

Chapter Ten

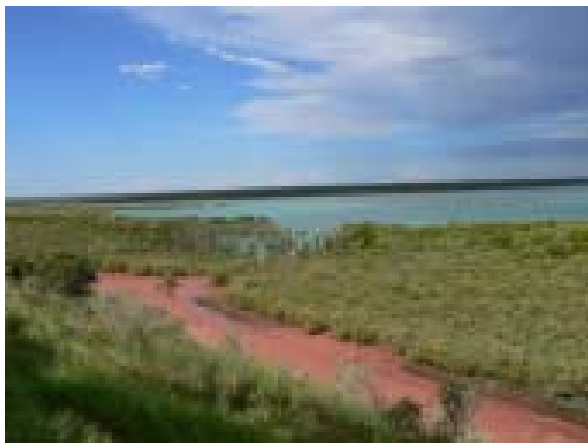
Aboriginal Community Governance in Western Australia

Contents

Western Australia Aboriginal Community Governance	351
Indigenous Self-Determination in the Western Australian Context	351
Improving Government Service Provision to Aboriginal Communities	352
Accountability of Local Governments for 'Aboriginal' Funding	352
Funding for autonomy	354
Aboriginal Governance in Western Australia	355
Community governance	355
Regional governance	356
Reform of Aboriginal Community Governance in WA	356
Some key principles for Aboriginal community governance reform	357
A basic framework for reform of Aboriginal community governance	358

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. However, it is arguable that the Commission's recommendations for the recognition of Aboriginal customary law and the accommodation of cultural beliefs will be meaningless if more is not done to advance the broader objective of empowering Aboriginal communities to reclaim control over their own destinies. The Commission therefore examined the existing status of Aboriginal community governance in Western Australia and looked at what is being done (and what more could be done) to maximise opportunities for greater Aboriginal participation in decision-making, and to encourage more effective and appropriate community governance processes. The Commission's full examination of these issues is found in Part X of its Discussion Paper.¹



Indigenous Self-Determination in the Western Australian Context

Self-determination² is considered a fundamental human right at international law and is recognised in a number of international instruments.³ As shown in the Commission's Discussion Paper, although these instruments do not identify the forms that self-determination may take, there is nothing to suggest that self-determination includes the right to secede from the nation state or claim sovereignty over territory.⁴ Aboriginal organisations in Australia have historically 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.⁵

These sentiments were confirmed by Aboriginal people during the Commission's community consultations where, although the concept of self-determination was raised, 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. In the Discussion Paper it was noted that the aspirations of Aboriginal people in Western Australia appeared to be focused on, but not confined to, the pursuit of self-determination in relation to economic, social and cultural development. It is the Commission's opinion that in order for Western Australia 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.⁶

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 417–38.
2. The concept of indigenous self-determination is discussed at length in the Commission's Discussion Paper and will not be repeated here: see *ibid* 419–22.
3. The *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights* share a common Article 1 which provides that 'all peoples have the right to self-determination'. The Discussion Paper outlines issues in relation to the definition of 'peoples' and application of this right to indigenous peoples at international law: *ibid*.
4. LRCWA, *ibid* 420.
5. See discussion, *ibid* 420–21.
6. *Ibid* 421.

Improving Government Service Provision to Aboriginal Communities

Much of the entrenched disadvantage experienced by Western Australian Aboriginal communities stems from a lack of infrastructure and essential government services.⁷ Part of the reason for problems of service provision to Aboriginal communities lies in the complicated nature of relationships between the three levels of government responsible for the delivery of services. In its Discussion Paper the Commission examined the responsibilities of local, state and federal governments to provide essential services to Aboriginal communities. It found that the rhetoric of self-determination has, in the past, allowed governments to abdicate their responsibilities to provide services that are an entitlement of citizenship and which non-Aboriginal Australians take for granted.⁸

Although there have been many recent developments aimed at improving the delivery of government services to Aboriginal people and communities,⁹ more must be done to improve outcomes on the ground. A number of the recommendations in this Report are directed at improving (or establishing) state-provided programs and services to Aboriginal people¹⁰ and the Commission's first guiding principle for reform in Chapter Two is concerned with the normalisation of major infrastructure and essential services provided by the Western Australian government.¹¹ In this chapter the Commission has concerned itself largely with the provision of local government services.

Accountability of local governments for 'Aboriginal' funding

The provision of local government services is an area where Aboriginal communities in Western Australia have been found to be disadvantaged relative to non-Aboriginal communities in comparable geographic regions.¹² 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;¹³ the 'private' nature of Aboriginal communities (resulting in the perception of inability to access land for the purposes of service provision or infrastructure maintenance);¹⁴ 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.¹⁵

These factors are typically raised by local government to explain the lack 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 seen to be a priority.¹⁶

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7. Local government 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.
 8. For example, the lack of law enforcement in remote communities (examined in Part V of the Commission's Discussion Paper) 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: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 119.
 9. For discussion of individual initiatives, see LRCWA, *ibid* 424–25. These initiatives are largely consequent upon the Council of Australian Governments' *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>>.
 10. Such as programs addressing law and order issues, family issues, consumer education, cultural awareness training of providers and Aboriginal language interpreter services.
 11. See discussion under 'Principle One: Improve government service provision to Aboriginal people', Chapter Two, above pp 33–34.
 12. Department of Indigenous Affairs (DIA), 'The Provision of Local Government Services to Aboriginal Communities: A focus paper' (November 1999) 2–3.
 13. Communities located on Aboriginal Lands Trust land can claim charitable purpose exemptions under the *Local Government Act 1995 (WA)*.
 14. DIA, 'The Provision of Local Government Services to Aboriginal Communities: A focus paper' (November 1999) 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.
 15. *Ibid* 3.
 16. 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, RC1ADIC, *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.

The rhetoric of self-determination has allowed governments to abdicate their responsibilities to provide services that are an entitlement of citizenship and which non-Aboriginal Australians take for granted.

As explained in the Commission's Discussion Paper, local governments receive state and federal funding according to a formula that specifically recognises Aboriginal population, remoteness and disadvantage factors. However, because this funding is 'untied' (that is, the funding authority cannot dictate the way in which the money is spent), there is no direct accountability of local governments to ensure that Aboriginal-specific funding reaches Aboriginal communities.¹⁷ The Commission therefore proposed that the Western Australian government should investigate ways of improving the accountability of local governments for funding provided for the benefit of Aboriginal people in each local government area.¹⁸

Submissions received in respect of this proposal were generally supportive; in particular those received from regional development commissions.¹⁹ However, the submission of the Shire of Wyndham East Kimberley expressed concern about the Commission's proposal.²⁰ The Shire argued that the issue was 'not one at all of the lack of accountability for the current untied grants, but rather the inadequate level of funding for service provision to indigenous people outside of towns'.²¹ The Commission does not resile from the fact that service provision for remote communities is inadequately resourced; however, this is not the issue being addressed by its recommendation. Rather, the issue is that, as mentioned above, Aboriginal people are not seen as true constituents because many do not pay

local government rates, despite the fact that untied grants recognise and seek to account for this. The Shire of Wyndham East Kimberley's own submission attests to this attitude in saying: 'You cannot expect services to remote indigenous communities to be subsidised by ratepayers, when those communities do not pay rates'.²²

It has recently been reported that local councils have misused federal funding which was earmarked to provide essential services to remote Aboriginal communities in Western Australia.²³ This is not a new issue. It was recognised as far back as 1991 by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) which made two recommendations aimed at improving local government accountability for funding designated for Aboriginal people.²⁴ At that time the Western Australian Grants Commission (now the Western Australian Local Government Grants Commission) admitted that much inequity was occurring in local government areas in the distribution of funds between Aboriginal and non-Aboriginal people. The Grants Commission reported to the RCIADIC that it had introduced a means of withholding funds²⁵ from the local government authority where the authority could not demonstrate that funds were being spent in an equitable manner.²⁶ The Commission is not aware whether the Local Government Grants Commission currently has a means of ensuring accountability of local governments for equitable distribution of funds to Aboriginal people;²⁷ however, it

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17. See Department of Transport and Regional Services (Cth), *2004–2005 Report on the Operation of the Local Governance (Financial Assistance) Act 1995* (2006) 105.
 18. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 423, Proposal 91.
 19. Gascoyne Development Commission, Submission No. 38 (11 May 2006) 4; Pilbara Development Commission, Submission No. 39 (19 May 2006) 4.
 20. Shire of Wyndham East Kimberley, Submission No. 47 (7 June 2006).
 21. *Ibid.*
 22. *Ibid.*
 23. Calverley A, 'Councils 'Misuse' Aboriginal Money', *The West Australian*, 13 July 2006, 36. The report references an address delivered to a conference at Murdoch University on 12 July 2006 by Professor Peter Newman, who is Chairman of the Western Australian Government's Sustainability Roundtable. See Newman P, 'Sustainable Indigenous Communities: Applying the 11 principles' (Speech delivered to the national conference on sustainability of Indigenous communities, Murdoch University, 12 July 2006).
 24. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Recommendations 198 & 200. See also ATSIIC, *Towards Social Justice? An Issues Paper: Reform of Commonwealth-state financial relations* (1995), <<http://138.25.65.50/au/other/IndigLRes/1995/5/20.html>>.
 25. This was referred to in the RCIADIC report as the 'reduced service requirement'.
 26. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (vol. 4, 1991) [27.5] 'Delivering Local Government Services'.
 27. It appears that the 'reduced service requirement' by which the Western Australian Local Government Grants Commission (WALGGC) withheld funds from local governments is now redundant. There is an 'Aboriginal Environmental Health' disability factor that is applied by the WALGGC when determining grants. This gives more funding to recognise the extra costs incurred when providing environmental health services to remote Aboriginal communities in Western Australia. There is also an 'Indigenous' disability factor which allows those councils with large Indigenous populations to access more funding than they would otherwise receive. However, neither of these disability factors address inequality of service provision between

is clear that whatever processes may currently be in place, they are not working adequately to protect the interests of Aboriginal people in remote communities.²⁸

As recently as June 2006 the Minister for Local Government and Regional Development stated in Parliament that he receives constant 'complaints from remote communities that they are not receiving a fair deal out of local government'.²⁹ The Commission is concerned about this reality and therefore confirms its recommendation for improved accountability of local governments for funding received for the benefit of Aboriginal people. It should also be noted that the Commission has made the improvement of government service provision to Aboriginal communities its first guiding principle for reform in Chapter Two above.

Recommendation 129

Accountability of local governments for 'Aboriginal' funding and grants

1. That the Department of Local Government and Regional Development, in conjunction with the Western Australian Local Government Grants Commission, investigate ways of improving accountability of local governments for funding provided for the benefit of Aboriginal people in each local government area.
2. That mechanisms be put in place by the Department of Local Government and Regional Development to monitor and evaluate outcomes of local government service provision in Western Australian Aboriginal communities.

Funding for autonomy

In its Discussion Paper the Commission considered the funding options available to Aboriginal local governing bodies under the *Local Government Assistance Act 1995* (Cth). Broadly these include excision from the local government area and establishment as a separate

local governing body under state law (the Ngaanyatjarraku Shire Council in the Gibson Desert (Warburton) region is an example), and bodies 'declared' by the state to be local governing bodies.³⁰ The latter option has been used by other jurisdictions, notably the Northern Territory, to secure discrete federal funding for remote Aboriginal communities without the stringent reporting and service provision responsibilities required of local governments under state law.

To date there has been no attempt in Western Australia to take advantage of federal funding options for discrete Aboriginal communities as 'declared' local governing bodies. In its Discussion Paper the Commission suggested 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. In some cases, such funding might offer Aboriginal communities the prospect of enhancing their economic base by bringing employment to community members. However, it was acknowledged by the Commission that the direct funding option could only work in the most functional communities and would require significant initial support by government and preparatory programs to build local governing capacity. Nonetheless, the Commission considered that this option should be further explored in Western Australia and a proposal was made to that effect in the Discussion Paper.³¹

The Commission received only one submission in relation to this proposal. The Pilbara Development Commission (PDC) expressed concern that the

economic necessity of additional investment and support by government in the provision of preparatory programs to build the capacity of potential Aboriginal Local Governing Bodies prior to them undertaking their new role, is ... a substantial duplication of the role and responsibilities delegated to existing local government authorities for the provision of essential services.³²

The submission further suggested that when improvements were made to the accountability of local

Aboriginal and non-Aboriginal constituents of local government areas. See Western Australian Local Government Grants Commission, *Principles & Methods for the Distribution of Commonwealth Financial Assistance to Local Governments in Western Australia* (2004) 23–33.

28. This has been confirmed by the Department of Indigenous Affairs in its most recent survey of environmental health needs in Indigenous communities in Western Australia: DIA, *Environmental Health Needs of Indigenous Communities in Western Australia: The 2004 survey and its findings* (2005) 23.

29. Western Australia, *Parliamentary Debates*, Legislative Council, 27 June 2006, 4266b (Mr Jon Ford, Minister of Local Government and Regional Development).

30. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 431–32.

31. *Ibid* 436, Proposal 92.

32. Pilbara Development Commission, Submission No. 39 (19 May 2006) 4.

governments in the disbursement of funding pursuant to Recommendation 129, Aboriginal communities would benefit from increased service provision delivered by their current local governments.

The Commission acknowledges the points made by the PDC; however, it notes that this approach does nothing to address the reality that some Aboriginal communities are not well-served by their local governments and, given the attitudes discussed in the preceding section, may never be. It is the Commission's opinion that while the direct funding option may not be an immediate possibility for many communities (and should only be considered for functional communities with their prior, informed consent), it should not be dismissed without further investigation. The Commission has therefore confirmed its recommendation that direct funding possibilities be explored for the provision of basic local government services to functional discrete, remote Aboriginal communities that are currently not well-served by local government arrangements. It should be noted that major essential services (such as water, sewerage, power, public housing and health services) will continue to be supplied by various Commonwealth and state bodies under current bilateral agreements.³³

Recommendation 130

Allowing functional remote Aboriginal communities to access direct funding

1. That the Western Australian government explore the possibility of accessing federal funding for discrete, remote Aboriginal communities under s 4 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 and wish to build community capacity to provide and maintain basic essential services.
2. That such arrangements be preceded by programs aimed at building governing capacity within those communities and with appropriate initial government support.
3. That such arrangements only be pursued with the free, prior and informed consent of the relevant community.

Aboriginal Governance in Western Australia

Community governance

The *Aboriginal Communities Act 1979* (WA) defines the current system of Aboriginal community governance in Western Australia. Although the preamble to the Act is expressed in broad terms that might support the Act's extension to wider governance matters,³⁴ in practice the Act has only ever been used as a tool for addressing criminal justice issues. Problems with the current community by-laws scheme under the Act were canvassed in detail in Part V of the Discussion Paper, but in summary there have been significant issues with:

- the enforcement of by-laws by police and wardens;
- the capacity for breach of by-laws to contribute to the over-representation 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.³⁵

In its Discussion Paper the Commission proposed that the *Aboriginal Communities Act* be repealed and replaced with a new Act – the 'Aboriginal Communities and Community Justice Groups Act'³⁶ which could become a dedicated vehicle for establishment of community justice groups and reform of Aboriginal community governance. For reasons expressed in Chapter Five above and in the face of submissions from some Aboriginal communities that wish to retain their by-laws, the Commission has decided against the repeal

33. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 423–25.

34. 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.

35. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 118–20; 430–31.

36. *Ibid* 120, Proposal 11.

of the *Aboriginal Communities Act*.³⁷ It has determined that the Act may be amended to allow for the retention of by-laws by those communities that wish to keep them and for the establishment of community justice groups for all Aboriginal communities.³⁸ The Commission also recognises that the *Aboriginal Communities Act* could be developed so as to support a framework for the establishment of effective community governance structures pursuant to Recommendation 131 of this Report.³⁹

Regional governance

The abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) in March 2005 has created a new imperative for Aboriginal governance at all levels. Under the new Commonwealth arrangements for Aboriginal affairs the Australian government has introduced a new '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'.⁴⁰



In Western Australia the west Kimberley's Kullarri Regional Indigenous Body (KRIB) was one of the first regional representative structures established since ATSIC's demise. The Commission examined the KRIB model in its Discussion Paper and considered it an exemplar because it is a 'self-identifying' and 'self-organising' structure that has emerged from within the community itself.⁴¹ The Commission believes that regional governance models of this nature will have a significant role to play in ensuring the accountability of government for service provision to Aboriginal communities.

Reform of Aboriginal Community Governance in WA

There is no doubt that a pressing need exists for Aboriginal community governance reform in Western Australia. The impetus for such reform primarily arises from the state of entrenched Aboriginal disadvantage described in Part II of the Commission's Discussion Paper and the law and order issues examined in Part V. In considering the possibilities for reform of Aboriginal community governance in Western Australia, the Commission was mindful of the need to address the problems identified (and examined in some detail) in Part X of its Discussion Paper. In particular:

- the inequality of government service provision to Aboriginal communities (as compared to non-Aboriginal communities in similar geographic regions);
- the lack of Aboriginal participation in community governance and the need to build the governing capacity of Aboriginal communities;
- the lack of an economic base to provide employment and create independent, self-supporting communities;
- an over-reliance on non-Aboriginal staff in community governing organisations and problems with recruitment and retention of these staff;
- intra-community (family) feuding;
- community dysfunction and law and order issues;
- the breakdown of cultural authority of Elders caused by, among other things, the emergence of alternative authority structures imposed by the

37. See discussion under 'Western Australian Aboriginal Community By-Law Scheme', above pp 113–15.

38. See Recommendation 17, above pp 112–13.

39. See discussion under 'A basic framework for reform of Aboriginal community governance', below pp 358–59.

40. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 433.

41. *Ibid* 433–35.

The abolition of the Aboriginal and Torres Strait Islander Commission has created a new imperative for Aboriginal governance at all levels.

current scheme of community governance in Western Australia;

- the failure to utilise existing expertise and aid capacity building of individuals and communities;
- the failure to appropriately involve Aboriginal people in decision-making in respect of issues that impact upon their quality of life; and
- the imposition of inappropriately designed or inflexible governing structures that fail to respond to the unique cultural dynamics of Aboriginal communities.⁴²

In its Discussion Paper the Commission acknowledged the potential of newly emerging regional Aboriginal governing structures to address some of these issues; however, it reflected that the need for effective governance at the community level remains. 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.⁴³

Some key principles for Aboriginal community governance reform

From its examination of relevant issues and matters affecting Aboriginal community governance in Part X of the Discussion Paper, the Commission identified six key principles that it considered should be applied by government in furthering the object of governance reform in Aboriginal communities.

1. **Voluntariness and consent:** 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 encouraging effective participation, building governing 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 do not have the freedom to spend money in ways that will benefit them. Aboriginal 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 Indigenous 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. The Commission notes 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.

42. See *ibid* 422–35.

43. *Ibid* 435.

4. **Recognition of diversity and the need for flexibility in structure of governing institutions:** 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 family, social or skin groups and a balance of gender representation 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 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. For this reason, the Western Australian government should take a long-term approach to reform of Aboriginal community governance.⁴⁴

A basic framework for reform of Aboriginal community governance

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 be imposed *on the community*.

As noted earlier, the Commission has recommended the amendment of the *Aboriginal Communities Act* to enable the establishment of Aboriginal community justice groups.⁴⁵ The Commission believes that these representative, gender-balanced groups will answer many of the law and order issues in communities and assist in healing community dysfunction, and enhancing cultural authority and governing capacity. It is also of the opinion that the *Aboriginal Communities Act* may be a suitable vehicle for establishing a basic framework for reform and recognition of broader community governance in Western Australia. However, after considering the available research, governance studies⁴⁶ and the fact that relevant legislation⁴⁷ was under review at the time of writing the Discussion Paper, the Commission decided that it should not prescribe a governance structure but should confine itself to proposing a basic framework for reform based on the facilitation of self-identifying and self-organising governance structures informed by the guiding principles set out above.⁴⁸

44. See *ibid* 436–37.

45. For a fuller discussion of relevant recommendations, see discussion under 'Community Justice Groups', Chapter Five, above pp 97–123.

46. Such as the COAG trials and the Indigenous Community Governance Project at the Australian National University's Centre for Aboriginal Economic Policy Research. For details of the ANU CAEPR Indigenous Governance Project and access to its publications, see <<http://www.anu.edu.au/caepr/governance2.php>>.

47. For example, *Aboriginal Councils and Associations Act 1976* (Cth); *Associations Incorporation Act 1987* (WA); *Aboriginal Communities Act 1979* (WA).

48. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 438, Proposal 93.

It is the Commission's opinion that representation of all family, social or skin groups and a balance of gender representation should be considered as the starting point for new governing structures.

The Commission received broad support for this proposal from submissions, in particular for its advocacy of a flexible approach.⁴⁹ The Commission notes that a recent in-depth study of Maori governance by the New Zealand Law Commission has also recommended a legislative framework approach which is guided by similar principles of flexibility, community participation, and recognition and enhancement of cultural authority.⁵⁰ Since there has not been much to advance any of the issues which restrained the Commission from making a more detailed proposal at the time of writing its Discussion Paper, the Commission confirms its original proposal. The Commission also endorses the submission of the Gascoyne Development Commission which emphasised the value of non-Indigenous expertise and partnerships between government agencies and communities to assist Aboriginal communities to achieve their governance objectives.⁵¹



Recommendation 131

Basic legislative framework for reform of Aboriginal community governance informed by key principles

1. That the starting point for reform of Aboriginal community governance in Western Australia be limited to a basic legislative framework that can facilitate self-identifying and self-organising governance structures to emerge at a community level.
2. That reform of Aboriginal community governance in Western Australia be informed by the key principles of voluntariness and consent; community empowerment through effective participation, capacity building and devolved decision-making power; 'downwards accountability' to the community and flexibility of government funding; recognition of diversity and need for flexibility in structure of governing institutions; balanced family, social or skin group, gender and traditional owner representation; and recognition of need for a long-term approach to community governance reform.
3. That Aboriginal communities be free to develop or choose a model of governance that is appropriate for their needs rather than have a model imposed on them by government without their consent.

49. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006); Department of Indigenous Affairs, Submission No. 29 (2 May 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006); Department of the Attorney General, Submission No. 34 (11 May 2006); Gascoyne Development Commission, Submission No. 38 (11 May 2006); Dr Brian Steels, Mawarnkarra Health Service Roebourne, consultation (28 April 2006). The Aboriginal and Torres Strait Islander Social Justice Commissioner emphasised the importance of full and effective participation of Aboriginal peoples in all decision-making processes. This is reflected in Principle Two of the key principles for Aboriginal community governance reform: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006).

50. New Zealand Law Commission, *Waka Umanga: A proposed law for Maori governance entities*, Report No. 92 (May 2006).

51. Gascoyne Development Commission, Submission No. 38 (11 May 2006) 4.

