

LOCAL GOVERNMENT REFERENDUM, 2013

ALTERNATIVE YES/NO CASE

PREPARED BY THE CONSTITUTIONAL REFORM UNIT, SYDNEY LAW SCHOOL*

The proposed amendment

The Commonwealth Government proposes to amend section 96 of the Constitution to add the words in bold:

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State, **or to any local government body formed by a law of a State**, on such terms and conditions as the Parliament thinks fit.

* This is not the official Yes/No case. It is an alternative prepared by the Constitutional Reform Unit. The views expressed do not represent the University or any other institution or body.

This version, dated 23 May 2013, is based upon the amendment proposed in the Draft Exposure Bill. It may not be the final version of the amendment, which is yet to be passed by the Parliament. A revised version will be published once the referendum bill has been passed by both Houses.

YES CASE

1. The power of the Commonwealth Parliament to fund local government directly is in doubt

Local government has, since the 1920s, received Commonwealth funding by way of grants to the States that require the money to be passed on to local government bodies within the State. For some years, the Commonwealth has taken an alternative route of providing some of its grants directly to local governments, by-passing the States. For example, the 'Roads to Recovery' scheme has been a significant source of direct funding for local governments. However, the ability for the Commonwealth to continue this form of direct funding was put in doubt in 2009 by the High Court's *Pape* decision. It is likely that some schemes providing direct funding of local government may be declared invalid if they were to be challenged in the High Court. The proposed change would explicitly provide the Commonwealth with the power to fund local government directly, removing any doubt created by the High Court's decision.

2. Constitutional recognition would acknowledge the role played by local government in Australian society

Local government has a significant role in the provision of services. Local government bodies also work collaboratively with the State and Commonwealth governments in the development and implementation of policy objectives. This contribution will be recognised by including an express reference to 'local government' in Australia's most important legal document. Constitutional recognition of local government may help engender respect in the community for local government as an essential feature of the Australian system of government.

3. Direct funding of local government would avoid time-consuming negotiations with the States

Using the existing system of funding local government bodies through conditional grants to the States may result in delays which could be problematic when urgent funding or immediate economic stimulus is needed. Funding through the States is also dependent on State wishes, which may be different from Commonwealth policies.

Any stand-off between the Commonwealth and the States as to the conditions placed on grants may result in protracted negotiations and delays to funding. Direct Commonwealth funding would allow the Commonwealth to by-pass the States, permitting funding to flow to local government more quickly. It would avoid haggling about terms and conditions and allow governments to get on with the provision of services and facilities to the public.

4. The power to fund local government directly may result in more funding

The Commonwealth may be more likely to fund existing programs or new programs at the local level if there is political advantage in doing so. Although indirect funding of local government is possible by way of conditional grants to States, the Commonwealth may prefer to implement its own policies at the local level so that it can gain the electoral credit for building roads, sporting grounds and community facilities. This may give it the incentive to increase its funding. The possibility of such direct funding may be particularly important where the priorities of the Commonwealth and the States differ.

5. The Commonwealth would be better equipped to pursue national policy objectives

Collaboration between local government and the Commonwealth may result in more targeted investment in the provision of local services and the pursuit of national policy objectives. It would avoid the Commonwealth having to negotiate with the States about shared policy aims and instead permit the Commonwealth to pursue national policy objectives by funding local government bodies to implement them on the ground.

6. Direct Commonwealth funding to local government would be more equitable

Currently, most local government funding is made by way of conditional grants to the States. It is divided amongst the States on the basis of population and then distributed within each State with 30% going to local government areas based on their population and the rest distributed according to need. This advantages the more populous States as they get a larger proportion of the funding pool. If the Commonwealth directly funded local government it would be able to distribute funding to each local government body according to need. This is a more equitable way of distributing Commonwealth funding.

7. Constitutional recognition would help the voice of local government be heard

Local government is the level of government that is closest to the people. Its voice is often lost in the development of policy at the Commonwealth and State levels and in discussions on how it should be implemented. Local government bodies know best how to implement programs in their own communities. Constitutional recognition of local government may encourage other levels of government to take local government seriously and listen to local government bodies about their needs and community wishes.

8. The Constitution should be updated to recognise the entire system of government

The Australian people elect representatives to the federal Parliament, State and Territory legislatures and local councils. Yet only the State and federal Parliaments are mentioned in the Constitution. The level of government that most closely affects the day-to-day lives of the Australian people is not even mentioned in the Constitution. It is time to fix this anomaly and ensure that the existence of local government is recognised in the Constitution.

NO CASE

1. The Commonwealth Parliament already has the power to fund local government

The Constitution already provides the Commonwealth with the power to make grants to the States on the condition that all the money is passed on to local government. This is the way that the Commonwealth has provided funding to local government since the 1920s and it is clearly constitutionally valid. Even if direct funding of local government is unconstitutional in light of the High Court's recent decisions, there is no doubt that the existing indirect method of funding local government could continue. There is therefore no risk at all to the Commonwealth's ability to fund local government without this amendment.

2. The Commonwealth would have more influence over local government policy

Any direct funding to local government would be on such terms and conditions as the Commonwealth Parliament thinks fit. Those terms and conditions do not have to be confined to how the Commonwealth money can be spent. They could extend to anything that a local council does, regardless of whether the Commonwealth's money funds it. This may limit the ability for local governments to pursue their own objectives in their own communities. It could potentially turn them into agents of the Commonwealth, implementing Commonwealth policies. The risk is that local government bodies would lose their identity and their capacity to implement the wishes of their local community, undermining their purpose and standing in the community.

3. The establishment of a central authority to oversee funding arrangements may be more costly and inefficient than the current system

Local government has different responsibilities and roles in each of the States. Because each State establishes and oversees its local government system, it already has all the necessary information about each of its local government bodies. If local government were to be funded directly from Canberra instead, a new federal bureaucracy would be needed to collect and assess this information. It would need to develop a single funding formula to fit different local government bodies across the country. This would be difficult, administratively burdensome and expensive. It would also increase the administrative burden on local government bodies as they would have to provide different information, based upon different funding formulas to two different levels of government. It is more efficient to use the systems that already exist at the State level.

4. Direct funding would not necessarily result in increased funding

The Commonwealth currently provides some direct funding to local government, as well as giving funding to local government through conditional grants to the States. It can already give as much money as it wants to local government. Changing the Constitution will not put any more money into Commonwealth coffers to allow it to spend more from its budget on local government. If the aim of the amendment is to facilitate pork-

barrelling in marginal electorates as a means of getting more money to local government, then it should be rejected. The Commonwealth should fund local government properly. The Constitution should not be changed to facilitate poor behaviour.

5. It would centralise power in the Commonwealth

This expansion of Commonwealth power will contribute to the centralisation of power in Australia. The proposed amendment would permit the Commonwealth to by-pass the States and fund projects at the local level on any policy area, even when it is not otherwise within Commonwealth power. The High Court in two recent cases clipped the Commonwealth's wings by telling it that it cannot spend money on programs that are not otherwise within its powers. This proposed amendment would allow the Commonwealth to by-pass the States and interfere in policy areas outside its powers by using local government and the conditions that it places on local government grants to do so. This would disturb the current constitutional balance between the division of State and Commonwealth responsibilities.

6. Centralised distribution of funding may seriously disadvantage some States

Most Commonwealth financial assistance to local government is currently distributed amongst the States on a population basis. Within each State, 30% is distributed according to the population of a local government area and the rest by reference to need. If the Commonwealth starts to give all its local government funding directly, rather than through the States, there would no longer be a distribution of funds amongst the States based on population. Instead, some form of 'equalisation' formula would most likely be applied (as with the distribution of the GST). When the Commonwealth Grants Commission looked at how such a system might work back in 1991, it calculated that New South Wales would lose about two-thirds of its local government funding. Victoria and Queensland would also have suffered significant losses. It also concluded that an equalisation system would involve extra administrative costs at the Commonwealth and State levels, reducing the size of the pool of money to be distributed.

7. Accountability would be reduced and the blame-game extended

A local government body would be accountable to both Commonwealth and State governments, as well as its electorate. The Commonwealth could impose conditions on its grants which may be inconsistent with State policies or incompatible with existing structures and procedures. It may also tie up local government budgets, placing conditions on grants that local government 'match' funding or maintain funding levels in relation to particular programs. This is likely to lead to a lack of responsibility, as some areas of local government will be over-funded, some under-funded and many important matters will simply get lost in-between. The Commonwealth, State and local governments will all blame each other for these failings and no one will be accountable. It is hard enough for local government to be accountable to two masters (the State and the local community). Being accountable to three masters would be impossible.