

## **CULTURAL INSTITUTIONS AND GUIDELINES: A LEGAL PRIMER ON LAW AND INDIGENOUS KNOWLEDGE**

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I am going to be somewhat unorthodox in my presentation by giving *two* backgrounds, then I will talk about a document that the Intellectual Property Research Institute of Australia (IPRIA) published earlier this year – a little about what that document does and some of its content – and then finish up.

To start with, I need to acknowledge the work by AIATSIS in this project. The work I've been doing over the last couple of years has been part of a collaborative research project between AIATSIS and IPRIA. The project had two parts that were to many extents overlapping. There was empirical work that was conducted by Dr Jane Anderson, who used to be a Research Fellow at AIATSIS, and who is now at New York University. The work she was doing involved fieldwork with indigenous communities in relation to things like: views on the creation exploitation of intellectual property (IP); use of IP as a tool to further economic interests of indigenous people; and views on the activities of cultural institutions and the accessibility, ownership and reproduction of indigenous cultural materials. She also looked at practical tools for improving the relationship between indigenous communities and cultural institutions. Jane has written extensively in relation to this area and published a number of academic outputs arising from her work,<sup>1</sup> and there is also a final report which talks about her work, which will be released next year. Importantly, too, she has written a framework for protocols for indigenous communities that are interested in developing their own protocols for knowledge management. These will be made publicly available in early 2007.

The second part of the project involved work with cultural institutions, and this is where I was far more involved. The project was instigated due to issues being experienced at AIATSIS in relation to material in their library and audio-visual archives. Those issues appear to have revolved around themes of ownership: who holds rights in physical and intangible aspects of collection items? How do those rights interrelate? And how do laws and cultures of indigenous people fit within this ownership framework?

We had numerous discussions with people at AIATSIS over the course of this research, in relation to the issues they faced in collection management. For example, say AIATSIS holds a sound recording made in the 1970s. Somebody comes in – a descendent of the person who is recorded – and says that they would like to listen to that sound recording. However the deposit form completed at acquisition says that to listen to the sound recording, patrons must have consent from the depositor. The depositor for whatever reason says no. What do you do? Then let's say you do provide access and the person says: 'I would like to take a copy home. This is the only recording of my grandfather and I would like to keep a copy for the community.' What do you do then? AIATSIS is not the copyright owner. Do you infringe copyright law to then fulfil what are quite reasonable requests by patrons at the Institute?

In the course of our discussions, we heard numerous examples of similar scenarios, and it seemed that ownership was the common thread. This was repeated in broader research with other institutions, in which we heard of similar issues and experiences occurring. This was

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<sup>1</sup> Examples include: Jane Anderson, 'Indigenous Knowledge, Intellectual Property, Libraries and Archives: Crises of Access, Control and Future Utility' in Martin Nakata and Marcia Langton (eds), *Australian Indigenous Knowledge and Libraries* (2005); Jane Anderson, 'Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use', paper presented at 'Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena', Columbia University, New York, 5-7 May 2005.

through workshops and seminars and interviews and surveys that people were very generous in assisting us with. In parallel with this work, I also undertook research in relation to the legal principles that are relevant to the acquisition, use and reproduction of collection items. The main output of that work is a legal primer for management of Australian indigenous collections.<sup>2</sup>

The second lot of background: Before I go into the content of the Primer, I want to talk about our understanding of how the sector was operating in relation to its indigenous collections.

The starting point that we adopted was that indigenous collections have certain qualities that make them different from other collections held by government and cultural institutions. This relates to the way in which they were brought into existence, such as the lack of true informed consent when items were produced, and the lack of benefits being returned to communities and individuals who participated in research. We also thought that the significance of items to indigenous people can be quite acute, particularly considering that there might be secret or sacred knowledge recorded in materials, or that there may be no equivalent material held within the indigenous community from whom the material derives. There is also a long history of disrespectful behaviour in relation to indigenous materials. None of this is new. That was not any sort of original or groundbreaking finding. We all know that.

We also saw that cultural institutions are responding to these special issues around their indigenous collections. We can see that in the activities of ATSIILRN,<sup>3</sup> the production of protocols facilitating dialogue in relation to indigenous collections,<sup>4</sup> and also within individual institutions who are creating their own guidelines and policies. These protocols and policies cover all manner of different topics, ranging from staffing of institutions and the classification of materials, through to repatriation of original and copy material. But we also saw varying awareness of the issues surrounding indigenous collections, varying degrees of implementation of new policies, and common questions that need to be addressed.

A key aim of the Primer is to assist institutions implement guidelines and protocols and policies by examining legal principles relevant to the acquisition, access and reproduction of indigenous collections.

What I have tried to do in the Primer is approach these principles of ownership in a way that also draws in discussion of indigenous laws, and other sorts of ethical considerations in collection management. To provide an example: acquisition. The most basic legal question when you are drafting acquisition documentation is, "have I affected a legal transfer of property?" In indigenous collections you might ask another question. You might ask, "how does this document need to be drafted to take into account that my institution is acquiring something that has an indigenous origin?" So for instance, do you want to accept conditional gifts? If so, who can put the conditions on? What is the legal effect of conditions? There might be further questions: can you obtain additional information at acquisition which may help later collection management? And not just as some ad-hoc thing that people do when they remember, but which is actually part of acquisition documentation? The next layer on top of all that might be to ask how your acquisition policies relate to other collection management strategies: to policies regarding what you are going to collect and why.

What I am trying to do, even though my focus as a lawyer is on the legal stuff, is to explore legal principles in relation to other cultural and ethical issues as well.

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<sup>2</sup> Emily Hudson, *Cultural Institutions, Law and Indigenous Knowledge: A Legal Primer for the Management of Australian Indigenous Collections* (Intellectual Property Research Institute of Australia, 2006) ('Primer'). The Primer can be downloaded for free from <<http://www.ipria.org>> and is available at SSRN at <<http://ssrn.com/abstract=955977>>. Bound copies are available for purchase from IPRIA.

<sup>3</sup> Eg, ATSIILRN, *Aboriginal and Torres Strait Islander Library and Information Resource Network Protocols* (updated 2005), available at <<http://home.vicnet.net.au/~atsilirn/>>.

<sup>4</sup> Eg, Janey Dolan, *Continuous Cultures, Ongoing Responsibilities: Principles and guidelines for Australian museums working with Aboriginal and Torres Strait Islander cultural heritage* (Museums Australia, 2005), available at <<http://www.museumsaustralia.org.au>>.

So, how does the Primer achieve this? First, when discussing legal principles, I also critique them to some degree, and explore relevant ethical and cultural considerations. Second, there is a separate chapter looking solely at ethical collection management principles. That chapter focuses on principles and processes, as it would be wrong for me, for many reasons, to write on culturally-appropriate management in a way that purports to be prescriptive. Thus, the aim is to provide some prompts for decision-making.

(In this regard, I had an interesting discussion earlier in the day with Vicky Nakata. We were talking about the ATSLIRN Protocols, and the feedback for those protocols, and Vicky noted that some people wanted more detail (“how do you implement these things?”) while others wanted less detail (lists of things to do that were much more step-by-step and easy to follow). I thought to myself, as an outsider to this process to some degree, that protocols are really important for conscious raising. They are a crucial component in the paradigm shift to get people to think indigenous collections in a different way. However, when I read protocols as a lawyer, I get nervous about all the potential legal issues surrounding their implementation. Digital archives is a great example. The potential copyright issues immediately spring to mind, but I’m also thinking privacy, confidential information, defamation, and so forth. There is a very complex web of ownership issues which can arise for a policy as apparently simple as “we should improve digital access to collections”. So I think we need detail: we need to discuss *how* to implement our policies and protocols. One consideration is legal issues. Obviously, there are many others.)

Thus, what the Primer does *not* do is provide some kind of one-stop-shop for collection management. My expertise is a lawyer. I’ve focussed on the law, and the aim is to assist in other dialogues and debates, not to have some sort of “read this once and never read anything else” document. I hope it does contribute to other discussions and strategies.

Nor is the Primer a normative document containing suggestions for law reform. I do critique the law. I do say “this is where it is criticised for not accommodating indigenous beliefs and practices.” But I have decided very deliberately not to say “and this is how we should change the law.” Why? A few reasons. First of all for philosophical reasons: there is a lot of debate at the moment in relation to the desirability of law reform, whether to massage existing law to fit indigenous knowledge better, or new “*sui generis*” regimes. Some people argue strongly in support of law reform, other people say it is never going to work whilst it is based on western principles of ownership and knowledge. I just didn’t think this was the time for me to enter into this debate. I thought it would start to confuse the purpose of the Primer.

Second, there are a lot of hurdles at the domestic and international level in relation to achieving law reform on intellectual property and indigenous knowledge. For instance, the communal moral rights bill has yet to be passed, which does not bode well for the passage of more broad-acting legislation. My point is that I don’t think we can rely on law reform, particularly by the legislature. I just don’t think that we should be saying, “let’s just wait until we get law reform, and *then* we will start this process of thinking about new ways of collection management.” There is plenty that can be done under the existing framework of the law to improve management of indigenous collections. I am hoping that by explaining how the law works, some of the problems around ownership might be avoided – even if in the long term broader reform is required to achieve more meaningful and significant goals.

What I want to finish by doing is just drawing on two topics from the primer. One is from chapter two, which looks at western legal notions of ownership and how they are conceived and understood, and the second is from the case study on law and databases.

When we started researching this area, we followed the usual course of writing down all the relevant areas of law. Then we thought, “conceptually this is a nightmare”, because we can’t have a document called “*Twenty Areas of Law*”, with no connection between them, just randomly included. (Well we could if we didn’t really care about achieving anything, but we decided not to do that.) Instead, we’ve divided things up into three categories. I accept that there is this is not a perfect schema, but it will do.

- One type of property right relates to the actual physical item. This is often where we are most at ease with western legal notions of ownership. That is, it is quite easy to conceptualise that I own this thing (say, a plastic bottle): I can drink from it, I can throw it out, I can loan it to a friend – *and I can exclude anyone else doing these acts because the bottle belongs to me*. The Primer talks about the rights of the owner of personal property, and how ownership can be transferred (donation, sale, etc). It also talks about an area called “bailment”, which is a fancy word for any situation in which ownership and possession are split – so a loan is a good example of a bailment. Also, cultural institutions are classified as charities for the purposes of the law, so the law of charities is relevant to the way in which you exercise property rights in relation to the collection. Finally there is cultural heritage legislation that will guide activity.
- There are also rights in information. As an aside, I think we focus a lot on copyright when we think about indigenous cultural materials, but I think the informational rights are very interesting, and perhaps a sleeping dog in terms of chances for law reform. Thus, there is recognition in western law of rights in relation to “confidential information”. These rights often arise in a commercial context (customer lists, secret formulae and that sort of thing), but they have also been invoked to protect personal information and secret indigenous knowledge. The Primer also talks about privacy law. We don’t have some kind of general right to privacy in Australia, but we do have legislation that relates to the personal information held by agencies like cultural institutions, and I talk about the possibility that restricted indigenous collections may actually be subject to privacy legislation. There is also freedom of information, archives and public records legislation that are relevant to those access issues and informational content.
- Chapter 5 deals with copyright and allied rights. I go over some key principles in relation to copyright (these are more fully explained in a separate publication<sup>5</sup>) and have a case study on digital archives.

For those who are visual learners, I also present this in different ways in the Primer, to help readers understand how all these various rights inter-relate.

Finally, I’d like to flag an issue from the case study on law and databases, and that is the new “flexible dealing” exception.<sup>6</sup> Very quickly, copyright issues arise when you make a digital archive or database, because the acts of creation and dissemination – such as reproducing materials and making them available online – are exclusive rights of the copyright owner. This means that the act of compiling a database raises the possibility of copyright infringement. We talk in detail in the case study about different options you can use to deal with copyright issues in the creation of digital archives. We discuss assignments and licences; traditional and open licences; implied licences; risk management; and issues for user-generated content. I also want to highlight that the new flexible dealing exception may change some of this, because it may allow certain *public* activities to be done under a statutory exception rather than with the licence of a copyright owner. That is, up until a few months ago, I would have said to you that if you are going to make copyright material available in publicly accessible database, and you’re not the copyright owner, you will infringe copyright if you don’t have a licence. But this may not always be the case following recent amendments to the *Copyright Act*..

The Primer is available for free online at <<http://www.ipria.org>>, and bound copies are also available for purchase.

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<sup>5</sup> Emily Hudson and Andrew T Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitisation* (Centre for Media and Communications Law and Intellectual Property Research Institute of Australia, 2005). Available for free from <<http://www.law.unimelb.edu.au/cmcl>>. Bound copies are also available for purchase.

<sup>6</sup> *Copyright Act 1968* (Cth), s 200AB.