

**CRIMINAL LAW (COERCIVE CONTROL AND AFFIRMATIVE CONSENT) AND OTHER LEGISLATION  
AMENDMENT BILL 2023**

**Submission No:** 26  
**Submitted by:** Respect Inc, Scarlet Alliance, Australian Sex Workers Association & DecrimQLD  
**Publication:** Making the submission and your name public  
**Attachments:** See attachment  
**Submitter Comments:**



27 October 2023

Committee Secretary  
Legal Affairs and Safety Committee  
Parliament House  
Brisbane Qld 4000  
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**RE: Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023**

Thank you for the opportunity to submit on the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023. We note that this Bill implements legislative changes recommended by the Women's Safety and Justice Taskforce, Hear Her Voice – Report One – Addressing coercive control and domestic and family violence in Queensland, and Report Two – Women and girls' experiences across the criminal justice system.

Respect Inc is the state-wide sex worker organisation in Queensland, run by and for sex workers. Our organisation provides a comprehensive health promotion, peer education and community engagement program with offices and sex worker drop-in spaces at the Gold Coast, in Brisbane and Cairns, as well as regional outreach to other locations.

#DecrimQLD is a committee of sex workers who have joined with Respect Inc to progress the removal of harmful and discriminatory sex work laws and achieve decriminalisation in Queensland.

Scarlet Alliance, Australian Sex Workers Association is the national peak body for sex workers and sex worker organisations in Australia. Through our objectives, policies and programs, we aim to achieve equality, social, legal, political, cultural and economic justice for past and present workers in the sex industry. Our membership includes state and territory-based and national sex worker organisations and individual sex workers across unceded Australia. Through our work and that of our member organisations and projects, we have the highest level of contact with sex workers and access to sex industry workplaces throughout Australia of any agency. Scarlet Alliance represents sex workers on a number of government and non-government committees and advisory mechanisms.

Our organisations welcome the coercive control legislation and strengthening of consent laws in Queensland. Many of the issues covered in this Bill have a direct impact on sex workers in Queensland. As a result, our organisation's contributed directly to the Women's Safety and Justice

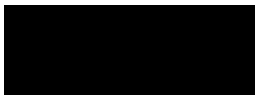
Taskforce process and supported sex workers to contribute. The current laws and policing approaches in Queensland significantly impact on sex workers' safety, the ability of sex workers to report sexual, domestic, family and other forms of violence and increase the likelihood that sex workers will be accused persons and have experiences with watchhouses, on remand and sentencing.

Respect Inc, Scarlet Alliance and DecrimQLD support the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 including the sex work related provisions **348AA(1)(l)** related to fraudulent misrepresentation that a sex worker would be paid, **348AA(1)(n)** the stealthing provision, **103ZW(e)** the jury direction in relation to sex workers and **103ZG** that prohibits questions and evidence concerning sexual reputation of complainant that we take to include sex work experience. However, we strongly recommend the rewording or removal of **348AA(1)(k)(i)** relating to the 'identity of a person' and we join many other organisations to recommend the removal of **348AA(1)(m)** related to 'serious disease' and endorse the submission by Queensland Positive People and National Association of People with HIV Australia (NAPWHA) on this provision.

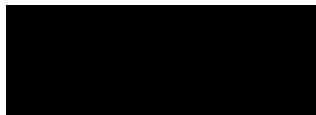
Respect Inc, Scarlet Alliance and DecrimQLD give permission for this submission to be published on the Committee website.

Should you require further information on these matters we would be pleased to respond to questions or appear at the hearing. Please contact Janelle Fawkes to organise further information.

Yours sincerely,



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## **Comments on 348AA Circumstances in which there is no consent**

Respect Inc, Scarlet Alliance and DecrimQLD recommend the rewording or removal of 348AA(1)(k)(i) when a person is mistaken *'about the identity of the other person'*.

**348AA(1)(k) the person participates in the act with another person because the person is mistaken—**

**(i) about the identity of the other person; or**

**(ii) that the person is married to the other person;**

It is common practice for a sex worker to conceal their legal identity from clients. Sex workers are often known only by a pseudonym or work name for privacy and safety reasons.

The intent described in the explanatory notes is for this provision to address a person who poses as another person's **spouse**. For this purpose 'identity' is too broad a term.

Without rewording, so that the specific intent is clear, or removal of the provision, we feel strongly that this will have unintended consequences for sex workers.

We also note it 'is not intended that this provision would criminalise conduct based on a person's representations about their gender or sexual characteristics' however remain concerned this could potentially impact trans and gender diverse community members.

**Respect Inc, Scarlet Alliance and DecrimQLD support 348AA(1)(l) as an essential circumstance in which there is no consent for sex workers.**

**348AA(1)(l) the person is a sex worker and participates in the act because of a false or fraudulent representation that the person will be paid or receive some reward for the act**

Our organisations support this provision in this current form as it will ensure that in Queensland it is recognised that there is no consent when payment or reward to a sex worker for sexual services is withdrawn or not made. This clarification is essential for sex workers but also for police and the DPP who, up to this point, have previously only prosecuted this offence as fraud. It will provide sex workers in Queensland a recourse to justice in line with other jurisdictions.

In sex work, a key aspect of consent is payment or reward for the services negotiated. If the payment or reward is not made or is withdrawn, consent is also withdrawn. When the payment or reward, and therefore consent, is not made or withdrawn, sex with a sex worker becomes rape.

Fraudulent misrepresentation that a sex worker will or has been paid continues to be a major issue raised by sex workers in Queensland with Respect Inc, indicating that it continues to be a relatively widespread concern.

In previous submissions Scarlet Alliance, Respect Inc and DecrimQLD made clear that any provision in sexual consent laws must expressly state that non-payment of a sex worker is a circumstance where

there is no consent, in order to ensure that sex workers can access the criminal justice system in these scenarios.

The Women's Safety and Justice Taskforce (WSJ Team, the Taskforce) clearly heard the barriers faced by sex workers when reporting sexual violence and other crimes against them. The Taskforce also noted that '[t]he majority of sex workers and advocates consulted by the Taskforce were firmly of the view that non-payment constitutes rape or sexual assault.'<sup>1</sup>

Our organisations echo the words of the Honourable Justice Hilary Penfold PSM QC in the Supreme Court of the Australian Capital Territory where similar legislation has enabled several successful cases by sex workers:<sup>2</sup>

*Certainly, no one should doubt that fraudulently achieving sexual intercourse by [non payment of a sex worker] constitutes rape, rather than a dishonesty offence, although of course dishonesty is a major element of this fact situation.*

**Respect Inc, Scarlet Alliance and DecrimQLD recommend the removal of 348AA(1)(m)**

**348AA(1)(m) both of the following apply—**

- (i) the person participates in the act with another person because of a false or fraudulent representation by the other person about whether the other person has a serious disease;**
- (ii) the other person transmits the serious disease to the person;**

Our organisations, along with others in the public health and HIV/STI sectors, strongly disagree with the explanatory notes premise that criminal law is the appropriate mechanism to promote honest dialogue, that the approach strikes an appropriate balance with the right to privacy, and that the provision does not mandate disclosure. However, above all other concerns we fail to see the evidence from the Women's Safety and Justice Taskforce process that this is a necessary provision.

This approach is similar to laws in Canada which are now widely recognised as having a detrimental impact. This led to Canada's Attorney General to issue a directive on HIV transmission to the Director of Public Prosecutions in 2018.<sup>3</sup> Obviously, it is not in Queensland's interest to adopt controversial, failed policy from other countries, particularly when Australia has taken such an effective leadership role in its response to HIV.

As noted, HIV and STI transmission are primarily a public health issue. Scientific advances in treatment and prevention have significantly reduced the likelihood of transmission. Australia's effective response to HIV recognises that it is education and not criminal offences that are the appropriate mechanism through which to reduce HIV transmission.

We support the comments by Queensland Positive People (QPP) and National Association of People with HIV Australia (NAPWHA) on these matters:

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<sup>1</sup> Women's Safety and Justice Taskforce, *Hear Her Voice* (Report No 2, July 2022) vol 1, 72, 95 and 153.

<sup>2</sup> *R v Livas* [2015] ACTSC 50, [34].

<sup>3</sup> <https://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html#nl4>

“QPP and NAPWHA support for the underpinning of sexual assault laws by consent as a voluntary agreement made by people with the freedom and capacity to make that decision. We also support the fundamental right of privacy for people with HIV and that they should not be placed in positions where they are obliged or compelled to disclose their status, especially when they are taking appropriate precautions to prevent transmission. We note that the Public Health Act 2005 (QLD) articulates this right to privacy<sup>4</sup> and, in our opinion, strikes an appropriate balance. We are concerned that any changes to consent as it relates to sexual offences in Queensland, which unnecessarily draws HIV within their scope, will undermine the delicate balance struck by the Queensland Public Health Act.”

The Public Health Act 2005 allows for the management of HIV-related risks including any situation where a person places another person at risk of HIV. The process outlines a comprehensive staged approach for the management and supervision of counselling, education and support for those persons living with HIV who place others at risk and have not responded to initial interventions at the local level, or who are unwilling or unable to change their risk behaviours.

We support QPP and NAPWHA’s comments to this regard:

“Each Australian state and territory has implemented management processes that align with the National Guidelines for the Management of People with HIV Who Place Others at Risk. The policy developed to manage this situation in Queensland recognises the public health value of a staged approach that begins with behaviour change, education and counselling and can progress to detainment under a public health order or a criminal charge if the actions do not cease. This approach has worked effectively.

“For this reason, over the past 40 years, HIV-specific criminal laws have been removed from every Australian jurisdiction. NAPWHA and QPP note with great concern that any attempt to undo this work, to recriminalise misrepresentation of HIV status in Queensland, will undermine the public health response and make HIV transmission more likely, not less.

“Both the National and Queensland-specific HIV strategies are based on the principle that both HIV-positive and HIV-negative people share the responsibility for preventing HIV transmission, and each party is responsible for maintaining their sexual health without assuming or relying on representations made by other parties on the risk of HIV transmission.

Queensland should be commended for entrenching this shared responsibility principle from the strategies into law through the Public Health Act 2005 (QLD). This Act (the Health Act) doesn’t require disclosure of HIV status but instead places a general duty on all people to take reasonable precautions to avoid HIV transmission.”

While the explanatory notes indicate this offence is not intended to ‘mandate disclosure’, in practice we strongly believe it will have that exact effect and the negative consequences.

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<sup>4</sup> Public Health Act (Qld) CHPT 3, SECT 66(2)

It also seems unnecessary to criminalise non-disclosure that leads to transmission at a time when the risk of transmission of HIV, when the person living with HIV is on treatment, has been found to be almost zero<sup>5</sup> as recognised in the 2023 WHO guidance.<sup>6</sup>

**Respect Inc, Scarlet Alliance and DecrimQLD support 348AA(1)(n) as an essential circumstance in which there is no consent**

**(n) the person participates in the act with another person on the basis that a condom is used for the act and the other person does any of the following things before or during the act—  
(i) does not use a condom; (ii) tampers with the condom; (iii) removes the condom; (iv) becomes aware that the condom is no longer effective but continues with the act.**

Respect Inc, Scarlet Alliance and DecrimQLD support the inclusion of this stealthing provision in the Bill and particularly the inclusion of situations where a condom is not used, is tampered with or is removed. Stealthing impacts a large number of people, including sex workers, and is an important addition to Queensland's consent laws.

In previous submissions on this matter 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. In our submission to the QLRC review of sex work decriminalisation we noted that stealthing is not unique to sex work it should not be in the sex work legislation. Rather it requires an amendment to the Criminal Code (Qld) 1899 and should apply to any person.

#### **Comments on Amendment of Evidence Act 1977**

**Respect Inc, Scarlet Alliance and DecrimQLD support 103ZG that prohibits questions and evidence concerning sexual reputation of complainant**

**103ZG Prohibition on questions and evidence concerning sexual reputation of complainant  
The court must not allow any questions as to, or admit any evidence of, the sexual reputation of the complainant.**

Sex workers have had evidence of current or former sex work experience used in court cases to undermine their experiences of sexual assault and rape. This is an important addition to ensure that a person's sexual reputation, which we take to include sex work experience, is not used as evidence.

**Respect Inc, Scarlet Alliance and DecrimQLD support 103ZW(e) that a judge may provide direction to the jury that it should not be assumed that the person consented to a sexual activity because the person worked as a sex worker.**

**103ZW Direction on behaviour and appearance of complainant**

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<sup>5</sup><http://www.thelancet-press.com/embargo/HIVtransmission.pdf>

<sup>6</sup><https://www.who.int/news/item/23-07-2023-new-who-guidance-on-hiv-viral-suppression-and-scientific-updates-released-at-ias-2023>

**The judge may direct the jury that it should not be assumed that a person consented to a sexual activity because the person—  
(e) worked as a sex worker.**

This addition is essential as it addresses an area of misconception in the community generally and it is an important direction to support cases including a sex worker being considered fairly with as little as possible impact of the misconceptions and high level of stigma and discrimination sex workers currently experience.