
KEEPING CULTURAL KNOWLEDGE WITH INDIGENOUS RESEARCH PROTOCOLS: A CASE STUDY ON THE KIMBERLEY LAND COUNCIL'S INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE POLICY

by Pauline Foster and Terri Janke

INTRODUCTION

Indigenous peoples are constantly approached for research purposes.¹ When researchers call on Indigenous peoples to hand over their knowledge, family histories, stories and images, Indigenous cultural and intellectual rights are at risk.² The Kimberley Land Council ('Council') has implemented a policy to ensure that research is conducted in accordance with ethical standards so that the rights of Kimberley Aboriginal people are protected from exploitation. It aims to ameliorate the impact of Australian intellectual property laws which fall short of protecting traditional knowledge, thereby giving effect to principles recognised in international law.³ It mandates that researchers obtain the free, prior informed consent of traditional owners through the Council, duly attribute their assistance and ensure that they partake in any resultant benefits and intellectual property rights. This measure has limited avenues for abuse by providing a contractual safeguard in an area where existing legal frameworks are largely inadequate.

HOW WAS THE POLICY DEVELOPED?

The Intellectual Property and Traditional Knowledge Policy ('Policy') has been in place since 2011. Plans for its development were initiated by the Council's Research Ethics and Access Committee ('REAC') in 2010 to complement its Research Protocol and standard research agreement. The Council engaged Terri Janke, Solicitor Director of Terri Janke & Company in Sydney to research and write the Policy. Ms Janke developed the Policy through a highly consultative process to make certain that it directly addressed the concerns of the Council, which is the peak body representing traditional land owners in the Kimberley region.⁴ A key aspect of this process was conducting an Intellectual Property workshop in Broome with the REAC prior to the drafting of the policy, during which the issues to be addressed by the Policy were identified. The Council's board and staff also reviewed the Policy following the completion of the preliminary draft.

The need for the Policy stems from the failure of current intellectual property law as enshrined in the *Copyright Act 1968* (Cth) ('*Copyright Act*') to protect traditional knowledge. This is due to the fact that

most traditional knowledge does not meet the prescriptive criteria necessary for classification as copyright. Under the *Copyright Act*, a work is protected if there is an identifiable author, the work is in material form, and the work is original. This definition omits 'works' such as Traditional Knowledge, which have evolved through incremental collaboration over time and oral heritage, whilst endowing those who record Indigenous culture in writing or through audio and/or visual means with copyright ownership.⁵ The Policy serves to compensate for the regulatory deficit permitted by the outmoded definitions in the *Copyright Act* by imposing legal obligations on the researcher to recognise Traditional Knowledge as intellectual property until such time that it is recorded in material form. Researchers⁶ wishing to undertake research on traditional Aboriginal lands or waters in the Kimberley, with Kimberley Aboriginal communities and/or with the Council must agree to comply with the conditions of the Policy and the Research Protocol under a Cooperative Research Agreement with the Council.⁷ These include requirements that the researcher submit an outline of their proposal to the REAC prior to conducting any research, incorporating details such as:

- The benefits and risks to Kimberley Aboriginal people
- Expected publications and the sites to be visited
- That he/she negotiate the research agreement with the Council and relevant Aboriginal community representatives.⁸

KEY PROVISIONS OF THE POLICY *FREE, PRIOR AND INFORMED CONSENT*

One of the major functions of the Policy is to establish best practice standards for formally obtaining the Free, Prior and Informed Consent⁹ ('FPIC') of the traditional owners through the REAC, for use of their Intellectual Property, Traditional Knowledge and Biological Resources. FPIC is defined to mean consent that is granted 'when all relevant information has been provided' and 'without coercion'.¹⁰ Any agreement entered into by the researcher with the Council must be the product of this consent.¹¹

This aspect of the Policy was fashioned as a response to the common practice of researchers who either undertook research

on Indigenous people without any consultation whatsoever or who approached Indigenous peoples directly in an attempt to obtain consent for their projects. The latter was problematic in that these individuals may not have had the appropriate authority to provide consent, and may not have been provided full details of the proposed use of the collected information. For example, younger people have been independently approached to grant approval for the use of collectively owned Indigenous Cultural and Intellectual Property, despite not being versed in the applicable customary law. The individuals singled out by researchers may also have been deliberately selected for their susceptibility to coercion. A related practice was that of attempting to ‘window shop’ for consent, whereby researchers would, if refused by a particular individual or body, proceed to request permission from others. The ability to engage in these unethical behaviours has been restricted by the implementation of the Policy and the Protocol because they oblige researchers to apply for consent through the Council, and stipulate that it is incumbent on the Council, rather than on the researcher, to identify the appropriate individuals and communities for consultation.¹²

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DISCLOSURE

The Policy mandates that the researcher disclose certain information in the research proposal, including details of intellectual property arrangements and Kimberley Aboriginal People’s involvement in the project.¹³ In addition, fresh consent must be sought under a new research proposal where the researcher’s intended use of the Aboriginal Cultural and Intellectual Property as approved in the original research agreement undergoes any change over the course of the project.¹⁴ This operates to ensure that researchers are prevented from obtaining consent under false pretexts.

The obligation to make detailed disclosure of the particulars of the project prior to commencing parts of the research relevant to Kimberley Aboriginal people was included to reduce the risk of exploitation of Indigenous Traditional Knowledge by people with ulterior motives. For example, there have been instances where people have obtained consent by claiming to be conducting environmental research of benefit to Kimberley Aboriginal people, but have in reality intended to use the information collected as

evidence of an insufficient connection to the land, in an effort to enable legal representatives to defeat native title claims.

INCREASED INPUT BY KIMBERLEY ABORIGINAL PEOPLE INTO RESEARCH PROJECTS

Under the Policy, researchers are also required to facilitate the participation of Kimberley Aboriginal people at all phases of the project, where possible.¹⁵ Importantly, this contemplates their involvement in shaping the direction of the project and in deciding the research methodology to be employed.¹⁶ The researcher should be prepared to amend the research proposal following consultation with the relevant community.¹⁷ The Policy also seeks to implement this obligation in specific ways, including:

- Where a Traditional Knowledge Holder has contributed significantly to the production of written materials such as a book or report, he/she should be invited to review and comment on the draft.¹⁸
- Researchers should consult the Kimberley Aboriginal people on the correct use of Aboriginal language words.¹⁹

Moreover, promoting the increased participation of Kimberley Aboriginal people in research projects conducted on their land and in their communities is a crucial means by which the Policy gives effect to its further aim of guaranteeing that the benefits arising from the project accrue to Aboriginal people.²⁰ It will contribute towards combating the oxymoronic situation which Maori academic Professor Linda Smith has described as:

... that the West can desire, extract and claim ownership of our ways of knowing, our imagery, the things we create and produce, and then simultaneously reject the people who created and developed those ideas and seek to deny them further opportunities to be creators of their own culture and own nations.²¹

The right of Indigenous people to control their cultural heritage and Traditional Knowledge under the *United Nations Declaration on the Rights of Indigenous Peoples*²² finds direct expression in this duty to ensure Aboriginal community participation.

INFORMS RESEARCHERS OF THEIR OBLIGATIONS

The Policy also serves to inform people who wish to conduct research on Country, including filming,²³ of the existence and content of their obligations under the Council’s Policy and Research Protocol.²⁴ These documents notify researchers that they are required to submit a research proposal to REAC²⁵ divulging specified information regarding their project prior to its commencement, and that they must legally bind themselves to comply with the Policy by signing a research agreement²⁶ with the Council. They also detail the standards to which researchers must adhere in conducting their projects.²⁷ By ensuring that

researchers are cognisant of the Council procedures applicable to them, compliance with the best practices established by the Policy²⁸ is facilitated.

Implementation of the Policy also operates to raise awareness amongst Kimberley Aboriginal people themselves of their rights pertaining to research conducted on their lands under the Policy, and the appropriate procedures that should be observed to ensure their protection. This in turn helps to prevent attempts to circumvent the Policy by people wishing to take advantage of lack of familiarity with it amongst the Aboriginal community.

CONCLUSION

The implementation of the Policy has successfully raised awareness of the procedures and rights in relation to research projects proposed to be conducted on Kimberley Aboriginal lands and seas. The Executive Assistant of the REAC, Jannah Lott, praised the practical utility of the Policy, commenting that:

... it has been really useful to call upon the document and draw researchers' attention to our position on various matters including reproduction of images, songs, etc. It's great having the concrete policy to refer to. The fact that our directors developed and endorsed it gives the Policy great credibility ...

In this way, the opportunities for Kimberley Aboriginal people to fall victim to the exploitation of their Intellectual Property and Traditional Knowledge have been curtailed, and the protection of their cultural heritage has been fortified. The terms of the Policy are only binding on those who sign up to the process and obtain research clearance from the Council's REAC. There remains potential for exploitation in that researchers who circumvent the process have little recourse at law. In an effort to encourage fair and negotiated sharing of Indigenous Traditional Knowledge, we recommend that governments and universities adopt similar Indigenous research protocols.²⁹ Furthermore, there are draft Articles on Traditional Knowledge and Traditional Cultural Expression protection, developed by the World Intellectual Property Organisation's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. These potentially provide a framework for Indigenous cultural and intellectual property rights recognition.³⁰ However, the Intergovernmental Committee's work towards finalising the Articles has stalled. Until there is legal protection, Indigenous people's traditional knowledge remains vulnerable. Indigenous organisations, like the KLC, must assert Indigenous cultural protocols, use contracts and existing intellectual property laws to their advantage, as illustrated in this case study. Ultimately Australia should adopt laws and policies to recognise Indigenous Cultural and Intellectual Property as intellectual property.

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Terri Janke and Company would like to acknowledge the KLC Research Ethics and Access Committee for their kind permission for this case study to be published.

- 1 Darrell A Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (International Development Research Centre, 1996) ch 1.
- 2 Terri Janke, *Writing up Indigenous Research: Authorship, Copyright and Indigenous Knowledge Systems* (2009).
- 3 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), art 31.1. The *Declaration* is not binding on Australia; *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993), art 8(j). Australia is a State party; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the 1992 Convention on Biological Diversity, opened for signature 29 October 2010, UNEP/CBD/COP/DEC/X/1 of 29 entered into force 12 October 2014). Australia is a signatory; World Intellectual Property Organisation, *The Protection of Traditional Knowledge: Draft Articles* <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_21/wipo_grtkf_ic_21_ref_facilitators_text.pdf>; World Intellectual Property Organisation, *The Protection of Traditional Cultural Expressions: Draft Articles* <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_22/wipo_grtkf_ic_22_ref_facilitators_text.pdf>.
- 4 Kimberley Land Council, *About Us* <<http://klc.org.au/about/>>.
- 5 Catherine Tayeh and Terri Janke, *Indigenous Cultural and Intellectual Property Rights, Traditional Knowledge and Traditional Cultural Expression: A Guide for Negotiating Native Title Agreements* (Terri Janke, 2013) 10-11.
- 6 'Researchers' include government officers, filmmakers and all people who collect, record or deal with Kimberley Aboriginal people's Intellectual Property, Heritage, Traditional Knowledge and Traditional Cultural Expression. Definition taken from: KLC Research, Ethics and Access Committee, Kimberley Land Council Aboriginal Corporation, *Intellectual Property and Traditional Knowledge Policy* (6 September 2011) <http://uploads.klc.org.au/2012/05/KLC_IP_TK_Policy_V1_final1.pdf> cl 1.2.
- 7 *Ibid* cl 23.2.
- 8 Kimberley Land Council, *Kimberley Land Council Research Protocol* (25 August 2011) <http://uploads.klc.org.au/2012/05/KLC_Research_Protocol_V2_final.pdf> 1-2.
- 9 KLC Research, Ethics and Access Committee, Kimberley Land Council Aboriginal Corporation, *Intellectual Property and Traditional Knowledge Policy*, above n 6, cl 1.3.5.
- 10 *Ibid* cl 2.8.
- 11 *Ibid* cls 3.8, 4.1.
- 12 Kimberley Land Council, *Kimberley Land Council Research Protocol*, above n 8, 1-2.

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- 13 KLC Research, Ethics and Access Committee, Kimberley Land Council Aboriginal Corporation, above n 6, cl 5.
- 14 Ibid cl 6.1.
- 15 Ibid cl 4.1; Kimberley Land Council, above n 8, 2.
- 16 Ibid.
- 17 Kimberley Land Council, above n 8, 2.
- 18 KLC Research, Ethics and Access Committee, Kimberley Land Council Aboriginal Corporation, above n 6, cl 11.2.1.
- 19 Ibid cl 13.1.
- 20 Kimberley Land Council, above n 8, 3; Ibid cl 1.3.3.
- 21 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 1999) 1.
- 22 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), art 31.1.
- 23 KLC Research, Ethics and Access Committee, Kimberley Land Council Aboriginal Corporation, above n 6, cl 2.13.
- 24 Ibid 3.
- 25 Kimberley Land Council, above n 8, 1-2.
- 26 KLC Research, Ethics and Access Committee, Kimberley Land Council Aboriginal Corporation, above n 6, cl 23.2.
- 27 Ibid 3.
- 28 Ibid.
- 29 World Intellectual Property Organisation, *The Protection of Traditional Knowledge: Draft Articles*, above n 3.
- 30 Ibid.
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Sea Flower, 2014

Alison Williams
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