

REFERENDUM TO AMEND THE CONSTITUTION TO RECOGNISE LOCAL GOVERNMENT

Introduction

Local government should not be recognised in Australia's Constitution.

In the Westminster System "government" is recognised as having three distinct powers, Legislative, Executive and Judicial. Local government in Australia is an exercise of the executive (administrative) power of the government of the States. Local government has no legislative, executive (administrative) or judicial power of its own but all power that it has is derived by delegation from the State Governments and is the actual exercise of powers of the State Government.

The propagation of misinformation is one of the hazards of which voters always need to be wary.

In the present campaign the proponents of changing the Constitution have adopted a catchcry proclaiming that local government is the "third tier (or level) of government". In our system it is not a "tier (or level) of government" at all. It is a means used by the State Governments for exercising aspects of their own administrative governmental functions. Local government itself is created and maintained by State Government legislation, the geographic extent of local government districts is determined by the State Governments, the powers of councils are determined by and conferred by State Governments, the authority to make regulations is delegated and supervised by the State Governments, establishment of new councils and amalgamation of existing councils are matters for the State Governments

Will there really be a referendum?

The Commonwealth Government has promised to hold yet another referendum on this issue during the current Parliament or at the next election. Some sceptics have noted other promises have not materialised (e.g. "there will be no carbon tax") and have

questioned whether there will really be yet another referendum on a proposal already defeated twice, particularly when the government majority in the House of Representatives ‘hangs on a knife edge’.

It is true that the present government depends upon the support of independents and one Green to maintain its majority. However, there is firm written commitment by two independents and one Green member of the House to support (indeed, require) the Government to fulfil its promise to hold this referendum.

On 1 September 2010 the Government entered into a signed agreement with the Greens for the guarantee of Green support in government undertaking that the government would hold a referendum to amend the Constitution so that it would recognise local government during the 43rd Parliament (the current parliament) or concurrently with the next election. Also, on 7 September 2010 the government entered into a signed agreement with independent members Mr Tony Windsor and Mr Robert Oakeshott (an agreement that enabled the ALP to form government) whereby those two independent members undertook to support the government in return for certain assurances including a commitment that the government would work towards achieving constitutional recognition for local government.

In the current 2011-2012 budget there is provision for \$49,800,000 over five years for funding the implementation of the specific policy commitments of the Department of Regional Australia, Regional Development and Local Government including the constitutional recognition of local government. In addition to that commitment the Minister (Mr Crean) in giving a budget statement, declared that an additional \$9,400,000 has been allocated for specific priorities including progression of a referendum on constitutional recognition of local government and other matters.

The Government has appointed a committee it calls “an independent Expert Panel” to report and make recommendations to it on:

- a. ”the level of support for constitutional recognition among stakeholders and in the general community; and
- b. options for that recognition.”

The Panel is supported by a secretariat within the Department of Regional Australia, Regional Development and Local Government.

The Government has the policy for a referendum. The policy is firmly supported by its colleagues in government (the Greens and two of the independents). Adequate money for the purpose has been budgeted and approved. The Department is geared for the referendum and the “independent Expert Panel” has been appointed. Clearly, the sceptics are mistaken and a referendum will be most likely be held.

What is a referendum?

The Constitution of the Commonwealth of Australia itself provides in *section 128* that the Constitution can be amended (i.e. changed, added to, or words removed) only with the consent of an overall majority of voters and a majority of voters in at least four of the six States. Only Parliament may initiate an amendment. The procedure is for a Bill for amendment of the Constitution to be presented to Parliament and debated in the usual way. The Bill must set out the exact wording of the changes proposed and must be approved in both the House of Representatives and the Senate before it is presented for approval by the vote of the people. (There is a provision for an exception enabling a referendum to be held when a proposal is “obstructed”) In the event that the Bill is passed by Parliament, it is then presented by “referendum” to the electors for approval. The electors are asked to approve the exact wording of the change and are required to vote “yes” or “no”. The details of the procedure are prescribed in the *Referendum (Machinery Provisions) Act 1984*. In summary, the normal procedure is for a the government to present to the electors the reasons why a ‘yes’ vote is desirable and to provide a 2000 word description of the reasons for voting ‘yes’. If the proposal has been opposed in Parliament there is usually a similar length summary of the ‘no’ case. If there is no significant opposition in Parliament it is unlikely that there will be any explanation of the reasons why a ‘no’ vote is desirable and a ‘yes’ vote undesirable and it is also unlikely that any summary of the ‘no’ case will be provided (as happened with the *Aborigines* referendum in 1967).

If an overall majority of the valid votes (including the votes in the ACT and Northern Territory) and a majority of the valid votes in at least four States approve the

proposed change, the proposed change is submitted to the Governor-General for Royal assent. Although the point has never been tested, it is my opinion that, as the people have approved, the Governor-General has no discretion under s.58 but must sign the proposed change into law without delay.

Is there a reason why 'local government' is not already recognised in the Constitution?

Yes. The reasons local government is not already recognised in the Constitution are that the Constitutional Convention decided not to include it in the original draft Constitution as it is a matter only for the State concerned and the draft was approved by a majority of voters in every 'State'; there have already been two referendums asking the Australian voters whether the Constitution should be changed to include local government and on both occasions the voters by democratic process have firmly rejected the proposals; local government falls outside the range of matters appropriate to establish and maintain Australia's federal structure; and, while very important, local government is a matter for the States and the State Constitutions but not for the Federal Constitution.

The nature of the Commonwealth of Australia Constitution is unlike most other national constitutions. In most countries the Constitution is the "fountainhead" from which all government, law, rights and responsibilities flow. Before "federation" on 1 January 1901, Australia consisted of six political entities (that came to be called 'States' from that time onwards) that were completely independent of each other. Each had its own laws, courts, governmental structures, taxation, armed forces, education and administration. Of course, in the main these were adaptations of principles inherited from England and, therefore, had remarkable similarity among the 'States'. In the late 19th Century there were proposals that the six "States" and, indeed, New Zealand, should develop a formal relationship or unity. For that purpose, meetings called 'Australian Federal Conventions' (commonly referred to as 'Constitutional Conventions') were established to work out an agreement or 'treaty' for corporate or co-operative existence that could be put to the people for consideration and vote. Submissions from the public were widely sought and

received. The discussions in these meetings covered an extraordinary amount of detail and did address the question of whether local government should be included. The overwhelming opinion, including that of Sir Samuel Griffith, was that local government is a domestic responsibility of the individual 'States' and really has no significance for the then proposed 'federation'. The draft Constitution ("treaty") settled on for submission to the people was ultimately approved by democratic vote in all six 'States' without a mention of local government and was agreed to by the British Parliament as the new Constitution for the Commonwealth of Australia. The States maintained their individual identities, laws, courts, government structures, taxation, education, and administration.

Local government remained part of the States' administrative structure over which the Federal (Commonwealth) Government and the Constitution had no authority. Local government is recognised in the State Constitutions of all six States. Each State and the Northern Territory has a Local Government Act. Australian Capital Territory has neither a Local Government Act nor, indeed, local government.

It is true that some councils and shires have run into difficulties over the years. Even the Sydney City Council went through a period in which it could not operate and the State Government appointed temporary Administrators in place of the elected representatives. Despite the occasional problem and dissatisfaction among rate payers and electors, local government has operated adequately well for more than one hundred and ten years since federation, as it did in the 'States' before federation when there was no Commonwealth Constitution. Over the years since federation, local government would have performed no better even if it had been recognised in the Commonwealth Constitution.

Between 1972 and 1975 Labor Prime Minister Whitlam stressed his opinion that local government should have a greater role in the Australian federal system. Indeed, it was argued that the Labor government led by him sought to implement through local government, policies it thought were being impeded by State Governments. In 1972-1973 the federal Government's payments for local government were \$7,500,000. By 1975-1976 they had increased to \$165,372,000. These payments were made principally through the State Governments because payments direct from the

Commonwealth were not authorised by any constitutional power. Thus, in 1974 the federal Labor government put to the voters a referendum proposal to insert into s. 51 of the Constitution a new power for the Commonwealth “to borrow money for, and to grant financial assistance to local government bodies” and to include a new section 96A to provide that the Commonwealth “Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit.” If this proposal had succeeded it would have had the effect of empowering the federal government to implement Commonwealth Government policy in the States simply by funding local government to do so, irrespective of the attitude or wishes of the State governments. This would have been a dramatic power change from the States to the Commonwealth. In fact, the proposal was firmly defeated. It gained an overall percentage vote of 46.85 and a majority only in New South Wales. It should be noted that the Liberal-National (CPA) opposition opposed the proposal.

In 1988 there was a further attempt by a Labor government to include local government in the Constitution. The proposal was to insert a new section into the Constitution, s.119A:

“Each State shall provide for the establishment and continuance of a system of local government, with local bodies elected in accordance with the laws of the State and empowered to administer, and to make by-laws for their respective areas in accordance with the laws of the State.”

While, at first reading, this proposal might have a benign appearance, a little thought produces realisation that the proposal restricts the State Governments. Such a provision would prevent a State from administering with its own departmental resources matters often handled by local government. While many people might have a preference for administration of a small local area by locally elected representatives, other factors such as economies of scale might be taken into account. Indeed, in some areas there is currently pressure for amalgamation of councils so that local government is not quite so “local”. If the State government decided to handle rubbish removal, sewerage, water reticulation, road repairs, local transport, parks and gardens, planning issues, libraries etc itself, it should not be forbidden by the Commonwealth Constitution.

Further, even in 1988 at the time of the referendum proposal it was already possible to argue that the mere mention of local government in the Constitution would or could open the gate for the Commonwealth to undermine State Governments by funding local government bodies as was perceived as a purpose in the 1974 referendum proposal. The possibility of successfully presenting that argument has now been extended to a near certainty by the decision and judges comments in the High Court case of *Pape v Commissioner of Taxation 2009 HCA 23 (7 July 2009)*. In that case the Plaintiff challenged certain proposals of the financial stimulus package intended to combat the Global Financial Crisis, on the ground of lack of Constitutional power. It is possible to understand the judgment as authorising payment by the Commonwealth to any body etc mentioned (or even inferred) in the Constitution.

Of course, the 1988 proposal like its predecessor, disregarded the original nature and structure of the Constitution as a “treaty” by which the signatories (the ‘States’) could cooperate and work together in certain areas (of which local government was not one because its operation was exclusively within the respective ‘States’). The 1988 proposal was thought by some to be destructive of the historic integrity of the Constitution. It was generally, and I suggest correctly, perceived to be a symptom of creeping centralism vesting gradually more power in the hands of Canberra to the detriment of the States and potentially even to the detriment of local government itself. The 1988 referendum was overwhelmingly defeated, gaining an overall percentage ‘yes’ vote of 33.61 and did not receive a majority in any State. Again, the Liberal-National opposition opposed the change.

What are the present proposals for change to the Constitution?

One of the tasks of the “independent Expert Panel” (referred to and explained under the heading “Will there really be a referendum?” above) is to identify the forms that recognition could take and has stated that it is looking for ideas that will make a practical difference, have a reasonable chance at a referendum and will resonate with the public. When these criteria are combined with the general tenor of their undated ‘Discussion Paper’, and the Panel’s repeated reference in that paper to local government as the third level of government in Australia, it appears that the Panel is

in favour of Constitutional change in this regard. Also, some of the “independent” Panel members have been outspoken in favour of Constitutional change and at least two of them have given written undertakings to support it without specifying or limiting the nature of the change (*viz.* Senator Bob Brown and Mr Tony Windsor, each of whom is signatory to one or other of the agreements with the Government referred to above).

While recognising there might be other categories it has not yet considered, the “independent” panel has identified four possible categories of amendment to the Constitution. It has called these categories “symbolic recognition”, “financial recognition”, “democratic recognition” and “recognition through federal cooperation”.

- a. Symbolic Recognition. The idea is to recognise local government in a way that would have minimal or no legal effect. Recognising local government at all is necessarily a change to the philosophical basis of the Constitution. Any kind of recognition might well satisfy a criterion for payment of funding direct from the Commonwealth Government to local government (rather than through the medium of and with the approval of the State Government concerned) enabling the Commonwealth Government to determine certain policies for implementation within the States. Although the intention of recognition might be symbolic, the fact of ‘minimal’ recognition could be far ranging. Such a change to the Commonwealth Constitution slants the Commonwealth/State power base in favour of the Commonwealth.
- b. Financial Recognition. Over the years there has been a substantial change of taxation arrangements (e.g. income tax, GST, capital gains tax) with the principal taxing power moving to the Commonwealth. This has meant that the Commonwealth Government needs to make financial grants to the State Governments to enable the State Governments to fulfil their governmental responsibilities, including the responsibilities the State Governments have delegated to local government. If grants are given from the Commonwealth Government direct to individuals or institutions (including local government) that a State Government is using as its agent or delegate for performing governmental functions, the relationship between the State Government and

the agent or delegate is immediately changed. The present structure of the Commonwealth Constitution permits Commonwealth money to be paid to State Governments for purposes normally carried out by local government but retains State sovereignty by not permitting direct payment to the subordinate.

It is true that the current Roads to Recovery Program and the Regional and Local Community Infrastructure Program have been funded largely by direct payment from the Commonwealth to local government. However, the “independent” Panel recognises in its Discussion Paper that the High Court has declared that the constitutional basis on which the Commonwealth has relied to support the legality of those direct grants does not exist. It is the generally held view among constitutional experts (as was the opinion producing the 1974 referendum) that there is no power in the Constitution supporting or allowing the funding of local government by the Commonwealth.

Such funding is a direct attack on State sovereignty and State Government. It dramatically moves the balance of governmental power from the States even further towards the Commonwealth. In 1974 and 1978 the people realised that inserting recognition of local government in the Constitution would constitute a dramatic power shift. It is not possible to foresee the full implications that might arise in the future if the Constitution were to be changed in this way.

- c. Democratic Recognition. While it is true that elected members of local government councils are answerable to their voters in the sense that they can be removed from office by not being chosen at the next election, the councils themselves are answerable to the State Government and can be suspended or removed from office if the Government decides there is sufficient reason. The final decision about whether local councils are elected or not lies with the State parliament.

The idea of “Democratic Recognition” being included in the Constitution has the effect of limiting the power of the State Government to fulfil its governmental responsibilities in such way as the State Parliament chooses.

The “independent” Panel’s Discussion Paper presents two possible proposals as follows:

1. Each State shall, and each Territory may, establish and maintain a system of local government bodies directly chosen by the people.
2. Each State shall, and each Territory may, provide for the establishment and continuance of a system of local government elected in accordance with the laws of the State or Territory.

Each of these proposals is an attack on State sovereignty. If either is appropriate at all, the place for it is the State Constitution not the federal Commonwealth Constitution. Inclusion of either in the Commonwealth Constitution would limit the States’ power on how its governmental responsibilities should be administered.

- d. Recognition through federal cooperation. Both levels of government, State and Commonwealth, recognise the importance of cooperation and have gradually increased their collaboration since Federation. Notable recent developments in this regard have included the growth in prominence and strength of the Australian Local Government Association. It has become a powerful voice regarding local government interests. The Council of Australian Governments has been formed and meets several times a year, providing a forum for the State Premiers, the Prime Minister and the President of the Australian Local Government Association to consult together on issues of national significance. Cooperation depends on goodwill. It cannot be enforced by law. Cooperation at present is at a high level. Attempting to enforce cooperation by changing the Constitution is unnecessary and could have a reverse effect.

Summary and Conclusion

Recognition of local government in the Australian Constitution has been rejected three times. The first was when the Constitution was drawn up, the second was at referendum under a Labor government in 1974 and the third was at a referendum under a Labor government in 1988. There is now an opportunity to appreciate the

reasons for the three previous rejections, the reasons for now rejecting the proposal a fourth time and voting “NO”.

The purpose of the Constitution was originally to enable the Commonwealth of Australia to come into existence and then continue on a permanent and indissoluble basis with the States maintaining their own governmental structures (including local government). Inclusion of local government would change and impact on the responsibility and power of State Governments.

Inclusion of local government in the Constitution would advance the principle of centralism to the disadvantage of federalism. More power would be transferred from the States to the Commonwealth

The mere mention of local government in the Constitution might be sufficient to enable the Commonwealth Government to undermine policies of State Governments by direct funding for local government to do its bidding.

If the inclusion of local government were to authorise direct funding from the Commonwealth to local government, much additional power over local government would pass to the Commonwealth Government. While it is not possible to read the future, such power might be extended for the Commonwealth to control councils to the distinct detriment of the principle of local government.

Local government is not a “level of government” but is a method of administration by a State Government of local matters.

There is no proposal to change the Constitution to establish local government. Local government is already established and has operated satisfactorily in the Commonwealth for more than 110 years since federation and it operated satisfactorily in the States before that. It is not inclusion in the Commonwealth Constitution that would give local government importance or significance. Its importance and significance derives from the State governmental functions it administers.

The undesirability of recognising local government in the Constitution is obvious.

The only sensible vote in the interests of Australia as a whole, continuing proper State administration in local areas, protecting federalism and the States from further Commonwealth encroachment is a “NO” vote.

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