GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF
NEW SOUTH WALES

FACULTY OF LAW

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Committee Secretary
Joint Select Committee on the Constitutional Recognition of Local Government
Department of House of Representatives
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into constitutional recognition of local government

Thank you for the invitation to make this submission. We do so in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

We support the recognition of local government in the Australian Constitution. Financial recognition of local government in particular will achieve a practical, substantive improvement to our system of government.

Our submission is brief and intended to bring to your attention our views on the key issues in this area. The Committee may be further assisted by the following publications:

- Nicola McGarrity and George Williams, 'Recognition of Local Government in the Commonwealth Constitution' (2010) 21 *Public Law Review* 164.

- George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010).

The need for constitutional change

Financial recognition of local government in the Constitution has become necessary due to recent High Court decisions. Direct Commonwealth funding of local government currently supports significant local government programs. Without amendment to the Constitution, these programs may not survive a legal challenge to their validity.

In *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, the High Court held that the Commonwealth does not have an unlimited spending power. The High Court was unanimous

in deciding that the Commonwealth can only directly fund matters over which it otherwise has power.

In June 2012, in *Williams v Commonwealth of Australia* (2012) 288 ALR 410 the High Court unanimously used as a starting point the holding in *Pape v Commissioner of Taxation* that every expenditure by the Commonwealth must be supported by a specific source of federal constitutional power.

In *Williams*, the Court, by a majority, held that in the absence of supporting legislation the federal executive power in section 61 of the Constitution did not empower the Commonwealth to enter into a funding agreement for the provision of chaplaincy services or to make payments under that agreement. It was held that federal executive power does not automatically include the capacity to enter into agreements or to provide funding with respect to matters that could have been provided for by legislation. Federal executive power may only extend to such matters where they are in fact supported by legislation.

These High Court cases are highly problematic for the capacity of the Commonwealth to directly fund local government. Local government is a State responsibility, and the Commonwealth has no general power over the sector. Given this, *Pape* and *Williams* cast doubt over current and future direct funding of local government by the Commonwealth.

The Commonwealth may still directly fund local government bodies and activities on an ad hoc basis where this can be tied back to a specific grant of federal power. For example, the Commonwealth could enact legislation under which direct funding is made to local government to improve local quarantine services because the Commonwealth has a power over 'quarantine' in section 51(ix) of the Constitution. However, funding programs that form the backbone of broader local government activity are likely to prove unable to be supported through use by the Commonwealth of its specific powers.

For example, the Nation Building Roads to Recovery Program, set out in the *Nation Building Program (National Land Transport) Act 2009* (Cth), is now likely to be invalid. No attempt has been made in the Act to limit payments to bodies that fall within Commonwealth power (eg constitutional corporations in s 51(xx)), nor to set conditions that would make payments attributable to federal power. As a result, the Roads to Recovery Program is likely to be struck down if challenged in the High Court.

In response to the *Williams* decision, just one week after judgment was handed down, the Commonwealth Parliament enacted emergency legislation in the form of the *Financial Framework Legislation Act (No 3)* 2012. That Act sets out a list of grants of financial assistance (or direct funding) with the purpose of authorising Commonwealth spending in those areas.

This legislation identifies many local government programs in very broad terms. It is unlikely that many can be clearly connected to a specific head of legislative power. If that is the case, the parts of the legislation expressed in this way may not survive a constitutional challenge to their validity and those programs will fail accordingly. In any event, no attempt was made in this Act to remedy the constitutional deficiencies now apparent in the Roads to Recovery program. The Act only dealt with funding schemes not otherwise supported by legislation.

The two recent High Court decisions do not affect the ability of the Commonwealth to provide funding to local government bodies via the States under s 96 of the Constitution. However, as noted by the Expert Panel, adopting this method may on occasion be problematic. It has the potential to weaken the implementation of unified national policy at a local level and could introduce inefficiencies and delay.

A constitutional amendment providing financial recognition is the most appropriate solution to the problem facing Commonwealth funding of local government. Such an amendment should give Federal Parliament a power to provide direct financial assistance to local government.

The proposed amendment to section 96

The Expert Panel on Constitutional Recognition of Local Government has proposed the following amendment to section 96 of the Constitution (proposed new words in italics):

> The Parliament may grant financial assistance to any State *or to any local government body formed by State or Territory Legislation* on such terms and conditions as the Parliament sees fit.

An amendment in the above form would solve the problem outlined above. In particular, the Commonwealth could use this amended section 96 to grant funding directly to local government bodies. The amendment also has the obvious advantage of simplicity.

While it is not necessary, additional text could be added to section 96 to even more explicitly and directly recognise the role of the States and Territories with respect to the regulation of local government. Recognition of the role that States and Territories play in *regulating* as well as *forming* local government bodies could be achieved by amending section 96 to read (proposed new words in italics):

> The Parliament may grant financial assistance to any State, *or to any local government body having powers and functions and formed in accordance with State or Territory legislation,* on such terms and conditions as the Parliament sees fit.

This formulation might better allay concerns that the States voiced to the Expert Panel about the constitutional consequences of recognising local government in the Constitution. In particular, it makes clear the extent to which local councils are controlled by State governments.

Conditions attached to section 96 grants

There may be some residual concern that the Commonwealth could use either of the above amended versions of section 96 to take over the regulation of local government from the States and territories. This concern is not well founded.

It is important to note that the Commonwealth already insists upon conditions and requirements through its existing grant programs. Indeed, it is appropriate that the Commonwealth be able to impose conditions, incentives and performance indicators so as to ensure the best value for taxpayer money.

That said, there is a limit on the extent to which such conditions can be applied. The Commonwealth cannot impose a condition that would require a local government body to do something that it is unable to do under its controlling State law. The Commonwealth could not, for example, require a local government body to engage in planning or other activities that breach State law. This is because an amended section 96 would not alter the fact that local government is controlled and regulated by the States.

All the Commonwealth could do via a revised section 96 is insist upon certain conditions in return for the receipt of money. The Commonwealth could not *force* local government to receive such money.

Inconsistency between Commonwealth grants and State laws

A concern might be raised that the Commonwealth could use conditions attached to a section 96 grant to force local government to operate outside the framework of regulation created by the States. For the reasons set out below, this would not be possible.

Section 109 of the Constitution provides:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Section 109, in dealing with inconsistency between federal and State *laws*, does not apply to grants under s 96.

Section 96 states that 'the Parliament may *grant financial assistance* to any State on such terms and conditions as the Parliament thinks fit'. It does not provide that the Commonwealth can *make laws* on a topic. This is important because section 109 only operates when 'a law of a State is inconsistent with *a law* of the Commonwealth'.

Financial recognition does not involve inserting a new section into the Constitution, merely amending the existing section 96 to expand its scope so as to include local government. That provision, as extensively used by the Commonwealth, does not amount to a head of power that can be used to override the States. It can only be used to set the terms and conditions of funding. It is also clear that such terms and conditions cannot give rise to a new scheme of federal regulation. A new head of federal legislative power would be required for that.

The High Court has considered the operation and effect of section 96 in cases going back decades. Decisions have confirmed the limited scope of the section, and in particular that it does not enable the Commonwealth to pass laws on a subject simply because it has given financial assistance in that area. For example, Chief Justice Sir Owen Dixon said in *Victoria v Commonwealth* (*Second Uniform Tax Case*) (1957) 99 CLR 575 that section 96 is confined 'to granting money'. He said it is not 'a power to make laws with respect to a general subject matter'.

The result of the proposed amendment is that section 96 would preserve the existing practice of direct federal funding to local government, along with the ability of the Commonwealth to set the terms and conditions on the voluntary receipt of such funding. However, this would not give rise to State laws being overridden by such funding. In fact, the converse would be

true. A local government body would only be capable of receiving such funding where it can do so consistent with the State laws regulating its functions and powers.

Winning the Referendum

The process of constitutional change is set out in section 128 of the Constitution. It requires that an amendment to the Constitution be passed by the Federal Parliament and, at a referendum, passed by a majority of the people as a whole, and by a majority of the people in a majority of the states.

Since Federation in 1901, 44 referendum proposals have been put to the Australian people with only eight of those succeeding. Significantly, no referendum has been passed since 1977.

This referendum might succeed if run on a similar basis to the successful referendum held in 1946. That referendum was run to remedy a problem identified by the High Court that undermined the ability of the Commonwealth to bring about a national pharmaceutical benefits scheme. Australians voted Yes to restore that scheme and the ability generally of the Commonwealth to provide important social services.

The 1946 referendum provides a model for how this referendum might be approached. However, that model also suggests that any referendum as a response to the High Court cases of *Pape* and *Williams* could not wait too long. Asking Australians to vote Yes due to the urgency and importance of the problem will lose its punch if there is a significant delay.

Australians will almost certainly vote No in any event if asked to endorse the vague concept of recognising local government in the Constitution. They would likely respond: why bother, and why we spending all this money on the issue?

To secure a Yes vote, Australians will need to see this referendum as fixing a problem that could undermine the provision of local services that they value. They will need to see the referendum as a practical and pragmatic response to that problem. They should be asked to vote Yes to continue the funding required to build local roads, libraries and community child-care centres (that is, to the staus quo). When it comes to these valued community services, it is better to be safe than sorry.

Australia's experience with referendums more generally demonstrates that referendums are able to succeed where the following four goals are achieved:

1 Bipartisanship

Bipartisan support has proven to be essential to referendum success. Referendums need support from the major parties at the Commonwealth level. They also need broad support from the major parties at the State level. However, cross-party support is by itself not sufficient to achieve referendum success. Referendums have failed despite such support.

2 Popular ownership

Just as deadly as partisan opposition is to constitutional reform is the perception that a reform idea is a 'politicians' proposal'. Australians have consistently voted No when they believe a

proposal is motivated by politicians' self-interest. This reflects a well-known undercurrent of distrust of Australian politicians.

The same undercurrent applies to local government. If Australians think that the referendum is about bringing benefits to local government, and not the community, they will reject the change. There is a real risk that Australians will vote against a local government referendum on the basis that they see it a self-serving measure for the benefit of local government politicians. Australians need to gain a sense that they are involved in creating a proposal that will benefit the broader community.

3 Popular education

Surveys of the Australian public show a disturbing lack of knowledge about the Constitution and Australian government. Many Australians are know little of even the most basic aspects of government. For example, a 1987 survey found that almost half the population did not realise Australia had a written Constitution.

These problems can be telling during a referendum campaign. A lack of knowledge, or false knowledge, on the part of the voter, can translate into a misunderstanding of a proposal, and an unwillingness to consider change on the basis that 'don't know, vote No' is the best policy.

The project of educating Australians about the Constitution is difficult, and it will never be perfectly completed, but it must be undertaken. Australians must be given the opportunity to cast a confident, informed vote.

4 Sound and sensible proposals

As important as it is to get the process of generating proposals right, it is equally important to get the proposal itself right. Whatever proposal emerges for local government recognition, it must be free of errors. It should also be a practical, meaningful change that meets a demonstrated need.

Reforming Australia's referendum machinery

Reform is also required to Australia's referendum machinery, which has remained mostly unchanged since 1912 and is badly outdated. A blueprint for doing this is contained in the 2009 report by the House Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No?*.

In the report the Committee makes 17 recommendations aimed at improving Australia's referendum machinery. Among other things, the Committee recommends that current restrictions on Commonwealth spending on referendums be removed, that an independent Referendum Panel be established prior to each referendum to determine an appropriate information and communications strategy, and that the Australian government develop and implement a national civics education program to enhance public engagement and improve knowledge of the Australian Constitution.

These are sensible proposals that would help to enhance public engagement in the upcoming referendum campaign on local government recognition. The federal Parliament should implement the Committee's recommendations as soon as possible.

Yours sincerely

Ms Shipra Chordia
Director, Federalism Project

Mr Paul Kildea
Director, Referendums Project

Professor Andrew Lynch
Centre Director

Ms Nicola McGarrity
Lecturer

Professor George Williams
Foundation Director