

CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

A DISCUSSION PAPER

Executive Summary

At a Local Government Constitutional Summit to be held in Melbourne in December 2008, decisions will be taken about the form of amendment and/or amendments to be made to the Australian Constitution so that local government is constitutionally recognised as the third tier of government. Any amendment proposed would be the subject of a referendum.

To that end, the Australian Local Government Association (ALGA) is encouraging local governments to contribute to those decisions by providing input from their Councils and the communities served and has provided a 'Council Conversations' kit for that purpose.

This paper provides a summary of the information contained in the kit that may be used by Council to determine the extent of their involvement in, and support for, Constitutional Recognition.

Background

Local Government in Australia existed prior to Federation and the creation of the Australian Constitution. Whilst the Constitution, created in 1901, provides a blueprint for how government works at the national levels in Australia, local government - a major provider of services and infrastructure to Australians – is not mentioned. The present situation is one in which most of the State Constitutions do recognise local government and there are provisions for maintaining a system of local government.

However, those provisions neither guarantee appropriate funding of local government nor, in most cases, guard against arbitrary amalgamation or dismissal. Failure to recognise local government and its role as the primary institution of local democracy has been highlighted in recent times by unilateral state government action without appropriate consultation.

Progress toward Constitutional Recognition

There have been a number of failed attempts to achieve Constitutional Recognition for local government in the past. However, developments since 2006 make achievement of that eventuality more likely within the foreseeable future.

In 2006, a Federal Parliament Resolution on Local Government stated that the House/Senate:

1. recognised that local government is part of the governance of Australia, serving communities through locally elected councils.
2. valued the rich diversity of councils around Australia, reflecting the varied communities they serve.
3. acknowledged the role of local government in governance, advocacy, the provision of infrastructure, service delivery, planning, community development and regulation.
4. acknowledged the importance of cooperating with and consulting with local government on the priorities of their local communities.
5. acknowledged the significant Australian Government funding that is provided to local government to spend on locally determined priorities, such as roads and other local government services.
6. commended local government elected officials who give their time to serve their communities.

The election of a new Federal Government on 24 November 2007 was an important development for the constitutional recognition of local government, as the Australian Labour Party went into the election with a platform commitment which promised:

An important aspect of reform of the federation is to recognise and make more efficient the work of the third tier: **local government**. Labour has committed to a Council of Australian Local Governments to assist local government representatives to have a more effective voice at COAG. One of the first tasks of the new Council will be to develop a plan for a national referendum on the constitutional recognition of local government.

To maximise the chances of success at a constitutional referendum, it is incumbent on local government to find a set of words that:

- can be supported by both sides of politics – it is noted that whilst the Liberal Party platform supports the right for local government to have taxing powers commensurate with their responsibilities, they have never expressly supported constitutional recognition of local government
- can be explained to the community; and
- preferably put separate from other proposed amendments to the Constitution.

Questions and Options for Constitutional Recognition of Local Government

In a letter to the Chief Executive Officer concerning this matter, the Western Australian Local Government Association (WALGA) identified the following questions for consideration by Councils.

1. Should recognition be simply symbolic?

The current preamble to the Constitution reads:

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

This clearly illustrates the fact that federation was all about bringing together five (and, after WA subsequently agreed to join the Commonwealth after the presentation of the *Commonwealth of Australia Bill* to the Imperial Parliament, six) colonies into one body politic under the Crown. It is a specific clause designed to declare one thing: the federation of a number of British colonies into one commonwealth.

The general role of a preamble in legislation is to provide the reasoning behind the passing of a piece of legislation, and can therefore be used to determine how an ambiguous piece of legislation should be interpreted. Whereas a preamble **usually** does not create legal rights and obligations, some **could** argue that symbolic recognition in the preamble could give rise to an implied constitutional right – that is, rights that are implied from the wording or concept within an express provision of the Constitution.

2. Should recognition impose certain funding obligations on the Commonwealth?

Some argue that local government requires a more secure revenue stream from the Commonwealth to provide the services and infrastructure expected by the community. While local government receives Financial Assistance Grants from the Commonwealth, the payments are made as grants via the States, largely because of doubt about the legal ability of the Commonwealth to make direct payments to local government.

The creation of a direct financial relationship lay at the heart of the proposed 1974 referendum on constitutional recognition of local government. Despite this, payments are currently paid directly to local government for the Roads to Recovery Program, although there have been indications in the past that one or more states might challenge this arrangement in court. Any further strengthening of the direct financial relationship between the Commonwealth and local government could result in a legal challenge.

3. Should recognition protect Local Government from forced structural change?

Establishing some constitutional principles in relation to the existence and continuation of local government could see a requirement for fair process and natural justice to be applied in relation to amalgamations or suspension/dismissal of Councils. However the interaction of such principles with existing State Legislation would need consideration.

4. Do Councils have other expectations from Constitutional Recognition?

Information provided by WALGA indicates that whilst there is interest in this matter, those expectations have yet to be articulated.

Where to from here?

As a body, local government needs to decide the style or styles of recognition to be pursued whether that recognition is symbolic, financial or institutional. That decision should be informed by input from individual Councils and the communities they serve.

The Australian Local Government Association (ALGA) has developed a Council Resource Kit to support local governments in conducting a 'Council Conversation' with Elected Members and the public. The outcomes from each of these conversations will contribute to discussions held at state-level forums and processes, culminating in a Local Government Constitutional Summit – A Special National General Assembly on 9 – 11 December 2008, in Melbourne.