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Submission on the NSW Law Reform Commission Anti-Discrimination Act (ADA) Review

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Dear NSW Law Reform Commissioners,

Who we are

Touching Base was established in 2000 to bridge connections between people with disability and sex workers, focusing on access, discrimination, human rights, legal issues and attitudinal barriers. Since then Touching Base has brought the disability sector and the sex industry together in respectful and meaningful ways, through education, policy development, lobbying, resources development and training workshops for disability workers and sex workers.

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Submission introduction

Touching Base is pleased to present our submission to the New South Wales (NSW) Law Reform Commission Anti-Discrimination Act (ADA) Review. Our submission is based on many years of addressing stigma and discrimination arising from people with disability seeking to access the services of sex workers, including unique research into how NSW local councils discriminate against sex workers and their workplaces.

As an unfunded charity with limited resources, we have only addressed some of the many important issues raised in the ADA review discussion papers and preliminary submissions. In principle Touching Base endorses submissions from peer-based organisations such as Scarlet Alliance - Australian Sex Workers Association, SWOP NSW, People With Disability Australia and the Council for Intellectual Disability, et al, where they cover other issues that could be applicable to our members.

Touching Base utilises the wording 'people with disability' and 'disabled people' throughout this submission. This reflects feedback we have received from disabled sex workers and we acknowledge that some people prefer person-first language and others prefer identity-first language.

Strengthening protections for people with disability

Broadly, from a disability perspective, the current ADA is outdated and no longer fit for purpose when compared to recently amended anti-discrimination laws in other Australian jurisdictions and international standards like the UN Convention on the Rights of Persons with Disabilities. It is not reflective of contemporary community standards and attitudes towards people with disability and sex workers.

Outdated language

The current ADA uses language that often reflects a 'medical model' of disability, focusing on individual impairment (e.g., "malfunction," "disfigurement") rather than the 'social model', which recognises that disability is caused by barriers in society (environmental, attitudinal, systemic).

ADA applicability to the criminal justice system

Adults with intellectual disability (ID) in NSW are significantly over-represented at all stages of the criminal justice system, both as alleged perpetrators and as victims of crime.¹ This disproportionate involvement is not an inherent consequence of intellectual disability but rather a direct outcome of systemic discrimination embedded within societal attitudes, inadequate support structures, and the mechanisms of the legal and correctional systems. The justice system often becomes an inappropriate default response when social, health and disability support systems fail to meet the complex needs of individuals with ID, effectively funneling them into incarceration.

A critical limitation in addressing this systemic discrimination lies within the existing NSW ADA Act, which prohibits discrimination based on disability in areas such as employment, education, and services, but its explicit and enforceable application within the criminal justice system remains unclear or limited.

Recommendation regarding language around disability

That the ADA is amended to reflect modern language² and a definition of disability that aligns with the UN Convention on the Rights of Persons with Disabilities, encompassing a broader understanding of disability, including temporary, past, future, and imputed disabilities, and cognitive disabilities like dementia.

Recommendation regarding ADA application to the criminal justice system

That the ADA Act is amended to ensure it has explicit and enforceable application within the criminal justice system.

New protected attribute - sex work activity

We are grateful to see sex worker needs included in the Review of the NSW Anti-Discrimination Act. Research has shown that sex workers disproportionately experience discrimination in many areas of life. This discriminatory treatment is

¹ Judicial Commission of NSW, '[Equality Before the Law: People with Disability](#)', Judicial Commission of NSW Benchbook, last reviewed April 2025,

² The [People with Disability Australia \(PWDA\) language guide](#)

consistent throughout society, affecting sex workers' access to finance, insurance, superannuation, accommodation, alternative employment as well as access to justice and health care³. We are acutely aware that these discriminatory practices can have a significant negative effect on the mental health of former and current sex workers. This has led to calls from researchers for “*action from governments to introduce enabling legal environments, stigma reduction programs and structural protections from sex work stigma.*”⁴

With lived experience of the flawed implementation of sex work decriminalisation in New South Wales, Touching Base is acutely aware it is vital to lay down robust anti-discrimination protections for sex workers in addition to the full decriminalisation of all types of sex work.

Recommendation regarding new protected attribute - ‘sex work activity’

That the ADA introduces a new protected attribute of ‘**sex work activity**’ with the following associated definitions:

sex work activity means the provision of the following services for payment or reward:

(i) *services that involve the person participating in a sexual activity with another person;*

(ii) *services that involve the use or display of the person’s body for the sexual arousal or gratification of another person.*

sex worker means a person who engages, has previously engaged, or who is thought to engage in sex work activity.

³ Scarlet Alliance <https://scarletalliance.org.au/anti-discrimination-and-vilification-protections/>

⁴ [Rethinking the relationship between sex work, mental health and stigma: a qualitative study of sex workers in Australia](#), Social Science & Medicine, Volume 268, January 2021, 113468

Discrimination by local councils

In 2015 Touching Base commissioned the University of Technology, Sydney (UTS) to conduct a 2 phase research project investigating how 40 Metropolitan Sydney Councils regulate their local sex industry premises, titled *The Subversion of Progressive Intent; The realities of sex work policy: When and how it is enforced*⁵.

Summary: UTS Research Local Council Regulation and Enforcement Impact on Sex Workers

Phase 1 of the UTS research

This research covered restrictions in zoning options for commercial Sex Services Premises and Home Occupation (Sex Services) areas.

This research shows evidence of how local planning laws still impose substantial and discriminatory restrictions on where sex industry premises can operate, often leading to the explicit or de facto prohibition of home based sex workers, even though this land use was decriminalised over 30 years ago. *There has not been any town planning justification to explain why this discrimination still exists*⁶.

Key findings from Phase One

- 8 Sydney metropolitan councils only allow sex worker home occupations with a Development Application (DA) - [with zero compliance].
- 32 metro councils prohibit sex worker home occupations entirely - [with zero compliance].
- City of Sydney is the only metro council to allow sex worker home occupations as an exempt development.
- 15 metro councils allow commercial sex services premises or sex worker home occupations in industrial zones only.

⁵ O'Mullane, M., 2015. [The Subversion of Progressive Intent; The realities of sex work policy: When and how it is enforced](#), Sydney, Touching Base Incorporated.

⁶ O'Mullane, M., 2015. [The Subversion of Progressive Intent; The realities of sex work policy: When and how it is enforced](#), Sydney, Touching Base Incorporated, p.6

- 30 metro councils have additional clauses which further restrict the possible locations of commercial sex services premises.

Home Occupation (sex services) - private sex workers

While ‘home occupation (sex services)’ are treated differently from commercial sex services premises under LEPs, and are not subject to the same specific planning controls in the Standard LEP instrument, most councils heavily discriminate against home-based sex workers.

“Councils which require a DA for sex worker home occupations put them in danger. Under no circumstances is it safe or reasonable to require independent sex workers working from residential areas to submit to the Development Application (DA) process. In fact the [Sex Services Premises Planning Guidelines \(2004\)](#)⁷ note that there are no known advantages in the discriminatory practice of requiring a DA from private sex workers. These guidelines highlight there are only disadvantages...”⁸

This indicates that even in a home-based setting, discrimination from local authorities means private sex workers face unique and insurmountable bureaucratic hurdles that they are unable to safely comply with, leading to zero compliance.

Of significant concern, this leads to known corruption potentials, as the [Sex Services Premises Planning Guidelines \(2004\)](#) observed, *“Potential for opportunities for corruption result from the inability of sex workers to comply with the requirements of a DA”⁹.*

Overly restrictive zoning

Local Environmental Plans (LEPs) specify zones where commercial sex services premises (e.g., brothels, sex on premises venues) are permissible with consent. They are typically only permitted in industrial zones rather than their natural habitat of

⁷ 5.2.4 OPTION 2B: LEP permits private worker home occupations as complying development or requires a DA, p.54

⁸ The Subversion of Progressive Intent: Sydney metropolitan local councils’ unworkable sex industry regulations - Fact Sheet One, p.2

⁹ APPENDIX E – Sample Fact Sheets, p.4

business and mixed-use zones. In addition these premises are often subject to stringent conditions not applied to other businesses.

Proximity Restrictions

Strict separation requirements are common, such as a 200-meter radius between sex services premises. Additionally, these businesses are often prohibited from being located near or directly opposite 'sensitive uses' like childcare centres, schools, churches, hospitals, community facilities, public parks, or residential areas. These restrictions can render large areas unsuitable for commercial sex services premises, even in zones where they are theoretically permitted. *This has safety implications for sex workers and their clients with disability*¹⁰.

See further details outlining the regulatory discrimination enacted by Sydney metropolitan local councils in the [Phase One Fact-Sheet](#).

Key findings from Phase Two: Complaints and Enforcement Actions by Local Councils

This phase revealed the various mechanisms local councils use to enforce planning laws which can lead to business closures, fines, and discriminatory practices against sex workers.

Discriminatory Enforcement Practices

Historically, a small number of local councils have engaged in 'duplicious practices' such as hiring private investigators¹¹ to obtain sexual services from workers as evidence of non-compliance with zoning or building application regulations. While some changes in NSW's sexual consent laws have presumably made these practices illegal, their past use highlights a discriminatory approach.

¹⁰ The Subversion of Progressive Intent: Sydney metropolitan local councils' unworkable sex industry regulations - Fact Sheet One, p.3

¹¹ O'Mullane, M., 2015. [The Subversion of Progressive Intent; The realities of sex work policy: When and how it is enforced](#), Sydney, Touching Base Incorporated, p.16

Sex services businesses and independent sex workers can face restrictions and discrimination from landlords and building management organisations, often influenced by local council planning laws that perpetuate ongoing stigma.

The research indicates that a disproportionate number of complaint actions against sex services premises can originate from a very small number of councils or even a single complainant, suggesting targeted enforcement rather than widespread community concern.

Research implications for the ADA NSW Review

The findings from this research underscore that despite 30 years of decriminalisation sex workers in NSW continue to face significant discrimination stemming from the regulatory environment imposed by local councils. The current planning laws and enforcement practices, while ostensibly about land use, often serve to marginalise sex workers, limit their ability to operate legally and safely, and perpetuate stigma.

State level discrimination

It is important to note that the Standard Instrument - Principle LEP, which is a mandatory template for all NSW local council LEPs, defines 'home occupation (sex services)' separately from other types of home occupations. It discriminates against sex workers by limiting the number of people able to work from their home compared to other home occupations and excludes them from operating a home business.

home occupation means an occupation that is carried on in a dwelling, or in a building ancillary to a dwelling, **by one or more permanent residents of the dwelling** and that does not involve—

- (a) the employment of persons other than those residents, or
- (b) interference with the amenity of the neighbourhood by reason of the emission of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil, traffic generation or otherwise, or
- (c) the display of goods, whether in a window or otherwise, or

- (d) the exhibition of any signage (other than a business identification sign), or
- (e) the sale of items (whether goods or materials), or the exposure or offer for sale of items, by retail,

but does not include bed and breakfast accommodation, home occupation (sex services) or sex services premises.

home occupation (sex services) means the provision of sex services in a dwelling that is a brothel, or in a building that is a brothel and is ancillary to such a dwelling, by no more than 2 permanent residents of the dwelling and that does not involve—

- (a) the employment of persons other than those residents, or
- (b) interference with the amenity of the neighbourhood by reason of the emission of noise, traffic generation or otherwise, or
- (c) the exhibition of any signage, or
- (d) the sale of items (whether goods or materials), or the exposure or offer for sale of items, by retail,

but does not include a home business or sex services premises.¹²

Under the NSW State Environment Planning Policy (Exempt and Complying Development Codes) other comparable types of home occupations and home businesses in NSW are permitted as exempt developments¹³.

It is these State-wide regulatory settings that enable NSW local councils to discriminate against home based sex workers.

The lack of explicit protection for 'sex work activity' as an ADA attribute means sex workers have limited avenues for redress against these discriminatory practices.

This highlights the urgent need for legislative reform to explicitly include sex work as a protected attribute, applicable to State and local government, to ensure that local

¹² <https://legislation.nsw.gov.au/view/html/inforce/current/epi-2006-155a#dict>

¹³ State Environment Planning Policy ([Exempt and Complying Development Codes](#)) 2008, Subdivision 22 [Home businesses, home industries and home occupations](#)

council regulations and enforcement actions are conducted without discrimination and in alignment with human rights principles.

Recommendation regarding discrimination by local councils

That legislative reform explicitly includes 'sex worker activity' as a protected attribute applicable to NSW State and local government functions to ensure that local council regulations and enforcement actions are conducted without discrimination against sex workers and in alignment with human rights principles.

Irrelevant criminal record

Crucially, unlike some other jurisdictions, 'irrelevant criminal record' is not currently a protected attribute under the NSW ADA, meaning that individuals cannot seek enforceable remedies for discrimination based on a criminal record that has no bearing on their ability to perform a job or access a service.

This legislative gap has profound consequences, as a criminal record can significantly hinder a person's employment prospects, perpetuating a cycle of poverty and disadvantage, particularly for Aboriginal and Torres Strait Islander people who are already over represented in the justice system.

Due to the high level of stigma associated with sex work, employers may view any criminal record - even if for a minor, unrelated offense - as a reason to deny employment, particularly in the care, community, or health sectors. This effectively bars sex workers from transitioning to other careers, regardless of the irrelevance of their past convictions

Recommendations regarding irrelevant criminal records

To address discrimination related to irrelevant criminal records being held against people with disability and sex workers, Touching Base advocates for the following changes to the NSW Anti-Discrimination Act 1977:

Introduce ‘Irrelevant Criminal Record’ as a protected attribute

That the ADA explicitly make unlawful discrimination on the basis of an ‘irrelevant criminal record’. This would align NSW with other jurisdictions, such as the ACT and Tasmania, where this is already a protected attribute. This change would provide a clear legal basis for disabled people and sex workers to challenge unfair treatment in areas like employment, housing, and access to services, where their criminal history is not relevant to the inherent requirements or risks.

Broaden the definition of ‘Criminal Record’

Ensure the definition of ‘criminal record’ within the Act is comprehensive, extending beyond convictions to include records related to arrests, criminal investigations, or criminal proceedings as is the case in other jurisdictions¹⁴. This broader scope would prevent indirect discrimination that can arise from police checks or background screenings that consider non-conviction data, which disproportionately affects individuals with intellectual disability due to their frequent contact with the justice system.

Strengthen enforceability and remedies

That the NSW ADA provides clear, enforceable remedies. This would empower people with disability and sex workers to seek meaningful redress, such as reinstatement in employment or compensation, when they experience unlawful discrimination based on an irrelevant criminal record.

Refine the ‘Inherent Requirements’ defence

While acknowledging that employers may need to consider criminal records for roles where they are genuinely relevant, the Act should establish stringent criteria for the ‘inherent requirements’ defence. This would require employers to demonstrate a direct and essential link between the specific criminal record and the core duties of the job, preventing blanket exclusions and ensuring individualised assessments for disabled people and sex workers.

¹⁴ For example, [NT ANTI-DISCRIMINATION ACT 1992 - SECT 4](#)

Implementing these reforms is essential to dismantle systemic barriers, ensure fair treatment, and promote the genuine social and economic inclusion of disabled people and sex workers, and preventing perpetual disadvantage due to past, irrelevant criminal records.

Homosexuality, sex and transgender grounds

The ADA currently prohibits discrimination and vilification based on homosexuality, which is defined as a ‘male or female homosexual’. This definition doesn’t cover other sexual orientations as it is expressed in binary terms.

Similarly, the ADA defines a transgender person in binary terms, as a member of the ‘opposite sex’. If their sex is indeterminate, the ADA defines them as identifying as a member of a ‘particular sex’.

The ADA must provide clear and accessible protections for LGBTQIA+ people of all sexualities and gender identities.

Recommendation regarding homosexuality, sex and transgender grounds

That the ADA’s existing protected attributes of ‘homosexuality,’ ‘sex’ and ‘transgender grounds’ should be replaced with **‘sexual orientation,’ ‘gender identity or expression,’** and **‘sex characteristics.’**

Lack of positive duty to provide reasonable adjustments

Unlike some other jurisdictions, the NSW ADA does not impose a clear ‘positive duty’ on organisations and employers to proactively make reasonable adjustments to prevent discrimination against people with disability. Instead, it often relies on a ‘defence of unjustifiable hardship’, meaning that discrimination is unlawful unless the discriminator can prove it would cause them ‘unjustifiable hardship’ to provide the adjustment. This unreasonably puts the onus on the disabled person to prove discrimination and can make it difficult to secure necessary adjustments.

Recommendation regarding a lack of positive duty to provide reasonable adjustments

That a positive duty to ensure accessibility is factored into the ADA to assist the elimination of discrimination, rather than simply reacting to individual complaints.

Ineffective Tests for Discrimination

The current tests for direct and indirect discrimination are outdated and can create practical difficulties for disabled people and sex workers, for example, by requiring a ‘comparator’ (how a person without disability/sex worker would be treated in the same situation), which can be hypothetical and hard to establish.

As the Public Interest Advocacy Centre has noted:

This hypothetical exercise can create significant practical difficulties, especially where it is unclear which comparator should be chosen or indeed if the wrong comparator is selected. It is also unnecessary – again, as the Discrimination Act 1991 (ACT) demonstrates, it is possible to adopt an amended approach which simply assesses where ‘the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes’ (s8(2))¹⁵

Recommendation regarding a comparator test

That the comparator test be removed from the ADA and replaced with an amended approach which simply assesses where *‘the person treats, or proposes to treat, another person unfavourably because the other person has one or more protected attributes’*.

¹⁵ Public Interest Advocacy Centre • PRELIMINARY SUBMISSION TO NSW LRC REVIEW OF ANTI-DISCRIMINATION ACT 1977, p.8

Protecting vulnerable complainants through advocacy, anonymity, and trauma-informed processes

Our membership includes people with disability and sex workers (including sex workers with disability) who have lived experience of trauma through discrimination. The process of pursuing complaints itself can be highly re-traumatising.

The likelihood of being 'outed' as a sex worker is a significant barrier to a former or current sex worker lodging a complaint when experiencing discrimination. Due to the huge societal stigma that has been entrenched and enforced through harmful legislation and regulations in New South Wales, it is essential to protect sex workers identities and privacy during the complaints process. Allowing organisational advocacy in both conciliation and tribunal proceedings will give complainants the opportunity to be supported as they speak up about their experiences and protect them from the numerous harms that can arise from being 'outed'.

Disabled people and sex workers need to be able to reach out to their peer community organisations for support and for community organisations to make a complaint on their behalf.

Recommendations regarding protecting vulnerable complainants

Enable Third-Party Advocacy

The NSW Anti-Discrimination Act (ADA) should be amended to explicitly allow a third-party organisation to lodge a discrimination complaint on behalf of a person who has experienced discrimination. This measure is crucial for protecting the identity and privacy of complainants who are vulnerable to significant harm if they are 'outed' during the complaints process.

Ensure Privacy and Anonymity

The complaints process, including both conciliation and tribunal proceedings, must be reformed to prioritise the protection of a complainant's identity. This is particularly important for individuals whose work or life circumstances carry a high level of social

stigma, such as sex workers. Provisions should be put in place to ensure that the identity of the complainant is not revealed without their explicit consent.

Offer Trauma-Informed Support

The complaints process should be designed to be trauma-informed, acknowledging that the act of reliving and reporting discrimination can be re-traumatising. The ADA review should consider how to build a supportive, less adversarial system that minimises the potential for harm to the complainant, especially when a third party is acting as an advocate. This includes allowing complainants to have peer support organisations present during proceedings.

Submitted on behalf of:

The Touching Base Inc Committee of Management