

## THE CONVERSATION

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# What happens if the government goes against the advice of the Voice to Parliament?

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Mick Tsikas/AAP

*We asked our readers what they would like to know about the proposed Indigenous Voice to Parliament. In the lead-up to the referendum, our expert authors will answer those questions. You can read the other questions and answers [here](#).*

If the government disagrees with representations made by the Voice, the short answer is that the government prevails. Governments and parliaments are elected to represent all the people, not just one group of the people. This means they have to take into account a broad range of considerations, including how to manage the budget and the economy, ensure national security and maintain the social wellbeing of the whole country.

### **Ensuring the government and parliament are better informed**

The role of the Voice, if the proposed constitutional amendment is passed, would be to ensure the government and parliament are better informed when making laws or decisions on matters relating to Aboriginal and Torres Strait Islander peoples.

The Voice could make representations about how laws and policies have unintended or perverse consequences, or how they could be made more effective and efficient if they operated in a different way. Any sensible government would take such representations seriously when considering how to make or change laws and policies, because everyone wants better results for Indigenous Australians.

Decisions made with the best will in the world from Canberra can always be improved by listening to the people on the ground who are affected by them. The role of the Voice would therefore be important in improving the quality and effectiveness of laws and government policies. But it could not determine what those laws and policies will be.

We have a democratic system for determining who makes the laws and who forms the government, and that is not going to be changed by the proposed constitutional amendment.

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***Read more: An Indigenous Voice to Parliament will not give 'special rights' or create a veto***

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## **The influence of the Voice**

The power and influence of the Voice will not be static. It will depend on two factors – relevance and quality.

The proposed amendment, as currently drafted, gives the Voice a potentially wide remit. It says it may make representations to both parliament and the executive government “on matters relating to Aboriginal and Torres Strait Islander peoples”.

This could include laws and policies that specifically relate to Aboriginal and Torres Strait Islander peoples, such as those concerning native title or the protection of cultural heritage. It could also include laws of general application which have a particular impact upon Indigenous Australians.

An example might be a future law that required photo identification for people to be able to vote in federal elections. While such a law would be one of general application, it would most likely have a greater impact upon Aboriginal and Torres Strait Islander people in remote areas who are less likely to have photo IDs. It would be important for the Voice to be able to make representations to parliament about the potential impact of such a law in suppressing the votes of Indigenous Australians and to the government about ways of ensuring all Indigenous Australians are able to vote.



The Voice to Parliament might, for example, give advice on how best to ensure Indigenous Australians are able to vote in elections. Karen Michelmores/AAP

When the Voice makes representations on matters that fall within its expertise and provides insights from those affected on the ground, it will be at its most influential. If, however, the Voice were to make representations on matters that are peripheral to Aboriginal and Torres Strait Islander peoples, or that are not informed by expertise or local experience, then it is much less likely to have influence.

If the Voice, for example, were to make representations on matters concerning Australia's defence policy or its relations with China, on the basis that there was an incidental effect on exports by Indigenous groups, the government would be unlikely to give its representations much, if any, attention. Instead, it would be far more likely to be influenced by the representations of other bodies that have greater expertise on the subject.

The second factor is the quality of the Voice's representations. If it makes measured, well-researched, evidence-based representations that make practical suggestions, it is likely to be influential.

However, if it were to spread itself too thin by making poorly considered representations about a wide variety of matters outside its expertise, or make impractical or partisan representations, then it would be less likely to be influential. So it will be a matter for the Voice itself to secure influence by ensuring the high quality of its representations.

### **Could the courts force the government or parliament to implement the Voice's representations?**

The High Court has consistently stayed out of the internal proceedings of parliament. It does not determine what parliament should or should not consider when passing laws. Due to the separation of powers, the courts cannot instruct parliament to give effect to representations by the Voice.

However, the courts can review a government decision that affects the interests of people if it was made in an unfair manner. If, for example, a law said the decision-maker must take into account representations of the Voice before making a certain type of decision, failure to do so would mean the decision was invalid. The court would then send the decision back to the decision-maker to be remade once the relevant representations had been taken into account.



Due to the separation of powers, the High Court cannot force parliament to adopt advice from the Voice.  
Lukas Coch/AAP

In these cases, the courts are only concerned with the fairness of the process – that the decision is made properly, taking into account all relevant considerations – not the content of the decision.

The decision-maker could remake the decision, taking into account the representation, and still not give effect to the representation. This would be perfectly valid. There is no obligation to give effect to the representation – only to take it into account, if the law requires the decision-maker to do so.

Some have raised concerns that instead of parliament deciding whether a decision-maker has to take into account representations of the Voice in relation to certain decisions, the High Court might interpret the Constitution as requiring this in all cases. This seems most unlikely, given neither the words nor the intent of the provision support such an interpretation.

A former chief justice of Australia, Robert French, has said there is “little or no scope for any court to find constitutional legal obligations in the facilitative and empowering provisions of the amendment”. In other words, all the amendment does is allow the Voice to make representations - it does not impose legal or constitutional obligations on how the government and parliament respond to them.

So, if the government and parliament disagree with the Voice, they are not required to give effect to its representations.

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***Read more: No, the Voice isn't a 'radical' change to our Constitution***

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## **Will this leave the Voice ineffective?**

If neither the government nor parliament is required to do what the Voice says, does this leave the Voice ineffective? No. The point of the Voice is to use political pressure to influence parliament and the government *before* laws and decisions are made, rather than to take legal action to attack laws and decisions *after* they are made.

That influence will be effective if the Voice makes high-quality representations within its expertise that, if adopted, would result in better outcomes for Indigenous Australians. Achieving better outcomes is the one thing everyone wants, so if the Voice fulfils its role in contributing to that, it will be an effective and valued national institution.