

SYMPOSIUM ON INTERNATIONAL INDIGENOUS RIGHTS, FINANCIAL DECISIONS, AND LOCAL POLICY

WESTERN AUSTRALIA'S REMOTE INDIGENOUS COMMUNITIES: A CASE AGAINST CLOSURES AND A CALL FOR NEW GOVERNANCE

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In the late 1970s thousands of Indigenous Australians initiated a movement back to the ancestral lands they had been removed from during the assimilationist era. Less than 50 years since their return to country, Aboriginal people living in Western Australia's (WA) remote communities are again grappling with their impending dispossession. WA Premier Colin Barnett's announcement late last year was panic inducing:¹

It is a problem that I do not want and the government does not want, but it is a reality. There are something like 274 Aboriginal communities in Western Australia—I think 150 or so of those are in the Kimberley itself—and they are not viable. They are not viable and they are not sustainable . . . I am foreshadowing that a number of communities are inevitably going to close.

Approximately twelve thousand Indigenous Australians reside in the 274 communities placed on the chopping block. One year since Barnett's announcement, these people have not been properly consulted, are unaware of which communities will be closed or the criteria pursuant to which that determination will be made. Adding to their uncertainty, he recently back-peddled from his announcement that up to 150 communities will close, stating that a "hub and orbit" strategy will be implemented. This will render some communities bigger and better resourced, others reduced in services, and the smallest ones subject to closure.

Precipitating the closures in WA was the federal government's decision in mid-2014 to discontinue funding municipal services (i.e. the supply of power and water) to remote Indigenous communities, thereby shifting such responsibility to the states.

The Policy Progression

The WA government's decision to no longer service "unviable communities" is not an isolated policy, but the culmination of a decade long policy progression toward centralized and mainstreamed administration of remote Indigenous communities.

Since 2004, the federal government has made radical changes to the administration of Indigenous Affairs. First, it abolished the Aboriginal and Torres Strait Islander Commission (ATSIC)—an independent statutory body comprised of Aboriginal representatives that administered programs directly affecting remote Indigenous

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¹ Western Australia, *Parliamentary Debates*, Assembly, Nov. 13, 2014, 8126 (Colin Barnett, Premier) (Austl.).

communities, such as the Community Housing and Infrastructure Programme (CHIP) and the Community Development Employment Projects (CDEP). Second was the introduction of a mainstreamed approach to servicing such communities, whereby more localized programs such as the above were dismantled and transferred to federal departments. The result: administration occurs predominantly in the state and federal capitals, often thousands of kilometers from remote Indigenous communities.

A centralized, minimalist model of administration has emerged. Minimalist models “seek to ground policy design in economic concepts and market practices, and to minimize frontline administrative discretion and popular participation in administration.”² As Charles Sabel and William Simon observe, “[t]he core economic norm is efficiency, which prescribes that resources be invested so that at the margin their return is equal and that duties be assigned to those who can perform them most cheaply.”³

To facilitate this model of administration, successive governments have prioritized larger Indigenous communities (smaller communities are more difficult and expensive to govern centrally). For example, the “Working Future—A New Deal for the Northern Territory” (2009) policy mandates investment in larger “growth towns” as opposed to outstations and other small Indigenous communities. Also, the National Investment Principles in Remote Locations (2015) stipulate that priority be given to providing infrastructure and services to larger, economically sustainable communities.

International Legal Obligations

Discontinuing the supply of essential services to any number of WA’s Indigenous communities arguably contravenes Australia’s international legal obligations. While Premier Barnett has invoked the right to socio-economic advancement to justify the closures, a holistic reading of the International Covenant on Economic Social and Cultural Rights⁴ (ICESCR) and authoritative commentary suggests that closing communities on this basis may violate the Covenant. Article 11.1 of the ICESCR obliges states to recognize the right to an adequate standard of living, including housing, and to the continuous improvement of living conditions. Notwithstanding the complexities and added expenses, special efforts are required to ensure that Indigenous residents of remote communities can enjoy the same social and economic rights as other Australians, without sacrificing important aspects of their cultures and ways of life. The Committee on Economic Social and Cultural Rights stated in General Comment 20 that “[t]he exercise of Covenant rights should not be conditional on, or determined by a person’s current or former place of residence” including in rural areas.⁵

Closing communities without adequately consulting affected Indigenous peoples may violate their right to participate in decision-making. The International Law Association has described this as a rule of customary law that, as a minimum, requires that states consult with Indigenous people before making decisions that affect their interests.⁶ The UN Committee on the Elimination of Racial Discrimination observes that “no decisions directly relating to their rights and interests are taken without their informed consent.”⁷ A year on from Premier Barnett’s announcement, adequate consultation has still not occurred. The WA government states that on the

² Charles Sabel & William Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 55 (2011).

³ *Id.* at 58.

⁴ International Covenant on Economic Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3.

⁵ Comm. on Economic, Social and Cultural Rights, General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, para. 34 (2009).

⁶ INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 74TH CONFERENCE 834, 853 (2010).

⁷ Comm. on the Elimination of Racial Discrimination, General Recommendation 23, Rights of Indigenous Peoples, UN Doc. A/52/18, annex V at 122, art 4(d) (1997).

ground consultation has been conducted in *larger* communities since April 2015. And yet, under the “hub and orbit” strategy it is the larger communities that are the least likely to be closed.

The proposed closures are in tension with the UN Declaration on the Rights of Indigenous Peoples⁸ (UNDRIP). Article 26 states that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” and article 8(2) demands that states provide effective mechanisms for prevention of and redress for, *inter alia*, “any action which has the aim or effect of dispossessing them of their lands . . . any form of forced population transfer which has the aim or effect of violating or undermining any of their rights . . . any form of forced assimilation or integration.” Premier Barnett insists that Indigenous communities will not be “closed,” but rather, essential services will no longer be funded. While this may not technically amount to “forced relocation,” terminating the provision of essential services like water would make living on such communities untenable, thereby necessitating relocation. This may violate the right to their lands in article 26 and, for failing to prevent or provide redress, article 8(2). Relocation is also likely to have a detrimental effect on the ability of Indigenous Australians to practice, develop, and maintain their culture (article 11), the right to teach spiritual and religious traditions and protect cultural and spiritual sites (article 12), and to transmit cultural knowledge and language to younger generations (article 13).

Australia’s failure to incorporate these international human rights instruments into domestic law is problematic for Indigenous people seeking enforcement of those rights, or redress for violations thereof. While Australia’s reception of international law is more nuanced than the binary monism/dualism and incorporation/transformation descriptors, generally international law must be implemented to attain the force of law in Australia. Australia ratified the ICESCR in 1975, but it has not been implemented through domestic legislation. Furthermore, absent domestic implementation, the UNDRIP (which was endorsed by Australia in 2009) and authoritative commentary such as from the International Law Association and UN Committees carry little legal weight.

Given the discordance between Australia’s commitment to upholding human rights at the international and national levels, examining this government policy through a rights violation frame is of less utility than in other country contexts. One might hope that as a result of increasing scrutiny (the international community sharply criticized Australia’s treatment of Indigenous Australians during the second Universal Periodic Review of Australia on November 9, 2015) Australia will take its international legal obligations more seriously. But for now, it is perhaps more instructive to interrogate the government’s justifications for the closures—a task I will now embark on.

Interrogating Economic Unviability

The contention that Indigenous communities should be closed because they are economically unviable may be challenged on two major grounds. First, servicing a constellation of Indigenous communities under a minimalist model of administration is both cost-ineffective and unresponsive to disparate communities’ needs. Thus, it would be more accurate to characterize that model, and not the communities themselves, as economically unviable.

Since the demise of ATSIC and CDEP, governments have increasingly outsourced service delivery to external service providers such as NGOs and for-profit organizations, with little support for Indigenous individuals and organizations. The CDEP was established in 1977 when Indigenous people were returning to their ancestral lands. It paid participants a notional equivalent to welfare, but incentivized work by entitling participants to

⁸ Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, arts. 26(1), 26(2) (Sept. 13, 2007).

additional income for extra hours worked. At its peak, CDEP accounted for approximately one third of the Indigenous labor force, providing a “cost effective way of providing both community development and labor market program type objectives” particularly to those living in areas with “very few non-CDEP labor market objectives.”⁹

Remote Australia has paradoxically become “both a region of mass unemployment . . . and mass labor shortages.”¹⁰ Communities are now serviced by external contractors on a fly-in-fly-out basis. This increases the cost of service delivery and also precludes an iterative relationship between service providers and their “clients,” rendering service delivery nonadaptive to local circumstances, needs or wants. Adaptation is not possible because there is no “avenue through which Indigenous people, the users of the services, can exercise choice or even influence in any real way the spending patterns or the actual services provided or their quality.”¹¹ Instead, service delivery organizations are only accountable to governments under their funding contracts. Making matters worse, governments have inadequately coordinated such service provision. The WA Auditor-General’s recently recommended to the Department of Housing that it “[i]mprove its coordination of services to remote aboriginal communities internally and with other agencies.”¹² He observed that the Department of Housing relies on “service providers self-reporting that their own work met contract needs and standards”¹³ and that “[i]nadequate oversight of service providers may mean that Housing has paid twice for some work.”¹⁴

Another explanation for the cost-ineffectiveness of remote service delivery is the tremendous absorption of government monies by bureaucratic red tape. The Department of Finance and Deregulation has noted that the “myriad of contracts, reporting requirements and funding periods” were a major deficiency observed by representatives of service providers in remote communities.¹⁵ The plethora of short-term funding arrangements absorbs the resources of service delivery organizations. For example, Roebourne in Western Australia has a population of 1,150 people and relies on sixty-seven service providers who are funded by more than four hundred Commonwealth and state programs.¹⁶

A second and broader problem with “economic viability” is that, being a static fiscal observation, it ignores the economic potential of remote Indigenous communities, as well as other benefits of Indigenous people remaining on country.

The co-location of remote Indigenous communities and vast parts of conservation rich Indigenous land provides significant employment and conservation opportunities which are only beginning to be realized. As custodians who have a spiritual connection to country and were dependent on their land for their subsistence, Indigenous people have historically cared for country. Since reoccupying their ancestral lands, they have mobilized traditional ecological knowledge to identify and combat new environmental threats. The synergies between these cultural practices and natural resource management are being capitalized through the Commonwealth’s “Working on Country” and “Indigenous Protected Areas” (IPA) initiatives, which provide opportunities for Aboriginal engagement with natural resource management.

⁹ Boyd Hunter & Matthew Gray, *Continuity and change in the Community Development Projects Scheme (CDEP)* 48 AUSTL. J. SOC. ISSUES 35, 36 (2013).

¹⁰ Mark Moran, *What job, which house?: Simple solutions to complex problems in Indigenous affairs*, AUSTL. REV. PUB. AFF., (2009).

¹¹ *Id.* at 52.

¹² OFFICE OF THE AUDITOR GENERAL OF WESTERN AUSTRALIAN, *DELIVERING ESSENTIAL SERVICES TO REMOTE ABORIGINAL COMMUNITIES* 8 (2015) 8.

¹³ *Id.* at 19.

¹⁴ *Id.*

¹⁵ Australian Government, *Department of Finance and Deregulation, Strategic Review of Indigenous Expenditure* (2010).

¹⁶ *Id.*

In his review of the IPA scheme, Brian Gilligan observed that Indigenous land management was “very cost effective in contributing to the conservation aims of the [National Reserve System Programme].”¹⁷ Moreover, a recent study of the Working on Country Program concludes that Indigenous Ranger jobs and IPAs are “providing essential environmental management and protection across vast areas of Australia . . . controlling and eradicating feral animals and noxious weeds, protecting threatened species, reducing greenhouse gas pollution and supporting critical research—delivers results from which all Australians benefit.”¹⁸ The report documents significant national economic benefits of IPAs and Working on Country Initiatives, including greater workforce participation, cost savings to governments through lower expenditures on health, policing, corrective services and public housing, and economic returns from new Indigenous business ventures.¹⁹ The benefits to Indigenous communities have also been considerable. Individuals employed under the schemes have higher incomes and greater opportunity to contribute to the external economy through gained skills and experience. Cultural and social benefits include a reduction in crime, preservation and transfer of cultural knowledge, and enhanced connection to country. There are also associated improvements to physical health, and reduced alcohol and substance abuse.²⁰

At present, over 63 million hectares of Australian land are IPAs. In the WA Ngaanyatjarra region alone there are 9.8 million hectares of IPA.²¹ The economic and conservation potential arising from Indigenous colocation in IPAs is massive. And yet, the closure of remote communities will empty these IPAs, thereby reducing opportunity for Indigenous management of those areas. The ecological knowledge and conservation practices of Indigenous people living remotely should be optimized. The government currently spends \$ sixty-seven million per annum on Working on Country and IPA programs, which constitutes only 2 percent of federal funding of Indigenous specific programs. Given the proven economic, environmental and other benefits of these initiatives, Governments should invest more money in the described initiatives, enabling Indigenous people to stay on country, while doing beneficial work that draws on their traditional knowledge.

Experimentalist governance

Earlier I characterized the mainstreamed and centralized service delivery model as a minimalist model of public administration that is ill suited to servicing remote Indigenous communities. For more than a decade, public funds have been centrally directed to address the needs of a constellation of disparate communities with little regard for local specificities, or the views of Indigenous people about their local needs and wants.

Simon and Sabel describe a second model, experimentalism, whose “governing norm in institutional design is reliability—the capacity for learning and adaptation.”²² The experimentalist governance model requires that central institutions give autonomy to local ones to pursue agreed objectives. A justification for providing local people or institutions with broad discretion lies in the principle of subsidiarity, which holds that decisions should be made as close to the level of affected individuals as is appropriate for the circumstances. In order for the governance system to learn and adapt to local specificities, experimentalist regimes facilitate a process of deliberative engagement among discretion bearing officials and the community. Four core elements underline

¹⁷ BRIAN GILLIGAN, *THE INDIGENOUS PROTECTED AREAS PROGRAMME: 2006 EVALUATION* 3 (2006).

¹⁸ PEW CHARITABLE TRUSTS AND SYNERGIES ECONOMIC CONSULTING, *WORKING FOR OUR COUNTRY: A REVIEW OF THE ECONOMIC AND SOCIAL BENEFITS OF INDIGENOUS LAND AND SEA MANAGEMENT* 1 (2015).

¹⁹ *Id.* at 27.

²⁰ *Id.* at 26.

²¹ *Id.* at 9.

²² Sabel & Simon, *supra* note 2, at 55.

this governance model.²³ First, framework goals are set and indicators for measuring their achievement are established. Second, local institutions are granted broad discretion to pursue these objectives. Third, in return for their discretion and autonomy, local institutions must report regularly on their performance and demonstrate that they are making progress. Fourth, consistent with institutional learning and adaptation, the framework goals and performance indicators are periodically revised.

Establishing an experimentalist model, governments could overcome the abovementioned deficiencies that have left communities passively underserved, and at considerable expense, while ensuring that local needs are met. At present there are few entry points for local people to engage in the governance system. To effectively respond to local specificities, officials should coordinate service delivery at the local level, in deliberation with the community. This will require the Government and its public servants to cede some power to those on the ground. It also necessitates flexible funding.

Conclusion

There are great challenges associated with servicing remote Indigenous communities, owing to, *inter alia*, the small size and large distances between communities and the high level of mobility across communities. But these challenges are not insurmountable, and closing communities is not the solution.

Establishing experimentalist, place-based governance systems, and investing more in initiatives which capitalize on the co-location of Indigenous people and conservation rich country is a viable alternative to closures. It is an alternative that is more compliant with international law. By allowing Indigenous people to stay in their communities, Australia would express its commitment to respecting and protecting the rights of Indigenous Australians. Closing communities and potentially breaking Indigenous people's connection to country, endangering their ancient cultures and languages will only further harm the descendants of Australia's first peoples. These are people whose profound resilience against their earlier dispossession should not be tested.

²³ See *id.* at 79.