

# A framework for a decriminalised sex work industry in Queensland

Consultation Paper WP 80

April 2022

Chapter 10

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# Workplace laws

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## Introduction

- 10.1 We are required to consider health and safety protections for sex workers and their clients, and safeguards against exploitation. We are also asked to consider potential impacts on the industry of moving to the new framework.<sup>265</sup>
- 10.2 Sex workers, like other workers, may be covered by general laws that regulate aspects of work, including work health and safety, workers' compensation and workplace relations laws. These laws include both federal and State laws. They give general protections to workers.
- 10.3 However, sex workers may have difficulty accessing or seeking to enforce these protections under the current framework: see chapter 4. Fear or threat of arrest or prosecution, repercussions from employers, or identification as a sex worker can be practical barriers.
- 10.4 Some sex worker organisations say decriminalising sex work will improve access to workplace entitlements and protections. They say it will empower sex workers and enhance opportunities for collective bargaining and advocacy in the workplace.<sup>266</sup>
- 10.5 In this chapter, we look at:
- general workplace laws in Queensland that apply to all workers, including sex workers; and
  - special workplace requirements that apply to sex workers in licensed brothels under the current framework.
- 10.6 We focus on how general workplace laws apply to sex workers (like other workers). We look at whether additional laws or other measures (such as guidelines or codes of practice) might be needed.
- 10.7 We also look at:
- enforcing contracts for sex work; and
  - protecting sex workers' autonomy to refuse to provide or continue providing sex work.

## What workplace laws apply?

- 10.8 Three main laws regulate aspects of work in Queensland:
- State work health and safety laws;
  - State workers' compensation laws; and
  - Commonwealth workplace relations laws.
- 10.9 These are general laws that apply across all industries.
- 10.10 Sex work-specific laws or other measures can also apply.
- 10.11 In Queensland, specific work health and safety rules apply to licensed brothels under the Prostitution Act and Prostitution Regulation.
- 10.12 In other jurisdictions, sex work-specific laws or measures include:
- a work health and safety code of practice or guideline for the sex work industry;
  - provision to recognise sex work contracts as valid; and

<sup>265</sup> See terms of reference para 1(d), (e), (k)(i)-(ii).

<sup>266</sup> Scarlet Alliance, *The Principles for Model Sex Work Legislation* (2014) 42.

- provision to protect sex workers' right to refuse to perform sex work.

## Working arrangements and the sex work industry

- 10.13 A person's entitlements and protections under workplace laws can depend on the nature of their contractual arrangement. This is the same for all workers in Queensland.
- 10.14 For example, the 'Fair Work system' established under the *Fair Work Act 2009* (Cth) applies only to 'employees' covered by it: see box 1.<sup>267</sup> It therefore would not apply to sex workers who work as independent contractors.
- 10.15 However, they would be covered by the *Independent Contractors Act 2006* (Cth). The Act sets up a national unfair contracts remedy scheme for contractors, who generally negotiate their own fees and working arrangements.<sup>268</sup>
- 10.16 Whether a worker is an employee or an independent contractor is determined by the nature of the relationship and depends on several factors. Generally, independent contractors work for themselves and employees work in someone else's business.<sup>269</sup> In practice, however, determining a person's status may be difficult.<sup>270</sup> This is an issue that arises in all industries.
- 10.17 Sex workers may work as independent contractors, employees, or a mixture of both.<sup>271</sup> We understand that most sex workers in Queensland are engaged as independent contractors.<sup>272</sup> However, some sex worker organisations say that some sex workers may not be receiving the full benefits of their independent contractor status.<sup>273</sup> It is illegal for an employer to attempt to disguise an employment relationship as a contractor relationship ('sham contracting').<sup>274</sup> The Fair Work Ombudsman can provide information and advice in relation to workplace laws and assist in resolving disputes.<sup>275</sup>
- 10.18 Some sex worker organisations say decriminalisation would enhance opportunities for sex workers to have their employment arrangements accurately classified, form unions and lobby

### Box 1: What is the 'Fair Work system' and who does it apply to?

- The Fair Work system provides a safety net of minimum entitlements for wages and conditions of employment for employees covered by it
- An employee in Queensland is covered by the Fair Work system if they work in the private sector or for a 'constitutional corporation' (that is, an Australian financial corporation or trading corporation or a foreign corporation that does business in Australia)

267 See generally Fair Work Ombudsman, 'The Fair Work system' <<https://www.fairwork.gov.au/about-us/legislation/the-fair-work-system>>; Fair Work Ombudsman, 'Protections at work' <<https://www.fairwork.gov.au/tools-and-resources/fact-sheets/rights-and-obligations/protections-at-work>>.

268 Fair Work Ombudsman, 'Independent contractors' <<https://www.fairwork.gov.au/find-help-for/independent-contractors>>.

269 See generally Business.gov.au, 'Employee or contractor?' (26 March 2021) <<https://business.gov.au/people/contractors/employee-or-contractor>>; Fair Work Ombudsman, 'Independent contractors: the difference between contractors and employees' <<https://www.fairwork.gov.au/find-help-for/independent-contractors#difference-between-contractors-and-employees>>; Business.gov.au, 'Contractor rights & protections' (24 June 2020) <<https://business.gov.au/people/contractors/contractor-rights-and-protections>>.

270 See, eg, two recent cases of the High Court of Australia overturning decisions of the Full Federal Court about whether workers were employees or independent contractors: *ZG Operations Australia Pty Ltd v Jamsek* (2022) 96 ALJR 144; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALRJ 89.

271 Scarlet Alliance, above n 266, 48.

272 PLA, *Operational Standards Manual*.

273 Scarlet Alliance, above n 266, 42. See also Respect Inc, *Regulating Bodies: An In-Depth Assessment of the Needs of Sex Workers [Sexual Service Providers] in Queensland's Licensed Brothels* (2017) 29, 39, 42.

274 Fair Work Ombudsman, 'Independent contractors: sham contracting' <<https://www.fairwork.gov.au/find-help-for/independent-contractors#sham-contracting>>. See also Business.gov.au, 'Employee or contractor?' (26 March 2021) <<https://business.gov.au/people/contractors/employee-or-contractor>>.

275 Fair Work Ombudsman, 'Independent contractors: where to get information and help' <<https://www.fairwork.gov.au/find-help-for/independent-contractors#get-information-and-help>>; Business.gov.au, 'Contractor rights & protections' (24 June 2020) <<https://business.gov.au/people/contractors/contractor-rights-and-protections>>.

for industry awards. They also say it will enhance opportunities for collective bargaining and advocacy.<sup>276</sup>

## Work health and safety

- 10.19 Queensland’s work health and safety laws ensure the health and safety of all workers in the workplace.
- 10.20 Queensland also has specific health and safety requirements for licensed brothels under the Prostitution Act.

### What are Queensland’s work health and safety laws?

- 10.21 Each state and territory has work health and safety laws. They have been harmonised across Australia to create a nationally consistent framework.<sup>277</sup> There is a regulator in each state and territory that is responsible for ensuring compliance.<sup>278</sup>
- 10.22 In Queensland, the work health and safety legislation is:
- the *Work Health and Safety Act 2011*; and
  - the *Work Health and Safety Regulation 2011*.
- 10.23 They are supported by codes of practice.
- 10.24 Workplace Health and Safety Queensland is the regulator responsible for promoting, monitoring and enforcing work health and safety laws. It is part of the Office of Industrial Relations.

### Who is protected?

- 10.25 Work health and safety laws protect the health and safety of all ‘workers’ in the ‘workplace’. A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking: see box 2.<sup>279</sup>
- 10.26 They also protect the health and safety of other people (the general public), so they are not put at risk by work activities.

#### Box 2: Who is a ‘worker’ and what is a ‘workplace’?

- ‘Workers’ include employees, contractors, subcontractors, outworkers, apprentices and trainees, work experience students, and volunteers
- An individual employer or business owner who performs work for the business or undertaking is also a worker
- A ‘workplace’ means ‘a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work’

<sup>276</sup> Scarlet Alliance, above n 266, 42. See also Respect Inc, *Regulating Bodies: An In-Depth Assessment of the Needs of Sex Workers [Sexual Service Providers] in Queensland’s Licensed Brothels* (2017) 29, 39, 42.

<sup>277</sup> Except for Victoria, each state and territory has enacted legislation based on model laws: Safe Work Australia, ‘Model WHS laws’ <<https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws#harmonising-whs-laws>>.

<sup>278</sup> Safe Work Australia, ‘WHS regulators and workers’ compensation authorities contact information’ <<https://www.safeworkaustralia.gov.au/law-and-regulation/whs-regulators-and-workers-compensation-authorities-contact-information>>.

<sup>279</sup> *Work Health and Safety Act 2011* (Qld) ss 7–8.



## Who has work health and safety obligations and what are they?

10.27 The *Work Health and Safety Act 2011* makes every 'person conducting a business or undertaking' responsible for work health and safety: see box 3.<sup>280</sup> This legal obligation is known as a 'duty of care'. The person conducting the business or undertaking has the main (or primary) duty of care. Other people also have duties under the Act.

10.28 In the sex work industry, examples of a person conducting a business or undertaking are a brothel licensee and a private sex worker (as a self-employed person).

10.29 A person conducting a business or undertaking must ensure:<sup>281</sup>

- the health and safety of workers in the workplace, so far as is reasonably practicable; and
- that the health and safety of other persons is not put at risk from work carried out by the business or undertaking.

10.30 A self-employed person must ensure their own health and safety while at work, and the health and safety of others who may be put at risk, so far as is reasonably practicable.<sup>282</sup>

10.31 A duty to ensure health and safety means the person must eliminate or, if elimination is not possible, minimise risks to health and safety, so far as is 'reasonably practicable': see box 4.<sup>283</sup>

### Box 3: Who is a 'person conducting a business or undertaking'?

- A person conducts a business or undertaking whether the person conducts it alone or with others, and whether or not for profit or gain
- They can be a sole trader (for example a self-employed person), a partnership, company, unincorporated association, government department or public authority (including a local government)

### Box 4: What is 'reasonably practicable' in ensuring health and safety?

- Doing what is 'reasonably practicable' to ensure health and safety means the person must do what is reasonably able to be done, taking into account and weighing up all relevant matters, including:
  - the likelihood of the hazard or risk occurring;
  - the degree of harm that might result from it;
  - what the person concerned knows, or ought reasonably to know, about the hazard or risk and ways of eliminating or minimising it;
  - the availability and suitability of ways to eliminate or minimise it; and
  - the cost associated with eliminating or minimising it, and whether the cost is grossly disproportionate to the risk

10.32 Without limiting the general duty, the Act sets out specific duties a person conducting a business or undertaking must comply with, so far as is reasonably practicable. They include:<sup>284</sup>

- providing and maintaining a work environment without risks to health and safety;
- providing and maintaining safe systems of work;
- providing adequate facilities for the welfare of workers;

<sup>280</sup> *Work Health and Safety Act 2011* (Qld) s 5.

<sup>281</sup> *Work Health and Safety Act 2011* (Qld) s 19(1)–(2).

<sup>282</sup> *Work Health and Safety Act 2011* (Qld) s 19(5).

<sup>283</sup> *Work Health and Safety Act 2011* (Qld) ss 17–18.

<sup>284</sup> *Work Health and Safety Act 2011* (Qld) s 19(3).

- providing workers with information, instruction, training or supervision needed for them to work safely and without risks to their health; and
  - monitoring the health of their workers and the conditions of the workplace under their management and control to prevent injury and illness.
- 10.33 All Queensland businesses should have an effective risk management process. The person conducting a business or undertaking should identify hazards, assess risks, find ways to control those risks, and then make sure those controls keep working.<sup>285</sup>
- 10.34 They must consult with workers who are, or are likely to be, directly affected by a matter relating to work health and safety. This includes when identifying hazards and assessing risks and when making decisions about ways to eliminate or minimise those risks.<sup>286</sup>
- 10.35 The Act also requires:<sup>287</sup>
- officers of a person conducting a business or undertaking (such as managers) to exercise due diligence to ensure the person conducting a business or undertaking complies with work health and safety duties; and
  - workers and other persons at the workplace (such as customers and visitors) to:
    - take reasonable care for their own health and safety and the health and safety of others who may be affected by their actions or omissions;
    - follow reasonable instructions given by the person conducting a business or undertaking; and
    - cooperate (if they are a worker) with any reasonable policy or procedure to ensure work health and safety.
- 10.36 If a worker has a reasonable concern about a serious risk to their health or safety from immediate or imminent exposure to a hazard, they may stop or refuse to carry out work.<sup>288</sup>

### **How are work health and safety obligations monitored and enforced?**

- 10.37 Workplace Health and Safety Queensland educates employers and employees on their legal duties, inspects workplaces to make sure work health and safety duties are being met, and takes appropriate enforcement action if they are not. It also investigates work-related fatalities and serious injuries.
- 10.38 A workplace inspection may occur in response to a health and safety incident, notification or complaint. It may also take place as part of a statewide compliance campaign or workplace assessment.
- 10.39 An inspector has the power to enter a workplace, or a place they reasonably suspect is a workplace. They do not need to give notice first, and do not need consent from the person who

<sup>285</sup> WorkSafe.qld.gov.au, 'Managing risks' (2021) <<https://www.worksafe.qld.gov.au/safety-and-prevention/creating-safe-work/managing-risks>>.

<sup>286</sup> *Work Health and Safety Act 2011* (Qld) pt 5 div 2.

<sup>287</sup> *Work Health and Safety Act 2011* (Qld) ss 27, 28, 29.

<sup>288</sup> *Work Health and Safety Act 2011* (Qld) s 84.

manages or controls the place. They can also enter a place used for residential purposes to access a suspected workplace: see box 5.<sup>289</sup> If an inspector enters a place that is not a workplace, they must leave immediately.<sup>290</sup>

10.40 An inspector may enter any place if the entry is authorised by a search warrant. A search warrant may be issued by a magistrate if there are reasonable grounds for suspecting there is a particular thing or activity that may be evidence of an offence against the *Work Health and Safety Act 2011* at the place.<sup>291</sup>

10.41 During workplace visits, inspectors may identify breaches that the duty holder can rectify in the presence of the inspector. Breaches that cannot be immediately rectified will result in other measures.<sup>292</sup> For example, inspectors can issue notices to direct compliance with the Act (such as improvement notices or prohibition notices: see box 6).<sup>293</sup> Failure to comply with a notice is an offence.<sup>294</sup> Workplace Health and Safety Queensland can also apply to a Magistrates Court for an injunction to require a person to comply with a notice, or to restrain them from contravening a notice.<sup>295</sup>

10.42 If a duty holder does not follow work health and safety laws, they could be:<sup>296</sup>

- given an infringement notice (on the spot fine);
- required to give an enforceable undertaking (a legally binding written agreement to put in place effective health and safety measures); or
- prosecuted for offences for breach of health and safety laws.

10.43 If a person is found guilty of an offence against the Act, the court may impose a penalty or make other orders. The maximum penalty for breaching a health and safety duty is:<sup>297</sup>

#### Box 5: Inspectors powers to enter a place used for residential purposes

- An inspector may not enter any part of a place used only for residential purposes unless they:
  - have consent from the person with management or control of the place;
  - are authorised under a search warrant; or
  - need to enter to gain access to a suspected workplace, but only:
    - if the inspector reasonably believes that no reasonable alternative access is available; and
    - at a reasonable time having regard to the times they believe work is being carried out at the suspected workplace

#### Box 6: What is an 'improvement notice' or 'prohibition notice'

- An 'improvement notice' requires a person to remedy a breach of the work health and safety laws or prevent a likely breach
- A 'prohibition notice' prohibits a person from carrying on an activity that involves serious risk to a person's health or safety from an immediate or imminent exposure to a hazard, until the inspector is satisfied that the risks have been remedied

<sup>289</sup> *Work Health and Safety Act 2011* (Qld) s 170.

<sup>290</sup> *Work Health and Safety Act 2011* (Qld) s 163(1)–(3).

<sup>291</sup> *Work Health and Safety Act 2011* (Qld) ss 163(4), 167.

<sup>292</sup> WorkSafe.qld.gov.au, 'Enforcement options' (2021) <<https://www.worksafe.qld.gov.au/laws-and-compliance/compliance-and-enforcement/audits-and-inspections/workplace-inspections/enforcement-options>>.

<sup>293</sup> *Work Health and Safety Act 2011* (Qld) pt 10 divs 1–3.

<sup>294</sup> The maximum penalty is 500 penalty units (\$68 925) for an improvement notice and 1000 penalty units (\$137 850) for a prohibition notice: *Work Health and Safety Act 2011* (Qld) ss 193, 197.

<sup>295</sup> *Work Health and Safety Act 2011* (Qld) s 215.

<sup>296</sup> See further WorkSafe.qld.gov.au, 'Compliance and enforcement' (2021) <<https://www.worksafe.qld.gov.au/laws-and-compliance/compliance-and-enforcement>>; Workplace Health and Safety Queensland and Electrical Safety Office Queensland, *Compliance Monitoring and Enforcement Policy* (December 2018).

<sup>297</sup> *Work Health and Safety Act 2011* (Qld) s 33.

- 500 penalty units (\$68 925) for a worker or other person;
  - 1000 penalty units (\$137 850) for a person conducting a business or undertaking or officer; and
  - 5000 penalty units (\$689 250) for a corporation.
- 10.44 Higher penalties apply if the duty holder breaches a health and safety duty that exposes a person to risk of death or serious injury or illness, or if the duty holder engages in conduct that recklessly exposes a person to risk of death or serious injury.<sup>298</sup>
- 10.45 Other orders the court may make include:<sup>299</sup>
- adverse publicity orders;
  - restoration orders;
  - work health and safety project orders;
  - work health and safety undertakings;
  - injunctions; and
  - training orders.

### What specific work health and safety requirements apply for licensed brothels?

- 10.46 A brothel licensee is a person conducting a business or undertaking. As such, they must meet the general work health and safety laws outlined above.
- 10.47 Brothel licensees must also meet requirements in the Prostitution Act and Prostitution Regulation, such as:
- a requirement to make sure each room in the brothel has a concealed alarm button (or equivalent communication device) in working order;<sup>300</sup> and
  - requirements about health, including safe sex practices and sexual health management (discussed in chapter 11).
- 10.48 They must also comply with the conditions or restrictions in their brothel licence.<sup>301</sup> Some conditions are standard to all brothel licences and others may be included for an individual licence. Standard licence conditions include requirements about:<sup>302</sup>
- having sufficient electronic surveillance for the safety and security of sex workers, staff and clients (Brothel Licence Conditions 15.1–15.5);
  - documenting policies and procedures that show how legal and regulatory obligations are met (including under the Prostitution Act, Prostitution Regulation and licence conditions) (Brothel Licence Condition 17.1);
  - introducing new sex workers and managers to their roles (induction) and giving them information (Brothel Licence Conditions 6.1–6.3, 7.1–7.2);

<sup>298</sup> *Work Health and Safety Act 2011* (Qld) ss 31–32.

<sup>299</sup> *Work Health and Safety Act 2011* (Qld) ss 234–242. The maximum penalty for not following an order, without reasonable excuse, is 500 penalty units (\$68 925).

<sup>300</sup> *Prostitution Regulation 2014* (Qld) s 23(a).

<sup>301</sup> *Prostitution Act 1999* (Qld) s 19(5)(d)(iii).

<sup>302</sup> See PLA, *Brothel Licence Conditions* (v 14, 13 May 2019).

- recording and responding to complaints or incidents (Brothel Licence Condition 18.1);
- facilities (such as showers, toilets and change facilities and sharps containers) (Brothel Licence Conditions 12.1–12.3);
- managing clinical waste (Brothel Licence Condition 16.1); and
- maintenance and cleaning (Brothel Licence Condition 22.1).

10.49 Brothel licensees receive an Operational Standards Manual from the PLA before they are granted a brothel licence. It outlines requirements under the Prostitution Act and Prostitution Regulation and standard brothel licence conditions. It also gives practical guidance about how brothel licensees can meet their work health and safety obligations under the *Work Health and Safety Act 2011* and control hazards specific to sex work.<sup>303</sup> This includes practical guidance on managing workplace violence, threats, bullying, coercion and harassment.<sup>304</sup>

### How are work health and safety obligations of brothel licensees monitored and enforced?

10.50 The PLA monitors the operation of all licensed brothels to make sure they follow the Prostitution Act, Prostitution Regulation and their brothel licence conditions or restrictions. Authorised PLA officers carry out audits and inspections at least twice a year. They also give information and help to licensees and managers to improve compliance.<sup>305</sup>

10.51 The PLA can carry out disciplinary inquiries and take disciplinary action against brothel licensees and approved managers on certain grounds. This includes if a brothel licence condition is breached, or if the brothel is being managed in a way that makes it desirable for action to be taken.<sup>306</sup> A breach of the Prostitution Act or Prostitution Regulation is deemed to be a breach of the licence.<sup>307</sup> The PLA can do one or more of the following:<sup>308</sup>

- reprimand the licensee or manager;
- add a condition or restriction to the licensee's licence or the manager's certificate;
- require the licensee or manager to enter into an undertaking to perform, or not perform, particular tasks;
- require the licensee or approved manager to meet a requirement specified by the PLA within or for a specified time;
- order the licensee or manager to pay into the fund an amount that is not more than the monetary value of 135 penalty units (\$18 609.75);
- suspend the licensee's licence or manager's certificate for a specified period of not more than one year;
- cancel the licensee's licence or manager's certificate;
- order that the licensee or manager is not eligible to apply for a licence or be an approved manager either permanently or for a specified period.

303 PLA, *Operational Standards Manual*.

304 Ibid.

305 PLA, 'Queensland brothel licence compliance' (2022) <[https://www.pla.qld.gov.au/licensing/brothel-licence#comply\\_license\\_conditions](https://www.pla.qld.gov.au/licensing/brothel-licence#comply_license_conditions)>.

306 *Prostitution Act 1999* (Qld) ss 27(c)–(d), 53(b)–(c).

307 See PLA, *Brothel Licence Conditions* (v 14, 13 May 2019).

308 *Prostitution Act 1999* (Qld) ss 29, 55.

- 10.52 Authorised PLA officers can also issue a penalty infringement notice (on the spot fine) for many offences under the Prostitution Act and Prostitution Regulation.<sup>309</sup> The amount varies depending on the offence. For example, it is an offence if a brothel licensee fails to follow the requirement under section 23 of the Prostitution Regulation for each room to have an alarm. The maximum penalty is 4 penalty units (\$551.40).
- 10.53 Workplace Health and Safety Queensland inspectors can also attend licensed brothels to make sure general work health and safety laws are being followed.
- 10.54 Police officers can also issue penalty infringement notices for offences under the Prostitution Act and Prostitution Regulation.<sup>310</sup> Authorised police officers have powers to enter licensed brothels under part 3, division 3 of the Prostitution Act.
- 10.55 The PLA can refer suspected offences under the Prostitution Act and Prostitution Regulation to the Queensland Police Service for investigation and action. It is an offence for a licensee or an approved manager to provide prostitution at the brothel in breach of any condition or restriction of a licence or certificate.<sup>311</sup>
- 10.56 As well as workplace laws, criminal laws (such as laws against assault, rape and stalking) are part of the overall framework that protects the safety of sex workers and others. A police officer may also enter a licensed brothel for an emergency, in response to a call for assistance or as part of an investigation under another police power. Entries made under these circumstances are regulated by the *Police Powers and Responsibilities Act 2000*. Police are responsible for investigating crimes such as rape, assault, or stalking. They are also responsible for investigating illegal sex work.

## Work health and safety and the sex work industry

- 10.57 Queensland's licensed brothels generally operate to a high standard of compliance with their regulatory requirements,<sup>312</sup> and 'provide a relatively safe and healthy environment' for sex work.<sup>313</sup> The PLA works with licensed brothels to ensure they meet the best practice operating standards for work health and safety.<sup>314</sup> However, the PLA identifies a '[I]ack of capacity to respond adequately to health and safety risks, impacting sex workers, clients and the community'.<sup>315</sup>
- 10.58 In 2017, Respect Inc surveyed 200 sex workers in licensed brothels in Queensland. Participants in the survey identified barriers to accessing work health and safety standards in brothels, including inadequate training and a lack of awareness of legal rights:<sup>316</sup>
- 33% of participants said they did not think their training was sufficient;
  - 30% said they were unsure or not aware of their legal rights as a sex worker working in a licensed brothel;
  - 29% said management did not always allow them to refuse clients; and
  - 49% said they had or might have felt pressured by management to see a client they were not comfortable with.

309 *State Penalties Enforcement Regulation 2014* (Qld) ss 4–6, sch 1.

310 *State Penalties Enforcement Regulation 2014* (Qld) ss 4–6, sch 1.

311 *Prostitution Act 1999* (Qld) s 78(1)(c). The maximum penalty is 200 penalty units (\$27 570) or five years imprisonment.

312 PLA, *Annual Report 2020–2021* (2021) 4.

313 *Ibid* 59.

314 *Ibid* 15.

315 *Ibid* 11.

316 Respect Inc, *Regulating Bodies: An In-Depth Assessment of the Needs of Sex Workers [Sexual Service Providers] in Queensland's Licensed Brothels* (2017) 14, 27, 30.

- 10.59 Participants were reluctant to report experiences of workplace coercion or bullying because of stigma, discrimination and concerns about confidentiality. Nearly half the participants said they would not make a complaint to police if they were assaulted at work.<sup>317</sup>
- 10.60 Participants also identified health and safety issues with their work environment, including a lack of light and ventilation and inadequate facilities.<sup>318</sup>
- 10.61 The report emphasised the importance of peer-driven education and advocacy and improving relationships between sex workers, regulators and the police.<sup>319</sup>
- 10.62 Licensed brothels represent only a small proportion of the overall sex work industry in Queensland: see chapter 3.
- 10.63 As self-employed persons, private sex workers have obligations under general work health and safety laws to ensure their own health and safety while at work and the health and safety of others who may be put at risk. However, some sex worker organisations say the current laws regulating sex work are a barrier to work health and safety, because private sex workers may not work together for safety or to share costs. This limits the type of safety strategies that can be used. Private sex workers can not lawfully, for example:
- share staff or premises;
  - have a receptionist manage bookings and screen clients for them;
  - message another sex worker to check in for safety before and after an appointment (although they can tell another person who is not a sex worker and who does not take on this role for any other sex worker); or
  - hire a bodyguard or driver, unless that person is licensed as a bodyguard or crowd controller and does not work for any other sex worker.
- 10.64 Some sex worker organisations say this means private sex workers 'have to choose between working safely and working legally'. They also say these laws reduce the likelihood that sex workers will report crime (because of fear of prosecution) and increase isolation and stigma.<sup>320</sup>
- 10.65 Other forms of sex work are illegal in Queensland (such as sex work in escort agencies or massage parlours, street-based sex work and two or more private sex workers working together under a co-operative arrangement). It has been noted that sex workers in the illegal industry:<sup>321</sup>
- are vulnerable to the risk of abuse and exploitation by operators and clients. Health and safety may not be prioritised, and conditions may be unsanitary. Because these operations are unregulated and unscrutinised, workers do not have access to basic protections and avenues of redress.
- 10.66 Some sex worker organisations say decriminalisation will improve access to existing work health and safety laws for all sex workers. They also say it will improve sex worker health and safety by decreasing isolation and stigma and increasing opportunities for education and support.<sup>322</sup> It has also been noted that decriminalisation will improve the safety of sex workers

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317 Ibid 21.

318 Ibid 38.

319 Ibid 42–3 (and at 35, 37).

320 See, eg, E Jeffreys, E O'Brien & J Fawkes, *The Case for Decriminalisation: Sex Work and the Law in Queensland*, Crime and Justice Briefing Paper (QUT, 2019); Z Stardust et al, "I wouldn't call the cops if I was being bashed to death": sex work, whore stigma and the criminal legal system' (2021) 10(3) *International Journal for Crime, Justice and Social Democracy* 142, 144; B Smee, 'Sex workers in Queensland must choose: be safe or be legal', *The Guardian* (online, 7 March 2019) <<https://www.theguardian.com/society/2019/mar/07/sex-workers-in-queensland-must-choose-be-safe-or-be-legal>>.

321 PLA, *Annual Report 2020–2021* (2021) 18.

322 See generally Scarlet Alliance, above n 266, ch 3.

by removing barriers to accessing justice, empowering sex workers to know their rights, and increasing the likelihood of sex workers reporting crimes to police.<sup>323</sup>

- 10.67 In 2008, the New Zealand Prostitution Law Review Committee completed a review of the impact of decriminalisation on the sex work industry in New Zealand.
- 10.68 Generally, the Committee noted that decriminalisation had an overall positive effect on sex worker health and safety, with sex workers reporting ‘increased confidence, well-being and a sense of validation’ because sex work was no longer criminal.<sup>324</sup>
- 10.69 Research indicated there was an increased level of awareness of health and safety requirements in the sex work industry. The committee observed there was a low level of complaints, which might indicate a high level of compliance. However, it also considered that a complete picture could not be given because there was no system of regular inspections. It noted that inspections tended to be reactive in response to a complaint, rather than proactive. The Committee recommended that the health and safety regulator should be resourced to carry out regular inspections. It also recognised the need for education and support and for a good relationship to be developed between the regulator and the sex work industry to promote cooperation and compliance.<sup>325</sup>
- 10.70 The Committee also noted the importance of improving relationships between the sex work industry and the police. There was conflicting evidence on whether sex workers were more likely to report violent behaviour by clients to police. It was intended that decriminalisation would make it more likely for sex workers to report such behaviour to police, which would increase their safety ‘as clients realised that they could no longer “get away with it”’. The Committee noted that it had been only five years since decriminalisation and that ‘simply decriminalising an industry will not produce overnight changes in entrenched attitudes’. It also noted that stigma was a key factor in the non-reporting of incidents and would take time to lessen.<sup>326</sup>

### What approach is taken in other jurisdictions?

- 10.71 In New South Wales, the Northern Territory, and New Zealand, where sex work is decriminalised, sex work businesses are regulated by general laws that apply to all businesses. This includes work health and safety laws and planning laws.
- 10.72 The same approach is being taken in Victoria. The *Sex Work Decriminalisation Act 2022 (Vic)* repeals the licensing scheme and criminal laws that are not needed.<sup>327</sup> The sex work industry will be regulated just like any other industry, by agencies such as local government, WorkSafe and the Department of Health.<sup>328</sup>
- 10.73 Some jurisdictions have kept sex work-specific health laws (see chapter 11) and some have specific guidelines for work health and safety.

<sup>323</sup> See, eg, G Abel, ‘A decade of decriminalization: sex work “down under” but not underground’ (2014) *Criminology & Criminal Justice* (online).

<sup>324</sup> Prostitution Law Review Committee, *Report on the Operation of the Prostitution Reform Act 2003* (May 2008) 50.

<sup>325</sup> *Ibid* 53, 55.

<sup>326</sup> *Ibid* 58.

<sup>327</sup> *Sex Work Decriminalisation Act 2022 (Vic)* ss 1(c), 37. The licensing system in the *Sex Work Act 1994 (Vic)* will be repealed in the second stage of decriminalisation.

<sup>328</sup> Department of Justice and Community Safety (Vic), *Decriminalising Sex Work* (Discussion Paper, 2021) 3.



## Is there a role for special guidelines or a code of practice?

- 10.74 Guidelines and codes of practice give people conducting a business or undertaking practical guidance on how they can meet their work health and safety obligations. Many industries in Queensland have codes of practice under the *Work Health and Safety Act 2011*.<sup>329</sup>
- 10.75 The PLA gives brothel licensees an Operational Standards Manual that gives practical guidance about how brothel licensees can meet their work health and safety obligations and control hazards specific to sex work.<sup>330</sup>
- 10.76 Under a decriminalised framework, Workplace Health and Safety Queensland can work with the sex work industry to ensure work health and safety. Practical guidance and education may be needed, especially given the change to a decriminalised sex work industry. Only some forms of sex work are legal under the current framework and most sex work in Queensland occurs outside the licensed sector. Guidance could be given in sex work-specific guidelines or a code of practice.
- 10.77 New South Wales and New Zealand have work health and safety guidelines for the sex work industry.<sup>331</sup> Guidelines are also proposed in Victoria.<sup>332</sup>
- 10.78 The Australian Capital Territory has a code of practice for the sex work industry.<sup>333</sup>
- 10.79 Scarlet Alliance has also developed a Best Practice Guide to Occupational Health and Safety in the Sex Industry.<sup>334</sup> They suggest this could be adapted for use in all Australian states and territories.<sup>335</sup>

## What matters are covered by the guidelines or codes of practice?

- 10.80 The guidelines in New South Wales and New Zealand and the code of practice in the Australian Capital Territory, at [10.77] to [10.78] above, cover several matters. These include:<sup>336</sup>
- training and information that should be given to staff, both as part of the induction process and ongoing (including training in safe sex measures, the correct way to use equipment, and work safety procedures);
  - supply and use of personal protective equipment (such as condoms and lubricant);
  - installing safety devices and establishing policies to ensure personal security and prevent workplace violence, bullying and harassment (such as alarm buttons, screening clients, ejecting inappropriate clients and having clear safety procedures);
  - housekeeping and cleaning (including the disposal of sharps, managing clinical waste, dealing with blood and other bodily fluid spills and laundry management);
  - providing and maintaining amenities (including adequate heating, cooling and lighting, and ergonomic furniture).

329 See generally WorkSafe.qld.gov.au, 'Codes of practice' (2022) <<https://www.worksafe.qld.gov.au/laws-and-compliance/codes-of-practice>>.

330 PLA, *Operational Standards Manual*.

331 SafeWork NSW, 'Health and safety guidelines for sex services premises in NSW' <<https://www.safework.nsw.gov.au/resource-library/other-services/health-and-safety-guidelines-for-sex-services-premises-in-nsw>>; Occupational Safety & Health Service (NZ), *A Guide to Occupational Health and Safety in the New Zealand Sex Industry* (2004).

332 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 October 2021, 10 (Horne, Minister for Ports and Freight, Minister for Consumer Affairs, Gaming and Liquor Regulation, Minister for Fishing and Boating).

333 Work Health and Safety (Sexual Services Industry) Code of Practice 2011 (ACT).

334 D Edler, *A Guide to Best Practice: Occupational Health and Safety in the Australian Sex Industry* (Scarlet Alliance, 1999).

335 Scarlet Alliance, above n 266, 42.

336 See also Edler, above n 334.

10.81 Similar matters are covered in the PLA Operational Standards Manual for brothel licensees.<sup>337</sup>

### How are guidelines or codes of practice made and what status do they have?

10.82 Codes of practice are approved by the Minister under section 274 of the *Work Health and Safety Act 2011*. A person conducting a business or undertaking must either:<sup>338</sup>

- follow an approved code of practice; or
- manage hazards and risks arising from work in a way that is different to the code but meets a standard of health and safety that is the same as or higher than the standard required in the code.

10.83 A code of practice can be used in legal proceedings for an offence against the Act. The court may have regard to the code as evidence of what is known about a hazard or risk, risk assessment or risk control. It can also use the code to decide if a person has met their duty by doing what is reasonably practicable.<sup>339</sup>

10.84 An inspector can also refer to a relevant code of practice when directing a person, in an improvement or prohibition notice, to remedy a contravention.<sup>340</sup>

10.85 Guidelines are less formal than a code of practice as they are not approved under the Act. However, they can educate and influence practice and give practical guidance on how sex work businesses can meet their work health and safety obligations. Guidelines could be made by Workplace Health and Safety Queensland, in consultation with other agencies and organisations and with the sex work industry.

10.86 In New South Wales, it can be a condition of receiving development consent from local government that a sex work business must follow the health and safety guidelines.<sup>341</sup>

## CONSULTATION QUESTIONS

**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?

## Workers' compensation

10.87 Workers' compensation is a form of insurance paid to employees if they are injured at work or become sick because of their work.

<sup>337</sup> PLA, *Operational Standards Manual*.

<sup>338</sup> *Work Health and Safety Act 2011* (Qld) s 26A.

<sup>339</sup> *Work Health and Safety Act 2011* (Qld) s 275.

<sup>340</sup> *Work Health and Safety Act 2011* (Qld) s 204.

<sup>341</sup> P Crofts et al, 'Ambivalent regulation: the sexual services industries in NSW and Victoria—sex work as work, or as a special category?' (2012) 23(3) *Current Issues in Criminal Justice* 393, 404. See also, eg, City of Sydney, *Adult Entertainment and Sex Industry Premises Development Control Plan* (2006).

- 10.88 Each state and territory has workers' compensation laws.
- 10.89 Queensland's workers' compensation framework is established by the *Workers' Compensation and Rehabilitation Act 2003* and the *Workers' Compensation and Rehabilitation Regulation 2014*.
- 10.90 The Act requires all Queensland employers to take out workers' compensation insurance to cover themselves and workers they employ against work-related injury or illness. This may be under either a WorkCover insurance policy or a licence as a self-insurer.
- 10.91 The policy covers a person who is a 'worker' employed by the business within the meaning of the Act: see box 7.<sup>342</sup>
- 10.92 The policy does not cover a person who is not a 'worker' for purposes of the Act (for example, a person who is a director or partner of their own business). They can take out Workplace Personal Injury Insurance, although this is not compulsory.<sup>343</sup>
- 10.93 If a sex worker meets the definition of a 'worker', they will be covered by the employer's accident insurance policy for the business. Whether a person is a worker for the purposes of workers' compensation will depend on their working arrangements and how they are engaged.<sup>344</sup>
- 10.94 Sex workers who do not meet the definition of worker (such as independent contractors, sole operators or self-employed persons, and those operating in a partnership) can take out their own insurance. This is the same for workers in other industries.

#### Box 7: Who is a 'worker' for the purposes of workers' compensation?

- Only an individual can be a worker (sole traders may be considered workers, but a corporation, partnership or trust is not a worker)
- A 'worker' is a person who works under a contract and, in relation to the work, is an employee for the purpose of assessment for PAYG withholding under the *Taxation Administration Act 1953* (Cth)
- The Act also sets out specific inclusions and exclusions
- In particular, a person is a worker if:
  - they are paid entirely or partly by commission; or
  - are a party to a 'contract of service'

## Are contracts for sex work enforceable?

- 10.95 A court may hold that a contract is unenforceable because it:<sup>345</sup>
- involves conduct that is criminal or otherwise prohibited by legislation; or
  - is contrary to public policy.
- 10.96 A contract may be held to be contrary to public policy if it is 'sexually immoral'.<sup>346</sup> For example, in *Ashton v Pratt (No 2)*, it was found that an agreement by a wealthy businessman to pay a sex worker to become his mistress would be unenforceable as it was a 'contract to provide meretricious sexual services'.<sup>347</sup>
- 10.97 On the other hand, courts have held that illegality does not prevent sex workers, or other persons who work in brothels, from accessing benefits under employment legislation. For a

<sup>342</sup> *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 11, sch 2; WorkSafe.qld.gov.au, 'Who should I cover' (14 September 2021) <<https://www.worksafe.qld.gov.au/claims-and-insurance/workcover-insurance/who-should-i-cover>>.

<sup>343</sup> WorkSafe.qld.gov.au, 'Who should I cover' (14 September 2021) <<https://www.worksafe.qld.gov.au/claims-and-insurance/workcover-insurance/who-should-i-cover>>.

<sup>344</sup> Ibid.

<sup>345</sup> M Irving, *The Contract of Employment* (LexisNexis, 2nd ed, 2020) [5.30]–[5.31].

<sup>346</sup> Ibid.

<sup>347</sup> [2012] NSWSC 3.

contract to be unenforceable, the illegality must be 'sufficiently serious' for public policy to require that result. The court can also have regard to wider public policy considerations. For example, in *Phillipa v Carmel*, a sex worker who performed sex services at a brothel was entitled to seek compensation for unfair dismissal under the *Industrial Relations Act 1988* (Cth).<sup>348</sup> In *Barac v Farnell*, a receptionist in a brothel was entitled to seek workers' compensation under the *Workers' Compensation Act 1951* (ACT).<sup>349</sup>

- 10.98 Under a decriminalised framework, criminal offences that are no longer needed will be removed. Sex work will be recognised as legitimate work.
- 10.99 Some sex worker organisations say decriminalisation will remove barriers to enforcing contracts for sex work (such as contracts between sex worker and client, or for hiring premises, drivers, receptionists or security).<sup>350</sup>
- 10.100 The Northern Territory and New Zealand, which have decriminalised sex work, have included legislative provisions to make it clear that a contract for sex work is not illegal or unenforceable on public policy grounds.
- 10.101 Section 7 of the *Sex Industry Act 2019* (NT) says:
- Contract for sex work not void**
- No contract for or to arrange sex work is illegal or void on public policy or similar grounds.
- 10.102 This section:<sup>351</sup>
- explicitly provides that contracts for sex work are legal, thereby overriding the common law position that a contract for sex work is illegal or void on public policy or similar grounds, purely because the subject matter of the contract relates to sex work.
- 10.103 Similar provision is made in section 7 of the *Prostitution Reform Act 2003* (NZ). It was explained that:<sup>352</sup>
- Common law may currently make contracts for commercial sexual services unenforceable. The purpose of clause 5 is to ensure that contracts for the provision of (or arranging the provision of) commercial sexual services are enforceable. It is part of the overall framework of the bill that aims to make prostitution subject to the controls and regulations that govern the operation of other businesses.
- 10.104 Other Australian states and territories, including New South Wales and Victoria, do not have the same provision.

## CONSULTATION QUESTION

- 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?

<sup>348</sup> [1996] IRCA 451.

<sup>349</sup> (1994) 53 FCR 193.

<sup>350</sup> Scarlet Alliance, above n 266, 44, 47.

<sup>351</sup> Explanatory Statement, Sex Industry Bill 2019 (NT) 2.

<sup>352</sup> Justice and Electoral Committee, New Zealand Parliament, *Prostitution Reform Bill 66-2* (Report, November 2002) 10.

## Sex worker autonomy

10.105 Sex work laws in the Northern Territory and New Zealand include a positive statement that sex workers may refuse to perform sex work despite anything in a sex work contract.

10.106 Section 9 of the *Sex Industry Act 2019* (NT) provides:

### Refusal to perform sex work

- (1) Despite anything in a contract for sex work, a person may, at any time, refuse to perform or continue to perform sex work.
- (2) The fact that a person has entered into a contract for sex work does not of itself constitute consent for the purposes of the criminal law if the person does not consent, or withdraws the person's consent, to performing sex work.
- (3) However, nothing in this section affects any right to rescind or cancel, or to recover damages for, a contract for sex work that is not performed.

10.107 The explanatory notes say this balances 'the competing interests between worker safety and the general application of contract law'.<sup>353</sup>

10.108 Section 9(1) states the right of sex workers 'to refuse to undertake sex work'. This 'is to allow a sex worker to stop the booking and withdraw their services at any time where they fear for their safety or wellbeing (whether it be physical, psychological or health), or otherwise'.<sup>354</sup>

10.109 Section 9(2) makes it clear that a contract for sex work does not constitute consent for the purposes of the criminal law.<sup>355</sup>

Reflecting that consent is a fundamental (and ongoing) requirement for sex work, subclause (2) prevents an offender using the consent initially provided through a contract for sex work as a defence to an assault or other crime committed against the sex worker. While a worker may have consented to engage in sex work, that consent does not necessarily translate to consent in the participation of activities that would ordinarily constitute a criminal offence (such as assault or sexual assault).

10.110 Section 9(3) reinforces the common law position that applies to all contracts: that, where a person breaches a contract (in this case by exercising their right to refuse under section (1)), and does not provide what was contracted for, the other party may have a right to reimbursement, or remedies other than specific performance. However, it was explained that:<sup>356</sup>

This does not mean that sex workers will be required to pay compensation to clients on every occasion a contract is terminated. As the common law acknowledges, the entitlement to damages for a breach of contract will depend on the particular circumstances around that breach. For example, if a worker is assaulted, then an offence has occurred, and it is that action which has brought the booking to an end at the instigation of the perpetrator. There would not be recourse under the law of contract (or the criminal law) for the perpetrator to seek compensation as the perpetrator brought the contract to an end, not the worker.

Likewise, if the worker is an employee, that worker would not be liable to reimburse an employer (operator) if that employer were obliged to pay compensation because the worker refused to provide the services agreed to between the employer and the client. Under general employment law, the employer is vicariously liable for actions of its

<sup>353</sup> Explanatory Statement, *Sex Industry Bill 2019* (NT) 3.

<sup>354</sup> *Ibid.*

<sup>355</sup> *Ibid.* Consent where a person fraudulently promises to pay money to a sex worker is discussed in ch 18.

<sup>356</sup> Explanatory Statement, *Sex Industry Bill 2019* (NT) 3–4.

employees, and is obliged to indemnify them for any actions they have done in good faith. In addition, public policy precludes an employer seeking compensation from an employee where that employee is exercising a statutory right in favour of the employee's health and safety (such as that provided under subclause (1)).

10.111 Section 17 of the *Prostitution Reform Act 2003* (NZ) includes a similar provision.

10.112 During the parliamentary debates, it was noted that sex workers would:<sup>357</sup>

have the right, at any time, to withdraw from a contract to provide a sexual service if they felt the situation was getting threatening.

10.113 The Justice and Electoral Committee noted that a provision stating the right of sex workers to refuse to provide commercial sexual services:<sup>358</sup>

equalises the power imbalance between sex workers and their clients and management, it recognises the right to choose without fear of reprisal, and gives sex workers power and ability to make choices about bodily integrity.

10.114 There is no similar provision in other Australian states and territories.

10.115 Under work health and safety laws, a person conducting a business or undertaking must have effective risk management processes to control risks to work health and safety. This includes risks of workplace violence, abuse, bullying, coercion and harassment. Workers also have a right to stop or refuse to carry out work if it is unsafe. For example, sex workers may stop or refuse to perform a sexual practice if there is a risk to health (for example, if the client refuses to wear a condom and there is risk of contracting a sexually transmissible infection), or if there is a risk to safety from violent, abusive or threatening behaviour.

10.116 The work health and safety guidelines for the sex work industry in New South Wales state:<sup>359</sup>

- employers should '[a]cknowledge that workers have the right to refuse particular clients on the basis of prior violent, abusive or threatening behaviour by that client'; and
- if 'a client requests that a worker does not use a condom, the worker has the right to refuse to engage in any sexual practice', due to increased risk of contracting a sexually transmissible infection.

10.117 The code of practice in the Australian Capital Territory says that:<sup>360</sup>

- '[s]ex workers have the right to refuse particular clients, or particular kinds of work'; and
- '[a]ny worker has the right to refuse to participate in any work activity where they have reason to believe that to do so may place them at risk'.

10.118 In Queensland, brothel licensees must also follow the conditions of their licence, including the following standard conditions.

10.119 Brothel licence condition 5.1 says:

**Sex Worker Autonomy**

Sex workers must not, either expressly or impliedly, be:

- a) coerced, directed, bullied, threatened, or unfairly penalised by whatever means; or

<sup>357</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 19 February 2003, 3608 (T Barnett).

<sup>358</sup> Justice and Electoral Committee, New Zealand Parliament, *Prostitution Reform Bill 66-2* (Report, November 2002) 17.

<sup>359</sup> SafeWork NSW, 'Health and safety guidelines for sex services premises in NSW' <<https://www.safework.nsw.gov.au/resource-library/other-services/health-and-safety-guidelines-for-sex-services-premises-in-nsw>> [6], [9].

<sup>360</sup> Work Health and Safety (Sexual Services Industry) Code of Practice 2011 (ACT) app 4 (prevention of workplace violence).

- b) compelled to provide an introduction, to see a client, or to provide a particular service.
- 10.120 Brothel licence condition 7.2(b) requires new managers to be given information to make sure they always follow brothel licence condition 5.1.
- 10.121 Brothel licence condition 6.2(c) also requires that the induction of sex workers includes information about brothel licence condition 5.1. This is restated in the PLA Operational Procedures Manual for brothel licensees.
- 10.122 Some sex worker organisations say decriminalisation will improve access to workplace laws, including work health and safety laws, and empower sex workers.<sup>361</sup>
- 10.123 Scarlet Alliance tells us that:
- Sex workers must be able to retain a contractual right to withdraw services at any time during a booking, without this being perceived as a contractual breach that may cause monetary liability. This ensures that we are able to enforce our boundaries and practice safety strategies without the fear of clients pursuing us for breach of contract.

## CONSULTATION QUESTION

- Q22** Should there be a new law stating that a person may, at any time, refuse to perform or continue to perform sex work?

