

# A framework for a decriminalised sex work industry in Queensland

Consultation Paper WP 80

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# Fraudulent promise to pay a sex worker for a sexual act

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## Introduction

- 18.1 In recommending a framework for a decriminalised sex work industry, our terms of reference ask us to consider if any changes to the law are needed to deal with situations where a person has promised to pay money to a sex worker for a sexual act but the payment is not made.<sup>728</sup>
- 18.2 We take this to mean non-payment where a person fraudulently promises to pay a sex worker. This differs from non-payment that does not involve fraud (for example, where a client intends to pay but the payment is declined or reversed because of an administrative error).
- 18.3 We considered this issue in our June 2020 report on consent laws and the excuse of mistake of fact in the Criminal Code, but did not recommend changes to those laws to address this issue. The Commission decided that it raised broader policy issues about regulating and protecting sex workers and how sex workers are treated in the criminal justice system, which were outside the scope of the review.<sup>729</sup>
- 18.4 We are now looking at this issue in light of the change to a decriminalised sex work industry.

### Sex work is both a commercial exchange and an activity that requires consent

- 18.5 Sex work engages areas of civil law (like the law of contract) and criminal law (especially the law about consent to sexual activity).
- 18.6 Sex work is a commercial exchange between a sex worker and a client for sexual acts. Usually, the sexual acts are exchanged for payment of money (but payment in another form might be agreed, like goods or accommodation): see chapter 7. Sex work is negotiated and agreed between the parties.
- 18.7 In chapter 10, we consider the enforceability of sex work contracts and the sexual autonomy of sex workers. We ask if there should be a new law stating that a person may, at any time, refuse to perform or continue to perform sex work.
- 18.8 Sex work is different to other commercial exchanges because it concerns the sex worker's bodily integrity and issues of consent. Like any other person, sex workers have sexual autonomy. Entering a commercial arrangement for sex work does not itself constitute consent for this purpose: see chapter 10. Under the criminal law, each person participating in a sexual act must give consent to the act. Consent must be given 'freely and voluntarily'.
- 18.9 In this chapter, we ask if the criminal law should be changed to deal with fraudulent promises to pay a sex worker for a sexual act.
- 18.10 Some sex worker organisations report an increase in clients withdrawing or reversing their payments to sex workers.<sup>730</sup> Some say the criminal law does not deal effectively with situations where a client fails to pay or withdraws or reverses their payment. In Queensland, police sometimes prosecute non-payment as the offence of fraud, which may result in the offender being fined.<sup>731</sup> There is support in Queensland's sex worker community to change the criminal

<sup>728</sup> Terms of reference para 2.

<sup>729</sup> QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report No 78 (2020) 133–34.

<sup>730</sup> A Schultz, 'No payment, no consent: sex worker advocacy groups say fraud and rape is on the rise', *Crikey* (online, 5 August 2020) <<https://www.crikey.com.au/2020/08/05/sex-work-advocacy-fraud-rape/>>.

<sup>731</sup> M McGowan and C Knaus, "'It absolutely should be seen as rape': when sex workers are conned", *The Guardian* (online, 13 October 2018) <<https://www.theguardian.com/australia-news/2018/oct/13/it-absolutely-should-be-seen-as-when-sex-workers-are-conned>>.

law so that a fraudulent promise by a client to pay a sex worker for a sexual act is treated as a rape (or sexual assault).<sup>732</sup>

## Relevant criminal laws in Queensland

18.11 The Criminal Code includes several laws that might apply and are relevant:

- the crimes of rape and sexual assault, and the definition of consent that is relevant to those crimes;
- the crime of procuring a sexual act by false pretence; and
- the crime of fraud.

### Rape, consent and circumstances where consent is negated

18.12 Chapter 32 of the Criminal Code includes the crimes of ‘rape’ (section 349) and ‘sexual assault’ (section 352). The maximum penalty for rape is life imprisonment. For sexual assault, the maximum penalty is 10 years imprisonment, or higher in certain cases.

18.13 Consent is a key element of those crimes. To prove rape or sexual assault, it must be proved that the sexual activity took place without consent.<sup>733</sup>

18.14 ‘Consent’ is defined in section 348.<sup>734</sup> Section 348(1) says:

In this chapter, **consent** means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

18.15 Section 348(2) gives a list of circumstances in which a person’s consent is not freely and voluntarily given. These are sometimes called circumstances that ‘negate’ consent. This means that the person’s consent was not free and voluntary, and is prevented from being effective, because of the particular way in which it was obtained. Section 348(2) says that:

Without limiting subsection (1), a person’s consent to an act is not freely and voluntarily given if it is obtained—

- (a) by force; or
- (b) by threat or intimidation; or
- (c) by fear of bodily harm; or
- (d) by exercise of authority; or
- (e) by false and fraudulent representations about the nature or purpose of the act; or
- (f) by a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.

18.16 One of those circumstances, in section 348(2)(e), is where consent is obtained by false or fraudulent representations about the nature or purpose of the act. This is limited to false or

<sup>732</sup> See, eg, Respect Inc, Submission No 46 to Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020* (2021) 1. See also Evidence to Parliamentary Legal Affairs and Safety Committee, Parliament of Queensland, Brisbane, 21 January 2021, 24 (Dr E Jeffries, State Coordinator, Respect Inc); Respect Inc, Submission to Women’s Safety and Justice Taskforce, Queensland Parliament, *Discussion Paper Two: Women’s and Girls’ Experience of the Justice System* (2021) 15.

<sup>733</sup> Criminal Code (Qld) ss 245, 347, 349(2)(a), 352(1). See also QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report No 78 (2020) 13.

<sup>734</sup> See Criminal Code (Qld) s 347 (definitions of ‘assault’ and ‘consent’).

fraudulent representations ‘about the nature or purpose of the act’. It does not cover other types of fraud.

- 18.17 In the context of a commercial transaction between a sex worker and client for sex work, it might be said the ‘nature’ of the act is to engage in the particular sexual act (such as sexual intercourse, masturbation, or oral sex). The ‘purpose’ of the act would typically be the sexual gratification of the client. But this would depend on the facts of each case.
- 18.18 Case law on this is not settled. But it is unlikely that a client’s fraudulent promise to pay a sex worker for a sexual act would fall within section 348(2)(e).<sup>735</sup>
- 18.19 Importantly, however, the list of circumstances in section 348(2) does not limit the definition of consent in section 348(1). This means that other circumstances may ‘negate’ a person’s consent, even if they are not stated in section 348(2).<sup>736</sup>
- 18.20 It is a question for the jury to decide whether the person’s consent was given freely and voluntarily. Depending on the facts, a jury in a particular case might be satisfied that a fraudulent promise to pay the sex worker for the sexual act means the sex worker’s consent was not given freely and voluntarily. This possibility was raised in *R v Winchester*, in which it was said:<sup>737</sup>

[section 348](2), which expressly provides that it does not limit [section 348](1), does not purport to define exhaustively the circumstances in which a consent will be deemed not [to] be free and voluntary. ...

Whether the consent of a promisee entering into sexual relations after a promise or offer ... can be considered not to be ‘freely and voluntarily given’ will depend on whether, having regard to the circumstances in which the promise or offer is made and characteristics of the offeree ..., the offeree is to be regarded as not having exercised her free choice.

- 18.21 It will therefore depend on the particular facts of the case whether rape or sexual assault will be found.

### Procuring a sexual act by a false pretence

- 18.22 Chapter 22 of the Criminal Code deals with ‘offences against morality’ and includes the crimes of ‘procuring a sexual act by coercion etc’ (section 218).
- 18.23 Section 218(1) says:

A person who—

...

- (b) by a false pretence, procures a person to engage in a sexual act, either in Queensland or elsewhere; ...

commits a crime.

<sup>735</sup> See, eg, *R v Winchester* [2014]1 Qd R 44, 65 [75] (Muir JA). See also *Papadimitropoulos v The Queen* (1957) 98 CLR 249; *R v Pryor* (2001) 124 A Crim R 22; *R v BAS* [2005] QCA 97.

<sup>736</sup> See J Crowe, ‘Consent, power and mistake of fact in Queensland rape law’ (2011) 23(1) *Bond Law Review* 21, 22–4.

<sup>737</sup> *R v Winchester* [2014]1 Qd R 44, 65–8 [75]–[85] (Muir JA). That case was not about sex work. It included evidence alleging the defendant had offered the complainant child the gift of a racehorse, which he did not own, in exchange for sexual intercourse.



- 18.24 That section also makes it a crime for a person to use ‘threats or intimidation of any kind’ to procure another person to engage in a sexual act, or to drug another person to overpower them so that a sexual act can be engaged in with them.<sup>738</sup>
- 18.25 The maximum penalty is 14 years imprisonment.
- 18.26 For this offence:<sup>739</sup>
- A person engages in a sexual act if the person:
    - allows a sexual act to be done to the person’s body; or
    - does a sexual act to the person’s own body or the body of another person; or
    - otherwise engages in an act of an indecent nature with another person.
  - Engaging in a sexual act is not limited to sexual intercourse or acts involving physical contact.
  - ‘Procure’ means ‘knowingly entice or recruit for the purposes of sexual exploitation’.
- 18.27 Before changes were made in 1992, section 218 had said:<sup>740</sup>
- Any person who—
- ...
- (2) By any false pretence procures a woman or girl, who is not a common prostitute or of known immoral character, to have unlawful carnal connection with a man, either in Queensland or elsewhere; ...
- is guilty of a misdemeanour ...
- 18.28 The *Prostitution Laws Amendment Act 1992* (Qld) changed this to remove the words ‘who is not a common prostitute or of known immoral character’ and use more gender-neutral language.<sup>741</sup>
- 18.29 A client who fraudulently promises to pay a sex worker for a sexual act could be charged under this section.
- 18.30 Other jurisdictions have similar procurement offences, but they vary in scope and how they operate. Some writers describe procurement offences like the one in section 218 as ‘lesser offence[s] to punish fraudulent sex that does not fall within the limited categories of consent-vitiating fraud’. The Queensland offence is ‘notable for both its breadth (eg, all sexual acts, gender neutrality and no morality requirement) and severity (ie, 14 years imprisonment)’. In contrast, similar offences in other jurisdictions have a lower maximum penalty.<sup>742</sup>

<sup>738</sup> Criminal Code (Qld) s 218(1)(a), (c).

<sup>739</sup> Criminal Code (Qld) s 218(2)–(3), (4).

<sup>740</sup> RF Carter, *Criminal Law of Queensland* (Butterworths, 8th ed, 1992) 4118.

<sup>741</sup> See *Prostitution Laws Amendment Act 1992* (Qld) s 9; Explanatory Notes, *Prostitution Laws Amendment Bill 1992* (Qld) 2. See also *Criminal Law Amendment Act 1997* (Qld) s 29, increasing the penalty from 7 to 14 years and inserting the definition of ‘procure’.

<sup>742</sup> J Chen, ‘Fraudulent sex criminalisation in Australia: disparity, disarray and the underrated procurement offence’ (2020) 43(2) *UNSW Law Journal* 581, 583, 591.

## Fraud

- 18.31 A client who fraudulently or dishonestly promises to pay money to a sex worker in exchange for a sexual act and does not pay could also be charged with the crime of ‘fraud’ under section 408C of the Criminal Code.
- 18.32 This is contained in chapter 37 of the Criminal Code which deals with ‘offences analogous to stealing’.
- 18.33 Section 408C(1) says:  
A person who dishonestly—  
...  
(d) gains a benefit or advantage, pecuniary or otherwise, for any person; or  
...  
(g) induces any person to do any act which the person is lawfully entitled to abstain from doing; ...  
commits the crime of fraud.
- 18.34 The maximum penalty is five years imprisonment, or higher in some cases.

### How should a fraudulent promise by a client to pay a sex worker for a sexual act be dealt with under the criminal law?

- 18.35 A fraudulent promise by a client to pay money to a sex worker in exchange for a sexual act may fall within various criminal offences. This will depend on the particular circumstances of the case. It could be:
- fraud (under section 408C);
  - procurement by false pretence (under section 218); or
  - rape or sexual assault, if it is found that the fraudulent promise to pay negated the sex worker’s consent.
- 18.36 Decriminalising sex work might have practical effects on the setting in which these scenarios arise. Decriminalising sex work will remove barriers to sex workers’ reporting of crimes committed against them. It should also improve sex workers’ ability to screen and negotiate with clients, adopt safety strategies and transparent business practices, and access other protections. It might also lead to changes in individual, social and cultural attitudes about sex work and sex workers with positive effects on sex workers’ rights and safety.
- 18.37 Sex workers negotiate with their clients about the sexual services that will, and will not, be provided. Like any other person, a sex worker has sexual autonomy. Under the criminal law, each adult who participates in the sexual act must give free and voluntary consent to the act.
- 18.38 On one view, a sex worker’s consent to the sexual act is secured on the basis of payment. They may not have given consent to the sexual act had they known they would not be paid for their sexual services. On this view, sexual activity where there was a fraudulent promise to pay the sex worker might be seen as violating the sex worker’s sexual autonomy and bodily integrity.

18.39 Respect Inc argues that:<sup>743</sup>

In sex work, a key aspect of consent for sexual services is payment for the services negotiated. If payment is not made or withdrawn, whether or not the sex worker is yet aware, consent is also withdrawn. When the payment and therefore consent is breached access to a person's body and sexual labour is sexual violence ...

18.40 Respect Inc says that section 348(2) of the Criminal Code should be amended so that 'consent is not freely and voluntarily given by a sex worker when payment for sexual services is withdrawn or not given'. They say this is 'essential to provide clear direction to police and the justice system'.<sup>744</sup>

18.41 In the Commission's review of consent laws and mistake of fact, it asked if section 348(2) of the Criminal Code should be changed to list a new circumstance 'to address the situation where the complainant consents to a sexual act under a mistaken belief induced by the defendant that there will be a monetary exchange in relation to the sexual act'.<sup>745</sup>

18.42 Several submissions to that review supported such a change. Some of the reasons given in support of this were:<sup>746</sup>

- to 'communicate the standards of respect we expect people to show each other';
- 'that there is a lack of clarity as to whether non-payment of sex workers amounts to rape under the current law and that this affects the attitudes of police officers and their approaches to survivors'; and
- that sex workers can experience barriers to reporting acts of sexual violence and the addition of such a circumstance would give 'in principle support to sex workers having the same right to free and voluntary sexual consent as all other Queenslanders'. (notes omitted)

18.43 Other submissions to that review did not support any change to the circumstances in section 348(2) of the Criminal Code.

18.44 One legal stakeholder said:<sup>747</sup>

The offence of rape carrying a maximum penalty of life imprisonment should not be aligned with circumstances relating to the recovery of money. This is fraud, not rape. Including this type of circumstance into the non-exhaustive list under section 348(2) could have the impact of creating separate categories of rape. Work needs to be done regarding education in relation to the circumstances already covered but misunderstood, rather than introducing new categories that traditionally would not be understood by most members of the community as rape. A better way to protect sex workers would be to reform the law of that industry, particularly where at present a sex worker who has someone assisting with protection and recovery of money is breaking the law.

<sup>743</sup> Respect Inc, Submission No 46 to Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (2021)* 1.

<sup>744</sup> Ibid.

<sup>745</sup> See QLRC, *Review of Consent Laws and the Excuse of Mistake of Fact*, Report No 78 (2020) 131.

<sup>746</sup> Ibid 132.

<sup>747</sup> Ibid 133.

18.45 Another legal stakeholder stated that ‘a distinct offence is not necessary as such conduct is already captured by the broad definition of fraud in section 408C of the Criminal Code’.<sup>748</sup>

### Approaches in some other jurisdictions

18.46 Criminal laws in Australia have developed and operate differently. There are significant differences in the way criminal responsibility for serious offences is structured, and in the scope and operation of offences and defences (including for rape and sexual assault). We need to be careful when comparing laws. But we can look to other jurisdictions for possible options.

18.47 A fraudulent promise to pay a sex worker for a sexual act is addressed in criminal laws in other jurisdictions in various ways. As a general summary, this includes:<sup>749</sup>

- rape, where consent is negated if it is obtained by fraud or false representation (as in the Australian Capital Territory, Tasmania and Western Australia);<sup>750</sup>
  - in some other jurisdictions, the list of circumstances in which consent is negated includes false or fraudulent representation about the nature or purpose of the act (like Queensland and the Northern Territory), but the list is not exhaustive;<sup>751</sup>
- procuring a sexual act by fraud (such as in Victoria);<sup>752</sup> and
- fraud or criminal deception (such as in the Northern Territory).<sup>753</sup>

### The Australian Capital Territory

18.48 The Australian Capital Territory amended its definition of ‘consent’ in 1985 to effectively provide that any type of fraud may negate consent.<sup>754</sup>

18.49 Section 67(1)(g) of the *Crimes Act 1900* (ACT) provides that:

#### **67 Consent**

(1) For sections 54, 55(3)(b), 60 and 61 (3)(b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused—

...

(g) by a **fraudulent misrepresentation of any fact** made by the other person, or by a third person to the knowledge of the other person; ... (emphasis added)

18.50 In *R v Livas*, the offender pretended to pay a sex worker \$850, with what turned out to be an envelope containing folded up paper. The sex worker discovered this only after having sexual intercourse. The offender ‘pleaded guilty to one offence of sexual intercourse without consent,

748

Ibid.

749

See generally Chen, above n 742, 597.

750

See *Crimes Act 1900* (ACT) s 67(1)(g); Criminal Code (Tas) s 2A(2)(f); Criminal Code (WA) s 319(2)(a).

751

See Criminal Code (NT) s 192(2)(g).

752

See *Crimes Act 1958* (Vic) s 45.

753

See Criminal Code (NT) s 227.

754

*Crimes (Amendment) Act (No 5) 1985* (ACT) s 4 (as passed).

the apparent consent of the complainant, having been obtained by fraud'. He was sentenced to a period of imprisonment for 25 months, with a total of eight months to be served.<sup>755</sup>

18.51 In her victim impact statement, the complainant described the impact of the offending:<sup>756</sup>

My retrospective regret focused mainly upon my naivety. In my work, I do not simply allow clients access to my body. For a short time I give them the opportunity to feel loved. In a world that values romantic fantasy, I offer a commercialised version. The care and attention that I showed Mr Livas during what I thought to be an honest service was completely devalued when I realised that I had been deceived. The tenderness of the act of lovemaking was shared by the man who called himself 'Peter', and was incongruent with the violation that was really happening. My desire to give clients a service that I think they deserve was used to goad me into not checking the payment. Nevertheless, I made several attempts to check the payment, but was physically blocked by Mr Livas as he used his body to herd me into the shower and onto the bed. He was not aggressive per se in these manoeuvres, but I did have a sense of powerlessness after being thwarted in my attempts. In the days following the incident, I was unable to think clearly, eat or sleep properly and I felt continuously tired. I was confused and hurt in a deeply emotional way, feeling shame about my gullibility.

18.52 The judge said of the offending:<sup>757</sup>

it must be clearly understood that something that looks like a consent to sexual intercourse, if obtained by fraudulent activity as this one clearly was, is not a consent. The offence of having sexual intercourse with a person, without her consent, is clearly made out ...

The offence was clearly premeditated and the statement of facts makes it clear that Mr Livas abused the trust that the complainant had placed in him. On the other hand, I accept, as was indeed noted by the complainant in her Victim Impact Statement, that there was no force or violence used to achieve sexual intercourse ...

It seems that Mr Livas is still focused on the event as a commercial transaction that he says he always intended to make good. While he may be genuinely regretful that he was not able to pay the money, it is hard to see this as remorse for the deliberate deception, and the violation of the complainant's personal integrity that he achieved by it ...

Sex workers clearly fall into the category of vulnerable workers in general and may be particularly vulnerable to abuse of this kind. Certainly, no one should doubt that fraudulently achieving sexual intercourse by this kind of activity constitutes rape, rather than a dishonesty offence, although of course dishonesty is a major element of this fact situation.

18.53 The offender appealed his sentence on a number of grounds, including that the fraudulent obtaining of consent reduced 'the objective seriousness of the offence'.<sup>758</sup> The appeal was dismissed. The appeal court quoted paragraph [36] from the judge's reasons in the case:<sup>759</sup>

<sup>755</sup> *R v Livas* [2015] ACTSC 50, [1], [39], [41].

<sup>756</sup> *Ibid* [22].

<sup>757</sup> *Ibid* [21], [23], [25], [34].

<sup>758</sup> *Livas v The Queen* [2015] ACTCA 54, [5].

<sup>759</sup> *Ibid* [21].

I note Mr Livas's lack of offending in the last four years and his employment and other positive factors in his life. It is unfortunate to have to sentence a person in those circumstances to imprisonment, but rape is a serious offence and this rape, although not the worst kind of rape, must be taken seriously.

18.54 The appeal court went on to say that:<sup>760</sup>

Her Honour was correct to describe the offence as a serious one. In our view, a period of full-time custody was inevitable and the period he was ordered to serve was modest. In this regard we read her Honour's remarks at paragraph [36] as saying merely that despite the appellant's favourable subjective circumstances, the objective circumstances required the imposition of full-time custody.

18.55 In the later case of *R v Mynott (No 2)*, the defendant pleaded guilty to two counts of engaging in sexual intercourse without consent with two sex workers he had agreed to pay for sexual services but did not pay after having received those services. In each case, the complainants had consented to sexual intercourse, but that consent was negated because it had been obtained by a fraudulent misrepresentation by the offender.<sup>761</sup>

18.56 In the first instance, NI had agreed to travel to Canberra from Sydney to provide sexual services on the basis of an offer made by the offender that his return flights would be paid for and he would be paid \$1500. NI arrived in Canberra and on asking about payment was told by the offender that he would go to an ATM later to withdraw the money, which the sex worker agreed to. NI and the offender engaged in sexual activity without payment having been made. NI again asked about payment and was told 'that they would stop at an ATM on the way to the airport'.<sup>762</sup> They took a taxi to the airport and on the way the offender left the taxi, ostensibly to get money from an ATM to pay NI, but the offender did not return to the taxi. The sex worker made subsequent unsuccessful attempts to be paid and eventually caught a bus back to Sydney empty handed.

18.57 In the second instance, KS agreed to an offer by the offender to come from Victoria to Canberra to provide sexual intercourse in exchange for return flights and payment of \$2000. KS ended up paying for his own flight, on the basis he would be reimbursed by the offender. KS was not collected at the airport by the offender as agreed but was told by the offender to use an Uber. Subsequently, KS agreed to an offer by the offender for an extra payment of \$500 for a third person to join them. 'KS repeatedly emphasised the importance of payment' and told the offender he needed part payment before any sexual activity.<sup>763</sup> They ended up having sex without any payment being made. Afterward, the offender left, saying that he would be back in 10 minutes, but he never returned.

18.58 In his victim impact statement, NI said he had felt 'very upset, betrayed and sad'.<sup>764</sup> The court said:<sup>765</sup>

The loss of trust associated with the incident affected NI's ability to engage in escort work and he had to change his line of work.

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760 Ibid [25].

761 *R v Mynott (No 2)* [2020] ACTSC 232.

762 Ibid [13].

763 Ibid [24].

764 Ibid [32].

765 Ibid [33]–[34].

KS did not provide a victim impact statement, but it is clear from the agreed statement of facts that he was shocked and upset by the offence.

18.59 The court found that:<sup>766</sup>

Each offence was of significant objective seriousness. Each was associated with significant planning. The offender did not reveal his real name to the complainants, and he financed or attempted to finance their expenses using the credit card details of a third party. Each offence encompassed several episodes of sexual activity. Because of the nature of sex work, sex workers are vulnerable to sexual offences of this kind.

18.60 On both counts, the offender was given a total sentence of three years and four months' imprisonment, with a non-parole period of 16 months.<sup>767</sup>

## Western Australia

18.61 Western Australia defines the types of factors that will negate consent to sexual activity at a much more general level. Any kind of material fraudulent misrepresentation has the potential to negate consent to sexual intercourse.

18.62 For this purpose, section 319(2)(a) of the Criminal Code (WA) says:<sup>768</sup>

**consent** means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, **deceit, or any fraudulent means**; ... (emphasis added)

18.63 Whether this encompasses a situation in which a person has fraudulently promised to pay a sex worker for a sexual act will depend if it is interpreted broadly to include any fraud or more narrowly to limit it to fraud about the nature or purpose of the act.<sup>769</sup>

18.64 In Western Australia, (in circumstances where the fraudulent conduct of the client does not fall within consent-vitiated fraud) the 'lesser' procurement offence does not apply to sex workers. Unlike Queensland, Western Australia has not abolished the morality requirement in its procurement offence, which excludes a person who is 'a common prostitute or of known immoral character'.<sup>770</sup>

<sup>766</sup> Ibid [35].

<sup>767</sup> Ibid [75], [77].

<sup>768</sup> Western Australia amended its definition of 'consent' in 1985: *Acts Amendment (Sexual Assaults) Act 1985* (WA) s 8. The definition previously said 'a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deception or fraudulent means'.

<sup>769</sup> See *Michael v Western Australia* (2008) 183 A Crim R 348.

<sup>770</sup> Criminal Code (WA) s 192(1)(b). See [18.27]–[18.28] above.

## CONSULTATION QUESTIONS

- 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?





