this type that unless this is clarified in the legislation police are unlikely to shift their understanding or approach and cases of rape will continue to go unaddressed, including by serial offenders. Section 348(2)(e) ‘by false and fraudulent representations about the nature or purpose of the act;’ should be amended to include ‘or the withdrawal of payment or non-payment of a sex worker’.

¹⁷¹Elizabeth Byrne 6th February 2015 Man jailed for raping sex worker by pretending to pay with envelope stuffed with paper ABC News <https://www.abc.net.au/news/2015-02-06/man-jailed-for-rape-after-tricking-sex-worker/6075496>; Funnell, N. (2014). 25 November 2014 She agreed to have sex with him. But this man is guilty of rape. Mamamia <https://www.mamamia.com.au/sex-worker-rights/>

Stealthling

A number of organisations and individuals in Queensland including Respect Inc have raised the issue of non-consensual tampering with, or removal of, condoms during sex. When this occurs consent is negated, and sex without consent is sexual assault. As stealthling is not unique to sex work it should not be in the sex work legislation. Rather it requires an amendment to Chapter 32 of the Criminal Code (Qld) 1899 and should apply to any person.

In the QLRC *Consent and Excuse of Mistake of Fact Report* the Commission's view states:

6.142 The Commission acknowledges and shares the view expressed in the submissions that the sabotage or removal of a condom without the other party's consent is a concerning practice. It is aware of at least one instance where such an act has been prosecuted as rape in Queensland.

6.143 There may well be merit in considering whether this practice should be specifically dealt with as an offence in its own right. The Commission does not recommend an amendment to section 348(2) of the Criminal Code to include specific circumstances where the defendant sabotages or removes a condom without consent.¹⁷²

However, since that inquiry there are a number of changes that we believe justify a reconsideration of this decision.

In October 2021 the ACT Parliament changed the Crimes Act to include a provision under the consent definition¹⁷³: '67 (1) (j) participates in the act because of an intentional misrepresentation by another person about the use of a condom'.

In November 2021 the Victorian Law Reform Commission (VLRC) released its report *Improving the Response of the Justice System to Sexual Offences*, which recommends a change to Victoria's consent provisions to also make stealthling unlawful:

The VLRC has also recommend that section 36(2) of the Crimes Act be amended to include a new circumstance in which consent is not given by a person where, having consented to sexual activity with a device to prevent sexually transmitted infections or contraceptive device, the other person does not use, disrupts or removes the device without the person's consent. The effect of this amendment would be to make explicit that such action, colloquially known as "stealthling", is a crime.¹⁷⁴

Stealthling is the non-consensual removal or damage of a condom during sex, or failure to use a condom if it was agreed to. As with the rest of the decriminalisation framework stealthling should be addressed within legislation applying to all Queenslanders and would not require sex work-specific laws.

¹⁷² QLRC Review of consent laws and excuse of mistake of fact Report (2020)

https://www qlrc.qld.gov.au/_data/assets/pdf_file/0010/654958/qlrc-report-78-final-web.pdf

¹⁷³ Crimes Act (ACT) <https://www.legislation.act.gov.au/View/a/1900-40/current/html/1900-40.html>

¹⁷⁴<https://www.moores.com.au/news/government-affirms-proposed-consent-laws-what-this-means-for-your-school-or-organisation/>

Queensland's criminal laws are **not** adequate to deal with stealthing or circumstances where there is a fraudulent promise by a person to pay money to a sex worker in exchange for a sexual act.

Recommendation 55: Consent laws in the Criminal Code (Qld) 1899 Section 348(2)(e) 'by false and fraudulent representations about the nature or purpose of the act' should be amended to include 'or the withdrawal of payment or non-payment of a sex worker'.

Recommendation 56: Consent laws in the Criminal Code (Qld) 1899 Section 348(2) should be amended to include the provision 'by an intentional misrepresentation by another person about the use of a condom'.