



Via email only

15 August 2025

Response to Consultation on NSW Anti-Discrimination Act Review

Dear Sir/Madam,

The FSU is a non-partisan organisation established in order to promote the fundamental human right of Freedom of Speech within Australia. We defend, protect and promote the Free Speech rights of all Australians irrespective of the content of the speech.

Whilst we do not address the entire consultation, there are certain aspects of the proposed reforms which present concerns in respect of Freedom of Expression. We address each in turn below.

1. Imposing Equality of Outcome

We are concerned to ensure that anti-discrimination legislation should be a shield, not a sword. The existing focus on formal equality rather than substantive equality should be maintained. Formal equality is a proper legislative goal for anti-discrimination legislation, whereas equality of outcome is not.

The suggestion that equality of outcome should be implicitly or explicitly made a part of the purpose of the Act permeates much of the rest of the consultation paper, and should be rejected. The fact that other jurisdictions may take a different view is not material to the merits of that approach, other than to note that these experiments have had negative consequences, both for free speech, and the reputation of anti-discrimination law.

2. Replacing Sex with Gender

Perhaps one of the most concerning proposals canvassed within the consultation paper is the idea that sex should be abolished as a protected characteristic and replaced by gender. Unfortunately, gender identity is a characteristic that tends to be weaponized by individuals seeking to compel speech.¹ We would object to such a change on this basis.

¹ <https://www.thefire.org/news/im-trans-trans-communitys-illiberalism-putting-our-rights-risk>



3. Burden of Proof Shifting

Exceptions can be important in respect of facilitating Freedom of Expression, because they can be a basis for facilitating discussions of sensitive topics. One example is the Giggle App, which enabled biological women to have discussions which they would otherwise be inhibited from having in the presence of biological men.

We are concerned that making exceptions a discretionary status that must be applied for by the person or body to whom the exception might apply creates the real prospect of inconsistency in when exceptions apply, and puts the burden of proving that an exception is justified upon the applicant for that exemption.

4. Vilification Provisions

As these provisions are usually weaponized by activists who like to engage in censorship, the most appropriate step is to remove them from the Act. If not, then the threshold should be raised and certainly not lowered. Proven intent to vilify should always be a necessary ingredient for any vilification claim. The unhappy truth is that hate speech laws usually end up penalising minorities, rather than advancing their inclusion.²

5. Conclusion

When appropriately designed, anti-discrimination law offers important protections, by enabling everyone to participate in the community on an equal basis. Unfortunately, some of the proposed reforms risk placing anti-discrimination law into disrepute, including by undermining Freedom of Expression. This risks undermining these important protections for those who most need them: the most vulnerable in Australian society.

We hope that you will be able to take these concerns on board.

Yours sincerely,

Dr Reuben Kirkham, *Free Speech Union of Australia*

² See e.g. Strossen, Nadine. *Hate: Why we should resist it with free speech, not censorship*. Oxford University Press, 2018.