

The Role of Local Government

By

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I would like to begin my address today by setting the scene for the issue of constitutional recognition. This will be done by outlining the different ways in which we might approach a campaign for recognition.

There are three.

Firstly, we can propose recognition as a stand alone issue. This means emphasising our support for elected local government as part of our political system.

Secondly, we can campaign for recognition as part of a wider program of political reform. This means an enhanced role for local government linked to a change agenda, such as an expanded role for the Commonwealth or a new form of co-operative federalism.

Thirdly, we can campaign for recognition as part of an even wider program of reform designed to tackle the major issues of the day. Indeed I would argue that it is impossible to undertake any discussion of public policy today without referring to the major challenges we face such as climate change, international terrorism, and the global financial crisis. And, just to add to the complexity, these challenges come at a time in which the balance of world power is shifting to China and India. Not surprisingly the state and government generally has made a dramatic comeback and is now at centre of the action having been sidelined by the ideology of the free market for so long. People are looking to their governments at all levels, local, state and national, to find solutions to our problems that are politically digestible and sustainable. That isn't going to be easy and will certainly put a high premium on policies that are tough but fair. Indeed I believe "fairness" will become the key determinant of success or failure because it is central to individual commitment and community integration. This will necessitate a collective vision backed up by a public policy agenda and the strength of leadership to see that it is implemented. To put that in simpler terms – that will mean strong government.

However, before analysing these three approaches to recognition in the context of recent Australian history I would like to say a few things about my own view of local government and its place in Australian politics.

Some Personal Reflections

Not only did I enjoy a three-year stint as a Fremantle City Councillor I took a keen interest in local government matters when a member of the Western Australian State Parliament for twenty years. I'm not just talking here about the everyday contact a local MP has with his or her local authority but also about the role and position of local government in our political and public policy landscape. In fact in one of my early contributions to parliamentary debate I canvassed the issue of better reporting by local government to facilitate improved accountability and the sharing of good ideas across the boundaries. In particular I enjoyed the challenge of addressing the WA Local Government Association each year – firstly as Leader of the Opposition and then as Premier. Not only was it a demanding political environment but there were always meaty public policy initiatives that would be canvassed, such as crime prevention, planning law and how to tackle regional and remote disadvantage.

The question of the relationship between state and local government was never far from the surface and it soon became pretty clear to me that the best way to relate to local government was by way of partnership. In opposition I became interested in the agreements the Bacon Government was entering into with local governments. When I came to power in 2001 I was able to introduce my own model of partnership agreements with the Local Government Association and with individual Councils. It meant that issues could be anticipated and dealt with in a co-operative manner. Part and parcel of this process was a consultation and communication agreement between peak State and Local Government bodies.

Such an approach reflected my view that there are always areas of common agreement between governments which can form the basis for joint action, particularly in the area of social and economic infrastructure. By working together solutions which may be beyond the capacity of a government working alone become possible. It's only by providing a forum within which all sides put their concerns and aspirations on the table that we are able to advance such a model. It makes government a type of "work-in-progress" to improve the social, economic and environmental conditions of the people, particularly when coupled with properly constituted Regional Development Commissions acting as planners and facilitators, as is the case in Western Australia. The State Government also provided money to help oil the wheels of co-operation.

Of course it wasn't all sweetness and light but I do believe the framework I developed had the potential to further the cause of our state sustainability plan consistent with the principles of local governance. Indeed it made local government an important partner in that plan and locally generated and creative ideas were able to be implemented. However, I was only able to reach this conclusion because local government had undergone significant reforms in the twenty years I was in State Parliament; reforms like a widened electoral base, increased powers to act on behalf of local residents, more transparency in Council processes, greater community engagement and tougher accountability requirements. Local government always looked best when it embraced rather than resisted these changes and when it demonstrated in practice that it was an indispensable and progressive sphere of government. As we know only too well this is not always the case and all too often individual councils let the side down with corruption and/or maladministration.

Earlier Referendum Campaigns

Perhaps not surprisingly none of these changes and the improvements that followed have been enough to convince the people of the need for constitutional recognition. I remember well the ill-fated referendum of 1988. The Hawke Labor Government had proposed that a new section 119A be added to the Constitution. It read

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 the State and empowered to administer, and make by-laws for, their respective areas in accordance with the laws of the State.

This was pretty mild in its implications. Yes it did mean a constitutional obligation to establish and continue a system of local government, but it left the power to determine how that would be done to the States. Nor did it preclude the dismissal of a Council "subject to a new local government body being elected within a reasonable period" as the explanatory memorandum to the Constitutional Alteration (Local Government) Bill 1988 put it. Once and for all local government would have been recognised as an integral part of our political system and federal constitution.

Only 33.61% voted for the proposition. Some say it failed because it was linked with other more controversial proposals related to civil rights, parliamentary terms and fair elections. Others say it lost because of opposition from the Coalition parties. Others

say it confirmed the view that Australians will always say no unless there is a clear and compelling reason to do otherwise and local government had not provided that reason. Others again say it was a victim of a broader dispute about the powers of the States and the Commonwealth. In fact all of these factors played a part.

Whichever way you look at it there wasn't consensus amongst the political elite as to its necessity. Nor was there widespread and passionate support within the community for its implementation. This division at the top was a particularly potent negative. The same conclusion can be reached about a later referendum – that of 1999 to establish Australia as a Republic. In this case the proposal put to the people – that the President be appointed by a two-thirds majority of the Commonwealth Parliament – was itself a substantial cause for division. Indeed some of the republicans who had advocated a direct election model at the Constitutional Convention supported the “No” case in the referendum campaign. On whether or not some version of direct election would have broken the back of the opposition to change remains a debateable point. Certainly it would have injected a popular element to the campaign, something that was definitely lacking in the republican narrative.

Both 1988 and 1999 tell us a good deal about Australian politics. Indeed changing the Australian Constitution has never been easy. We have had 44 referendums since 1906 and only eight (22%) have succeeded. It has been somewhat easier at the State level where constitutional provisions can be changed by way of ordinary legislation (with some exceptions). The Australian states have recognised local government in their constitutions. Victoria has the most positive wording with its reference to local government as “a distinct and essential tier of government consisting of democratically elected Councils”. Such recognition by the states is mainly symbolic but also institutional, at least to the extent that “a system” of elected Councils is required. Much more is said, of course, in the Local Government Acts.

Going further than this state-based recognition either by incorporating recognition into the Australian Constitution or requiring a meaningful and entrenched test of procedural fairness prior to amalgamating or dismissing Councils has proved a bridge too far. This being the case at state level I find it hard to imagine circumstances where the Commonwealth would consider such procedural provisions for the Australian Constitution.

Contrasting Approaches to Local Government Reform

At a gathering like this it is important that we ask the question: “Will it always be a bridge too far”? Those who say yes would argue that it is better to concentrate the local government reform efforts in the states and on inter-government relations generally. Given the nature of state politics windows of opportunity may emerge to strengthen the legal position of local government in ways that would be impossible at the federal level. The very notion of “local government reform” is not a static one and needs to be re-evaluated as new challenges emerge. This is a matter for the political processes in each of the states and it would be better not to have any federal constitution constraining those processes. In respect of the political position of local government generally opportunities are always there for partnerships with the state and federal governments in areas like health, education and infrastructure. For example the National Reform Agenda endorsed by COAG has a great deal of potential for local government involvement. The fact that monies may have to flow from or through the states to facilitate these partnerships ought not to be and has not been so far an obstacle to their successful development. What would result may not amount to constitutional recognition but it would certainly raise the status and extend the involvement of local government in the nation’s affairs.

This being said let me turn to an alternative approach, the campaign for recognition in the Australian Constitution. It would be a mistake to say it is an impossibility but foolish to think it can be easily achieved. My earlier references to the 1988 Referendum showed just how difficult these seemingly straightforward campaigns can be. Nothing I’ve seen about the three models that are being considered – symbolic recognition, institutional recognition or financial recognition – would lead me to think otherwise. Either the propositions lack contention and raise insufficient passion or are too contentious and raise too much passion.

Differing Narratives about Australian Government

However, I think there is a deeper issue at stake here. Just how does local government conceive of itself within the Australian political system? It’s easy to say that the local sphere needs status and recognition as an important part of our democratic system but not so easy to say precisely what that means in Australia today. The truth is, as we found in 1988 and in the 1974 Referendum about direct funding as well, local government gets caught up in the ongoing debate about

Australian federalism. This is an issue that cannot be avoided if local government is to prioritise its quest for constitutional recognition.

Let me clarify what I am saying by describing what I see as the two competing narratives at play in Australian politics today. Firstly, there is the narrative built around the growth in the power and importance of the Commonwealth. Secondly, there is the narrative built around the idea of shared responsibility between the Commonwealth and the States. It's often defined as the model of co-operative federalism with unity on outcomes but diversity in the means to achieve them.

It seems to me that local government is unsure as to which way to line up in this debate. It's political instincts push it to co-operative federalism and a place at the table which is the Council of Australian Government. However, its desire for an expanded role often pushes it into the camp of the wealthier and increasingly powerful Commonwealth.

The model of Australian government which sees the Commonwealth playing a dominant role, not just in its mandated spheres of influence but also in areas traditionally the province of the States like urban infrastructure, public hospitals and schools, creates new opportunities for local government. The radical implementation of such a strategy would see the Commonwealth looking for new ways to deliver services and for new arms of delivery from the non-government sector and local government. Under this model there is quite an incentive for constitutional amendment that would allow local government to be directly funded from the Commonwealth. This was, of course, the aim of the 1974 proposal. If successful it would have allowed the Commonwealth to fund local government in same way as it funds the States with Special Purpose Payments under Section 96 of the Constitution.

It is hard to imagine a thorough-going implementation of this change in Australian governance without significant implications for local government. There would be an expanded role but at the same time there would be increased pressure to amalgamate and regionalise and, of course, there would be "terms and conditions" for the funding. The experience of Australia's Universities is a good case study of what may happen when the Commonwealth takes over. Although the States still have legislative authority for our Universities they are now funded and regulated by the Commonwealth. What was new and extra money to start with became money

that had to be fought for in competition with other Commonwealth responsibilities and what had been relatively light-handed regulation by the States became micro-management from the Commonwealth. Interestingly some of the State Governments have returned to the domain of higher education by funding special initiatives, usually in research, that coincide with their local and regional priorities. However, any notion that the States would re-establish financial control is not being contemplated.

There is, however, a less radical version of increased Commonwealth involvement. This is where the Commonwealth does not attempt to take responsibility for and control of local government (and other functions currently exercised by the states) but where it complements local revenue-raising and state support where it exists with Commonwealth funding. This is the theme in the recently issued Commonwealth Paper “A Better Deal for Local Communities – Local and Australian Governments Working in Partnership” (2008). It advocates working partnerships to improve outcomes, improved financial management and reporting structures to facilitate infrastructure investment and a workforce planning strategy. To forward this agenda a new body the Australian Council of Local Government, to be chaired by the Federal Minister for Infrastructure, Transport, Regional Development and Local government is proposed.

This document reads very much like the sort of document that has emerged from State Departments of Local Government in recent years. It points to the need for a “permanent and robust consultative mechanism”, for collaborative ventures to tackle social exclusion, better asset management including “shared services”, and a more strategic mode of operation. It even refers to the benefits of economies of scale, for example from coordinating and aggregating procurement contracting arrangements between Federal and Local Government.

Basically what both State and Commonwealth Governments have been saying to local government is “become more managerial so we can partner with you on our national, regional and local objectives”. This takes us into the territory of the National Reform Agenda and the objectives it has set not just in the areas of competition policy and regulatory reform but also in relation to productivity, social inclusion, climate change and indigenous disadvantage. Just as the Commonwealth is looking to share responsibility with the States and Territories so too are both the Commonwealth and the States looking to share responsibility with local government.

They know this will be necessary if the outcomes of improved productivity, a fairer society and a low carbon imprint are to be achieved.

For local government this means being at the COAG table when major initiatives are being developed, being proactive in relation to the nation's social, economic and environmental objectives and ensuring that good systems of management and accountability are in place.

I would maintain that the politics of this tripartite model of partnership are much better than the politics of an alliance with the Commonwealth to facilitate central control. Whatever the politics, however, this is a fundamental question that local government needs to ask about its strategic positioning.

Where does this leave the question of constitutional recognition? Certainly it takes us back to the type of proposition put to the people in 1988 or perhaps inclusion in a new preamble to the constitution. Although mostly symbolic in nature 1988 did make it clear that the States had to establish and continue a system of elected local governments. Taking it further into the murky waters of institutional protections against amalgamation and dismissal opens up too many avenues for opposition. So too I would argue does the proposal to guarantee a certain percentage of the nation's revenue for local government. Hypothecation is always difficult to achieve when governments are looking for flexibility of response.

Linking Local Government to C.O.A.G and/or a new Preamble

There may, however, be another way we can approach the issue. If the objective is one of shared responsibility for nationally agreed outcomes then the recognition being sought is a seat at the table. This takes us to the Council of Australian Government where the Commonwealth, States, Territories and Australian Local Government Association have a place. We might ask the question: "Should COAG be incorporated into the Australian Constitution?" If yes, should local government be listed as one of its participants? Given that local government is there now – and has had its role extended in the latest round of inter-governmental negotiations over climate change, housing and infrastructure – the answer to the second question would certainly be in the affirmative.

Probably the more important question is the first one. Critics would say if the Cabinet is not mentioned in the Constitution why would we want to incorporate a reference to the Council of Australian Government. Is it an institution that deserves the same status as say the Parliament and the Judiciary? Would incorporation of COAG in the Constitution make its agreements justiciable? Is the current model of inter-governmental co-operation through COAG always going to be the way we conceive of these things? Pragmatists would say that arrangements like COAG are best addressed by each generation free of the constraints that would come with a provision in the Constitution.

In saying this I am reminded of Section 101 which states:

There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of the constitution relating to trade and commerce, and of all laws made there under.

Section 103 then refers to how the Commission is to be appointed and Section 73 provides that appeals on questions of law can be heard in the High Court.

An Inter-State Commission was first appointed in 1912 but lost its judicial power in 1915 and lapsed in 1920. It was revived by the Whitlam government in 1975 to inquire into transport issues. In 1989 it was abolished and its functions passed to the Industry Commission. Despite its passing the matter of its potential relevance to Australian government is raised from time to time.

In a sense this provides arguments both for and against the inclusion of COAG in the Constitution. It does show there can be flexibility about these matters even when they are in the Constitution. On the other hand it does raise the question of justiciability. Indeed the doctrine of the separation of powers was used to neuter the proposal for the Inter-State Commission. It could be argued by analogy that if COAG was in the Constitution the agreements it enters into may be subject to judicial review – as indeed that are in some other jurisdictions. Much better, so the argument goes, that they remain open to executive interpretation and flexibility. In response to this one might ask: “Would it be a bad thing if inter-government agreements had the force of law behind them?” Would it provide a greater incentive to ensure the agreements were actually delivered?

However, what none of these arguments canvas is the role constitutional recognition would play in institutionalising the process of national co-operation that involves all levels of government. This focus on shared responsibility and co-operation would provide good ammunition for argument in the type of atmosphere created by a referendum campaign. Indeed of all the types of recognition one might consider it would seem to have the most neutral of implications when it comes to the ongoing debate about the powers of the state and commonwealth governments. On whether it is a proposal that would be of interest to our executive governments, state or federal, remains a moot point. In saying this I note that state and Commonwealth governments have rejected the notion that COAG should be set up under legislation in contrast to the current, less formal arrangements.

There is, of course, the option of incorporating local government in a new Preamble to the Australian Constitution. This is certainly feasible and would amount to a form of symbolic recognition. However, it begs the question as to whether pursuit of a new Preamble incorporating local government has enough weight as a political objective.. Where the issue of a new Preamble would surface is in the context of a renewed debate about the Republic and/or indigenous recognition. Whilst the Republic is off the boil at the moment one would expect it to return to the political agenda. So too indigenous recognition which was a matter raised in the last federal election. Considering how local government recognition could be incorporated into a renewed debate about the preamble should certainly be on your agenda.

Conclusion

The problem with all the debates around specific proposals is that local government has been progressing without recognition in the Australian Constitution. State laws have changed to ensure a greater role. It now partners with both State and Federal Governments and it does receive financial assistance from the Commonwealth. It is represented at COAG and recognised as having a part to play in the National Reform Agenda.

Whilst the campaigns for constitutional recognition may have helped propel this forward march they did not achieve their objective of recognition. To succeed recognition is going to have to join with a campaign that has weight in the public

imagination and which dovetails with the particular case for local government recognition being pursued. When the issue is put in these terms what seems to stand out is the National Reform Agenda and the role local government can play in its implementation. What this also does is put local government into the debates about climate change, productivity and social inclusion which I mentioned at the beginning of my address. This is the sort of context that gives constitutional recognition a chance.