

CONSTITUTIONAL RECOGNITION UPDATE

National General Assembly of Local Government, 18 June 2012

There have been important developments since the last National General Assembly. In particular, the federal government's expert panel on this topic has completed its task, and presented its report.

The report is a careful and considered analysis of each of the main options for constitutional reform in this area. It recognised that financial recognition of local government in the Constitution is a 'viable' option. Importantly, the panel recognised that it was viable not just over the longer term, but with regard to a referendum held in 2013.

Financial Recognition

In December 2008, ALGA held a Constitutional Summit to debate formal recognition of local government in the Constitution. Three options emerged.

- Option 1: Recognition of Local Government in a New Preamble
- Option 2: Institutional Recognition of Local Government
- Option 3: Financial Recognition of Local Government

ALGA has focused its energy on achieving the third option, financial recognition of local government. It has done so because this option presents is a modest, achievable change with the best prospects of success at a referendum, and because financial recognition deals with a problem that needs to be fixed if local government is to best serve its communities over the longer term.

Financial recognition is needed because the High Court in the case of *Pape* in 2009 cast significant doubt on whether Commonwealth can directly fund local government. Major direct federal funding may well now be unconstitutional, such as the Roads to Recovery Program, 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.

This question has since been raised again in another High Court case. In August year the High Court heard a challenge to the National School Chaplaincy Program in the case of *Williams v Commonwealth*. It was argued that the scheme is unconstitutional on a number of grounds, including because the Commonwealth lacks the power to provide direct federal funding of this kind.

States such as Western Australia intervened in the case to argue that the *Pape* decision means that the Commonwealth only has limited power to provide direct funding. These arguments naturally act to reinforce the view that it is not now possible for the Commonwealth to directly fund local government, and that ongoing federal programs like Roads to Recovery are unconstitutional.

The case may or may not provide more guidance on direct federal funding of local government. It may leave the position as it is, that is, with major doubt about the ability of the Commonwealth to directly fund the sector, or clarify this in some way. It is also possible that the High Court will decide the case on a different ground, and so not have to deal with the question of direct funding at all.

The High Court was likely to hand down its decision in *Williams v Commonwealth* at the end of 2011, or early in 2012, but has yet to do so, leaving the Commonwealth nervous about its prospects and how the case might affect its funding not just of local government, but of many other areas.

A constitutional amendment that dealt with this would provide recognition of local government and of fixing a known problem. For local government, it would create an expectation, and hope for increase in the size of the funding pie over time (vs take over from the States).

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.

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

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

The government's expert panel found that this could be amended to add:

or to any local government body formed by State or Territory Legislation

This would be a common sense, practical amendment. The change is needed so that the Commonwealth can continue to directly fund local government to provide these and other important community services. This would also remind people of the value of local government.

The choice of words is also important because it makes clear that local government would remain the subject of state regulation. The change would build into the Constitution the concept of local

government being formed by State or Territory legislation, and so recognise that local government is not a creature of the Commonwealth but of the States and Territories.

But

The panel adopted a pragmatic approach to its finding that financial recognition of local government is a viable subject for a referendum in 2013. It said this was subject to two conditions:

1. the Commonwealth must negotiate with the States to achieve their support for the financial recognition option; and
2. the Commonwealth must adopt the steps suggested by ALGA to achieve informed and positive public engagement on the issue.

These caveats are sensible and appropriate. Strong opposition from the states would sink the referendum, and if Australians do not know what they are voting for, many will follow the mantra 'don't know, vote no'.

It is clear what needs to be done, but as yet the Federal government has yet to respond to the expert panel's report, as it is waiting for the decision of the High Court in the Williams case.

This means that the federal government still needs to begin the process of ensuring that any change put to a referendum next year has the support of the opposition and of the states. At the very least, it needs to be clear that the opposition will not oppose the referendum, and that the states will not run a campaign against it.

And of course it is a massive job to inform Australians about this issue, and to convince them of the need to the Yes. The task is made clear by the fact that many Australians do not even know we have a written constitution

Assuming that the government does get behind the findings of its expert panel, there is still time to run the referendum next year.

The government could introduce a bill into Parliament to hold a referendum in the next few months. That bill might then be passed, likely after an inquiry and report by a parliamentary committee, late in 2012. This would enable the referendum to be held in the first half of next year.

I am aware that ALGA is doing everything it can to assist this process. I have given advice on a bill being prepared by ALGA the government could introduce into to kick-start the referendum process.

That bill reflects the financial recognition option favoured by the expert panel that would enable the Commonwealth to continue to directly fund local government, while also respecting and preserving the rights of the states and territories to regulate the sector.

Conclusion

Changing the Constitution is hard, but in this case it is also worthwhile. This is a referendum that ought to be run, but I do not believe that the referendum should be about constitutional recognition of local government. Australians will be naturally wary about voting for appears to be ALGA's self-serving change.

Our national Constitution should acknowledge local government, but in a way that achieves meaningful and practical change that benefits everyone. Australians should be asked to vote Yes for an option that will help local government bodies improve the quality of life and wellbeing of their communities.

The pitch is crucial. If Australians are asked to vote yes to recognising local government in the Constitution, then the referendum will likely fail.

If, instead, Australians are asked to fix a flaw in the Constitution to ensure that local government can get the money it needs to continue to provide vital community services such as roads, libraries and child-care centres, then I think there is every chance of achieving a Yes vote.