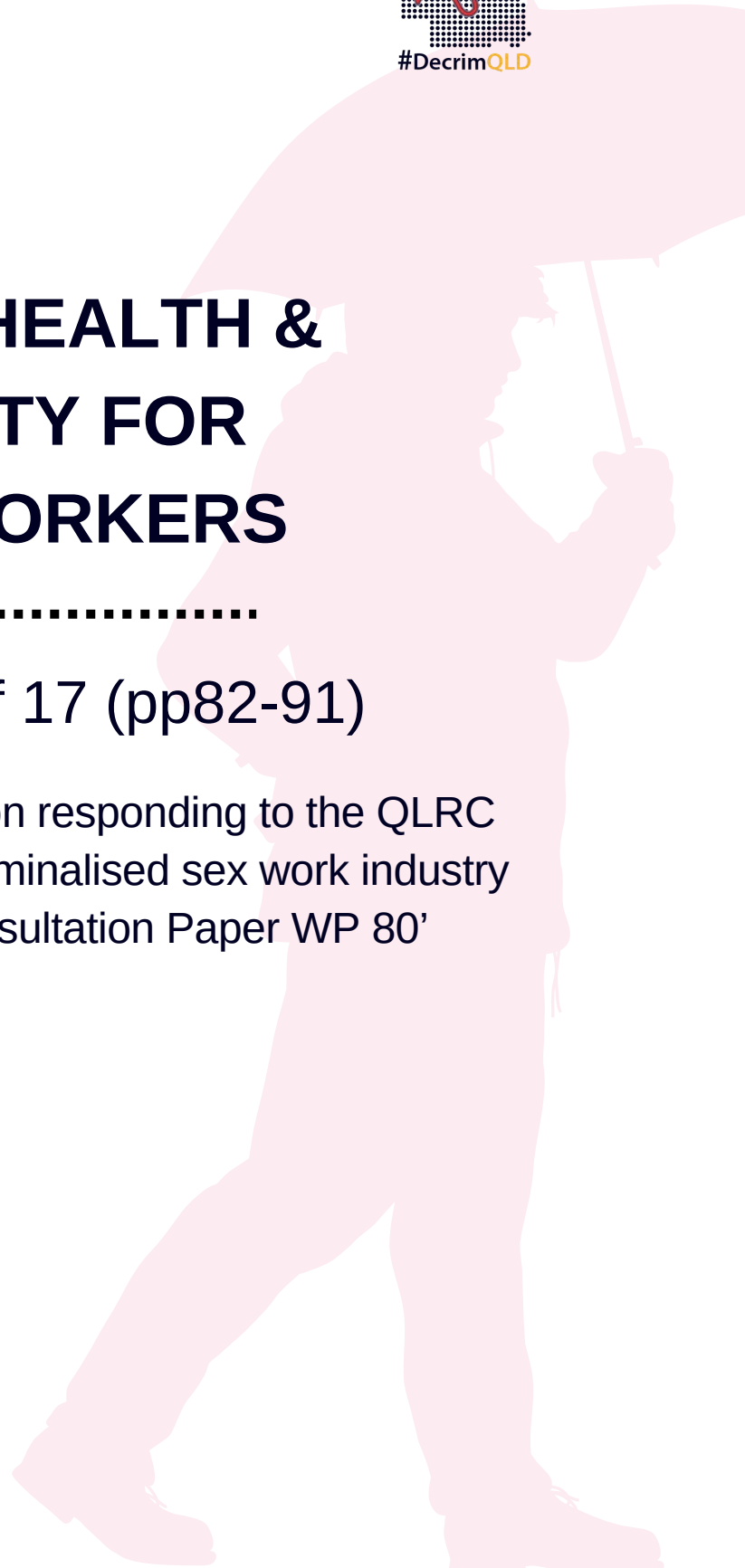




WORK HEALTH & SAFETY FOR SEX WORKERS

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Section 6 of 17 (pp82-91)

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



CHAPTER 10: WORKPLACE LAWS

- Q18** What is the best way to make sure people in the sex work industry meet their work health and safety standards?
- Q19** Should there be a guide for the sex work industry on how to meet work health and safety obligations (for example, a code of practice made under the *Work Health and Safety Act 2011* or guidelines)?
- Q20** Are there any other work health and safety matters we should consider in developing a framework for a decriminalised sex work industry?
- Q21** Under a decriminalised framework for the sex work industry, should legislation state that a contract for or to arrange sex work is not illegal or void on public policy or similar grounds?
- Q22** Should there be a new law stating that a person may, at any time, refuse to perform or continue to perform sex work?

Q18 The best way to make sure people in the sex work industry meet their WHS standards is to make sure accurate and comprehensive sex work WHS guidelines (not a code), developed by Respect Inc in consultation with sex workers and WorkSafe Qld, are readily available online and in formats that provide easy access to the most marginalised sex workers.

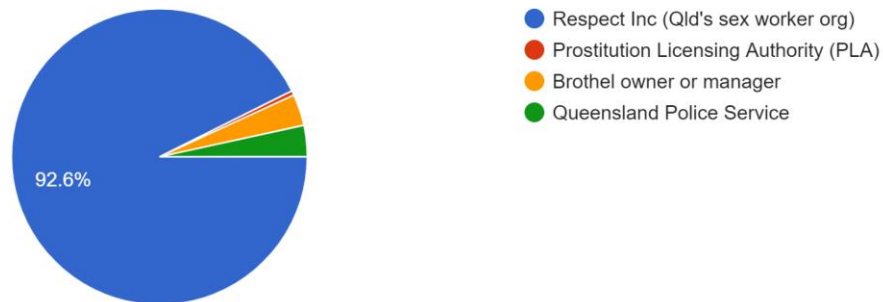
Fresh start for WHS following decriminalisation

The Prostitution Licensing Authority developed an *Operational Standards Manual*⁴⁸, which includes reference to some WHS matters for the 20 licensed brothels. It should be noted that the manual was not developed in consultation with workers and is not suited to expansion for a much broader and decriminalised sex industry, which will include a range of scales of sex industry businesses providing a range of services. WHS strategies are currently practised in Queensland sex industry workplaces, even in those locations currently operating outside of the licensing framework, without a special regulatory framework of enforcement. These practices are a result of peer education and are tailored to scale depending on the needs of particular workplaces. Sex workers in Queensland trust Respect Inc to provide them with accurate and timely WHS information, resources and workshops and Respect Inc is their first choice for support when needed.

⁴⁸ Prostitution Licensing Authority *Operational Standards Manual for Licensed Brothels*
https://www.pla.qld.gov.au/_data/assets/pdf_file/0004/691321/Operational-Standards-Manual-Final.pdf

33: If you had a problem, who would you go to for support? (choose one)

204 responses



Our recommendations in this chapter are based on starting afresh on the development of WHS guidelines to suit the sex industry in Queensland.

Workplace health and safety model for the sex industry in Queensland

When sex work is decriminalised in Queensland, WHS rights and responsibilities will apply to all sex industry businesses. It will not be necessary to develop new laws or regulations specific to the sex industry but it will be important for Respect Inc, in collaboration with unions and regulators, to develop a set of sex industry WHS guidelines.

There is a comprehensive system of existing laws and codes that will apply alongside the new sex work guidelines so the system will include:

1. The Work Health and Safety Act 2011 (Qld) (WHS Act) is compatible with the Work Health and Safety Act 2011 (Cth) that applies uniformly across Australia, providing each state with a framework 'model' to harmonise health and safety laws across Australia.
2. The Work Health and Safety Regulation 2011 (Qld) (WHS Regulation) explains specific procedural and administrative requirements that are set out in the WHS Act. The regulation includes the Hierarchy of Control Measures (s36) that outline the identification of hazards or risks, and steps in elimination or minimisation of health and safety risks. It also provides a determination of what is high-risk work that makes it clear sex work should not be categorised as high risk as this category does not include work comparable to sex work. WorkCover Queensland classifies brothel keeping and sex work as a low-to-moderate risk industry.⁴⁹
3. Codes of practice that apply to all industries, for example:
 - a. First Aid in the Workplace Code of Practice 2021
 - b. How to Manage Work Health and Safety Risks Code of Practice 2021 (Physical & Psychological Risks)
 - c. Work Health and Safety Consultation, Co-operation and Co-ordination Code

⁴⁹ WorkCover Queensland Gazette Notice 1, 2021. https://wcq-search.squid.cloud/s/redirect?collection=wcq-meta&url=https%3A%2F%2Fwww.worksafe.qld.gov.au%2F_data%2Fassets%2Fpdf_file%2F0032%2F77369%2FQueensland-government-gazette.pdf&auth=uTBZS%2BMX6bGkw5iHNueDsg&profile=default&rank=3&query=prostitution

of Practice 2021

- d. Managing the Work Environment and Facilities Code of Practice 2021
- e. Psychosocial Code of Practice expected by 2023 replacing existing guides covering bullying/coercion, stress, fatigue and violence risks.⁵⁰

- 4. WHS guidelines developed to suit the range of types and scales of sex industry businesses, maintaining the flexibility to be updated as needed.

In Queensland, the safety regulator is Workplace Health and Safety Queensland (WHSQ).

PCBUs

WHS provides a definition of a *person conducting a business or undertaking* (PCBU)⁵¹ that encompasses the range of employment relationships in the sex industry in Queensland. Safe Work Australia states that a 'PCBU is a broad concept that extends beyond the traditional employer/employee relationship to include all types of modern working arrangements' and applies legal responsibilities to all PCBUs.

We note that in Queensland a PCBU is required to comply with Codes of Practice, including those listed above that apply to all businesses, and the regulator has powers to ensure this, unlike in other jurisdictions where a Code of Practice is advisory only.

WHS compliance

There is sufficient legal requirement for all PCBUs to comply with WHS requirements and the regulator has existing powers to address non-compliance.

In line with the intention of decriminalisation of the Queensland sex industry there should not be sex industry-specific powers or additional laws or regulation in relation to compliance.

We note again that continuation of a licensing framework or other laws layered on top of a decriminalisation model that leave some sex workers criminalised or create a two-tiered industry will undermine compliance and we warn against this approach for this reason.

Particularly in the initial or implementation phases, compliance should be promoted through education supported by a communication strategy that incorporates translated and multi-format resources and training for sex industry operators and sex workers. Respect Inc, along with the regulator, will play an essential role in ensuring both sex industry operators and sex workers are aware of their rights and responsibilities.

⁵⁰ Worksafe Qld, Psychosocial hazards and factors. Online resource. <https://www.worksafe.qld.gov.au/safety-and-prevention/mental-health/Psychosocial-hazards-and-factors>

⁵¹ Safe Work Australia, The meaning of 'person conducting a business or undertaking. Online resource. <https://www.safeworkaustralia.gov.au/sites/default/files/2021-01/What%20is%20a%20person%20conducting%20a%20business%20or%20undertaking.pdf>

Under the Act and Regulations PCBUs are required by law to eliminate risks to health and safety.⁵²

As a PCBU, you have a duty to ensure the health and safety of workers' and other persons in the workplace. A PCBU must seek to eliminate risks to health and safety so far as reasonably practicable. If a PCBU cannot eliminate a risk, they must minimise the risks so far as is reasonably practicable. You must identify, assess, and control hazards and risks.

The model WHS Regulations sets out specific requirements that PCBUs must comply with when managing risks that arise from certain hazards or hazardous work.

For certain risks, the model WHS Regulations provide that where it is not reasonably practicable to eliminate risks to health and safety the PCBU must apply the hierarchy of control measures in minimising risks to health and safety.

WHS Section 18 of the WHS Act defines the standard that is to be met and describes the process for determining 'reasonably practicable'.⁵³

PPE—prophylactics including condoms

As prophylactic use is regularly misunderstood as the only or predominant WHS issue for sex workers we are noting here that Queensland's Work Health and Safety Regulation 2011⁵⁴ requires use of and provision of PPE. PCBUs who operate sex work businesses are required to provide PPE, ensure as far as is practicable that the PPE is worn by sex workers and clients, and must provide information, training and instruction on the proper use and wearing of PPE as well as its storage and maintenance, replacing the need for additional condom use laws specific to the sex industry or a specific code. These responsibilities would be detailed in the sex work WHS guidelines.

WHS regulator

The workplace health and safety regulator in Queensland, WHSQ, has significant powers to inspect workplaces, advise on and enforce laws, including to: provide advice about rights, duties and responsibilities, and complying with local laws; assist PCBUs, workers and others to resolve WHS issues; ensure compliance by issuing notices. They may also issue sanctions, including: giving infringement notices, accepting enforceable undertakings; and commencing prosecutions.

Reporting to regulator

All sex industry workplaces in Queensland will have injury (physical or psychological), illness or dangerous incident reporting requirements to the regulator, and sex workers will be able to report an issue at their workplace to WHSQ.

⁵² Safe Work Australia. (2022). <https://www.safeworkaustralia.gov.au/law-and-regulation/duties-under-whs-laws/duties-pcbu>

⁵³ Reasonably practicable is defined in the Cth resources. https://www.safeworkaustralia.gov.au/system/files/documents/2002/guide_reasonably_practicable.pdf

⁵⁴ Queensland Work Health and Safety Regulation 2011 Chapter 3 Division 5 Section 44, 45, 46, 47.

Guidelines not a code

WHS guidelines and protections for sex workers exist in some Australian jurisdictions and New Zealand, each of these was based on the Scarlet Alliance, *A Guide to Best Practice OHS in the Australian Sex Industry* template and updated to accommodate local variations and laws.⁵⁵

Experience in these locations demonstrates that WHS guidelines will be effective for the decriminalised Queensland sex industry. The guidelines will identify the WHS rights and responsibilities of owners, operators, employees and sub-contractors in sex industry businesses.

Guidelines that sit alongside universal workplace laws and codes that apply to all workplaces would be best developed by Respect Inc in partnership with WorkSafe QLD, relevant unions, and the Office of Industrial Relations Queensland. It is sex workers who are best placed to identify hazards within the current practices in the range of sex industry businesses, to identify resulting risks and to problem solve, in line with the Hierarchy of Control Measures how the risks can be eliminated, minimised or where PPE is required. Respect Inc is best placed to bring together a variety of sex workers familiar with the range of workplaces to inform the development, including in regional and rural settings, with support from relevant unions, and to facilitate the engagement of business owners that will be far broader than the current licensed brothels, as it did during COVID discussions.

The following is an example of what the new WHS guidelines could include :

- common hazards and risks specific to the sex industry and ways in which they should be managed
- common types of worker injury including repetitive strain injury
- reporting of incidents and accidents
- addressing public health and workplace health and safety risks such as body fluid spill protocols, waste disposal, personal protective equipment provision, use and information
- drug and alcohol, smoking
- cleaning protocols, linen/laundry
- spas and pool management
- consultation arrangements with workers and their representatives
- method of complaints about WHS implementation in the workplace and workplace documentation of WHS matters.

References to matters covered in Codes of Practice for all industries would also be made including security and safety, first aid, fire, lighting inside the building and at entrances and exits, food storage and shared kitchen facilities for workers, heating and cooling, etc.

Q.21 Under a decriminalised framework for the sex work industry, should legislation state that a contract for or to arrange sex work is not illegal or void on public policy or similar grounds?

⁵⁵ Scarlet Alliance. (1999). A guide to best practice OHS in the Australian sex industry.
<https://scarletalliance.org.au/library/bestpractise>

If sex work is in fact decriminalised in Queensland, public policy should reflect this shift and there should not be a requirement for legislation to ensure recognition in the courts and in other ways that a contract for sex work is not illegal or void on public policy or similar grounds. We refer to the submission from the Queensland Council of Unions in this regard. However, we note that discrimination often results in rights available to others being diminished and sex workers and the sex industry experience high levels of discrimination.

If there is any legal or policy reason that a contract for, or to arrange, sex work would be voided as the result of the direction the QLRC takes in the development of draft legislation this should be addressed in the new Bill.

Sex worker community leadership and implementation of WHS guidelines are an extension of the community development approach, which recognises 'sex work as a legitimate occupational choice', and it is one of the ways sex worker organisations in other jurisdictions 'directly challenge the long-institutionalized notion that sex workers are irresponsible regarding their own health and that of the larger community'.⁵⁶

Q.22 Should there be a new law stating that a person may, at any time, refuse to perform or continue to perform sex work?

There are commonwealth and state laws that provide protections for all workers. As outlined below, the WHS Act and the Fair Work Act provide protections in this regard and the Criminal Code includes protections relating to consent. The new WHS guidelines will state that a person may, at any time, refuse to perform or continue to perform sex work in line with the WHS Act.

For this reason we do not see a requirement to create a new law.

Fair Work Act 2009 (Cth)

Section 343 (Coercion) (1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to (a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or (b) exercise, or propose to exercise, a workplace right in a particular way.

Section 345 (Misrepresentations) (1) A person must not knowingly or recklessly make a false or misleading representation about: (a) the workplace rights of another person; or (b) the exercise, or the effect of the exercise, of a workplace right by another person.

Work Health and Safety Act 2011 (Qld)

Division 6 of part 5 of the WHS Act—Section 84 Right of worker to cease unsafe work

Section 84 allows a person to cease work if there is a serious risk to the worker's health or safety.

A worker may cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard.

⁵⁶ Majic, S. (2014). *Sex work politics, from protest to service provision*, University of Pennsylvania Press, Philadelphia. p. 43.

In this way, the existing WHS laws provide that a sex worker can refuse a booking if it would cause them harm.

Section 86 of the same law requires the worker to notify the person conducting the business or undertaking and remain available to carry out alternative work, which in a sex work setting could be other sex work bookings.

Other workplace law matters

Workcover

According to WorkCover Queensland, brothel keeping and sex work is a low-to-moderate risk industry. Every workplace accident insurance policy has a WorkCover Industry Classification (WIC) code, which is used to calculate the WorkCover premium. In 2021 the category 'Brothel Keeping and Prostitution Services' had a risk rating of 1.046 as compared to some of the more highly rated occupations such as Correctional Services 5.875 or Police 2.789 and lower-rated occupations such as Office Admin 0.531.⁵⁷

We note that Safe Work NSW in the Health and Safety Guidelines for the sex industry states:⁵⁸

...according to previous legal cases involving NSW workers compensation matters, sex workers are 'deemed workers' of the SSP at which they are performing work (see part 16 for information). The [Workplace Injury Management and Workers Compensation Act 1998](#) defines a worker as a person who has entered into, or works under a contract of service or training with an employer (whether by way of manual labour, clerical work or otherwise, whether the contract is expressed or implied, and whether the contract is oral or in writing).

You must take out a workers compensation policy to cover all workers (including 'deemed workers'). Penalties apply for employers who do not hold a workers compensation policy or who under declare wages paid to workers.

And that:

Proprietors cannot rely on the taxation status of sex workers for workers compensation purposes.

Even though sex workers may be considered to be operating an independent business for tax purposes, for workers compensation purposes sex workers can be deemed to be an employee of the person or business who operates the premises.

⁵⁷ WorkCover Queensland Gazette Notice 1, 2021. https://wcq-search.squiz.cloud/s/redirect?collection=wcq-meta&url=https%3A%2F%2Fwww.worksafe.qld.gov.au%2F_data%2Fassets%2Fpdf_file%2F0032%2F77369%2FQueensland-government-gazette.pdf&auth=uTBZS%2BMX6bGkw5iHNueDsg&profile=default&rank=3&query=prostitution

⁵⁸ Safe Work NSW. Sex workers are deemed workers. Accessed 24 May, 2022 https://www.safework.nsw.gov.au/resource-library/other-services/health-and-safety-guidelines-for-sex-services-premises-in-nsw?result_397396_result_page=2

A number of court cases have found sex workers to be eligible for workers compensation benefits even though:

- the proprietor and the sex worker had entered into a written contract
- the proprietor claimed the payment arrangement for the sex workers consisted of splitting fees
- the payments made allegedly represented charges for room hire or short-term rental paid for by either the sex worker and/or their client/s⁵⁹
- the proprietor stated they had no operational control over the sex worker regarding scheduling attendance at the premises, scheduling appointments or outcalls, or the nature of the services offered by sex workers.

These decisions require proprietors to pay workers compensation premiums for sex workers and allow sex workers to claim entitlements to workers compensation benefits if other criteria applicable to all workers are met. If a sex worker is injured in a work-related incident and a policy is not in place, the sex worker will still be entitled to benefits and the proprietor may be personally liable for any costs associated with a claim and other penalties.

⁵⁹https://www.safework.nsw.gov.au/resource-library/other-services/health-and-safety-guidelines-for-sex-services-premises-in-nsw?result_397396_result_page=16

Recommendation 17 (Q18): To support the sex industry to meet WHS responsibilities, WHS guidelines should be developed through a process led by Respect Inc, these guidelines should be supported by a communication plan supported by multiple mediums and should be translated into multiple languages.

Recommendation 18 (Q18-20): No additional statutory obligations or compliance requirements should be developed for the sex industry in Queensland. WHS laws and legal requirements for all PCBUs to implement WHS will apply to the sex industry in Queensland once decriminalised. Compliance will be regulated by the existing powers of the regulator, the WHSQ, as it is for all businesses. A process is available to workers to report WHS non-compliance. The WHS regulator has powers to address non compliance across all industries.

Recommendation 19 (Q18-20): The existing PLA Operational Standards Manual should be abolished and a fresh start to WHS guidelines undertaken (as above).

Recommendation 20 (Q19): Workplace Health and Safety Guidelines (not a code) should be developed by Respect Inc in partnership with WorkSafe QLD, relevant unions and the Office of Industrial Relations Queensland. The Guidelines will incorporate rights and responsibilities enshrined in the Work Health and Safety Act 2011 and Regulations, Codes of Practice that cover all industries and address WHS issues specific to the range of sex industry workplaces in Queensland. Evidence shows good sex worker WHS must be framed by a community development sex worker-led model of consultation, collaboration, peer-based implementation and evaluation. Health promotion of this nature requires multiple communication methods: short explanatory videos, pictorial diagrams, on-site support, workshops, one-on-one peer education advice, extensive documentation and possibly economic support.

Recommendation 21 (Q20): An evaluation of implementation and compliance of WHS guidelines should be conducted in four languages to determine required adjustments and future resourcing needs, five years after implementation.

Recommendation 22: Adequate funding should be provided to Respect Inc to develop comprehensive WHS guidelines in at least four languages and in multiple formats.

Recommendation 23 (Q21): If sex work is decriminalised public policy must reflect this major shift and there should not be a requirement for legislation to ensure recognition in the courts and in other ways that a contract for sex work is not illegal or void on public policy or similar grounds.

Recommendation 24 (Q22): The WHS guidelines should reinforce that a sex worker may refuse to perform or continue to perform sex work in line with the WHS Act. If sex work is decriminalised there is no need for a special law.