

6 April 2023

Ms Julie Inman Grant
eSafety Commissioner
PO Box Q500, Queen Victoria Building
NSW 1230

enquiries@esafety.gov.au

Dear Ms Inman Grant

Ensuring the Voice to Parliament Referendum debate is free and fair

The Institute of Public Affairs (IPA) was founded in 1943 as a non-profit educational research organisation with the objective of furthering the individual, social, political, and economic freedom of the Australian people, and maintaining and enhancing the Australian way of life.

A central strand of the IPA's research for 80 years has been Australia's democratic traditions, particularly in relation to freedom of speech, egalitarianism, and respect for the diverse views of the community.

Foundational to the Australian way of life is that every Australian should have an equal say over the big issues facing our nation's future, and for debate around those issues to be conducted in a free and fair manner.

It is in this context that I am writing to you. On 28 March 2023 you spoke at a press conference at Parliament House regarding the forthcoming referendum on whether to entrench an Aboriginal and Torres Strait Islander Voice in the Australian Constitution. You are quoted as saying social media companies are to be "on notice" during the referendum debate. In particular, you asserted social media companies must monitor their platforms for 'key words that might be used to silence voices', for 'mis- and disinformation', and commented on their obligations to minimise 'online hate':

We need to make sure that we're minimising online hate. And again, my entreaty to everyone in Australia is, when you see online hate happening, report it to the platform and report it to eSafety. We have the powers to take it down. We're working with law enforcement in across Australia.

The IPA is also interested in the role social media companies need to play in the forthcoming referendum debate to ensure it is free and fair. Please see *attached* our letter to Prime Minister Anthony Albanese calling for the *Broadcasting Services Act 1992* to be broadened to include social media platforms as broadcasters, and to prevent them from censoring political debate during the referendum.

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Given our mutual interest in the role of social media in the referendum debate on an indigenous Voice, we would welcome a meeting with you to discuss the role the eSafety Commissioner can play in helping to ensure the referendum is free and fair. Of particular interest to us is any clarification you can provide as to what online material regarding the Voice may constitute 'hate speech', and whether hateful material directed at anti-Voice proponents and campaigners will be dealt with in the same way as hateful conduct directed at indigenous Australians.

Please confirm your availability to meet with us to discuss our concerns regarding the importance of free and fair debate in the lead-up to the referendum. We also ask that you provide written clarification as to whether the examples provided below would, in your assessment, constitute 'hate speech', and should therefore be subject to your power to 'take it down.'

Content moderation during the Voice debate

As you would know, defining 'hate speech' and similar concepts is in practice difficult, and can be a subjective exercise. With this in mind, I would make these preliminary comments:

- The *Online Safety Act 2021*, the legislation under which the powers of the eSafety Commissioner are defined, does not make unlawful or make actionable 'online hate' or 'hate speech'. It is important that Australians have clarity about what you mean when you call on them to report 'online hate' so that you can exercise your powers to 'take it down'.
- 'Hate' is an inherently subjective concept. To engage in any debate on an important issue runs the risk of offending someone with a different view. But a person's subjective feelings of offence cannot be grounds for silencing political opinion.
- The current Commonwealth government is a strong proponent of an indigenous Voice. Significantly, the eSafety Commissioner is an official of the Commonwealth government. Thus, the exercise of your considerable powers to limit online content, in the context of a political debate in respect to which the government has made its views clear, could be perceived to be state-sanctioned censorship of its opponents rather than the genuine restriction of harmful online abuse.
- There is a widespread community perception that the large technology companies already moderate online content in a way that unfairly silences right-of-centre opinions. This was most recently brought to light by the reporting on the so-called "Twitter Files", the release of emails sent by the previous management team of social media company Twitter prior to its takeover by Elon Musk. The reporting by independent journalists Matt Taibbi and Bari Weiss confirmed an overwhelming left-wing bias by the employees of Twitter resulting in unfair censorship of conservative viewpoints.

Given these concerns, the powers of the eSafety Commissioner to compel the removal of online material in the context of a political debate must be exercised with the utmost caution. Any perception (real or otherwise) that your office, the Commonwealth government, or the powerful social media platforms, have unfairly skewed the referendum debate would damage the legitimacy of its outcome and greatly harm the process of indigenous reconciliation. In this spirit, we would like you to clarify your views on what constitutes 'online hate'.

What opinions on the Voice are hateful?

Could you please confirm if you consider any of the below examples, if communicated on a social media platform and directed at a certain person or group, would represent a breach of the *Online Safety Act 2021* or otherwise require the involvement of the eSafety Commissioner to direct such content to be removed or silenced? (For the purposes of this letter, conduct which can be subject to the powers of the eSafety Commissioner are referred to as ‘hate speech’):

- There are numerous examples of prominent proponents of the Voice labelling critics of the proposed constitutional change as ‘racist’, ‘subconsciously racist’, ‘rednecks’, and ‘nasty eugenicists’ (see examples of these below). Racism is commonly regarded as a form of racial hatred. Is it hate speech to express an opinion opposed to the Voice?
- On three occasions videos promoting IPA research have been censored by large social media platforms. These are referred to in our letter to Prime Minister Albanese mentioned above and available at the links below.¹ Would any aspect of those videos constitute hate speech?
- On 14 February 2023, Senator Alex Antic during a Senate committee hearing asked whether if someone were 5% indigenous they could qualify to be a member of the Voice. Senator Anthony Chisholm claimed the line of questioning was ‘borderline racist’. Is it hate speech to question who qualifies for membership of the Voice?
- The Voice has been described as creating a ‘two-tiered society’, creating a ‘fourth arm of government’, or creating separate rights based on race. Do any of these terms or arguments constitute hate speech?

It can be observed that criticisms of anti-Voice proponents (at least in respect to reported criticisms by public officials and prominent personalities) can be highly vitriolic. Can you please confirm if any of the following constitute hate speech:

- On 10 March 2023 barrister Bret Walker SC is reported to have said that he considers it ‘racist’ to refer to the Voice as an ‘abomination’ or a ‘fourth arm of government’. Is calling someone racist for disagreeing on a political issue a form of hate speech?
- On 5 December 2022 pro-Voice activist and member of the Referendum Working Group, Professor Marcia Langton, is reported to have compared those that oppose the Voice to ‘nasty eugenicists’. If directed at an individual or targeted at a group, would the term ‘nasty eugenicist’ represent hate speech?

¹ Institute of Public Affairs, “IPA research leads debate forcing Federal Government backflip on Voice pamphlet” (11 February 2023) <https://www.youtube.com/watch?v=2YDumVti06M>;
“IPA Research: Is Big Tech Seeking to Influence the Voice Referendum?” (30 September 2022) <https://www.youtube.com/watch?v=Dq4SueFTiEc>;
“Race Has No Place: IPA Research Video on Indigenous Voice” (26 September 2022) https://www.youtube.com/watch?v=qIpm_CiVX-E

- On 29 November 2022 pro-Voice activist and member of the Referendum Working Group, Noel Pearson, referred to anti-Voice advocate Senator Jacinta Nampijinpa Price as being caught in a ‘redneck celebrity vortex’. Does referring to someone as a ‘redneck’ constitute hate speech?
- On 9 March 2023 Professor Marcia Langton is again reported to have said that those that attempt to shield the government from Voice-related court matters were displaying ‘subconscious racism’. Should an accusation of being subconsciously racist be considered hate speech?
- On 27 March 2023 former ABC journalist Jon Faine is reported to have said that opinions by those who are ‘not indigenous’ and who are ‘urban white commentators’ should not prevail. Do comments attempting to delegitimise the opinions of people on the grounds of their ancestry or race constitute hate speech?

We would welcome your answers to these questions and the opportunity to discuss them with you.

Regards,



John Storey
Director, Legal Rights Program
Institute of Public Affairs

28 February 2023

The Hon. Anthony Albanese MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Copies to: Senators and Members of the House of Representatives

Dear Prime Minister

The Federal government must ensure the Voice to Parliament debate is free and fair

The Institute of Public Affairs was founded in 1943 as a non-profit educational research organisation with the objectives: to further the individual, social, political, and economic freedom of the Australian people; and to maintain and enhance the Australian way of life.

A central strand of the IPA's research for 80 years has been on Australia's democratic traditions, including in relation to freedom of speech, egalitarianism, and tolerance for the diverse views of the community.

Foundational to the Australian way of life is that every Australian should have an equal say over the big issues facing our nation's future, and for debate to be conducted in a free and fair manner.

It is in this context that I am writing to you and your colleagues to bring to your attention a critical matter relating to the actions of major digital platforms, or 'big tech' companies, to attempt to manipulate public discourse in favour of one side of the debate. This letter outlines three recent acts of censorship by major digital platforms in relation to the Voice debate.

On 18 January 2023, during an interview with Ben Fordham on 2GB Radio, you confirmed that Australians should 'come forward' with suggested improvements to the Voice, saying 'you've got my phone number: make a suggestion.' The IPA is sharing our suggestions in this letter for how the government can act to ensure Australians can have a free and fair debate.

Google restricts IPA video on the Voice

On 14 February 2023, Google refused an attempt by the IPA to promote a video entitled 'IPA research leads debate forcing Federal Government backflip on Voice pamphlet.' The video contained IPA analysis of the federal government's proposed Referendum (Machinery Provisions) Bill 2022.

The cited reason for refusing to allow the IPA to promote its video, and therefore share its research into a critical public policy issue, was that it was an 'Australian election Ad' featuring

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‘An Australian federal political party, a candidate for the Australian House of Representatives or Senate, or a current elected federal officeholder in the Australian House of Representatives or Senate.’ This was incorrect: the video featured only IPA Research Fellow John Storey, and no political candidates or representatives of any political party. Despite the obvious error, Google has not reversed its decision.

Facebook restricts IPA video on the Voice

In September 2022 the IPA sought to communicate our research on Facebook to ensure it reached a broad cross section of the community. The research video was entitled ‘Race has no place’ and featured the comments of senators Jacinta Nampijinpa Price and James McGrath, and leading academic and public intellectual Anthony Dillon on the Voice.

On four separate occasions Facebook acted to ensure the visibility of the video was minimised. The IPA had attempted to pay a fee to share the video to more social media users but was rejected on the basis that the video was inconsistent with Facebook’s policy regarding “Ads about Social Issues, Elections or Politics policy”.

Meta, the parent company of Facebook, did not explain how a research video discussing racial equality violated Facebook’s policies. And there was no explanation for Facebook’s decision to remove the ban, then reapply the ban a short time later. Facebook later admitted they made the mistake and admitted they were wrong to have removed the ban on the promotion of the video, though they wrongly maintained that the content of the IPAs video required a ‘disclaimer’.

Facebook restricts second IPA video on the Voice

On 30 September 2022, the IPA published a research video, ‘Is big tech seeking to influence the referendum?’, which analysed the recent actions of the big tech companies in restricting the use of their platforms to those who were critical of the Voice. That video was rejected for promotion on the same day. To date, Facebook has not lifted this prohibition.

These three events expose a trend by major digital platforms to influence the public debate on the Voice. In a liberal democratic society, powerful—and in many cases foreign-owned—companies should not interfere in domestic debate, much less critical votes undertaken by the Australian people.

In an address to the Australian National University’s National Security College on 14 February, the Minister for Home Affairs Clare O’Neil MP stated: ‘Foreign interference is relentless, it is insidious, and it not only affects individuals, it fundamentally undermines our democratic processes.’ One of the most pressing examples of this kind of interference is large, foreign owned, corporations deciding how a domestic vote is debated.

There can be no confidence in the outcome of a referendum if it is plainly evident that Australians were not given an opportunity to engage in a free and fair debate about the question.

To this end, we are calling on the federal government to ensure the proposed referendum, if it takes place, will be enacted in a manner that allows Australians to say and hear all arguments for and against constitutional change. This means making a commitment to:

- Ensure big tech companies do not use their power to influence who is allowed to speak in relation to the Voice referendum debate:

The federal government should pass laws to prevent censorship of political viewpoints by digital platforms. Currently, Schedule 2, Part 2, Section 3 of the *Broadcasting Services Act 1992* requires broadcasters to offer political parties the opportunity to broadcast election material during an election.

This provision should be temporarily amended for the period of the referendum to: apply during a referendum campaign; expand the definition of broadcasters to apply to digital platforms; apply the requirement to give opportunity to broadcast referendum material to all referendum participants (not just political parties as is currently the case); and should clarify that digital platforms censoring referendum material (for instance, through shadow banning or posting misinformation warning) is unlawful.

At the conclusion of the referendum period these amendments should automatically repeal by way of a sunset provision.

- Ensure the ‘yes’ and ‘no’ cases receive equal government funding and equal regulatory treatment:

We note your comments made at the National Press Club on 22 February 2023 in which you state ‘We’re giving equal funding, of zero, to both the Yes and No cases’. This is only part of the story: separate from the question of direct funding is disparate regulatory treatment to ‘yes’ and ‘no’ campaigners. The government you lead gave the ‘yes’ campaign direct and immediate financial support in the October 2022 federal budget by granting deductible gift recipient status to Australians for Indigenous Constitutional Recognition, an advocacy group campaigning in favour of the ‘yes’ case, without any comparable status granted to a group campaigning for a ‘no’ vote at the referendum. If the government is going to provide financial support to participants in the referendum, it must do so on an equal basis.

- Ensure the referendum pamphlet is prepared and distributed in the traditional manner, and not drafted by an unrepresentative ‘expert’ or ‘independent’ panel:

The IPA welcomes the reports that the federal government has reversed its intention to abolish the traditional pamphlet explaining the arguments for and against a proposed constitutional change. However, the federal government must commit to ensuring the pamphlet is not drafted by an unrepresentative ‘expert’ or ‘independent’ panel.

Regardless of political party, all members of parliament are custodians of the Australian way of life, and central to the Australian way of life are the principles of liberal democracy, and the right of Australians to be given a fair go and have their say.

Regards,

A handwritten signature in blue ink, appearing to read 'Morgan Begg', with a stylized, cursive script.

Morgan Begg
Director of Research
Institute of Public Affairs