



THE UNIVERSITY OF  
NEW SOUTH WALES



FACULTY OF LAW

1 November 2011

The Secretariat  
Expert Panel on Constitutional Recognition of Local Government  
GPO Box 803  
Canberra ACT 2601

Dear Secretariat

### **Inquiry into Constitutional Recognition of Local Government**

We support recognition of local government in the Australian Constitution. However, the alteration must do more than merely recognise the existence of local government. It is unlikely that Australians will support such a change, which might be criticised as mere window dressing and as being insufficient to justify the high cost of holding a referendum. Constitutional recognition of local government ought to achieve a practical, substantive outcome that offers real benefits to our system of government and ultimately to the well-being of the Australia's people.

This is not a lengthy submission because we have already canvassed issues around the constitutional recognition of local government. In particular, the Panel may be assisted by the following publications:

- Nicola McGarrity and George Williams, 'Recognition of Local Government in the Commonwealth Constitution' (2010) 21 *Public Law Review* 164.
- Andrew Lynch and George Williams, 'Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?' (2008) 31 *University of New South Wales Law Journal* 395.

When it comes to the task of winning a referendum, the Panel may also find of use:

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

In the sections below, we elaborate upon these publications with regard to the matters raised in the Panel's Discussion Paper.

#### **A Options for constitutional change**

There is detailed discussion on the options presented in the Panel's discussion paper in the first two publications listed above.

### ***Financial recognition***

We believe that the Australian people should be asked to vote at a referendum dealing with the financial recognition of local government. A constitutional amendment of this kind would provide recognition while fixing a known problem.

The High Court in *Pape v Commissioner of Taxation* (2009) 238 CLR 1 cast significant doubt on the capacity of the Commonwealth to directly fund local government. On this, see the following advice:

[http://www.councilreferendum.com.au/site/misc/alga/downloads/PAPE/ALGA\\_Advice\\_GeorgeWilliams\\_130809.doc](http://www.councilreferendum.com.au/site/misc/alga/downloads/PAPE/ALGA_Advice_GeorgeWilliams_130809.doc)

Direct federal funding programs such as Roads to Recovery may now be unconstitutional, and even if this funding is continued despite the risk, the High Court case may impact on the willingness of federal governments to fund future programs. It is clear that this risk is far from hypothetical, as is demonstrated by the recent High Court challenge in *Williams v Commonwealth* to federal direct funding of school chaplains.

The change to the Constitution need only be a simple one. We favour that which would amend the relevant part of section 96 of the Constitution to read:

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

This wording has the advantage of also ensuring that the capacity of the Commonwealth to fund local government bodies only arises in respect of such bodies created by the relevant State or Territory. It serves to reinforce the purpose of the change as being only to enable direct federal funding of local government, and not to transfer legislative responsibility of local government from the State to the federal sphere. We have used a slightly different wording to that proposed by the Panel in order to retain the possibility of section 96 enabling the funding of local government bodies that may at some future point crossover State and Territory borders.

This is a common sense, practical amendment that is needed now to the Australian Constitution. The change is required so that the Commonwealth can continue to directly fund local government to provide important community services and infrastructure like roads.

### ***Democratic and symbolic recognition***

In recognising local government in section 96 of the Constitution, it may also be appropriate to insert text regarding the role of the States and Territories in regulating such bodies and the link between local government bodies and their communities. This need not be achieved by inserting a freestanding provision to this effect, but by defining the reference to 'local government body' added to section 96. This text might be placed as an additional paragraph to that section, and could read:

‘Local government body’ means a body elected by the people, having powers and functions and constituted in accordance with a law of a State or Territory Parliament.

This definition would not constrain State and Territory Parliaments in the creation and regulation of local government bodies. It would only serve to define which bodies are capable of receiving direct federal funding under section 96. If this definition were inserted, it would remove the need for the words proposed above for a revised section 96: namely, *‘formed by a State or Territory Parliament’*.

In addition, if Australians are separately asked to vote on adding a new preamble to the Constitution mentioning Federal and State government, the preamble should also refer to local government. To fail to do so would reinforce the current exclusion of local government from the Constitution, and could undermine recognition of local government achieved elsewhere in the document.

### ***Recognition through federal cooperation***

Finally, as has been written in the second article listed above, there are the reforms relating to the federal system of particular advantage to the States that may also be considered as part of a plan to enhance the status of local government under the Constitution.

This referendum may offer an opportunity to explicitly promote a new dynamic to the relationship between the three levels of government in Australia. While recognising that in any federal system the prospect of co-ordinate or competitive behaviour between governments must be possible and may, in any number of circumstances, be desirable, there is also a case to be made for facilitating federalism as a relationship couched in cooperative terms. Not only might this assist in easing the way for constructive political solutions to national problems; it may also deal with problems of particular concern to the States and bring the Constitution into line with the rapid developments in recent years towards executive-based federal co-operation.

The express constitutional recognition of cooperative efforts between the Commonwealth, the States and Territories and local government would provide a more secure foundation than currently exists for the validity of laws implementing intergovernmental agreements. It may also be possible to use this opportunity to significantly enhance the capacities for parliamentary oversight and effective review of the powers exercised pursuant to such schemes – the major qualm which has been voiced in respect of cooperative endeavours in the past (see the Senate Select Committee on the Reform of the Australian Federation, June 2011 as just the most recent example of bipartisan concern on these issues).

In the article listed above addressing this topic, we cite examples of provisions that recognise and support the value of intergovernmental co-operation in the Constitutions of India, South Africa and Switzerland. Such a provision could be inserted into the Australian Constitution to support cooperation between the three tiers of government in Australia.

In addition, there remains a pressing need to overcome the effects of the High Court’s decisions in the two cases discussed on page 8 of the Discussion Paper. The necessary

reform would be to better support cooperative arrangements at least through a constitutional amendment entrenching two legal propositions:

- State parliaments may, with the consent of the Commonwealth Parliament, empower federal courts to determine matters arising under State law; and
- States parliaments may, with the consent of the Commonwealth Parliament, empower federal agencies to administer State law and impose duties in the administration of that law.

Remedying these cooperative blackspots would complement the notion of providing financial recognition to local government. With financial recognition, it would provide reforms directed to well-known problems in the Constitution that afflict all three tiers of government. Local government would be recognised as part of an agenda that will build cooperation into the Constitution in a manner that will enable the representatives of the people, whichever the level of government, to work more effectively to meet the problems and challenges facing their community.

Importantly, none of these changes would redistribute power between the tiers of government. The changes would merely recognise that, where there is consent and agreement, governments ought to be able to act together through financial and other mechanisms to achieve goals that are in the local and national interest. B

## **B 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.

Australia's experience with referendums demonstrates that a poll on local government recognition may be won if 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 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.

## **C Popular engagement: what needs to occur from here**

Looking ahead, it is critical that the process of reform is conducted in a way that achieves strong public involvement and input. This is important not only to secure the popular ownership and popular education that are essential to winning a referendum, but also to make sure that the process engages a wide range of voices and attracts broad legitimacy. The consultations by the Expert Panel have provided a foundation in this respect, but there is scope for additional public engagement in the immediate period before Parliament settles on a specific referendum proposal. Further, the government should lay the foundation for public engagement during the referendum campaign by reforming Australia’s referendum machinery.

### *Achieving popular engagement: Three suggestions*

Ideally, a process of popular engagement should aim to secure four goals: broad participation, informed judgment, inclusiveness, and scope for public input to genuinely influence outcomes. Three participatory mechanisms that would help achieve these goals, and thus broaden and deepen popular engagement in debate about

constitutional recognition of local government, are citizens' assemblies, local deliberative forums and interactive websites.

### *1 Citizens' assemblies*

A citizens' assembly is an innovative democratic device that operates much like a short-term 'parliament' of ordinary citizens brought together to deliberate on, and make recommendations about, a specific issue of public policy. Citizens' assemblies have been conducted around the world on a range of issues and have proven highly effective in inspiring public interest in policy issues (including constitutional change), improving trust in reform processes and generating sensible proposals for change. The citizens' assembly model would seem well-suited to the specific issue of local government recognition, as it would provide a forum for the careful and deliberate consideration of the different reform options, while also serving to spark public awareness and informed debate.

### *2 Local deliberative forums*

Local deliberative forums invite citizens to attend a local venue (such as a town hall) to engage in facilitated small group discussions with their peers on particular issues, with the aim of identifying areas of broad support and making recommendations for change. To help foster discussion, participants are provided with basic information materials, and are assisted by experts who are on hand to answer questions. This model was used successfully in 1997–98 when the Constitutional Centenary Foundation, in conjunction with the Australian Local Government Association and participating local councils, conducted 58 such forums (attracting more than 3,000 participants) on issues such as the republic, preamble reform, the federal system and human rights.

The local deliberative forum would be an ideal mechanism for encouraging citizens to learn about, and have input into, debates about the constitutional recognition of local government. In contrast to the passive nature of public meetings, these forums prompt individuals to engage with other peoples' perspectives and take an active role in debate. Forum communiqués could be forwarded to the federal government to assist its consideration of which reform options should proceed to the referendum. They could also be filtered into the deliberations of the citizens' assembly.

### *3 Interactive websites*

An innovative approach to popular engagement is to invite citizens to enter into an online dialogue with experts about proposed constitutional changes. Iceland recently did this as part of an attempt to encourage public engagement in the drafting of a new national constitution. Following the Icelandic example, the federal government could establish a body of experts to post draft clauses implementing each of the different reform options and invite public comment on them. For example, a week of online discussion might be devoted to the amendments required to secure democratic recognition of local government, while another week might address the changes needed to advance financial recognition. People could be invited to make comments either on the website itself, or through Facebook and Twitter, and each week the experts could issue a response. The process of engagement would help to improve

citizens' understanding of the issues, while the public's online input could be forwarded to the government to assist their consideration of which reform options should proceed to a referendum.

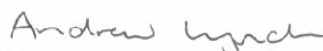
### ***Reforming Australia's referendum machinery***

It is also important that the federal government lay the foundation for popular engagement during the referendum campaign. To do this, it should reform 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 government should implement the Committee's recommendations as soon as possible to avoid any perception that these machinery changes are motivated by a desire to influence the referendum vote.

Yours sincerely,



**Mr Paul Kildea**  
Co-Director, Referendums Project



**Dr Andrew Lynch**  
Centre Director



**Ms Nicola McGarrity**  
Lecturer



**Professor George Williams**  
Foundation Director