THE CONVERSATION

Academic rigour, journalistic flair

AAP Image/Lukas Coch

A constitutional Voice to Parliament: ensuring parliament is in charge, not the courts

Published: October 27, 2022 9.46am AEDT

Shireen Morris

Senior Lecturer and Director of the Radical Centre Reform Lab, Macquarie University Law School, Macquarie University

Australians will soon vote in a referendum on a First Nations Voice – a constitutionally guaranteed body empowering Indigenous communities to advise parliament and government on Indigenous affairs, as advocated by the Uluru Statement.

Prime Minister Anthony Albanese has released a draft constitutional amendment requiring parliament to establish the Voice.

However, some critics have raised concerns about “judicial activism”. They worry the High Court might interpret the provisions in unpredictable ways, creating legal uncertainty.

Careful constitutional drafting can address such concerns by making the amendment “non-justiciable”.

Non-justiciable constitutional clauses respect parliamentary supremacy. It means courts don’t get involved.

A constitutionally guaranteed First Nations Voice is intended to be non-justiciable.

The amendment can now be perfected to remove any doubt that parliament will be charge of its operation, not judges.

Prime Minister Anthony Albanese has released a draft constitutional amendment requiring parliament to establish a Voice to Parliament. AAP Image/Aaron Bunch

Read more: Putting words to the tune of Indigenous constitutional recognition

What's been proposed

The government's draft constitutional amendment reads:

> 1. *There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.*
> 2. *The Aboriginal and Torres Strait Islander Voice may make representations to parliament and the executive government on matters relating to Aboriginal and Torres Strait Islander Peoples.*
> 3. *The parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice.*

This is modest and reasonable, but can be refined.

Clause two could be revised to read (bolding is author's addition):

> *The Aboriginal and Torres Strait Islander Voice may make representations to parliament and the executive government* ***on proposed laws and*** *matters relating to Aboriginal and Torres Strait Islander peoples.*

Adding “proposed laws” will confirm and signpost non-justiciability. It will fortify the amendment against criticism. It will help answer concerns about uncertain judicial interpretation.

Constitutional clauses referring to “proposed laws” are considered unenforceable by the courts. This is because the High Court deals with laws, while “proposed laws” are parliament’s business.

Australia’s first chief justice and founding father of the Constitution, Samuel Griffith, explained in 1911 that parliament’s internal affairs are “not subject to [...] review by a court of law”.

As former High Court judge Edward McTiernan once said, “Parliament is master in its own household.”

Why ‘proposed laws’ is a key phrase

The “proposed laws” suggestion is not new.

Back in 2014, Indigenous leaders and constitutional conservatives – experts anxious to protect the Constitution from judicial activism – collaborated on how to achieve the empowering constitutional recognition Indigenous peoples sought, without creating High Court uncertainty.

The solution was a constitutionally guaranteed Indigenous advisory body, which would work through political dialogue, rather than through the courts.

Constitutional law expert Professor Anne Twomey suggested an amendment in 2015. It used the phrase “proposed laws”, which she noted was:

> *deliberately employed to indicate that this is an internal parliamentary process that cannot be interfered with or enforced by the courts.*

Legal scholars Professors Megan Davis and Gabrielle Appleby recently recalled how Twomey’s 2015 suggestion informed the First Nations dialogues that culminated in the Uluru Statement’s 2017 call for a constitutionally guaranteed First Nations Voice.

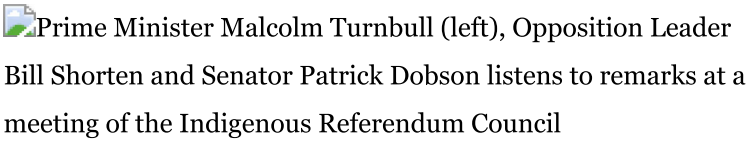
In its 2017 final report, the government-appointed Referendum Council affirmed the Voice amendment must be non-justiciable, noting:

> *The proposed Voice would not interfere with parliamentary supremacy, it would not be justiciable, and the details of its structure and functions would be established by parliament through legislation that could be altered by parliament.*

However, the “proposed laws” approach only works with standalone provisions that do not limit parliament’s law-making power.

Those suggesting a “duty to consult” within an Indigenous head of power as a more modest constitutional change should be commended for engaging productively, but are on the wrong track. These formulations limit parliament’s power, creating uncertainty for courts to resolve.

The government’s approach is more modest and workable, and should be refined.


Prime Minister Malcolm Turnbull (left), Opposition Leader Bill Shorten and Senator Patrick Dobson listens to remarks at a meeting of the Indigenous Referendum Council

The government-appointed Referendum Council affirmed the Voice amendment must be non-justiciable. AAP Image/Paul Miller

Better than other proposals

The intent to keep the Voice amendment away from the courts and under the purview of parliament sets it apart from all other options for Indigenous recognition.

An earlier proposal for a constitutional ban on racially discriminatory laws would enable courts to strike down parliament’s laws.

Proposals for a new preamble acknowledging Indigenous peoples could yield unpredictable judicial interpretations of the whole Constitution. Constitutional conservatives oppose a symbolic insertion for this reason.

By contrast, a constitutionally guaranteed Voice intends to keep policy matters out of the courts for resolution through political processes. It is the most legally sound and constitutionally compatible solution.

The Uluru Statement was released in 2017. AAP Image/Lukas Coch

On the question of scope

Non-justiciability also means those trying to excessively limit the issues on which the Voice can provide advice are missing the point. If properly drafted, scope issues would be resolved by parliament through legislation.

And why would politicians want to unnaturally limit the Voice’s ability to give non-binding advice on matters that are important to Indigenous communities? Environmental laws, for example, might not directly target Indigenous people but may yield negative consequences for economic development on Indigenous land. Indigenous communities may wish to alert government to the impacts of such policies.

To prohibit such advice would undercut a key practical benefit of the Voice. Flexibility and common sense are needed here.

Equally, those seeking to constitutionalise a broad scope should remember the Referendum Council's directive: as the final report made clear, scope issues should be resolved by parliament, not judges.

Let's work together

Experts should keep non-justiciability firmly in mind when suggesting improvements to the government's draft constitutional amendment.

We need an efficient bipartisan process to refine and agree on the Voice amendment.

The phrase "proposed laws" should be included to confirm parliament will be in charge, not the courts.

Read more: Creating a constitutional Voice – the words that could change Australia

---