



Law Council  
OF AUSTRALIA

Martyn Hagan  
Acting Secretary-General

15 January 2013

Mr Glenn Worthington  
Secretary  
Joint Select Committee on Constitutional Recognition of Local Government  
PO Box 6021  
Parliament House  
Canberra ACT 2600

by email: [jsclg@aph.gov.au](mailto:jsclg@aph.gov.au).

Dear Mr Worthington

#### **INQUIRY INTO CONSTITUTIONAL RECOGNITION OF LOCATION GOVERNMENT**

I am pleased to attach a submission prepared by the Law Council's Legal Practice Section Australian Environment and Planning Law Committee regarding the inquiry into Constitutional Recognition of Local Government.

This submission has been lodged by the authority delegated by Directors to the Secretary General, but does not necessarily reflect the personal views of each Director of the Law Council of Australia.

Yours sincerely

**Martyn Hagan**  
**Acting Secretary-General**

Joint Select Committee on  
Constitutional Recognition of  
Local Government –  
Inquiry into Constitutional  
Recognition of Local  
Government

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**Submission by the Legal Practice Section  
Australian Environment & Planning Law  
Committee of the Law Council of Australia**

**January 2013**

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The Law Council of Australia has recognised the changing role of local government and has supported the idea of an amendment to the Australian Constitution to include the recognition in the Constitution of local government and also clarify the power of the Commonwealth Government to grant monies to local government.

The Select Committee's Terms of Reference is as follows:

#### Terms of Reference

- (1) a Joint Select Committee on Constitutional Recognition of Local Government be appointed to inquire into and report on the majority finding (financial recognition) of the Expert Panel on Constitutional Recognition of Local Government including by amending section 96 of the Constitution, and in conducting its inquiry, the Committee will assess the likelihood of success of a referendum on financial recognition, and will take into account the following matters:
  - (a) the report of the Expert Panel on constitutional recognition of Local Government, including preconditions set by the Expert Panel for the holding of a referendum;
  - (b) the level of State and Territory support;
  - (c) the potential consequences for Local Government, States and Territories of such an amendment; and
  - (d) any other matters that the Committee considers may be relevant to a decision on whether to conduct a referendum, and the timing of any referendum.

In its submission of 4 November 2011 (Attachment 1) the Law Council noted its concern if the issues of local government recognition was dealt with at the same time as Constitutional recognition for Aboriginal peoples and Torres Strait Islanders. It is the position of the Law Council that these issues should be addressed separately.

Since the preparation of its initial submission the Law Council has supported the position that a greater priority for any Constitutional amendment is the recognition in the Australian Constitution of Indigenous Australians. Although it may be outside the scope of this Committee's recommendations, the Law Council believes that it is far more important to build a consensus for this Constitutional change, than for any amendment that will deal with local government.

In terms of the timing of the proposed amendment the Law Council position is that it should take place following a successful amendment of the Constitution to recognise Aboriginal peoples and Torres Strait Islanders.

It is recognised that the Committee is focussing on the words of a proposed amendment as being a necessary result of the decision of the High Court in *Pape v Commission of Taxation* (2009) 238 CLR 1.

It must also be recognised that the Final Report did identify that financial recognition did not enjoy unanimous support among stakeholders. The Law Council to that end supports the views of the Australian Local Government Association about the potential negative impacts of a failed referendum.

Given the historical difficulties of passing amendments to the Constitution it is appropriate to adopt a cautious approach. It can be observed that if a proposition fails there is usually

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little political will to bring the issue back before the voters. It costs a great deal of time and money to run a Constitutional Referendum.

The recommendation was for the following amendment:

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 sees fit.

The Law Council supported the following amendments:

The Parliament may grant financial assistance to any State *or to any local government body formed within the limits of a State or Territory* on such terms and conditions as the Parliament sees fit.

Or

The Parliament may grant financial assistance to any State *or to any local government body* on such terms and conditions as the Parliament sees fit.

The Law Council accepts that the proposed form of amendment, which was suggested in the Submission by Gilbert & Tobin Centre for Public Law seeks to avoid the phrase “within the limits of a State or Territory” on the basis that in the future there may be local government bodies “that may at some future point crossover State and Territory borders” (at p.2).

Although the suggestion seems reasonable, the Law Council is unsure that it would be possible for this to occur. States cannot cede or take control of and on their boundaries. The only way a ‘local government body’ could be formed across two or more States would be with Commonwealth assisted legislation.

The Law Council cannot imagine a future, however desirable, when there is uniformity in local government legislation across the States and Territories. This would appear to be the only other option for the possible creation of local government bodies that straddle states.

The Law Council would therefore suggest that a better alternative is the most minimal and merely insert the phrase “*or to any local government body*”.

However this also raises the issue of actual recognition of local government within the Constitution.

To that end the Law Council would support at the minimum a definition of ‘local government’ as suggested by the Centre for Public Law that could read:

‘Local government body’ means a body elected by the people, having powers and functions and constituted in accordance with a law of a State or Territory.

Such a definition would rule out the Commonwealth from establishing its own system of local government.

Despite the concerns expressed on the likelihood of a successful referendum should it also include democratic recognition the Law Council believes that both the financial and democratic recognition should be held together.

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If anything it is accepted that this may delay a referendum on the financial recognition. However any amendment to the Constitution to include a referendum and a definition of local government will ignite a debate about the role of local government itself.

If this is not dealt with as a package it is likely that the Referendum on financial recognition will fail.

Given the ambivalence of the State governments to even the financial recognition option it would seem that much more work is needed to demonstrate to the community the benefits of democratic and financial recognition of local government in Australia.

## **Conclusion**

The Law Council supports a referendum on the financial and democratic recognition of local government.

The Law Council recommends that the working be simplified but that a definition be included in the section.

The Law Council notes the concerns raised in the Expert Panel's Report of December 2011 as to the potential difficulties to achieve a successful referendum on either of these issues.

The Law Council reiterates that its position is that the most pressing Constitutional reform need should be the recognition of Aboriginal and Torres Strait Islander Peoples within the Constitution.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

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# Constitutional Recognition of Local Government

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## Expert Panel on Constitutional Recognition of Local Government

4 November 2011

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## Introduction

1. The Law Council is pleased to provide the following submission to the Expert Panel on Constitutional Recognition of Local Government.
2. As outlined in **Attachment A**, the Law Council represents the Australian legal profession through the bar associations and law societies of each State and Territory and the large law firm group (the “constituent bodies” of the Law Council).
3. This submission has been prepared with the assistance of the Australian Environment & Planning Law Committee of the Legal Practice Section of the Law Council.
4. The Law Council supports the recognition of local government through amendment to the Constitution of the Commonwealth of Australia.
5. The Law Council is concerned, however, that the issue of Constitutional recognition of local government is intended to be dealt concurrently with the more pressing issue of Constitutional recognition of Aboriginal peoples and Torres Strait Islanders. The Law Council believes that these two Constitutional reform questions should be addressed separately and not be put to referendum at the same time. The Law Council considers that addressing each question separately will offer both proposals a greater chance of an affirmative vote at referendum.
6. That being said, the Law Council supports amendments to the Constitution:
  - (a) recognising the importance and role of local government in Australia;
  - (b) clarifying the power of Parliament to make monetary grants direct to local governments; and
  - (c) noting that 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 their respective areas in accordance with the laws of the State.
7. The Law Council further supports continued formal arrangements for local government to be represented in the Council of Australian Government (COAG) process through the Australian Local Government Association (ALGA).
8. The Law Council does not support amendments that would seek to impose restrictions on States as to the supervision and possible dismissal of local government bodies. This should be a matter left to State governments, subject to the requirement that local government bodies be elected by the people.
9. The Law Council does not support amendments that would require the Territories to establish local governments.

## The changing role of local government

10. The changing role of local government is demonstrated over the history of the last century.

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11. In his research paper entitled “Local Government and the Commonwealth: an evolving relationship”,<sup>1</sup> Dr Lyndon Megarrity highlights the changing role for local government. It is noted that the role of local government was “barely mentioned during the 1980s Constitutional Conventions” and that most of the constitutional framers saw local government as a responsibility of the States. Concern was also expressed as to the potential to include local government within the Commonwealth Constitution, as it might impair and hamper the “revenue and the financial position of the various colonies”.<sup>2</sup>
  12. The important contribution of local government has been recognised, however, given its growth with respect to the provision of services and increased regulatory function following WWII and in the last decades of the 20<sup>th</sup> Century. This is reflected in terms of regulation and environmental protection, by the signing of the Intergovernmental Agreement on the Environment (IGAE), by the inclusion of local government in the COAG process and by the recognition of local government in a number of international instruments, including Agenda 21 and declarations to deal with environmental protection.
  13. The involvement of the Commonwealth in funding local government was a focus of the Chifley Government that ceased upon the election of Menzies.<sup>3</sup> It was not until the ALP Government of Gough Whitlam from 1972 to 1975 that The Commonwealth used local government channels to achieve a number of Commonwealth goals.<sup>4</sup> Under the Whitlam government, Commonwealth grants to local government grew from \$7.5 million in 1972 to \$165 million in 1975. Programs financed at the local government level from Commonwealth funding included senior citizen centres, sewerage facilities, leisure facilities, urban transport, tourism and environmental protection.<sup>5</sup>
  14. The changing role of local government in the protection of the environment and its regulatory functions has been recognised in both Commonwealth and international spheres.
  15. The IGAE was signed by the Australian Local Government Association on behalf of local government in October 1990,<sup>6</sup> in which the Commonwealth and the various States governments recognise the importance of local governments in the role of environmental protection.
  16. The introduction to the IGAE reads:

*On 31 October 1990, Heads of Government of the Commonwealth, States and Territories of Australia, and representatives of Local Government in Australia, meeting at a Special Premiers' Conference held in Brisbane, agreed to develop and conclude an Intergovernmental Agreement on the Environment to provide a mechanism by which to facilitate:*

- *a cooperative national approach to the environment;*
- *a better definition of the roles of the respective governments;*
- *a reduction in the number of disputes between the Commonwealth and the States and Territories on environment issues;*

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<sup>1</sup> Dr Lyndon Megarrity, “Local Government and the Commonwealth: an evolving relationship”, Australian Parliamentary Library, 31 January 2011.

<sup>2</sup> Ibid, p.3.

<sup>3</sup> Ibid, p.7.

<sup>4</sup> Ibid, p.8.

<sup>5</sup> Ibid, p.8.

<sup>6</sup> URL: [www.environment.gov.au/about/esd/publications/igae/index.html](http://www.environment.gov.au/about/esd/publications/igae/index.html).

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- *greater certainty of Government and business decision making; and*
  - *better environment protection;*

*AND WHEREAS the Parties to this Agreement*

*ACKNOWLEDGE the important role of the Commonwealth and the States in relation to the environment and the contribution the States can make in the development of national and international policies for which the Commonwealth has responsibilities;*

*RECOGNISE that environmental concerns and impacts respect neither physical nor political boundaries and are increasingly taking on interjurisdictional, international and global significance in a way that was not contemplated by those who framed the Australian Constitution;*

*RECOGNISE that the concept of ecologically sustainable development including proper resource accounting provides potential for the integration of environmental and economic considerations in decision making and for balancing the interests of current and future generations;*

*RECOGNISE that it is vital to develop and continue land use programs and co-operative arrangements to achieve sustainable land use and to conserve and improve Australia's biota, and soil and water resources which are basic to the maintenance of essential ecological processes and the production of food, fibre and shelter;*

*ACKNOWLEDGE that the efficiency and effectiveness of administrative and political processes and systems for the development and implementation of environmental policy in a Federal system will be a direct function of:-*

- i. the extent to which roles and responsibilities of the different levels of Government can be clearly and unambiguously defined;*
- ii. the extent to which duplication of functions between different levels of Government can be avoided;*
- iii. the extent to which the total benefits and costs of decisions to the community are explicit and transparent;*
- iv. the extent to which effective processes are established for co-operation between governments on environmental issues; and*
- v. the extent to which responsible Governments are clearly accountable to the electorate for the development and implementation of policy; and*

*ACKNOWLEDGE that in the development and implementation of environmental policy it is necessary to accommodate the regional environmental differences which occur within Australia...*

17. "Local government" is defined as a Local Government body established by or under a law of a State other than a body the sole or principal function of which is to provide a particular service (such as the supply of electricity or water).
18. The IGAE acknowledged the limited role of the ALGA, providing:
  - 1.11 *The Commonwealth, the States and the Australian Local Government Association acknowledge that while the Association is a party to this Agreement, it cannot bind local government bodies to observe the terms of this Agreement. However in view of the responsibilities and interests of local*

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*government in environmental matters and in recognition of the partnership established between the three levels of government by the Special Premiers Conference process, the Commonwealth and the States have included the Australian Local Government Association as a party to this Agreement and included references in the Agreement to local government and all levels of government.*

1.12 *The States will consult with and involve Local Government in the application of the principles and the discharge of responsibilities contained in this Agreement to the extent that State statutes and administrative arrangements authorise or delegate responsibilities to Local Government, and in a manner which reflects the concept of partnership between the Commonwealth, State and Local Governments.*

19. The IGAE identified the responsibilities and interests of local government, as follows:

2.4.1 *Local Government has a responsibility for the development and implementation of locally relevant and applicable environmental policies within its jurisdiction in co-operation with other levels of Government and the local community.*

2.4.2 *Local Government units have an interest in the environment of their localities and in the environments to which they are linked.*

2.4.3 *Local Government also has an interest in the development and implementation of regional, Statewide and national policies, programs and mechanisms which affect more than one Local Government unit.*

## **International Agreements**

20. At the international level, the role of local authorities has been recognised as vital to the achievement of sustainable development. Agenda 21<sup>7</sup> is an action plan of the United Nations related to sustainable development and was an outcome of the United Nations Conference on Environment and Development (UNCED) held in 1992 in Rio de Janeiro, Brazil. Agenda 21 is a comprehensive action plan to be taken globally, nationally and locally by United Nations organisations, governments, and major groups in areas in which humans directly affect the environment. Agenda 21 was adopted, along with the Rio Declaration of Environment and Development, by more than 178 Governments at the UNCED. The full implementation of Agenda 21, the Programme for Further Implementation of Agenda 21 and the Commitments to the Rio Principles were strongly reaffirmed at the World Summit on Sustainable Development (WSSD) held in August and September 2002.

21. An objective of Agenda 21 in integrating environmental and socio-economic considerations into decision-making is contained in Section 8.3:

*The overall objective is to improve or restructure the decision-making process so that consideration of socio-economic and environmental issues is fully integrated and a broader range of public participation assured. Recognizing that countries will develop their own priorities in accordance with their prevailing conditions, needs, national plans, policies and programmes, the following objectives are proposed:*

*(a) To conduct a national review of economic, sectoral and environmental policies,*

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<sup>7</sup> URL: [www.un.org/esa/dsd/agenda21/res\\_agenda21\\_28.shtml](http://www.un.org/esa/dsd/agenda21/res_agenda21_28.shtml)

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*strategies and plans to ensure the progressive integration of environmental and developmental issues;*

- (b) To strengthen institutional structures to allow the full integration of environmental and developmental issues, at all levels of decision-making;*
- (c) To develop or improve mechanisms to facilitate the involvement of concerned individuals, groups and organizations in decision-making at all levels;*
- (d) To establish domestically determined procedures to integrate environment and development issues in decision-making.*

22. A major part of Agenda 21 was devoted to involving local government and local communities in the development of local plans and activities. Chapter 28 provided for local government in the following terms:

### **BASIS FOR ACTION**

*28.1. Because so many of the problems and solutions being addressed by Agenda 21 have their roots in local activities, the participation and cooperation of local authorities will be a determining factor in fulfilling its objectives. Local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, establish local environmental policies and regulations, and assist in implementing national and subnational environmental policies. As the level of governance closest to the people, they play a vital role in educating, mobilizing and responding to the public to promote sustainable development.*

### **OBJECTIVES**

*28.2. The following objectives are proposed for this programme area:*

- (a) By 1996, most local authorities in each country should have undertaken a consultative process with their populations and achieved a consensus on "a local Agenda 21" for the community;*
- (b) By 1993, the international community should have initiated a consultative process aimed at increasing cooperation between local authorities;*
- (c) By 1994, representatives of associations of cities and other local authorities should have increased levels of cooperation and coordination with the goal of enhancing the exchange of information and experience among local authorities;*
- (d) All local authorities in each country should be encouraged to implement and monitor programmes which aim at ensuring that women and youth are represented in decision-making, planning and implementation processes.*

### **ACTIVITIES**

*28.3. Each local authority should enter into a dialogue with its citizens, local organizations and private enterprises and adopt "a local Agenda 21". Through consultation and consensus-building, local authorities would learn from citizens and from local, civic, community, business and industrial organizations and acquire the information needed for formulating the best strategies. The process of consultation would increase household awareness of sustainable development issues. Local authority programmes, policies, laws and regulations to achieve Agenda 21 objectives would be assessed and modified, based on local programmes adopted. Strategies could also be used in supporting proposals for local, national, regional and international funding.*

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28.4. Partnerships should be fostered among relevant organs and organizations such as UNDP, the United Nations Centre for Human Settlements (Habitat) and UNEP, the World Bank, regional banks, the International Union of Local Authorities, the World Association of the Major Metropolises, Summit of Great Cities of the World, the United Towns Organization and other relevant partners, with a view to mobilizing increased international support for local authority programmes. An important goal would be to support, extend and improve existing institutions working in the field of local authority capacity-building and local environment management. For this purpose:

(a) Habitat and other relevant organs and organizations of the United Nations system are called upon to strengthen services in collecting information on strategies of local authorities, in particular for those that need international support;

(b) Periodic consultations involving both international partners and developing countries could review strategies and consider how such international support could best be mobilized. Such a sectoral consultation would complement concurrent country-focused consultations, such as those taking place in consultative groups and round tables.

28.5. Representatives of associations of local authorities are encouraged to establish processes to increase the exchange of information, experience and mutual technical assistance among local authorities.

23. Local governments adopted Agenda 21 plans in Australia. These have often laid the groundwork for further discussion and development of plans to make communities and cities more sustainable. Many local governments and coalitions of local governments have taken the initiative to develop adaption programs to deal with climate change and sustainable development. Such examples include the Sustainable Sydney 2030, the 15 Sydney Coastal Councils Group who have developed policies and plans to combat rising sea levels<sup>8</sup> and the Local Government Associations in the various States who have undertaken their own research on numerous matters that impact local government.
24. Australia has changed significantly since Federation in 1901, and local government has played an increasingly important role in our system of government and in international experience.
25. It is submitted that local government requires appropriate recognition within the Constitution to formally recognise the role it plays in the Australian federal system as the third tier of government, thereby enhancing the status of local government in the community and its dealings with the other two levels of government.

## **Previous Constitutional Inquiries and Proposed Amendments**

26. In 1974, the Referendum to alter the Constitution to allow the Commonwealth to “borrow money for, and grant financial assistance to, local government” was rejected.
27. The issue of local government recognition in the Constitution was considered by the Constitutional Commission that was established to report back to the

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<sup>8</sup> URL: [www.sydneycoastalcouncils.com.au/](http://www.sydneycoastalcouncils.com.au/).

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Commonwealth Government in 1988 regarding possible amendments to the Constitution.

28. The First Report of the Constitutional Commission of May 1988 (First Report) recommended the insertion of section 119A into the Constitution:

*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 their respective areas in accordance with the laws of the State.*

29. The First Report noted that local government in Australia in 1988 consisted of 836 individual bodies with approximately 8,000 elected members and 170,000 employees. Local government bodies were constituted exclusively in accordance with the laws of the relevant State or Territory.<sup>9</sup>
30. The issue of local government recognition was also discussed in the report summarising the recommendations of the Constitutional Commission's five advisory committees (Summary Report).<sup>10</sup> The Summary Report identified that discussion about constitutional recognition ranged from a bare symbolic acknowledgment in the Constitution of the existence of local government to guarantees to local government powers, sources of revenue, and security from arbitrary dismissal.<sup>11</sup>
31. Issues were raised in the Summary Report as to whether the Federal Government should be able to by-pass the States and grant money directly to local government, and whether local government bodies should be able to impose rates on State and Federal Government property in their rating area. The report also questioned whether local government should be subject to similar democratic guarantees as the individual and democrat rights committee had recommended for Federal and State Parliamentary Elections, that is, "the right to vote, and one vote, one value".<sup>12</sup>
32. In 1988, the Distribution of Powers Committee recommended against recognition of local government within the Constitution. The Committee was concerned that implications of recognition had not been sufficiently considered and symbolic recognition was an insufficient reason to change the Constitution. The Committee was also concerned that mere recognition may entrench another level of government, which would operate in competition with the States.<sup>13</sup>
33. However, the Trade and National Economic Management Committee recommended in favour of constitutional recognition of local government and left the form of recognition to be determined by the Constitutional Commission, noting:
- local government provides essential services and facilities at local level. It has a significant role in planning and environmental protection matters. The committee considered that demands on local government are likely to increase in response to pressure from local communities.*<sup>14</sup>

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<sup>9</sup> First Report of the Constitutional Commission, Summary, Australian Government Publishing Service, May 1988, p.27.

<sup>10</sup> Australia's Constitution Time to Update, Summary of the Reports of the Advisory Committees to the Constitutional Commission, Australian Government Publishing Service, August 1988, pp.58-60.

<sup>11</sup> Ibid, p.58.

<sup>12</sup> Ibid, p.59.

<sup>13</sup> Ibid, p.59.

<sup>14</sup> Ibid, p.59.

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34. The Constitutional Commission considered three alternatives and noted it was unclear which option would be preferred by local government bodies and organisations.
  35. The Trade and National Economic Management Committee also recommended that the Commonwealth's spending power be widened to ensure the Commonwealth had power to grant money directly to local government.<sup>15</sup>
  36. A proposed amendment was put to a referendum in 1988. The proposed s.119A 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 to make by-laws for, their respective areas in accordance with the laws of the State.*
  37. This proposal was defeated.

## Ideas for changing the Constitution

38. The Expert Panel on Constitutional Recognition of Local Government Public Discussion Paper of September 2011 identifies a number of options available for the recognition of local government.
39. The Law Council provides the following comments regarding the options of financial recognition and democratic recognition of local government, subject to the Law Council's primary recommendation that the Constitutional recognition of local government is not dealt concurrently with the Constitutional recognition of Aboriginal peoples and Torres Strait Islanders. The issue of Constitutional recognition of Aboriginal peoples and Torres Strait Islanders should be given priority to the Constitutional recognition of local government.

## Financial Recognition

40. Financial recognition of local government would enable Federal Government funding to be provided directly to local governments.
41. The Summary Report recommended that the Commonwealth's spending power under section 81 be widened, "to put it beyond doubt that the Commonwealth has power to grant money directly to Local Government".<sup>16</sup>
42. The Constitution should be amended in order to clarify the Commonwealth's capacity to directly fund local government and to ensure that local government has the same ability to access funding from the Commonwealth as the States currently enjoy.
43. The Law Council supports an amendment to section 96 in either of the following two ways (new words italicised):
  - (a) ... the Parliament may grant financial assistance to any State *or to any local government body formed within the limits of a State or Territory* on such terms and conditions as the Parliament thinks fit; or

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<sup>15</sup> Ibid, p.59.

<sup>16</sup> Ibid, p.59.

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(b) ... the Parliament may grant financial assistance to any State *or to any local government body* on such terms and conditions as the Parliament thinks fit.

44. An amendment to section 96 along these lines would be sufficient to achieve the objective of enabling Parliament to grant monies directly to one or more local governments on such terms as it sees fit.

## Democratic Recognition

45. As discussed above, the First Report sought to limit the requirement for the establishment of local government to the States and exclude the Territories. It noted that it may be “unnecessary and onerous”<sup>17</sup> for local government to be imposed on Territories.

46. The Law Council does not support amendments that would require the Territories to create a local government system. It is noted that the Northern Territory has a local government system. While the Australian Capital Territory does not have a local government system, it may be argued that the ACT Legislative Assembly fulfils the need for community participation and carries out the functions of local government. It is submitted that it would be onerous and probably unnecessary to require the ACT to institute a further tier of government, given the size of the ACT, the Canberra community and coastal territories.

47. It is noted in the Final Report of the Constitutional Commission that the section 119A proposed by The Constitutional Commission would have the following effects:

*(a) That all people of each State are represented by an elected local government body;*

*(b) That all local government bodies shall not be dismissed arbitrarily; and*

*(c) That, if a local government body in any area was lawfully suspended pursuant to a State law, it would be restored within a reasonable period by elections.*<sup>18</sup>

48. The Law Council does not support amendments seeking to impose restrictions on States as to the supervision and possible dismissal of local government bodies. This should be a matter left to State/Territory governments, subject to the requirement that local government bodies be elected by the people. It is appropriate that State/Territory governments should be able to regulate and if necessary dismiss local governments, for instance as a consequence of maladministration, corrupt conduct or other purposes. This protects the broader interests of the community and recognises that local government is still subject to State control.

49. Constitutional recognition of local government in the above terms would require local governments to be elected by the people and would also require any local governments dismissed under State laws to have provision made for their election or re-election. Although it may be argued that dismissal of an elected local council should be conducted through an Act of Parliament, there may be a necessity for the State executive to act promptly, which may not be achieved if the local government can only be dismissed by way of legislation. It should be a matter for the States to

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<sup>17</sup> First Report of the Constitutional Commission, Summary, Australian Government Publishing Service, May 1988, p.23.

<sup>18</sup> Final Report of the Constitutional Commission, Summary, Australian Government Publishing Service, August 1988, p.33.

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determine how local government is regulated and if local government can be dismissed by the State through an Executive Order or by an Act of Parliament.

50. The Law Council submits that the requirement for fresh elections should be dealt with under the local government statutes of the various States. The responsibilities of local government are still in the process of development, as are the optimum ways to achieve the functions of local government. The creation of local government areas occurred over an extended period of time in many States. Local governments also vary in terms of population and size. Further reform may be needed in terms of boundaries and this should be a matter for the various States to consider.
51. It is submitted that the proposed amendment to section 119A that was put to a referendum in 1988 remains appropriate today:

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

52. The Law Council supports the inclusion of the words “*and each Territory may*” after “*each State shall*” and the words “*or Territory*” after “*the State*” as this recognises the existence of forms of local government in the Northern Territory without mandating that all Territories have a local government body.
53. It is further submitted that it may be appropriate to delete the phrase “*and make by-laws for*”. This would still enable local government bodies to administer their areas in accordance with the laws of the State. As a number of local governments have formed regional groupings to assist in the management and discharge of certain regulatory functions, the proposed constitutional amendment should not prohibit local government from acting together to achieve cost-effective outcomes for the discharge of their regulatory functions.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 56,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.