

# **THE CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT**

*2010 National General Assembly of Local Government, 16 June 2010*

Thanks, it's a pleasure to be here.

There is currently no mention of local government – the third tier of government in Australia – in the Australian Constitution. There should be.

In 1974 and 1988, proposals were put to the Australian people at referendums to fix this. Both were unsuccessful.

In December 2008, ALGA held a Constitutional Convention to discuss and debate formal recognition of local government in the Constitution. Three options emerged from that Convention.

I will explore each in turn, but focus on the third option relating to the financial recognition given that it is the option now, rightly in my view, being given the most serious consideration.

## **OPTION 1: RECOGNITION OF LOCAL GOVERNMENT IN A NEW PREAMBLE**

There has long been debate about adding a new preamble, or opening words, to the Australian Constitution. In particular, it has been argued that a new preamble would be an appropriate way of recognising Indigenous Australians in the Constitution.

This idea put to the people by the Howard Government in a referendum in 1999, but was rejected. Both major parties have since indicated support for a future attempt to achieve this.

It would make sense that any new preamble to the Constitution also mention the three tiers of government in Australia. A new preamble could contain a commitment ‘to democracy and the rule of law in federal, state and local government’.

This recognition of local government would be straightforward and purely symbolic. It would not change the status of local government in Australia, nor do anything to improve its financial or other positions.

If the Australian government initiates debate about a new preamble to the Constitution, local government should be involved. It should seek to ensure that any new preamble includes recognition of local government.

However, this is not a debate that local government can initiate by itself. The debate will instead most likely be generated by a desire to recognise Aboriginal peoples in the Constitution.

The best that local government can do on this issue is to wait and see.

## **OPTION 2: INSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT**

Local government might be recognised in the Australian Constitution by inserting text that goes beyond symbolic recognition. This might be provided for in a new chapter to the Constitution (which already provides a separate chapter for the States).

Institutional recognition of local government could provide:

1. There must be a system of local government in each State.
2. Local government representatives must be directly chosen by the people.

3. Except in accordance with an Act of the relevant State Parliament, a local government body may not be dismissed or amalgamated or its borders changed.
4. (a) The three levels of government in Australia – federal, state and local – should co-operate with one another on matters of common interest.  
(b) Local government bodies must be given an opportunity to comment on federal or State proposed laws that could affect their status, institutions, powers or functions.

Such change could bring about important new protections greater democratic accountability for local government. It also offers the greatest advantages to local government in terms of building into the Constitution legal principles that might benefit the sector over the longer term.

My view is that the Australian Constitution should contain text of this kind, as to constitutions in other nations.

However, it is hard to see that this option is currently achievable.

In going considerably beyond mere constitutional recognition of local government, this option also has the greatest risk of provoking opposition from the States due to concerns that it may compromise their current control of local government.

This option might well be progressed if an Australian government ever embraces wholesale reform of Australia's Constitution as it relates to a federal system. Change of this kind for local government would fit well into a large package like that, but it's hard to see any government championing this option outside of such a process.

### **OPTION 3: FINANCIAL RECOGNITION OF LOCAL GOVERNMENT**

This option responds to a known problem.

The decision of the High Court in *Pape* last year has cast significant doubt on the ability of the Commonwealth to continue its direct funding of local government. Major current funding for the local government may well now be unconstitutional, and even if this funding is continued despite the risk, the High Court case will likely to have a major impact on the willingness of federal governments to fund future programs.

A constitutional amendment that dealt with this would have the benefit of both providing recognition of local government and of fixing a known problem.

In the past, Australians have shown themselves willing to vote for referendums that fix a problem of this kind. A good example is the 1946 referendum put by the Chifley government. It was put after a High Court decision threatened the ability of the Commonwealth to fund a national pharmaceutical benefits scheme. The people passed the change to overcome the High Court decision, giving federal Labor its only referendum victory in 25 attempts.

The change to the constitution need only be a simple one. Section 96 says:

The [federal] Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

This could be amended to say:

The [federal] Parliament may grant financial assistance to any State *or local government body* on such terms and conditions as the Parliament thinks fit.

This would be a common sense, practical amendment that is needed now to the Australian Constitution. It is an amendment that has a good chance of attracting support from across all of Australia's political parties. It is also an amendment that, with such support and a smart campaign run by local government, is likely to win at a referendum of the Australian people.

I personally would support the amendment because it would both grant long-overdue constitutional recognition of local government and, in doing so, fix a major problem that threatens the delivery of community services.

In fact, if I was to explain this change to the people, I would do so by focusing on services like roads and childcare facilities. I would explain that this change is needed so that the Commonwealth can continue to directly fund local government to provide these and other important community services.