



29 September, 2023

NSW Law Reform Commission
nsw-lrc@justice.nsw.gov.au

RE: Anti Discrimination Act 1977 (NSW) Review—Preliminary Submission

Dear Commission,

Thank you for the opportunity to provide this preliminary submission in relation to the NSW Anti-Discrimination Act, 'the Act'. This review is important in furthering and cementing the rights of all people in New South Wales, and sex workers are an integral part of the New South Wales community who urgently require discrimination and vilification protection under the Act to address the excessively high levels of discrimination we experience.

Respect Inc is the state-wide sex worker organisation in Queensland that provides a comprehensive health promotion and peer education program for sex workers. Respect Inc has offices and sex worker drop-in spaces in Cairns, Brisbane and the Gold Coast and provides regional outreach in other locations.

Our submission asserts that the Act should be modernised and simplified to better reflect contemporary community standards and that the discrimination and vilification protections should be reformed to include the protected attributes 'sex work' and 'sex worker'. Sex workers (and other complainants) must be able to protect their personal identity throughout the complaints process under the Act in order for them to be accessible in the first place.

We would also like to point out the significant barriers that exist in lodging discrimination complaints and request that you consider the option of anonymous submissions from marginalised communities, including sex workers, in your consultation phase. This will assist in maximising input into the outcome of the review. Many sex workers have utilised this option in other jurisdiction's anti-discrimination reviews.

Respect Inc also endorses the submissions made by SWOP NSW and Scarlet Alliance, Australian Sex Workers Association.

Lulu Holiday
Respect Inc State Coordinator

Range of attributes protected against discrimination requires reform

Sex workers in Australia experience extremely high levels of discrimination across many aspects of our personal and work lives.¹ Recognition of excessive levels of discrimination has resulted in sex workers being covered by attributes in anti-discrimination legislation. Research in 2020 and 2015 found a high prevalence of stigma and discrimination perpetrated against sex workers in Australia, further highlighting the importance of specific anti-discrimination and vilification protection for sex workers:

In 2020, [Scarlet Alliance conducted research in partnership with CSRH](#) that surveyed 647 sex workers in relation to stigma and discrimination; 96% of participants reported experiencing any stigma or discrimination related to their sex work within the last 12 months, including 34% who indicated that this 'often' or 'always' occurred. 91% of participants reported any negative treatment by health workers, including 24% who indicated this 'often' or 'always' happened. [In 2015, research by CSRH](#) found that 31% of health workers self-reported they would behave negatively toward sex workers because of their sex work. Among the general public, 64% self-reported they would behave negatively toward sex workers because of their sex work... In some jurisdictions, council staff have been known to take steps such as informing landlords about someone's sex work with the goal of having sex workers evicted. Stigma and discrimination creates housing instability.²

Having not reviewed its discrimination legislation since well prior to the changes in sex work law, New South Wales laws contain a significant gap with no discrimination or vilification protection that covers sex work. While New South Wales has undertaken some legislative reform to decriminalise many aspects of sex work, without anti-discrimination protections the impact of discrimination and vilification remains high.

Research in other states and territories and nationally where sex workers have been surveyed, demonstrates that rates of discrimination range from 72–96% of sex workers.³ The scale of this discrimination points to the widespread and normalised unfavourable treatment of sex workers across many areas of life. Examples include: in the areas of goods and services provision, health care settings, accommodation, banking, superannuation and insurance, education, work, the administration of state laws and programs as well as sexual harassment and vilification. Reports to the New South Wales sex worker organisation, SWOP NSW, indicates that the levels are also high in this state.

¹ Scarlet Alliance (2022) Briefing paper: Anti-discrimination & vilification protections for sex workers in Australia. https://scarletalliance.org.au/wp-content/uploads/2022/07/Anti_Discrim2022.pdf

² *ibid.*

³ DecrimQLD and Respect Inc. (2022) Unprotected and under-reported. <https://respectqld.org.au/wp-content/uploads/Synopsis-1-ADA.pdf>

For these reasons the new attributes of ‘sex work and sex worker’ should be added to the Act and should include protection from discrimination in all the same areas covering other protected attributes, i.e., employment, education, accommodation, registered clubs, and in the provision of goods and services, etc. The attribute should cover where a person is presumed to be, has previously been, is currently ‘doing’, or has characteristics appertaining generally or imputed to sex workers, as well as our relatives or associates.

We note that multiple organisations in New South Wales have recommended this change to the Act’s attributes in a range of forums, including in the call-out for submissions by Alex Greenwich ahead of the development of the Equality Bill. In addition, the recommendation is also a finding of the Gender Centre, SWOP NSW and Professor Noah Riseman from the Australian Catholic University project to document the experiences of trans sex workers to inform the *Special Commission of Inquiry into LGBTIQ hate crimes*. Recommendation 9 includes ‘adding “sex work” and “sex worker” as protected attributes under the Anti-Discrimination Act’ in the Speaking Out Against Anti-Trans Violence: A Call for Justice report.⁴

Note on other attributes covering sex work

Consultation with sex workers and a review of discrimination cases in Queensland has demonstrated that the attribute ‘lawful sexual activity’ does not provide adequate discrimination protection for sex workers and fails to provide clear direction to the courts or the community.

The attribute ‘lawful sexual activity’ also fails to provide clear direction as to who is covered by the attribute and what activities are protected from unlawful discrimination to the Queensland community, services and institutions as well as to the Human Rights Commission, QCAT and the courts. This is demonstrated by the lengthy legal debates over the attribute and definition that have ensued in each case heard by these tribunals and the court, and the confusion among lawyers, sex workers and services as to rights and responsibilities. For these reasons we do not recommend the attribute ‘lawful sexual activity’.

In the 2022 Anti-Discrimination Act review the Queensland Human Rights Commission supported the need to change the Queensland attribute of ‘lawful sexual activity’ to ‘sex worker’ and ‘sex work’.

⁴ Riseman, N (2023) *Speaking out against anti-trans violence: A call for justice*. Australian Catholic University.
<https://lgbtiq.specialcommission.nsw.gov.au/assets/lgbtiq/NSW-Special-Commission-of-Inquiry-into-LGBTQI-Hate-Crimes-Submission.pdf>

We note that the Scarlet Alliance Briefing Paper: Anti-Discrimination & Vilification Protections For Sex Workers in Australia⁵ states:

There is a common misconception that attributes ‘occupation’, ‘trade’, ‘profession’, or ‘calling’, and ‘lawful sexual activity’ provide redress for sex workers.

Avoid limitations of attributes in other jurisdictions by using attributes ‘sex work’ and sex worker’

It is essential that sex workers are protected from discrimination as a result of being both a sex worker and doing sex work. Sex workers experience high levels of discrimination in both areas.

The attribute of ‘lawful sexual activity’ has been contained in the Act since it was first passed in 1991; however, it did not include any statutory definition.⁶ This changed significantly with the passage of the amendments in the *Discrimination Law Amendment Act 2002 (Qld) (No. 74/2002)* with the addition of the definition of ‘lawful sexual activity’ as meaning ‘a person’s status as a lawfully employed sex worker, whether or not self- employed’ (Schedule 1, p.145).

In the decision of *Dovedeen Pty Ltd & Anor v GK [2013] QCA 116*⁷, the Court of Appeal made it clear that this express statutory definition in the Act limits the attribute to that definition—the protected attribute is a person’s ‘status’ and does not extend to the ‘activity’ of engaging in sex work.⁸ This experience in Queensland informs our organisation’s recommendation that New South Wales should instead include an attribute covering ‘sex work’ (performing sex work) and ‘sex worker’ (the status of being a sex worker).

Attribute to include protection in all areas

The new attributes of ‘sex work and sex worker’ should provide protection from discrimination in all the same areas available to other protected attributes. This includes: employment, education, accommodation, registered clubs, and in the provision of goods and services, etc. It is important that this protection also includes: *presumed to be, previously been, currently ‘doing’, having characteristics appertaining generally or imputed to sex workers, as well as our relatives or associates.*

⁵ Scarlet Alliance, Australian Sex Workers Association. (2022). *Briefing paper: Anti-discrimination & vilification protections for sex workers in Australia.*

https://scarletalliance.org.au/library/Anti_Discrim2022

⁶ *Anti-Discrimination Act 1991* (Qld) (as passed, No. 85/1991).

⁷ *Dovedeen Pty Ltd & Anor v GK* (2013). QCA 116.

<https://www.queenslandjudgments.com.au/caselaw/qca/2013/116>

⁸ *Dovedeen Pty Ltd & Anor v GK* (2013). QCA 116. Per Fraser and Gotterson JJA at [18]-[24].

<https://www.queenslandjudgments.com.au/caselaw/qca/2013/116>

Definition of sex work

As it will be necessary for a definition to be included in the Act we support the following definition by SWOP NSW as it captures the range of sex work taking place in 2023:

Sex worker means a person who performs sex work. Sex work means the provision by a person of services that involve participating in sexual activity, including erotic entertainment, in return for payment or reward.

Whether the existing tests for discrimination are clear, inclusive and reflect a modern understanding of discrimination

Comparator test

It is our opinion that the case *Payne v APN News & Media* (2015)⁹ demonstrates how the application of a comparator test does not support sex workers seeking redress for discrimination. Sex workers are routinely charged more for advertising in the personals section of classifieds pages, set aside for sex work advertisements. Settlements at conciliation for this type of discrimination have not been uncommon. However, the ruling in this case caused the case to fail when it was decided that another advertiser in a different section of the newspaper was not a suitable comparator. Instead, it was suggested that the comparison would need to be to someone advertising in the personals section who was not a sex worker, and who was charged less. We do not accept that this decision was made with an adequate understanding of the issues. Equally, the case of *Dovedeen Pty Ltd v GK* (2013) demonstrates the impact of arguments about the 'correct' comparator reducing the effectiveness of the Act. Over three hearings the issue of the comparator was debated ad nauseum to the detriment of fairness.

We note other jurisdictions have removed the comparator test requirement and the Queensland Human Rights Commission review recommended this for Queensland.

Intersectional discrimination

The sex worker community is diverse, encompassing sex workers who are part of the LGBTIQ+ communities, Aboriginal and Torres Strait Islander people, people living with HIV (PLHIV), people with disability, people who use drugs, and a wide range of ages, racial and cultural backgrounds, and religions. When sex workers experience discrimination it can be due to the combined effect of attributes (intersectionality).

⁹ *Payne v APN News & Media* (2015). QCAT 514.
<https://www.qhrc.qld.gov.au/resources/case-studies/lawful-sexual-activity>

Respect Inc recommends changes that remove the need for use of a comparator test, allow for recognition of combined attributes (intersectionality) and make judgments on the basis of 'unfavourable treatment', and 'disadvantage'. A unified approach which determines that a policy or practice is invalid if it disadvantages a protected group, whether directly or indirectly, should be considered.

Adequacy of protections against vilification

Sex workers in New South Wales experience vilification, but as this is not covered under the Act sex workers currently have no recourse to justice. This vilification takes many forms including how sex workers are referred to and described in the media and by members of the public. Vilification causes harm and increases the risk of violence for our community members.

A recent report *Speaking Out Against Anti-Trans Violence: A Call for Justice* documents the experiences of trans sex workers in New South Wales and informs the Special Commission of Inquiry into LGBTIQ hate crimes. It notes 'sex workers also need vilification protection under the Anti Discrimination Act and by inclusion in section 93Z(1) of the NSW Crimes Act'. It too recommends adding 'sex work' and 'sex worker' as protected attributes under the Anti-Discrimination Act

The joint submission of Scarlet Alliance and Respect Inc in August 2021 in Queensland¹⁰ outlined some examples of the wide variety of types of vilification sex workers experience:

Sex workers experience vilification from members of the general public, the media, organisations, law enforcement and government actors and agencies. Entrenched stigma and discrimination, historic criminalisation and a lack of consistent and comprehensive anti-discrimination and anti-vilification protections for sex workers has meant that sex workers are treated as an 'easy target' for vilification as individuals and as a collective in Queensland. Due to the absence of sex worker-specific vilification protections in Queensland, as well as the barriers to reporting vilification based on race, religion, gender or sexuality experienced by sex workers...vilification and hate crimes enacted against sex workers go undocumented and unreported.¹¹

¹⁰ Respect Inc and Scarlet Alliance, Australian Sex Workers Association. (2021). Submission to the Legal Affairs and Safety Committee *Inquiry into serious vilification and hate crimes*.

https://respectqld.org.au/wp-content/uploads/Documents/sub_250821.pdf

¹¹ Ibid.

Exceptions, special measures and exemption processes

No exceptions/exemptions relating to sport, superannuation, insurance, or public health should apply to sex workers, or for religious, private educational or charitable bodies. We strongly recommend limiting exceptions to anti-discrimination protections currently possible under the Section 54 'Statutory Authority', and expanding the application of discrimination law to government bodies and authorities, including the police.

Adequacy and accessibility of complaints procedures and remedies

Providing options for anonymous complaints

Sex workers (and other complainants) in New South Wales must be able to protect their personal identity throughout the complaint process under the Act (this is a necessary safety measure for sex workers who do not routinely share their legal names with clients of sex industry business owners/operators). Provisions for anonymity that are clear and certain would make the process less intimidating and significantly reduce the risk for sex workers in accessing our rights. Protecting sex workers' anonymity throughout the entire process is critical to being able to make a complaint as a sex worker. The procedures should make it clear that the anonymity of a sex worker will be protected at every stage. This must occur to allow sex workers to have faith in, and use, these processes available to other citizens.

Privacy concerns related to a complainant's sex work being connected to their legal name, and the fear of consequences in their personal lives if they chose to report, were quoted as significant barriers to survey participants reporting discrimination in Queensland, and if not addressed are likely to be similar in New South Wales. The enormity of the risk to an individual sex worker reporting discrimination by police and other institutions was also a factor listed by survey participants, pointing to the need for processes to address and protect against the power imbalance between complainants and respondents.

The Queensland case of *Dovedeen Pty Ltd v GK* (2013)¹² demonstrates the way the current system can be a barrier to sex workers progressing a complaint. In this case the tribunal allowed the complainant to have their name substituted with the letters GK. However, in the Court of Appeal against the Appeal Tribunal's decision¹³, Justices Fraser and Gotterson were persuaded that it would not be appropriate to amend the title of the proceedings to substitute the sex worker's name for initials with which she had been identified up to this point. Justice Wilson dissented, otherwise the non-publication order would have resulted in the effective 'outing' of the person's legal name, identifying them as a sex worker.

¹² *Dovedeen Pty Ltd v GK* (2013). QCA 116.

<https://www.queenslandjudgments.com.au/caselaw/qca/2013/116>

¹³ Crown Law. (2013, July 1). *Court of Appeal rules sex worker not discriminated against by motel operator*.

<https://www.crownlaw.qld.gov.au/resources/publications/court-of-appeal-rules-sex-worker-not-discriminated-against-by-motel-operator>

Representative and organisational complaints

Sex workers often experience discrimination as a class, and representative complaints enable sex workers as a community to obtain justice without individual sex workers having to take up the case by themselves.

Organisation complaints would allow SWOP NSW, the sex worker organisation, to make a complaint on behalf of a sex worker or group of sex workers. This would also assist in protecting the anonymity of sex workers wishing to lodge a complaint. While there are some options for both in New South Wales the scope appears limited and a strengthening of these options should be considered as part of the review.

This table is a sample of some areas of discrimination reported to Respect Inc.

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| Finance | Banking facilities such as Eftpos and loans being refused. |
| | Accounts being closed or refused without notice or cause. |
| | Insurance companies refusing coverage for life insurance or income protection. As Workcover QLD still does not provide coverage to sex workers within brothels, these sex workers continue to be recognised as independent contractors. |
| Education | Schools refusing children of sex workers to be enrolled. |
| | Training providers refusing to acknowledge the skills and knowledge gained as a sex worker or refusing enrolment by 'out' sex workers. |
| Community groups | Churches and clubs refusing enrolment or membership. |
| Welfare programs | Community services refusing to provide assistance: <ul style="list-style-type: none"> ● Forms of aid such as emergency relief funding ● Children/family support programs ● Homeless outreach charities ● Domestic violence support services |
| | Homelessness support services where evictions upon discovery of sex worker status or discovery of sex work activities outside of the housing provided occur regularly. |
| | Children's community services disadvantaging families where one family member has identified as a sex worker. |
| | Centrelink threatening to cut off payments due to sex work. |
| | Centrelink-associated job providers not acknowledging that sex work is a |

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| | valid form of employment. |
| Media | Advertising media charging more for sex work ads and refusing to charge on account, insisting on pre-paid accounts and refusing to allow the option of opting out of additional, expensive online advertising. |
| | Vilifying media articles. |
| Policing | Refusal to take reports across a variety of criminal actions towards sex workers, using stigma and discrimination to drive unbeliveablity of the sex worker making the report. |
| | Accusing sex workers of conducting illegal activity due to lack of knowlege on sex work laws. |
| Employment | Where a person is dismissed or harassed until they resign due to knowledge of their past or current sex worker status. |
| | Refusal to grant Blue Cards to allow employment in sectors that work with minors if a person discloses their sex work. |
| Accommodati on | Eviction. |
| | Refusing an accommodation booking. |
| | Charging more per night, additional fees. |
| | Inability to rent a premises or house due to stigma and discrimination around sex workers being bad tenants or attracting more traffic to the location. |
| | Adding sex workers to a banned list. |
| | Supplying untrue or derogatory references to other housing or accommodation providers. |
| Health | When sex worker status is discovered refusal to continue with diagnostics unless an STI test is performed. |
| | Obsessive focus around sexual health, STIs and BBVs. |
| | Mental health professionals blaming sex work for a broad range of health conditions, regardless of the sex worker's experiences. |
| | Recommendations to stop work as the remedy for all health concerns, difficulties or diseases. |