

Preliminary report

- 1.1 This report provides the Committee's major conclusions and recommendations about the majority finding of the Expert Panel on Constitutional Recognition of Local Government, as directed by the Committee's resolution of appointment.
- 1.2 This preliminary report relies on publicly available information, 131 submissions to the inquiry and evidence taken at a public hearing in Sydney on 16 January 2013.
- 1.3 The Committee will seek an amendment to its resolution of appointment to enable it to present a final report in March 2013. That report will contain a comprehensive discussion of the evidence received during the inquiry.

Addressing the uncertainty

- 1.4 Evidence emphasised the uncertainty around those programs delivered by local governments that the Commonwealth Government funds directly.
- 1.5 Previous inquiries, as well as reviews by agencies such as the Commonwealth Grants Commission and the Productivity Commission, have highlighted the expanding roles, responsibilities and functions of local government. These services provide the essential foundation and structure that enable local communities to prosper and grow.
- 1.6 Past crises in Australia have highlighted the need for governments to be able to respond rapidly and flexibly to ensure the well-being of their communities. In some circumstances the most effective way to do that is for the Commonwealth to deliver funds directly to local government. Examples of such responses involving direct funding from the Commonwealth to local government include the Regional and Local

- Community Infrastructure Program (RLCIP), which was established as a response to the global financial crisis.
- 1.7 Direct funding of local government by the Commonwealth has been common practice for the past two decades. Indeed, as noted by Professor Anne Twomey, direct funding has increased in proportion to Commonwealth grants, which are made under Section 96 of the Constitution, since the mid-1990s.
- 1.8 The High Court's decisions in *Pape*¹ and *Williams*² have created significant uncertainty about the ability of the Commonwealth Government to respond in this way in the future. These decisions have also created uncertainty regarding critical ongoing direct funding programs such as Roads to Recovery, which experts have confirmed would most likely be found unconstitutional.
- 1.9 Whilst the Commonwealth Parliament passed the *Financial Framework Legislation Amendment Act (No. 3)* 2012, to address implications of the *Williams* decision, evidence to the Committee has suggested that this legislation may itself be subject to constitutional challenge. Experts agree that if this were to occur, it would most likely be found that the legislation does not provide a basis for the Commonwealth to fund areas for which it does not have a direct legislative head of power. The legislative support for the Roads to Recovery program could be found invalid on similar grounds if challenged. As noted by Professor Anne Twomey, 'My own point of view, as a constitutional lawyer – particularly looking at the Roads to Recovery program – is that it is more likely than not that it is constitutionally invalid.'³
- 1.10 The Committee heard evidence that indicates there are already attempts to challenge the constitutionality of forms of direct funding by the Commonwealth. The High Court's decision in *Williams* is only likely to bolster the confidence of people willing and able to challenge the Commonwealth on constitutional grounds. It is therefore not a matter of 'if' but of 'when' the presently understood ability for the Commonwealth to fund local government directly is struck down as unconstitutional by the High Court.
- 1.11 The urgency of addressing the present situation comes from two sources. Firstly, there is an imperative to address potential unconstitutionality and the threat to funding it represents ahead of a possible High Court Challenge. Secondly, and as Professor Brown stated in his evidence to the

1 *Pape v Commissioner of Taxation* [2009] HCA 23.

2 *Williams v Commonwealth of Australia* [2012] HCA 23.

3 Professor Anne Twomey, *Proof Committee Hansard*, Sydney 16 January 2013, p.2.

Committee, Commonwealth funding to local government could be impacted even in the absence of a pending High Court challenge because of the uncertainty surrounding the ultimate constitutional status of such funding.

Recommendation 1

The Committee recommends that a referendum on financial recognition of local government be held in 2013.

Given the importance of securing state and territory support, the Committee further recommends that, in addition to the efforts of the local government sector, Commonwealth Government Ministers, particularly the Minister for Regional Australia, Regional Development and Local Government, the Attorney-General and the Special Minister for State, immediately commence negotiations with state and territory governments to secure their support for the referendum proposal.

Amendment proposal

- 1.12 By tasking the Joint Select Committee to look into the majority view of the Expert Panel, the Parliament directed the Committee to further develop and refine proposals for financial recognition. This includes determining the best form of words to be used as the amendment proposal.
- 1.13 The Committee supports the Expert Panel's proposed form of words for the amendment. Section 96 should be amended to insert new words (shown in italics with one drafting alteration, in square brackets):

the Parliament may grant financial assistance to any State *or to any local government body formed by State or Territory [l]egislation* on such terms and conditions as the Parliament sees fit.
- 1.14 Evidence to the Committee confirmed that the Expert Panel's proposal would adequately address the uncertainty created by the *Pape* and *Williams* cases. Professor George Williams considers that the proposal is sufficient in legal terms to achieve certainty for direct funding of local government.
- 1.15 Professor Williams, at the public hearing on 16 January 2013, also stated that the form of words proposed by the Expert Panel adequately addressed state and territory government concerns that a reference to local

government in Section 96 would undermine their responsibility for and control of local government.

- 1.16 Contrary to assertions in some submissions, such as that from the Premier of Western Australia, constitutional experts do not believe that the form of words proposed by the Expert Panel would dilute the existing powers of state and territory governments. The submission by the Gilbert + Tobin Centre of Public Law submitted that an amendment to Section 96 in the form of words proposed by the Panel would not enable the Commonwealth to take over the regulation of local government from the states and territories. Including local government in Section 96, this submission states, ‘does not amount to a head of power that can be used to over-ride the States’.⁴
 - 1.17 This submission also dismissed the idea that the Commonwealth could use conditions attached to Section 96 grants that would ‘force local government to operate outside the framework of regulation created by the States’.⁵ The High Court has confirmed that Section 96 is confined to granting money, and that it is not a power to make laws with respect to a general subject matter.⁶
 - 1.18 In addition, these words have been in the public domain for over a year and have been considered by governments, academics and stakeholders. The proposal also has the invaluable advantage of being simple and easy to understand.
 - 1.19 For many state and territory governments, no formal position on a referendum can be given until there is a concrete proposal. Because this Committee’s role includes making recommendations in this regard, the Commonwealth Government has been unable to commence formal negotiations to secure state and territory government support. In addition, the Australian Local Government Association (ALGA) – and its member organisations – have not commenced negotiations and lobbying to secure similar support for the formal proposal.
 - 1.20 Now that the Committee has recommended a concrete proposal, the Commonwealth Government should commence negotiations immediately with state and territory governments. Additionally, ALGA and its membership should immediately commence negotiations and lobbying to secure the support of state and territory governments for the proposal.
 - 1.21 Given the importance and urgency of this issue and the need to ensure a successful referendum outcome, negotiations should begin without delay.
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4 Gilbert + Tobin Centre of Public Law, *Submission 63*, p.3.

5 Gilbert + Tobin Centre of Public Law, *Submission 63*, p.4.

6 Gilbert + Tobin Centre of Public Law, *Submission 63*, p.4.

Recommendation 2

The Committee recommends that the referendum propose an amendment to Section 96 of the Constitution:

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

Timing of the referendum

- 1.22 Evidence put significant emphasis on holding the referendum at a time that 'maximises its chances of success'. There does not appear to be any consensus from stakeholders and experts around when the 'right time' may be. Indeed, there is a danger in waiting passively for the 'right time' to present itself.
- 1.23 The Committee believes that the uncertainty created by the *Pape* and *Williams* cases creates a moment for action. In this situation, those concerned about that continuing uncertainty must act to create the 'right time' for a referendum.
- 1.24 The Committee's position is supported by evidence received from the submission from the Gilbert + Tobin Centre of Public Law that stated that referenda to address problems identified by the High Court are most likely to succeed if held as close to those decisions as possible. They noted that there is a risk that the 'urgency and importance of the problem will lose its punch if there is a significant delay'.⁷
- 1.25 The Gilbert + Tobin Centre of Public Law submission noted one of the few successful referenda held in Australia was the one held in 1946 which was based on the need to remedy a problem identified by the High Court.
- 1.26 This referendum sought to restore the ability of the Commonwealth, which had been undermined by a High Court decision, to bring about a national pharmaceutical benefits scheme. As the submission notes, 'Australians voted Yes to restore that scheme and the ability generally of the Commonwealth to provide important social services.'⁸
- 1.27 The Australian community is facing a similar problem right now. As noted by Professor George Williams, the referendum proposal would correct a specific problem identified by the High Court, and in substance

⁷ Gilbert + Tobin Centre of Public Law, *Submission 63*, p.5.

⁸ Gilbert + Tobin Centre of Public Law, *Submission 63*, p.5.

would merely return Australia's legal framework to the status quo that existed prior to the *Pape* and *Williams* decisions. Such a 'corrective' referendum is highly likely to succeed, as demonstrated by the 1946 example.

- 1.28 Some advocates for financial recognition of local government have expressed concerns that there is not enough time between now and the next federal election to build the necessary support. One reason for this is a belief that a better time would be when the political environment was 'less toxic'. Concerns about sacrificing a proposal to financially recognise local government ignore the evident consensus between federal parliamentary parties, as demonstrated by unanimous support for the appointment of this committee, the bipartisan participation in the work of the Expert Panel and statements by party leaders giving support for financial recognition of local government.
- 1.29 The Committee believes that, in addition to the momentum created by the *Williams* decision, there is ample time to build community support and ensure that the necessary legislation and arrangements are in place.
- 1.30 In terms of public engagement and awareness, the Committee notes that, as Professor Brown acknowledged, we are now in a digital age where social media plays a significant part in informing and influencing public opinions. A partisan campaign phase of 6 – 8 weeks, as suggested by Professor Williams, would be realistic, achievable and above all, meaningful.
- 1.31 In terms of holding the referendum with the next federal election, the Committee draws attention to the evidence provided by Professor George Williams who cited the example of New South Wales referenda which are held at the same time as state elections. Professor Williams suggested that one of the reasons for this success is because the referendum question is rarely the most contentious political issue at stake in the campaign leading to the election.⁹
- 1.32 For these reasons, the Committee believes that a referendum to recognise local government in Section 96 of the Australian Constitution should be held at the same time as the 2013 federal election.

⁹ Professor George Williams, *Proof Committee Hansard*, Sydney 16 January 2013, p.12.

Recommendation 3

The Committee recommends that a referendum on financial recognition of local government be held at the same time as the 2013 federal election.

Assessing the likelihood of success

- 1.33 Significant Commonwealth resources will be required to ensure an informed vote.
- 1.34 The Australian Electoral Commission (AEC) will make a vital contribution on enrolment and voting matters, particularly given the additional complexity for voters having to vote in a referendum as well as a federal election at the same time.
- 1.35 The AEC clearly demonstrated that it is well prepared for a referendum at the next election. However, the Committee understands that further delays in the development of these referendum materials could impact on the quality of these products, which may result in uninformed votes.
- 1.36 Public engagement and information beyond that provided by the AEC will also be critical for a successful outcome. The Australian community will need information on the Constitution itself, constitutional change and factual information on the question itself. This is the national civics education campaign recommended by the Expert Panel.
- 1.37 The 2009 Report of the House of Representatives Legal and Constitutional Affairs Committee inquiry into the machinery of referendums (the LACA report) recommended that a non-partisan Referendum Panel should be established prior to any referendum to develop an overarching communications strategy for the referendum, including educational material. The Committee believes that the Commonwealth Government should consider establishing a Referendum Panel.
- 1.38 The Committee considers funding for partisan campaigns as essential to promoting public awareness and public engagement with the issue. It could also result in the type of popular ownership viewed as essential for a successful outcome.
- 1.39 The Committee disagrees with ALGA's recommendation that public funding for partisan campaigns be distributed according to the proportion of support for or against the proposal in Parliament. The Committee believes that funding should be distributed to partisan campaigns on an equal basis, with both sides of the question receiving equal funding.

The Commonwealth Government should be responsible for determining the total funding available to support well-financed partisan campaigns, and how this funding is distributed.

- 1.40 The Committee heard evidence from the Department of Regional Australia, Local Government, Arts and Sport (DRLGAS) and the Attorney-General's Department. DRLGAS advised that they have responsibility for local government policy as well as some local government programs. The Attorney-General's Department is responsible for constitutional matters.
 - 1.41 Both Departments indicated that implementing this referendum merely depends on direction from Government.¹⁰ The Departments clearly display a high degree of preparedness, and given the urgency of the task, the Committee believes that the Department of Regional Australia, Local Government, Arts and Sport should be the lead Commonwealth agency in coordinating and implementing this referendum. The Attorney-General's Department, which is responsible for constitutional matters, will of course be a key player in the whole-of-government effort.
 - 1.42 The Committee invited the Department of Prime Minister and Cabinet, the Department of Finance and Deregulation, and the Treasury to attend the hearing and provide submissions to the inquiry. Given that these three Departments all declined the Committee's invitation, the Committee can only assume that these Departments are comfortable with including local government in Section 96.
 - 1.43 The Committee notes that, despite the current fiscal environment, trying to undertake public information and engagement activities such as the national civics education campaign and the funding of partisan campaigns cannot be done successfully on a shoe-string budget.
 - 1.44 The Committee is aware of its responsibility to assist the Parliament to make decisions about temporary amendments to the *Referendum (Machinery Provisions) Act 1984*. In consideration of the Commonwealth Government's position that these changes should be considered on a referendum-by-referendum basis,¹¹ these recommendations are outlined below.
 - 1.45 Funding for both a civics education campaign and the public funding of partisan campaigns would require the temporary suspension of the legislative limit on spending contained in the *Referendum (Machinery*
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10 See *Proof Committee Hansard*, Sydney 16 January 2013, pp. 48-58.

11 Government response to the report of the former House of Representatives Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums*, 31 October 2012, p.3.

Provisions) Act 1984. The Committee believes that this limit should be temporarily suspended for a referendum on financial recognition of local government.

- 1.46 The Committee agrees with the findings of the LACA report and believes that the official Yes/No cases should continue to be drafted and approved by Parliamentarians.
- 1.47 There are other matters discussed in the LACA report that would improve the conduct of a referendum, particularly relating to the official pamphlet and communication methods. The Committee believes that addressing these matters will be beneficial for the referendum process.
- 1.48 The Yes/No pamphlet should be sent to every household rather than to every voter, in order to avoid waste. All Commonwealth Government activities relating to the referendum should utilise a range of communication methods to ensure that the referendum engages all parts of society. Format guidelines should be adopted to ensure that the Yes/No pamphlet is easily comprehensible to all voters.

Recommendation 4

The Committee recommends that the Commonwealth Government begin all necessary preparatory activities to ensure a successful outcome for a referendum on financial recognition in 2013. The preparatory activities include:

- the Australian Electoral Commission begin the necessary preparatory activities for a referendum in 2013;
- the Department of Regional Australia, Local Government, Arts and Sport, as lead coordinating and implementing agency, take the necessary steps for implementing a national civics education campaign and managing funding of partisan campaigns;
- the Attorney-General's Department release a draft of the constitution amendment bill by 31 January 2013 in order to begin the process of public consultation;
- temporary amendments be made to the *Referendum (Machinery Provisions) Act 1984*, to effect the following outcomes:
 - ⇒ remove the legislative limit on Government spending;
 - ⇒ confirm that Parliamentarians should draft and approve the 'Yes' and 'No' cases for the official referendum pamphlet for financial recognition of local government. In the event that there is no requirement for a 'No' case, the Committee recommends that there should be an official 'Yes' case only;
 - ⇒ allow the official Yes/No pamphlet to be sent to every household rather than every voter;
 - ⇒ enable a range of communication methods to educate and reach across all Australian demographics; and
 - ⇒ use format guidelines for the official 'Yes/No' referendum pamphlet to ensure the factual nature and comparability of the cases in the hands of voters.

Michelle Rowland MP

Chair