

Local Government and the Australian Constitution

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The politics of amending the Constitution

Many local government officials are seeking to have local government written into the national constitution. Such a change will be difficult to achieve, for Australians tend to regard amendment proposals warily. Only eight of 44 proposed amendments have been made to the Commonwealth Constitution since Federation.

The amendment provisions are detailed in s.128 of the Commonwealth Constitution.

The Parliament

The Parliament has a central role in the amendment process:

- only the Parliament may initiate constitutional amendments
- the process begins with the introduction of a Bill into the Parliament
- not less than two months and not more than six months after the amendment proposal has been ratified by the Parliament, it shall be put to the voters in a referendum

The campaign

Typically, the YES case for an amendment is led by the sponsoring government, while the NO case often is argued by the Opposition of the day, usually with the support of informal groups of citizens .

Voters receive an officially-produced booklet which provides voters with a description of the proposal, how the relevant constitutional sections will be altered, a 2,000 word summary of the reasons for voting YES, and very often a similar length summary of the NO case. On some occasions, however, such as the *Aborigines* referendum (1967), the pamphlet will not contain a NO case document. Ideally, a local government referendum should be sufficiently non-controversial for there to be no opposing case that is sent to voters.

The votes

The so-called 'double majority' is required for an amendment to be passed:

- a national majority of all voters – including those in the Territories – must support the proposal
- at least four of the six States must support the proposal — with Tasmania's one vote equalling that of New South Wales

- several national majorities have been defeated by a failure to have four states supporting particular amendment proposals

The most recent amendment successes occurred as long ago as 1977. Eight proposals have been rejected by voters in the years since.

Local government representatives need to keep in mind various political aspects of constitutional amendment when planning how they will conduct this campaign: what is being sought, the political requirements for success, the problem of distortion, and the dangers posed political 'contamination'.

What is being sought

It is important to be sure of, and united about, what is being sought in the hoped-for referendum. Local government supporters should ask themselves: what are we seeking? Is it symbolic recognition of local government? Is it constitutional protection against dismissal of councils? Or is it a determination to secure local government's financial health by virtue of having a guaranteed place at the Commonwealth's financial table?

Of these, the option with the best chance of success probably would be symbolic recognition. This would not put any ongoing cost upon the Commonwealth, it would not appear to threaten the place of the States, and it might be regarded as preparing the way for later legislative or amendment activity.

So, an important piece of advice for supporters of a local government amendment is: don't overreach, simply try for what is possible.

The political requirements

There are various political requirements that need to be considered by local government people if the chances of success are to be maximised.

(a) The Commonwealth Government must be persuaded that recognising local government in this way improves the Australian system of government

No constitutional amendment will succeed if the government of the day will not support its progress through the Parliament. Generally, a government will be reluctant to do so if it believes that it is likely that its proposal will be defeated. So, at the very least, local government needs to persuade the Commonwealth Government that this proposal is beneficial to our system of government, that it is something that people want, and that the government will not lose face if the proposal is eventually rejected by the voters. Opponents of the proposal are likely to say that our system has operated perfectly well since 1901 without this provision. Local government needs to persuade the Government that it is an appropriate change to be made in the early 21st Century.

(b) The Opposition must be persuaded that such an amendment is worth supporting

This might seem obvious, for the absence of a formal NO statement in the brochure given to voters would increase the amendment's chances greatly. However, it can be very tempting for an opposition to seek to defeat a proposed amendment, preferring to embarrass the government than to fight for the acceptance of the constitutional change — even if it has supported it previously. So, local government must work to keep the Opposition sympathetic to the cause, from now until referendum day.

It is important to remember that the proposed local government referendum almost certainly would be held on the same day as an election. It need not be, but the great cost of holding it on a separate day suggests that future constitutional referenda are very unlikely to be held as separate events. In the past, concurrent election battles have undermined referendum battles.

(c) There is a need to ensure the passage through the Parliament is uncontroversial

It is to be hoped that all Commonwealth members of parliament support the cause. In 1967 the attempt to remove the 'nexus', which ties the House of Representatives and Senate numbers at a 2:1 ratio, was supported by the Government and the Opposition. Despite this, a few dissident Senators led a successful campaign that saw the proposed amendment easily defeated.

A determined effort therefore should be made to ensure that every MP and Senator is supportive of the local government proposal. In the House of Representatives there is the need to have the Labor and Liberal Parties supporting the local government change, but the Nationals and the three independents also need to be satisfied with the proposed change.

In the Senate, Government and Opposition must be supportive, but there is a need to have the Greens Senators, Steve Fielding of Family First, and the South Australian independent, Nick Xenophon, all supporting the amendment proposal. A Senator as significant in his state as Xenophon could well cause a defeat for the referendum in that State.

(d) Voters must understand the issue

Local government spokespeople need to be able to deal with a particularly important question that they are likely to hear from members of the general public: 'We've always had local government, generally it works well, why do we need to change it after so many years?' In previous referenda examples, including the two on local government (1974, 1988), many confused voters decided to stay with the status quo by voting NO.

So, local government people must be convincing about why there should be a change to our Constitution. It may appear sensible and logical to a local government representative, but far from essential to many voters. Local government must talk about the issue often, to as many people as they can — though they need to explain, rather than talk as if the merit of their cause is obvious.

(e) Voters must not be frightened by the issue

Governments have usually put forward quite rational, easily-argued amendment proposals, but opponents have often drummed up enough doubt in the Australian community for voter concerns to prevail on polling day. The *Rights and Freedoms* case (1988) was portrayed as undermining our legal system and threatening our system of government. Other cases have included the many occasions when proposed changes involving the Senate or the states have been described as attempts to subvert our system of government. The *Simultaneous Elections* attempts (1974, 1977) or the *Terms of Senators* proposal (1984) were examples.

If in the local government case, opponents of the proposal are able to plant seeds of doubt in voters' minds, then it would be much more difficult to have the change approved than if it appeared safe and non-threatening.

(f) There is a need to ensure that no other significant players are concerned about the proposal

Prominent non-parliamentary voices can play a part in the defeat of constitutional referenda. A famous example was the 'Fourteen Powers' referendum (1944) that sought to give more power to the Commonwealth in some areas of government for a period of five years. This was defeated comfortably, with prominent Premiers leading the campaign against it. In 1999 the *Republic* and the *Preamble* referenda were defeated by a campaign led by anti-Republic forces, many of whom were opposed to breaking our links with the Royal Family.

Local government must seek to avoid having any public figures —such as Premiers — making claims that the local government proposal will weaken our system of government.

The difficulties of distortion

Constitutional amendment supporters must be aware that in such campaigns, there is no requirement that the arguments keep to the facts. Amendment opponents very often distort the arguments and exaggerate the dangers, with the aim of frightening the voters. There have been many times when this has occurred.

The *Aviation* proposal (1937) was designed to give the Commonwealth power to make laws with regard to aviation. However, the NO case supporters pushed the argument much further than the government expected, claiming that the proposal would 'ruin the state railway systems' and 'bankrupt country towns'. The two earlier *Local Government* cases featured similar distortion of the facts by opponents. Opponents of the Commonwealth making grants to local government (1974) asserted that the referendum was 'an underhand attempt to put Canberra's bureaucratic fingers into every one of Australia's Council Chambers'. In the recognition of local government case (1988) the proposal was described as being 'a legal minefield that will keep the High Court busy for years'. Such exaggerated claims can be difficult to rebut.

Local government therefore needs to be ready to work to defuse a scare campaign against the proposal.

A warning about political contamination

Even if local government forces heed the advice given here, they could still have difficulty in achieving the change that they seek. This is because they may find their battle efforts contaminated by two other issues that have emerged in recent months. Either might prove to be awkward for local government supporters to handle; both might well be fatal for the cause, and need to be acknowledged.

Fixed parliamentary terms

There has been talk of the possibility of the Commonwealth Government putting up another amendment proposal at the time of the next election, namely the introduction of fixed, four-year terms for the House of Representatives. The problem here is that a fixed term proposal is likely to be highly divisive, particularly over the question of whether or not Senate terms should be four, six or eight years. If the Opposition were to decide to oppose fixed terms — which it would be very likely to do — then it would be highly likely to oppose a local government amendment as well. Something like this happened when the two previous local government referenda were held. The 1974 case shared polling day with simultaneous elections, amending the Constitution and democratic elections. In 1988, parliamentary terms, fair elections and rights and freedoms were also on the ballot paper. In each year, the Opposition of the day called for the defeat of all the proposals — which was the outcome. The local government questions were swamped.

So, if the local government proposal confronts voters on the same day that they have to consider fixed terms, local government's supporters may well be disappointed.

A republic

A Senate committee is currently inquiring into the issue of Australia becoming a republic. It is discussing the question of whether there should be a plebiscite on the issue. What do they mean? They are considering whether Australian voters should be asked what has been called 'a simple yes or no question' to whether electors support Australia becoming a republic. This would not be a constitutional referendum, though it would assume that voters would understand the difference between a constitutional referendum and a plebiscite. If this is to be held, it also will be presented to the voters at the time of the next general election.

All of which could lead to Opposition members, confronted with the issues of fixed terms, a republic *and* local government, warning Australian voters of the dangers to the nation's Constitution of 'Labor wreckers'. Such were the claims made against the six proposals put forward during the Whitlam Government years, as well as the six put forward during the Hawke Government years. If I am correct about the plebiscite proposal, the chances of the local government amendment being ratified in the referendum will lessen greatly.

If these three questions are put to the voters in 2010, all that local government can do is try to encourage voters to see the local government issue as the one that is not only necessary, but *safe*. This would not be easy to do in the heat of an electoral battle.

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Scott Bennett, formerly of the Australian National University and the Parliamentary Library, Canberra, was one of the speakers at the Local Government Constitutional Summit in Melbourne in December 2008. This paper summarises the points he made on that occasion, when he warned of the difficulties that lay ahead of any attempt to achieve recognition of local government in the Commonwealth Constitution.