Noel Pearson's proposal could deliver real authority for Indigenous Australia

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As well as his declaration, Noel Pearson has floated an idea worth considering: a constitutionally entrenched representative body for Indigenous Australia

‘Pearson’s proposal is not just constitutional poetry.’ Photograph: Tracey Nearmy/AAP

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On Monday Noel Pearson backed proposals for a declaration of recognition for Indigenous Australians. He referenced the US Declaration of Independence and conjured up an image of Australian children reciting the declaration at school assemblies and civic leaders intoning it at the opening of parliament.

It would be symbolic – not legally binding – but Pearson’s proposal is not just constitutional poetry.

In November 2014, Tony Abbott told Australians for Constitutional Monarchy that “the challenge is to find a way to acknowledge Aboriginal people in the constitution without otherwise changing it”.

I am uneasy about such calls for reform without change.

But the prime minister successfully campaigned against a republic and understands the realpolitik of amending the Australian constitution. On constitutional recognition he is looking for a wording that does not spook constitutional conservatives while simultaneously delivering for Indigenous Australians.

The recent Empowered Communities: Empowered People report from the Wunan Foundation floated the idea of amending the constitution to establish a consultative body of Indigenous Australians. Pearson sees merit in such a proposal when combined with a declaration of recognition.

Such a proposal would not offend constitutional conservatives, increasing the prospect that a referendum in May 2017 could succeed.

Australian legal and political culture places a firm emphasis on parliamentary supremacy. A legally enforceable bill of rights has met resistance for this reason. Under Pearson's proposal, parliament would remain supreme, free to disagree with the proposals of the consultative body.

A non-binding consultative body would defer to parliament but it would not necessarily be irrelevant. Internationally, there is precedent for such consultative bodies.

Other countries have bodies that lack binding authority but do not suffer a lack of influence.

Finland, Norway and Sweden, for example, have established parliaments for the Sámi people. These parliaments have various powers, including power over the allocation of funds designated for the Sámi. They are public authorities and have a measure of political influence.

Other countries have bodies that lack binding authority but do not suffer a lack of influence. Sweden, again, has a council on legislation (Lagrådet). This body is made up of current and former judges and advises the Swedish parliament (Riksdag) on the constitutionality of proposed legislation. Its advice is non-binding but is generally adhered to.

A consultative body of Indigenous Australians would offer non-binding advice. At the same time it could wield political authority. The people, through a referendum, would have established the consultative body. It would derive some authority from that fact alone. It could use its position as an institution of the constitution to demand an explanation whenever government seeks to ignore one of its reports.

Here's how I imagine it might work. The government proposes legislation likely to impact on Australians of Aboriginal and Torres Strait Islander descent. The consultative body considers the proposals and publishes its findings, presumably with the power to lay a report before the parliament. The parliament would be free to legislate irrespective of that advice but the consultative body could demand an explanation.

There would be no legally enforceable right but there would be political authority. The government and parliament would face pressure to respect an institution established by the people through a referendum.

Many will see the proposals for a symbolic declaration and a consultative body as overly deferential to constitutional conservatives. They will want to hold out for a legally binding power, a judicially enforceable non-discrimination clause.

Such proposals will be more difficult to get up in a referendum. More importantly, such models are inherently reactive: legislation cannot be litigated until after it is enacted.

The consultative model is different. It gives Indigenous Australians a voice in the legislative process. Indigenous Australians constitute a micro-minority – approximately 3% of the population. As Pearson put it on ABC's PM:

There's no way that we're going to regularly have members to speak on our behalf in the parliament, and yet parliament is regularly making laws about us. So a provision which makes us part of the formal process of parliament, I think that has got to be part of the discussion.

A micro-minority is unlikely to have a significant voice in a majoritarian parliament. An innovative solution to that problem is required. This proposal has the twin benefits of not disturbing the central tenet of parliamentary supremacy and simultaneously offering the prospect of meaningful reform. It has got to be part of the discussion.