



Attn: Australian Human Rights Commission
Level 3, 175 Pitt Street,
Sydney
New South Wales, Australia

c.c. Lorraine Findlay
Human Rights Commissioner

By email: TGD.Submissions@humanrights.gov.au Lorraine.Findlay@humanrights.gov.au

26 February 2024

To the Australian Human Rights Commission,

RE: Free Speech Concerns in respect of a call for submissions on ‘current and emerging threats to trans and gender diverse human rights’.

The Free Speech Union of Australia (FSU) is a non-profit organisation that aims to protect and promote the free speech rights of our members and Australians more broadly.

We recently learned that [the Australian Human Rights Commission is calling for submissions on current and emerging threats to trans and gender diverse human rights](#). We have some significant concerns about this consultation and how it is being conducted.

1. Investigation of ‘misinformation’ and failing to recognise Freedom of Speech

Trans rights and the associated conflicts these can create are currently the subject of national political debate in Australia. Unfortunately, the consultation materials do not appear to be neutrally worded. It appears that those with gender critical views are being cast as spreading misinformation, being extremists and even violating human rights. The consultation materials refer to: “*Anti-trans mobilisation, dis- and misinformation, and extremism and radicalisation*”. This type of language seems designed to delegitimise the viewpoint of people who have a

gender critical perspective (which includes many trans people), or merely practical concerns about implementing 'trans rights'.

We find it most worrying that the Human Rights Commission - which is vouchsafed with protecting the most fundamental human right - namely 'free speech' - is instead promoting 'concerns' such as 'mis-information'. The focus of the Commission should be on unlawful discrimination and upholding genuine human rights, not pursuing illusory concerns such as 'hate speech' or 'misinformation'.

One of the biggest threats to free speech in Australia (and many other countries) is the clamour for hate speech laws to 'protect' certain groups from hearing ideas they don't like. Hate speech laws are problematic because 'hate' is subjective - different people find different things hateful, and attempts to make 'hate speech' illegal typically result in insulating the ideological preferences of certain favoured groups from criticism. According to one of the world's foremost experts on hate speech laws, Nadine Strossen: "*Punishing ideas we consider hateful or discriminatory not only violates fundamental free speech principles; it also may well increase intergroup distrust and discrimination rather than reducing them.*" It is concerning that the AHRC has overlooked the unhappy history of these ideas, including that the main drivers of hate speech provisions were slavers afraid of group libel, and after that, the Soviet Union under Stalin.¹

Hate speech restrictions, which certain advocates allege are needed to protect the mental wellbeing of vulnerable minorities, have instead been empirically found to harm the mental health of those who "self-silence".² We are concerned that attempts to ban misinformation are really just ways to implement hate speech restrictions via the backdoor and insulate certain ideas from criticism. This is not appropriate in a democratic society. It also ignores the extensive criticism made in respect of a recent proposal for a 'misinformation bill'.³

2. Restricting Public Participation to only those who the AHRC agree with.

We also find it most concerning that the Commission says it will only accept submissions from people and organisations who it regards as "subject-matter experts". All other submissions will presumably be ignored. Would lesbian and gay people who have concerns about the displacement of sex in favour of gender identity be regarded as subject-matter experts? What about someone who is concerned about child safeguarding, or perhaps the implications for disability rights? Without immediate clarification, the unfortunate inference that might be drawn is that the AHRC is less willing to respect the rights of those people who it disagrees with: a

¹ See Strossen, Nadine. *Hate: Why we should resist it with free speech, not censorship*. Oxford University Press, 2018. Strossen was the former President of the ACLU.

² Many empirical studies show a relationship between self-silencing and Depression: Carr et al. 1996; Flett et al. 2007; Jack & Dill 1992; and Thompson, 1995. - for a longer list, see: [Free Speech and Mental Health in School | The Foundation for Individual Rights and Expression \(thefire.org\)](https://www.thefire.org/)

³ We note that the Human Rights Commissioner, Lorraine Findlay, supported this considerable criticism: <https://humanrights.gov.au/about/news/opinions/why-misinformation-bill-risks-freedoms-it-aims-protect>

worrying position given the important powers and responsibilities of this organisation. Restricting who can submit is antithetical to liberal democratic principles and will have a chilling effect on submissions. It does not help resolve the difficult issues, or advance the genuine concerns of trans people (rather than trans activists), thus being a mummery of a consultation process. It is only through dialogue that these issues will be resolved.⁴

The Commission also appears to have overlooked the fact that human rights can be legitimately invoked in support of the gender critical position. For example, those with gender-critical views might invoke Articles 18 and 19 of the Universal Declaration of Human Rights to argue that their rights to freedom of conscience and freedom of expression guarantee them the right to hold and profess these views. They could also potentially bring their own claims under Anti-Discrimination Law, which the AHRC would be responsible for conciliating, which is all the more reason for a neutral approach to be taken.⁵

The Commission has a legal obligation to support all human rights. It is also expected to produce balanced and well-researched reports. It is not appropriate for Commissioners to act as decision-makers concerning whose submissions and viewpoints will be deemed acceptable. Nor is the AHRC supposed to be taking sides.

We therefore ask you to confirm that you will accept any and all submissions to this consultation, regardless of “subject matter expertise”. We also ask to know what steps will be taken to ensure that something like this will not happen again.

Finally, it may help if the (unnamed) people responsible for this consultation⁶ discuss the problems with misinformation with the Human Rights Commissioner. We have therefore copied her into this letter in the hope that this dialogue will now happen.

Yours sincerely,

Free Speech Union of Australia

⁴ Cass R. Sunstein, "Three Civil Rights Fallacies," 79 California Law Review 751 (1991).

⁵ To give a simple example, a woman who is not happy with the toilet facilities might file a sex discrimination claim (noting that similar claims have already been upheld under a similar legal system, namely the UK: *Earl Shilton Town Council v Miller* [2023] EAT 5). The AHRC may have to deal with a victimisation claim made by someone who argues they are advancing disability rights by challenging the measures taken in respect of vulnerable adults and children (e.g. with neurodiverse conditions) and are being overly encouraged to transition. The point is that the AHRC has a duty to be fastidiously neutral, rather than appearing to take one side, let alone prejudging issues in advance of a case.

⁶ This consultation appears to be within the purview of the Sex Discrimination Commissioner, as we understand she presently has responsibility for 'LGBTQI+' rights. In future, we would hope that there would be no ambiguity as to who is responsible for what. This might improve the quality of the AHRC's work.