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Culture and Native Title: making the most of opportunities!

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Redrawing the regions: Opportunities and challenges in the current federal policy landscape.

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Abstract

Calls for a national constitutionally entrenched Voice to the Parliament made in the *Uluru Statement from the Heart* in 2017 have been consistently rejected by the current Commonwealth Government. The need for regional and local voices to provide input into Government policies and programs has been widely accepted and processes for co-design are underway. The design and implementation challenges are significant. Current processes can benefit from a close look at the history of policy setting for regional decision making, including the demise of the *Aboriginal and Torres Strait Islander Commission* in 2004. With appropriately designed and resourced regional voices, Government services for indigenous citizens could be improved, and community alienation reduced. Native Title Representative Bodies could play a useful role in future regional voice mechanisms.

Introduction:

Since the *Uluru: Statement from the Heart* proposal was launched in 2017, advocates for a national Voice to Parliament, entrenched in the Australian constitution, have found the political terrain difficult. The Australian Government has initiated a process to meet some of the demands, but with significant exceptions.

Minister Wyatt established a Senior Advisory Group, co-chaired by Marcia Langton and Tom Calma, which met in Canberra in November 2019. They group was tasked with establishing processes and references for a national co-design process with a tight mandate.

In addressing the first meeting, the Minister said:

I understand that many in this room and across the country have expressed disappointment that enshrining the voice in the constitution is off the table. I also acknowledge and respect the fact that many of you will not reconcile from that view – I'm not here to change your mind. But we are here to deliver outcomes for Indigenous Australians.

He went on to comment that:

When I've been out in community, people are saying to me – don't worry about the constitution, we just want to be heard. We want to know who will listen to our concerns and be in a position to do something about them – and the majority are local or State service delivery issues...To me, the most important aspect of this work is the Local/Regional voices.¹

The dual focus on the regional level and the need to address disadvantage is consistent with Coalition party views during the consultations by the Joint Select Committee on Constitutional Recognition co-chaired by Mr Julian Leeser MP, the member for Berowra, and Senator Patrick Dodson.² A similar focus is reflected in the final Committee report recommendation for a co-design process to:

outline and discuss possible options for the local, regional, and national elements of The Voice, including the structure, membership, functions, and operation of The Voice, but with a principal focus on the local bodies and regional bodies and their design and implementation³

Such a stance is also consistent with the Prime Minister's early December 2019 announcement of machinery of government changes stressing the need for the Public Service to focus on implementation and service delivery rather than policy development, viewed as the preserve of Ministers and the Executive Government. The Prime Minister stated after the election:

The success of policy is not recognised in its articulation but its delivery, its implementation. Anyone involved in business will understand that it's the execution of your strategy that matters, not just having one. I want a public service that's very much focused on implementation.⁴

The binary relationship between the public service as passive advisors, answerable to politicians as active decision makers is a characteristic structural feature of current Government ideology and practice. There can be no question that the Parliament, and its members, sit above and beyond any advisory structure, current or future. There is little appetite in such an outlook for creating a new body that might challenge or question that primacy. This leads to the straw man argument, portraying a Voice to the Parliament as a third chamber⁵.

The current co-design process, led by Professors Tom Calma and Marcia Langton, will be focused, primarily, on giving indigenous Australians some say in implementation and service delivery of government services particularly at the regional and local level, as well as

¹ <https://ministers.pmc.gov.au/wyatt/2019/senior-advisory-group-opening-remarks>. See also his comments to Patricia Karvelis (27 January 2020) and to Chris Kenny (3 February 2020)

² I had the privilege of attending many of the consultations as Chief of Staff to Senator Dodson.

³ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018

⁴ Simon Benson The Australian 6 December 2019

⁵ These claims were made by Ministers including Mr Joyce and Mr Dutton. Prime Minister Scott Morrison echoed Mr Turnbull's argument that the voice would be viewed as a "third chamber of Parliament" as recently as September 2018. "People can dress it up any way they like - but I think two chambers is enough," he said. Bo Seo, 2019 The Australian Financial Review <https://www.afr.com/politics/federal/the-indigenous-voice-to-parliament-explained-20190710-p525s6>

establishing some new consultation mechanisms at the national level to the Government of the day. It will also not be canvassing the Uluru proposals for a Makarrata Commission.

There is a parallel process of co-design for a national Voice, but not with the intention of constitutional entrenchment under the current Government and clearly, from the Ministers comments, one that is intended as an advisory Voice to Government, not the Parliament itself. Some advocates express the hope that such a Voice may emerge at a secondary stage. The track to achieving such is not evident at this stage and there is no clear evidence of any Coalition party room appetite for such a body in any form .⁶

The history of regional voices

While the regional voice concept has a long history, any return to regional governance will reverse a tide that has been out for decades under governments of both persuasions. From the Whitlam Government of 1972 to the establishment of ATSIC in 1990, there had always been some form of an elected national indigenous policy advice body to the Government. The tide was in for most of two decades. The seas, however were choppy. Bodies such as the NAC, the NACC, and the ADC were “often plagued by criticisms from within their indigenous constituencies, and difficult relations with government”⁷. Their regional footprint, and their power to directly influence decision-making on matters that affected the lives of Aboriginal people, was limited.

The decision to abolish ATSIC in 2004 (made without any consultation with Indigenous people) changed the shape and nature of Federal Government attitudes towards for decades to come. That decision, it is often forgotten, was a bipartisan one. Prime Minister Howard and Minister Vanstone announced the Government’s intention to abolish ATSIC only a few weeks after Mr Latham announced the Labor Party intention to do so if elected.⁸

The decisions were informed by a partial reading (at best) of the extensive review carried out by John Hannaford, Bob Collins and Jackie Huggins, who concluded that the national body was

⁶ On 15 January the Minister announced the membership of the National Co-design Group. The Group will be co-chaired by senior Indigenous leader Dr Donna Odegaard AM who will be joined by 15 members to develop models for a national voice to government. Minister’s media release 15 Jan <https://ministers.pmc.gov.au/wyatt/2020/appointment-national-indigenous-voice-co-design-group>

⁷ Sanders, W. (1994), RECONCILING PUBLIC ACCOUNTABILITY AND ABORIGINAL SELF-DETERMINATION/SELF-MANAGEMENT: IS ATSIC SUCCEEDING?. Australian Journal of Public Administration, 53: 475-488. doi:10.1111/j.1467-8500.1994.tb01496.x

⁸ Pratt and Bennet 2004 The end of ATSIC and the future administration of Indigenous affairs. Parliamentary Library Current Issues Brief

beyond salvation, but that the regional councils were providing a valuable service, and should be retained and strengthened.⁹

The tide would be out for regional governance for most of the next two decades. Since the demise of ATSIC in April 2004 no Federal Government has taken considered steps to cultivate any sense of deep engagement in or influence over Government policies and programs at the regional level. That gap has been filled to a degree with the growth in numbers (around 3000) and functions of incorporated indigenous bodies, including native title representative bodies. Such growth is an important evolution of indigenous governance and the role of these bodies in any future regional governance mechanisms requires careful consideration.

Despite the persistence of a rhetorical policy of self-determination, Federal governments (of all persuasions) have taken major policy interventions that bypassed or ignored attempts by Aboriginal communities and organisations to try and influence Government thinking and action, including most significantly the Northern Territory Emergency Response (the intervention) in 2007.

For many communities in the Northern Territory, the intervention was being rolled out at the same time as local community councils were being dismantled and amalgamated into a complex structure of regional shires. Sixty-one councils were reduced to 16. In terms of reduction in council numbers, this has been described as 'easily the largest scale, forced local government amalgamation in Australia'.¹⁰

For the communities I have worked with since 1979 in Central Australia, the loss of any local point of engagement with decision makers and decision making created by the amalgamation has exacerbated a sense of alienation and powerlessness. The only organizations retaining any sense of being under direct local community control are the sports teams and art centers. There are exceptions, where Aboriginal organizations have taken on service delivery through organizations with an established emphasis on local decision-making such as the Purple House (an Aboriginal Controlled Community Organisation delivering dialysis services from Alice Springs).

At the same time as the Intervention and the council amalgamations, the anthropology profession was engaged in a significant conversation, stimulated by Peter Sutton's *The Politics*

⁹ Hannaford, John, Collins, Bob and Huggins, Jackie (2003). Review of the Aboriginal and Torres Strait Islander Commission, June 2003: Public Discussion Paper. Public Discussion Paper.

¹⁰ Tiley and Dollery 2010 Historical Evolution of Local Government Amalgamation in Queensland, the Northern Territory and Western Australia. UNE Working Paper

of Suffering, proclaiming the demise of any liberal consensus on indigenous issues.¹¹ Joined by indigenous authors such as Marcia Langton and Noel Pearson, these writings had a strong and direct influence on policymakers on both sides of the political aisle. In particular, there was a growing disillusion with an emphasis on what was described as a rights agenda, including the rights of self-determination, local and regional political governance. Also under scrutiny was what was portrayed as a cultural agenda that, it was argued, was leading to poor outcomes in areas such as family violence, health and education .

As a result policies and programs designed and delivered by the Federal Government, including national partnerships agreements with the states and territories on issues such as housing and remote service delivery were increasingly driven from Canberra and the state and territory capitals. Consultation mechanisms were usually minimal and negotiation processes with indigenous community bodies and regional organisations were either completely absent or piecemeal and tokenistic.

There has been an evident decline, over the last decades of increasingly centralised, top-down decision-making, in the capacity of indigenous communities to have any say on how Government policies and programs should be designed, delivered and evaluated for their communities. At an individual level those men and women who were the community leaders, the thought champions, the go to mediators with government representatives are these days more likely to be unemployed, wrestling with their cashless debit card, or passed away.

The rhetorical gap has widened between the “free, prior and informed consent ’enshrined in the UN Declaration on the Rights of Indigenous Peoples, signed by the Australian Government in 2009, and the reality of community capacity on the ground, especially in the remote communities of Australia, where there is an unarguably profound need for some kind of voice to influence Government decisions imposed upon them. This is not to assume that these communities are ever likely to speak with only one voice on issues, as the native title disputes of 2018 in the Noongar Settlement and the Adani mine ILUA demonstrate.

The current co-design process, led by Professors Langton and Calma, supported by the recently minted National indigenous Australians Agency, may be viewed as an historically important opportunity in a Federal policy landscape that has been characterized by challenges more than opportunities for some time. While it will not deliver the national Voice envisaged at Uluru, there is a real opportunity for overdue reform at the regional level.

Redrawing Regional boundaries: A challenge

¹¹ Sutton, P. (2009). *The politics of suffering: Indigenous Australia and the end of the liberal consensus*. Melbourne Univ. Publishing.

The history of regional governance bodies have been ably mapped by Will Sanders in the Macquarie atlas of Indigenous Australia¹². The process of defining practical, affordable and representative regional boundaries for electoral purposes was a challenge for policy makers developing the NACC (1973-77), the NAC (1977-85) and ATSIC (1990-2005).

The original proposal for ATSIC regions was for 60 regions, some of which crossed state and territory boundaries. This was changed in 1993, when the number of regions was reduced to 36, each confined by a state and territory boundary. The current boundaries for the National indigenous Australians Agency (the successor agency to the Department of Prime Minister and Cabinet) are those developed under Minister Scullion, for twelve administrative regions, with no regional decision-making authority nor the departmental delegations at the regional level that could enable the allocation of funds to priorities on a regional basis. Addressing this imbalance on an administrative basis could be a starting point for the regional Co design process and represents low hanging fruit for a policy innovation.

Many of the political geography challenges for the current co-design process will be familiar to those who remember the extended consultation process under Minister Gerry Hand for designing and redesigning the ATSIC boundaries. They include balancing different objectives including:

- recognising indigenous perceptions of social and cultural definitions of regional identity and place based authority
- accommodating (or aligning) state and territory roles and responsibilities in regional service delivery
- acknowledging the regional entities being developed through treaty making processes in Victoria, the NT and Queensland.
- building administrative support and capacity for regional decision-making (including the significant need to re-skill public servants in community engagement on the ground)
- realigning Federal Government policies and programs to deliver through a regional footprint (including portfolio governance mechanisms and delegations)

These objectives may at times be inherently conflicted and will require an adroit policy hand from Government to balance appropriately. They may also be internally contentious. Many indigenous groups will have different views on the most appropriate scale to define their regional identity. One group's First Nation may be another's tribe, may be another's mob, or even family.

¹² Macquarie Atlas of Indigenous Australia / general editors, Bill Arthur & Francis Morphey ; [foreword by Patrick Dodson].

The decision to change the ATSIC boundaries in 1993 and re-align them to state and territory borders points to a significant challenge for the exercise at hand. In remote communities in the Western Desert, where I have worked, the NT, SA and WA borders create artificial lines across country where there has been a long standing shared cultural and linguistic regional identity. These lines create significant barriers to practical cooperation and shared service delivery that defy common sense.

Kaltukatjara (Docker River) in the NT is a corrugated but quick 100 km drive from Warakurna (Giles) in WA. The schools in those two communities are separately staffed, administered and resourced, one from Alice Springs (8 hours drive), the other from Perth, (21 hours). While the student population overlaps greatly in this mobile community, the curriculum of the schools is completely different; there is no data sharing on student attendance, achievements, needs and educational interests. Training for Aboriginal education workers and teachers is not shared across the border. Similar structural constraints exist for police and health services.

It is reasonable to consider that a regional authority, probably based in Alice Springs, could make significant gains in improving the education, health and justice outcomes for these remote communities of the Western Desert Region, while also reducing administrative costs and improving efficiency. Such a body would be accountable to the broader Western Desert communities in ways in which the capitals of Perth, Darwin and Adelaide could never hope to be.

In a policy sense, this allows for the development of ‘collective impact’ approaches where different actors from different sectors become committed to a common agenda for solving a specific social problem.¹³ The Maranguka Justice Reinvestment project in Bourke seeks to operate along those lines and is achieving demonstrable results¹⁴.

A threshold question to be addressed in the co-design process is to determine the powers and responsibilities of any regional authority, and how those powers might be shared with any national Voice. Ideally, the structure would utilize the principle of subsidiarity, so that decisions could be taken at the lowest possible level, closest to where they will have their effect, and at the point where citizens can directly engage in shaping the futures of their own communities.¹⁵

In our flawed Australian system of contested federalism, blame shifting and learned helplessness become entrenched so that systemic change gets defined as a too hard “wicked” policy problem. To redefine responsibility for social, economic and cultural development and

¹³ Kania, J., & Kramer, M. (2011). Collective impact.

¹⁴ <http://www.iustreinvest.org.au/new-evidence-from-bourke/>

¹⁵ <https://dictionary.cambridge.org/dictionary/english/subsidiarity> Marco Balboni (2019) The global reach of the principle of subsidiarity: the case of Australia, *Commonwealth & Comparative Politics*, 57:2, 193-207, DOI: [10.1080/14662043.2019.1574001](https://doi.org/10.1080/14662043.2019.1574001)

change as a shared regional accountability owned equally by governments and accountable to indigenous communities and organizations may not be simple or immediately delivered but it is overdue.

Roles of native Title Bodies

In indigenous Australia, there is an existing national architecture that may be relevant to the issues of co-designing regional governance and decision-making. The native title structure of representative bodies and prescribed bodies corporate could have a role to play in contributing to the articulation of indigenous views on the futures of their communities at the regional level.

To be effective in contributing to this role, the existing resources and responsibilities of representative bodies would need to be enhanced and funded to succeed. In some cases existing bodies, statutory or otherwise, would currently struggle to find the capacity to deliver. At present such bodies have a limited capacity to go beyond their existing statutory responsibilities and contribute to relevant and significant regional issues such as economic development and environmental management, although these issues are critical to successful post determination outcomes.

As the COAG report of 2016 noted:

The Expert Indigenous Working Group notes Indigenous land holding bodies are frequently placed under enormous pressure to balance the competing pressures of commercial and legislative timeframes with the need to ensure effective and culturally appropriate consultation with Indigenous land owners, and to manage any disputes in relation to decision-making. Indigenous land holding bodies are often required to carry out these responsibilities with limited resources.¹⁶

Land, as has been pointed out, is a value carrier.¹⁷ There would be value in giving regional authorities, legitimated by land owners, through their representative bodies, the power to advise, or even direct, the decisions of governments in negotiated areas that might include:

- Land management and care, including fire, water, protected areas and carbon control.

¹⁶ COAG Investigation into Indigenous land administration and use, 2016 p 59

¹⁷ Tonkinson, M., & Tonkinson, R. (2010). The Cultural Dynamics of Adaptation in Remote Aboriginal Communities: Policy, Values and the State's Unmet Expectations. *Anthropologica*, 52(1), 67-75

Merlan 2015 Explorations towards Intercultural Accounts of Socio-Cultural Reproduction and Change *Oceania* 75 (3), 167-182

Peterson, N. (2015). Place, Personhood and Marginalization: Ontology and Community in Remote Desert Australia. *Anthropologica*, 491-500.

- Arts, language and cultural maintenance and revival.
- School curriculum, timetabling and staffing issues
- Housing capital investments and refurbishments
- Outstation and remote servicing of small isolated communities
- Health centre design and service delivery.
- The training and development of indigenous workforces in the region.

Through a regional authority, given power, time and resources, the management challenge of delivering services that are appropriate to the 'dynamic intersection space' of remote communities might be grounded, accountable and have higher chance of success.

Ensuring that native title holders through their prescribed bodies corporate and their representative bodies do have some voice in shaping decision-making processes at the regional and local level seems consistent with the spirit and original intent of the Native Title Act and the philosophy of the Mabo decision itself. To allow native title bodies a seat at the regional decision making tables, those regional Voices of the future, might contribute to informed advice to governments, enhance capacity for communities, reduce duplication and could be a correction to the locked in mode of centralized top down decision making and resource allocation that has impoverished, disempowered and failed indigenous communities across remote Australia.