

4 November 2011



The Chair
Expert Panel on Constitutional Recognition of Local Government
GPO Box 803
CANBERRA ACT 2601

BY EMAIL

Dear Sir/Madam

This letter is a brief submission of QPILCH to the Expert Panel on Constitutional Recognition of Local Government.

Introduction

QPILCH is the Queensland Public Interest Law Clearing House Incorporated. It is a non-profit, community based legal organisation that coordinates the provision of pro bono legal services for individuals and community groups.

QPILCH's objects include, among other matters, to raise awareness of social justice issues and participate in the development of socio-legal policies, laws and legal practices for the benefit of disadvantaged people.

QPILCH undertakes projects as its resources permit to proactively address gaps in access to justice by people who are disadvantaged. It also undertakes an advocacy role in relation to important legal rights issues.

QPILCH has insufficient resources to make a comprehensive submission within the Panel's timetable. However, QPILCH has recently commenced a project to make recommendations for improvement of environmental governance. We anticipate completing this project in late 2012. The aim of our project is to suggest a new framework for local decision-making in land and resource use and other issues that impact directly on the environment.

Constitutional recognition of local government is pivotal to local decisions affecting the environment and is generally supported by QPILCH to safeguard certain basic fundamental legal rights at the local level for the community including:

- (a) the right to a decent and healthy environment;
- (b) the right to the sustainable use of the environment;
- (c) the right of the community to good governance and decision-making at the local level including access by local government to direct Commonwealth funding as required.

Terms of Reference

The Terms of Reference for the Expert Panel are to report and make recommendations regarding:

Queensland Public Interest Law Clearing House Incorporated

incorporating the Homeless Persons' Legal Clinic, Self-Representation Civil Law Service, Refugee Civil Law Clinic, Administrative Law Clinic, QLS Pro Bono Scheme and Bar Pro Bono Scheme.

A Member of the PILCH Network

Address

PO Box 3631
South Brisbane BC
QLD 4101

Telephone

(07) 3846 6317

Facsimile

(07) 3846 6311

Email

contact@qpilch.org.au

Website

www.qpilch.org.au

ABN

52 033 468 135

IA

30188

- (a) the level of support for constitutional recognition among stakeholders and in the general community; and
- (b) options for that recognition.

QPILCH seeks to represent mainstream community values in the public interest by indicating its broad support for the constitutional recognition of local government.

Purpose of a Constitution – public perception

A constitution is generally a document that provides a framework for the government of a nation's peoples. It is usually the first step in nationhood. It is a body of fundamental principles and procedural and substantive rules. It can also create rights or elucidate values.

The framers of our constitution were people of a particular time in our history, representing colonies that in the main were convinced of the need for a federation that preserved colonial power. For a host of reasons, not least of which was a perceived need for security, the founders were clear that the borders of this new nation would encompass continental Australia including Tasmania.

The failure of the framers of the constitution to mention Indigenous people is seen by many people as a product of its time. It is easy to look back from the present: to accuse them of racist oversight or excuse their oversight because it was not our decision – we are not responsible for the actions of our forebears. Given our current understanding of what we know and don't know, it is harder to imagine that our descendants will look so kindly or ambivalently on us.

Change

Attempts to change the constitution have often been attended by fiercely opposing points of view. On the one hand - the view that the constitution should change to reflect changes in values since 1901; and on the other hand - the need for consistency and certainty through the preservation of the federal structure and state powers. Perspectives on the role of the constitution on the basis of its immutability or changing values have made change difficult.

QPILCH is conscious of these difficulties and of the limited Terms of Reference of this review. Nonetheless, while trying to make practical suggestions, we have also included suggestions that we believe need to be raised for the long-term wellbeing and security of Australia.

We believe that many Australians are looking for a greater role in decision-making and while we support recognition of local government in the constitution, we believe that over coming decades, governments will see the benefits of greater community participation in the actual making of decisions that directly affect those communities.

We ask the panel to anticipate the potential for direct involvement of people through a framework that provides for the democratic, informed, consensual, cordial and responsible resolution of issues or disputes at the local level, in which representative governments participate, not control.

New democratic mechanisms are needed to overcome the concerns of many people who feel estranged from government.

Local government has a critical place in a new system that enables an affected citizens' participation in informed debate and decision-making.

Recognising local government in the constitution

Should the role of local government in Australia be recognised by including a reference to local government in the Australian Constitution?

QPILCH broadly supports the constitutional recognition of local government.

Such recognition will give local government a status that recognises its increasingly significant role in land use planning and environmental management.

Symbolic Recognition

Do you think that, if the Constitution is changed to include a preamble or statement of values, local government should be referred to in either?

For pragmatic reasons, we accept that symbolic recognition in a Preamble is the most likely option that Australians would support.

However, we also favour inclusion of a Statement of Values that would refer to the democratic values of local government and, as discussed later, incorporate values that recognise and support a healthy environment. They are intertwined, as local government's role is intricately involved in planning, environmental management and local decision-making.

Financial Recognition

Should the Constitution be changed to explicitly say that the Commonwealth Government can provide funding directly to local councils?

We agree that the constitution should be changed to enable Commonwealth government to directly fund local government.

Local councils need to have a degree of autonomy from State government so they have bargaining power. In future, the ability to respond to increasing pressures will be dependent on the ability of people and institutions, including all levels of government, to work together.

If councils are subject solely to State control, there will be limited opportunities to create genuine partnerships.

Importantly, councils may need to reach agreement with others across borders or across regions or align with communities of interest or ecosystems. At the moment, they are created around human populations, not around earth systems.

If independently funded, local governments will be able to respond to challenges and needs quickly and decisively, placing resources where they are most needed.

The argument that some local governments cannot be trusted to act responsibly has historical foundation. However, denying them the independent funding and control of

their affairs will not prevent this recurring. The involvement of citizens in local decision-making and the provision of transparent information systems would be a greater bulwark against corrupt practices and other forms of misconduct.

Do you agree with either of the suggested changes to section 96 of the Constitution?

If our argument is accepted that councils should have the ability to work regionally and across borders, the second suggested change to section 96 is the preferred approach. That is, amendments should be made to section 96 to provide:

'...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.'

Democratic Recognition

Should democratic elections for local governments be guaranteed by the Constitution?

We believe that democratic principles should be enshrined in the constitution for local government.

If so, which of the proposed provisions should be included in the Constitution?

We support option 2 **without** the qualification permitting a State to provide a power under Statute to dismiss a Council:

'Each State shall, and each Territory may, provide for the establishment and continuance of a system of local government elected in accordance with the laws of the State or Territory.'

Giving a State government the power to create the system of local government would ensure, in the absence of an overarching Commonwealth responsibility, consistency across all local councils in the State. Such State legislation could also establish the process for citizen involvement that we canvass later in this submission. As outlined above, with an enhanced constitutional status, greater transparency in the way councils operate, and more cooperative governance in issues that tend to lead councils into error, there should be less need for State intervention.

Recognition through federal cooperation

If the Constitution is changed to refer to the desirability of cooperation between the Commonwealth and the States, should local government be included in any such provision?

As outlined above (and to be expanded upon in the QPILCH project), we strongly agree that cooperation and concerted participation in decision-making should be a feature of our democratic system.

This would entail the involvement of all relevant levels of government and relevant stakeholders at the lowest appropriate level. This means that, in land and environment issues, rather than the prevailing command and control structure that

imposes local solutions, clear systems should operate to facilitate dialogue and encourage agreement or facilitate dispute resolution at an early stage.

Such a process, in our view, would be facilitated by local government and supported by a system of arbitration and or judicial determination.

We agree that “many Australians expect the different levels of government in Australia to cooperate on issues that require a joint approach.” However, we submit that problems can be solved only by governments and people working together.

While all levels of government may recognise the importance of cooperation and collaboration, they are often incapable of implementing such an approach.

Accordingly, the idea to insert in the Constitution an express reference to the desirability of cooperation between all levels of government warrants further investigation, particularly to achieve better integration and coordination of environmental laws, processes and responses. At the same time, greater participation of people in cooperative decision-making warrants closer attention.

Other questions

Are there any other ideas not covered in this discussion paper that you support?

QPILCH Project

Our project relates only to issues that impact on the environment, that is, planning, land and resource use and environmental protection. This of course has become a major function of local government, which no longer has just the traditional responsibilities for roads, waste and sewerage. It is a function that has grown significantly as Australia has developed, its population has grown and competition for resources has increased.

In our view, the mechanisms that exist for dealing with this growth, particularly for ensuring probity and accountability and for managing competing interests, have not kept pace with the times.

Constitutional recognition of the environment

Many Australians today are concerned about the environment and our future in it. Along with recognition of Indigenous Australians in the constitution (which we support), we believe that the land in which we live and its environment should be similarly recognised in the constitution.

While constitutions are often seen as documenting governmental arrangements, more and more people are recognising the symbolic need for locating our place in the environment as well as creating governmental arrangements that better protect habitats and other species.

More than 60 nations across the world now give constitutional recognition to the environment or a human right to a decent environment.

Many artists represent the landscape, habitats, animals, improvements, social, commercial and cultural activities and environmental impacts on the land we call

Australia: this 'wide brown land', this 'sunburnt country', 'girt by sea', etc, etc are burned into our soul. Yet in many ways, the images and symbols of Australia are under threat through extinction, destruction or over-commercialisation. The values they represent have become diminished and unrecognisable.

The AGS' *Measures of Australian Progress*¹ shows that all environmental indicators are getting worse (except for air quality). Land degradation and unsustainable land use, loss of biodiversity through destruction of habitat threaten catastrophic damage to our natural systems and our future. Government decision-making is weighted in favour of economic development, fails to consider cumulative impacts, the public debate leading up to decision-making relies on inadequate or over-simplified knowledge, and the goal posts are frequently moved.

Competing demands on the environment should be resolved not just in favour of people. Other species, which also rely for their survival on the land, have a right to our respect and protection.

Our constitution should, in our view, recognise not just government of the people by government, but the ability and facility for all interests to participate, and for competing views to be resolved in accordance with the values and mores of the day within a democratic framework.

Our current system of government, controlled by special interests and using opaque processes, cannot do this and whilst recognition of local government alone will not change this situation, it will provide the basis for reform.

This analysis of government is not new. But a new response to it is needed.

We are researching decision-making processes that may fit our unique circumstances in order to mediate local views and special interests competing for resources, land use options and environmental protection, in an open and accountable way through agreement. The processes we recommend also may not be new – but may need to be adapted to address local land and environment issues.

QPILCH recognises that constitutional recognition of the land and environment in the preamble to the constitution for example will not alter this situation. However, it may pave the way for greater community recognition of its importance to our future and for faster action when it is needed.

The constitution incorporates important economic values for ordered commerce – trade between the States, external trade and customs - and implies a legal system based on the rule of law. However, as Emeritus Professor Ian Lowe has observed², markets give us what we want, while natural systems give us what we need.

The constitution should also incorporate important ecological values that are compatible with a sustainable future.

Professor Lowe has also pointed out that in a world without laws, polluters will always prevail over non-polluters. He argues that the converse never holds true, because in

¹ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1370.0.55.001>

² Speech at *Wild Law Conference*, Griffith University, 16 September 2011.

our current legal system, polluters are always the defendant and the people trying to stop the pollution have the onus of proving the breach³.

Traditionally, human use of land and nature, not nature itself, is the subject of the law.

Constitutional acknowledgement of the natural environment may lead to the development of laws that ensure a better balance between those who follow sustainable pathways and those who don't.

Do you think that there are other ways of recognising the role of local government and enhancing its status, apart from constitutional change?

The ideas we are researching for greater community involvement in decision-making could be implemented by local councils without constitutional change. However, they would be harder to achieve without constitutional recognition and without direct funding.

Local government support for direct participation in decision-making would significantly enhance local government's indispensability and standing, so long as it introduced a process that is transparent, accesses reliable scientific and other knowledge and is based on best practice principles.

Do you think that there are any implications beyond the benefits to local government that might result from the suggested changes to the Constitution?

Democracy is made more vibrant with multi-layered governance.

Thank you for the opportunity to comment.

Yours faithfully

Tony Woodyatt
Director

³ Ibid.