

EXPERT PANEL ON

Constitutional Recognition
of Local Government



Public Discussion Paper

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The views expressed herein are those of the Expert Panel on Constitutional Recognition of Local Government and do not necessarily represent the views of the Commonwealth of Australia.

Constitutional Recognition of Local Government

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Introduction

This paper aims to promote discussion on whether local government should be recognised in Australia's Constitution. It invites public comment on the different ideas it contains for changing the Constitution.

The Commonwealth Government is committed to holding a referendum on this issue during the current Parliament or at the next election. There is currently support across the political spectrum for some form of recognition of local government. However, before any referendum can be held, the proposal must pass both Houses of the Parliament.

As a step in meeting its commitment, the Government has established the independent Expert Panel on Constitutional Recognition of Local Government to provide advice on this issue. The Expert Panel's terms of reference and a list of members are in Attachment A.

The Expert Panel has been given two key tasks:

- to assess whether there is sufficient support in the Australian community to recognise local government in the Constitution
- to provide recommendations to the Government on specific changes that could be made to the Constitution to bring about such recognition.

The Expert Panel wants to hear the views of a wide range of Australians on these issues. This discussion paper sets out some reasons for including local government in the Constitution and some ideas about how the Constitution could be changed to achieve this. The panel seeks submissions on the ideas and issues involved to inform its advice to the Commonwealth Government. You will find a number of questions throughout the paper to use as starting points for any views that you want to share.

The Constitution

The Australian Constitution, the nation's founding political and legal document, was developed at a series of constitutional conventions in the 1890s and came into effect with the Federation of Australia in 1901. The Constitution sets the basic rules on how governments, and the different arms of government, operate in Australia. Due to historical circumstances, it addresses only the relationships between State Governments, Territories and the Commonwealth. Local government is not mentioned anywhere in the Constitution.

Australia has changed significantly since Federation in 1901. From time to time, the Australian people are asked to update the Constitution to reflect these changes. The Constitution can only be updated through a referendum, and any proposed change has to achieve what is known as a double majority. That is, it requires a national majority of votes and a majority of votes in a majority of States. There is more information on previous referendums, including two on local government, in Attachment B.

Local government in Australia's Federation

Local government bodies have existed in Australia since the establishment of the Adelaide Corporation (now the City of Adelaide) in 1840. Across Australia, there are now about 560 local government bodies that promote local interests and deliver important services and infrastructure. These bodies are very diverse: the areas they cover range from less than a square kilometre to almost 380,000 square kilometres (approximately the same area as Japan), and their populations range from a few hundred to more than 1 million.

Local government is a legislative responsibility of the States and Territories and is recognised in the Constitution of each State. State parliaments determine the roles and responsibilities of local governments, and those responsibilities vary from State to State.

Over recent decades, the role of local government has widened significantly. It now covers areas such as planning, environmental management, recreation, regional development and human services. Also, local government is increasingly being asked to contribute to national policy areas such as economic development and action on climate change, and to support improvements in public policymaking and service delivery at the regional level. Through these processes, local government is now directly involved in the development of national policy.

More and more, shared responsibilities require greater cooperation among the three levels of government. The peak Australian local government organisation has been accepted for two decades as a member of the Council of Australian Governments, the highest forum for collaboration in our federal system. All levels of government have now agreed that they must take a cooperative approach to the reallocation of responsibilities and resources to minimise duplication and waste and to increase sustainability and accountability.

A good example of such cooperation can be seen in the Inter-governmental Agreement Establishing Principles Guiding Inter-governmental Relations on Local Government Matters. The agreement, signed in 2006 by Commonwealth, State and Territory ministers for local government and the Australian Local Government Association, sets out a framework for the funding and delivery of services to the community at the local level.

The Commonwealth Parliament formally acknowledged the role of local government in Australia in 2006. All political parties supported a resolution that:

1. recognises that local government is part of the governance of Australia, serving communities through locally elected councils
2. values the rich diversity of councils around Australia, reflecting the varied communities they serve
3. acknowledges the role of local government in governance, advocacy, the provision of infrastructure, service delivery, planning, community development and regulation
4. acknowledges the importance of cooperating with and consulting with local government on the priorities of their local communities
5. acknowledges 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. commends local government elected officials who give their time to serve their communities.

While the resolution did not advocate recognising local government in the Constitution, it affirmed the integral part played by local government as the third level of government in the Australian Federation.

Why recognise local government in the Constitution?

Including a reference to local government in the Constitution would formally recognise the role it plays in the Australian federal system as the third tier of government. This recognition would enhance the status of local government, in the community and in its dealings with the other two levels of government. Local government would be better able to attract the support and resources

Should the role of local government in Australia be recognised by including a reference to local government in the Australian Constitution?

it needs, and to develop the new capacities to fulfil its increasingly important role in our system of government. For example, a wider range of people might stand for election as councillors or apply for professional and management positions within local government, and career, trade, training, employment and retention opportunities at all levels might open up.

Recognition could also enhance the ability of local councils to advocate the interests of their communities through collaboration with other levels of government. It could thus make a practical difference to local government's ability to deliver local services and infrastructure, and to its future development as an integral part of the Australian Federation.

Certain forms of recognition would have more specific objectives and effects, as discussed below. For example, a form of ‘financial recognition’ has been proposed to overcome legal doubts about the Commonwealth’s ability to directly fund local government, while ‘democratic recognition’ would guarantee that local government councillors must, as a general rule, be democratically elected.

Ideas for changing the Constitution

There are a range of ideas on how to include local government in the Australian Constitution. Each meets different practical objectives and has advantages and disadvantages. In its considerations, the Expert Panel is looking for ideas that will:

- make a practical difference
- have a reasonable chance at a referendum
- resonate with the public.

The panel has identified four ideas that appear to satisfy these three criteria and is looking for specific feedback on each of them. Some of these ideas have already been discussed in the community and could be proposed at a referendum in this term of Parliament. Others have had less public debate and may need a longer time for discussion before going to a referendum.

The panel notes at the outset that including an express reference to local government in a substantive provision of the Constitution could be held by the High Court to prohibit a State from altering the fundamental characteristics of a system of local government. Definition of those characteristics would then become a matter for the Court.

The constitutions of some nations make detailed provision for the powers and responsibilities of local government. The panel does not believe that this form of recognition would satisfy the three criteria above. It would be widely regarded as an unacceptable intrusion into the constitutional role of the States. Accordingly, that option has not been included.

The Expert Panel is interested in which, if any, of the ideas you support, and what you see as the advantages and disadvantages of each. The ideas are not mutually exclusive, and more than one could be incorporated in a referendum proposal. The panel would also like to know whether there are any other ideas you would like to add.

Symbolic recognition

Symbolic recognition of local government would seek to enhance the status of local government in the Australian Federation in a way that has minimal or no legal effects.

This idea has been raised on a number of occasions. One option is that local government be acknowledged in a new preamble to the Constitution. Currently, the Constitution does not have a preamble into which a statement of recognition could simply be inserted. However, it is well recognised that if there were to be a new preamble it would cover a range of matters, not just local government. A proposal to add a preamble was put to referendum in 1999, along with a proposal that Australia become a republic. Neither was successful.

Do you think that, if the Constitution is changed to include a preamble or statement of values, local government should be referred to in either?

An alternative approach to symbolic recognition would be to incorporate a 'statement of values' in the body of the Constitution. If this were done, the statement could refer to the democratic foundations of local government. While this form of recognition would be unlikely to have a practical impact on local government, it could affect the approach of the High Court to interpreting other provisions of the Constitution, particularly if the provision were part of the text and not in the preamble.

Local councils throughout Australia have long advocated that, if there were to be a preamble to the Constitution, then local government should be mentioned. However, both this approach and the concept of a statement of values raise some issues beyond the Expert Panel's terms of reference.

Financial recognition

Many councils rely on funding, from both their State Government and the Commonwealth Government, to supplement income from rates and other charges and to provide essential services and infrastructure in their communities.

Most Commonwealth funding to local government is paid to State Governments, which then pass the funds on to local governments. However, the Commonwealth Government also has a number of programs for local government under which grants are paid directly to local councils.

In 2009, the High Court declared that the constitutional basis on which the Commonwealth had traditionally relied to support the legality of direct grants to local government did not do so. Many constitutional lawyers doubt that any other head of Commonwealth power can support the kind of direct funding of local government that now exists. It could be years before the High Court decides the matter. In the interim, important Commonwealth funding arrangements, such as the Nation Building Roads to Recovery Program and the Regional and Local Community Infrastructure Program, are of questionable legality.

It is possible to replace direct Commonwealth funding of local government by providing grants to the States on the condition that they pass those funds directly to local government. However, the experience of local government is that this can sometimes lead to delays, increased costs and a significant reduction in the funds available to deliver the services that the Commonwealth wishes to support.

Should the Constitution be changed to explicitly say that the Commonwealth Government can provide funding directly to local councils?

Another idea for constitutional recognition of local government, therefore, involves changing the Constitution to ensure that the Commonwealth Government can provide funding directly to local councils, without having to pass the funding through State Governments. There is widespread support for this change among local government bodies, which are greatly concerned about the current legal uncertainty.

Do you agree with either of the suggested changes to section 96 of the Constitution?

One way to resolve questions about the Commonwealth's capacity to directly fund local government is to amend section 96 of the Constitution, which deals with funding from the Commonwealth Parliament to the States. Section 96 could be amended to ensure that local government has the same ability to access funding from the Commonwealth as the States currently have. Amendments to section 96 could be made in the following two ways (new words are in italics):

1. ... the Parliament may grant financial assistance to any State *or to any local government body formed within the limits of a State or Territory* on such terms and conditions as the Parliament thinks fit.
2. ... the Parliament may grant financial assistance to any State *or to any local government body* on such terms and conditions as the Parliament thinks fit.

The first of these two ideas more clearly affirms that the establishment of the system of local government is a matter for State and Territory legislation.

Democratic recognition

Local councils, like the Commonwealth and State Governments, are democratic bodies that are answerable to their communities. Many Australians expect to be able to elect their local council, and vote out a council they do not agree with, in the same way as they can for Commonwealth and State Governments.

There is no guarantee at a national level that local councils must be elected. Most State constitutions describe local councils as elected bodies, but whether and how that is achieved in practice depends on a normal Act of Parliament. The relevant section in the State constitution can also usually be amended simply by an Act of Parliament. Therefore, the final decision about whether local councils are elected or not lies with the State parliament, not the people.

State Governments and parliaments have extensive powers to dismiss local councils and appoint administrators or replacements. The limits on these powers vary between the different States. For more information on the different protections in State constitutions, see Attachment C.

Should democratic elections for local governments be guaranteed by the Constitution?

The limited protection for local government under State constitutions has long been a concern for local government representatives, who have argued that local government cannot be a legitimate democratic institution if it is not protected by inclusion in the Australian Constitution.

An appropriate way of addressing citizens' rights to democracy at the local level would be to include a guarantee in the Australian Constitution that local communities have a right to elect their local councils. Two possible proposals for inclusion in the Constitution are 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.*

The first option includes a clear democratic requirement, which is based upon the wording in the current Constitution for elections to the Commonwealth House of Representatives and Senate. This option would probably rule out existing provisions in some States for property qualifications and multiple voting in local government elections. The second option would let the States and Territories determine the electoral basis of local government, provided it met the general description of an election, but with a weaker democratic guarantee.

If so, which of the proposed provisions should be included in the Constitution?

Under either of these provisions, it is probable that State and Territory governments would not be able to exercise their executive powers to dismiss local councils, as they have done in the past. Nor could they pass legislation authorising themselves to do so either by legislation or executive order. To maintain the possibility of dismissing a local council, preferably by Act of Parliament rather than by ministerial directive, each of the above amendments could be qualified by adding the following words:

The Parliament of a State or Territory may by Statute dismiss a local government body, and provide for the appointment of persons to perform its functions and exercise its powers until such time as a new local government can be elected.

This approach would be similar to that taken in the Victorian Constitution.

Recognition through federal cooperation

A fourth idea is to change the Constitution to explicitly encourage cooperation between governments. In any such amendment, the role of local government could be expressly recognised in the context of improving the relationship between all three levels of government.

Many Australians expect the different levels of government in Australia to cooperate on issues that require a joint approach. Often, problems can be solved only by governments working together. All levels of government recognise the importance of cooperation and have increased their collaboration since Federation.

The three levels of government cooperate on many issues. However, the High Court has determined that some forms of cooperation, upon which the Commonwealth and all State Governments and parliaments had agreed, are not legally possible under the Constitution. In particular, the High Court has ruled invalid a scheme in which the State and federal governments cooperated to improve the function of our courts.¹ The High Court has also found that the States cannot impose certain executive duties on the Commonwealth, even where there is agreement from the Commonwealth.² In deciding one case, a High Court judge dismissed the idea of cooperative federalism as a mere ‘political slogan’ of no legal effect.³

If the Constitution is changed to refer to the desirability of cooperation between the Commonwealth and the States, should local government be included in any such provision?

A number of specific proposals have been put forward to overcome these decisions. One idea is to insert in the Constitution an express reference to the desirability of cooperation between the Commonwealth and the States. A reference to cooperation among and between all three levels of government could be included in any such

provision. While such a provision would not be of direct operational effect, its inclusion could have significant influence on the High Court’s approach to interpreting other provisions of the Constitution in a way that enhances cooperative conduct.

A further step, with more direct effect, would be to insert a provision requiring the Commonwealth and the States to give each other an opportunity to comment on any proposed laws that would affect their status, powers and/or functions. Again, if such a provision were adopted, it would be open to include local government in the provision.

These ideas include matters that go beyond the Expert Panel’s terms of reference. Their consideration would require a more extensive process of consultation than panel is able, or indeed qualified, to undertake.

¹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

² *R v Hughes* (2002) 202 CLR 535.

³ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 566.

Further questions

The Expert Panel is interested in your views on some further questions to help inform its report to the Commonwealth Government.

What do you think are the advantages and disadvantages of the particular ideas discussed in this paper?

Which ideas, or combination of ideas, do you think could best provide a basis for constitutional recognition of local government in Australia?

Are there any other ideas not covered in this discussion paper that you support?

Do you think that there are other ways of recognising the role of local government and enhancing its status, apart from constitutional change?

Do you think that there are any implications beyond the benefits to local government that might result from the suggested changes to the Constitution?

How to have your say

There are two ways that you can have your say and submit your views to the Expert Panel. First, you can provide a written submission, either through the panel's website at www.localgovrecognition.gov.au, or by post to:

The Secretariat
Expert Panel on Constitutional Recognition of Local Government
GPO Box 803
Canberra ACT 2601

The deadline for receiving written submissions is **4 November 2011**. Unless you request otherwise, submissions will be published on the website.

Second, you can participate in the online survey on the website. The Expert Panel will also hold a series of consultations across Australia from late September through to November 2011. There is more information about these on the website.

Attachment A: Terms of reference and panel membership

Expert Panel terms of reference

Context

The Government has committed to pursue recognition of Local Government in the Australian Constitution.

Purpose

The Government has decided to establish an independent Expert Panel to consult with stakeholder groups and the community on the level of support for constitutional recognition of local government and to identify possible forms that recognition could take.

The Expert Panel will report to Government in December 2011.

Terms of Reference

The Expert Panel should, report on and make recommendations regarding:

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

The Expert Panel will have regard to the benefits and risks of the different options as well as outcomes that may be achieved for key stakeholders through constitutional recognition of local government.

In conducting its inquiry, the members of the Expert Panel will consult:

- Local governments and their representative bodies, including the Australian Council of Local Government and the Australian Local Government Association (ALGA);
- State and Territory governments;
- Federal parliamentarians;
- Subject matter experts, such as constitutional reform, local government and regional government experts; and
- Interested members of the Australian community.

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

Expert Panel members

The Hon. James Spigelman AC QC (Chair)

Councillor Paul Bell AM

Professor A.J. Brown

Senator Bob Brown

Father Joe Caddy

Mr Ross Cameron

Mr Peter Clarke

Mr Rob Hudson

The Hon. Karlene Maywald

Mayor Genia McCaffery

Mr Greg McLean OAM

Mrs Jane Prentice MP

Professor Graham Sansom

Right Hon. Lord Mayor of Perth Lisa Scaffidi

Mr Sid Sidebottom MP

Mr Jim Soorley AM

Ms Lucy Turnbull AO

Mr Tony Windsor MP

Attachment B: History of constitutional recognition of local government

The Australian Constitution does not refer to local government; historically, local government was not recognised in State constitutions either.

Local government is now recognised in all State constitutions. The Commonwealth Constitutional Convention established by the Whitlam Government recommended at a number of the sessions it held between 1973 and 1985 that local government be given recognition in State constitutions and/or the Australian Constitution. As a consequence, all State constitutions were amended between 1979 and 1989 to acknowledge local government.

Proposals to recognise local government in the Australian Constitution have twice been put unsuccessfully to referendum: by the Whitlam Government in 1974 and by the Hawke Government in 1988.

The 1974 referendum

In 1974, four referendum proposals were put to the vote. One dealt with local government and proposed inserting two new provisions in the Australian Constitution. Both provisions addressed the issue of direct Commonwealth funding to local government:

- A proposed new section 51(ivA) would have provided that the Commonwealth could make laws with respect to '[t]he borrowing of money by the Commonwealth for local government bodies'.
- A proposed new section 96A would have provided that '[t]he Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit'.

The proposed law was rejected twice by the Senate, and was put to the people only after being passed on two occasions by the House of Representatives.⁴ The national vote in favour was 46.85%; only in New South Wales did a majority of voters support the proposal. None of the referendum proposals put to the vote in 1974 were successful.

⁴ The 1974 local government proposal and three other unsuccessful referendum questions put in 1974 are the only referendums conducted under the 'deadlock' provisions, which allow a referendum proposal to be put to the vote without the approval of the Senate. See George Williams and David Hume, *People power: the history and future of the referendum in Australia* (UNSW Press, 2010) 40.

The 'yes' campaign in the 1974 referendum focused on two issues:⁵

- Local government would have to increase rates and charges without Commonwealth funding, as State funding was insufficient.
- In the past, State premiers had insisted on financial assistance to local government being funded through the States.

The 1974 referendum 'no' campaign arguments included the following:⁶

- The Commonwealth could already fund local governments through the States under section 96, so change was unnecessary.
- The Commonwealth ('Canberra') would have new power to control local government.
- It would be expensive to have a new administrative system in Canberra for distributing funds to local government.

The 1988 referendum

In 1985, the Commonwealth Government set up a Constitutional Commission to replace the Constitutional Convention and instructed the new commission to report by 1988.⁷ In its final report, the Constitutional Commission recommended a new section 119A to recognise local government. Its reason was that there was a 'need to accord [local government] the status of an established part of the structure of government' to restrain arbitrary State abolitions, though not temporary lawful suspensions or amalgamations.⁸

Four referendum proposals were put to the vote in 1988. The local government proposal largely followed the Constitutional Commission's recommendation, and proposed a new section 119A in the following terms:

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

The Constitutional Commission had recommended using the phrase 'local government bodies' rather than 'a system of local government'. This proposal would have provided a form of democratic recognition to local government, as it ensured that local government bodies were elected. The national vote in favour of this proposal was 33.62%, and the proposal did not get majority support in any State. As in 1974, all four proposals were defeated.

5 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution' (2010) 21 *Public Law Review* 164, 168; Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Constitutional Change* (1997) 101–2.

6 McGarrity and Williams, above n 5, 168; Standing Committee on Legal and Constitutional Affairs, above n 5, 101–2.

7 The replacement of the Australian Constitutional Convention by the Constitutional Commission was opposed by the federal Opposition and by most of the States: see Cheryl Saunders, 'Constitutional recognition of local government' in Nico Steytler (ed) *The place and role of local government in federal systems* (Konrad-Adenauer-Stiftung, 2005) 56.

8 Constitutional Commission, *Final report of the Constitutional Commission 1988* (Australian Government Publishing Service, 1988) [8.39].

The 'yes' campaigners in the 1988 referendum argued that:⁹

- constitutional recognition was the only way to guarantee the continued existence of local government
- the amendment would recognise the important role played by local government
- the amendment would strengthen the system of decentralised community based government.

The 'no' campaigners argued that:¹⁰

- the language of the proposal was vague and uncertain
- it would not stop arbitrary dismissals or amalgamations of local government bodies
- it would result in further centralisation of government in Australia, controlled from Canberra.

⁹ McGarrity and Williams, above n 5, 169; Standing Committee on Legal and Constitutional Affairs, above n 5, 101–2.

¹⁰ McGarrity and Williams, above n 5, 169; Standing Committee on Legal and Constitutional Affairs, above n 5, 101–2.

Attachment C: Local government in State constitutions

Every State constitution was amended between 1979 and 1989 to acknowledge the role of local government. The provisions in all of the State constitutions except Victoria's are very similar. They each describe local government as:

- a body that is elected¹¹ or 'is duly elected or duly appointed'¹²
- having powers as provided by the State parliament or legislature
- responsible for the good governance / better government of a particular area of the State.

The Victorian Constitution has stronger recognition in the form of guarantees that local councils must be democratically elected, and must have both a 'governing body' and an 'administration'. It also lists the areas relating to local government about which the State parliament may make laws explicitly.¹³

The Victorian and Queensland constitutions are the only State constitutions that have a description of the due process for dismissing a local government body. In Victoria, a local government body can only be dismissed by an Act of Parliament; in Queensland, dismissal requires ratification by the Legislative Assembly.¹⁴

Some observers suggest that these provisions provide little protection for local government.¹⁵

Local government advocates have argued that the protections for local government in State Constitutions are further weakened because State Constitutions can, as a general rule, be changed in the same way as an ordinary Act of Parliament. A referendum is not required, as it is for changes to the Australian Constitution. The only exception is that some State parliaments have 'entrenched' some provisions regarding local government in their State Constitutions. By entrenching a provision, a State parliament determines the way that the provision can be changed in the future. According to some, however, there remains a legal question over whether any entrenched provisions, particularly those dealing with local government, would be upheld under a legal challenge.¹⁶

Three States have entrenched provisions that deal with local government. The South Australian Constitution requires that a Bill to end the system of local government be passed by an absolute majority. The Queensland Constitution requires that a referendum be held to end the system of local government. The Victorian Constitution requires a referendum to change any of the provisions currently dealing with local government.

Of these, the Victorian Constitution has the strongest protection for local government, as the chances of the whole system of local government being removed in any State have been rated as exceptionally unlikely.¹⁷

11 *Constitution of Queensland 2001* (Qld) s 71(1); *Constitution Act 1934* (SA) s 64A(1); *Constitution Act 1934* (Tas) s 45A(1); *Constitution Act 1889* (WA) s 52(1).

12 *Constitution Act 1902* (NSW) s 51(1).

13 *Constitution Act 1975* (Vic) ss 74A(1) and 74B.

14 *Ibid* s 74B(2); *Constitution of Queensland 2001* (Qld) s 72–76.

15 McGarrity and Williams, above n 5, 167; Saunders, above n 7, 54.

16 McGarrity and Williams, above n 5, 168.

17 Saunders, above n 7, 56.

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