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Committee Secretary
Joint Select Committee on Constitutional Recognition of Local Government
Department of House of Representatives
PO Box 6021
Parliament House
CANBERRA Act 2600
AUSTRALIA
BY EMAIL: jsclg@aph.gov.au

Dear Secretary

Submission: Financial Recognition of Local Government

I support recognition of local government in the Commonwealth Constitution. However, I have a number of concerns with the recommendations in the Preliminary Report of the Joint Committee on Constitutional Recognition of Local Government.

1. The recommended timing of the referendum

I am concerned the recommendation that the referendum be held in September 2013, at the same time as the 2013 federal election, allows insufficient time to ensure the referendum has its best chance of success. Successful referendums have been based on bipartisan support, support in the States, popular ownership and a vigorous public education campaign.¹ While the Committee recommends that negotiations between the Commonwealth and the State and Territory governments commence immediately, and that a national civics education campaign be managed by the Department of Regional Australia, Local Government, Arts and Sport, I fear that there is insufficient time to garner the necessary levels of support.

My fear rests not only in the short time period between now and the election, but the fact that this period is likely to be characterised by lack of partisanship and political attacks between the parties. Even despite the significant previous bipartisan support for the proposal, the Preliminary Report was not supported by the Coalition members of the Committee. Consensus and bipartisan support, so pivotal in securing referendum success, is already eroding. If the government decides to adopt the

¹ See further George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press 2010).

recommendations in the Preliminary Report and push ahead with the referendum in September, this may see the previous bipartisan support fracture even further, particularly given the toxicity of political debate leading up to an election. It leaves the government open to attacks that it is rushing through constitutional change with appropriate engagement and education of the electors.

Further, there is significant doubt that the government will be able to bring the States on board with the proposal, or at least all of the States.

The Commonwealth is constitutionally limited in its ability to restrict spending by the States on campaigning against the referendum. There is a constitutional limitation that prohibits the Commonwealth from impairing the States' capacity to function as governments (*Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Austin v Commonwealth* (2003) 215 CLR 185). It is likely that this limit would prevent the Commonwealth from restricting campaigning and education campaigns by State governments in constitutional referendums.

As such, there is a significant risk that if the States, or even some of the States, don't support the proposal, a negative education campaign may be run that counters the proposed Commonwealth civics education campaign.

Even without the loss of bipartisan support or the failure to gain support in the States, during the period leading up to the election media attention will be directed primarily at the election campaigns and antics of the political parties, and is not likely to cover the issues raised by the referendum in depth. As such, voters may feel that they have insufficiently engaged with the proposal and therefore be more inclined to vote to retain the status quo.

2. Weakness of the 'urgent' and 'necessary' platform

It is true that the *School Chaplain's Case* (*Williams v Commonwealth* [2012] HCA 23) has thrown significant doubt on the constitutionality of much of the funding provided directly by the Commonwealth to local governments. There is therefore a case to argue that the referendum is urgent and necessary to return the constitutional position to the previously understood status quo.

However, I fear that this argument, if used as the primary platform in the Yes Case and to justify the short lead-in time for the referendum, is open to criticism and may undermine the success of the referendum.

Direct funding between the Commonwealth and local governments has not always been a feature of our federal system. It has really only been common practice over the last four decades. Funding was traditionally provided to local governments through the states under section 96 of the Constitution – and indeed, much funding continues to use this mechanism. There is no reason that the Commonwealth could not revert back to the practice of using the States as conduits for the funding, at least in the short-term.

This system has been criticised for its inefficiency, and specifically the need to have two administrative regimes for local government funding allocation, one at the federal level and one in the States, and there are concerns that States are able to obstruct the flow of money to local

governments. However, it is a proven constitutional mechanism that could be used as a 'stop-gap' measure that would then allow time for a longer lead-in to and education campaign for a referendum to address the *School Chaplain's Case*.

I would have concerns that opponents of the referendum would be able to exploit this argument against the Yes Case to demonstrate that the status quo remains able to facilitate the local government funding programs, at least in the short-term. This leaves the referendum open to the criticism that it is not urgent, and the government is rushing through a referendum without taking the appropriate time to engage and consult with the community.

3. Repercussions if the referendum is not successful for future referendums on local government

If the referendum is not successful, and I fear because of (1) and (2) above that it won't be, holding the referendum in 2013 may hamper any push for greater and more meaningful recognition of local government - such as recognition of the democratic mandate or legislative competencies of local governments - in the future. A number of different options for constitutional recognition are explained in Nicola McGarrity and George Williams' article, 'Recognition of Local Government in the Commonwealth Constitution' (2010) 21 *Public Law Review* 164, which I am sure the Committee is familiar with. If the referendum is not successful, the electorate may be disinclined to tackle the subject again in the future and it would be hard to justify the public expense.

Even if the referendum was successful, it could hamper any further movement for constitutional recognition of local government because the Australian people may be disinclined to tackle the question of local government recognition again. The 'necessity' created by the *School Chaplain's Case* could be squandered on a (potentially unsuccessful) technical referendum, and an opportunity to draw on it as part of a campaign for broader local government recognition later would be lost.

4. Repercussions if the referendum is not successful for future referendums in other areas

I also have concerns that if the referendum is not successful, it may harm the chances of success of future referendums. If it is successful, it may build momentum in the political and public spheres towards other important referendums – including about constitutional recognition for indigenous Australians, about extending and fixing parliamentary terms, about whether Australia should be a republic and about the distribution of competencies and financial powers between the Commonwealth and the States.

Studies have shown that there are a number of factors that are relevant to the success of a referendum, including bipartisan support and support from the States. I believe that there is also a sense of exceptionalism associated with a referendum proposal in Australia and this perhaps contributes to the conservative approach that has been taken by the electorate to referendums in the past.

This referendum, with its history of bipartisan support, has the capacity to show Australian voters and politicians that success in a constitutional referendum is not impossible in Australia. But only if it is successful.

Conclusion

In conclusion, I support the constitutional recognition of local government and it is for this reason I have serious concerns about the recommendations made in the Preliminary Report.

Yours sincerely

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