

PART I

Methodological Overview

Contents

Methodological Overview	7
Managing the Reference	9
The Project Team	9
Special Commissioners	9
Aboriginal Research Reference Council	10
Respect for Cultural Protocols, Practices and Information	10
Memorandum of Commitment	10
Confidentiality of Cultural Information	11
Research Method	11
Focus Group Meetings	11
Community Consultations	12
Pre-consultation meetings	12
Metropolitan consultations	12
Regional and remote consultations	13
Background Papers	13
List of Background Papers published	14

Methodological Overview

Managing the Reference

As a result of a restructure of the agency in 1997, the Commission no longer employs full-time research officers and project managers. Instead, through a tender process, the Commission engages the services of consultants who have expertise in the particular area that the Commission is investigating. These consultants assist the Commission in implementing research strategies and collecting the data necessary to properly inform the Commission in making its recommendations. In respect of the current reference—where cultural protocols necessitated a degree of Aboriginal involvement in the work—this process of external tendering has been particularly beneficial. Importantly, this process has allowed the Commission to ensure critical Aboriginal involvement in the reference from an early stage.

The Project Team

The Commission tendered for project management of the reference in January 2001 and, following culturally appropriate consultation and tender evaluation,¹ the successful tenderer, the Crime Research Centre (CRC) at the University of Western Australia, was appointed to form the Project Team. Upon the recommendation of the CRC, Ms Cheri Yavu-Kama-Harathunian (an Aboriginal woman of the Cubbi Cubbi clan of North Queensland) was appointed to the position of Project Manager in March 2002. Ms Yavu-Kama-Harathunian came to the project with significant experience working in the justice system, including in Western Australia's correctional services. Two part-time Research Directors—Dr Harry Blagg (a criminologist/ethnographer) and Professor Neil Morgan (a legal academic)—were appointed to assist the Project Manager and to provide legal, policy and research coordination services from multi-disciplinary perspectives.

Special Commissioners

The Commission is constituted by three part-time Commissioners drawn from academia, government and private legal practice. However, in cognisance of the cultural sensitivities involved in a project of this nature, the Commission asked the Attorney-General to appoint two Indigenous Special Commissioners to provide advice and support to the Commission and its Project Team. In June 2002, Professor Michael Dodson and Mrs Beth Woods were appointed as Special Commissioners for the Aboriginal customary laws project. Both Special Commissioners are highly regarded by their peers and have held important positions in Aboriginal affairs and government agencies. In addition to advising the Commission on certain matters relating to the reference, the Special Commissioners travelled with the Commission to conduct consultations with Aboriginal communities around the state.



1. The Commission appointed a five-member Aboriginal advisory panel to oversee the tender evaluation process.

Aboriginal Research Reference Council

Upon the advice of the Project Team, the Commission appointed an Aboriginal Research Reference Council (ARRC) to assist in the project and provide advice on culturally appropriate processes for the conduct of the reference and for the collection of data. The ARRC is made up of highly respected members of the Western Australian community, representing a diverse group of Aboriginal people who work in health, education, legal, community-based and government organisations.² The ARRC also includes members who have traditional law backgrounds and strong connections to the regions.

Respect for Cultural Protocols, Practices and Information

Memorandum of Commitment

One of the first issues upon which the Commission sought advice from the ARRC was the design of appropriate cultural respect protocols to guide the Commission in the conduct of its work (particularly its field work) on the reference. With the assistance of the ARRC and the Project Team, the Commission formulated a document of undertaking to be distributed to Aboriginal communities to assure the people of the Commission's commitment to conduct its inquiry with integrity and with proper respect for cultural protocols and practices. Together with the ARRC and the Project Team, the Commission executed a Memorandum of Commitment in the following terms:

The Law Reform Commission of Western Australia is committed to:

- (1) Working honestly and with integrity with Aboriginal people.
- (2) Entering Aboriginal country with permission and with respect for, and honour of, the local cultural protocols and practices of the Aboriginal people of that country.
- (3) Leaving Aboriginal country with permission and with respect for, and honour of, the local cultural protocols and practices of the Aboriginal people of that country.
- (4) Ensuring that Aboriginal stories, information, cultural knowledge and cultural narratives are treated with the greatest respect and honour.
- (5) Abiding by the confidentiality to be accorded to all materials given to the Commission in confidence.
- (6) The Commission will treat cultural materials given to it, including stories, information, cultural knowledge and cultural narratives as the property of relevant Aboriginal people, subject to the laws of the state and the Commonwealth.
- (7) The Commission does not wish to own, nor claim to own, the stories and information given by Aboriginal people, subject to the laws of the state and the Commonwealth.
- (8) Ensuring that the principles contained in this Memorandum of Commitment continue past the life of the reference on Aboriginal customary laws.
- (9) Ensuring at all times that the aspirations and views of Aboriginal people are respected and acknowledged.³



2. The membership of the ARRC may be found at Appendix C to this Discussion Paper.

3. A signed facsimile of the Memorandum of Commitment may be found at Appendix B to this Discussion Paper.

Confidentiality of Cultural Information

As well as wishing to conduct its inquiry with integrity and respect for cultural protocols and practice, the Commission was especially concerned to ensure that Aboriginal people retained ownership (or custodianship) of the cultural information exchanged and gathered for the reference. As a government agency, the Commission is obliged to retain records and documents for certain required periods under the *State Records Act 2000 (WA)*; these documents and records could then be subject to an application for release or review under the *Freedom of Information Act 1992 (WA)*. The Commission was concerned that these statutes might enable culturally restricted information (that is, stories or information traditionally restricted under an Aboriginal community's traditional laws and customs to a particular gender or a particular class of persons) to become available to persons that might not otherwise be permitted by the cultural owners to have access to it. The Commission was also aware that information of a very personal nature may be shared with it during the course of the reference and wanted to ensure the confidentiality of any such information.

After consultation with the ARRC and the Project Team it was decided that, in the interests of protecting as far as possible any significant cultural information of Aboriginal people, the Commission would ensure that:

- information on the ownership, access and treatment of information would be communicated by the Commission to Aboriginal communities at the pre-consultation phase as well as during the formal introduction to consultation meetings;
- only the formal introduction stage of consultation meetings would be video-recorded by the Commission and that only hand-written notes in summary form would be made of the ensuing proceedings;
- the names of individuals sharing information would not be recorded by the Commission; and
- in instances of particularly sensitive information, the Commission would only record the *essence* of the information in order to respect the cultural significance or personal nature of the information, as well as its source.



The Commission abided by these principles throughout the research-gathering phase of the reference and ensured that all researchers and facilitators involved in the reference understood the limits placed upon the recording of information. In this way a practicable balance was struck between the need for records to be made of information pertinent to the proper execution of the reference and the need to protect certain information from unintended disclosure.

Research Method

In consultation with the ARRC and the Commission, the Project Team designed the process for data collection for the reference. The process included focus group meetings with key stakeholders, community consultations in all regions of the state and the publication of background papers to provide a dedicated research base for certain areas covered by the reference.

Focus Group Meetings

During the early stages of research-gathering for the reference, the Commission carried out a number of focus group meetings with key stakeholders including the Aboriginal and Torres Strait Islander Commission (ATSIC), the Aboriginal Legal Service (ALS), the Department of Indigenous Affairs WA (DIA), the Department of Justice (WA) Community Corrections Unit; and the Parole Board of Western Australia. The Commission also held meetings with local Elders and with representatives of a number of Aboriginal community-based organisations around the state including Clontarf Aboriginal College; Buniyarrh Centre; Wongatha Wonganarra Community Centre; Wangka Maya Language Centre, Wirraka Aboriginal Health Centre; Bloodwood Tree Association; Kimberley

Aboriginal Law and Culture Centre; and several local Aboriginal corporations and land councils. These meetings provided the Commission with important information to assist the consultation process.

Community Consultations

Like the ALRC, the Commission determined that the best way to research the potential for recognition of Aboriginal customary laws was to speak with the people directly concerned. The Commission therefore organised a series of consultative visits to Aboriginal communities in the Perth metropolitan area, as well as in the regional and remote areas of Western Australia.

Pre-consultation meetings

The main consultations were preceded by a number of pre-consultation meetings undertaken by the Project Team and members of the Commission in all areas visited. These meetings gave the Commission the opportunity to introduce the project to Indigenous communities, community leaders and local Aboriginal organisations. The Commission was also able to seek advice from these individuals and organisations about the conduct of consultation meetings in the area; the

preferred dates, locations and venues for meetings; the predicted attendance at meetings; the necessary arrangements to be made in respect of transport and culturally appropriate catering; and the best way to reach people to ensure that they were made aware of the location, dates and times for consultation meetings. Advice was also sought about the particular issues concerning Aboriginal people and communities in each area to better prepare the Commission for its consultative visits.

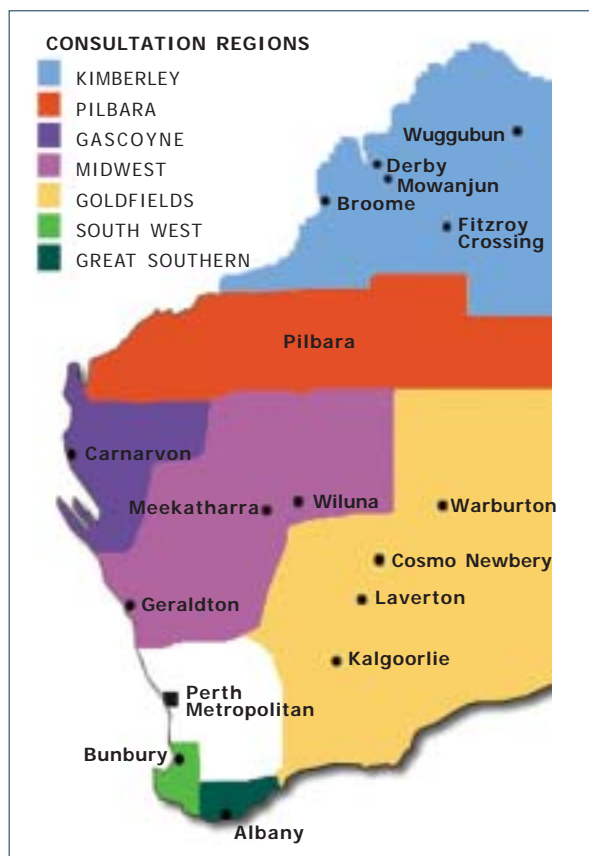
During the pre-consultation phase the Commission distributed relevant information about the reference, including copies of the Project Overview, the signed Memorandum of Commitment and a video produced by the Commission that explained the reference in easy-to-understand and culturally appropriate terms. The Commission also sought formal permission from Elders and appropriate community leaders to conduct consultations within their communities and upon Aboriginal land.

Metropolitan consultations

The Commission began its formal community consultations in November 2002 with meetings held in the Perth metropolitan area. Acting upon advice from the Project Team and the ARRC, the Commission decided to conduct five community consultations in the metropolitan area, covering the areas of primary Aboriginal residence in the capital.

Each of the consultations commenced with introductions by the Project Manager and Special Commissioner Beth Woods followed by a traditional welcome to country and a presentation about the project by then Chairman of the Commission, Professor Ralph Simmonds (now the Hon. Justice Simmonds of the Supreme Court of Western Australia). After the formal introductions and welcome, the consultations were opened up for contributions, comments and discussions by all who were present. These discussions sometimes occurred with the group as a whole and sometimes within smaller discussion groups to reflect more specific concerns.

During the metropolitan consultations notes were taken by the Project Team in accordance with the guidelines discussed above under the heading 'Confidentiality of Cultural Information'. These notes were then compiled by the Research Directors (in collaboration with other members of the Project Team) into thematic summaries. The thematic summaries of all consultations were made publicly available on the Commission's



website⁴ as they came to hand. The specific issues of concern to Aboriginal people, outlined in these thematic summaries, will be discussed in more detail in the following chapters.

Regional and remote consultations

During 2003, the Commission conducted consultative visits of the main regions of the state including the south west and Great Southern regions; the Goldfields and Western Desert regions; the Pilbara and Kimberley regions; and the Gascoyne and mid-west regions. In each of these regions a number of large public meetings were held. The Commission also met with representatives of local Aboriginal organisations and regional authorities (such as local shire councils, ATSIC, DIA, the Western Australian Police Service and local magistrates). Where possible, the Commission visited regional prisons to ensure that those in direct daily contact with the justice system were also given the opportunity to contribute.⁵

The format of the regional and remote consultations varied according to the requirements of the local communities and the advice obtained by the Commission in its pre-consultation meetings. In many cases consultations took place over a number of days and included large public meetings, gender-based discussion groups, theme-based discussion groups and one-on-one (or restricted group) confidential briefings. The consultations were guided by four key questions that together provided a focal point for the discussion of customary law issues:

- How is Aboriginal customary law still practised?
- In what ways is it practised?
- In what situations is it practised?
- What issues confront Aboriginal people when practising their law today?

While the Commission employed these questions as a general guide for discussion of law issues, the questions were not always in direct alignment with the issues confronting particular Aboriginal communities. A degree of flexibility in the consultation process was therefore required.



As with the metropolitan consultations, care was taken to ensure that information recorded by the Project Team was done so in compliance with the protocols established by the Commission in consultation with the ARRC.

Background Papers

In early 2003, the Commission advertised a call for papers on matters relating to the practise and recognition of Aboriginal customary law and its interaction with Australian laws, particularly the laws of Western Australia. A total of 15 background papers were commissioned from highly regarded authors with particular expertise in their relevant field. Published papers covered Aboriginal customary law as it relates to family law; the criminal justice system; provision of interpreting services; international law; Indigenous cultural and intellectual property; women's interests; and other general topics. A detailed case-study of a north-west community was also commissioned.

Details of the background papers published by the Commission for the purposes of this reference are listed below. Opinions expressed in the background papers are those of their individual authors. Whilst the Commission does not necessarily endorse the authors' opinions it has taken the information contained in the background papers into account in producing the proposals advanced in this Discussion Paper.

4. See <<http://www.lrc.justice.wa.gov.au>>.

5. The Commission visited regional prisons at Roebourne, Greenough and Albany, as well as Bandyup Women's Prison and Casuarina Prison in the Perth metropolitan area.

List of Background Papers published

1. Victoria Williams, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law' (December 2003).
2. Michael Cooke, 'Caught in the Middle: Indigenous Interpreters and Customary Law' (March 2004).
3. Greg Marks, 'The Value of a Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area' (June 2004).
4. Tony Buti and Lisa Young, 'Family Law and Customary Law' (August 2004).
5. John Toohey AC QC, 'Aboriginal Customary Laws Reference – An Overview' (September 2004).
6. Kathryn Trees, 'Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study' (November 2004).
7. Neil Morgan and Joanne Motteram, 'Aboriginal People and Justice Services: Plans, programs and delivery' (December 2004).
8. Harry Blagg, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia' (January 2005).
9. Greg McIntyre SC, 'Aboriginal Customary Law: Can It Be Recognised?' (February 2005).
10. Megan Davis and Hannah McGlade, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' (March 2005).
11. Chris Cunneen and Melanie Schwartz, 'Customary Law, Human Rights and International Law: Some conceptual issues' (March 2005).
12. Terri Janke and Robynne Quiggin, 'Indigenous Intellectual Property and Customary Law' (March 2005).
13. Catherine Wohlan, 'Aboriginal Women's Interests in Customary Law Recognition' (April 2005).
14. Steven Churches, 'Aboriginal Customary Law in the Context of Western Australian Constitutional Law' (April 2005).
15. Phillip Vincent, 'Aboriginal People, Criminal Law and Sentencing' (June 2005).