



Australian Sex Workers Association

Phone – 02 9517 2577
Fax – 02 9517 2488
Post – PO Box 854,
Newtown NSW 2042
Street – Suite 203, 1 Erskineville Road,
Newtown NSW 2042
Email – info@scarletalliance.org.au
Web – www.scarletalliance.org.au
ABN - 86 612 112 065

26 July 2023

Department of Industry, Science and Resources - Technology Strategy Branch
GPO Box 2013
Canberra ACT 2601

Via email: DigitalEconomy@industry.gov.au

To the Department of Industry, Science and Resources,

Thank you for the opportunity to submit to the consultation on *Safe and responsible AI in Australia*.

Scarlet Alliance is the Australian Sex Workers Association. Through our objectives, policies and programs, Scarlet Alliance aims to achieve equality, social, legal, political, cultural and economic justice for past and present workers in the sex industry.

Formed in 1989, Scarlet Alliance, Australian Sex Workers Association is the national peak sex worker organisation. Our membership includes state and territory-based and national sex worker organisations and individual sex workers throughout unceded Australia. Scarlet Alliance uses a multifaceted approach to strive for equality, justice and the highest level of health for past and present workers in the sex industry. We achieve our goals and objectives by using best practices including peer education, community development, community engagement and advocacy.

Scarlet Alliance is a leader when it comes to advocating for the health, safety and welfare of workers in Australia's sex industry. Through our work and that of our member organisations and projects, we have the highest level of contact with sex workers and access to sex industry workplaces throughout Australia of any agency. Scarlet Alliance represents sex workers on a number of government and non-government committees and advisory mechanisms.

In recent years, and particularly since the beginning of the COVID-19 pandemic, many sex workers also now engage in online forms of sex work as we navigate an increasingly precarious labour environment and need to diversify our income streams. Sex workers also use online tools to create and distribute health information, harm reduction resources and share safety strategies.

Alongside an expansion of sex work in online spaces, in-person sex work also increasingly relies on internet technologies. Like other workers and businesses, sex workers increasingly rely on internet technologies to carry out everyday business activities such as advertising, communications, payment processing and other services that have moved to digital/virtual service delivery. As sex workers join workers and businesses in every industry in facing increased reliance on online technologies, the discrimination and stigma experienced by our community when accessing in-person banking and other services has also shifted online. As such, the governance and regulation of online spaces and digital technologies are opportunities to either address or replicate the barriers, stigma and discrimination faced by sex workers in Australia and globally.

While the *Safe and Responsible AI in Australia* Discussion Paper notes that the implications of artificial intelligence (AI) and automated decision-making (ADM) on work and labour markets are beyond the scope of this inquiry, technology governance and regulatory measures can directly impact sex worker wellbeing and safety.¹ Due to the both the far-reaching consequences of overseas legislation, and recent developments in

¹ See Danielle Blunt and Ariel Wolf, '[Erased: The Impact of FOSTA-SESTA and the Removal of Backpage on Sex Workers](#)' (2020) (14) Anti-Trafficking Review 117.

Australian internet regulation,² sex workers in Australia are experiencing rapid loss of access to online technologies through crude content moderation practices and discriminatory ADM, as corporations, particularly in the finance and technology sectors, respond to an increasing scope of legal liability to 'combat trafficking,' 'prevent money-laundering' and 'protect' vulnerable people online.

This submission is focussed towards how the governance and regulation of AI and ADM in Australia may impact sex workers, and how regulation of new and emerging technologies must promote fairness, equity of access, data autonomy and privacy for all people in Australia.

Sex workers have been identified as being 'consistently the test population for novel surveillance technologies,'³ and as 'canaries in the coal mine' when it comes to new measures of censorship and control.⁴ Our lived experiences reveal the failures in corporate policy and state regulatory approaches to respond to the economic, free-speech and privacy needs of sex workers across unceded Australia and globally, leading our community to lose access to income, safety tools and strategies, and vital peer connections.

Yours sincerely,



Mish Pony
Chief Executive Officer

² See Scarlet Alliance, [Submission No 36 to the Senate Standing Committees on Environment and Communications](#), *Online Safety Bill Inquiry* (3 March 2021).
[Evidence to Senate Standing Committees on Environment and Communications](#), Canberra, 5 March 2021, 19-22 (Jules Kim and Gala Vanting, Scarlet Alliance).
[Evidence to Senate Standing Committees on Environment and Communications \(answers to questions taken on notice\)](#), Canberra, 9 March 2021 (Jules Kim and Gala Vanting, Scarlet Alliance).
Scarlet Alliance, [Submission to eSafety Commissioner](#), Restricted Access System Declaration Online Safety Act 2021 Inquiry (20 September 2021).

³ Olivia Snow '[Sex Workers Have Been Banned From Airbnb for Years. Will You Be Next?](#)', *The Nation* (online, 26 November 2022).

⁴ Emily Smith, '[Sex Workers Are Canaries In The Free Speech Coal Mine](#)', *Buzzfeed News* (online, 8 April 2018).

Table of Contents

Executive Summary	3
Sex work in Australia	4
Algorithmic bias	5
Algorithmic bias and access to internet technologies	5
ADM and financial discrimination	7
Personal information and data security	8
Personal information - images and generative AI	8
Proposed governance approaches	9
Risk-based regulation	9
Non-regulatory approaches	11
Recommendations	11

Executive Summary

While recent developments in artificial intelligence (AI) and automated decision-making (ADM) present exciting possibilities across many areas in both the public and private sectors, there is increasing global concern that these new and emerging technologies represent unpredictable and unacceptable risks to fairness, transparency, privacy and the rule of law.

In an attempt to understand and mitigate these risks, governments, policy-makers and industry leaders around the world have proposed a number of approaches to regulate and govern the use of AI and ADM in the public and private sectors. Australia must now consider how the rise of AI and ADM technologies interacts with its regulatory frameworks for internet and digital technologies, information and privacy, human rights and other areas, and whether additional specific regulation is required.

As noted in our introductory letter, as communities that experience the everyday consequences of digital discrimination and algorithmic bias, sex workers are uniquely positioned to provide input into technology governance and regulation. As a historically criminalised undertaking, sex work and sex workers have been marginalised through well-established discriminatory barriers relying on markers such as gender, race, migration status, marital status, asset ownership or lack thereof, familial genealogy, class, education, citizenship, ability to present identity documents, proof and regularity of income, source of income and position in society as measured by having a respected 'job'.

These structural barriers, many of which amount to human rights violations, are now embedded in the delivery of systems and services both in human and algorithmic decision-making. In opposition to this, decades of campaigns to dismantle these barriers have led to significant progress towards the realisation of human rights for sex workers and other marginalised communities. Sex workers are highly invested in the question of if and how historic discrimination will be perpetuated and reintroduced through the widespread use of AI and ADM in Australia.

The implications of unaddressed biases are severe for sex workers, however it is not just sex workers who stand to benefit from good governance of AI and ADM. The regulation of these technologies must be designed to deliver inclusion, not barriers, and promote the human rights of marginalised populations throughout unceded Australia.

Sex work in Australia

Australian sex workers work across a range of workplaces and conditions, including in brothels, adult entertainment venues and BDSM studios, through agencies, independently, in massage parlours, on webcam, in pornography, producing direct-to-consumer content, on the street, for trade, or in other kinds of opportunistic sex work.

Many forms of sex work in Australia are regulated by individual states and territories, utilising a variety of approaches across public health, planning and environmental, criminal, workplace health and safety and contract law. Sex work is considered legal and legitimate work by the Commonwealth, and has been largely decriminalised in New South Wales since the 1970s.⁵ Recent legislation in the Northern Territory⁶ and Victoria⁷ recognises that sex work is work, and that sex workers are entitled to specific anti-discrimination protections in order to fully realise their industrial and human rights.⁸ The Queensland Government has also committed to passing similar legislation.⁹ Legislation prohibiting discrimination on the basis of a person's 'profession, occupation, trade or calling' or on the basis of 'lawful sexual activity' is also currently in place in the Australian Capital Territory, Queensland and Tasmania.¹⁰

Despite this progress, sex workers in Australia routinely experience stigma and discrimination when accessing healthcare,¹¹ seeking other forms of employment,¹² reporting crimes committed against them,¹³ and when accessing banking and other financial services.¹⁴ During the past decade, sex workers in Australia and overseas have also experienced a loss of access to technological tools and services at exponential rates, largely as a result of a global trend towards laws and policies that create obligations for private entities to respond to what governments envision as online and real-world harms. The most far-reaching of these measures, the United States legislation *Allow States and Victims to Fight Online Sex Trafficking Act 2017* (commonly referred to as FOSTA-SESTA) has yet to generate a successful conviction for a victim/survivor of human trafficking offending,¹⁵ but has been found to **diminish the ability of sex workers across the globe to work independently**, through loss of income, lack of access to health information and harm reduction strategies, and lack of access to peer

⁵ *Prostitution Act 1979* (NSW).

⁶ *Sex Industry Act 2019* (NT) s 3.

⁷ *Sex Work Decriminalisation Act 2022* (Vic) s 1.

⁸ Victorian Equal Opportunity and Human Rights Commission, [Sex work discrimination – Your rights and responsibilities under the Equal Opportunity Act 2010](#) (Guideline, May 2023).

See also Sarah Spina-Matthews ['With anti-discrimination changes, Northern Territory has some of the world's most progressive sex work laws. It wasn't always that way'](#), *ABC News* (online, 27 November 2022).

⁹ Hon Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence ['Government to decriminalise sex work'](#) (Media Statement, 24 April 2023).

¹⁰ See *Discrimination Act 1991* (ACT) s 7(1)(p), *Anti-Discrimination Act 1991* (QLD) s 7(l), and *Anti-Discrimination Act 1998* (TAS) s 16(d).

¹¹ Kahlia McCausland et al, "'It is stigma that makes my work dangerous": experiences and consequences of disclosure, stigma and discrimination among sex workers in Western Australia' (2022) 24(2) *Culture, Health & Sexuality* 180, 185.

¹² *Ibid* 190.

¹³ Zahra 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.

¹⁴ Lavender Baj, ['How Australian Banks Are Legally Discriminating Against Sex Workers'](#), *Junkee* (online, 10 November 2021).

¹⁵ United States Government Accountability Office, Report to Congressional Committees GAO-21-385, [Sex Trafficking, Online Platforms and Federal Prosecutions](#) (June 2021) 1.

support and networking.¹⁶ Since the rise of this approach, sex workers in Australia have also reported losing access to services such as web-hosting,¹⁷ social media,¹⁸ and payment processors and merchant facilities.¹⁹

Algorithmic bias

As the *Safe and Responsible AI in Australia* Discussion Paper notes, perpetuation of biases by AI and ADM are a central concern. Harms generated by algorithmic technologies have been documented in both public and private sectors contexts,²⁰ and risk entrenching systemic discrimination on an ‘unprecedented scale.’²¹ The risk of perpetuating biases is not limited to models being trained on flawed data sets; bias in AI/ADM can be inadvertently introduced at any stage during a technology’s development, and can be difficult to identify and correct until after a system has produced harmful outcomes.²² The Australian Human Rights Commission (AHRC) has also identified a need for targeted education and information for private sector actors using AI and ADM technologies to ensure that they are compliant with Commonwealth and state/territory anti-discrimination legislation.²³

Scarlet Alliance believes that regulation and governance of AI and ADM technologies must adequately identify and address systemic bias before technologies are implemented. It should not be incumbent on sex workers, or any other marginalised community, to experience bias generating loss of income, privacy breaches and safety risks in order for regulatory tools (such as privacy and human rights protections) to be triggered. We expect that the consensus emerging from this consultation should be a framework that promotes a standard of inclusion, and regulation against active exclusion. Anything less amounts to tacit permission for private sector actors to undermine decades of social reform for sex workers and other marginalised communities. Given the ubiquitous nature of this technology, AI and ADM governance and regulation has the potential to either improve or devastate the social inclusion of marginalised communities across unceded Australia.

Algorithmic bias and access to internet technologies

Sex workers in Australia and overseas are directly impacted by algorithmic bias from tech services and social media platforms. The clearest example of this is the practice of ‘shadow-banning’, where content an algorithm detects as potentially inappropriate (although not necessarily in breach of its terms of service) is effectively hidden from audiences. Shadow-banning may be limited to an individual post, but usually impacts multiple or all posts made by an account, may render the account itself invisible in search results, and can delay or prohibit the account-holder from accessing the platform’s paid advertising options. ADM may be used to remove an account altogether, without a human determining whether a post(s), paid advertisement or account has actually breached the platform’s or provider’s terms of service.²⁴

¹⁶ Blunt and Wolf (n 1). See also Erin Tichenor, [“I’ve Never Been So Exploited”: The Consequences of FOSTA-SESTA in Aotearoa New Zealand](#) (2020) (14) Anti-Trafficking Review 99, which explores the impacts of FOSTA-SESTA in Aotearoa New Zealand, where sex work has been decriminalised since 2003.

¹⁷ Julie Fenwick, [‘Australian Sex Workers Have Been Removed From Linktree. What They Are Doing Is Not Illegal’](#), *Vice* (online, 21 January 2022).

¹⁸ James Purtill, [‘Sex workers fear a new wave of deplatforming — and the proposed Online Safety Bill’](#), *ABC News* (online, 20 February 2021).

¹⁹ Amber Schultz, [‘It’s sex discrimination: banks strip brothels and escort agencies of their rights’](#), *Crikey* (online, 20 May 2020).

²⁰ Australian Human Rights Commission (AHRC), [Human Rights and Technology](#) (Final Report, 27 May 2021) 105-7.

²¹ Tendayi Achiume, [Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance](#), UN Doc A/HRC/44/57 (18 June 2020) [6].

²² Karen Hao, [‘This is how AI bias really happens — and why it’s so hard to fix’](#), *MIT Technology Review* (online, 4 February 2019).

²³ *Human Rights and Technology* (n 20) 108-9.

²⁴ Paula Akpan, [‘What Exactly Is Shadow Banning?’](#), *Bustle* (online, 2 August 2020).

The harms generated by this form of ADM outweigh any benefit that an individual post will be seen by unintended audiences, with algorithmic technologies 'rating [images of] women more racy than images containing men,'²⁵ as well as disproportionately impacting LGBTQI+ people and people of colour,²⁶ and people accessing and sharing political content and health information.²⁷

A survey of more than 200 sex workers and adult entertainment performers in the United States (where sex work is mostly criminalised) identified shadow-banning and algorithmic bias as having negative impacts on mental health, as well as having a chilling effect on the sharing of health and safety information and engagement in political speech.²⁸ Scarlet Alliance believes that algorithmic bias and shadow-banning generates similar impacts for sex workers in Australia in terms of mental health and self-censorship by sex workers and sex worker organisations when preparing and distributing health promotion messages and safety information to avoid losing connections, audience reach or losing access to the social media platform itself.

In relation to posts made across all major social media platforms (Facebook, Instagram and Twitter), the following experiences have been reported by Scarlet Alliance member organisations:

- A health promotion social media account run by a sex worker peer organisation being temporarily barred from posting after sharing a health promotion post about condom use;
- Paid advertisements for health promotion events and community events run by sex worker organisations' being blocked prior to publication for 'breaching community standards';
- Posts advertising job vacancies for sex worker peer positions for service delivery and advocacy at state/territory and national sex worker organisations (funded by government and payable under the Social, Community, Home Care and Disability Services Industry Award) being deemed as breaching community guidelines;
- Posts sharing sex worker COVID-19 safety plans referenced on government websites being deemed as breaching community guidelines;
- Posts sharing legislation relating to sex work, such as the *Sex Industry Act 2019* (NT) and the *Anti-Discrimination Act 1992* (NT) being deemed as breaching community guidelines
- Sex worker organisations' social media accounts being permanently 'closed' because the platform deems sexual health promotion inappropriate content and/or a breach of terms and conditions.

The fact that sex work is not criminalised by the Commonwealth, nor the existence of state/territory legislation specifically decriminalising sex work or implementing anti-discrimination protections for sex worker does not appear to reduce the incidents of shadow-banning or algorithmic bias against sex workers and sex worker organisation in Australia. While social media and other tech platforms are aware of algorithmic bias in ADM used to determine whether a user is compliant with terms of service, providers have done little to address algorithmic overreach and face no consequences if they ignore it all together.

At the Australian Government Modern Slavery Conference on June 27-29 2003, Mish Pony, Scarlet Alliance CEO asked Malina Enlund, Safety Policy Manager of APAC META, why sex workers in decriminalised jurisdictions were subject to the same rates of shadow-banning and algorithmic discrimination as sex workers in criminalised settings, to which she responded (paraphrased) 'We are a multinational and there are so many different laws, we can't fit them all.' In any other scenario, a global corporation conducting business knowingly in breach of domestic law would generate widespread outrage.

Impacted platform users in Australia have identified that bias in AI and ADM is increasing rather than being addressed.²⁹ A simple Google search of the terms 'shadowbanning complaint sex work' returns hundreds of thousands of primary source materials documenting a decade of sex workers raising this issue within the public sphere, including:

²⁵ Gianluca Mauro and Hilke Schellmann, ["There is no standard": investigation finds AI algorithms objectify women's bodies](#), *The Guardian* (online, 8 February 2023).

²⁶ Chanté Joseph, ['Instagram's murky "shadow bans" just serve to censor marginalised communities'](#), *The Guardian* (online, 9 November 2019).

²⁷ Mauro and Schellmann (n 25).

²⁸ Hacking/Hustling, [Posting into the Void](#) (Community Report, October 2020) 52-3.

²⁹ Mauro and Schellmann (n 25).

- Sexual Health Alliance, 2022³⁰
- *Sydney Morning Herald*, 2022³¹
- *The Atlantic*, 2022³²
- *Porn Studies*, 2021³³
- *The Daily Dot*, 2020³⁴
- *Huffington Post*, 2019³⁵
- Tits and Sass, 2019.³⁶

Big tech companies are aware of the existence of bias in the ADM used to identify and hide or remove content that it deems ‘inappropriate’, are aware that this bias impacts specific marginalised communities, and are aware that this bias may mean that their products and services may be operating in breach of Australian law.

ADM and financial discrimination

The use of AI and ADM technologies by the financial products and services sector generates significant historical, ongoing and emerging concerns for sex workers in unceded Australia. Within the sector, which includes banks and other financial institutions, payment processors, credit card companies and merchant facilities providers, ‘the policies of U.S.-based companies to exclude sex workers have largely been replicated or applied’ in Australia,³⁷ despite major differences in legal and policy approaches to various forms of sex work, and the existence of anti-discrimination protections for sex workers in several Australian jurisdictions. Financial services operate in different jurisdictions and must comply with a range of financial regulations, but are not currently being held accountable to the different and often opposing social norms and human rights laws in those jurisdictions.

AUSTRAC, Australia’s financial crime and anti-money laundering regulator, has noted that whole-sector and indiscriminate debanking and other forms of financial discrimination from institutions are **not** an effective approach to risk-management, and in fact ‘can increase the risks of money laundering and terrorism financing and negatively [impact] Australia’s economy.’³⁸ The increasing use of ADM within the financial services sector risks entrenching and increasing financial discrimination against sex workers and other populations affected by financial discrimination and debanking, with the proprietary and ‘black box’ nature of these technologies making it difficult to identify whether financial services providers are compliant with relevant anti-discrimination legislation.

Recommendation 1: That the Australian Human Rights Commission (or other AI/ADM specific regulatory body, if established) be resourced to provide targeted education and information for private-sector actors providing goods or services to people in Australia, to ensure that their AI and ADM technologies are compliant with Commonwealth and state/territory anti-discrimination legislation.

³⁰ Emily Carriere, ‘[Shedding some light on shadow banning](#)’, *Sexual Health Alliance* (Blog Post, 1 August 2022).

³¹ Carla Jaeger, ‘[What is shadow banning? And what do social platforms say about it?](#)’, *Sydney Morning Herald* (online, 29 April 2022).

³² Gabriel Nicholas, ‘[Shadowbanning Is Big Tech’s Big Problem](#)’, *The Atlantic* (online, 28 April 2022).

³³ Carolina Are and Susanna Paasonen ‘[Sex in the shadows of celebrity](#)’ (2021) 8(4) *Porn Studies* 411.

³⁴ Ana Valens, ‘[Report says shadowbanning is real—and it’s suppressing sex workers](#)’, *Daily Dot* (online, 16 Oct 2020).

³⁵ Jesselyn Cook, ‘[Instagram’s Shadow Ban on Vaguely ‘Inappropriate’ Content Is Plainly Sexist](#)’, *Huffington Post* (online, 29 April 2019).

³⁶ Suzy Hooker, ‘[Shadowbans: Secret Policies Depriving Sex Workers of Income and Community](#)’, *Tits and Sass* (Blog Post, 21 June 2019)

³⁷ Zahra Stardust et al, ‘High Risk Hustling: Payment Processors Sexual Proxies and Discrimination by Design’ (2023) 26(1) *City University of New York Law Review* 57, 67.

³⁸ AUSTRAC ‘[AUSTRAC statement 2021: de-banking](#)’ (Media Release, 29 October 2021).

Personal information and data security

The collection, storage and use of personal information for use by AI and ADM technologies is also a major concern for people living in Australia.³⁹ While most people are aware that data is collected from online activity, there is ‘substantial disconnect’ between the way people in Australia believe their data is collected, stored and used, and the way their data is actually collected, stored and used, with the terms of service of many digital platforms and services granting ‘significant discretion over how...user data is used and disclosed to other businesses and organisations, both now and in the future.’⁴⁰

While effective privacy legislation limits and regulates the collection, storage and use of personal information by private and public sector organisations, the sheer volume of data collected, combined with broad discretion afforded to digital platforms and services to collect, store and share user data, generates risks for data privacy and security. This can lead to a ‘mosaic’ effect, where combining de-identified datasets can lead to data re-aggregation identifying specific groups or individuals.⁴¹ It is untenable to argue that users provide ‘informed consent’ for organisations to collect, store, use and share data if the terms of service outlining these limits are vague or difficult to understand,⁴² or when having an account with a platform or service is necessary in order to access information, essential goods and services or participate in any commercial activity.

Due to the stigmatised and sometimes criminalised nature of our work, sex workers have specific concerns about data privacy and security. At minimum, sex workers need to be able to access online technologies without having their sex work status or accounts used for sex work linked to their personal identity. Most sex workers use some form of pseudonym(s), particularly for online activity related to sex work business, information sharing, organising or performance. This cannot be undermined by AI/ADM connecting pseudonymous identities with personal information - for instance, there are reports that Meta’s new platform Threads has published the full legal names of people operating sex worker accounts without permission.⁴³

Anecdotal evidence also points to the data of sex workers and their associates being extensively shared between private entities, leading to denials of service (solely on the basis of alleged sex work status) from a diverse range of platforms, including DoorDash and AirBnB.⁴⁴ While Scarlet Alliance acknowledges that businesses can choose whether or not to provide goods or services to particular individuals for any reason, the surveillance of the everyday business activities of sex workers by private-sector actors using this information to draw negative inferences based on a person’s sex work status is unacceptable, **and amounts to illegal discrimination in many Australian jurisdictions.**

Personal information - images and generative AI

During the consultations for the *Online Safety Act 2021* (Cth) and establishment of the eSafety Commissioner, Scarlet Alliance raised concerns that this legislation and existing Australian privacy protections do not adequately address the misuse of images of sex workers.⁴⁵ While sex workers may consent to image sharing in some contexts (for example, through paid advertising or to subscribers via content-sharing platforms), this consent cannot be inferred to other contexts, such as ad-scraping (where untraceable offshore sites publish the images or personal information of sex workers without consent and with no accessible avenue for this to be removed), or other scenarios of non-consensual image sharing.

³⁹ According to the Office of the Australian Information Commissioner’s Australian Community Attitudes to Privacy Survey 2020, 78% of survey participants believed that individuals should be informed of what factors and personal information any algorithm considered - see *Human Rights and Technology* (n 20) 48.

⁴⁰ Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 2.

⁴¹ Jill Capotosto [‘The mosaic effect: the revelation risks of combining humanitarian and social protection data’](#) *International Committee of the Red Cross Humanitarian Law & Policy* (Blog Post, 9 February 2021).

⁴² *Digital Platforms Inquiry* (n 42) 422-434.

⁴³ See @Mistressmatisse ([Twitter, 6 July 2023, 11:20am AEST](#)).

⁴⁴ Snow (n 3).

⁴⁵ See Evidence to Senate Standing Committees on Environment and Communications (answers to questions taken on notice) (n2).

The concerns relating to data reaggregation outlined above also apply to data in the form of personal images, where generative AI technology may be used to ‘unobscure’ identifying details that a sexworker has hidden in the images they share (such as facial features, tattoos or other identifying markers) or allow for the creation of ‘deepfakes’ based on existing sex worker images. It is essential that all people, including sex workers, are able to retain autonomy over their images, and provide consent (or non-consent) for use of these images in various contexts. Non-consensual use of this information risks the conflation of sex work identities with ‘real world’ identities, restricting freedom of movement, causing reputational damage, limiting employment opportunities outside of the sex industry, generating harms to privacy and physical safety and the restricting the ability to remove images from public platforms.

Any governance framework for AI/ADM must provide clear and enforceable limits on the use of personal information and images in AI/ADM models, both as data inputs and using these technologies to reaggregate or generate personal information or images relating to specific individuals. In particular, Scarlet Alliance would support strict limits or bans on public and private sector use of one-to-one facial recognition systems and other biometric surveillance technologies.

Recommendation 2: That Australia’s AI/ADM governance framework includes clear and enforceable limits on the use of personal information and images in AI/ADM models, both as data inputs and using these technologies to reaggregate or generate personal information or images relating to specific individuals. In particular, Scarlet Alliance would support strict limits or bans on public and private sector use of one-to-one facial recognition systems and other biometric surveillance technologies.

Proposed governance approaches

As noted by the Discussion Paper, governments across the globe have recognised that AI and ADM technologies present risks beyond existing online technologies that require tailored regulation. Scarlet Alliance supports in principle the development of a regulatory framework specific to AI and ADM technologies, but notes that this framework must be developed to deliver inclusion, equity and access to technologies alongside economic gains.

The recent review of the *Privacy Act 1988* (Cth) identified two major challenges for AI and ADM regulation - to what extent a decision must rely on algorithmic technology for it to be considered ‘automated,’ and what kinds of decisions have ‘legal’ or ‘significant’ consequences to be within scope for regulation.⁴⁶ While AI and ADM used within public health, criminal justice or migration systems calls for the highest degree of transparency and accountability, private entities also make ‘significant’ decisions using ADM, ‘effectively bar[ring] someone from certain goods or services,’ or determining access to ‘financial and lending services, housing, insurance, education enrolment,...employment opportunities and health care services, or access to basic necessities, such as food and water.’⁴⁷

The increasing role of private entities in making ‘significant’ decisions can be seen in the context of the increasing role of digital technologies in the everyday lives of people in Australia. The ability to access news and information, and to participate in domestic or international markets as either a consumer or provider of goods or services increasingly requires access to digital technologies, and control of/access to these technologies is increasingly mediated by ‘big tech’ corporations such as Meta or Google.⁴⁸ As digital technologies play an increasing role in all aspects of life for people in Australia, distinctions between the ‘significance’ of decisions made by state versus private-sector actors become less clear-cut. Any specific regulatory framework for AI and ADM in Australia must recognise the increasing necessity for people in Australia to access and use digital technologies, and that the use of AI and ADM by organisations in either the public or private sector may generate ‘significant’ consequences for people in Australia.

⁴⁶ Attorney-General's Department, [Privacy Act Review](#) (Final Report, 16 February 2023) 188.

⁴⁷ Ibid, 188-9.

⁴⁸ See Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 1-3 and 6-7.

Risk-based regulation

As noted in the Discussion Paper, many governments are implementing specific regulation of AI and ADM technologies by categorising them according to the risk of potential harms a technology may generate. While this approach has the benefit of ensuring that developers of new technologies provide transparent assessments of the potential risks presented by those technologies, it is challenging to implement this regulatory approach towards AI/ADM technologies that are already widely-used within the private sector without regulation, without having a consensus understanding as to what those technologies are and how they function.

Further, this approach places developers in the position of justifying the overall benefit of their technology, against complex ethical dilemmas and international and domestic legal and regulatory frameworks. Aside from the obvious financial incentives for developers to downplay potential risks, this approach places an onus on developers to preemptively assess a particular technology's risks against legal, ethical and governance frameworks, which may be outside their skillset.⁴⁹ Further, even with rigorous testing, the harms generated by a particular technology may not become apparent until the technology is widely-used.⁵⁰ The AHRC identified AI/ADM developers as requiring targeted education in ethics and legal frameworks relevant to AI development, and proposes an accreditation or certification system for AI designers. In addition to our endorsement in **Recommendation 1** that the AHRC be resourced to provide education to AI/ADM developers providing goods and services to, we would endorse the development of an ethics-based accreditation or certification for AI/ADM developers carrying on business in Australia.

Recommendation 3: That Australia's AI/ADM governance framework includes a compulsory ethics-based accreditation or certification for AI/ADM developers carrying on business in Australia.

While it is becoming more widely understood that infrastructure ensuring a human check or justification for ADM is often unfeasible or even impossible, it is unhelpful to categorise particular technologies as 'black box'; due to proprietary technology, algorithmic complexity and new systems being built on existing technology, the reality is that all AI and ADM technologies are to some extent inscrutable.

Scarlet Alliance believes that these complexities are best mitigated by **the establishment of an AI and ADM-specific independent government regulator**, in line with the AHRC recommendation for the establishment of an AI Safety Commission.⁵¹ It is imperative that this regulator promotes digital rights and technology access for **all people in Australia**, including sex workers and other groups facing the erosion of digital rights and ability to access online technologies.⁵²

If such a body is established, it must have a clear rights-based remit, consult with groups facing marginalisation of digital rights both during its establishment phase and on an ongoing basis, and promote transparency with regular reporting requirements. If this body oversees a complaints process for those negatively impacted by AI/ADM technologies, the complaints process must be able to validate and respond to complaints from sex workers made using pseudonyms or working names, without requiring identifying legal details such as name, identity documentation, postal or residential addresses, or any other details that would identify the complainant. The process should allow for complaints to be submitted using anonymized IP addresses or VPNs if required. It must also allow sex workers who wish to complain completely anonymously to do so as an affected class or through an advocate, including a sex worker peer organisation like Scarlet Alliance or our member organisations. A number of existing Australian bodies already allow anonymous and/or representative

⁴⁹ See *Human Rights and Technology* (n 20) (32).

⁵⁰ See *Human Rights and Technology* (n 20) 31.

⁵¹ *Human Rights and Technology* (n 20) 128-135.

⁵² Scarlet Alliance (n2) outlines the concerns raised during the passing of the *Online Safety Act 2021* (Cth) and the establishment of the Australian eSafety Commissioner. See also Eden Gillespie ["'Rushed through parliament": Sex workers' concern about Online Safety Act'](#), *SBS News* (online, 1 March 2021).

complaints, including the Office of the Australian Information Commissioner,⁵³ the NSW Anti-Discrimination Board,⁵⁴ the AHRC,⁵⁵ the Queensland Human Rights Commission,⁵⁶ and the ACT Human Rights Commission.⁵⁷

Recommendation 4: That Australia’s AI/ADM governance framework includes the establishment of an AI and ADM-specific independent government regulator, with a focus on promoting digital rights and technology access for all people in Australia, including sex workers and other groups facing the erosion of digital rights and ability to access online technologies. This body should oversee a complaint process that allows for representative and pseudonymous complaints, and complaints made through an advocate or advocacy body.

Non-regulatory approaches

The Discussion Paper notes the importance of non-regulatory approaches as part of an AI and ADM governance framework. Similarly, the AHRC has recommended targeted education for technology users (the general public), AI and ADM designers and developers, and public sector organisations utilising AI and ADM in decision-making.⁵⁸ Scarlet Alliance supports this approach, and would recommend that sex worker peer organisations, alongside peer-led organisations from other marginalised communities affected by AI/ADM bias, be resourced to provide information to our communities on data privacy and security and navigating emerging AI/ADM technologies.

Recommendation 5: That Scarlet Alliance, sex worker peer organisations and peer-led organisations from other marginalised communities affected by AI/ADM bias be resourced to provide information to our communities on data privacy and security and navigating emerging AI/ADM technologies.

Recommendations

1. That the Australian Human Rights Commission (or other AI/ADM specific regulatory body, if established) be resourced to provide targeted education and information for private-sector actors providing goods or services to people in Australia, to ensure that their AI and ADM technologies are compliant with Commonwealth and state/territory anti-discrimination legislation.
2. That Australia’s AI/ADM governance framework includes clear and enforceable limits on the use of personal information and images in AI/ADM models, both as data inputs and using these technologies to reaggregate or generate personal information or images relating to specific individuals. In particular, Scarlet Alliance would support strict limits or bans on public and private sector use of one-to-one facial recognition systems and other biometric surveillance technologies.
3. That Australia’s AI/ADM governance framework includes a compulsory ethics-based accreditation or certification for AI/ADM developers carrying on business in Australia.
4. That Australia’s AI/ADM governance framework includes the establishment of an AI and ADM-specific independent government regulator, with a focus on promoting digital rights and technology access for all people in Australia, including sex workers and other groups facing the erosion of digital rights and ability to access online technologies. This body should oversee a complaint process that allows for representative and pseudonymous complaints, and complaints made through an advocate or advocacy body.
5. That Scarlet Alliance, sex worker peer organisations and peer-led organisations from other marginalised communities affected by AI/ADM bias be resourced to provide information to our communities on data privacy and security and navigating emerging AI/ADM technologies.

⁵³ Office of the Australian Information Commissioner, *CDR Privacy Safeguard Guidelines* (v 4.0, 15 November 2022) [Chapter 2: Privacy Safeguard 2 — Anonymity and pseudonymity](#).

⁵⁴ [‘How to Make a Complaint’](#), *Anti-Discrimination NSW* (Web Page, 20 January 2023).

⁵⁵ [‘Complaint Form’](#), *Australian Human Rights Commission* (Web Page, January 2023).

⁵⁶ [‘Complaints’](#), *Queensland Human Rights Commission* (Web Page, 15 September 2021).

⁵⁷ [‘Information for People Making Complaints’](#), *ACT Human Rights Commission* (Web Page, 2022).

⁵⁸ *Human Rights and Technology* (n 20) 31-32.