

# PART X

---

## Aboriginal Community Governance in Western Australia

# Contents

---

<b>Aboriginal Community Governance</b>	419
The Indigenous Right to Self-Determination	419
Indigenous Self-Determination in the Western Australian Context	421
A Note about Terminology	422
Governance Issues in WA Aboriginal Communities: The Impetus for Reform	422
Indigenous Disadvantage and Inequality of Government Service Provision	422
Local government services	422
State and federal government services	423
Addressing government service provision to Aboriginal communities in Western Australia	424
Facilitating Aboriginal Participation in Community Governance	425
Capacity building and governance	426
Obstacles to Effective Aboriginal Community Governance	426
Lack of economic base	426
Education, training and recruitment of staff	427
Feuding and dysfunction	427
Breakdown of cultural authority	428
Institutional design	428
Aboriginal Community	430
Governance in Western Australia	430
Aboriginal Communities Act 1979	430
Ngaanyatjarraku Shire – An Example of Aboriginal Local Government	431
Funding Options for Aboriginal Local Governing Bodies in Western Australia	431
Local governing bodies created under state law	432
‘Declared’ local governing bodies	432
Regionalisation of Aboriginal Governance	433
Aboriginal Regional Governance in Western Australia	433
A Regional Governance Exemplar: Kullarri Regional Indigenous Body	433
The ‘four ward model’	433
Representation	434
The role of KRIB	434
Exploiting existing expertise	434
Other Regional Representative Bodies in Western Australia	435
Reform of Aboriginal Community Governance in Western Australia	435
Need for Aboriginal Community Governance Reform	435
Funding for Autonomy	435
Some Guiding Principles for Aboriginal Community Governance Reform	436
A Basic Framework for Reform	437

# Aboriginal Community Governance

It is recognised that the effects of colonisation have largely undermined the traditional Aboriginal power structures and relationships that give customary law its vitality, legitimacy and authority. The Commission's consultations revealed that many Aboriginal people see reclaiming traditional values through recognition of customary law as an important way to address these deficits.<sup>1</sup> However, it is arguable that the Commission's proposals for the recognition of Aboriginal customary law and the accommodation of cultural beliefs (set out in the previous chapters) will be meaningless if more is not done to advance the broader objective of empowering Aboriginal communities to reclaim control over their own destinies.

Like all other systems of law, Aboriginal customary law cannot be divorced from its cultural and social contexts. While recognition of customary law may assist Aboriginal people to revive or consolidate aspects of their culture, there exists a multitude of problems of Indigenous disadvantage that impact negatively upon Aboriginal peoples' social wellbeing.<sup>2</sup> As discussed in Part II, many of these problems stem from, or are exacerbated by, inadequate or culturally inappropriate government service provision; in particular, service delivery at the local and regional levels. While a genuine whole-of-government approach to the delivery of services to Aboriginal people (as proposed in Part II) is crucial to overcoming problems of Indigenous disadvantage, greater benefit to Aboriginal people will undoubtedly flow from enhancing Aboriginal participation in the institutions that govern their lives.<sup>3</sup> The following discussion details the existing status of Aboriginal community governance in Western Australia and looks at what is being done (and what more can be done) to maximise opportunities for greater Aboriginal participation in decision-making and encourage more effective and appropriate community governance processes.

## The Indigenous Right to Self-Determination

At international law, self-determination is considered a fundamental human right. The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic Social and Cultural Rights* (ICESCR) share a common Article 1 which provides that:

- (1) All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
- (3) The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

While the Article provides some notion of what may be involved in the concept of self-determination, it does not define the term or identify the substantive forms that self-determination may take. Additionally, as former Aboriginal and Torres Strait Islander Social Justice Commissioner Bill Jonas has pointed out, the phrase 'all peoples' is somewhat misleading because there is 'no internationally agreed definition of a "peoples"'.<sup>4</sup> This lack of definition is reflected in *ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries* which states in

---

1. See, for example, Law Reform Commission of Western Australia (LRCWA), Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13; *Rockingham*, 9 December 2002, 5; *Cosmo Newbery*, 6 March 2003, 20; *Carnarvon*, 30–31 July 2003, 4; *Broome*, 17–19 August 2003, 25–26; *Manguri*, 4 November 2002, 6; *Bunbury*, 28–29 October 2003, 8.

2. See the lengthy discussion of Indigenous disadvantage in Part II, above.

3. Christine Fletcher has argued that states that, 'inequities between black and white Australians—such as Indigenous peoples' poor health, inadequate housing, lack of community infrastructure and disproportionate representation in the criminal justice system—are symptomatic of political deprivation, not separate public administration problems.' Fletcher C, 'Living Together but not Neighbours: Cultural Imperialism in Australia' in Havemann P (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (1999) 335.

4. Aboriginal and Torres Strait Islander Social Justice Commissioner, *ibid*.

Article 1(3) that:

The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law

In fact it has been argued that because the right to self-determination found in the ICCPR and the ICESCR was framed in relation to colonial peoples, it has no application to indigenous populations within nation states.<sup>5</sup> However, both the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights have interpreted common Article 1 'as applying to the situation of indigenous peoples'.<sup>6</sup>

Article 3 of the *United Nations Draft Declaration on the Rights of Indigenous Peoples* ('the Draft Declaration') seeks to resolve the dilemma at international law by taking the formula found in the ICCPR and the ICESCR and making it specific to indigenous peoples. It also attempts to elaborate upon the scope of the right to self-determination by providing in Article 31:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.<sup>7</sup>

It will be noted that there is nothing in this Article that would suggest that self-determination includes the right

to secede from the nation state or claim sovereignty over territory,<sup>8</sup> yet according to Jonas:

Australia is one of only four countries that actively pursue the rejection of Indigenous peoples' self-determination and collective rights in the annual negotiations on the Draft Declaration... In both the domestic and international arenas, Australia's opposition to recognition of a right to self-determination has been based on simplistic, and often legally incorrect, assumptions which present self-determination as purely symbolic, as a catchcry for all the failings of Indigenous policy in the past thirty years, or as 'a rigid choice between all or nothing – between the forming of an independent state or complete denial of a cultural and political identity'.<sup>9</sup>

Jonas argues that 'the reality of Indigenous self-determination...lies between these extremes and is [an ongoing] process of negotiation, accommodation and participation'.<sup>10</sup> This view is supported by Erica-Irene Daes, the Chairperson of the United Nations Human Rights Sub-Commission Working Group on Indigenous Populations (the group responsible for the preparation of the Draft Declaration), who states that 'the right of self-determination of Indigenous peoples should ordinarily be interpreted as their right to freely negotiate their status and representation in the [nation] State in which they live'.<sup>11</sup> This is known as 'internal self-determination', signifying rights to full and effective political participation within the nation state (pursuant to Article 31 of the Draft Declaration) but not threatening the state's territorial integrity.<sup>12</sup> The explanatory note accompanying the Draft Declaration makes plain that only in circumstances where a nation state's dominant political system 'becomes so exclusive and non-democratic that it no longer can be said to be

5. See, for example, Castellino J, 'Indigenous Peoples and the Scope for Forgiveness and Reconciliation in International Law: Unpacking the intertemporal rule', paper delivered to the Commonwealth Law Conference, London (13 September 2005) 9.
6. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) 188.
7. This Article and the other provisions of the Draft Declaration are subject to the qualification in Article 45 that '[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations'.
8. The fact that Article 31 of the Draft Declaration does not address land rights as part of self-determination, but is limited to 'increased rights within a mutually beneficial relationship within the state' is seen by some commentators as a significant compromise of the original ideal of self-determination as 'emancipation for a subjugated people'. Castellino J, 'Indigenous Peoples and the Scope for Forgiveness and Reconciliation in International Law: Unpacking the intertemporal rule', paper delivered to the Commonwealth Law Conference, London (13 September 2005) 8.
9. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 2, <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>> (footnote omitted).
10. *Ibid.*
11. Daes E, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1993/26/Add.1 (12 June 1993) 6 as cited in Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 23.
12. In contrast to 'external self-determination' which is generally considered to involve a right to separate from the existing state. However, Jonas makes clear that there are important external elements to the achievement of meaningful 'internal' self-determination within a state. These include the right to participate in international negotiations and involvement 'in international organisations where decisions are taken that affect core aspects of [indigenous peoples'] existence and development'. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 2, <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>. The creation of the United Nations Permanent Forum on Indigenous Issues offers indigenous peoples the opportunity to participate more directly in negotiations and decisions at an international level. For more information on the Permanent Forum and other indigenous-specific mechanisms within the United Nations system see above Part IV and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 6.

To effectively engage with Aboriginal people in pursuing these aspirations it is necessary to consider ways of giving Aboriginal people greater control over, and substantive power within, the decision-making processes that affect their lives.

“representing the whole people”<sup>13</sup> is secession likely to be considered justified.<sup>14</sup>

## Indigenous Self-Determination in the Western Australian Context

Acknowledging the limitations placed upon the Indigenous right to self-determination at international law, Indigenous organisations in Australia have indicated that they do not seek to push a separatist agenda, but rather seek to renegotiate their relationship with governments and their political status within the nation.<sup>15</sup> Jonas has observed that:

In the Australian context, Indigenous peoples are so numerically inferior and geographically dispersed that it is nonsense to suggest that the creation of separate states would be feasible... At no stage have any Indigenous Australians participating in international negotiations on self-determination suggested that secession is a realistic option.<sup>16</sup>

These sentiments were confirmed by Aboriginal people during the Commission's community consultations where, although the concept of self-determination was raised,<sup>17</sup> at no stage was a desire for a separate state or political system expressed. In fact the opposite was the case, with most communities indicating a strong desire to cooperate, and work in partnership, with government.<sup>18</sup> This is not to suggest that claims to

Aboriginal territory (especially pursuant to native title rights) are not important to the Aboriginal peoples of Western Australia. Aboriginal peoples' responsibility to, and relationship with, the land is of enormous cultural significance and is an important manifestation of the Indigenous right to self-determination. Although consideration of native title is outside the Commission's Terms of Reference, the Commission respects Indigenous interests in land and natural resources and supports the continuing improvement of processes that recognise these interests.

Within the Commission's Terms of Reference it is noted that the aspirations of Aboriginal people in Western Australia are focused on, but not confined to, the pursuit of self-determination in relation to economic, social and cultural development. For the state to effectively engage with Aboriginal people in pursuing these aspirations it is necessary to consider ways of giving Aboriginal people greater control over, and substantive power within, the decision-making processes that affect their lives. This requires a re-examination of current systems of community governance. While the Commission does not pretend to address all issues with the present system of Aboriginal community governance in Western Australia, the following offers a critique on the system and suggests some guiding principles and a framework for future reform.

- 
13. Daes E, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1993/26/Add.1 (12 June 1993) [21]. This is supported by the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations* (1970) which states that the recognition of the right of all peoples to self-determination shall not 'be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.
  14. As former Aboriginal and Torres Strait Islander Social Justice Commissioner Bill Jonas has observed, although '[s]ecession is an extreme expression of self-determination... It cannot be absolutely discounted as a possible expression of self-determination. The situation in East Timor is an excellent example of why it should not be discounted'. *Social Justice Report 2002* (2002) ch 2, <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>.
  15. Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 23–24.
  16. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 2, <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>.
  17. LRCWA, Project No 94, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002; *Armada*, 2 December 2002.
  18. See, for example, LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003; *Broome*, 17–19 August 2003; *Carnarvon*, 30–31 July 2003; *Mirrabooka*, 18 November 2002.

## A Note about Terminology

The Commission is aware of the broader discourse surrounding the use of the terms 'self-determination',<sup>19</sup> 'self-government'<sup>20</sup> and 'self-management'<sup>21</sup> in relation to Australian and international Indigenous affairs. In particular, the Commission notes that whilst potentially having quite different meanings, these terms are often used interchangeably by commentators (including by government) and that no real agreement appears to have been reached in relation to precise definitions of these terms.<sup>22</sup> Although the proposals of the Commission feature aspects of all three concepts, in the following discussion the Commission has preferred to avoid any misunderstanding of its intention by employing, where possible, the politically neutral term 'community governance'.

## Governance Issues in WA Aboriginal Communities: the Impetus for Reform

### Indigenous Disadvantage and Inequality of Government Service Provision

Part II of this Discussion Paper, which outlines issues of concern to Aboriginal people raised during the Commission's community consultations, paints a picture

of entrenched Indigenous disadvantage among Western Australian Aboriginal communities. Much of this disadvantage, it was revealed, stems from a lack of infrastructure and essential government services to Aboriginal communities. Education, housing and health are among the government services discussed in Part II, while problems with law enforcement, especially in remote communities, are discussed in Part V. Part of the reason for problems of service provision to Indigenous communities lies in the complicated nature of relationships between the three levels of government—local, state and federal—responsible for the delivery of services.

### Local government services

In Western Australia local government is responsible for the provision of basic essential services to constituents within the designated local government area. Essential services include the provision and maintenance of infrastructure such as local roads, footpaths, street lighting, stormwater drainage, parks and recreational facilities. It also has responsibilities such as town planning; building regulation and inspection, development approval; environmental health (such as food safety, waste disposal, effluent disposal and pest control), and the welfare and control of domestic animals, in particular dogs.

The provision of local government services is an area where Aboriginal communities in Western Australia have been found to be disadvantaged relative to non-

19. As discussed above, self-determination has become a fluid—and perhaps compromised—concept that takes many forms in international and domestic legal discourse. See Castellino J, 'Indigenous Peoples and the Scope for Forgiveness and Reconciliation in International Law: Unpacking the intertemporal rule', paper delivered to the Commonwealth Law Conference, London (13 September 2005); Kingsbury B, 'Self-determination and "Indigenous Peoples"' (1992) 86 *Proceedings of the 86th Annual Meeting of the American Society of International Law* 383; Gayim E, *The Principle of Self-Determination: A study of its historical and contemporary legal evolution* (Oslo: Norwegian Institute of Human Rights, 1990).
20. The Harvard Project on American Indian Development in North America suggests that the key feature of self-governance is decision-making power. In practical terms this has been held to mean the existence of indigenous governing institutions and control over management of resources and allocation of funding free from external interference. Cornell S, 'The Importance and Power of Indigenous Self-Governance: Evidence from the United States', paper delivered to the Indigenous Governance Conference, Canberra (3 April 2002) 2–3. See also *Report of the Royal Commission on Aboriginal Peoples: Renewal, A Twenty-Year Commitment* (Ottawa: Canadian Communication Group, vol. 5, 1996) 1–2. There is some debate about whether self-government is an inherent right (stemming from international law recognition of Indigenous peoples to freely determine their political status and economic, social and cultural development) or a delegated right (accorded to Indigenous peoples by a devolution of power from the existing state) and whether there is a need for territorial sovereignty for full exercise of self-government rights.
21. In Australia, 'self-management' is a term often used to suggest that self-determination of indigenous peoples is being recognised and supported. The term usually infers a delegated right to make decisions related to economic management of communities with 'upwards' accountability to government. Recent manifestations of self-management include the policy of 'practical reconciliation' and shared responsibility agreements (the latter suggesting a degree of governing responsibility resting with Aboriginal communities, although the reality of involvement in decision-making processes relating to communities must be questioned). See Fletcher C, *Aboriginal Politics: Intergovernmental Relations* (Carlton: Melbourne University Press, 1992) 10; McCausland R, 'Shared Responsibility Agreements: Practical reconciliation or paternalistic rhetoric?' (2005) 6 (12) *Indigenous Law Bulletin* 9; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 2 <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>.
22. For example, Joseph Castellino has referred to 'the multitude of meanings and varied interpretations of the right' to self-determination. Stephen Cornell of the Harvard Project on American Indian Development in North America has openly struggled with the meaning of self-government, describing it as 'a variable term' that may be 'wide or narrow in scope' while Tamara Kamien has noted that self-government 'does not have a clear definition'. Self-management appears to be a term of political convenience with Bill Jonas drawing attention to the fact that Australian governments have tended to use the terms self-determination and self-management 'almost interchangeably'. See, Castellino J, 'Indigenous Peoples and the Scope for Forgiveness and Reconciliation in International Law: Unpacking the intertemporal rule', paper delivered to the Commonwealth Law Conference, London (13 September 2005) 7; Cornell S, 'The Importance and Power of Indigenous Self-Governance: Evidence from the United States', paper delivered to the Indigenous Governance Conference, Canberra (3 April 2002) 2–3; Kamien T, 'Implementing Self-Government – An Examination of the *Aboriginal Communities Act 1979* (WA)' (1995) *Murdoch University E-Law Journal* [2.3]; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 2 <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>.

Aboriginal communities in comparable geographic regions.<sup>23</sup> A study undertaken by the Department of Indigenous Affairs in 1999 identified a number of factors contributing to the inequality of local government service provision to Aboriginal communities including the difficulty of providing and maintaining infrastructure in remote areas; issues with tenure of land and capacity to levy council rates; the ‘private’ nature of Aboriginal communities (resulting in the perception of inability to access land for the purposes of service provision or infrastructure maintenance);<sup>24</sup> the fact that that because some Aboriginal communities are located on Aboriginal Lands Trust or Crown land, provisions of the *Health Act 1911 (WA)* and *Local Government Act 1995 (WA)* are not applicable and cannot be enforced by local government authorities; and the history of federal and state agencies circumventing local government approvals and involvement.<sup>25</sup> These factors are typically raised by local government to explain negligence of local government service provision to Aboriginal communities; however, a more accurate explanation can perhaps be found in the fact that the lack of rate income generated by Aboriginal communities has fostered a view that Aboriginal people are not genuine constituents of local government and are therefore not a priority.<sup>26</sup>

Local governments receive state and federal funding (through the state’s Local Government Grants Commission) according to a formula that specifically recognises Aboriginal population, remoteness and disadvantage factors.<sup>27</sup> Under the *Local Government (Financial Assistance) Act 1995 (Cth)*, National Principle 5 states that ‘financial assistance shall be allocated [by the Local Government Grants Commission] in a way which recognises the needs of Aboriginal and Torres Strait Islanders within their boundaries’.<sup>28</sup> However, because funding is ‘untied’ (that is, the funding authority does not dictate the way in which the money

is to be spent), there is no direct accountability of local governments to ensure that Aboriginal-specific funding in fact reaches Aboriginal communities.<sup>29</sup> For example, it was noted in a 1999 Department of Indigenous Affairs report that only six per cent of the Aboriginal Environmental Health Allowance received by the Shire of Broome was actually spent on environmental health related services to Aboriginal communities on the Dampier Peninsula.<sup>30</sup> Although there are recent improvements to accountability via reporting requirements under the *Local Government (Financial Assistance) Act 1995 (Cth)*, these only require a non-benchmarked ministerial assessment of the delivery of local government services to Aboriginal communities. The Commission believes that more can be done by the state government (in particular, under the ministerial reporting requirement) to hold local governments accountable for the ‘untied’ funding that they receive from the Local Government Grants Commission for the purposes of providing for Aboriginal constituents.

### Proposal 91

That the Western Australian government investigate ways of improving accountability of local governments for funding provided for the benefit of Aboriginal people in each local government area.

## State and federal government services

Major essential services to Aboriginal communities (such as water, sewerage and power) are currently supplied by various Commonwealth and state bodies often with overlapping jurisdiction and an ad hoc mixture of Commonwealth and state funding sources. For example, under the Commonwealth-state bilateral agreement the Commonwealth is responsible for

- 
23. Department of Indigenous Affairs, ‘The Provision of Local Government Services to Aboriginal Communities: A focus paper’, (November 1999) 2–3.
24. Ibid 9. In particular in respect of communities declared under the *Aboriginal Affairs Planning Authority Act 1972 (WA)* where permits are required to enter community lands. Further, access roads to Indigenous communities are often private roads and, as such, councils have sometimes refused to take responsibility for their maintenance or provision. In recognition of this, in Western Australia, one third of the Special Road Works funding is directed to local governments specifically for the improvement and provision of roads.
25. Ibid 3.
26. Gerritsen R, Crosby J & Fletcher C, *Revisiting the Old in Revitalising the New: Capacity Building in Western Australia’s Aboriginal Communities* (Canberra: North Australia Research Unit, Australian National University, 2000) 24. See also Department of Indigenous Affairs, *Building Stronger Communities* (2002) 17; Commissioner Patrick Dodson, RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol. 1, 1991) [9.1]. Apart from the Shire of Ngaanyatjarra (Warburton)—the only ‘Aboriginal-owned’ local government body in Western Australia—Aboriginal interests are not strongly represented on councils and are not therefore accorded priority.
27. Department of Indigenous Affairs, ‘The Provision of Local Government Services to Aboriginal Communities: A focus paper’ (November 1999) 3–4.
28. Department of Transport and Regional Services, *2003–2004 Report on the Operation of the Local Governance (Financial Assistance) Act 1995* (2005) 104.
29. Department of Indigenous Affairs, ‘The Provision of Local Government Services to Aboriginal Communities: A focus paper’ (November 1999) 4.
30. Ibid.

communities of less than 50 residents or five permanent dwellings while the state government is responsible for gazetted communities with a greater number of residents or dwellings.<sup>31</sup> Health services are also split between state and Commonwealth with some communities receiving health care provided by the state and others serviced by Aboriginal health organisations, which have a mixture of state and Commonwealth funding. As mentioned earlier, a key service provided by state government which is lacking in many remote communities is law enforcement. The issues surrounding policing on Aboriginal communities are canvassed in Part V. Other state-provided services include emergency services and public housing – these issues are discussed in Part II.

### Addressing government service provision to Aboriginal communities in Western Australia

In the past the rhetoric of Aboriginal self-determination has allowed governments to abdicate their responsibilities to provide services that are an entitlement of citizenship which non-Aboriginal Australians take for granted. For example, the lack of law enforcement in remote communities (discussed in Part V) is largely a consequence of the perception that the *Aboriginal Communities Act 1979* (WA) 'empowers' communities to deal with their own law and order problems. There is also, the Commission suspects, a pervading misconception that targeted services for Aboriginal people are alternative, rather than supplementary, to mainstream services. In practice this has meant that many Aboriginal communities, in particular remote communities, receive inferior services (or, in some cases, none at all). This aspect of the service provision relationship between governments and communities is in the process of being addressed at a policy level, but there remains the significant challenge of carrying this policy through to those responsible for frontline service delivery. As highlighted throughout this Discussion Paper, the policy promises of governments in respect

of Indigenous affairs have not always been rendered in reality 'on the ground'.

The current focus on outcomes of government service delivery programs (rather than policy and process) underpins the Council of Australian Governments' (COAG) 'National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders'.<sup>32</sup> In response to this joint Commonwealth-state initiative there have been a number of important developments in the improvement of government service provision to Indigenous communities in Western Australia. These include:

- The introduction of benchmarks established by the COAG's Steering Committee for the Review of Government Service Provision in response to indicators of Indigenous disadvantage and the assessment of the impact of government program and policy interventions.<sup>33</sup>
- Government funding for ongoing mapping and gap analysis projects to improve inter-agency cooperation, identify local achievement in service delivery and alert government to gaps in services to Aboriginal people.<sup>34</sup>
- The Commonwealth-state bilateral agreement on essential services (2000), which clearly delineates a role for local governments (as a subset of the state's



31. Commonwealth of Australia, State of Western Australia and Aboriginal and Torres Strait Islander Commission, 'Bilateral Agreement on the Provision of Essential Services' (2000) 6–7.

32. *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders* (1992), < <http://www.alga.asn.au/policy/indigenous/nationalCommitment.php>>.

33. See, SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2005* (July 2005).

34. Department of Indigenous Affairs, 'Service Provision to Aboriginal People in the Town of Derby – West Kimberley' (May 2005) 4.

responsibility) in the provision of essential services and in the planning and monitoring aspects of service provision. Bilateral agreements have also been negotiated on health (1996) and housing (2002).

- The development of the Aboriginal Communities Strategic Investment Program (a state government initiative in response to the findings of the Chief Executive Officer Working Party on Essential Services to Aboriginal Communities). The program targets large remote Aboriginal communities and aims to contribute to improvements in health and living standards through improved community management and administration; normalisation of power, water and sewerage services; and the increased involvement of local government in delivery of services. Under this program local government is envisaged to have a much greater role in identifying, developing and preserving key community infrastructure and assets.<sup>35</sup>
- The negotiation of service agreements between local government bodies and Aboriginal communities. For example, the Shire of Derby West Kimberley has completed service agreements with the communities of Looma and Mowanjum which incorporate projects aimed at improving access to local government services and the optimisation of services. The Shire of Broome has completed a service agreement with Aboriginal communities on the Dampier Peninsula and at Bidyadanga. Three specific service agreements have now been signed, covering environmental health, building inspections and community layout planning.
- The *Statement of Commitment to a New and Just Relationship* (2001) which sets out the principles and processes for government and Indigenous interests to negotiate a statewide partnership framework to facilitate agreements at the local and regional level on service provision, justice outcomes and native title.

The partnership framework underpins advances in delivery of government services to Aboriginal communities in Western Australia. The success (or

otherwise) of this initiative will therefore have significant bearing on the realisation of improved services and infrastructure for Aboriginal people in this state. Perhaps in acknowledgement of this the government has recognised the significance of the institution of 'effective governance structures, political recognition and representation of the Indigenous people's status and [their] right to be involved in the decision-making that will impact upon their quality of life'.<sup>36</sup> The facilitation of Aboriginal participation in community governance is therefore crucial to the government's plans to address Indigenous disadvantage in Western Australia.

## Facilitating Aboriginal Participation in Community Governance

The national emphasis on 'equalisation' of service provision has coincided with the recognition by government that the failure of previous service delivery approaches has much to do with Aboriginal communities being understood as 'passive recipients of services rather than active participants'<sup>37</sup> who determine their own needs and make decisions about how services are delivered. It has been observed throughout this Discussion Paper that the most effective solutions to the problems and disadvantage experienced by Aboriginal communities are those that are 'owned' by the community and respond to the particular conditions and cultural dynamics of the community.<sup>38</sup> Prior to its abolition in March 2005, the acting Chairperson of ATSIC described the importance of community participation in decision-making in relation to service delivery:

A central issue is how to empower people at the community and regional levels, so that policies and service delivery are driven by the people and the communities themselves. In this vision of the world as it should be, service delivery by governments and agencies is driven by the needs of the community rather than by one-size-fits-all policies and models which are imposed from above and afar. We want Indigenous people and communities to drive change and shape their own futures. But that means we have got to get two things right:

35. For a fuller discussion of this program see Gerritsen R, Crosby J & Fletcher C, *Revisiting the Old in Revitalising the New: Capacity Building in Western Australia's Aboriginal Communities* (Canberra: North Australia Research Unit, Australian National University, 2000); see also 'Aboriginal Communities Strategic Investment Program' <<http://www.dia.wa.gov.au/Policies/EnvironmentalHealth/ACSIP.aspx>>.

36. Department of Indigenous Affairs, 'Why is there so much talk about capacity building and what is it?' <<http://www.dia.wa.gov.au/Policies/Communities/Why.aspx>>.

37. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003* (2003) 81.

38. See, for instance, the Commission's discussion of the need for culturally appropriate responses to address the issues of family violence and child abuse in Indigenous communities: Part VII, above pp 352–53.

- the capacity of community members and the community as a whole to make good policy and to campaign and negotiate for the outcomes they want; and
- the good governance and self-management of Aboriginal and Torres Strait Islander people at national, regional and local levels.<sup>39</sup>

Not only is community participation crucial to ensuring that Indigenous needs are met in a demand-responsive and culturally appropriate way, it has also been observed that ‘participation by Aboriginal communities in the process of implementing governmental policy and programs is necessary if they are to raise their administrative and decision-making capacities’.<sup>40</sup> The realisation of effective Aboriginal community governance and the reduction of Indigenous disadvantage therefore depend upon the development of management capacity within communities.<sup>41</sup>

## Capacity building and governance

The Aboriginal and Torres Strait Islander Social Justice Commissioner’s *Social Justice Report 2001* defines ‘capacity building’ and ‘governance’ as follows:

**Capacity Building** relates to the abilities, skills, understandings, values, relationships, behaviours, motivations, resources and conditions that enable individuals, organisations, sectors and social systems to carry out functions and achieve their development objectives over time.

**Governance** concerns the structures and processes for decision making, and is generally understood to encompass stewardship, leadership direction, control, authority and accountability.<sup>42</sup>

Capacity building has become a catchcry of governments in recent years and now features as a significant element in policy responses to Indigenous disadvantage at all levels of government.<sup>43</sup> However, applying such a narrow focus to capacity building (that is, merely focusing on addressing service delivery issues in Aboriginal communities) may ultimately impede the

success of these policies. Capacity building must have a wider focus that keys into ‘grass-roots’ governance reform in Indigenous communities. Without this broader reform, the cultural objectives of Aboriginal communities are in danger of being overshadowed by the social and political objectives of normalising government service provision to Aboriginal communities. There is also the danger, expressed by the Aboriginal and Torres Strait Islander Social Justice Commissioner, that equating the development of capacity in Aboriginal communities with improvement in service delivery may ‘co-opt the process of capacity building so that it reinforces the characteristics of the existing system, with all [its] structural problems’.<sup>44</sup>

Although the capacity of communities to function more efficiently and positively interact with government service providers may be addressed by governance training programs currently being instituted in Aboriginal communities, it is important that community values are respected in this process. The effective representation of its members by a governing institution of an Aboriginal community will necessarily require education in the language and values of white institutions and the broader economy; but if government’s ways of doing business with Aboriginal communities does not also change, then the social and economic problems currently restraining the progress of those communities will remain. The focus of capacity building must therefore also extend to building the capacity of government to engage in meaningful consultative partnerships with Indigenous people.<sup>45</sup>

## Obstacles to Effective Aboriginal Community Governance

### Lack of economic base

The lack of an economic base to provide employment and create independent self-supporting communities is a major obstacle to governance reform in Aboriginal communities. It contributes to a range of social

39. ATSIAC, *Annual Report 2002–2003* (2003) 9 as cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003* (2003) 62.

40. Gerritsen R, Crosby J & Fletcher C, *Revisiting the Old in Revitalising the New: Capacity Building in Western Australia’s Aboriginal Communities* (Canberra: North Australia Research Unit, Australian National University, 2000) 24. See also Department of Indigenous Affairs, *Building Stronger Communities* (2002) 18.

41. *Ibid.*

42. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2001) 67.

43. A major study into capacity building in relation to service delivery in Aboriginal communities was undertaken between 2002 and 2004 by the Parliament of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (SCATSIA). The Committee reported in June 2004. See, SCATSIA, *Many Ways Forward: Report of the inquiry into capacity building and service delivery in Indigenous communities* (June 2004). It is noted that the international literature is beginning to embrace the term ‘capacity development’ (focusing on sustainable governmental capacity developed over time) rather than capacity building.

44. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003* (2003) 77.

45. The imperative of capacity building directed to government has also been stressed by the Department of Indigenous Affairs (DIA). See DIA, *Services to Discrete Indigenous Communities in Western Australia*, Discussion Paper (September 2002) 26–29.

problems, from competing for scarce resources to—particularly amongst Aboriginal youth—lack of hope and self-esteem and consequent substance abuse. Noel Pearson has observed:

The development of self-sufficiency of Aboriginal communities is a long term agenda. Communities are not even going to make modest inroads into self-sufficiency in the next few years. Economic development is a generational challenge and it will be one of the hardest to overcome. This is because of the lack of resources, the need for education and training, and all of the problems that attend economic development in remote Australia. Remote Australia is not an easy place to get economic enterprises going. The least skilled, least resourced people are living in the areas of Australia where it is hardest to get economic development going. That is our predicament.<sup>46</sup>

Remote and rural Aboriginal communities clearly face a difficult task in attaining economic self-sufficiency and in the short-term are almost completely dependent on government welfare or funding of community development and employment programs.<sup>47</sup> The type of funding (whether block grants or specific purpose funding) and its source will usually dictate the degree of Aboriginal control over decisions about how money is allocated; however, there is always some degree of external control over the expenditure of public monies and in the past resource application has been almost entirely managed by city-based bureaucrats. In contrast, monies drawn from community enterprises—such as art production, lease of land to mining or pastoral interests, or harvesting of seed for revegetation projects—may be applied as the community (or individual beneficiaries) sees fit; thereby increasing Indigenous control of decision-making and developing management capacity within the community. The development of sustainable economic projects within Aboriginal communities therefore represents a crucial step toward self-determining effective community governance.

### Education, training and recruitment of staff

At present there is an over-reliance on non-Aboriginal staff in community governing organisations which

creates three significant problems. First, reliance on non-Aboriginal staff decreases opportunities for building capacity and social capital within Aboriginal communities. Second, having non-Aboriginal people speaking for the community means that interactions with government are more likely to be carried out on non-Aboriginal terms emphasising non-Aboriginal values and diminishing constituent representation. And third, because of the remoteness, cultural difference and inferior service provision of many Aboriginal communities there is considerable difficulty in attracting and retaining quality, ethical staff.<sup>48</sup>

It has also been observed that Aboriginal community organisations are not supported in their own management – that they are only funded to deliver services. In the context of ‘limited skills and experience, social, economic, and educational disadvantage, isolation and absence of support’,<sup>49</sup> the requirements placed by funding agencies on accountability to government consumes such a degree of human and financial resources that the organisation’s attention is diverted away from the needs of the community. As a result the community is disadvantaged and the organisation fails in performance evaluation, which in some cases results in funding being withdrawn.

### Feuding and dysfunction

Most contemporary Aboriginal communities can be said to have emerged through the process of colonisation, dislocation and the amalgamation of tribes or peoples that may have no historical connection. Many Aboriginal people no longer live on their ancestral lands and social organisation within some communities may have only tenuous ties to traditional Aboriginal society. While these factors do not necessarily dilute the force of Aboriginal culture and laws, they may contribute to social conflict or dysfunction and the factionalisation of governing institutions within communities.

During its consultations the Commission heard repeated accounts of serious family feuding that has debilitated communities and undermined authority structures (whether traditional or otherwise).<sup>50</sup> Pearson has observed that nepotism and family feuding are a major

46. Pearson N, *Our Right to Take Responsibility* (Cairns: Noel Pearson & Associates, 2000) 55.

47. The role of the government subsidised Community Development Employment Project (or CDEP) and its importance, particularly to remote Aboriginal communities, is discussed in Part II, above pp 37–38.

48. Department of Indigenous Affairs, *Building Stronger Communities: Capacity building with Indigenous communities being undertaken by the WA Department of Indigenous Affairs* (2002) 19.

49. Kimberley Community Management Services, ‘Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs’ Inquiry into Capacity Building in Indigenous Communities’ (August 2002) 2.

50. See, for example, LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 6 & 7; *Geraldton*, 26–27 May 2003, 13, 14 & 17; *Broome*, 17–19 August 2003, 27; *Bunbury*, 28–29 October 2003, 14 & 16; *Albany*, 18 November 2003, 21; *Armadale*, 2 December 2002, 25; *Midland*, 16 December 2002, 40.

obstacle to Indigenous progress and a drain on political energies.<sup>51</sup> Pearson also believes that community disputation has led to lost opportunity for Aboriginal people and a diminution of goodwill.<sup>52</sup> Nevertheless, there has been some success in dealing with family feuding in institutional design. Pearson cites the example of the Coen Regional Aboriginal Corporation, which overcame its governance difficulties by designing a structure that recognised community factions and ensured representation of all interests.<sup>53</sup> Similar results have been achieved at Bidyadanga in Western Australia where skin groups are represented on the community's governing council. It will also be noted that the Commission's proposal for community justice groups, set out in Part V above, envisages constituent representation of all family or skin groups in addition to equal gender representation to address issues of factional conflict and to enhance the legitimacy and consequent authority of the groups.<sup>54</sup>

### Breakdown of cultural authority

Contributing to dysfunction within many Aboriginal communities is the apparent breakdown of the cultural authority of Elders. The Commission's consultations yielded many references to Aboriginal peoples' concern about diminishing regard for Elders, particularly by Indigenous young people.<sup>55</sup> This breakdown is undoubtedly a continuing consequence of colonial dislocation of Aboriginal peoples from their traditional land, past government policies of removal of Aboriginal children from their cultural context and the forced unification of different Aboriginal tribes on reserves and missions. However, there are contemporary factors that contribute to this problem. In his background paper for this reference John Toohey suggests that the disintegration of traditional authority may be attributed in some cases to the emergence of alternative authority structures imposed by the current scheme of community

governance in Western Australia, namely, community councils.<sup>56</sup> Toohey observes that Aboriginal community councils are merely

a consequence of government funded [sic] and the requirement of incorporation in order to receive money and to account for it. Those who comprise such councils are generally not chosen because of their deep knowledge of traditional matters. Rather they are more likely to be chosen by the community because they are younger, articulate in the English language, and have the ability to deal with the service providers and with the complexities of maintaining those services. The importance which those councils inevitably assume may at times overshadow the standing of those who would ordinarily be regarded as the 'elders'.<sup>57</sup>

These observations invoke the significance of institutional design in relation to Aboriginal community governance.

### Institutional design

Many commentators see the obstacles to improving living conditions in Aboriginal communities—such as lack of community participation, inappropriate allocation of resources and community dysfunction—as arising from the inappropriate structure of institutions that operate in the Indigenous domain. As Sullivan has observed 'more effective delivery of welfare lies not in more efficient bureaucracy but in changing the structure of delivery to accommodate Aboriginal ways of doing things'.<sup>58</sup> This would necessarily take into account the views of the community and facilitate greater individual participation in the process. Writing of First Nations peoples in Canada, Paul Havemann has observed that there is a 'fundamental chasm' between the tradition-oriented worldview of indigenous peoples and the world of modernity brought by colonisation.<sup>59</sup> For Havemann, the question is how to design institutions that recognise this difference and do not impose white

51. Pearson N, *Our Right to Take Responsibility* (Cairns: Noel Pearson & Associates, 2000) 48.

52. ABC Radio National, *Background Briefing* (29 October 2000), < <http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http%3A/www.abc.net.au/rn/talks/bbing/stories/s203074.htm>>.

53. Pearson N, *Our Right to Take Responsibility* (Cairns: Noel Pearson & Associates, 2000) 69.

54. See Part V, 'Community Justice Mechanisms – Membership', above pp 134–35.

55. Such sentiments were repeated throughout the Commission's consultations with communities, including with the more remote Western Australian communities: see generally the Commission's *Thematic Summaries of Consultations*. See also the comments of community members in Roebourne recorded in Kathy Trees' case study: Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study*, LRCWA, Project No 94, Background Paper No 6 (November 2003). In relation to children and youth, these matters are discussed in more detail in Part II and in relation to community law and order these matters are addressed in Part V.

56. In turn, as observed in Part V, the lack of cultural authority in many Aboriginal communities has been an important reason for the failure of the current by-law scheme under the *Aboriginal Communities Act 1979* (WA). See Part V, 'Factors Against the By-Law Scheme: Lack of cultural authority', above p 120.

57. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) Appendix 1, 28 (footnote omitted).

58. Sullivan as cited in Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future* (Sydney: Federation Press, 2003) 166.

59. Havemann P, 'Aboriginal peoples in Canada: Aspirations for distributive justice as distinct peoples (an interview with Paul Chartrand)', in Havemann P (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Auckland: Oxford University Press, 1999) 69.

values, norms and power structures on indigenous communities.<sup>60</sup>

Larissa Behrendt is one of many Indigenous Australian commentators that see a need for structural change in the institutions that affect Aboriginal people to accommodate 'institutional pluralism'.<sup>61</sup> While institutions may appear to be ideologically neutral, Behrendt argues that:

it is inevitable that the laws and institutions of society are constructed with the values of the dominant culture and that they produce unsatisfactory results, conflict, marginalisation and ostracism for those who find themselves challenging those values. This goes some of the way to explaining why 'Western' institutions often fail Indigenous people.<sup>62</sup>

Roger McDonnell and Robert Depew warn against a romanticised notion of returning governance of Aboriginal communities to a traditional power structure simply because it must have worked in the past. They describe this as 'dangerously naïve' and argue that

it ignore[s] the massive amounts of information from the areas of justice, health and social services indicating just how comprehensively problematic and complex many contemporary Aboriginal communities are. It would also beg the question why, if they are in place in a sufficiently robust form, indigenous institutions and values are not having a more positive impact on the lives of those whose institutions and values they reflect.<sup>63</sup>

This is a salient warning but on the other hand there is an important and well-recognised need to find what Stephen Cornell describes as a 'cultural match' between communities and the institutions that directly govern them. That is, for governing institutions to have any chance of success, they must reflect the values, and match the political culture, of the community they seek to govern.<sup>64</sup> It is this, Cornell argues, that gives governing institutions their legitimacy. In Cornell's view this means

designing governing institutions that match *indigenous* notions of how authority should be organized and

exercised. It means working with—not against—indigenous law and practice.<sup>65</sup>

However, it must be remembered that the embrace of culture in the design, and indeed practice, of Indigenous governing institutions must take account of modern pressures upon Aboriginal people and the diversity of views in any given Aboriginal community. As McDonnell and Depew point out:

Aboriginal people today are just that, they are contemporaries who, quite apart from being the proud inheritors of distinct traditions, may have developed sensibilities with regard to gender equality, individual rights, and a host of other values that may be contrary or contradictory to that tradition. Furthermore no one can know in advance what that mix might be.<sup>66</sup>

In many ways, these sentiments reflect the true nature of self-determination: that a people should have the freedom to 'determine their political status and freely pursue their economic, social and cultural development'.<sup>67</sup> Similar to the opinions expressed by many Indigenous Australians, the Canadian Royal Commission on Aboriginal People (RCAP) observed that many indigenous Canadians felt that systems of government which do not reflect traditional values of Indigenous peoples erode traditional authority structures, the importance of the family, and traditional consensual decision-making.<sup>68</sup> However, RCAP also pointed out that, when given the opportunity to design their own governing systems, many indigenous Canadians saw useful features in mainstream forms of government.

Aboriginal people, like other contemporary people, are constantly reworking their institutions to cope with new circumstances and demands. In doing so they freely borrow and adapt cultural traits that they find useful and appealing. It is not the heedless reproduction of outmoded practices that makes a vigorous tradition, but a strong connection with the living past.<sup>69</sup>

RCAP also observed that 'the fact that some Aboriginal governments may resemble Canadian governments in their overt structure does not preclude their being

60. Ibid 67.

61. Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future* (Sydney: Federation Press, 2003) 131.

62. Ibid 67

63. McDonnell RR & Depew RC, 'Aboriginal Self-Government and Self-determination in Canada: A Critical Commentary' in Hylton JH (ed), *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich Publishing, 1999) 357.

64. Cornell S, 'The Power and Importance of Indigenous Self-Governance: Research findings from the Harvard Project on American Indian Economic Development', presentation to the Building Effective Indigenous Governance Conference, Canberra (3 April 2002).

65. Ibid.

66. McDonnell RR & Depew RC, 'Aboriginal Self-Government and Self-determination in Canada: A Critical Commentary' in Hylton JH (ed), *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich Publishing, 1999) 369.

67. *International Covenant on Civil and Political Rights* and *International Covenant on Economic Social and Cultural Rights*, Article 1.

68. Royal Commission on Aboriginal Peoples- Final Report, Volume 2: Restructuring the Relationship, 1.2 Traditions of Governance, 11.

69. Ibid 3.

animated by Aboriginal outlooks, values and practices'.<sup>70</sup> In other words, institutions of Aboriginal community governance may accommodate Aboriginal perspectives without necessarily being based entirely on Aboriginal values. The important point would appear to be that Aboriginal communities should be free to determine the design of their immediate governing institutions. Institutional design may differ widely amongst Aboriginal communities in response to their differing needs or cultural outlooks and the means by which government facilitates this process must be sufficiently flexible to accommodate this diversity.

## Aboriginal Community Governance in Western Australia

### *Aboriginal Communities Act 1979*

The *Aboriginal Communities Act 1979* (WA) ('the Act') is the existing system of Aboriginal community governance in Western Australia. As discussed in detail above in Part V,<sup>71</sup> the Act was conceived primarily as a vehicle for the management of law and order issues within Aboriginal communities and was intended to operate in conjunction with a community court system presided over by Aboriginal Justices of the Peace. (As explained in Part V, this court system never eventuated.) The Act made provision for Aboriginal community councils to declare by-laws applying within designated community lands to regulate such matters as traffic, damage, alcohol consumption and supply, disorderly behaviour and admission to land.<sup>72</sup> At the date of writing 25 Aboriginal communities, mainly situated in the Kimberley region, operate community by-law schemes under the Act.<sup>73</sup>

Having reportedly evolved from the international law focus on Indigenous self-determination in the 1970s,

the Act was originally touted as providing some form of governing autonomy to Aboriginal communities.<sup>74</sup> However, it has been widely criticised for imposing non-Aboriginal governance structures upon Aboriginal communities that have, in some cases, complicated traditional kin relationships and undermined the traditional authority of Elders.<sup>75</sup> Indeed, apart from proposing by-laws to address certain forms of behaviour within community lands, there is no opportunity for genuine Aboriginal community governance: the Act imposes a governing structure upon a community (by way of a non-representative incorporated community council); prescribes the process for, and parameters of, community law-making; invests authority for enforcement in a non-Aboriginal authority; and stipulates the appropriate sanctions for breach of offences. In fact, the Act can only really be seen as an attempt to bring the general court and legal system into communities where a lack of police presence, abuse of alcohol and other matters had caused community order to disintegrate.<sup>76</sup> According to Patrick Dodson:

'Experimental' at its inception, it could be said [the Act] has never been taken seriously. Apart from some individual Magistrates, no-one has seriously acknowledged, enhanced or sponsored the legitimate right of Aboriginal people to develop self-management legal process programmes for their own communities.<sup>77</sup>

Although the preamble of the Act is expressed in broad terms that might support its extension to wider governance matters,<sup>78</sup> in practice the Act has only ever been used as a tool for addressing criminal justice issues. In this respect, the 'experiment' can be said to have been singularly unsuccessful.<sup>79</sup> Problems with the current community by-laws scheme under the Act are canvassed in detail in Part V above, but in summary there have been significant issues with the enforcement of by-laws by police and wardens; the capacity

70. Ibid 22.

71. See Part V, 'Aboriginal Community Justice Mechanisms: The Western Australian Aboriginal Community By-Law Scheme', above pp 115–20.

72. *Aboriginal Communities Act 1979* (WA) s 7(1).

73. It is noted that although only 25 communities operate by-laws under the Act, there are many more communities that have expressed interest in being proclaimed under the Act. McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Vol. 1, July 1992) 6. McCallum notes (at 79) that there are considerable delays—up to 3 years in some cases—in processing a community's application for proclamation under the Act (the same was noted by an earlier review of the Act undertaken by John Hedges in 1985). The Commission understands that applications are currently on hold while a further review into the operation of the Act is undertaken by the Department of Indigenous Affairs. See: Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 August 2004, 5043 (Mr JC Kobelke, Minister for Indigenous Affairs).

74. Kamien T, 'Implementing Self-Government – An Examination of the *Aboriginal Communities Act 1979* (WA)' (1995) *Murdoch University E-Law Journal* [1].

75. See, for example, Kamien, *ibid* [3.4].

76. Certainly, the Act never purported to engage meaningfully with customary law. See: Commissioner Patrick Dodson, RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol. 1, 1991) [9.3.4]; ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [757].

77. Commissioner Patrick Dodson, RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol. 1, 1991) [9.3].

78. The preamble of the Act reads 'An Act to assist certain Aboriginal communities to manage and control their community lands and for related purposes'. See also McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Vol. 1, July 1992) 97.

79. The Lingjari Foundation, *The Munjurla Study: A Scoping, Profiling and Planning Process in Respect of the WA COAG Site Trial for the Purposes of Informing the Negotiation of a Comprehensive Regional Agreement* (April 2004), 117.

for breach of by-laws to contribute to the overrepresentation of Aboriginal people in the mainstream criminal justice system; the fact that by-laws have been established by communities (and approved by the Governor) that go beyond the delegated law-making powers contained in the enabling Act; that the by-law scheme creates an additional layer of law applicable only to Aboriginal communities; that community councils empowered under the Act are not always representative and are in some instances dysfunctional; and that by-laws are not always, as the Act envisaged, established in consultation with the community and are not necessarily reflective of traditional authority structures or customary law.



The Commission has proposed in Part V that the Act be repealed and replaced with a new Act – the ‘Aboriginal Communities and Community Justice Groups Act’.<sup>80</sup> The proposed Act will contain the means by which Aboriginal communities can enhance community control of their law and order issues; in particular by the establishment of community justice groups which seek to consolidate the cultural authority of Elders and offer a culturally appropriate, community-owned process for control of behaviour in the place of the current by-law scheme.

## Ngaanyatjarraku Shire – An Example of Aboriginal Local Government

With a population of 1,708, Ngaanyatjarraku Shire takes in ten communities in the Gibson and Great Victoria Deserts (Warburton, Tjirrkarli, Jameson, Blackstone, Wingellina, Warakurna, Tjukurla, Wanarn, Patjarr and Giles) and is the only Aboriginal local governing body in Western Australia. Established in July 1993, Ngaanyatjarraku broke away from the Shire of Wiluna in an effort to improve service delivery to the people of the tri-border region.<sup>81</sup> Currently Ngaanyatjarraku Shire provides a cross-section of local government services to most of its constituent communities including

litter and waste management, dog control, environmental health services, youth services, maintenance of recreation facilities, road maintenance, street lighting and building services (planning and development). Although a substantial improvement on the very limited services previously provided to the region by the Shire of Wiluna, Ngaanyatjarraku Shire acknowledges that it will take some time for the full range of local government services to be available to all communities in the region.<sup>82</sup>

As a local governing body, the Shire of Ngaanyatjarraku is primarily funded by the federal government through the *Local Government (Financial Assistance) Act 1995* (Cth) as distributed by the state government’s Local Government Grants Commission. In April 2005 the Shire’s total operating revenue was recorded at just over \$5.1 million, with just \$165,000 of that amount being raised by rates levied on mining tenements and community leasehold land.<sup>83</sup>

## Funding Options for Aboriginal Local Governing Bodies in Western Australia

There are two types of local governing bodies recognised for the purposes of discrete federal funding under s 4(1) of the *Local Government (Financial Assistance) Act 1995* (Cth):

80. See Part V, Proposal 18, above p 140.

81. The Shire of Ngaanyatjarraku is located roughly where the borders of South Australia, Western Australia and the Northern Territory intersect. However, the Ngaanyatjarra lands are even more extensive and take in 250,000 square kilometres of Western Australia (or 3% of the Australian landmass) and cover parts of the adjoining shires of East Pilbara and Laverton. Shire of Ngaanyatjarraku, ‘Lands’, <<http://www.tjulyuru.com/lands.asp>>.

82. Shire of Ngaanyatjarraku, ‘Shire Functions’, <<http://www.tjulyuru.com/functions.asp>>.

83. Shire of Ngaanyatjarraku, ‘Shire Statistics’, <<http://www.tjulyuru.com/facts.asp>>.

- (a) a local governing body established by or under a law of a State, other than a body whose sole or principal function is to provide a particular service, such as the supply of electricity or water; or
- (b) a body declared by the Minister, on the advice of the relevant state Minister, by notice published in the *Gazette*, to be a local governing body for the purposes of [the *Local Government (Financial Assistance) Act 1995*].

## Local governing bodies created under state law

Ngaanyatjarraku Shire was created under the *Local Government Act 1995* (WA) as a full local government, thereby coming under s 4(1)(a). As such it is subject to the rigorous reporting and auditing requirements of mainstream local governments. There are also a further 55 Aboriginal communities in Australia that are funded as full local governments under their respective state Acts. However, many of these are in Queensland which recently provided for Aboriginal Councils under the *Community Services (Aborigines) Act 1984* (Qld) to achieve full shire status under the *Local Government (Community Government Areas) Act 2004* (Qld).<sup>84</sup> Under this Act, Councils are automatically declared for the purposes of federal funding but not all of the rigorous legislative requirements imposed on mainstream local governments in Queensland apply. It is envisaged that, over a period of years and after implementation of a Community Governance Improvement Strategy (which addresses governing capacity, systems procedures and policy, financial management and service delivery in consultation with Aboriginal people and other stakeholders), Aboriginal community governments in Queensland will be brought under the mainstream *Local Government Act 1993* (Qld) with all the rights and responsibilities that that recognition brings. It should be noted, however, that the Queensland response specifically applies non-Indigenous or Western models of governance to Indigenous communities, although there is some flexibility for unique institutional development such as in the area of electing councillors.

The Northern Territory has an operating system for Aboriginal community governance that is not dissimilar to the new Queensland scheme. Community Governing Councils (CGCs) are created under the *Local Government Act 1993* (NT) and have the same functions and powers (including by-law making powers) as local government councils but are much smaller in size. They are also subject to the same regulatory requirements as local governments, however there is some freedom for self-organisation by way of a 'scheme' agreed by the community and approved by the Chief Minister that lays out such matters as eligibility to vote, council procedures and determination of functions. The CGC structure is used most frequently by remote Indigenous communities that are unable to rely on nearby towns for facilities or services.<sup>85</sup> There are 30 such councils in the Northern Territory.

## 'Declared' local governing bodies

As mentioned above, an Aboriginal (or any other) community may be declared a local governing body by the Minister under s 4(1)(b) of the *Local Government (Financial Assistance) Act 1995* (Cth) for the purpose of securing discrete federal funding. Although this option has never been used in Western Australia, there are 36 Aboriginal communities that are declared for the purposes of discrete funding elsewhere in Australia.<sup>86</sup> 'Declared bodies' are treated as local governments for the purposes of grant allocation even though they are unlikely to have the same legislative requirements as local governments and are not created under state Local Government Acts. In the Northern Territory 28 community incorporated associations are declared as local governing bodies for the purposes of attracting federal funding. Although these incorporated associations (or community councils) do not have the by-law making power of a local government, they do have full decision-making power and are able to fund their own service provision (through state and federal grants and limited revenue raising) and provide employment for their people. In addition, the declared local governing body structure gives communities a greater degree of autonomy from the Northern Territory government than under the CGC model.<sup>87</sup>

84. The *Local Government (Community Government Areas) Act 2004* and Community Governance Improvement Strategy came about as a result of the 2001 Cape York Justice Study which highlighted specific justice problems (in particular, alcohol and authority problems) in Aboriginal communities. Responses to the consequent green paper placed a spotlight on issues of equality in service provision for Aboriginal communities.

85. For further discussion see Way F & Beckett S, 'Landholding and Governance Structures under Australian Land Rights Legislation', Australian Research Council Collaborative Research Project on Governance Structures for Indigenous Australians, Discussion Paper No 4 (undated). See also Local Government Association of the Northern Territory, *Annual Report 2003–2004* (2004); available on <<http://www.lgant.nt.gov.au>>.

86. Of the 36 declared local governing bodies, Northern Territory has 28, New South Wales has two, Victoria has one and South Australia has six.

87. Way F & Beckett S, 'Landholding and Governance Structures under Australian Land Rights Legislation', Australian Research Council Collaborative Research Project on Governance Structures for Indigenous Australians, Discussion Paper No 4 (undated).

## Regionalisation of Aboriginal Governance

Despite the relative autonomy provided by the various Northern Territory governance structures, many small local councils are failing and many have developed a 'dependency on resident non-Aboriginal staff and government agencies for their survival'.<sup>88</sup> Like Western Australia and the other states, the Northern Territory is also experiencing significant problems with service provision to Aboriginal communities and entrenched Indigenous disadvantage. For these reasons, and to rationalise the large number of very small local governing bodies in the Northern Territory and avoid duplication of structures where possible, the government has begun to advocate a move toward regional governance.<sup>89</sup> The new regional bodies will subsume a number of CGCs and small 'declared' community councils and bring greater power to the table to negotiate regional partnership agreements with government and service providers and facilitate economies of scale. It is also considered that regional governments will provide greater opportunities for attracting and retaining professional staff.<sup>90</sup> Eventually, it is understood that the smaller councils and community governing structures will be abandoned.<sup>91</sup>

## Aboriginal Regional Governance in Western Australia

The abolition of ATSIC in March 2005 has created a new imperative for Aboriginal governance at all levels. Under the new Commonwealth arrangements for Indigenous affairs the Australian government has introduced a 'whole-of-government' approach to delivering services to Aboriginal people. Part of this new approach involves the establishment of multi-agency Indigenous Coordinating Centres in former ATSIC regions to oversee partnership agreements between communities and the Commonwealth government and to integrate services provided by all levels of

government to Aboriginal communities. Key to the ultimate success of the new arrangements is the establishment of a network of regional representative organisations 'to ensure that local needs and priorities are understood'.<sup>92</sup>

## A Regional Governance Exemplar: Kullarri Regional Indigenous Body

The west Kimberley's Kullarri Regional Indigenous Body (KRIB) is one of the first Western Australian regional representative structures to emerge following the demise of ATSIC. In fact negotiations for the establishment of KRIB predated ATSIC's abolition by some 12 years. In this sense, KRIB can be seen as an exemplar because it is a 'self-identifying' and 'self-organising' structure that has emerged from within the community itself. In other words, it is the product of true community participation, rather than mere consultation.

### The 'four ward model'

Over a period of many years a number of governance models were considered by the people of the Kullarri region in an effort to improve equality of service delivery to west Kimberley communities. In 2002 the 'four ward model' was selected as a governing structure that best reflected the 'self-identified cultural and local representation at the regional level'.<sup>93</sup> The four ward model is comprised of 'four discrete ethnographic areas'<sup>94</sup> which select representatives to form ward councils. Each ward council then selects three representatives to sit on KRIB, the regional body.

An important aspect of the KRIB model is that the delineation of the four wards was not imposed upon the constituent communities by external authorities; rather, it has emerged as a result of how local Aboriginal people view the region. Each ward has needs and interests that may be quite distinct from the others. For example, the South Ward, which is comprised

88. Northern Territory Government, Department of Community Development, Sport and Cultural Affairs, *Building Stronger Regions – Stronger Futures* (2003) 11.

89. *Ibid.*

90. Smith DE, 'From Gove to Governance: Reshaping Indigenous Governance in the Northern Territory', Australian National University Centre for Aboriginal Policy Research, Discussion Paper No 265 (2004) 21.

91. Northern Territory Government, Department of Community Development, Sport and Cultural Affairs, *Building Stronger Regions – Stronger Futures* (2003) 11.

92. Australian Government, *New Arrangements in Indigenous Affairs* (updated ed., February 2005) 5.

93. Burdon Torzillo & Associates Pty Ltd, *Kullarri Regional Partnerships Project: Final Report*, prepared for Kullarri Regional CDEP Inc, Broome ICC and Kullarri Regional Indigenous Body (July 2005) 6.

94. *Ibid.* 6. The wards are: North (Bard Jawi) Ward, comprising Lombardina, Djarindjin, One Arm Point and surrounding outstations; Central Ward, comprising Beagle Bay and surrounding outstations; Town Ward, comprising Broome and town reserves; and South Ward, comprising Bidyadanga and its surrounding area.

primarily of the geographically remote community of Bidyadanga, will have very different infrastructure and service delivery needs than that of the Town Ward which takes in the regional hub of Broome. While the communities and outstations comprising the Central Ward may have significantly different cultural views to those comprising the Bard Jawi Ward which occupies the north of the Kullarri region.<sup>95</sup>

There is flexibility in the role that each ward plays in the overall regional representative structure and this role may vary over time.<sup>96</sup> For example, a ward may begin by identifying and communicating local ward issues, needs and interests to KRIB which undertakes to represent those interests in negotiations on regional policies and partnership agreements; but, the possibility exists that in time, a ward may separate from the regional council in a move towards self-sufficiency. Presumably, a functional ward wishing to separate from KRIB may also seek to be excised from its local government area and pursue discrete funding as an independent shire in the manner of Ngaanyatjarraku Shire or as a 'declared' local governing body under the *Local Government (Financial Assistance) Act 1995* (Cth).

## Representation

Each ward has the power to determine the appropriate representation for their ward council:<sup>97</sup> KRIB's guiding principles require only that each ward has traditional owner representation. Ward councils will generally include representatives from each of the different communities or outstations making up the ward plus a separate traditional owner or native title group. Although gender balance is not expressly addressed by requiring equal male-female representation at the ward level, the voices of women are ensured by a non-ward seat on KRIB for the Kullarri Indigenous Women's Aboriginal Corporation.<sup>98</sup>

As a result of this community-driven (rather than government imposed) representative arrangement, the governance structures in each ward are quite

different.<sup>99</sup> In fact, since the South Ward is a single community ward, it has decided not to establish a ward council at this time. Instead, the community and the separate traditional owner group are directly represented on KRIB.

## The role of KRIB

KRIB's objectives remain focused to a degree on realising equality of service provision in the Kullarri region, but KRIB is not itself a service provider or funding body.<sup>100</sup> KRIB's role is to advocate for the interests of the region with one voice, to map a 30-year vision for the region, to negotiate partnership agreements and memoranda of understanding with government and service providers on mutually beneficial terms, and to develop governing capacity in the region. KRIB appears to be grounded in the notion of 'partnership' with government, communities, other Indigenous bodies and individuals. However, in this context, partnership is understood to refer to equality of relations between parties and not to mere consultation.

## Exploiting existing expertise

Acknowledging the broad experience and specific expertise of the plethora of existing associations<sup>101</sup> and other bodies in the Kullarri region, KRIB has developed the concept of 'theme teams' to advise and enhance participation in (and acceptance of) the new regional structure. Suggested theme teams include '[e]arly childhood development, education, economic development, communications, culture and arts, employment and training, governance and strategy, health, housing and infrastructure, justice, land and natural resources, women's issues, families and youth'.<sup>102</sup> Theme teams are expected to maximise improved outcomes in the region by ensuring that existing forums, programs and expertise are exploited, that unnecessary duplication is avoided, that service provision and outcomes are monitored and that all relevant people are 'at the table' to ensure policy and program success.<sup>103</sup>

95. In fact Burdon Torzillo notes that the view has been expressed by North Ward and Central Ward members that 'significant healing has commenced from the opportunity the Ward structure provides for diverse groups to get together': *ibid* 45.

96. *Ibid* 35.

97. Burdon Torzillo & Associates Pty Ltd, *Kullarri Regional Partnerships Project: Final Report*, prepared for Kullarri Regional CDEP Inc, Broome ICC and Kullarri Regional Indigenous Body (July 2005) 6.

98. *Ibid* 28.

99. *Ibid* 25.

100. *Ibid* 8. KRIB appears to have made a conscious decision not to be involved in service provision despite calls from regional Indigenous service providers to be service provider based. KRIB's ultimate decision to avoid service provision was supported by the need to ensure that the body remained independent of government and representative of the community: *ibid* 14.

101. It is noted that there are 130 corporations created under the *Aboriginal Councils and Association Act 1976* (Cth) in the Kullarri region: *ibid* 45.

102. *Ibid* 6.

103. *Ibid*.

## Other Regional Representative Bodies in Western Australia

Although not all borne of the lengthy, 'self-emerging' and 'self-identifying' process that determined the Kullarri model, there are several other regional representative bodies in different stages of development in Western Australia. The more advanced of these include Wunan (east Kimberley), Yamatji (central west) and Ngaanyatjarraku (Warburton region).

Each region appears to be developing different structures to suit the needs and interests of regional players. For example, the proposed Yamatji Regional Assembly will have representatives from 12 organisations or communities representing specific issues including land, housing, health and justice.<sup>104</sup> The roles of the Assembly will include advising government of issues specific to the region, providing an interface between service providers and the community and monitoring and evaluating service delivery.<sup>105</sup> While the Ngaanyatjarraku Shire Council (the only existing discrete Aboriginal shire in Western Australia) is in the process of finalising a broad Regional Partnership Agreement with the state and federal governments to include whole-of-government engagement on service delivery and a strategic investment plan.<sup>106</sup>

## Reform of Aboriginal Community Governance in Western Australia

### Need for Aboriginal Community Governance Reform

There is no doubt that there is a pressing need for Aboriginal community governance reform in Western Australia. The impetus for such reform primarily arises from the state of entrenched Indigenous disadvantage discussed in Part II of this paper and the law and order issues discussed at length in Part V. In considering the possibilities for reform of Aboriginal community governance in Western Australia, the Commission is mindful of the need to address the problems identified earlier in this Part, in particular:

- inequality of government service provision to Aboriginal communities;
- lack of Aboriginal participation in community governance;
- lack of community economic base;
- problems with recruitment and retention of staff;
- intra-community (family) feuding;
- dysfunction and law and order issues;
- breakdown of cultural authority; and
- inappropriate or externally imposed governing structures.

The Commission notes the enormous potential of regional governing structures, such as KRIB, to address many of these issues; however, the Commission recognises that there is still a need for effective governance at the community level. Indeed, the effectiveness of regional bodies will ultimately rely upon the 'health' and capacity of their constituent communities and their ability to interact with the relevant regional body.

### Funding for Autonomy

The Commission is of the opinion that current options available for Aboriginal community governance in Western Australia are narrow and limiting. In particular, it is noted that there has been no attempt in Western Australia to exploit federal funding options for discrete Aboriginal communities as 'declared' local governing bodies. The Commission believes that this option may offer Aboriginal communities (in particular communities that are not being adequately provided for by current local governments) the opportunity to fund or negotiate their own service provision in a broadly autonomous environment.<sup>107</sup> In some cases, such funding may offer Aboriginal communities the prospect of enhancing their economic base by bringing employment to the community and its members. Of course, it must be acknowledged that such an option could only work in the most functional communities and will require significant initial support by government and preparatory programs to build local governing capacity. Nonetheless, it is an option that the Commission considers should be further explored in Western Australia.

104. Senator Amanda Vanstone, Minister for Immigration, Multicultural and Indigenous Affairs, *Minister Announces New Indigenous Representation Arrangements*, Media Statement (29 June 2005).

105. *Ibid.*

106. *Ibid.*

107. It is noted that this would probably require excision of the community lands from the current local government area; however, in many cases (in particular remote communities) this will not impact negatively on the community as current relations between local governing bodies and remote communities appear to be unworkable and Aboriginal-specific funding is not being routed to Aboriginal constituents.

### Proposal 92

That the state government explore the possibility of accessing federal funding for discrete Aboriginal communities under s 4(1)(b) of the *Local Government (Financial Assistance) Act 1995* (Cth) with a view to offering this autonomous option to functional Aboriginal communities that are not currently well-served by their local governments.

## Some Guiding Principles for Aboriginal Community Governance Reform

Before turning to examine the potential of a framework for Aboriginal community governance reform in Western Australia, it is useful to isolate some guiding principles from the discussion in this Part. The Commission has identified six key principles that should be applied by government in furthering the object of governance reform in Aboriginal communities.

### 1. Voluntariness

The process of establishing a new governance structure must be voluntarily undertaken by each Aboriginal community. Where significant underlying issues of feuding and consequent dysfunction exist in a community, governance structures formed as a result of external pressure will inevitably fail. In these cases the process of healing and building communities must be given priority.

### 2. Empowerment of communities by building capacity and devolving decision-making power

A significant problem with past approaches to facilitating community governance and government service delivery is that the communities themselves have generally not been involved in identifying and implementing local solutions and having the freedom to spend money in ways that will benefit them. Indigenous communities have come to consider themselves, and be considered by governments, as passive recipients of government programs. As a consequence the ability of Aboriginal people to make decisions affecting their own community has been considerably eroded. In order that communities are genuinely empowered, capacity building for good governance must be focused not only on leaders and organisations, but also on the community.

### 3. 'Downwards accountability' and flexible funding

Regardless of past attempts to deliver tailored service provision to Aboriginal communities one thing has remained constant: services have been delivered almost exclusively by white bureaucracy with policy goals and implementation strategies set by government. Even representative structures such as ATSIC, which put Aboriginal people into key decision-making roles, were required to account to government through institutions and practices that reflected values and beliefs of mainstream 'white' Australia. This has resulted in 'upwards accountability' to government in the expenditure of funding for service provision and an emphasis on process. It was noted earlier that a significant amount of any funding received to deliver services may be spent on complying with government accounting practices and audit requirements. In contrast, 'downwards accountability' involves accounting to the community for the expenditure of government money allocated for their benefit and emphasises outcomes for the people receiving the services.

### 4. Recognition of diversity and the need for flexibility

Just as Aboriginal communities are different, the method or structure of governance that works for each community will vary. A mistake that governments have made in the past in attempting to bring 'self-government' to Aboriginal communities is to impose a single inflexible governing structure upon all communities, regardless of capacity, community conflict, community aspirations, cultural considerations or geographic location. A diversity of models that are flexible enough to be responsive to local community needs and ways of self-organisation or decision-making must be offered to Aboriginal communities seeking to reform their governing structures. Preferably, the type of governing structure ultimately chosen will self-emerge and may be unique to that community.

### 5. Need for true community representation

Perhaps partly as a result of the colonial practice of moving disparate Aboriginal groups into reserves or designated areas, some Aboriginal communities are debilitated by feuding and this has adversely affected their governing institutions. In order to guard against factionalisation of governing institutions, it is the Commission's opinion that representation of all clan or family groups and a balance of gender representation

*It is the Commission's opinion that the most important rule to observe in community governance reform is that the model of governance be developed by the community, rather than imposed on the community.*

should be considered as the starting point for new governing structures. The Commission also considers that traditional owner groups should be represented on community governing councils.

#### **6. Recognition that this process will take time**

No matter what type of governing structure is ultimately determined for a community, the self-government experiment will fail if the community has chronic social problems that remain unaddressed. Issues such as family feuding, alcohol and solvent abuse, family violence and general dysfunction must all be independently addressed as part of the capacity building process before true community governance can succeed. Both the government and Aboriginal people must therefore recognise that the process of delivering greater governing autonomy to Aboriginal communities will, in some cases, take a significant amount of time.

### **A Basic Framework for Reform**

The Commission is impressed by the self-identifying and self-organising governance structures emerging at the regional level and considers that the starting point for reform of community governance in Western Australia should be limited to a basic framework that can facilitate this approach at a community level. Although the guiding principles set out above should inform the process of reform, it is the Commission's opinion that the most important rule to observe in community governance reform is that the model of governance be *developed* by the community, rather than *imposed* on the community.<sup>108</sup>

As noted earlier, the Commission has proposed in Part V that the *Aboriginal Communities Act 1979* (WA), which provides the current community governance structure, be abolished and that a new statute (the

'Aboriginal Communities and Community Justice Groups Act') be enacted to enable the establishment of Aboriginal community justice groups. The Commission believes that these representative, gender-balanced groups will answer many of the law and order issues in communities and will assist in healing community dysfunction and enhancing cultural authority and governing capacity. Importantly, the groups allow discrete communities to establish their own community rules and sanctions and enhance the opportunity for recognition of Aboriginal customary law.<sup>109</sup> The groups will also have a broader role to play in informing courts and justice bodies and in diverting Aboriginal people away from the criminal justice system.

The Commission believes that the proposed 'Aboriginal Communities and Community Justice Groups Act' may also be a suitable vehicle for establishing the basic framework for reform and recognition of forms of community governance in Western Australia. However, in view of the current state of flux in Indigenous affairs, both in Western Australia and in the country at large, the Commission is reluctant to move beyond a general proposal encouraging the facilitation of self-identifying and self-organising governance structures informed by the guiding principles set out above. In reaching this conclusion the Commission has also been influenced by the following factors:

- that the system of incorporation and accountability of Aboriginal community councils under the *Aboriginal Councils and Associations Act 1976* (Cth) is presently under review;<sup>110</sup>
- that the Department of Indigenous Affairs in Western Australia is in the process of examining the viability of the *Aboriginal Communities Act 1979* (WA) and the effectiveness of various community governance models in Western Australia;

108. The Commission notes that the same conclusion was reached by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Many Ways Forward: Report of the Inquiry into Capacity Building and Service Delivery in Indigenous Communities* (Canberra, June 2004) 128.

109. In some communities, particularly those where there is significant factionalisation in governing institutions, these community justice groups might take on a broader community governance role. For example, there is no limit to the types of matters that the community justice group may make rules about on behalf of the community. As mentioned in Part V, community rules may extend to traffic matters, control of dogs and waste disposal (typically the domain of a local government body) and negotiation with service providers (typically the domain of a community council).

110. A new Corporations (Aboriginal and Torres Strait Islander) Bill 2005 is currently before federal Parliament.

- that the important research of the Indigenous Community Governance Project at the Australian National University's Centre for Aboriginal Economic Policy Research—which is funded in part by the Western Australian government and which will ultimately inform the creation of new community governance structures in Western Australia—is ongoing;<sup>111</sup>
- that government service provision to Aboriginal communities in Western Australia is being addressed at a whole-of-government level by dedicated programs and partnerships;<sup>112</sup>
- that governance capacity building programs are a current focus of governments and of new regional representative bodies;
- that the new regional representative bodies (which have emerged from a self-identifying and self-organising process) will be in a position to monitor and evaluate the delivery of government services to constituent communities and negotiate memoranda of understanding and service agreements on behalf of those communities; and
- that the Commission's proposal for community justice groups will, when implemented, assist in addressing underlying issues of community dysfunction, law and

order and lack of cultural authority that currently impede the governing capacity of many Aboriginal communities in Western Australia.

The Commission therefore proposes:

### Proposal 93

That the starting point for reform of Aboriginal community governance in Western Australia be limited to a basic framework that can facilitate self-identifying and self-organising governance structures to emerge at a community level.

That reform of Aboriginal community governance in Western Australia be informed by the guiding principles of voluntariness; community empowerment and devolved decision-making power; 'downwards accountability'; flexibility in funding and institutional structure; and balanced clan and gender representation.<sup>113</sup>

That Aboriginal communities be free to develop or choose a model of governance that is appropriate for their needs rather than have such model imposed on them by government.

111. For details of the ANU CAEPR Indigenous Governance Project and access to its publications see: < <http://www.anu.edu.au/caepr/governance2.php>>.

112. As detailed above p 433.

113. These principles are discussed under 'Some Guiding principles for Aboriginal Community Governance Reform', above pp 436–37.