



Position Paper

**Obtaining Sex Under a False Pretence
for the Purpose of Investigation or Obtaining Information
is Rape.**

26 February 2019

POSITION PAPER

Obtaining Sex Under a False Pretence for the Purpose of Investigation or Obtaining Information is Rape.

It is SWOP's view that consent is negated when private investigators, police, prison officers, and immigration and border control officers, initiate sexual contact under the false pretence that said sexual contact is not undertaken on the course of their employment or engage in sexual intercourse with people, either in the process of investigating them, investigating their employer, arresting or detaining them, or while they are in custody or detention.

It is SWOP's view that the use of both fraud and deception to obtain sexual intercourse constitute sexual offences; and as such they should both be explicitly prohibited in s61HA of the *NSW Crimes Act 1900 No 40*. We will continue to advocate for their clear inclusion to end the practice of obtaining sex fraudulently.

Background

Sexual contact between law enforcement officers and suspects creates a serious potential for abuse with very little crime prevention upside. As Katharine Bodde and Erika Lorshbough from the New York Civil Liberties Union explain, the "power dynamic makes consent impossible in this circumstance. Anyone in police custody implicitly understands this and knows that not going along with a police officer's wishes could have serious adverse consequences."ⁱ

SWOP's direct experience working with NSW sex workers who have been tricked into sex with police and private investigators, is that they experience the sexual intercourse as sexual assault when the perpetrator's true identity and purpose are revealed. When a person is defrauded or deceived into sexual intercourse, it has a very similar impact to other forms of sexual assault. At SWOP we have anecdotal evidence of this from sex workers who report being tricked into providing sexual services by clients who they later find out have defrauded them. As sex workers, it is clear that their consent to sexual intercourse was conditional upon them receiving payment.

Sex workers have also anecdotally reported to SWOP that private investigators have been utilised in family court matters, where an ex-partner may be seeking to prove the worker was a danger to their child because of their choice of employment. Earlier this year we made a submission to the Review of the Family Law System IP48ii to attempt to address this parallel practice.

In all of these examples, sex workers report experiencing distress akin to the distress they might feel when faced with other forms of sexual assault. It diminishes the seriousness of sexual assault for non-consensual sexual intercourse to be wielded as a reasonable tool for investigating crime, custody issues or development approval. We are not the only jurisdiction to think so. In Alaska, House Bill 112iii was introduced to close the loophole allowing law enforcement to engage in sexual contact with victims, witnesses or perpetrators of crimes who are under police investigation. Currently in Alaska, it is only illegal for a peace officer to have sexual contact with persons after they have been arrested.

Background (cont.)

The Tasmanian provisions about consent found in section 2A of the Criminal Code Act (1924)iv, state that a person does not freely agree to an act if the person:

- (f) agrees or submits because of the fraud of the accused; or*
- (g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused;*

SWOP believes the *NSW Crimes Act 1900 No 40 s61HA* would benefit from being updated to reflect these provisions, and have made submissions to this effect.

NSW law, as it stands, makes justice for sex workers who have experienced consent negated by fraud unlikely; however in the ACT, this constitutes an offence. The ACT Supreme Court upheld a conviction in *R v Livas* negating consent obtained by fraud when *Livas* did not pay for the sexual services he obtained.^v While s61HA of the *NSW Crimes Act 1900 No 40* does mention the negation of consent “under a mistaken belief as to the identity of the other person” in 5(a) and “under any other mistaken belief about the nature of the act induced by fraudulent means” in 5(c) it is our belief that consent negated by fraud and significant deception need to be further clarified to prevent the practice.

Historical Context

In NSW many sex workers still bear the scars of police brutality stemming from performing sex work prior to the Royal Commission into the New South Wales Police Service. Known as Wood Royal Commission, this investigation ran from 1995-1997 and eventually led to the decriminalisation of sex work as a means to end widespread police corruption that was affecting our industry.

Prior to decriminalisation, law enforcement officers were able to regularly demand sex workers give over both money and acts of non-consensual sexual intercourse in order to avoid arrest. Decriminalising sex work in NSW took away this incentive, so we are disappointed to see sexual entrapment of sex workers by some NSW Local Government Areas and their agents creeping back in.

NSW Local Government Areas

Many sex workers have contacted SWOP about the practice of some NSW Local Government Areas to use private investigators to obtain sexual intercourse from sex workers for evidence against businesses operating without correct development consent.

We consider these duplicitous practices by investigators as analogous to sex obtained fraudulently. This issue has had repeated media attention, usually focusing upon the titillating angle of a man (usually middle-aged, Caucasian) being paid by the taxpayer via Local Government Areas hiring private investigator firms, to have sex with female sex workers who often do not have English as a first language. Here are just a taste of the tabloid media articles covering this practice:

NSW Local Government Areas (cont)

- 2013:** “On Thursday, North Sydney Council confirmed that its compliance team was launching legal action against seven premises, previously identified by Brothel Busters, found to offering illegal services.”^{vi}
- 2014:** “*The Sun-Herald* can reveal that in the past three years, 10 Sydney councils hired the same 60-year-old man to sleep with sex workers and help strengthen their legal standing against rogue brothel barons.”^{vii}
- 2015:** “For almost 10 years, Brothel Busters conducted surveillance on behalf of councils and the legal brothel industry. Its work saw more than 60 brothel closure orders issued across 16 council areas.”^{viii}
- 2015:** “Hornsby Council paid a private investigator to go undercover inside the parlour and have sex with a prostitute as part of a bitter, year-long legal battle to have the operation closed.”^{ix}
- 2015:** “A fair, clear and amenity-based decision making process that allows the appropriate number of brothels required to service the needs of that local council area to operate within the law, would be a better solution than increasingly bizarre methods we’ve seen reported in the media, including councils employing private investigators to have undercover sex on the public purse.”^x
- 2015: “John is one of a small group of licensed private investigators who are called upon by councils all over the state to root out evidence of illegal sex work by posing as regular customers.”^{xi}
- 2019: “And it's not enough for the sleuth to know that sexual services are being offered to customers — they actually have to go through with the act themselves.”^{xii}

Sex Worker Responses

These pieces upset NSW sex workers whenever they appear in the media because they normalise sexual assault.

The Chief Executive Officer, Cameron Cox, explains this in one article:

I have sex on an understanding that I’m sleeping with a client, with someone who wants to have sex. If I knew they were a council worker or a PI, I wouldn’t have given my consent meaning they’ve had sex with me by fraud. In the ACT, they’d go to jail for rape if they did that. We see it as rape and I’ve had a number of very distressed sex workers call me and wonder if they’ve been a victim of it.^{xiii}

Sex Worker Responses (cont.)

Here are some online responses to the most recent article:

“This man is using deception to obtain sexual services. There is no proper consent. Therefore it is rape. Shocking.”^{xiv}

“Government/council funded rape”^{xv}

“So he gets paid to have sex and is congratulated but we get paid to have sex and we get arrested or murdered? Seems legit”^{xvi}

“...how can there be consent in a case like this?”^{xvii}

“That's appalling. He should be deeply ashamed. And in jail.”^{xviii}

“Sydney council, are you for real!?”^{xix}

Yours sincerely,

Cameron Cox; CEO Sex Workers Outreach Project Inc.

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SWOP acknowledges and pays respect to the traditional owners of all the lands on which we work. Aboriginal land, always was, always will be.



ⁱ American Civil Liberties Union, *There's No Such Thing as 'Consensual Sex' When a Person Is in Police Custody*, accessed 30 January, 2018 at <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/theres-no-such-thing-consensual-sex-when-person>

ⁱⁱ Australian Government, *Review of the Family Law System—Issues Paper (IP 48)*, 14 March, 2018 accessed online 23 July, 2019 at <https://www.alrc.gov.au/publications/family-law-system-ip>

ⁱⁱⁱ Alaskan State Legislature, HB 112: “An Act relating to sexual assault by a peace officer against a person who is a victim, witness, or perpetrator of a crime”, accessed online 10 July, 2018 at <http://www.akleg.gov/basis/Bill/Text/30?Hsid=HB0112A>

^{iv} Criminal Code Act 1924 [TAS], Section 2A, accessed online 10 July, 2018 at <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1924-069>

^v *R v Livas* [2015] ACTSC 50 accessed 10 July, 2018 at <http://courts.act.gov.au/supreme/judgments/r-v-livas>

^{vi} Sydney Morning Herald, *New red-light zone as illegal sex trade expands north*, 17 November, 2013 accessed online 23 July 2019 at <https://www.smh.com.au/national/nsw/new-red-light-zone-as-illegal-sex-trade-expands-north-20131116-2xnlb.html>

^{vii} Sun Herald, *Councils hire sex spies to catch parlours in the act*, 21 September, 2014 accessed online 23 July 2019 at <https://www.smh.com.au/national/nsw/councils-hire-sex-spies-to-catch-parlours-in-the-act-20140920-10jigg.html>

^{viii} Sydney Morning Herald, *I give up: Lawless sex industry prompts brothel buster to call it quits*, 4 April, 2015 accessed online 23 July 2019 at <https://www.smh.com.au/national/nsw/i-give-up-lawless-sex-industry-prompts-brothel-buster-to-call-it-quits-20150401-1mcswx.html>

^{ix} Sydney Morning Herald, *Show me more sex, judge tells council in landmark legal case*, 9 March, 2015 accessed online 23 July 2019 at <https://www.smh.com.au/national/nsw/show-me-more-sex-judge-tells-council-in-landmark-legal-case-20150305-13vx7g.html>

^x Daily Telegraph, *Brothels cost north shore council over \$100,000 in a year to regulate an “underbelly of shady operators”*, 4 June, 2015 accessed online 23 July 2019 at <https://www.dailytelegraph.com.au/newslocal/north-shore/brothels-cost-north-shore-council-over-100000-in-a-year-to-regulate-an-underbelly-of-shady-operators/news-story/1905ce64a1c555084b0a663499c53364>

^{xi} News.com.au, *'If you looked hard enough, you might find a massage parlour that doesn't offer sex'*, 12 March, 2015 accessed online 23 July 2019 at <https://www.news.com.au/news/if-you-looked-hard-enough-you-might-find-a-massage-parlour-that-doesnt-offer-sex/news-story/122726022171>

^{xii} The Sun, *THE BROTHEL BUSTER Meet the undercover brothel investigator who gets paid to be pleased by sex workers*, 2 July, 2019 accessed online 23 July, 2019 at <https://www.thesun.co.uk/sun-men/9375656/undercover-brothel-investigator-paid-sex-workers/>

^{xiii} News.com.au, *Sex workers speak out about the crackdown on illegal or non-compliant brothels*, published online 28 September, 2018 at <https://www.news.com.au/lifestyle/relationships/sex/sex-workers-speak-out-about-the-crackdown-on-illegal-or-noncompliant-brothels/news-story/19d5f564d8768a11de539f98d54c6c1b>

^{xiv} https://twitter.com/Ekklesia_co_uk/status/1146410099050725376

^{xv} <https://twitter.com/naughtynurdy/status/1146687489584713730>

^{xvi} <https://twitter.com/StellaRaeYVR/status/1146481643454025733>

^{xvii} <https://twitter.com/cathalmalone/status/1146369300900589568>

^{xviii} <https://twitter.com/RaffishPaddy/status/1146393984358649856>

^{xix} <https://twitter.com/uglymugsie/status/1146359229785235456>