

**Jurisdictional devolution: Towards an effective  
model for Indigenous community self-determination**

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**No. 233/2002**

ISSN 1036-1774

ISBN 0 7315 5608 9

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## Abbreviations and acronyms

AGPS	Australian Government Publishing Service
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ANU	The Australian National University
ATSIC	Aboriginal and Torres Strait Islander Commission
CAEPR	Centre for Aboriginal Economic Policy Research
CAR	Council for Aboriginal Reconciliation
CEDA	Committee for the Economic Development of Australia
CEO	Chief Executive Officer
CGC	Commonwealth Grants Commission
CHINS	Community Housing and Infrastructure Survey
DFACS	Department of Family and Community Services
DHHS	(US) Department of Health and Human Services
HREOC	Human Rights and Equal Opportunity Commission
HRSCCAA	House of Representatives Standing Committee on Aboriginal Affairs
HRSCFCA	House of Representatives Standing Committee on Family and Community Affairs
IOG	Institute of Governance
IT	information technology
IUCN	International Union for Conservation of Nature
NARU	North Australia Research Unit
NCAI	National Congress of American Indians
NEW	Native Employment Works program
PRWORA	<i>Personal Responsibility and Work Opportunity Reconciliation Act 1996 (USA)</i>
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
TANF	Temporary Assistance to Needy Families

## Summary

Over a decade ago the House of Representatives Standing Committee on Aboriginal Affairs and the Royal Commission into Aboriginal Deaths in Custody concluded that the essence of self-determination is the devolution of political and economic power to Indigenous communities. Self-determination was defined to mean Indigenous people having control over the ultimate decisions about a wide range of matters including political status, and economic, social and cultural development, and having the resources and capacity to control the future of their own communities within the legal structure common to all Australians.

This paper proposes that the concept of jurisdictional devolution could provide a key framework for the practical implementation of self-determination at the community level for Indigenous Australians, and proceeds to examine the nature of the concept, its application, and the challenges and opportunities it presents. It argues that the concept of jurisdictional devolution can be used as an organising perspective or frame of reference. This enables us to develop a policy-relevant language with which to discuss the implementation of local-level self-determination, and connects theoretical propositions about inherent rights to self-determination, and the practice of achieving it in a workable form.

The paper begins by developing an operational definition for the term 'jurisdictional devolution'. It then considers the question: why devolve? What are the imperatives for jurisdictional devolution, the likely advantages and benefits? The discussion focuses on practical design and implementation by examining the lessons that can be drawn from two case studies of devolution in the arena of welfare. The first is from the United States of America, where a process of welfare devolution to Native American Indian Tribes is in the early stages of implementation. The object of this case study is to extrapolate lessons and insights that can be applied to the design and implementation of a relevant Australian model. The second case study presents a preliminary proposal, developed by a central Australian community, for the future devolution of particular components of welfare jurisdiction.

Against the backdrop of that broad comparative perspective, the paper proceeds to consider the factors that will be relevant in Australia for constructing a framework for jurisdictional devolution. A key issue is what might constitute the most effective and relevant Indigenous boundaries and units for devolution. To whom or what would jurisdiction be devolved? In other words, who constitutes the 'self' in self-determination? A 'geography of devolution' is proposed in the form of a flexible aggregation model—regionally dispersed, layered community governance—which has both community and regional elements.

The paper concludes by drawing together these lessons, limitations and practical options in order to highlight the operating principles and types of strategic action that would need to inform the design and implementation of a workable framework for jurisdictional devolution in Australia.

## **Acknowledgments**

The consideration of issues in this paper has greatly benefited from discussions at different times with Stephen Cornell, Sarah Hicks, Neil Sterritt and Neil Westbury, and from the comments of participants at the Centre for Aboriginal Economic Policy Research seminar series on 'Indigenous Governance: Issues, Models and Options for the Future', convened by myself and Dr Will Sanders over three months in 2002 at the Australian National University. I would also like to thank Bill Arthur and Patrick Sullivan for their particularly helpful comments on a draft of this paper. My appreciation also goes to Frances Morphy who provided invaluable editorial input and assisted with the layout, and to Sally Ward for proofreading.





## Introduction

In 1990, the House of Representatives Standing Committee on Aboriginal Affairs (HRSCAA) concluded in its report *Our Future, Our Selves: Aboriginal and Torres Strait Islander Community Control, Management and Resources*, that the essence of self-determination is ‘the devolution of political and economic power to Aboriginal and Torres Strait Islander communities’. Self-determination was defined to mean Aboriginal people having ‘control over the ultimate decision about a wide range of matters including political status, and economic, social and cultural development’ and ‘having the resources and capacity to control the future of their own communities within the legal structure common to all Australians’ (HRSCAA 1990: 12).

A year later, the national report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) concluded ‘that the principle of self-determination is the appropriate basis for reform in Aboriginal affairs’ (RCIADIC 1991, Vol. 4: 19). It also confirmed, through its consultation process, the core principle of self-determination as being the right of Indigenous people to make choices among the spectrum of possibilities for self-determination within the ambit of the Australian legal system.

Describing self-determination as an ‘evolving concept’, the RCIADIC posed the critical question of how such control could be secured. It responded by significantly building upon the HRSCAA report, attempting to set a future direction for achieving self-determination. In particular, it recommended that:

- Federal, State and Territory Governments introduce triennial block grant funding for Indigenous organisations, giving communities
- ‘the greatest freedom possible to decide for themselves the areas on which the funds would be spent’, and that
- ‘wherever possible this funding be allocated through a single source with one set of audit and financial requirements but with the maximum devolution of power to communities and organisations to determine the priorities for the allocation of such funds’ (RCIADIC 1991, Vol. 4: 21).

The RCIADIC further argued that such a process of devolution would have to involve Indigenous Australians at the level of policy design as well as service delivery.

In the decade since the HRSCAA and RCIADIC reports, debate has continued about how to implement Indigenous self-determination, and a number of subsequent government inquiries and research papers have reached similar conclusions.<sup>1</sup> All these various reports have tried to grapple with the concept of devolution, and specifically jurisdictional devolution—whether it be in regard to funding arrangements, regulatory issues, functional areas of government service delivery, decision-making, policy formulation, or political representation.

This paper is exploratory. It focuses on the concept of jurisdictional devolution and proposes that it could provide a key framework—at both the policy and practical levels—for the implementation of self-determination at the community level for Indigenous Australians. It argues that the concept of jurisdictional devolution can be used as an organising perspective or frame of reference (see also Judge et al. 1995; Stoker 1998). It enables us to develop a policy-relevant language with which to discuss the implementation of local-level self-determination, affording a connection between theoretical propositions about inherent rights to self-determination, and the practice of achieving it in a workable form on the ground. It also allows us to explore the nature and extent of the barriers to, and benefits of the process. And it provides a means of identifying the key design principles and areas of strategic action that would be required to give practical effect to self-determination at the community level.

The paper pursues these broad objectives by first developing an operational definition or language for the term ‘jurisdictional devolution’. It then considers the question: why devolve? What are the imperatives for jurisdictional devolution; the likely advantages or benefits? The paper then focuses on issues of practical design and implementation, by examining the lessons that can be drawn from two case studies of devolution from the arena of welfare. The first is a case study from the United States of America (USA) of welfare devolution to Native American Indian Tribes that is in the early stages of implementation. The object is not to suggest a straight importation of an American model; but rather to derive useful lessons and insights that can be taken into consideration for the design and implementation of an Australian model. The second case study presents a preliminary proposal developed by a central Australian community for the future devolution of particular components of welfare jurisdiction.

Against the backdrop of that broad comparative perspective, the paper then proceeds to consider the factors that will be relevant for the construction of a framework for jurisdictional devolution in Australia. A key issue is what might constitute the most effective and relevant Indigenous boundaries and units for devolution. To whom or what would jurisdiction be devolved? In other words, who constitutes the ‘self’ in self-determination? A ‘geography of devolution’ is proposed in the form of a flexible aggregation model—regionally dispersed, layered community governance—which has both community and regional elements.

The paper concludes by drawing these lessons, limitations and practical options together in order to highlight the operating principles and strategic action that would need to inform the design and implementation of a workable framework for jurisdictional devolution in Australia.

Before proceeding, some caveats need to be mentioned. Firstly, the paper focuses on the Indigenous community level, and its potential connection to wider regional aggregations. Indigenous political and institutional factors at the national level are not a focus. These have been substantially examined in a wide variety of publications (see e.g. Australia Institute 2000; Sanders 2002; Sullivan 1996; and numerous papers, reviews and government inquiries, many of which are listed on

the Aboriginal and Torres Strait Islander Commission (ATSIC) web page [www.atsic.gov.au]). While jurisdictional devolution implies a 'top-down' process, this paper suggests that workable and relevant forms of devolution will only be developed by first examining the nature of needs at the local level, and local preferences and circumstances, and how those critically affect design and implementation.

Secondly, the possibility of developing a policy-relevant framework for the practical implementation of self-determination is explored in the full knowledge that in recent years self-determination, let alone an implementation strategy, has been rejected as an active federal government policy position (see Dodson & Pritchard 1998; Sanders 2002: 2). One purported reason for rejection by government is that self-determination promotes separatism and a stand-alone form of sovereignty. Clearly, there are other interpretations of self-determination, including the framework of jurisdictional devolution discussed here and those put forward in many previous government inquiries. Despite the policy position of the present Federal Government, key agencies, statutory authorities and lower levels of government continue to promote various policy and program strategies to secure positive benefits from Indigenous self-determination and empowerment.

### **Jurisdictional devolution: some definitional issues**

The term 'jurisdiction' is defined in its common-sense meaning as 'the right, power, or authority to administer the law by hearing and determining controversies'; 'the extent or range of judicial or other authority'; and the 'territory over which authority is exercised'.<sup>2</sup> Jurisdictional authority may be exercised over public institutions, territory, expenditure and revenue-raising capacities, and functional and policy areas such as law-making, taxation, health, housing, municipal services, education, economic development, social security and so on. Under Australian federalism, jurisdictions are multi-layered, with different kinds of power and authority differently distributed across levels; sometimes divided, sometimes overlapping and concurrent.

When we think of 'jurisdiction' we must also recognise an inherently cross-cultural element. A number of commentators argue that Aboriginal law constitutes an 'original jurisdiction'. For example, Noel Pearson (1977) has suggested that the concept of sovereignty resided in Aboriginal law and corporate groups prior to British colonisation. Marcia Langton refers to the 'ancient jurisdictions' of Aboriginal polities, arguing that if, as the common law now holds, 'native title survives, then Aboriginal jurisdictions, that is the juridical and social spaces in which such laws are practices, must also survive' (Langton 2002: 1; see also Reynolds 1996, 1998: 208–15). The practice of Aboriginal governance today is, as Langton (2002: 6) argues, indistinguishable from practices of ownership, and that jurisdiction is an 'extremely localised one, elaborated across regions, but exercised by individuals with authority'.

A range of precedent-setting court cases and reports have sought to explore the nature of Indigenous jurisdiction, and the extent of its potential co-existence with the common law.<sup>3</sup> Particular pieces of legislation have given a degree of recognition and protection to particular aspects of it; for example, traditional ownership expressed as inalienable freehold title over certain territory. But recognition of an Indigenous jurisdiction has been piecemeal, and its exercise invariably confined to the so-called ‘traditional’ domain—that is, it is generally not seen to include resource rights, commercial exploitation, legislative or court authority, control over revenue raising, or a right to self-government.

The term devolution can be defined to mean the transference of power and authority over jurisdictions from a higher, central level or order of government to other levels or orders of government. When it occurs in the form of transferring broad powers over specific territory to self-governing units, it gives effect to sovereignty and self-government. But it may also take the form of vertical transfers of discrete powers over specific jurisdictions, or even over sub-components of specific jurisdictions (e.g. transferring authority over particular resources or functional areas). Such transferred power may be in respect to any possible combination of administrative, political, financial, functional and policy domains. Within the system of federalism and the legal structure common to all Australians, ‘devolution’ is arguably a more appropriate term than ‘decentralisation’ in talking about developing Indigenous jurisdictional authority as an aspect of local self-determination.

Decentralisation is the delegation of responsibility to subordinate dispersed units of hierarchical jurisdiction which have primary accountability upwards to their superiors in the hierarchy (International Union for the Conservation of Nature (IUCN) 2001: 2). It may provide more local administrative and management discretion, but financial control, policy independence and decision-making power are not necessarily transferred or more discretionary (Whiteford 2001: 112). For example, transferring welfare services from a central government department to a community welfare office which is staffed by government officers or their local agents, and which is directed by central government policy and program objectives, is an example of decentralisation. In decentralisation, top-level decision-making processes are dispersed throughout the system of government (Arbib 1984); but jurisdictional authority is not transferred.

The term devolution, on the other hand, describes cases where the transfer of responsibilities coincides with the transfer of power and capacity to legitimate, representative institutions. Devolution can give a practical form to corporate or geographic autonomy, and to the possibility of ‘internal self-government’ (Arthur 2001: 2). It involves the creation of relatively autonomous realms of authority, responsibility and entitlement, together with accountability to local constituents. For example, transferring authority for welfare policy and program design, administration and implementation (either in full or in part) to a community or regional institution which is representative of community or regional residents, and is able to exercise a degree of prerogative in these areas, is an example of jurisdictional devolution (see also Whiteford 2001: 112).

There are limits to which it is possible to sustain an analytical distinction between the terms 'devolution' and 'decentralisation'. For example, it should be possible to initiate a process of devolution via a series of consciously targeted decentralisation steps that progressively transfer delegation and authority. Equally, there may be a point in this continuum at which the limits of decentralisation as a strategy for implementing self-determination and developing community governance became apparent; for example, in the form of central government reluctance to transfer power and disrupt the existing bureaucratic balance of power among the units of government.

To sum up, jurisdictional devolution is defined here as the process of power sharing within a common legal and governmental order.<sup>4</sup> It results in a form of 'decentred diverse federalism' where autonomy is practiced as an 'interdependent' process, in relation to other units (Havemann 1999: 472; Nedelsky 1989; Young 2000: 238, 253). By implication, jurisdictional devolution is about the political economy of power-sharing, and the process of developing a system of inter-related jurisdictional parts. Any move along the centralised-devolved continuum can therefore take a range of forms with variation in jurisdictional coverage and in the extent of autonomy and interdependence, according to whether it is legislative, administrative, or both (Havemann 1999; Ivison et al. 2000; Whiteford 2001: 112).

### **Potential benefits and opportunities of devolution**

Calls for jurisdictional devolution come from a number of different quarters, for reasons which spring from political, cultural and economic concerns including cultural diversity, shared identity, heritage protection, community economic development, regional land and resource management, and the desire for greater self-determination.

### **Devolution as a means to implementing self-determination**

The principle of self-determination holds that culturally distinct groups should have a degree of control over those economic, political, and social institutions that impact on their way of life. Ironically, some commentators complain it is actually Australia's self-determination policy that is the current problem in Indigenous affairs; that it is holding Indigenous people back from socioeconomic engagement with the mainstream economy. But it is premature to declare self-determination as being past its 'use-by' date when, at no stage over the last three decades, has any Indigenous community or region been handed genuine self-determination. Rather, the implementation of self-determination by Australian governments over the last two decades has consisted more of a 'dump and run' exercise. Certain assets, resources and responsibilities have been handed over to community organisations. But at the same time, many government departments and non-government agencies have 'vacated the field', withdrawing staff and practical support.

The current position is that government funding and administrative arrangements impose major restrictions on the capacity for self-determination of Indigenous communities and their organisations (Australia Institute 2000; Commonwealth Grants Commission (CGC) 2001; Smith 2002b). Funds are:

- administered by multiple departments which retain financial authority;
- delivered in a stop-start process via a multitude of small separate grants;
- subject to changing policy and externally controlled program priorities, inflexible conditions and timeframes; and
- overloaded with heavy burdens of administrative and 'upward' accountability.

This occurs in a context where a high degree of overlapping government jurisdiction over Indigenous program and service delivery exists alongside an entrenched resistance within governments and their departments to coordinate those functions. There is also a lack of transparency in government expenditure on Indigenous program funding (Arthur 1991; Australia Institute 2000; CGC 2001; Council for Aboriginal Reconciliation (CAR) 1998; Smith 1992a, 1992b, 2002b). Little by way of comprehensive financial authority, or self-governing powers, have been devolved to communities, and little sustained attention has been paid to building the governing institutions and capacities necessary for the effective implementation of self-determination. As a result, Indigenous community organisations are overwhelmed by the daily workload of implementing what could be called a 'Claytons' self-determination.<sup>5</sup> In these circumstances, jurisdictional devolution could arguably constitute an effective and measured means to give practical content and meaning to self-determination policy.

### **A trend towards greater devolution**

There is both a historical and a current Australian Indigenous demand for greater participation in the decision-making institutions of the state and for more autonomy in the form of devolved authority across a wide range of jurisdictions, including land ownership and management, health, welfare, economic development, law, and education. This demand is not cohesive, nor pan-Australian, but it is a force, and in some areas it is growing more assertive and strategic (see Reynolds 1996, 1998).

This trend parallels an international movement towards greater Indigenous self-determination and self-governance through devolution (see Cornell et al. 2000; Havemann 1999; Hawkes 2001; Hicks & Dossett 2000; Hylton 1999; Ivison et al. 2000). The Indigenous momentum is thus part of a widely recognised global trend towards the implementation by nation states of greater devolution and decentralisation; especially in respect to devolution of authority over jurisdictional matters to sub-systems within the state (Whiteford 2001; World Bank 1994).

### **Devolution fits federated systems**

As a process of evolutionary change, devolution fits well into federal governance systems in general (see Hawkes 2001: 153–4; Kymlicka 2000; Young 2000), and

arguably also into Australia's federal system. A key advantage of federalised jurisdictions lies in their diversity. Federalism allows for a greater voice at the local level, and greater choice (national governments are usually predisposed towards uniform policies), and it accommodates a diversity of identities and loyalties. Australian federalism has undergone a fundamental reshaping in recent years which has seen a growing emphasis on the advantages of collaborative diversity. As Martin Painter noted, 'State and Commonwealth governments have found themselves, often against their immediate wishes, cooperating ever more closely on joint schemes of policy and administration'—and 'doing so in new ways that ... further entangle them in webs of financial and bureaucratic relations' (1998: 1–2). In such a system, zones of Indigenous jurisdiction could become a recognised component, and this has been increasingly the case overseas (Fiscal Realities, Economists 2002; Hawkes 2001; IOG 1997, 1998; Johnson et al. 2000).

In developing a model of modern governance for the USA that would be inclusive of Native American Indian rights and interests, Iris Young (2000) advocated the benefits of a 'decentred diverse democratic federalism'. The model is partly based on the operation and early colonial influence of a traditional form of confederacy amongst the Iroquois Indian Nations which emphasised 'the virtues of united strength that preserved a high level of local self-determination' amongst member groups (2000: 241). Young's model of decentred federalism draws partly upon the work of Frug (1999) and Nedelsky (1989) who have explored the notion of the 'relational self' and 'relational autonomy' in constructions of citizenship, community-building and governance. As distinct from the 'sovereign self', the 'relational self' is not an isolate, but constituted by interaction with others and their interdependencies. Instead of assuming that governance must be centred, bounded and unitary, the concept of the relational self poses the possibility that federal systems of governance can be decentred and accommodate interdependent layers: a 'pooling of sovereignties—federal, state and Indigenous' (Hawkes 2001: 154).

Furthermore, as Young (2000) and Hawkes (2001) argue, there are 'mutual traditions' or analogues to western federal concepts and systems within the traditions of many Indigenous peoples. These comprise, for example, federalised Indigenous political organisations, and religious and economic alliances, which stress a structural balance between interdependence and autonomy. Arguably, the culturally-based principle of 'autonomy and relatedness' found amongst Indigenous Australians—a principle which is fundamental to the creation and reproduction of enduring Indigenous webs of social relations, economic exchange cycles, and ritual and political alliances—is an example of such a 'mutual tradition'.

Within the Australian Indigenous domain there is a cultural preference, on the one hand, for autonomy, that is marked by a tendency towards localism and the value accorded to small kin-based congeries of people attached to core geographic locales. But this momentum towards 'atomism' and autonomy is balanced, on the other hand, by an equally compelling strain towards 'collectivism', connectedness and interdependence (Sutton 1995a). This brings small-scale groups together into

sometimes lasting, sometimes short-term confederacies that are formed on the basis of wider systems of cross-cutting territorial and reciprocal kin responsibilities and ritual alliances, and larger-scale political and economic networks (see Smith 1995; Sullivan 1995; Sutton 1995b).<sup>6</sup>

The process of devolution within a system of decentred federalism aims to provide the constituent units or parts with more effective control over their own spheres of action, and influence over the determination of the conditions of local action. It is the case, however, that mutual traditions and behavioural norms need not be based on mutually acceptable value systems. To that extent, any framework for devolution will have to consider the applicability of universally accepted guiding principles for good governance (such as equity, fairness, flexibility, transparency, accountability, efficiency and effectiveness), to a design 'fit' with local and regional culturally-specific traditions (see discussion of various aspects of this issue in Cornell et al. 2000; Cornell & Taylor 2000; Martin 2002; Plumptre & Graham 1999; Sterritt 2001).

### **Building more effective community and regional governance**

Another argument for the benefits of devolution, which I increasingly receiving attention internationally, is cast in terms of the so-called 'crisis of governability' in centralised states, including the 'growing dysfunction of state action' (see Hawkes 2001; Merrien 1998; Stoker 1998). Large jurisdictions obscure the linkages between authority and responsibility. They invariably claim authority, but their reach, in terms of administrative and communications capacity, exceeds their grasp, in terms of ability to implement. As a consequence, the state apparatus is criticised for losing touch with civil society, being unable to cope with regional policy and economic problems, and being unable to arbitrate between numerous competing demands (Merrien 1998; Plumptre & Graham 1999).

By comparison, jurisdictional reportedly provides a mechanism for building better governance at the local and community levels. It promotes more direct participation of local constituents in decision-making. It enables more locally-informed targeting of programs and policies, the establishment of more relevant governance structures and processes, and therefore the likelihood of more effective service delivery because of a greater responsiveness to local preferences and circumstances. Devolved jurisdictions are also reported to be incubators for innovation, where local experimentation can be carried out and solutions adapted in ways not possible at more centralised ('remote') levels of government (Argy 2001; Stoker 1998; World Bank 1994).

Smaller jurisdictions shorten the number of connections between levels of accountability, and therefore link accountability more immediately to responsibility and consequences. They may also reduce unnecessary duplication resulting in better value for money; although there is usually a set of trade-offs between efficiency and equity at any jurisdictional level (Argy 2001; Whiteford 2001).



Devolution has been shown to provide a way of community-building and of region-building (Cashaback 2001; Cornell et al. 2000, 2001; World Bank 1994). The call for greater devolution is part of renewed international interest in indigenous community development, and the spatial dimensions of socioeconomic disadvantage; what Kleinman (1998) calls the 'new politics of place and poverty' (see also Peters 1999). In Australia, the connection between Indigenous disadvantage, and population distribution across different geographic locations is well-documented, and solutions should be tailored accordingly (see CGC 2001; Taylor 1997). In order to maximise socioeconomic wellbeing in different locales, and more effectively respond to differences in local preferences, and disabilities conferred by geography, it may well be necessary to vary local governance structures and the coverage of devolved jurisdictions.

### **Facilitating cohesive local political representation**

Devolution highlights the issue Weaver (1984) called 'political representivity', and is both cause and effect in new stages in the formation of Indigenous cultural and political identities. The federalist principle of 'autonomy and relatedness' arguably informs the 'persistent and strong assertion of Indigenous interests via large-scale organisations' (such as through regionally-based political, land rights and native title organisations, see Smith 1995: 66-7; Sullivan 1995) which Sutton (1995b) has referred to as the 'new corporate tribes'. But a tidal wave of organisational incorporation has occurred in Indigenous communities over the last three decades. There is also a lack of national policy clarity, and under Australia's self-determination policy, several different structural levels of Indigenous representation have been funded (familial, organisational, community and regional). This has occurred in a haphazard and poorly coordinated manner. As a consequence, fiscal duplication and ineffective governance have been exacerbated on the ground.

Today, there is a legally incorporated body for approximately every 100 Indigenous people in the country. While there have been political and other advantages to incorporation, many Indigenous organisations have become silos of factional power within communities and regions, competing with each other for local legitimacy, scarce funds and staff. The results have more often been counterproductive than conducive to good community governance and accountable political representation.

A systematic framework for jurisdictional devolution could facilitate a more integrated approach to Indigenous attempts to develop representative governance organisations from regional and community-based sets of interests.<sup>7</sup> As part of that process, the existing organisational separatism within many communities would need to be structurally counterbalanced by the devolution of significant responsibility to a single community governance body, with accountability to *all* community members and authority over community development. This design principle also has implications for the generation of wider regional levels of jurisdictional representation across several communities.

At the same time, the Australian Indigenous tradition of diverse decentralised federalism suggests that no single corporate or cultural layer will suffice or be effective by itself as the sole structural unit for devolution. Rather, jurisdictional devolution will need to be built upon identified layers or aggregations of responsibility and accountability—as it has been for the Australian federal system of government.

Important groundwork for Indigenous self-determination via greater devolution has already been laid in some regions of Australia, particularly in local government and in the establishment of regional Indigenous service and representative organisations (see Arthur 2001; Nettheim et al. 2002; Sanders 2002; Smith 1995; Westbury & Sanders 2000). It nevertheless remains the case that few Indigenous communities and their governing institutions are able to exercise *comprehensive jurisdictional authority* over many of the matters of most direct concern to them, because few levels of Australian government share their jurisdictional responsibilities and powers with Indigenous people.

### **In summary**

There are significant political, cultural, economic and institutional advantages for many stakeholders that accrue to the process of jurisdictional devolution. Such a process would give a practical content to self-determination at the Indigenous community level. The extent to which these benefits can be secured, and perverse outcomes avoided, rests on factors operating at several levels. These will be explored below.

The question now to be examined in more detail is, what would comprise a framework for jurisdictional devolution for Indigenous self-determination that would positively assist in securing such benefits, and what might it look like on the ground? There is a great deal to be learnt about design and implementation issues, and potential benefits and obstacles, by examining two devolution initiatives—one already in practice overseas, and another under negotiation in Australia.

### **Temporary Assistance to Needy Families: an overseas model for jurisdictional devolution of welfare**

In the USA, the self-determination policy as articulated in the *Indian Self-Determination and Education Assistance Act 1975* and subsequent amendments and legislation, makes it possible for Indian Tribes to contract and compact with the Federal Government to directly manage federal programs. Recently, this process has expanded to include the devolution of federal welfare programs to both State and Tribal authorities via a new program called Temporary Assistance to Needy Families (TANF), which replaces existing national welfare programs (US Department of Health and Human Services (DHHS) 2000).

At the beginning of 2001, the Navajo Tribe signed a proclamation to establish the largest Indian-operated devolved TANF program in the country. With the DHHS

supplying \$31.2 million and another \$1 million coming from the State of New Mexico for office construction, the Federal Government, combined with the State Governments of Arizona, New Mexico and Utah turned over to the Navajo the various welfare payments and the raft of service delivery now known as TANF. The three State Governments kept their offices operating for six months while the Navajo Tribe hired and trained staff, and set up 12 offices to deliver the TANF program to an estimated 27,000 Navajo people.

This is one of the latest in a series of tribally-run welfare programs that have been devolved since 1996 when President Clinton signed national welfare reform legislation known as the *Personal Responsibility and Work Opportunity Reconciliation Act* (PRWORA). This legislation established a transparent process for devolving jurisdictional authority over key areas of federal welfare policy, funding and service delivery to State governments and to Tribes. It is part of a national welfare reform agenda that is designed to move welfare recipients in to work. It also amended the national *Social Security Act* (s. 412) to enable States and federally-recognised Indian Tribes, or consortia of such Tribes, to apply for block federal funding to directly design and operate their own welfare programs.

Under the legislation, the Federal Government redirects to the Tribe an amount equal to that which would have been provided to the State for welfare services to all Indian families residing in proposed service area. The legislation also enables Tribes to enter into partnerships with State Governments to provide support services to Indian families. In parallel with the TANF initiative, federal funding was appropriated to the Native Employment Works (NEW) program to promote tribal work activities and create employment opportunities.

Approval is based on the development and submission of a detailed Tribal TANF Plan, covering a three to four-year period and identifying its proposed service area and population, welfare policies and objectives, program guidelines and penalty regimes, welfare service to be provided, and an economic development plan to support access to employment. Each Tribal TANF Plan goes through an exhaustive federal assessment process, and must obtain Federal Government approval. Updated plans must be submitted every three years. To secure final approval, a Tribe has to have a governing body and capacity to administer the program; and a representative mandate from its constituents.

Indian people participating in TANF for at least two years are required to participate in work activities. According to the latest report to Congress, Tribes enjoy 'unprecedented flexibility'. Under the devolved program they have authority to use federal welfare funds in any manner that is reasonably calculated to accomplish the overall welfare agenda. A tribal governing body can deliver the program or outsource it, and determine program and eligibility criteria.<sup>8</sup> It can also decide what form of benefits are appropriate for their population (e.g. Tribes have flexibility to provide assistance, including to TANF clients, in the form of cash, payments, food vouchers, clothing, shelter, utilities, household goods, personal care items, child-care, and transportation to work). What constitutes acceptable work (e.g. it may be defined to include culturally relevant work, job

search, subsidised employment, community service, vocational training and education), standards of work and participation requirements are in the hands of the Tribes. Tribes may define their own relevant concept of 'family' and 'needy family' (which may include extended-family, shared parenting) and determine the local support services that will be provided to members. By agreement with States, Tribes may also choose to include non-Indian families in their service area. Tribal approaches to these matters must be laid out in their initial plan (DHHS 2000).

As a devolved jurisdiction transferring significant areas of authority, implementation of a Tribal TANF is nevertheless subject to a statutory framework which stipulates planning, approval and funding processes. New national regulations were also been passed in June 1999, covering requirements about the use of funds, program elements, and accountability, and specifying a cap on the amount of federal TANF funds that may be expended on administrative costs. Tribes are also subject to the same data collection and reporting requirements as State Governments.

### **The early lessons from welfare devolution through TANF**

Not surprisingly, devolution of the TANF welfare program has highlighted a number of barriers and challenges. The welfare outcomes are dealt with in more detail in Daly and Smith (forthcoming). Here I will concentrate on the broader policy, structural and procedural issues that have arisen during the early implementation stage.

#### **The extent of devolution to Tribes**

A number of tribal groups have availed themselves of the opportunity to undertake devolved responsibility for welfare. As at the end of 2001, 34 tribal entities (including individual tribal governments and consortia of Tribes) have taken over devolved responsibility for their own TANF programs. These cover more than 170 Tribes in 15 States (out of 330 federally-recognised Tribes and 12 Alaskan Regional Associations designated as eligible to administer the Tribal TANF program if they so choose) (Brown et al. 2001; Hicks & Dossett 2000).

The 34 Tribal TANF programs assist a projected total of 17,000 Indian families per month out of a total of approximately 40,000 families; that is, at least one-third (probably more) of all Indian families (DHHS 2000). The number of families served monthly ranges from eight to over 9,000. If all 38 pending plans are approved, it is estimated that Tribal TANFs will cover approximately half of all Indian families in the country. The 34 Tribal TANF programs were expected to draw down more than \$86 million during the 2001 fiscal year (DHHS 2000). By the same year, a number of tribal groups were undertaking devolved responsibility for other related welfare functions.<sup>9</sup>

### **A flexible, culturally relevant program**

TANF is a young program, and as yet only a small number of field evaluations have been carried out. From research and Congress reports to date, it is clear that the Tribes have begun to take advantage of TANF's flexibility to tailor welfare, employment and training programs to particular reservation populations, economies and social and cultural circumstances (Cornell et al. 2001). As a consequence, there is no standard Tribal TANF, but substantial variability in program design and implementation (Hillabrant & Rhoades 2001). For example, ten Tribal Plans allow for participation in traditional subsistence activities to count toward meeting an individual's work requirement; seven count participation in substance abuse programs and violence counselling towards meeting their work requirement; only five have simply adopted the federal work activities requirements (DHHS 2000).

Tribal TANF programs appear to have been able to deliver more comprehensive and more integrated welfare services on the ground, and it is reported that the local Tribal TANF offices are more accessible to tribal clients than are State offices located at greater distances from reservation populations. For example, the Tanana Chiefs Conference, a non-profit corporation serving tribes in interior Alaska, has used its TANF program to fund part-time workers in each of its 38 isolated villages whose role is to help welfare recipients obtain benefits and support services (Brown et al. 2001: 2). Some tribal TANF programs have also adopted more flexible definitions of 'family' to accommodate extended kin relations and childcare arrangements, for example defining family to include 'caretaker relatives' (Hicks 2001: 3). As a result, Indian people are attracted to tribally-run welfare programs, and the Tribal TANF caseload has been growing as people take themselves off the State rolls.

### **A greater focus on Indian welfare characteristics**

Devolution has served to focus attention on, and analysis of, Indian welfare characteristics and, therefore, the specific needs of recipients in making the transition into work. Indian Tribes face significant challenges in implementing welfare reform. Many tribal communities suffer from disproportionate poverty rates, remote geographic locations and lack of access to mainstream services, high costs of delivery, lack of an economic base, inadequate training, and lack of facilities and infrastructure.

Under the TANF in general, non-Indian caseloads in State-run programs have dropped dramatically. On average, welfare caseloads across the states have dropped by 50 per cent (DHHS 2000).<sup>10</sup> The complexity of the Indian welfare picture has become more apparent. A recent study of a selection of Tribal TANF programs found that 64 per cent of Indian adults participate in some type of work activity. Of that total, only 11 per cent were working in unsubsidised employment, and a only small proportion of those were working full time. Approximately 33 per cent were undertaking job search and job readiness activities (DHHS 2000). In other words, Indian welfare caseloads are dropping in a

number of States, but not dropping as fast as non-Indian caseloads. And in some States and on some reservations, caseloads are actually rising as Indian welfare recipients choose to register in Tribal TANF programs (Brown 2001; Hillabrant & Rhoades 2001).

There are a number of factors here, many of which involve demand and supply in respect to all long-term welfare recipients, rather than the process of devolution. As State welfare rolls are dropping, their remaining caseloads are becoming increasingly—and disproportionately—Indian (Hicks & Brown 2000: 4). That is, after the most able-to-work recipients have left the welfare rolls, the so-called ‘hardest-to-serve’ recipients remain. A large proportion of the Indian TANF caseload are in this category: persons with low human capital endowments requiring specialised and intensive support, and placing exceptional demands on tribal staff and resources. As a consequence, in States with significant proportions of Indian residents, welfare is becoming more and more an Indian program, and Tribal TANF programs are assuming the major case management role with long-term welfare recipients, in adverse local economic circumstances (Burke 2001; Cornell et al. 2001).

Jobs are scarce on Indian reservations (the average unemployment rate across all Indian reservations in 1999 was 43%; on some it was as high as 70–80%). Lack of access to child-care and transportation, substance abuse and mental health problems are reported as the top barriers (Brown 2001: 3; Hicks 2001). Much of the ‘work participation’ that people are moving into consists of subsidised work, work experience, education and training. Where people have been moving from welfare to work on tribal programs it has been generally to low-waged work, and they continue to need income support via TANF—as has been the case for many non-Indian TANF clients. This is not so much a problem of devolution, it is more of a broader economic issue.

### **Devolution and the ‘work first’ policy**

The hallmark of mainstream welfare reform enacted via the USA Federal Government’s TANF program is ‘work first’; that is, the policy assumption is that with low job readiness but the right incentives and supports, American welfare recipients will find employment within a stipulated timeframe (and are required to do so). With the devolution of TANF to tribal groups, this approach has been shown to be impractical on Indian reserves where there is an enormous job gap and economic under-development (Cornell et al. 2001; Hillabrant & Rhoades 2001: 56). Accordingly, many tribal TANF programs are supplementing ‘work first’ with education, training and supported work initiatives, and adapting program criteria to count these as active participation to fulfil TANF work activity criteria.

More recent evaluations (Cornell et al. 2001; see also DHHS 2000: 5, 6–9) have argued that while ‘education first’ is an important strategy, it is a limited one, at best a holding position. Compared to all ethnic and minority groups on the welfare rolls within the USA, Indian Americans are in fact the best educated and have the highest participation rate in job preparation programs (Cornell et al.

2001: 6, 37).<sup>11</sup> But education is unlikely to have significant impact on Indian welfare dependency given the scarcity of jobs on Indian reservations. Without jobs, education and training are of limited help to welfare recipients. Economic development and economic growth are the lynchpins for welfare reform and securing outcomes from TANF programs—whether they be Tribal or State, devolved or not (Cornell et al. 2001; Hicks & Brown 2000: 7).

### **Program linkage and coordination issues**

The connections between TANF and other key employment, training and economic development programs are weak. Preliminary evaluations indicate that well-established linkages with other programs and agencies are critical to successful devolution (Hillabrant & Rhoades 2001). No single agency is likely to have the range of resources and expertise to address all issues and problems faced by Indian welfare recipients. It has become critical to match the needs of recipients with different agencies that can respond effectively and rapidly (Hicks 2001; Hicks & Brown 2000).

The *Indian Employment, Training and Related Services Demonstration Act 1992* (Known as 'Public Law 102-477') allows Tribes to combine the funds they receive for a variety of employment, training, education and related services from federal agencies (Brown 2001; Hicks 2001: 5; Hillabrant & Rhoades 2001: 30-31). An increasing number of Tribes have activated these '477 Programs' to support jurisdictional devolution not only in respect to welfare programs but other related areas. These various programs can then be delivered through a single plan, a single budget and a single reporting system.

There have been major advantages for Tribes in using this type of statutory mechanism to implement a workable form of devolution. The advantages include:

- being able to co-locate services to provide welfare recipients with a one-stop shop, and to streamline eligibility processes and reporting burdens for different programs;
- creating a larger integrated pool of funds for welfare, employment and training activities to support devolution;
- allowing staff to be more easily be deployed across programs via the pooling of multiple funding sources;
- reducing the number of funding sources for which expenditure needs to be accounted;
- reducing referrals across programs, and enhancing access to available programs; and
- reducing duplication of services.

### **Changing the dynamics of State-Tribal relationships**

The devolution of TANF to States and to Tribes seems to be slowly changing the historic tensions in the relationship between them (DHHS 2002: 4; Hicks & Dossett 2000). The interests of both parties are converging as both now focus on

families and individual welfare recipients with substantial obstacles to gaining employment. Under a devolved TANF, States and Tribes have had to develop better communication processes and negotiate transfer arrangements. Tribes are finding that some States are becoming important sources of support and technical assistance on the ground to tribal staff (Begay 1999). Tribal TANFs are having to develop strong program linkages and referral arrangements with State agencies. And a number of Tribes have negotiated agreements with State Governments and county offices about service delivery procedures.

A small number of Tribal TANFs have chosen to sub-contract delivery back to State service providers for different components of their programs. Some States, in turn, are increasingly using Tribal TANF officers to assist them to plan case management strategies and eligibility criteria for other Indian clients who remain on State caseloads. At the same time, early evaluations report a continuing legislative bias favouring State administration and funding arrangements at the expense of tribally devolved programs (Johnson et al. 2000; Hicks & Brown 2000). Also coordination is proving complex in cases where States lack an overall policy position on the range and extent of possible cooperation between their various departments and Tribal TANF offices.

### **Economy of scale issues**

Small Tribes have faced problems with economies of scale in the welfare devolution process. Some have sought to mitigate these by forming consortia to provide services and share program operating costs and staff (Hillabrant & Rhoades 2001: 55). This is of particular benefit when the funds, client population numbers, established infrastructure and other resources are too small to enable a Tribe to operate a TANF of its own. These consortia have also enabled geographically discontinuous Tribes to administer a single devolved program.

There were three multi-Tribal TANF operations at the beginning of 2001 (Brown 2001: 7; DHHS 2000). One is an inter-Tribal consortium of 19 Tribes from southern California (known as the Californian Manpower Corporation), and the other two are Alaskan Regional Associations which serve a total of seven Alaskan native villages or Tribes. Several other tribal consortia are known to be actively exploring the option of operating TANF programs. The evidence to date suggests substantial tribal administrative and coordination capacity is required for consortia to be established and effectively maintained.

### **Institutional capacity-building**

In the context of the historical lack of facilities and administrative infrastructure on many reservations, institutional capacity-building has been shown to be critical in devolving tribal social service provision (Pandey et al. 2000). Tribes are having to build offices, develop their own regulatory codes, reform their constitutions, and develop new governance arrangements and procedures for delivering the TANF program. Devolution has invariably required substantial strengthening of tribal financial and accounting systems, and other auditing and



record-keeping capacities. It has also highlighted the need for leaders and local staff who are capable of engineering the transition to more integrated and effective service provision (Cornell et al. 2001: 38).

### **Technical support and data management**

The change from passive receipt of welfare benefits to devolved management has generated greater demand for information and technology to support administration and evaluation. Devolution has highlighted the dearth of accurate data on Indian populations (by tribal affiliation) at the State level, including amongst Tribal organisations. Tribes generally lack the information resources, trained statistical staff, and infrastructure to administer welfare information systems of the quality that State and Federal Governments possess (Brown 2001; Hicks & Brown 2000: 10).

As a result, devolution has encouraged increased agreement-making about communication procedures, technical support, and data management with State and Federal agencies. For example, the Navajo Nation TANF is testing a customised electronic case management and tracking system that links case workers from its 12 welfare offices by satellite so they can coordinate the determination of eligibility for TANF, child support, child care and general assistance welfare services. The system is also designed to be compatible with State TANF data collection systems, so that information can be shared between the Tribe and States (Brown 2001: 4). Another Tribal TANF in Oregon uses the State's computer system for its case management, for the issuing of grants, and for data collection and reporting activities (Brown 2001: 6).

### **The adequacy of funding**

Currently, Tribal communities incur proportionately heavier financial burdens than do States in operating devolved TANF programs. Devolved program funding between States and Tribes is not equalised to take into account the fact that Tribal TANF programs serve long-term welfare recipients who face major impediments to transferring to work.

Approximately 71 per cent of Tribes receive State matching funds; the remainder are receiving significantly less funds than States received in order to carry out the same level of welfare services to the same kinds of welfare recipients (Brown et al. 2001). Tribes also receive their funding base on a formula that differs from that applied to State-run TANF programs—and they are locked into the 1994 population numbers provided by States for their Indian welfare clients (Hicks 2001; Hicks & Brown 2000: 6–8, 10; Hillabrant & Rhoades 2001).

There is a lack of federal funding for tribal program start-up—a significant hurdle given the historical gaps in reservation infrastructure and the high early costs of program establishment. This disadvantages smaller, less well-off tribal communities, and requires others to subsidise program costs with tribal resources. For example, the Navajo Tribe appropriated approximately \$1.5 million from its own tribal revenues to offset the start-up costs of TANF administration,

planning and information systems (Brown et al. 2001: 2). By comparison, States have received federal welfare program funding and infrastructure support, building up over the last 60 years.

An additional financial disadvantage for Tribes is that they do not receive the same bonuses offered to States for reducing welfare caseloads, and are not eligible (as States are) for funds to evaluate their programs. The National Congress of American Indians (NCAI) has noted that insufficient funding for the program has prevented some Tribes from initiating their own TANF programs (Hicks 2001; Hicks & Brown 2000; Hicks & Dossett 2000).

### **Implications of TANF for an Australian framework for jurisdictional devolution**

Recognising the historical, cultural, legislative and policy differences between the two countries, a number of potentially valuable lessons for Australia can be extrapolated from the TANF devolution process in the USA. The TANF experience highlights the importance of the following factors in the successful design and implementation of any process of jurisdictional devolution:

- a national legislative and policy framework to support the devolution process;
- national regulations to promote shared program benchmarks, equity, and administrative standards;
- a statutory basis for program coordination and fund pooling across several program areas,
- adequate baseline funding for planning, and for the set-up phase, infrastructure catch-up, administration, technical support and program evaluation;
- realistic timeframes for the initial planning stage and start-up;
- an incremental implementation that is subject to periodic evaluation and reporting requirements;
- flexible coordination and agreement-making mechanisms between Indigenous groups and State Governments and their departments;
- the development of local-level data collection, management and reporting systems;
- the potentially significant role of State and Federal Governments in providing technical assistance and data-sharing to Indigenous groups;
- the use of consortia arrangements to achieve economies of scale and enable small Indigenous populations to maximise the benefits of sharing administrative, funding and other resources; and
- institutional and governance capacity-building at the local level.

Whatever the jurisdictional domain involved, the design and implementation of a devolution process in Australia will need to address many of the broad problems and challenges highlighted by the American TANF experience. But there will also

be important differences. One of the most critical matters to be addressed is what might be the most appropriate units and boundaries in Australia for devolution at the local level, and what forms of power-sharing and authority might be involved. Answers to those questions will have spatial, cultural, political and social components, some of which are discussed below.

## **A Central Australian community proposal for devolution of welfare**

A recent welfare initiative taken by one Indigenous community in central Australia provides the opportunity to consider what the design components and principles of a model for jurisdictional devolution might be. It also highlights a number of the issues raised by the USA TANF devolution experience, allowing the development of a relevant framework and practical strategies for Australian circumstances.

### **The policy background**

Australia continues to operate a highly centralised social security system that reportedly has a high level of efficiency, but a weak level of response to local service issues (Whiteford 2001: 118). A number of recent government inquiries have sought to address the inadequacies of this model, including in its application to Indigenous Australians. In 2000, the House of Representatives Standing Committee on Family and Community Affairs (HRSCFCA) recommended in its published report *Health is Life* (2000), that where Indigenous communities wished to volunteer to manage welfare payments and services: '[t]he Commonwealth [should] facilitate innovative models of income support and funding to Indigenous communities' (HRSCFCA 2000: 33).

The Committee endorsed the need for the pooling of Indigenous health funds at a regional level, and the need for additional weighting to be given to cover the higher costs of servicing remote communities. It argued that communities should be supported to take responsibility for determining the use of pool funds in delivering health services to their community members.

In its response to the McClure (2000) welfare reform Report in late 2000, the Federal Government announced that:

A fundamentally new approach is needed to increase the social and economic participation of Indigenous people ... Under this approach, community-based providers of welfare services ... will have a key role in the whole gamut of welfare reform—policy advice, programme design, programme implementation and service delivery (Commonwealth of Australia 2000: 8, 10–11).

At the same time, an Indigenous Families and Communities Roundtable was convened by the Commonwealth Minister for Family and Community Services with a brief to consider solutions for Indigenous welfare and economic development. The first Roundtable meeting in 2000 stated in a government media release that:

Programmes should be based on the views and aspirations of whole communities and Indigenous people themselves should have a central role in the design, planning and delivery of services (Commonwealth Minister for Family and Community Services, 24 October 2000).

A small number of research and applied projects have recently considered the factors involved in Indigenous welfare dependence, and have made recommendations, consistent with these policy objectives, for greater Indigenous participation, more culturally relevant service delivery, and local community control in welfare service delivery (see Pearson 2000; Sanders 1999; Smith 2000, 2002a). The unresolved issue of devolution lies at the heart of several initiatives arising from the welfare reform process. However, there is little public reporting or evaluation available; one recent proposal has been documented (see HREOC 2002: 79–91; Smith 2002a).

### **An agreement over coordination and pooling of block funding**

In 2001, the Indigenous Council members of a central Australian community, together with the Council's Chief Executive Officer, attempted to address this government policy about welfare reform. They put forward a practical proposal to devolve to the community and its Council particular areas of authority and funding for a small subsection of identified components of welfare, policy and administration. The proposal was to be fleshed out under the umbrella of a formal Community Participation Agreement with Government, through a newly established program to be administered by ATSIC.<sup>12</sup>

As a preliminary step, the Council proposed that the relevant welfare funding, currently being administered by several separate departments, should be pooled into what the community called 'one bucket'—that is, into one multi-year allocation, delivered down to the community via a single channel, subject to a single application and acquittal process, and using a negotiated set of evaluation indicators relevant at the community level (see Fig. 1).

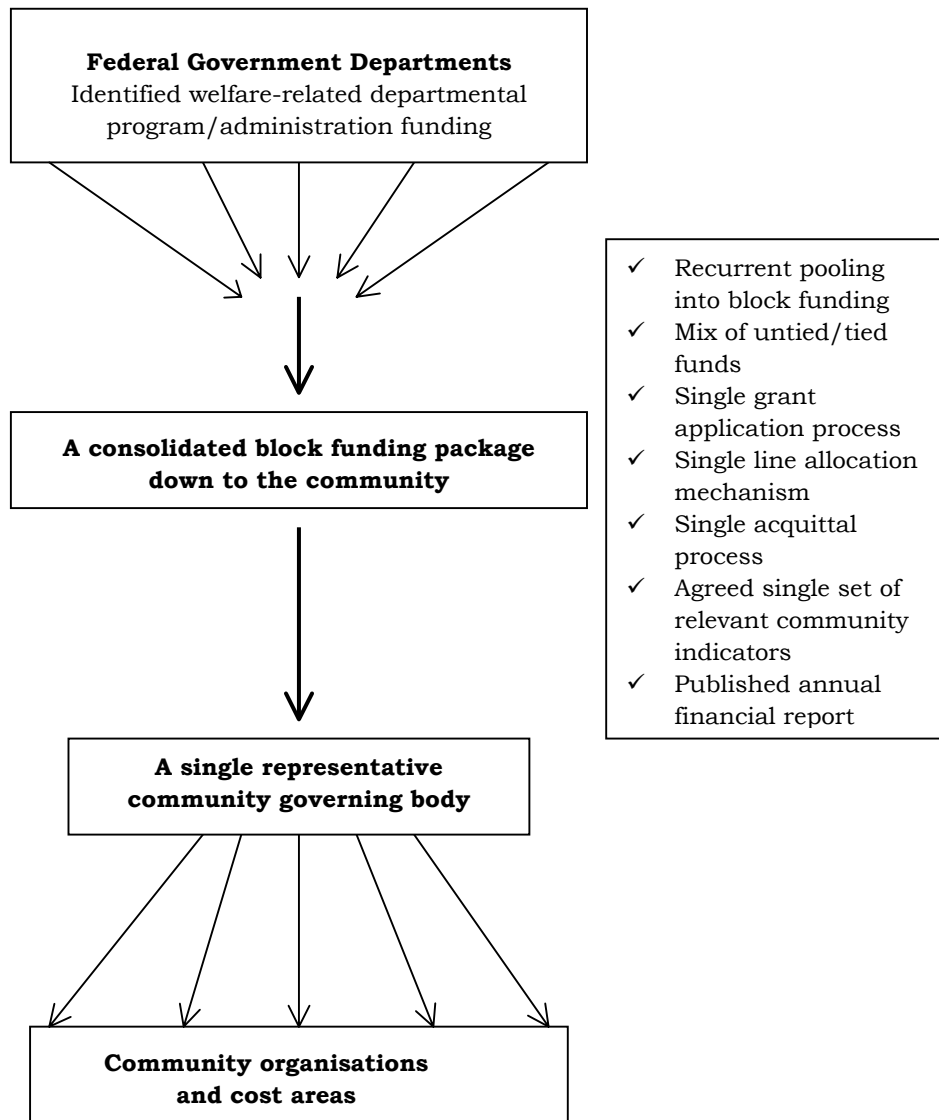
### **Delegation of authority and incremental implementation**

Council members, staff and resident families were aware of the severity of problems they would have to address in their own community. These included low levels of education, major health problems, high reliance on welfare payments, poorly defined governing institutions and responsibilities, and underdeveloped governance capacities. But the community was adamant about their desire to address the debilitating effects on families of welfare dependence and other entrenched problems. Accordingly, they wanted a measured, incremental transfer of authority, in the process of which they would work closely with the Federal Government, ATSIC, Centrelink, the Department of Family and Community Services (DFACS) and other departments, to build up the local governance, financial and administrative capacities that would be needed.

The Council proposal requested that the community be given a formally delegated authority under the *Social Security Act 1999* to undertake the devolved functions.

This delegation would have established an umbrella not only for its legal role, but also for transparently regulating its responsibilities to community members.

**Fig. 1. The proposed flow of identified welfare funding to the community**



### **Governance capacity building and support**

The Community Council also sought assistance to secure access to financial management training and expertise, and infrastructure including a local banking agency and income management advice to families; and requested relevant

departments to assist them in the development of community-based appeals and redress processes and structures.

The community identified a number of major forms of ongoing support and action that be needed at different levels, in order for a planned, incremental transfer of authority to occur (see Smith 2002a for details). Several of these resonate with issues identified as critical to devolution success in the USA TANF process. They included:

- a devolved community gateway for welfare participation and local program administration;
- a devolved delegation to the community under the *Social Security Act 1999*;
- a consolidated block of relevant program funding and acquittal package;
- creation and administration of a Community welfare and work Participation Program;
- the development and negotiation of Individual Participation Agreements;
- funding and support for development of a menu of community defined participation activities;
- community case-managed intensive assistance and support to community residents;
- provision of coordinated program training and supervision;
- community-based enforcement and appeal procedures, developed over time and in partnership with Centrelink and DFACS;
- program infrastructure development and support in the form of a Community Transaction Centre and networked IT;
- the reforming of community governance structures and the establishment of a related capacity-building program;
- the forging of local participation partnerships via agreements;
- national coordination and partnerships mechanisms;
- development of community data and communication systems for management, reporting and ongoing evaluation process; and
- development of enhanced community financial management systems, and access to financial literacy, planning and banking services.

### **Implications for jurisdictional devolution in Australia**

In 2002, the Community Council is no closer to a negotiated agreement. Given the extent of difficulties recognised within the community, it is ironic that it has been departmental turf wars in Canberra, a national policy void in respect to implementation of community agreements that include forms of devolution, and bureaucratic resistance, that have effectively stalled this preliminary proposal. The political response to the community proposal highlights the still unresolved tensions within Indigenous affairs between centralised bureaucratic control, and the desire for greater devolution and decentralisation. In such circumstances, when there is conflict over alternative policy proposals (centralisation versus

devolution), they tend to be evaluated by those in the bureaucracy on the basis of the extent to which proposals require an alteration in State and bureaucratic power positions. Not surprisingly, the outcome favoured at those levels is that which least disrupts the existing balance of power between Indigenous Australians and the state.

Nevertheless, the community proposal, with its emphasis on:

- the principle of legally devolved policy, financial and administrative authority to a representative community governing body;
- locally-relevant principles of individual and collective rights and equity;
- developing a realistic timetable for a supported and incremental transition;
- actively working in partnership with government, public service departments and the private sector to design and implement the model; in tandem with
- a comprehensive program of community capacity and institution building

stands as a model of the framework necessary for incremental jurisdictional devolution at the community level. The mechanism for securing such authority via a negotiated agreement also stands as an effective approach.

### **The community as the foundation for dispersed Indigenous self-determination**

How might these lessons and principles be translated into a workable framework for devolution that is transferable at the local level? In the absence of what Bern and Dodds (2000: 164) have termed ‘a compelling model of political representation’ in Indigenous Australia, there continues to be heated debate amongst policy makers and Indigenous people about the ‘self’ in self-determination. Suggestions range from individuals, to their extended families, through to tribal and clan groupings; local communities; regional geographic areas and regional organisations. All these different layers have been developed and funded in Australia, but in a haphazard and poorly coordinated manner. As a consequence, competing representative voices, duplication of services, program ineffectiveness and arguably, barriers to self-determination have been multiplied on the ground.

For many reasons, Indigenous communities are a logical starting point—the building blocks—for thinking about the boundaries and layerings of jurisdictional devolution, both vertically and horizontally. Higher-order regional levels of jurisdictional authority are likely not to be sustainable unless community governance structures and processes are in reasonable order. Problems arise for regionally-based organisations when they lose sight of the fact that their ongoing cultural legitimacy and regional mandates are grounded, first and foremost, at the community level. The smaller satellite communities and outstations surrounding larger ‘hub’ communities will flounder unless effective governance and other services are delivered down to them. Many larger communities have become the focal point for local service delivery by governments, and for economic

development initiatives. And a majority now have a legally incorporated Council or other governing body operating under community constitutions, performing a range of representative functions on behalf of their residents.

There are probably as many definitions of an Indigenous community as there are communities in Australia. A number are artificial constructions of the colonial process and are culturally heterogeneous. They contain traditional landowners as well as other Indigenous and non-Indigenous residents, all attempting to negotiate different rights and interests. But they have also become, as Frances Peters-Little (2000) writes 'an integral part of ... people's heritage and are fundamental to Aboriginality'. Many Indigenous people have come to identify their family and personal histories, and their economic wellbeing and political affiliations with particular communities and the wider cultural networks in which those communities are located. But defining the type, size and location of communities constitutes an important issue for developing a workable form of jurisdictional devolution.

### **The limits to localism?**

According to 1999 Community Housing and Infrastructure Needs Survey (CHINS) data, there are approximately 1,300 discrete Indigenous communities in Australia. Of these, 80 are located within larger non-Indigenous population centres and the remainder are geographically separate from other population centres. Only 149 have a population of 200 people or more (there are only 30 discrete communities in Australia with populations over 500 people). The majority—close to 80 per cent—have populations of less than 50 people. Approximately one-third of Indigenous Australians live in remote or very remote locations in these discrete communities. The remainder are scattered within urban and metropolitan locations, where there are what could be called Indigenous 'communities of interest' (see Peters 1999: 412). These urbanised communities of interest retain strong cultural and historical identities, but are often without a traditional land base.

The idea that there is an ideal size for Indigenous governance has been demonstrated to be a chimera by both the USA TANF process described above, and by the extensive research of the Canadian Royal Commission into Aboriginal self-governance and self-determination (see IOG 1997, 2000; Peters 1999). Nevertheless, there are important scale and aggregation factors that do have to be considered. An important question for the issue of devolution in Australia is whether all these communities will want to, or should be, the focus for jurisdictional devolution. For example, do the 942 Indigenous communities with populations of less than 50 want to have their own separate governing structures and administrative processes, separate financial management systems, direct funding allocations, and service delivery responsibilities? Is this a viable degree of local separatism for implementing devolution on the ground?



Arguments for devolution are arguably greatest where Indigenous people are concentrated geographically (Hawkes 2001: 156). But these situations do not exhaust the possibilities for jurisdictional devolution. Other types of dispersed Indigenous communities (e.g. those dispersed in rural areas, settled across different townships, or scattered in metropolitan neighbourhoods) have demonstrated the desire for a devolved jurisdiction that is based on a governing body representing a membership which is not territorially defined. Even then, however, the question of economies of scale will need to be addressed. The Canadian Royal Commission argued that some First Nation communities were too small to effectively exercise the jurisdictions they hoped to assume (IOG 2000: 1) and various approaches have been proposed to address problems concerning economies of scale (K. Graham 1999; IOG 2000; Peters 1999).

Availability of funds and resources will clearly set limits to devolution, and so too will governance capacity and effectiveness. Such 'limits to localism' have already been recognised in the historical development and funding of the outstation movement in Australia, where the trend has been for smaller outstations to aggregate themselves around a larger 'hub' community for the purposes of securing service delivery and administration.

### **Towards a model for jurisdictional devolution: regionally dispersed, layered community governance**

The history of Australian Indigenous political development to date has been strongly influenced by a cultural preference for a federalist principle of 'connected localism' (what has been called 'relational autonomy' by Nedelsky 1989)). This suggests that no single 'self' will suffice by itself as *the* local unit of devolution. Rather, devolution will be best realised by creating interlocked layers or aggregations, with corresponding distributions of responsibility and accountability.

Aggregation is a mechanism which could potentially address these keys issues of culture, demography and administrative scale. Aggregation is a process of assembling or 'scaling up' by the collection of particulars into a mass or sum, which it is then possible to consider as a whole or collectively. Aggregation is sufficiently justifiable whenever units are sufficiently independent *and* similar.

One potential model for implementing this approach to jurisdictional devolution at the local level is based on regionally-dispersed, layered community governance. This is not a new idea—aspects of such a model have been explored by researchers (see e.g. Arthur 2001; Rowse 1998; Sanders & Arthur 2001; Smith 1995; Sullivan 1995; Westbury & Sanders 2000), and in various program and policy initiatives. Under this model, the 'scaling up' of jurisdictions—expanding their reach and linkages—can be achieved by a process of aggregation. Local community jurisdiction would remain in place, but specific areas of authority and responsibility could be delegated to governance layers of greater collective scope.

Such a model focuses on the key role of major 'hub' communities as the foundation stones for establishing representative community governance structures with authority to administer agreed areas of jurisdictional authority. These major communities could also act as the starting point for aggregation at the sub-community and regional levels. For example, they could deliver services and resources downwards to the 'spokes' of surrounding smaller satellite communities. Satellite communities will undoubtedly want to retain a level of autonomous decision-making and daily management; but will be more effectively serviced by governance structures and infrastructure that are more 'centrally' located at hub communities. In other words, different community layers would undertake activities and responsibilities commensurate with capacity, efficiency and culturally-based local alliances.

Communities do not operate in isolation; they are part of wider regional cultural and economic networks. From hub communities, jurisdictional responsibilities and distributed accountability could also be dispersed 'upwards' to regional Indigenous organisations. These could deliver agreed services (e.g. coordinated services in areas such as health, housing, financial management, banking, employment recruitment, infrastructure delivery and maintenance).

One can envisage that regional levels of jurisdiction might develop if 'regional districts' are created by consortia of communities cooperating for wider purposes (e.g. for regional land management, for large-scale economic development projects, capital investment, or the development of region-wide conservation or heritage protection standards) (see also Cashback 2001). Such evolving regional districts would form a sounder basis for the development of regional authorities or levels of governance.

There are several advantages to this model of aggregation for the purposes of jurisdictional devolution. It responds to the culturally-based preference for *both* local autonomy and wider forms of collective interdependence, and is premised on flexibility, where local and regional aggregations could arise out of shared cultural, social, economic and political strategies and networks. The model emphasises a 'whole of community' approach to political representativeness and has 'soft boundaries' adaptable to changing circumstances in communities and regions.

A particular advantage of the model is that it distributes different forms and degrees of accountability across layers, thereby spreading the workload entailed in devolution, and enables 'two-way' accountability to be reinforced (i.e. internal or vertical accountability to Indigenous constituents at different structural levels, and external or horizontal accountability across to public and private sector institutions and levels of government) (see J. Graham 1999; Martin & Finlayson 1996; Nicoll 1997). Accountability assumes the existence of reciprocal obligations, an exchange that is akin to an agreement (Nicoll 1997: 6). Dispersed, or layered accountability is similarly premised on the idea of a two-way process, but recognises that there are varying degrees of accountability and accountability to

different stakeholders. Dispersed, mutual accountability is already a feature of Australian federalism, as it is of Indigenous society.

The model also addresses economies of scale via the possibility of aggregation, recognises that there are different types of communities (including specific locales and dispersed 'communities of interest'). Importantly, it builds upon historical and political trends already established as a result of Indigenous initiatives on the ground.

## **Conclusion**

A decade ago the RCIADIC (1991 Vol. 2: 503) noted with some insight that: 'It is remarkable how a concept [i.e. self-determination] which is so widely recognised as being central to the achievement of the profound change which is required in the area of Aboriginal affairs remains so ephemeral and so difficult to define'. Governments, it noted 'can genuinely believe that their policies give practical recognition to self-determination, and yet in the eyes of Aboriginal people the policies fail to do so'. This paper has argued that in Australia, self-determination can be better defined and effectively secured through a framework for jurisdictional devolution. Such a framework provides us with a policy-relevant language and strategies for the practical implementation of self-determination.

Importantly, the framework of jurisdictional devolution also heeds the advice proffered by the RCIADIC; namely, that the most appropriate solutions will be found by looking 'at what Aboriginal people and their organisations are actually doing and how they, in fact, relate to the broader society in order to gain an insight into the sense of self-determination which is the aspiration of most Aboriginal people' (RCIADIC 1991 Vol. 2: 509). The history of Indigenous action and initiatives overwhelmingly stresses the desire to secure greater local authority and control. In one form or another, Indigenous Australians have been fighting for jurisdictional devolution for a very long time. But the experience in Australia to date, and useful lessons available from overseas, suggest that a number of key areas of support and action will need to be in place, or under concurrent development, if effective and relevant forms of devolution are to be designed.

Jurisdictional devolution arrangements will be diverse on the ground, but this does not mean that each community must entirely reinvent the wheel when thinking about devolution. There is a wealth of relevant local, national and international experience that can be drawn upon, including universally accepted design principles that will need to be addressed. These include the need for financial and administrative transparency, equity and fairness of funding arrangements, certainty of devolved authority, clearly defined responsibilities, participatory and consensus-based community devolution processes, flexibility and choice, dispersed vertical and horizontal accountability, efficiency and effectiveness, cultural legitimacy and mandate, sustainable leadership, and an alignment of responsibilities with capacity.

Securing beneficial outcomes from devolution will be linked to achieving a design match between strategy and structures. New models, or the adaptation of existing models of community and regional governance, will need to be considered. This paper suggests the value of a broad framework based on a model of aggregation, focusing on regionally dispersed, layered community governance, and jurisdictional devolution to major 'hub' communities.

Devolution is not only about the transfer of power, it is also about the transfer of resources. Jurisdictional devolution will require access to, and authority over a range of financial, social, cultural and natural resources—in other words, more than just money. A fiscal framework will need to underwrite the process, which identifies:

- the equitable division and allocation of block financial transfers to the local level;
- the division of expenditure responsibilities and accountability; and
- agreed areas of financial authority.

Devolution will require a degree of consensus about the basic units of representation, and mechanisms for promoting those units. For this to occur there is a need for an Indigenous political culture that will support the capacity of communities and regions to handle the transfer of powers involved. A level of Indigenous institutional development will be required, including local governance structures and procedures capable of effective representation and accountability, and of administering additional authority. For these to be developed, an Indigenous 'civil society' is needed at the local and regional level to support the transfer of power with ongoing mandates; and to determine the specific form of devolution. Local leaderships who can mobilise constituents to provide mandates, who are widely seen to be representative, and who can give direction to the transfer process will be critical.

The Australian and American case studies indicate that a staged uptake of jurisdictional authority is best. Devolution is a step-by-step process in which 'authority is conferred in incremental tranches as local competencies in management and responsibility are progressively demonstrated' (IUCN 2001: 2). These competencies do not arise out of thin air: a systematic program of capacity building will need to be carried out in communities in parallel to systematic planning and start-up phases.

Concrete action and commitment will be needed at all government levels to progress the design and implementation of jurisdictional devolution, including statutory, policy and regulatory frameworks. A commitment by higher orders of government and bureaucracy to the process will be critical, as will a forum within which to progress negotiated agreements about power-sharing and coordination. This suggests a need for two processes of devolution: one from the bottom up, and the other from the top down.

The reality is that jurisdictional devolution in Australia will be a process of particular complexity because the challenge will be to create a 'space' for new

kinds of Indigenous authority within zones of jurisdiction already occupied by Federal, State, and Local Governments. But the self-determination policy, as it is presently constituted and implemented, is not working well in Indigenous affairs. While communities have been handed increased responsibility for service delivery, and are subject to greater scrutiny of their financial accountability to government, very little genuine jurisdictional authority has actually been devolved to them. Without these areas of authority and capacity, community governance and institutional development will continue to be substantively defective, and the self-determination policy could well become as the Royal Commission on Aboriginal People in Canada suggested (RCAP 1996, Vol. 2 (2): 755), an exercise in ‘illusion and futility’.

## Notes

1. These are summarised in discussions in Australia Institute (2000: Appendix 2) and Human Rights and Equal Opportunity Commission (HREOC) (2002).
2. See the *Macquarie Dictionary* (2nd edn, 1991) and the ‘Lectric Law Lexicon’ at the website [[www.lectlaw.com/rotu.html](http://www.lectlaw.com/rotu.html)].
3. In *Mabo v Queensland No. 2* the High Court rejected the historical legal fiction of terra nullius and found that native title was not extinguished by the British acquisition of sovereignty. The majority ruling in *Mabo* emphasised the existence of Aboriginal law and custom as the foundation of entitlement (see also Pearson 1997). In the Australian High Court case of *Yanner v Eaton* (1999) 73 ALJR 1518, the court recognised the right to exercise a native title exploitation of wildlife without an appropriate authority being obtained under relevant state legislation. In the case of *NT of Australia Court of Summary Jurisdiction, Police & J.G. Yunipingu* No. 9709243 (1998, Transcript (DPP Reference No. 1, (2000) 134 NTR 1) (see also Bastern 2001), the defendant applied reasonable force, in accordance with Aboriginal law governing traditional ownership of land, to punish an act by a non-Aboriginal on that land, that was deemed by the defendant to be wrongful under Aboriginal law. The magistrate recognised ‘the rights of the defendant [a Yolngu man] to enforce Yolngu law on Yolngu land’ and stated that under *the Aboriginal Land Rights (Northern Territory) Act 1976* ‘The land is deeded so that Aboriginal people may pursue ... traditional lives which means, amongst other things, an observance of and the administration of the Aboriginal law applicable to the area where they live’ (1998: 16).
4. As opposed to the formation of ‘an independent, internationally recognised state with ultimate authority [or sovereignty] over all matters within a determinately bounded territory’ (Young 2000: 252).
5. ‘Claytons’ is the brand name for an Australian beer which has a low alcohol content—a ‘half strength’ beer advertised as ‘the drink you have when you’re not having a drink’. The term has become more widely applied by Australians—to the extent that it is now listed in the *Macquarie Dictionary* (2nd edn, 1991)—to refer to any action,

commodity or process which is negatively characterised as being a poor-quality substitute or imitation, not 'the genuine thing'.

6. A confederacy is simply an alliance of persons, parties or states for some common purpose; a group of persons, parties etc. united by a common alliance (*Macquarie Dictionary*, 2nd edn, 1991).
7. For a more detailed consideration of the role of incorporated organisations as a mechanism for self-determination and regional autonomy, see Arthur (2001) and Sanders (2002).
8. For example, under s. 408 of the *Social Security Act* as amended by PRWORA, any month in which a TANF recipient spends in Indian country where 50% or more of all adults are not employed, does not count toward the applicable time limit for TANF assistance. There has been criticism that even this cut-off point is too high, given that the majority of reservation populations have unemployment levels between 38% and 45%.
9. In 2001, 257 tribal childcare grantees serving more than 500 tribes received \$90 million in federal Childcare and Development Block Grants; 5 tribes were operating their own Child Support Enforcement programs; 78 tribal grantees administered \$15 million in Welfare-to-Work grants to support employment opportunities under TANF (Brown et al. 2001: 2).
10. Beyond those figures the picture is less clear, with recent evaluations suggesting that only 35–40% of former welfare recipients are employed for the entire year after they leave welfare, that wages are low and tend to remain low, that welfare recipients are becoming the working poor, and that the decline in child poverty has not kept pace with the decline in caseloads (Brown et al. 2001). The outcomes are causing many involved to start redefining the problem of 'welfare' to include the problem of the 'working poor'.
11. A ten-year study of poverty, welfare reliance and economic development on one Indian reservation reported that job opportunities had not increased at a rate that accommodated the rising number of educated Indians living there. Approximately one in five heads of households had at least four years of college but still remained below the poverty line (Antell et al. 2002).
12. In the July 2001 Budget, the Federal Government announced that it would allocate \$32 million over four years to ATSIIC to assist potentially 100 communities to 'develop and manage' the Agreements and 'plan for better service delivery at the local level'. The funding includes ATSIIC support for related activities such as 'leadership, strengthening culture and community governance'. Each Agreement 'will involve the community in identifying practical ways people can contribute to their families and communities in return for their income support'. In practice, ATSIIC is expected to 'coordinate each stage of the design of the Community Participation Agreements through negotiation with the communities and key agencies' (Smith 2002a).

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