



Australian Government

Indigenous Higher Education Advisory Council

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Dear Ms Parker and Mr Bailie

Re: Indigenous Knowledge Consultation

I am writing as Chair of the Indigenous Higher Education Advisory Council (IHEAC) in response to the Indigenous Knowledge consultation being undertaken by IP Australia, the Office for the Arts (OFTA) and the Attorney-General's Department (AGD). IHEAC commends the respective departments for examining how Australia can better protect Aboriginal and Torres Strait Islander traditional knowledge, culture and genetic resources through the intellectual property (IP) system. It is encouraging that the Government acknowledges the importance of engaging with Aboriginal and Torres Strait Islander people during consultations as they are the titleholders, proprietors and ancestral owners of traditional knowledge.

Since its inauguration in 2004, IHEAC has provided policy advice to the Australian Government on improving outcomes in higher education for Aboriginal and Torres Strait Islander students and staff relating to their participation, retention and progression both in study and in employment. IHEAC has contributed greatly to the Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People, which takes into consideration the important role of Indigenous knowledge.

This letter provides attachments outlining a summary of recommendations (Attachment A) and a paper examining the key issues in relation to research of Aboriginal and Torres Strait Islander knowledge systems in the higher education sector (Attachment B). IHEAC appreciates the contact made by the departments during its consultation process and wishes to continue working closely with Government regarding this important issue.

Yours sincerely,

Professor Steve Larkin
Chair, IHEAC

8 June 2012

**Indigenous Higher Education Advisory Council's recommendations on the:
*Indigenous Knowledge Consultation***

IHEAC recommends that the following issues are considered during the development of relevant policy by IP Australia, OFTA and AGD:

Summary of Recommendations:

That Australia, within the WIPO IGC, work to develop a uniform and comprehensive international doctrine guiding best practice in protecting Indigenous knowledge. This could involve:

- Applying current international norms such as article 8j from the Convention on Biological Diversity
- Considering a *sui generis* instrument to acknowledge the distinct differences between Western IP laws and Indigenous customary laws.

That IP Australia, OFTA and AGD canvass the possibility of developing a national legislative and policy framework which:

- Considers the informed consent, shared benefits, communal intellectual property protections and recognition of customary laws and practices of Indigenous communities
- Provides guidance on the attribution and acknowledgement of Indigenous knowledge holders and communities
- Recognises the rights of the clan or community as the owners of the knowledge.

That the departments consider the development of a *sui generis* instrument to protect Indigenous knowledge rights which are consistent with Indigenous customary law.

That the departments consider how to provide easily accessible and intelligible information, particularly to Aboriginal and Torres Strait Islander people and other stakeholders such as universities and research bodies, on Indigenous people's rights regarding their traditional knowledge including:

- A website
- Public awareness campaign
- Training.

That the departments canvass the possibility of forming an advisory body to provide guidance to universities and research institutions on how research should be conducted on Indigenous knowledge, following the development of necessary legislative and policy frameworks.

That IP Australia, OFTA and AGD consider a national governance structure and body to administer and protect rights, coordinate protocols, provide ongoing legal advice regarding IP queries, complaints and offer mediation and dispute resolution.

That the departments liaise with IHEAC in the development of the discussion paper.

Key issues

The Indigenous Higher Education Advisory Council (IHEAC) welcomes the opportunity to provide comments and recommendations for IP Australia, OFTA and AGD to consider examining further in its future policy developments on protecting Indigenous Knowledge.

Indigenous knowledge and why it needs to be protected

Indigenous knowledge is a broad term which refers to a range of tangible and intangible cultural products of an individual, family, or community which includes traditional knowledge, traditional cultural expression and relationships with the land. The knowledge which is shared inter-generationally through oration is integral to Aboriginal and Torres Strait Islander people's identity and cultural heritage.

Much of Indigenous knowledge contributes to research and development, in areas such as pharmaceuticals, health and society and agriculture. When Aboriginal and Torres Strait Islander oral knowledge systems are the subject of research and subsequently recorded for the first time to material form, they are susceptible to exploitation. IHEAC is concerned that the rights of traditional owners of knowledge are not adequately acknowledged or protected in Australia; nor is their right to share in the benefits reaped from the uses of this knowledge.

Protecting cultural heritage, maintaining cultural integrity and controlling appropriation, usage and branding of Indigenous knowledge is important to the process of Aboriginal and Torres Strait Islander people's self-determination.

Current mechanisms to protect Indigenous knowledge

There are a variety of documents, systems and activities that currently seek to address the lack of protection of Indigenous knowledge at international, national, and regional levels. IHEAC will briefly note the key mechanisms and highlight the limitations of these below.

International mechanisms

United Nation's Declaration on the Rights of Indigenous People (UNDRIP)

The importance of Indigenous people's right to 'maintain, control, protect and develop' their cultural heritage, traditional knowledge and traditional cultural expressions and their intellectual property is outlined in Article 31 of the UNDRIP, to which Australia is a signatory. Important aspects such as the right of prior informed consent are emphasised in the UNDRIP.

While the UNDRIP is not a legally binding international treaty, IHEAC considers it to be an aspirational document which should guide domestic policy and law formation.

World Intellectual Property Organisation (WIPO)

IHEAC is aware that Australia is a member of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, and is currently undergoing text based negotiations towards a possible international legal instrument for protecting Indigenous Knowledge.

While the status of the instrument to come out of this process is not yet agreed, IHEAC hopes that Aboriginal and Torres Strait Islander people's needs and interests are captured in any outcome determined. IHEAC would appreciate being regularly updated on any progress made during negotiations and endorses the current consultation process being conducted with the aim of accurately reflecting Aboriginal and Torres Strait Islander's views.

IHEAC is aware that the Indigenous Caucus recently put forward a range of options to gain better representation on the IGC and endorses the Decision on Agenda Item 7 on the Participation of Observers to explore these options further. IHEAC particularly endorses point 1 that Aboriginal and Torres Strait Islander people's views should be encompassed within an entity separate to the Australian nation-state at UN forums. This would accurately reflect the history of Australia and acknowledges that Aboriginal and Torres Strait Islander people never gave up their sovereign status¹.

Informed consent and benefit sharing

IHEAC is aware that Australia ratified the United Nations Convention on Biological Diversity which includes article 8j which ensures Indigenous knowledge related to biological and ecological technology is protected, encouraging the sharing of benefits with Indigenous communities. IHEAC is also aware that Australia is considering ratifying the Nagoya Protocol on Access and Benefit Sharing.

IHEAC is concerned that the Convention provides little relief to Indigenous peoples and does not cover a large portion of cultural heritage within Australian IP law. IHEAC is also concerned that the Nagoya Protocol is limited in its ability to provide adequate protection. IHEAC encourages the government to consider extending protection across other forms of cultural heritage. IHEAC also hopes that WIPO will address the shortfalls under the Convention and the Nagoya Protocol.

National mechanisms

A range of cultural protocols and ethics guidelines provide support for researchers and institutions to conduct research on Indigenous knowledge in a culturally appropriate, just and respectful manner. Chapter 4.7 of the National Statement on Ethical Conduct in Human Research provide values and ethics principles for research involving Aboriginal and Torres Strait Islander people.

The main sources of guidance in the research sector are the AIATSIS 2011 *Guidelines for Ethical Research Practices in Australian Indigenous Studies*, and the NHMRC's *Values and Ethics: Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research 2003*.

¹Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Twenty-First Session, Geneva, April 16 to 20, 2012, Decisions of the Twenty-first Session of the Committee, available at :
http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_21/wipo_grtkf_ic_21_ref_decisions.doc

AIATSIS's guidelines provide information on research needing to be attributed to the communities who have contributed greatly to research.

Universities and publicly funded entities are guided by the *Australian code for the responsible conduct of research* and the *National Principles of Intellectual Property Management for Publicly Funded Research*. A number of research agencies also develop their own guidelines to address identified gaps in the material available.

Challenges in protecting Indigenous knowledge

IHEAC considers that the current international and national mechanisms are limited and fail to provide comprehensive protection of Indigenous knowledge.

Indigenous customary law versus Western law

IHEAC is concerned that the current debate about the protection of Indigenous knowledge falls within the IP law paradigm. As Professor Dodson notes in his concept paper to the United Nations Permanent Forum on Indigenous Issues, "Indigenous traditional knowledge is not simply a different type of intellectual property; it is a completely different entity."²

Indigenous knowledge systems are held by a person, family or community and can only be shared through a complex system of consents. Aboriginal and Torres Strait Islander communities have their own rules around the protection of knowledge (customary laws), in particular information which is considered 'secret and sacred'³.

These customs and laws and Indigenous cultural and intellectual property rights are largely not acknowledged under Western intellectual property law⁴. According to Professor Mick Dodson: *For the most part intellectual property law fails to protect indigenous rights and interests because western constructs of intellectual property focus on individual knowledge and creativity, rather than communal trans-generational knowledge.*

As an example of the differences, IHEAC cites Terri Janke's work on copyright law at Appendix 1.

Lack of a coordinated approach

With the above-mentioned guidelines for ethical research and treatment of Indigenous knowledge in Australia, IHEAC is concerned about the lack of a coordinated national approach; instead institutions and researchers must navigate their way through a complex range of options, not all of which are mandatory.

² Dodson, Mick (2007) *Report on Indigenous Traditional Knowledge*, Permanent Forum on Indigenous Issues, Sixth session, available at: http://webcache.googleusercontent.com/search?hl=en&gbv=2&q=cache:w5el0g0SxIYJ:http://www.un.org/esa/socdev/unpfii/documents/6_session_dodson.pdf%2Bdodson%2Bcustomary%2Blaw%2B2007%2Bpermanent%2Bforum&gs_l=serp.3...17249.21733.0.21998.21.17.0.0.0.593.2157.0j2j2j0j1.7.0.cish.1.0.0.Oc-R_gO9Brs&ct=clnk

³ Janke (2009) *Writing up Indigenous research: authorship, copyright and Indigenous knowledge systems*, Terri Janke and Company Pty Ltd

⁴ Janke (2009) *Beyond Guarding Ground: A vision for a national Indigenous Cultural Authority*, Terri Janke and Company Pty Ltd

Without a national legal and policy framework that recognises Indigenous ownership and knowledge, there are no ramifications if guidelines are not followed. While there is significant good will in the research sector, the onus is on agencies to develop separate approaches and individual researchers to behave ethically and appropriately.

Without a coordinated approach, it is unclear what the quality of research practice is and how this is monitored. The methods used to approve research conducted in Aboriginal and Torres Strait Islander communities also appear to be inconsistent across universities.

IHEAC acknowledges that progress has been made over the last few decades, with a number of legal cases challenging IP laws and making gains in the protection of Indigenous knowledge in Australia. However, as Terri Janke argues, “should Indigenous peoples have to rely on creative lawyers to protect their cultural and intellectual property?”⁵

IHEAC is concerned that Indigenous owners of traditional knowledge are unaware of their rights and are vulnerable to exploitation without proper guidance and access to clear, streamlined information.

Recommendations for consideration

The Australian Government needs to demonstrate guidance and leadership on protecting Indigenous knowledge systems.

Ideally, IHEAC would like to see a legislative framework developed which reviews the current protections for Indigenous knowledge under the IP system and considers a *sui generis* instrument. In his concept paper to the UNPFII, Professor Mick Dodson outlined the reasons for a new and customised approach to protecting Indigenous knowledge. IHEAC endorses that a *sui generis* instrument is explored as a way to reflect Indigenous customary law in protecting Indigenous knowledge at the WIPO IGC and also in the policy considerations made by government departments.

IHEAC also recommends that an overarching policy framework is developed, providing whole-of-government guiding principles for ethical and culturally appropriate research of Indigenous knowledge, drawing together the best aspects of other policies and protocols already in existence. The guidelines should provide information on consent, attribution, benefit sharing and integrity issues.

Once developed, information should be easy to access and readily available through, for example, a dedicated website, communication strategy, and training courses for research authors, research owners and Indigenous owners of traditional knowledge.

An advisory body on the proper use of Indigenous knowledge in research would be helpful to ensure all universities and research institutions follow one consistent, national protocol. IHEAC considers that AIATSIS could play a greater and more valuable public role in this space.

To address the shortfalls in Australia’s IP system, Terri Janke calls for a National Indigenous Cultural Authority where Aboriginal and Torres Strait Islander people own and control their cultural and intellectual property. IHEAC supports the establishment of a national body to

⁵ Janke (2009) *Beyond Guarding Ground: A vision for a national Indigenous Cultural Authority*, Terri Janke and Company Pty Ltd

administer and protect rights, coordinate protocols, provide ongoing legal advice regarding IP queries, complaints and offer mediation and dispute resolution. This model could be similar to the collecting society in the Copyright model where royalties are administered and enforcement directed from an independent body, while the policy and legislative framework for protection exists in the Copyright Act.

Depending on whether it is guided by policy or a legislative scheme, the Authority could be:

- A separate body
- Part of the National Indigenous Knowledge Centre
- An extension of AIATSIS's current role

Shortfalls in copyright protection

When Aboriginal and Torres Strait Islander oral knowledge systems are the subject of research and subsequently recorded for the first time to material form, they are susceptible to exploitation.

Terri Janke, lawyer and well known writer on Indigenous IP issues, outlines a number of shortfalls in copyright protection⁶, namely:

- Copyright protects the expression but not the underlying ideas which means, for example, that the knowledge conveyed in dance and music is not protected – only the recording of the dance or music.
- Copyright protects individuals' rights but not collective rights which becomes problematic when working with communities who have ownership over traditional knowledge:
 - While copyright owners have exclusive rights to control what is done with the work, copyright law does not take into consideration the traditional owners of the knowledge and the rights they should have over the work being produced. Under Copyright law, traditional owners do not have control over who has access to that knowledge which is of great concern especially regarding secret and sacred knowledge.
 - Research is often expropriated, used and attributed to the authors of the research and not necessarily to the communities who have contributed greatly to the research.
 - Moral rights – rights of the author to be attributed as the author of the work and the right of integrity - are for individuals only and not collective groups. IHEAC is disappointed that the proposal to amend the Copyright Act in 2003 to include Indigenous communal moral rights has not gone anywhere. Without communal moral rights, communities or clan elders cannot take action against disrespectful use of cultural works or where works are falsely attributed or not attributed at all.
 - the law also does not acknowledge the longitudinal rights of TK over generations as copyright expires after 70 years after the author's lifetime

⁶ Ibid.

