Chapter Two

Guiding Principles for Reform

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Guiding Principles for Reform

This Final Report makes a total of 131 recommendations to improve the interaction of Western Australian law with Aboriginal law and culture. For the reasons elucidated in Part II of its Discussion Paper, the Commission has not confined itself to statutory reform; instead, the Commission makes recommendations that impact not only on Western Australian legislation, but also the policies, practices and procedures of government entities such as departments, agencies, correctional services and courts. During its six-year study of Aboriginal customary laws and culture in Western Australia the Commission has distilled a number of principles that should, in its opinion, guide future reform in each of the areas discussed in this Report.

The principles discussed below may appear obvious and many government departments and individual officers undoubtedly already strive to apply these principles in practice. The Commission's Final Report and recommendations in no way seek to detract from the excellent initiatives that are already in place or the efforts of individuals who are at the frontline of reform in various areas. However, in its research the Commission has found that, even with the best intentions, in the rush to address a perceived issue the process of ethical reform may sometimes be neglected. This can impact upon the effectiveness of the reform and can reflect negatively in outcomes for Aboriginal people. The following principles are by no means exhaustive and should not be understood as strict rules: they are simply intended to guide government in its application of reform and in its consideration of the recognition of Aboriginal law and culture in Western Australia.

PRINCIPLE ONE
Improve government service provision to Aboriginal people

Many people believe that Aboriginal people receive more public benefits than other Australians, but this is not the case. As the Human Rights and Equal Opportunity Commission has pointed out, it has been necessary for governments to develop special programs to meet the needs of Aboriginal people because they are the most economically and socially disadvantaged group in Australia.[1] This is most profoundly reflected by the fact that Aboriginal people have 20 years less life expectancy than the rest of the population.[2] They also do not access mainstream government services at the same rate as non-Aboriginal Australians.[3]

The extent of entrenched disadvantage suffered by Aboriginal Western Australians is described in Part II of the Commission's Discussion Paper.[4] Much of this disadvantage stems from a lack of infrastructure and essential government services to Aboriginal communities[5] and includes the provision of suitable housing, education, law enforcement and healthcare, as well as clean water, waste disposal and power. The Commission found that part of the reason for problems of service provision to Aboriginal communities lay in the complicated nature of relationships between the three levels of government—local, state and federal—responsible for the delivery of services.[6] There are, of course, other factors such as remoteness[7] that impact upon the provision of services to Aboriginal

1. The level of disadvantage suffered by Aboriginal persons has been said by the Commonwealth Productivity Commission Chairman Gary Banks to be 'disproportionately high, despite longstanding policy attention': Banks, G, *Indigenous Disadvantage: Assessing policy impacts* (Address to the Pursuing Opportunity and Prosperity Conference, Institute of Applied Economic and Social Research, Melbourne, 13 November 2003) 1, <http://www.pc.gov.au/speeches/cs20031113/index.html>.
2. As Gary Banks has reflected, 20 years 'is just short of the standard measure of a generation': ibid 4. See also discussion in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) Part II.
3. Human Rights and Equal Opportunity Commission, *Face the Facts: Some questions and answers about refugees, migrants and Indigenous peoples in Australia* (August 2005) 31.
4. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 20–44.
5. Cooper has observed that '[c]ommunities are relatively powerless and vulnerable and unable to challenge the Government as ATSIC did. They are so starved of services, infrastructure and expertise that they are easy to interest or pressure to agree to [Shared Responsibility Agreements] and are unlikely to complain or resist for fear of repercussion': Cooper D, 'Shared Responsibility Agreements: Whitewashing Indigenous service delivery' (2005) 6(15) *Indigenous Law Bulletin* 6, 7.
6. The shared responsibility for services to Aboriginal communities in Western Australia is discussed in some detail in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 422–25.
7. Remoteness is particularly relevant for Aboriginal people. When compared to the general population, Aboriginal people are far more regionally based. This is particularly so in the Kimberley where Aboriginal people make up one-third of the population. See Department of Indigenous Affairs, *Consulting Citizens: Engaging with Aboriginal Western Australians* (2005) 9–10.

communities,[8] but it has been conclusively found that government service delivery is an area where Aboriginal communities in Western Australia are disadvantaged relative to non-Aboriginal communities in comparable geographic regions.[9]

An attitude that seems to be prevalent in government circles is that Aboriginal people should perform community service work or assist government agencies in the delivery of services on a voluntary basis.[10] This is something that is not expected of the non-Aboriginal community.[11] Indeed, adequate service provision and necessary infrastructure is generally taken for granted by non-Aboriginal people, even in remote areas. In the Commission's experience Aboriginal people are often willing to assist in addressing the social problems and gaps in service delivery that they perceive in their communities; however, they should not be expected to do so without reward and support from agencies (or local governments) that would otherwise be responsible for delivery of those services.

Some of the recommendations contained in this Report propose the institution of specific programs and services for Aboriginal people to address particular needs identified by the Commission's inquiry or to redress discrimination against Aboriginal people in current government service provision.[12] The Commission has also recommended that local governments be made accountable for expenditure of the money received for the particular benefit of their Aboriginal constituents, particularly in remote communities.[13] As discussed in Chapter One, the Commission believes that it is important to put Aboriginal Australians on a level playing field with non-Aboriginal Australians. Therefore, it is the Commission's opinion that the processes of reform identified in this Report should begin with genuine government commitment to the improvement of service provision to Aboriginal communities.

8. A list of factors impacting upon service provision to Aboriginal communities in Western Australia, particularly at the basic infrastructure level, may be found in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 423. This is discussed further in Chapter Ten of this Report.
9. Department of Indigenous Affairs (DIA), *The Provision of Local Government Services to Aboriginal Communities: A focus paper*, (November 1999) 2–3. More recently DIA has stated that: 'Government reports have shown that, in relation to access to social services, [Aboriginal] people living in communities of between 5,000 and 10,000 face what they describe as "considerable" disadvantage, while those living in communities of below 5,000 people face "extreme" disadvantage. Those living in isolated areas are especially affected. They face a "lack of information" about what is available; the absence or inaccessibility of many services; poorer quality services; higher costs associated with accessing services; inappropriate urban service and funding models and poorly motivated staff'. See DIA, *Services to Indigenous People in the Town of Derby – West Kimberly: Mapping and gap analysis* (2004) 4.
10. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues* (June 2006) 65; Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003).
11. The federal government's new shared responsibility agreements are a good example of this point. They require Aboriginal people to take on behavioural change and other commitments in order to receive essential government services. These commitments are not generally required by non-Aboriginal communities: Cooper, D, 'Shared Responsibility Agreements: Whitewashing Indigenous service delivery' (2005) 6(15) *Indigenous Law Bulletin* 6, 8.
12. See, for example, programs and services for Aboriginal people within the criminal justice system (Recommendation 7); educational strategies for Aboriginal people about the criminal justice system and parenting (Recommendations 26 & 28); diversionary strategies for young Aboriginal people (recommendation 50); wills education and will-making initiative (Recommendations 69 & 70); enhanced culturally appropriate service delivery in the Family Court of Western Australia (Recommendation 88); provision of enhanced services for men in regional areas (Recommendation 92); establishment of a statewide Aboriginal language interpreter service (Recommendation 117); and the employment of Aboriginal liaison officers in courts (Recommendation 127). The adoption of a whole-of-government approach to Aboriginal service and program provision (Recommendation 1); and the institution of cultural awareness training for government employees, contractors, service providers, courts and lawyers (Recommendations 2,11,12, 56 & 128) should also assist in improving service and program provision to Aboriginal communities in Western Australia.
13. See discussion under 'Accountability of Local Governments for "Aboriginal" Funding', Chapter Ten, below p 352, and Recommendation 129, below p 354.
Also see Department of Indigenous Affairs, *Services to Indigenous People in the Shire of Wiluna: Mapping and gap Aanalysis* (2004) 30, where it was noted that public houses in the town of Wiluna were funded through Aboriginal-specific funding given for the purpose of *remote* communities in the shire, not the mainstream town.

PRINCIPLE TWO
Collaboration, cooperation and consultation

As argued in the Commission's Discussion Paper (and in Chapter Three below),[14] the Commission believes that a whole-of-government approach to the design, development and delivery of services and programs to Aboriginal people is required for success. This must involve not only cooperation and collaboration between governments (local, state and federal) and government departments, but also the ongoing involvement of Aboriginal people. The Aboriginal and Torres Strait Islander Social Justice Commissioner has forcefully argued that Aboriginal people have the right to be involved in decisions affecting their own interests.[15] This principle is reflected in international human rights law[16] and is strongly supported by the Commission.[17] The Department of Premier and Cabinet and the Department of Indigenous Affairs has produced a strategy for effectively engaging with Aboriginal people which the Commission commends to all Western Australian government agencies and non-government organisations.[18]

Since the demise of the Aboriginal and Torres Strait Islander Commission there is no national body that is representative of Aboriginal interests and therefore no clear focal point for collaboration and consultation with Aboriginal people. The Commission is concerned to ensure that this is not used as an excuse for lack of consultation or failure[19] to seek the active participation of Aboriginal people in government processes.[20] In the Commission's experience there are many representative organisations at the community and regional levels that can assist agencies to ensure that Aboriginal voices are heard in relation to the establishment of programs and processes affecting Aboriginal people. The Commission strongly recommends a collaborative approach that involves, at all stages, the effective participation of the Aboriginal people to whom specific programs and services are addressed. This principle is reflected in the Commission's recommendations throughout this Final Report.[21]

PRINCIPLE THREE
Voluntariness and consent

Somewhat aligned to Principle Two (which recognises that the success of government policies and programs directed at Aboriginal people requires their active involvement in the decision-making process) is the principle of voluntariness and consent. The imposition on Aboriginal communities of structures, processes and programs without due consideration of the consent of the people who are affected or expected to participate has been a particular failure of past governments at the state and national level.[22] Free, prior and informed consent is a principle underlying the United Nations' *Declaration of the Rights of Indigenous Peoples* and is recognised by the Western Australian government as a key factor underpinning effective engagement with Aboriginal people.[23]

14. See discussion under 'A whole-of-government approach', Chapter Three, below pp 46–48.
15. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2005* (2005) 99.
16. See, for example, Article 19 of the revised draft of the international *Declaration on the Rights of Indigenous Peoples.*
17. The need to actively engage Aboriginal people in decision-making and reform is reiterated throughout this report and included in many of the Commission's recommendations.
18. Department of Premier and Cabinet & Department of Indigenous Affairs (WA), *Consulting Citizens: Engaging with Aboriginal Western Australians* (undated), <http://www.dia.wa.gov.au/Policies/Communities/Files/ConsultingCitizensSept2005.pdf>.
19. The failure to adequately consult with Aboriginal people, particularly in remote communities, has been observed by the Department of Indigenous Affairs (DIA) in Western Australia: see DIA, *Services to Indigenous People in the Town of Port Hedland: Mapping and gap analysis* (2004) 25, where It was noted that '[n]o attempt has been made to visit these [remote] communities or to consult with community members'.
20. It has been noted by HREOC that the '[c]urrent arrangements [in indigenous affairs] are not sufficient to ensure the full and effective participation of indigenous peoples in decision making that affects them at any level – international, national or regional': Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2005* (2005) 219.
21. See, for example, the Commission's requirements for Aboriginal collaboration and participation in: the design and delivery of cultural awareness training (Recommendation 2); the establishment of community justice groups (Recommendation 17); the appointment of community officers under the *Protective Custody act 2000* (Recommendation 21); the establishment of Aboriginal courts (Recommendation 24); the development of educational strategies for Aboriginal people about criminal law and the criminal justice system (Recommendation 26); the development of protocols for police in establishing whether an Aboriginal person requires an interpreter (Recommendation 53); improvements to the prison application process for funeral attendance (Recommendation 60); determination of the appropriate policy regarding escort of Aboriginal prisoners to funerals (Recommendation 62); Indigenous cultural and intellectual property respect protocols (Recommendations 80 & 81); the review of the police order regime (Recommendation 95); the development and application of conservation programs (Recommendation 97); the review of the commercial harvesting licensing regime under the *Wildlife Conservation Act 1950* (Recommendation 103); and the reform of Aboriginal community governance in Western Australia (Recommendation 131).
22. Even the new arrangements in Indigenous affairs have been harshly criticised for being simply imposed on Aboriginal people. As Aden Ridgeway has said: '[T]he government's rhetoric in recent times regarding these so-called new arrangements has been at best illusory and at worst nothing short of deceitful, because the disingenuous repetition of the phrases about "bottom up" and "community control" cannot change the reality of the policy. That is, that it is top down, it is paternalistic and it is essentially just a veiled—a very thinly veiled—policy of assimilation': Commonwealth Parliament, Senate, *Parliamentary Debates*, 10 March 2005, 30 (Senator Aden Ridgeway).
23. Department of Premier and Cabinet & Department of Indigenous Affairs (WA), *Consulting Citizens: Engaging with Aboriginal Western Australians* (undated), <http://www.dia.wa.gov.au/Policies/Communities/Files/ConsultingCitizensSept2005.pdf> 18.

The principle of voluntariness and consent is respected throughout the Commission's recommendations in this Report. As made clear in Chapter Four, it is the Commission's view that voluntariness should be the guiding principle in determining who is bound by Aboriginal customary law.[24] Free and informed consent underpins the Commission's approach to the lawfulness of some physical traditional punishments.[25] Chapter Ten asserts voluntariness as the key principle underlying the reform of governance structures in Aboriginal communities.[26] Participation in Aboriginal courts[27] and community justice groups[28] is also dictated by the principle of voluntariness and consent at both individual and community levels.

PRINCIPLE FOUR
Local focus and recognition of diversity

As emphasised in the Commission's Discussion Paper, Aboriginal people in Western Australia are not homogenous.[29] Rather, they are culturally diverse peoples made up of over one hundred language groups or tribes.[30] Recognition of this diversity demands that government initiatives have a local focus and that generic programs have sufficient flexibility to adapt to the cultural dynamics of individual Aboriginal communities. For this reason the Commission's recommendations require that consultation, design, development and delivery of government programs and services be done on a local or regional basis to ensure the correct protocols are observed and cultural diversity is adequately acknowledged and reflected in programs and services to Aboriginal people.

The rejection of a one-size-fits-all approach is clear in the Commission's recommendations in matters such as cultural awareness training;[31] the establishment of Aboriginal courts;[32] the reform of community governance structures;[33] the establishment of community justice groups;[34] and the institution of initiatives to address family violence and child abuse in Aboriginal communities.[35]

PRINCIPLE FIVE
Community-based and community-owned initiatives

Linked to the local focus principle discussed above is the requirement that, where possible, government initiatives addressed to Aboriginal people are community-based and, more importantly, community-owned. There is now sufficient evidence to show that well-resourced programs that are owned and run by the community are more successful than generic, inflexible programs imposed on communities.[36] Undoubtedly this is because community-based and community-owned initiatives are inherently responsive to the problems faced by the community and are culturally appropriate to that community. They are driven by real community need rather than divorced governmental ideology.[37] As noted in a Background Paper to this reference, the Commission's community consultations, particularly in remote areas, 'revealed a number of instances where community-defined priorities differed significantly' from those of government agencies.[38] The importance of the community-owned and community-based approach is highlighted in the context of family violence programs in Chapter Seven of this Report.[39] It is also reflected in the Commission's

24. See discussion under 'Who is bound (and who should be bound) by Aboriginal customary law?', Chapter Four, below pp 65–66.
25. See discussion under 'Criminal Responsibility – Consent', Chapter Five, below pp 139–47.
26. See discussion under 'Some key principles for Aboriginal community governance reform', Chapter Ten, below pp 357–58.
27. See discussion under 'Aboriginal Courts – Voluntariness', Chapter Five, below p 133.
28. See discussion under 'Aboriginal Community Justice Groups', Chapter Five, below pp 97–123.
29. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) Part II.
30. Indeed, the Commission has been told that today there are over 300 discrete Aboriginal communities in Western Australia: Denis Callaghan, Department of Indigenous Affairs, telephone consultation (6 September 2006).
31. See Recommendations 2, 11, 12, 56, 60 & 128.
32. See Recommendation 24, below p 136.
33. See Recommendation 131, below p 359.
34. See Recommendation 17, below pp 112–13.
35. See Recommendation 91, below p 290.
36. See, for example, Commonwealth Standing Committee on Aboriginal and Torres Strait Islander Affairs, *We Can Do It! The needs of urban dwelling Aboriginal and Torres Strait Islander Peoples* (2001) 29–31; *Many Ways Forward: Report of the inquiry into capacity building and service delivery in Indigenous communities* (2004) 169, 243 & 252; Commonwealth Grants Commission, *Report on Indigenous Funding 2001* (2001) xvi.
37. Evans C, *Time to Bust Brough's Myths* (Address to the Canberra South branch of the Australian Labor Party, 19 June 2006) 7.
38. Blagg H, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 317, 318.
39. A full discussion of submissions, research and consultations supporting this approach in respect of family violence may be found under 'The need for culturally appropriate responses to family violence and child abuse', Chapter Seven, below pp 289–90. The approach is also discussed in detail in relation to the Commission's proposal for community justice groups: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 107 ff.

recommendations[40] and supported by submissions to the Commission's inquiry, including by the Human Rights and Equal Opportunity Commission.[41]

PRINCIPLE SIX
Respect and empowerment of Aboriginal people

As the Commission's principal project writer has elsewhere observed, 'many of the problems experienced by Aboriginal communities in Western Australia today—including community dysfunction, alcohol and substance abuse, feuding and youth issues—are symptomatic of a decline in cultural authority'.[42] The Commission's consultations with Aboriginal people yielded many references of concern about diminishing regard for Elders, particularly among Aboriginal young people.[43] This breakdown of cultural authority 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 also a number of contemporary factors that contribute to this problem.[44] The Commission's recommendations emphasise an approach to recognition of Aboriginal customary law and culture that seeks to enhance the cultural authority of Elders and respect and empower Aboriginal people. This is achieved in a number of ways:

- by acknowledging that Aboriginal people were ruled by a complex system of laws at the time of colonisation and by giving appropriate respect and recognition to those laws within the Western Australian legal system;
- by encouraging the institution of community-based and community-owned processes and programs that can more effectively respond to local cultural dynamics and needs;
- by the institution of substantially self-determining governance structures such as community justice groups that are empowered to play an active role in the justice system in Western Australia, as well as create community rules and sanctions to deal with law and order problems on communities;
- by the establishment of Aboriginal courts which encourage respect for Elders by involving them in the justice process;
- by encouraging the involvement of Aboriginal people in decision-making on matters that affect their lives and livelihoods;
- by the amendment of the Western Australian Constitution to accord Aboriginal people respect at the very foundation of Western Australian law; and

40. See, for example, establishment of programs and services for Aboriginal people within the criminal justice system (Recommendation 7); establishment of community justice groups (Recommendation 17); development of non-custodial bail facilities for juveniles in remote and regional locations (Recommendation 32); diversion of young Aboriginal people to a community justice group (Recommendation 50); development of family violence treatment and education programs (Recommendation 91); and reform of Aboriginal community governance (Recommendation 131).
41. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006); Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission, Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory (May 2003) 23–24 (as referenced by Submission No. 53).
42. Hands TL, 'Teaching a New Dog Old Tricks: Recognition of Aboriginal customary law in Western Australia' (2006) 6(17) *Indigenous Law Bulletin* 12, 13.
43. 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*, in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 213. 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.
44. These include the imposition of white governance structures on Aboriginal communities; the lack of education and a suitable economic base to provide employment and create self-supporting communities (thereby raising self-esteem and creating Aboriginal role models); and the failure of governments to actively involve Aboriginal people, especially Elders and those with traditional authority in decision-making.

- by removing bias and cultural disadvantage within the Western Australian legal system.[45]

As Senator Chris Evans recently observed, '[t]he language of empowerment has disappeared' and Aboriginal people 'have been positioned as either victims, or perpetrators, hostage to a culture that locks them in disadvantage'.[46] The Commission rejects attempts to stereotype Aboriginal people and Aboriginal culture.[47] The recommendations contained in this Report seek not only to empower Aboriginal people by creating an environment where Aboriginal people can build and exercise their capacity to make decisions that affect their everyday lives, but also to bring respect to Aboriginal people, law and culture. It is the Commission's opinion that sustainable improvement in Aboriginal peoples' living conditions and quality of life can only be achieved by government supporting the empowerment of Aboriginal people and championing the cause of reconciliation in the wider community.[48]

PRINCIPLE SEVEN
Balanced gender and family, social or skin group 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 should be considered as the starting point for new governing structures, including community justice groups.[49] In addition, the Commission is concerned that the voices of Aboriginal women must be heard by government. The Commission notes that women are often the driving force behind positive change in many Aboriginal communities.[50] For this reason the Commission has recommended equal gender representation on community justice groups and in any reform of Aboriginal community governance. Lack of balanced gender and family, social or skin group representation will impinge upon the operational legitimacy of governing structures and community initiatives, and further contribute to breakdown of cultural authority, especially in remote Aboriginal communities.

In the Commission's opinion, the principle of balanced gender and family, social or skin group representation is something that government agencies should also strive to achieve in their consultations with Aboriginal communities, and in encouraging input and participation in decision-making.

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45. For discussion of cultural disadvantage within the Western Australian legal system and the Commission's findings in this regard, see Hands TL, 'Teaching a New Dog Old Tricks: Recognition of Aboriginal customary law in Western Australia' (2006) 6(17) *Indigenous Law Bulletin* 12, 13–14.
46. Evans C, *Time to Bust Brough's Myths* (Address to the Canberra South branch of the Australian Labor Party, 19 June 2006) 9.
47. Stereotyping of Aboriginal people is evident not only in the media (as discussed in Chapter One above), but also in politics and policy. Cooper has observed that the federal government's current Shared Responsibility Agreements 'reinforce negative stereotypes about Aboriginal people. By implying a need for measures by the Government to force Indigenous communities and families to act responsibly, they conceal Indigenous initiative and success in taking responsibility for community problems. Instead, the Government claims the credit': Cooper D, 'Shared Responsibility Agreements: Whitewashing Indigenous service delivery' (2005) 6(15) *Indigenous Law Bulletin* 6, 8.
48. As Arabena has observed: '[Aboriginal people] must resist being defined by governments as 'disadvantaged citizens' and co-opted into simplistic debates that mask the structural and systemic barriers that have contributed to the situation in which we now find ourselves. A failure to recognise and embrace the cultural characteristics and the cultural capital of Aboriginal and Torres Strait Islander people is one of the major barriers that excludes us'. See Arabena K, *Not Fit for Modern Australian Society: Aboriginal and Torres Strait Islander people and the new arrangements for the administration of Indigenous affairs*, Research Discussion Paper No. 16 (AIATSIS Native Title Research Unit, 2005) 7.
49. See discussion under 'Aboriginal Community justice groups', Chapter Five, below pp 97–123; and 'Reform of Aboriginal community governance', Chapter Ten, below pp 356–59.
50. See, for example, Commonwealth 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* (2004) 214–15. See also, the discussion of the role of women in Aboriginal communities and their determination to overcome problems of family violence and child abuse in Chapter One, above pp 27–28. See also initiatives of Aboriginal women described in Blagg H, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 317; Wohlan K, 'Aboriginal Women's Interests in Customary Law Recognition' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 507.

PRINCIPLE EIGHT
Adequate and ongoing resourcing

A major obstacle to the success of Aboriginal community initiatives is ongoing, adequate resourcing.[51] As observed in the Commission's Discussion Paper, complex government accountability requirements placed on funding and grants can consume an enormous amount of an organisation's human and financial resources.[52] In regard to community-run programs and initiatives, the constant need to secure funding by application for grants or tenders is an obvious drain on the limited resources of community groups.[53] The more time a community organisation must spend in applying for funding, the more the organisation's attention is diverted away from the needs of the community.[54] This inevitably impacts upon the outcomes of the program which may, in the eyes of funding authorities, justify the withdrawal of funding. The Commonwealth Grants Commission has acknowledged that the failure of mainstream programs to address Aboriginal needs means that Aboriginal-specific programs have to do more than they were designed or funded to achieve.[55]

The Commission believes that there is a strong case for enhancing the flexibility of government funding for Aboriginal-owned community programs and for provision of support to assist in management of funding, compliance with accountability standards and application for continued or further funding.[56] Such support will also assist in building capacity in individuals and provide experience that can assist Aboriginal people to seek long-term employment in the public or private sector.

PRINCIPLE NINE
Ongoing monitoring and evaluation

In order to ensure the success of the reform process, policies and programs must be evaluated to determine their effectiveness and the agencies responsible for implementing them must be monitored to ensure that they are established in a timely manner. The principal responsibility for implementing (and subsequently evaluating) the programs and policies recommended in this Report rests with the government agencies, the subject of each recommendation.[57] However, experience shows that it is also important for government to put in place a system of ensuring that agencies pursue implementation of the recommendations and are properly resourced and supported to do so.[58]

If the process of monitoring and evaluation is to be properly executed it is necessary for government agencies and independent reviewers to have access to reliable data and statistical information to establish appropriate benchmarks.[59] The Commission notes that the monitoring of the implementation of recommendations of past reports in the area of Aboriginal affairs has been marred by 'self-assessment'[60]

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51. This is addressed in more detail under 'The need for culturally appropriate responses to family violence and child abuse', Chapter Seven, pp 389–90; and in the context of community governance in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 427.
52. LRCWA, ibid.
53. As observed by Senator Chris Evans, 'There are too many examples of fantastic programs getting funding for a year or two and not receiving any more money once the grant runs out. Governments need to be more constructive and creative with the financial levers at their disposal to support Indigenous communities in tackling the problems.' Evans C, *Time to Bust Brough's Myths* (Address to the Canberra South branch of the Australian Labor Party, 19 June 2006) 13–14.
54. The short timeframe within which grants are often given means community organisations may also have great difficulty attracting and retaining staff: see Commonwealth Grants Commission, *Report on Indigenous Funding 2001* (2001) 68.
55. Ibid 65.
56. Providing support to Aboriginal community programs should be considered a long term commitment by government. See NCOSS Sector Development, *Providing Capacity Building Support to Indigenous Organisations: Report on models utilised by the Illawarra Forum Inc* (2006) 9, <http://www.ncoss.org.au/projects/cba/IForumfinalreport.pdf>.
57. For a list of relevant responsible agencies by recommendation, see Appendix B, below pp 397–408.
58. The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) provides an appropriate example. The RCIADIC made 339 recommendations in 1991, but it was not until 2000 that the Western Australian government published a comprehensive review of the implementation of those recommendations. In that review it was noted that the Aboriginal Affairs Department would provide annual reports to Parliament on further implementation: see Aboriginal Affairs Department, *Government of Western Australia 2000 Implementation Report: Royal Commission into Aboriginal Deaths in Custody* (June 2001). This has never been done. The Aboriginal Justice Council was established to monitor the implementation of the RCIADIC recommendations, but was abolished in 2002. A new monitoring body has not been established: see Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 315.
59. Deficiencies in data collection in relation to Aboriginal people and programs in Australia were highlighted in Background Papers prepared for this reference by experts in benchmarking and program evaluation: see Morgan & Motteram, ibid; Marks G, 'The Value of a Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 121. Data limitations have also been identified by the Council of Australian Governments' Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage in Western Australia Report* (2005).
60. The report of the Victorian Department of Justice on the implementation of the RCIADIC recommendations noted: 'the reported situation with regard to Victoria's implementation of Royal Commission's Recommendations remains largely what government departments say it is'. Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*, Review Report (Vol. 1, October 2005) 703.

and delay in establishing a framework for proper evaluation.[61] In addition, the recent move toward a whole-of-government approach to service provision to Aboriginal people provides a particular challenge to traditional systems of government accountability.[62] In order to address these issues the Commission has proposed in Chapter Three the appointment of a Commissioner for Indigenous Affairs to, among other things, provide Parliament with a regular, independent evaluation of the progress made by government agencies in implementing the recommendations of this Report.[63]

It is the Commission's opinion that Aboriginal people must be involved in the evaluation of programs and services that seek to meet their needs.[64] However, the Commission warns that a balance must be struck between ensuring the participation of Aboriginal people in this process and overburdening Aboriginal communities and community-owned programs with administrative requirements.[65] The Commission endorses the partnership approach of the Statement of Commitment that the Western Australian government has entered into with Aboriginal Western Australians,[66] and suggests that accountability processes should be agreed between Aboriginal communities and government agencies to monitor the outcomes from the agreements to be made at regional and local levels.

61. The Gordon Inquiry reported to Parliament on 31 July 2002. In November 2002 the Western Australian Government published its response *Putting People First: The Western Australian state government's action plan for addressing family violence and child abuse in Aboriginal communities* (November 2002). This response included an Action Plan containing over 120 initiatives. In November 2005 the Auditor General reported on the effectiveness of the monitoring of the implementation of the Action Plan. The Auditor General was critical of the fact that no evaluation framework had been finalised to determine the effectives of the Action Plan and that the delay of three years was significant as the 'opportunity may have been lost to collect some baseline data.' See Auditor General for Western Australia, *Progress with Implementing the Response to the Gordon Inquiry* (November 2002) 10.
62. In its submission to this reference the Human Rights and Equal Opportunity Commission noted that to make a whole-of-government approach accountable in the reform process it is necessary to identify a lead agency to coordinate the practical implementation of recommendations: Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 19. In light of this comment the Commission has prepared Appendix B which sets out the lead agency responsible for each of the recommendations.
63. See Recommendation 3, below p 58.
64. See Principle Two and Principle Six in this chapter.
65. Marks noted in his Background Paper that 'externally driven monitoring and evaluation can in fact increase the marginalisation and alienation of those who are disadvantaged (even though the programs are designed to assist them) and can fail to provide valid and reliable data... When it comes to law and justice issues the legacy of a focus on Indigenous offending and heavy policing adds to the difficulty, given the resentment and distrust that may be present.' See Marks G, 'The Value of a Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 121, 135.
66. Government of Western Australia, *Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians* (2002).