Tuesday 22 September 2026

Digital Duty of Care Consultation
Department of Infrastructure, Transport, Regional Development, Communications, Sport and the Arts

Via email: digitaldutyofcare@communications.gov.au

To the Secretariat,

Re: Submission on the Exposure Draft - Online Safety Amendment (Digital Duty of Care) Bill 2026

Scarlet Alliance welcomes the opportunity to make this submission in response to the exposure draft of the Online Safety Amendment (Digital Duty of Care) Bill 2026.

About Scarlet Alliance

Scarlet Alliance is a peer-run organisation, and we take pride in our work being done by sex workers, for sex workers. Every staff member, committee member, and volunteer is a current or former sex worker, ensuring our advocacy, programs, and decisions come directly from lived experience.

Our work is grounded in our values of accountability, autonomy, collectivism, participation, solidarity, and transformation. We fight for equality and social, legal, political, cultural, health and economic justice for past and present workers in the sex industry. As the national peak body for sex workers in Australia, our members include sex worker organisations and projects, and individual sex workers across Australia. Together, we create a powerful national voice that uplifts and defends the rights of all sex workers.

Sex workers were early users of online chat rooms and personal websites before they became mainstream. In this sense, sex workers were the testers and quality checkers of online services and helped co-create and shape the internet as we know it. Today the internet and digital technologies are an essential part of many sex workers' lives.
DIGITAL SECURITY; THE SMART SEX WORKERS GUIDE. NSWP. 2021, pg 5

Thank you for considering our input into the exposure draft. Should the Department wish to discuss any of these points further with Scarlet Alliance please do not hesitate to reach out.

Warm regards,



Jenna Love
Interim Chief Executive Officer
Scarlet Alliance

SUBMISSION ON THE EXPOSURE DRAFT, DIGITAL DUTY OF CARE BILL 2026

Sex workers should be considered stakeholders in the creation of internet regulation and online policies. Legislation that intends to curtail or remove access to content deemed inappropriate for the general public risks unfairly limiting sex workers' digital footprint, and inadvertently reduces protections for sex workers from digital harms such policies are intended to prevent.

Governments must commit to a robust human rights-based approach rather than purely tech-based 'solutions' to complex societal issues.

DIGITAL SECURITY; THE SMART SEX WORKERS GUIDE. NSWP. 2021, pg 24

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ANTI-DISCRIMINATION PROTECTIONS

Scarlet Alliance believes, and in the case of Meta can confirm, online platforms currently have no intention of changing their policies to protect sex workers from being discriminated against by their company. This is because they are primarily based in jurisdictions that do not have anti-discrimination protections for sex workers.

The Digital Duty of Care Bill (Exposure Draft) increases the *punitive powers* of the eSafety Commissioner in relation to content removal, notices for taking down links, regulating apps and issuing penalties.

The bill does not consider the anti-discrimination concerns of internet users in Australia.

In recent discussion with the Department of Infrastructure, Transport, Regional Development, Communications, Sport and the Arts, Scarlet Alliance raised these concerns. We were advised discrimination carried out by online platforms against internet users in Australia was a situation for the Commonwealth Attorney General, and not the Minister responsible for the Digital Duty of Care. However, we note comparable overseas legislation does address certain rights and protections. For example the EU Digital Services Act references fundamental rights, and the UK Online Safety Act expressly seeks to protect freedom of expression.[1] By comparison, if a platform operating in Australia chooses to remove, exclude, discriminate against or shadow ban a sex worker, lawful sex worker advertising, sex worker safety information sharing or content promoting sex worker pride, the proposed Bill currently offers no penalty.

For the sex worker community, overcapture inspired by the Digital Duty of Care means removal of lawful advertising, the shadow banning of content designed to attract sex worker clients, the closure of accounts sharing sex worker peer education, and events promoting sex worker pride are rejected by the platform as contravening platform Terms and Conditions. This is discrimination against sex workers, resulting in the reduction of our members' incomes and the undermining of sex worker safety strategies.

The bill description of *Seriously harmful material and conduct* includes *child sexual exploitation or child abuse... grooming, preparing or procuring a child for sexual activity... incites or instructs extreme violence or cruelty... threats of rape.*. It is possible online services may implement a shadowban or removal trigger for the word sex, and consider that their compliance with the Digital Duty of Care. This creates discriminatory overcapture because it only negatively impacts the lawful use of the internet by certain people, and it only reduces access to the overcaptured information for certain people. Sexual health educators, sexual health physicians, sex workers, sexual consent advocates and anyone discussing, theorising or taking part in sexual sub-cultures are the producers most impacted. Young gender diverse people and adults, rural and remote internet users and people with disability seeking to learn more about any of those topics via the internet will be most impacted by overcapture. This is discriminatory overcapture. To avoid this 25C must include a drafting safeguard specifying content that is explicitly excluded from capture.

25D Harmful to children includes *pornography... promotes or provides for disordered eating ..... Promotes hostile attitudes towards women or gender equality...* It is possible an online service may use words such as porn, anorexia or blue stocking to implement automated shadowbanning or trigger account suspension or removal. They may consider this a compliance measure to meet the mandatory requirements of the digital duty of care. This is discriminatory overcapture, because it unfairly limits content produced by people involved in sex work, people



sharing information about a particular health diagnosis, and women. To avoid this 25D should include a clause describing what is not intended for capture under that section.

The discriminatory overcapture of lawful content by platforms using broad, non-human moderated systems, disproportionately impacts communities living with the very attributes mentioned in anti-discrimination law — Aboriginal and Torres Strait Islander people, women, non-English speaking background people, LGBTIQ+ people and people living with disability. The result is communities in Australia already recognised as requiring protection from discrimination are more likely to experience discrimination online when posting or sharing content as a result of the Digital Duty of Care. Explicit protection from discriminatory overcapture is required in many sections of the bill.

Recommendations

1. The "Objects of this Act" should include a clause related to ensuring online services do not discriminate against Australians online.
2. Non-discrimination should be a mandatory requirement of the Digital duty of care. (pg 31, line 29)
3. 25C and 25D should include a clause describing what is not intended for capture.
4. The Bill should include penalties for platform terms and conditions that discriminate based on attributes or characteristics protected from discrimination in Australian jurisdictions.
5. The Bill should include penalties for platforms undertaking discriminatory overreach into lawful content for shadowbanning or removal based on attributes or characteristics protected from discrimination in Australian jurisdictions.

HUMAN RIGHTS PROTECTIONS

Australian parliaments have an obligation to uphold 25 key human rights. These rights are underpinned by seven human rights treaties, and common law and the Australian Constitution. The role of the Parliamentary Joint Committee on Human Rights is to examine bills for Acts and other legislative instruments for compatibility with these responsibilities.

The Exposure Draft is lacking in compliance with a number of these key human rights.

RIGHT TO WORK

Australian governments are obliged to uphold the *Right To Work (Articles 6, 7, 8,* ICESCR). This is a fundamental right.

Online platforms are already known to remove sex worker content, exclude sex workers from being able to join the platform, or outright ban sex worker content. Such actions curtail sex workers' right to work. It is the responsibility of Australian governments' to protect this right, for sex workers and all other workers.

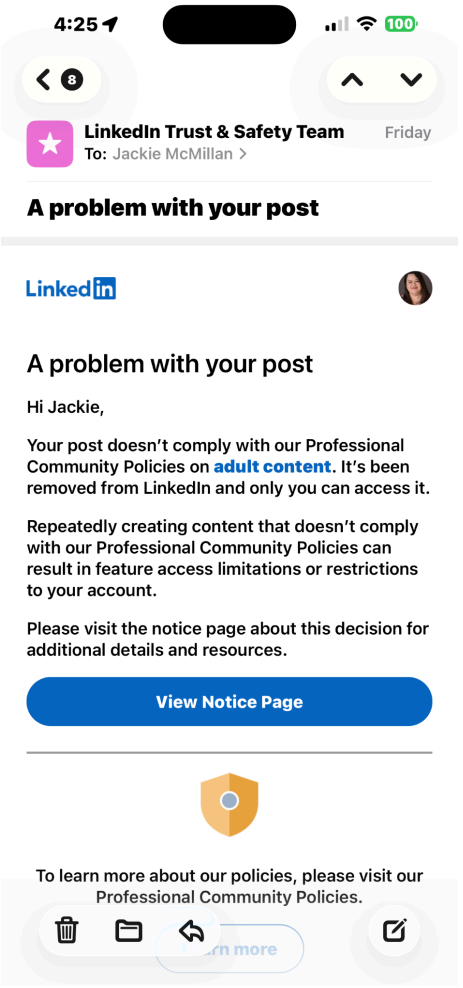
The Digital Duty of Care could do more to ensure online platform overreach into lawful content related to a person's right to work is prevented from occurring.



RIGHT TO REPRODUCTIVE AND SEXUAL HEALTH

Australian governments are obliged to uphold the *Right to Reproductive and Sexual Health, (Article 12*, ICESCR). This right is not universally recognised outside of Australia. In particular this right is dispute in the United States.

Abortion related content in Australia has been flagged for removal potentially triggering shadowbanning and penalisation of account holders. For example (see left, used with permission), Women's Health NSW received this notice regarding a post sharing insights from the the Children By Choice Abortion Conference last month).



Scarlet Alliance perceives the Digital Duty of Care could result in platforms *further* restricting access to such information, unless measures within the bill take care to prevent them from doing so. Restrictions could include forcing account holders to put reproductive and sexual health education behind age-gates. This would require the internet user to provide age assurance data and perhaps identity verification in order to exercise their right to access reproductive and sexual health information online.

Such censorship is a breach of a fundamental human right recognised in Australia. It also has the potential to cause other problems downstream; affecting Australians' health, wellbeing, access to reproductive justice and more. In another example, Women's Health NSW was penalised by LinkedIn for posting the following text and link:

"Anal cancer is an abnormal growth in the cells lining the anus, the last few centimetres of the bowel. Many people feel awkward talking about this part of their body. So, when symptoms appear – such as bleeding or itchiness – they may delay speaking to a doctor. But it's crucial to know what to look for, because if anal cancer is caught early the chances of treating it are much higher."

THE CONVERSATION: DON'T LET EMBARRASSMENT STOP YOU - TALKING ABOUT THESE ANAL CANCER SYMPTOMS COULD SAVE YOUR LIFE. 9 APRIL 2025

The use of the word 'anal' is likely the reason for this post to be flagged. In this example the overreach is obvious and the harm caused by overreach is clear. The post is not about sex or anal sex, but has been flagged as such due to the reference to genitalia. Discussion about genitalia is completely lawful in Australia.

Academics argue that trends in Australia's online regulation systems already threaten young people's lawful access to sexual health information online. Sexual and reproductive health promotion often includes frank discussions and images (e.g. diagrams of anatomy, condom demonstrations, depictions of sexual acts). Empirical studies show that automated and human moderators routinely misclassify such content as pornography. For example, algorithms have flagged innocuous health illustrations or cartoons as "adult" content.[2]

Overcapture is an outcome of platforms' asymmetrical favouring of automated removal or restriction of content that has any hint, reference or glimpse of body parts or sexually explicit language. This curtails Australian internet users' right to reproductive and sexual health. High penalties (60,000 penalty units) included in the Bill may also incentivise platforms to over-remove content to avoid liability, causing this already existing rights abuse to become more normalised. Platforms' fear of noncompliance, or overenthusiastic enforcement, could see any discussion of sexuality classed as 'high-impact themes,' regardless of whether the content is sexually explicit or actually violates any terms of service.

The Center for Intimacy Justice report, The Digital Gag: Suppression of Sexual and Reproductive Health on Meta, TikTok, Amazon, and Google documented systematic suppression of sexual and reproductive health information across major platforms, finding that nonprofit organisations, creators, and small businesses routinely had sexual health ads and content removed or had accounts suspended without clear explanation.[1] In 2025, it was reported that Google had blocked advertisements for an Australian government-funded STI campaign as 'adult content' on 12 occasions, and the organisation running the campaign had to contact Google on 10 different occasions.[3]

Marginalised groups – including rural youth, Indigenous communities, people with disability, or those in abusive homes – often rely on online channels for sexual and reproductive health support and information. Digital health researchers find that technology-based interventions 'can help to address inequities in sexual health outcomes' by reaching diverse and underserved adolescents.[4] This is equally true for sex workers, who use internet technologies for advertising, safety and community connection. Censoring or restricting broad categories of content is not only a breach of international human rights - it risks undermining health promotion, peer education and workplace organising, entrenching disadvantage within communities who already experience marginalisation.

RIGHT TO PRIVACY

The Exposure Draft s26(7) provides that the digital duty of care '*does not require any action to be taken in relation to lawful communication occurring in private solely between consenting adults*'. What is unclear is how a platform or regulator would implement this exemption in practice. In this scenario online platforms would need to screen all private messaging services to identify that private communications are 'lawful', 'private', and 'solely between consenting adults'.

Screening of all private communication would arguably be a breach of the *Right to Privacy (Article 17* ICESCR). In the absence of an express freedom of expression safeguard, or requirements for human review of automated moderation decisions, s26(7) may not comply with Australian human rights obligations.

Scarlet Alliance suggests breaches of private communications between adults, lawful or not, cannot be prevented from occurring without a breach of numerous human rights. It is foreseeable, for example, that conversations between adults relating to protest activity, if the protest activity is criminalised in the state or territory in which they reside, could be argued by governments as unlawful and therefore open to interception. In this situation the breach is not only to Australians' right to privacy, but also potentially to freedom of expression, freedom of association and criminal process rights including the right not to incriminate oneself.

RIGHT TO HEALTH

The inclusion of illicit drug use in s25c *Seriously harmful material and conduct* could result in the marginalisation of drug users from the ability to share harm reduction information, drug user pride and important health information online. This is a breach of Australia's human rights obligations to all Australians.

RECOMMENDATIONS

6. *The Objects of this Act* should include a clause addressing the primacy of upholding human rights for internet users in Australia.
7. Establish an oversight mechanism that includes non government organisations, the eSafety Commissioner and the Department of Communications; ensuring meaningful participation from sex workers, drug users and other marginalised communities including representatives from LGBTIQ+, youth, First Nations and disability rights organisations to surface unintended barriers.
8. The bill should be subject to a special inquiry to assess the potential breach of Australia's obligation to human rights.
9. The bill must include freedom of expression considerations, particularly in relation to s25H "reasonable practicable" test.
10. *Schedule 2 Part 1 Exemptions for online services* must explicitly state that the intention of the legislation does not include the removal of sexual and reproductive health education, drug related harm reduction content, LGBTQAI+ networking and articles, sex worker advertising and related support resources.
11. The bill must contain incentives for platforms to preserve lawful content. Online service should be encouraged by the laws to err on the side of preservation for disputed cases involving health and safety information, sexual and reproductive health education, drug related harm reduction content, sex worker advertising and related support resources.
12. *25B A safe online environment* should read "persons in Australia are **free to access and distribute lawful information without fear of removal, and be** protected from seriously harmful material and conduct;"
13. *25C Seriously harmful material and conduct* section must include an express rights protection that outlines Australian internet users freedom of expression and right to take part in public affairs.
14. Remove clause (k) from *25C Seriously harmful material and conduct, 'material or conduct that encourages, promotes urges or instructs illicit drug use*.'

NON-CONSENSUAL IMAGE SHARING

Scarlet Alliance supports the sentiment and intent of *Division 2-Removal notice powers* in the exposure draft. In particular it is correct that the Commissioner be able to waive the requirement for a complaint to have been made to the provider of the service.

Scarlet Alliance notes that sex workers have attempted and failed to utilise eSafety processes for the removal of content that is intimate in nature in recent years. By way of case study we offer an example below.

SWOP NSW have been supporting a worker (she/her) who had her photos taken in a photoshoot for a sex work profile while employed at an escort agency. It included photos of the worker in underwear, in a state of undress,



and topless. Following the termination of her employment by this agency, she asked that they take down the images of her. The agency removed the topless image only, and still kept the rest of the photos online, alongside her profile, which implies she still works for the business. She has asked on multiple occasions for them to be taken down. She was not informed when she did the photoshoot that they would continue to use the photos when she was no longer working at the business. She sent an application to eSafety for the photographs to be removed, however was given the following response:

eSafety cannot further progress your report as the images in your report does not meet the definition of an 'intimate image' under section 15 of the Online Safety Act 2021 (Cth). After considering the images and the information you provided, we determined that the circumstances are not such that an ordinary reasonable person would reasonably expect to be afforded privacy.

The worker in question was very disappointed with this outcome. She approached SWOP NSW and consented for this correspondence to be reproduced by our organisations and to follow up about this case. The worker considers the continued use of the images, despite repeated requests for their removal, to be harmful and distressing. She does not believe the ongoing use of the images reflects her wishes or current relationship with the business. Moreover, as she has been unfairly dismissed from the workplaces there is no practical need for the company to display the photos.

While the images may not meet the statutory definition of an 'intimate image', their use in a commercial sexual services context creates a different and significant form of harm. This is particularly the case where the worker has withdrawn consent and is no longer associated with the business, yet the images continue to be used in a way that implies ongoing involvement. We argue that the images are intimate, regardless of their intention to be used for work or privately. Scarlet Alliance has raised these concerns with eSafety and will continue to do so.

Scarlet Alliance can also report SWOP NSW has previously received feedback from members regarding challenges in navigating eSafety complaint processes. Since the eSafety Commission was established, SWOP NSW received several reports from members about inadequate or dismissive responses from eSafety Commission in response to complaints about online harassment. Feedback received by SWOP NSW indicates that some sex workers felt their concerns were not adequately understood or addressed through existing eSafety processes, particularly where the harm experienced did not align neatly with existing statutory definitions or categories. During the past incidents, the workers in question did not want SWOP NSW to follow up with eSafety on their behalf, for fear of reprisal should they need to access eSafety again in the future. The incidents reported and rejected for investigation by eSafety in the past include:

- Doxxing/'outing' (the Crimes (Domestic and Personal Violence) Act 2007 was updated to include "outing" a sex worker as intimidation)
- Non-consensual reposting of content uploaded behind a paywall
- Failure to remove images of sex workers from advertising pages
- Advertising being scraped from one website to another non-consensually
- Harassment and online bullying



There are sex workers who report exemplary support and care shown by eSafety Commission staff in dealing with online doxxing, harassment and bullying. Unfortunately those cases are outliers. We believe these experiences highlight the need for clearer legislative protections and more consistent approaches to assessing harms experienced by sex workers in digital environments.

IMPLEMENTATION CONSIDERATIONS

Ensure the Human Rights Commission is resourced to support anti-discrimination claims against platforms undertaking unfair penalising of lawful content and user accounts due to non-human moderated overcapture.

Sex worker organisations, sexual and reproductive health organisations, drug user organisations and other relevant community groups should be included as stakeholders in the development of the Digital Duty of Care guidelines (*26E*).

References

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