



AUSTRALIAN LOCAL
GOVERNMENT ASSOCIATION

**Submission to the Joint Select Committee on the
Constitutional Recognition of Local Government**

December 2012

The Australian Local Government Association (ALGA) welcomes the opportunity to make this submission to the Joint Select Committee on the Constitutional Recognition of Local Government (the Committee). ALGA is the national voice of local government representing more than 560 councils across Australia. ALGA is a federation of state and territory local government associations and includes the Government of the Australian Capital Territory in recognition of its combined state and local government functions.

The Government's decision and the Parliament's agreement to establish the Committee are important steps forward in the process of considering a referendum for the constitutional recognition of local government.

ALGA is particularly supportive of the terms of reference for the Committee and the decision that the report of the Expert Panel on the Constitutional Recognition of Local Government, released by the Government on 22 December 2011, will be the Committee's starting point.

ALGA acknowledges the work of the Expert Panel and that ALGA President Mayor Genia McCaffery and the former ALGA President Cr Paul Bell were members of the Expert Panel.

ALGA strongly supports the constitutional recognition of local government and was pleased to support the Expert Panel process through a substantial submission. It is not ALGA's intention to reiterate the details of that submission but a copy of the submission is attached for the Committee's information (Attachment 1).

In its submission to the Expert Panel, ALGA highlighted its preference for the financial recognition of local government to remove uncertainty around the Commonwealth's ability to directly fund local government through programs such as Roads to Recovery.

Importantly, the majority finding of that Panel favoured financial recognition of local government by amending Section 96 of the Constitution and this was ALGA's preferred option for recognition as advanced in our submission to the Expert Panel.

ALGA's preferred wording proposed to the Expert Panel in our Submission of October 2011 was a minimalist change involving the inclusion of three words – "and local government" in the text of Section 96.

The Panel considered this proposition but determined that a different set of words was required to make it clear that the establishment of a system of local government remains a matter for State and Territory legislation. Their proposal was:

Parliament may grant financial assistance to any state **or any local government body formed by State or Territory Legislation** on such terms and conditions as the Parliament sees fit.

The ALGA Board has reviewed the Panel's finding and accepted the need to support those words, subject to a minor variation to reflect the style of language in the Constitution. The Board's preferred option is now that Section 96 be amended to read:

Parliament may grant financial assistance to any state **or local government body formed by or under a law of a state or territory** on such terms and conditions as the Parliament sees fit.

In reaching this position ALGA was mindful of the need to pursue its preference for financial recognition while acknowledging the need to address state government concerns.

ALGA has prepared a draft Bill reflecting this change and this is included in Attachment 2 to assist in promoting early discussion and consultation on the proposal.

ALGA has previously considered other options such as symbolic recognition through inclusion in a Preamble to the Constitution, and broader institutional or democratic recognition through wider changes to guarantee a democratically elected system of local government in each state. ALGA had determined that those forms of recognition would have little practical value or would be unacceptable to state governments and would be unlikely to gain public support.

It is important to stress that ALGA's decision to pursue constitutional recognition and the subsequent decision to support financial recognition have been the product solely of local government's own long standing vision for inclusion in the Constitution, the developments in the High Court since 2009 with the *Pape* and *Williams* cases and a realistic appraisal by the sector, over a period of more than five years, that any constitutional change needs to be practical, simple and justified.

ALGA's proposal is not aimed at supporting a centralisation of power in the hands of the Federal Government. ALGA has been concerned by the tenor of some of the material which has been circulated opposing recognition and suggesting that the recognition of local government is part of a broader agenda to centralise power. Such material underlines the need for a rational, informed discussion of constitutional change in general and the recognition of local government in particular.

THE REPORT OF THE EXPERT PANEL INCLUDING PRECONDITIONS SET BY THE EXPERT PANEL FOR THE HOLDING OF THE REFERENDUM

The majority of Expert Panel members supported a referendum on the financial recognition question subject to two conditions (and presuming a sufficient level of bipartisan support within the Federal Parliament):

- That the Commonwealth negotiate with the States to achieve their support for the financial recognition option; and
- That the Commonwealth adopt the steps suggested by ALGA necessary to achieve informed and positive public engagement with the issue, these steps including allocating substantial resources to a major public awareness campaign and making changes to the referendum process.

ALGA's comment on the Expert Panel's preconditions

ALGA considers the first precondition, that the Commonwealth negotiate with the States to achieve their support for the financial recognition option, to be absolutely critical for a successful referendum. Local government operates within legislative frameworks created by State Parliaments and ALGA accepts that the inclusion of local government in the Constitution is an important matter for the state governments. In addition, the Constitution establishes the framework for Federation and how the Commonwealth and States will work together. ALGA has always considered the support of the great majority, if not all, of the States to be essential for a referendum on the recognition of local government.

The capacity of local government itself, through ALGA and the state local government associations, to engage the state governments on the financial recognition option has been severely constrained by the absence of any Federal Government commitment to financial recognition and its lack of willingness to support or propose a specific set of words for a constitutional amendment. Approaches from State Local Government Association Presidents to Ministers and Premiers in their jurisdiction seeking support for local government recognition have been rebuffed on the basis that the states will not give indications of support until they can consider a specific set of words being proposed by the Commonwealth.

ALGA is not aware that the Commonwealth has entered into any negotiations with the states for financial recognition and indeed the Government has yet to indicate publicly whether it supports the proposal.

With regard to the second precondition, the changes to the referendum process proposed by ALGA in its submission to the Expert Panel reflected, in part, the changes proposed to the earlier Senate Inquiry into the Machinery of Referendums which reported in 2009. Among the changes ALGA proposed were:

- The establishment of a Joint Select Committee in early to mid 2012 for a six month period to consider the recommendations of the Expert Panel
- A nationally funded education campaign on the Constitution ahead of any "yes" and "no" campaign

- Removal of the legislative limit on spending and public funding of the yes and no campaigns; and
- Apportionment of funds for the "yes" and "no" cases based on those Parliamentarians voting for and against the bill, with the amount of funding being equivalent to that provided for elections.

The establishment of the Joint Select Committee is clearly a major step forward, but there has been a substantial delay in appointing the Committee and the time frame for the Committee's report is extremely short and certainly well short of the six months ALGA considered necessary. ALGA is concerned that this will limit the Committee's ability to elicit submissions, hold public hearings and come to a carefully considered view about the timing and form of a referendum. ALGA also now believes it will not be possible for local government to run the most effective campaign in 2013, given the lack of time after a Committee report at the end of March and a subsequent parliamentary process to develop and pass a Bill.

The other three elements of ALGA's proposal to the Machinery of Government inquiry - a Commonwealth funded public education campaign; removal of the legislative limit on the funding of the yes and no cases; and apportionment of funding of the "yes" and "no" cases based on the vote in the Parliament - all require changes to the *Referendum (Machinery Provisions) Act 1984*. ALGA encourages the Parliamentary Committee to consider these proposals favourably.

Conditions considered by ALGA as essential to maximise the success of the referendum

ALGA believes several conditions are necessary for a successful referendum, based on the lessons learnt from the previous 44 Australian referendums. The key preconditions were outlined in ALGA's submission to the Machinery of Referendums inquiry, including, as mentioned above, the establishment of a Joint Select Committee of Parliament to look at the proposals recommended by a Constitutional Commission (essentially the role subsequently undertaken by the Expert Panel) and for the Joint Select Committee to determine which of the options have the greatest chance of the full support of Parliament and which should be put forward.

Only 8 out of 44 referendums have been successful. Much research has been conducted into the reasons for the low success rate, including the difficulty of obtaining the "double majority", the conservative nature of the Australian public, lack knowledge amongst voters about the Australian Constitution and how to change it, ignorance and disinterest in the Constitution leading to an unwillingness to countenance change, leaving voters open to misinformation campaigns by opponents of the change.

Bipartisan support is essential to ensure the best chance of success for a referendum proposal. With the lack of understanding in the community about the Constitution, voters

rely on the political parties to formulate their opinions. Australian constitutional history demonstrates that unless there is broad bipartisan support, referendums are unlikely to succeed.

Professors Colin Howard and Cheryl Saunders have suggested (Source: Parliamentary Research Paper No. 11 2002-03 "The Politics of Constitutional Amendment", p 13) that the votes in the two houses of Parliament be included in the information sent to voters to make clear to voters the strength of parliamentary support for any measure to go to referendum. Bipartisan support reduces the likelihood of a no case and the spread of misinformation for political gain.

The Government needs to take the lead on the issue and demonstrate its support publicly to champion the change. The Government needs to take the opportunity to raise the issue above politics and avoid the temptation of using a referendum question opportunistically. The Australian public's lack of knowledge of constitutional matters, conservatism when it comes to changing the Constitution, and susceptibility to misinformation, requires the Government championing the change to be a trusted source of information on the need for, and consequence of, the change. ALGA does not believe that local government alone should be responsible for obtaining the support of state and territory governments, or for educating the public. That is not to say that local government cannot play its role in working with the Federal Government in achieving support for a referendum proposition. ALGA's flexibility in moving to a preferred set of words for the financial recognition amendment which offers the maximum reassurance to states about their continuing responsibility for local government is a concrete example of this. Similarly, the efforts made by ALGA and state local government associations to increase public understanding about the constitutional issues, most recently through the publication of *The Case for Change: Why local government needs to be in the Australian Constitution* (November 2012) should be acknowledged and built on by the Government.

The public needs to be informed about our Constitution, and how to change it. Research into Australians' understanding of our Constitution and how to change it shows a great lack of knowledge amongst the general public. A 1994 report on citizenship by the Civics Expert Group found that only 18% of Australians have some understanding of what their Constitution contains, and a 1987 survey conducted for the Australian Constitutional Commission found 47% of Australians were unaware that Australia had a written Constitution (Source: Civic Experts Group, *Whereas the People: Civics and Citizenship Education*, 1994, AGPS, p.133; Constitutional Commission, *Bulletin*, September 1987, no, 5, p.6). ALGA's own polling research supports these results.

In its submission to the recent Parliamentary Machinery of Referendums inquiry ALGA suggested an education campaign to inform voters in advance of a referendum about the role of the Constitution, the mechanism by which it can be changed, the role of individual electors and the nature of the local government question (which goes to the heart of the certainty of local government funding and the sustainability of local communities). There should be a

national, factual information campaign, ahead of the referendum, approved by the Parliament. The report of the Machinery of Referendums Inquiry recommended the need for such an education campaign and the Expert Panel endorsed the recommendation.

The public needs to be informed in a factual way about the question being asked, to be able to cast an informed vote at the ballot box. The official "yes" and "no" cases prepared by Parliamentarians appear to have no requirement to adhere to facts and it has often been the case that opponents of amendments have distorted and exaggerated the dangers with the precise intention of frightening and misleading voters. For example, the 1937 Aviation proposal, which was designed to give the Commonwealth power to make laws with regard to aviation, was used by the "no" case to argue that the proposal would "ruin the railway systems" and "bankrupt country towns". Such exaggerated claims can be extremely difficult to refute.

ALGA believes that such exaggeration is neither appropriate nor ethical given that public funding is involved in producing and distributing this material. The Machinery of Referendums inquiry agreed, concluding that there needs to be much clearer information provided to voters, because voters who do not understand a proposal are more likely to vote "no". The vote may have more to do with a misunderstanding of the question or a fear of change, than a true assessment and vote for the proposal. It recommended an independent non-political panel be set up prior to each referendum responsible for a communications strategy, including education materials and how best to distribute them to all voters. For a referendum to have the best chance of success, it is critical that voters are adequately informed of the questions being asked and the consequence of the change.

In addition to these important preconditions, ALGA believes that the timing of a referendum is also critical to its success, and the ALGA Board is strongly committed to the view that the referendum should be held at a time which maximises its success. The primary determinant of the 'right time' for the referendum is the need to ensure that there is sufficient time in the process to allow for the measured and informed engagement not just of the Parliament, but also of the states and the voting public. In ALGA's view, the delays in the process following the release of the Expert Panel's report in December 2011 have eroded the chances of success for a referendum held in 2013.

Independent Research on the Level of Public Support

In its Submission to the Expert Panel ALGA included details of research undertaken in 2009 and 2011 to find out the level of support for a referendum. This research showed that there was a positive level of support for both the constitutional recognition of local government generally and the financial recognition of local government in particular.

ALGA commissioned further research in October 2012 to provide a more up to date assessment of the level of support and we are happy to share the major findings of this research with the Committee. The research illustrates a gentle decline in support for constitutional change in the absence of any specific proposals which could engage the public.

ALGA's 2012 research reveals the following.

There has been no change in way the public view the importance of the three levels of government. Local government is rated as very important or somewhat important by 59% (unchanged since 2011), compared with 64% for state government (up from 62%) and 63% for Federal Government (down from 64%).

In terms of which level of government is on the right track, all three levels have declined, but local government is considered to be the most on the right track (36%) compared with the Federal Government (31%) and the State Governments (29%).

When asked if the Australian Constitution should recognise and protect the existence of local government, 54% said yes. This is down from 57% in 2009 and 61% in 2011. The proportion of voters answering no has stayed steady at around 14% over the three years with the undecided increasing from 25% in 2009 to 32% in 2012. Support is highest in Queensland (60%) and lowest in the ACT (47%).

As with the 2011 research however, the 54% of voters in favour of recognition does rise by 10 percentage points to 64% when respondents are prompted with the fact that the convention is for federal funding to occur via the states rather than directly to councils (in 2011, the figures were 57% and 68% respectively). This shift in response from being undecided to being supportive highlights the importance of a public education campaign to build on the efforts of local government so far and the opportunities for a targeted and well resourced "yes" campaign to which ALGA and its state local government association members are committed but which will also require substantial public funding.

THE LEVEL OF STATE AND TERRITORY GOVERNMENT SUPPORT

As previously stated, ALGA is a federated body whose members are the state and territory local government associations and the ACT Government. ALGA's member associations have directly advocated for constitutional recognition with their respective state and territory governments but with limited success in some cases. There is a diversity of views held by state and territory governments and it is important that the Committee seek the views of these governments directly.

Many State Governments have been reluctant to provide a view on the constitutional recognition of local government in the absence of a specific proposal from the Federal Government. While ALGA and state and territory associations have consulted on the sector's preferred position and wording, until this point there has not been a commitment by the Government to a specific proposal – such as financial recognition – nor to an actual set of words for an amendment. As such, consultations with state and territory governments have been in the 'abstract' and the implications of a specific proposal impossible to fully assess.

The State Governments have generally been unreceptive to these approaches. It is clear that in this context, the specific wording of a proposed amendment supported by the Federal Government is critical to any substantive engagement with the majority of State Governments.

Feedback to ALGA on its proposal for financial recognition indicates that only two states appear supportive at this point; Queensland and South Australia.

ALGA notes that the Expert Panel proposed that the Federal Government negotiate directly with state and territory governments on the proposal for financial recognition. This has not happened. The Commonwealth has been understandably keen for ALGA and state associations to engage their state governments and elicit their support but, as stated above, in the absence of a specific proposal this has proven difficult if not impossible.

ALGA acknowledges that the support of most if not all of the state governments is an important factor in shaping the chances for overall success of a referendum for financial recognition. For this reason ALGA has varied its preferred set of words for an amendment to reinforce its view that the form of financial recognition sought by local government would not have an adverse impact on the powers and interest of the states with regard to local government.

THE POTENTIAL CONSEQUENCES FOR LOCAL GOVERNMENT, STATES AND TERRITORIES OF SUCH AN AMENDMENT

Consequences for local government

ALGA has strong legal advice and informed commentary from leading constitutional academics that the constitutional validity of the direct federal funding of local government is uncertain.

High Court decisions in the *Pape* case and the *Williams* case support this view.

After the *Pape* case ALGA received clear advice that a further challenge to the validity of the Commonwealth's use of the Executive power could result in a decision with implications for the Roads to Recovery program. One possible area of challenge identified was Commonwealth funding of private schools. In the event, the *Williams* case saw a challenge to Commonwealth funding of school chaplains.

It is ALGA's view that these two cases now provide clear guidance on the direction of the High Court's thinking and reinforce the uncertainty around continued direct federal funding of local government.

At this point, however, it must be stressed that the Roads to Recovery program has not been challenged in the High Court or declared invalid and there is no reason why funding cannot continue.

Nevertheless, ALGA's expectation is that there will be further challenges in the foreseeable future and inevitably a High Court decision which directly goes to the validity of direct payments to local government.

There is currently an action which has been initiated in Queensland which challenges the right of the Commonwealth to provide funding to the Gold Coast Council for a light rail project. If such an action was to be successful it would have major implications for the Gold Coast community as well as the Commonwealth.

The importance of direct funding to local government through the Roads to Recovery program should not be underestimated. Over its life so far, the program has provided more than \$3.5 billion of funding to local communities for local roads. The program has been extended until 2018-19 by which time a total of more than \$5.5 billion will have been provided.

ALGA believes the need to address the uncertainty around continued direct federal funding for local government is urgent and that the Government, Opposition, minor parties and Independents should act rapidly and responsibly on their states commitments to remove the uncertainty through a referendum.

Consequences for the Local Government Financial Assistance Grants from a Change to Section 96 of the Constitution.

Currently local government receives Financial Assistance Grants (FAGs) from the federal government as a payment under section 96 of the Constitution. The grants are made to the states on the condition that they are passed on to councils in full and without delay and in accordance with the allocation between councils agreed by the federal minister.

The FAGs have been in place in one form or another since the mid-1970s. Since that time all federal governments have accepted the importance of ensuring that local governments are able to provide a basic level of services to their communities. The grants are tied in the hands of states but untied in the hands of councils.

The grants are not provided directly to councils and as a consequence there is evident confusion in councils about the origin of the grants. A quick review of the annual reports of a number of councils reveals that the financial assistance grants are identified as general support grants and their origin is identified as payments from state government local government grants commissions. They are not identified as federal government grants because they pass through state governments prior to being paid to councils and in the eyes of councils it is the state governments which make the payments.

This may go some way to explaining why federal governments appear to have been reluctant to increase the amount of the grants despite the obvious need of local communities and the contrasting significant growth in the levels of general purpose support for the state governments. There have also been very substantial increases in the level of all other specific purpose payments provided by the Commonwealth to the states under the 2009 Federal Financial Relations Inter-Governmental Agreement.

ALGA does not agree that there is a basis for the view that the Federal Government would necessarily terminate, reduce, substantially alter the allocation or tie the FAGs payments to councils if the Constitution is amended to allow direct payments to councils.

The FAGs are covered by legislation (the *Local Government (Financial Assistance) Act 1995*) and it is already open to the Government to amend that legislation to end or reduce the payments or alter the allocation of the payments between states or between councils. Successive Federal Governments over many decades have not done so. The allocations between states and councils reflect governments' recognition of the need for an equitable allocation of the grants and the political ramifications of depriving local communities of such important and substantial support.

It has always been open to the Federal Government to change either the process for determining the allocations between councils or to vary the allocations recommended by state ministers. Successive Federal Governments have chosen not to do so, however, since making a substantial change to the allocation of the grants would require the Government to determine the method of allocation which can be justified to all communities.

Current allocations are based on the data collected and assessed by state local government grants commissions in all jurisdictions except the ACT. In total, across the jurisdictions, there are about 20 professional staff and around 30 part-time grants commissioners who travel regularly to all councils in their respective jurisdictions and maintain ongoing dialogue with councils. The grants commissions recommend allocations between councils to state ministers who then make recommendations to the Federal minister. There are currently about two Commonwealth public servants involved in the process. If the Commonwealth took over the direct role of the state grants commissions it would need to put in place a process for collecting and analysing data, determining allocations and engaging directly with all councils. Federal Governments have had the opportunity to introduce this centralised approach, but have not chosen to do so and there appears to ALGA no basis for assuming this would change if the Commonwealth had the capacity to directly make grants to councils.

ALGA accepts that the Government might seek to tie the grants to particular outcomes, but this is not dependent on the ability to pay the grants directly to councils. Indeed the current review of the FAGs being undertaken in part by the Commonwealth Grants Commission is

looking at the benefits of tying the grants.¹ There are however complications and administrative burdens in such a suggestion. The allocation methodologies adopted in each state reflect an assessment of the cost burdens on each council and the relative revenue raising capacity of councils. Tying the grants to particular activities to achieve specific outcomes makes the assumption that all councils engage in those activities. Councils greatly vary in terms of their roles and capacities. Substantial additional bureaucratic resources would also be necessary at the Federal level to establish the new accountability and program management structures which would be required.

Consequences for state and territories

Despite placing the precondition on a 2013 referendum, that the Federal Government should negotiate with the States to achieve their support, the Expert Panel's report did not proffer an opinion or make a proposal regarding how the Commonwealth should achieve the support of State and Territory Governments for financial recognition. However, the Chair of the Expert Panel, the Honourable James Spigelman AC has made subsequent comments on this matter in an address to the Local Government Association of Queensland's 116th Annual Conference on 24 October 2012.

Mr Spigelman believes that a Joint Select Committee is not the appropriate forum for such negotiations, rather that the process of engaging the States should proceed in parallel with the deliberations of the Joint Select Committee. He said that ALGA and State Associations of Local Government had undertaken considerable engagement with State leaders before the Expert Panel was appointed, however, the Expert Panel's own investigations did not affirm all previous promises of support made to ALGA.

Mr Spigelman considered that State and Territory Government support was not likely to be able to be achieved by the Joint Select Committee process, and that the process of engaging the States was a high priority which needed to occur at the same time as the Joint Committee conducts its inquiry.

ALGA agrees that considerable work needs to be done with the State and Territory Governments in order to gain their support and confidence in the financial recognition option.

ALGA has consistently reinforced the position that in seeking recognition, local government does not seek to break or change the relationship between itself and the State and Territory Governments. Indeed, a 2008 Constitutional Summit Declaration of councils across Australia reinforced the desire of local government to remain under the jurisdiction of the State and Territories, and that any recognition should not seek to protect councils from amalgamation or dismissal.

In order to provide State and Territory Governments with further assurance of this intention, ALGA has commissioned draft legislation containing the words that state jurisdictions were seeking, namely, that the preferred wording would be "*or local government body formed by*

¹ Note: ALGA does not support any proposal to tie local government Financial Assistance Grants (FAGs).

or under a law of a state or territory". The wording reflects the lessons learnt in the 1974 referendum and current constitutional protocol in referring to local government, to reinforce to State and Territory Governments that local government intends to remain under the jurisdiction of the State and Territory Governments.

ALGA has also sought advice on whether, as raised during the 2009 Machinery of Referendums Inquiry by a Coalition committee member, financial recognition could be used as a mechanism by the Commonwealth to gain further control over local government at the expense of the States.

Advice from leading constitutional lawyer, Professor George Williams, is that although the Commonwealth may impose conditions on achieving the best value for its money (i.e. insist upon certain conditions in return for receipt of the money), the Commonwealth is limited in the conditions it can impose - it could not require a local government to do something which was in contravention of its controlling state law. It would not increase the ability of the Commonwealth to control local government activity.

According to Professor Williams, it is important to recognise that the proposal is not to insert a new head of power into the Constitution enabling the Commonwealth to regulate local government affairs. The only proposal is to insert a power to enable the Commonwealth to directly fund local government bodies. The financial recognition proposal does not suggest inserting a new section of the Constitution, but merely altering an existing section. This means that we can say with confidence what the effect would be based upon more than a century of use of the existing section 96 provision.

This is confirmed by the leading High Court decisions on section 96. For example, Chief Justice Dixon of the High Court said in *Victoria v Commonwealth (Second Uniform Tax Case)* (1957) 99 CLR 575 that section 96 is confined 'to granting money and moreover to granting money to governments'. It is not 'a power to make laws with respect to a general subject matter'.

This was echoed by Mr Spigelman in his address to the Local Government Association of Queensland when commenting on local government's role as an instrument of national policy on the one hand, and the traditional subordination of its activities and powers to the States. Mr Spigelman said that we have now had several decades in which such Commonwealth grants have been expended both in amount and categories. There is a considerable body of actual experience of successful partnership amongst the three levels of government that has not undermined the fundamental constitutional responsibility of the State Parliaments for the respective systems of local government created in each state.

He further says that the system of direct grants to local government has developed over many years and has become, in many respects, a model of a successful partnership amongst the three levels of government. Nothing in what is proposed in any way impinges upon the Constitutional responsibility of the State Parliaments. Nevertheless the fear that the Commonwealth can bypass the States whenever it wants to, and centralise Commonwealth

power, remains and was the principal theme of the "no" cases in both previous local government referendums.

ALGA has commissioned draft legislation to assure State and Territory Governments of its intention to remain under the jurisdiction of State and Territory Governments, and to allow them to see local government's preferred words, as they have requested, in order to consider their position on whether to support a proposed referendum. ALGA can do no more without a Commonwealth commitment to the wording and without Commonwealth leadership with the jurisdictions. ALGA strongly agrees with the recommendation/precondition of the Expert Panel, that the Commonwealth has the primary role to achieve support from the States and Territories.

ALGA believes that the fear of the Commonwealth being able to bypass the States is unjustified, and this view is supported by legal experts (Professor George Williams and the Hon. James Spigelman AC). The foreseeable consequence for State Governments of financial recognition through a S96 amendment, is that there will be security and certainty of funding to local government, where the Federal Parliament considers this funding to be in the national interest. This will relieve some of the pressure on State budgets and ensure the community is able to continue to receive the service and infrastructure it needs at local level.

Possibly cause for greater apprehension by State Governments would be the situation where the Commonwealth ceases to fund existing programs for local services and infrastructure, particularly as a result of a successful High Court challenge to the validity of such programs.

Financial recognition is a simple and practical change, which according to the Expert Panel has the broadest base of political support amongst the political leadership and federal and state

ANY OTHER MATTERS THE COMMITTEE CONSIDERS RELEVANT TO A DECISION TO CONDUCT A REFERENDUM AND THE TIMING OF A REFERENDUM

ALGA is conscious of the difficulties associated with amending the Constitution. There are a number of issues not covered elsewhere in this submission which ALGA believes are important for the Committee to consider.

The timing of a Referendum

In 2010 the Government committed to holding a referendum on the constitutional recognition of local government and a referendum on the constitutional recognition of indigenous Australians by 2013. While there has been no explicit link with the next Federal Election which will be held in 2013, the opportunity to minimise issues of cost suggests that a referendum held simultaneously with the Election may be the preferred option.

ALGA is not opposed to holding a referendum simultaneously with an election, but the Board of ALGA is committed to ensuring that the referendum is held at a time which maximises the chances for success. ALGA believes that the referendum should be held when the pre-requisites identified by ALGA in its submission to the Expert Panel, and those identified by the Panel itself, have been met. This will maximise the chances of a successful referendum. There must be a commitment to a set of specific words which can achieve the financial recognition option. These words must provide the reassurance sought by State Governments regarding their Parliament's continued legislative responsibility for local government. There must be a negotiation by the Commonwealth with the States to achieve acceptance of these words and then a commitment to a public education campaign to engage the voting public. At this point ALGA does not believe that these pre-requisites can be achieved in time for a successful referendum to be held in conjunction with a Federal election held between August and November 2013.

The ALGA Board is fully committed to supporting a referendum for the financial recognition of local government and is also acutely aware that two previous referendums to recognise local government have not been successful. The sector cannot afford a third failure. ALGA has put in place the necessary campaign planning to support a well resourced and focused professional campaign in favour of a Yes vote, with engagement from the overwhelming majority of councils. Material has been prepared and circulated over the past few years to engage councils and the latest resource for councils is the document titled *The Case for Change: Why local government needs to be in the Australian Constitution*, a copy of which is included with this submission (it is also available on the ALGA website). These efforts on their own, however, will not be sufficient in the absence of support from the Federal Government for constitutional change, bipartisan support for the proposed amendment, support from most if not all state and territory governments, changes to the *Referendum (Machinery Provisions) Act 1984* and a political environment which allows a referendum proposal to be judged on its merits.

With regard to the possibility of an early Federal Election, the ALGA Board has determined that it would not be in a position to support a referendum being held in conjunction with an early Federal election held in the first half of 2013. The short time frame would preclude an effective campaign being run by local government, and insufficient time to educate and inform voters.

Cost issues and alternative voting methods

One of the issues which may drive the decision to hold a referendum in conjunction with an election is that of cost. The cost of a referendum has been put at around \$100m and it is important to note that since 1946, there have been 25 separate referendum questions asked in 10 referendum events. Of those events, 3 coincided with elections (at which a total of 8 questions were asked). There were 7 referendum events held separately to elections. On that basis, ALGA notes that previous Parliaments did not automatically give priority to the need to reduce costs in determining when a referendum was to be held.

ALGA believes that options to reduce the costs associated with referendums should be explored, including the option of potentially holding a referendum by postal vote or electronic vote. These options do not appear to have been previously considered, but they merit exploration as mechanisms which could promote the timing of a referendum being determined by the reference to when it might succeed on its merits, rather than being the subject of politicisation as part of a broader election campaign.

The use of electronic voting is evolving and its potential use in a referendum may also help to address the concerns around costs which have been raised with ALGA.

ALGA is aware that both of these options would require amendment to the *Referendum (Machinery Provisions) Act 1984*.

Holding a Local Government Referendum at the same time as another referendum question

The ALGA Board has previously considered whether a referendum to recognise local government should be held at the same time as a referendum question on the Indigenous Recognition question and has not ruled out such a double referendum. In fact ALGA believes that there are enough synergies between the two questions to merit a decision to hold a double referendum.

The critical issue for ALGA is whether the form of an amendment for Indigenous Recognition capable of winning public support can be agreed by the Indigenous community and the Parliament within the near future so that it can be put to a referendum vote at the same time as the Local Government question. The uncertainty surrounding direct federal funding of local government needs to be resolved in advance of a further challenge in the High Court and ALGA expects such a challenge to occur sooner rather than later.

Conclusion

The establishment of the Joint Select Committee is welcomed by ALGA and was one of the pre-requisites put forward by ALGA in its submission to the Expert Panel on the Constitutional Recognition of Local Government.

ALGA remains committed to the financial recognition of local government and to a referendum being held at a time which maximises the chances for success. Financial recognition through a change to section 96 of the Constitution is aimed at removing uncertainty around the continued direct federal funding of local government.

The wording of the amendment to section 96 proposed by ALGA to allow the continuation of direct federal funding of local government has been developed to ensure there is no impact on the power of the state governments to legislate for local government.

The local government sector as a whole recognises that we cannot afford a third unsuccessful referendum on this issue. Significant resources have been marshalled by local government to support a campaign, but this of itself will not be sufficient to achieve a positive result.

The ALGA Board believes that the chances of success for a referendum to recognise local government depend on satisfying the pre-requisites identified by the Expert Panel and ALGA, including Commonwealth negotiation with the States to win their support, a publicly funded education campaign on the Constitution, constitutional change and the local government question, and amendments to the relevant federal legislation to allow public funding of the "yes" and "no" campaigns. These pre-requisites have not been met and delays in the process have eroded the chances for a successful referendum in 2013.

ALGA

December 2012