Ethics

Working Paper 2

*Australian Anthropological Society Code of Ethics
Review: Intellectual Property*

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Australian Anthropological Society Code of Ethics Review: Intellectual Property

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Over a two-year period, between 2010 and 2012, the then executive of the Australian Anthropological Society (AAS) revised several clauses within the Code of Ethics. The focus was on updating the specific clauses relating to "Due Acknowledgement". This clause specifically deals with issues around attribution and the management of Intellectual Property (IP). We also added a sentence to related Clause 3.9 to reflect these revisions. A committee within the Executive was established to progress the revision, comprising Linda Connor, Alan Rumsey and Sarah Holcombe, while in 2011 Helen Lee replaced Linda Connor on the sub-committee as in-coming AAS President.

The catalyst for reviewing these particular clauses from the AAS Code of Ethics was a paper (Holcombe 2010) that was critical of the wording of this clause from the 2003 Code and the limited guidance provided more generally within the code on the ethical management of IP. Clause 3.7 stated that, "research participants may have contractual and/or legal interests and rights in data, recordings and publications, although rights will vary according to agreements and legal jurisdiction" (AAS 2003: 3, in Holcombe 2010: 24). This clause did not provide any recognition of the prior rights of the knowledge holders, while a legal, rather than ethical approach was espoused. As the paper stated in its critique, "Notwithstanding specific research agreements that individual researchers may have with their Indigenous co-researchers or Indigenous representative bodies, which tend to have clauses specifying where IP vests, the fact is that Indigenous people *do* have legal rights and interests in their own knowledge, and in its production and its dissemination. However, the big stick of legal agreements should not be necessary to realise these rights" (2010: 24).

As a result, the revision of the AAS code of ethics, began from the basis of a focus on Indigenous interests. While many, indeed possibly the majority of Australian anthropologists work with Indigenous peoples, the revisions also had to account for those who did not, as will be discussed below.

Updating the code was necessary in order to engage more fully with the ethical management of IP and to reflect more accurately the increased interest in Indigenous knowledge globally. Likewise, the fact that knowledge generated from all research is part of the 'knowledge market' – via the knowledge capitalism sector of the university system (Thornton 2009: 21), was also an emerging reality. The anthropological method of collaboration and working across the different knowledge systems of peoples is at the pointy end of this knowledge market. Yet, as Holcombe (2010) argued, our participatory methods in the field tended not to be replicated on our return when it came to acknowledgement and attribution of the knowledge holders with whom we worked, within the IP regime.

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The revision was also reflective of the broader national and international discussions on Indigenous data sovereignty and Indigenous Cultural and Intellectual Property (ICIP). Within the Australian context, it was informed by the 2009 revision of the *Guidelines for Ethical Research in Indigenous Studies* (GERAIS), as the pre-immanent code published by the Australian Institute of Aboriginal and Islander Studies (AIATSIS) which had just been through an extensive process of public consultation (see Davis 2010).[2] More closely, it was also informed by the collaborative work that Holcombe had undertaken with the Indigenous IP lawyer Terri Janke in a range of applied contexts (NT NRMB 2009; Holcombe and Janke 2012).

The international context was informed by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) that had been adopted by the UN General Assembly in 2007 and subsequently ratified by the Australian Government two years later. The UNDRIP introduced the concept of Indigenous Intellectual and Cultural Property (ICIP, Article 31) into the rights arena. This concept refers to all of the elements that make up Indigenous peoples cultural heritage, traditional knowledge and traditional cultural expressions. It includes genetic materials, knowledge of the properties of flora and fauna, oral traditions, literatures, visual and performing arts and so on.

Though the revision of and additional clauses added to the AAS code of ethics did not directly refer to this rights agenda, it nonetheless provided the additional leverage recognising that these voices had gained legitimate ground. For instance, one of the new clauses was as follows:

> 3.7 b) When appropriate, due credit may lead to joint authorship and/or joint copyright. Joint authorship can offer powerful recognition to a co-author or their representative body for their intellectual effort. As a minimum, attribution should be provided to the research participants in a prominent place, such as the title page or in the acknowledgements at the beginning of the research report / thesis / article etc, unless specifically requested otherwise. Attribution provides recognition for the provenance of knowledge/of a story.

Another addition was to clause 3.9 (*in italics*)

> Anthropologists should seek joint status for the researcher and research participants in planning and executing the research as far as feasible; notwithstanding 3.8 above, research should involve an essentially collaborative relationship between anthropologist and research participants. *Where feasible, this approach extends to the management of Intellectual Property and the joint publication of research.*

The changes were aimed at addressing the standard anthropological approach to research data where, on their return from the field, the 'data' becomes demarcated as the private property of the anthropologist and/or the anthropologist's institution. Thus, though it is standard practice to make research partners of Indigenous (and other collaborators) while in the field, this collaboration ceases on leaving the field, as the IP regime within which we are enmeshed kicks in. The changes to the code sought to critically engage with the limits of this

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[2] Of note, this code is currently undergoing another review, as part of the 10-year cycle of review.

regime, where copyright functions to privatize knowledge and the author becomes the knowledge 'owner'. Introducing avenues to ethically share IP and/or recognize knowledge provenance are 'due credit', 'attribution' and forms of shared copyright.

Issues raised by AAS members [3]

As might be expected there was a range of feedback, both positive and negative from members of the AAS. Much of the positive feedback made suggestions to elaborate on the details and was included in the revised circulated draft (2011). However, it is notable that most of this positive feedback was from people with field research experience of Indigenous Australia.

<u>Who is this change addressing?</u>
The critical feedback focused on two fundamental issues. The first was the implicit assumption that our research tends to focus on Indigenous and/or marginalised peoples, and that they therefore need protection. For example, in practice it was discussed that "Indigenous" and "non-Indigenous" people can be difficult to distinguish, nor are all indigenous people necessarily marginalized. Discussion, during the two AGMs, concerned the focus on "Indigenous" people and Holcombe acknowledged her own bias here in relation to her own research focus and that attempts have been made to exclude that term from this revised section of the code. As Martha Macintyre stated "…this code, like most others I've encountered, assumes a powerful researcher and a vulnerable subject" (email response 21.04.2011). The second, related issue was the diversity of contexts within which anthropologists work and the possible problem that if there is too much specificity in a Code then this diversity cannot be catered for.

<u>The complexity of shared Authorship</u> [4]
One responder remarked that the knowledge that emerges from research is not just data; it's also analysis, inference and interpretation. This impacts on the IP question as well, beyond what people know or what we think they know. Another person raised the question of the rights of researchers to intellectual autonomy. Do these changes imply that participants have final say over research, and, if so, what does that imply for integrity? She warned against the problem of telling people what they want to hear about themselves.
A third responder pointed out that the type of knowledge they deal with as an anthropologist is discourse. Although IP can be a problem, what about those who do not work with Indigenous people, but instead study everyday interactions in industrial society? So shouldn't we add 'may' to the formulation, i.e. '…research participants *may* have prior rights…'?

<u>Distinguishing between Legal and ethical issues</u>
Another responder also commented that we need to separate the legal from the ethical. He noted that "these are moving targets and that ethical discussions might inform the legal discussion later, making it easier to frame the discussion. Here's the moving legal problem;

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[3] Most of the discussion amongst members occurred at two AAS Annual General Meetings (AGM), the 2010 AGM at Deakin University and the 2011 AGM University of Western Australia, Perth, and thus this review draws from these sets of minutes.

[4] The issue of shared liability – that comes with sharing copyright – was also raised informally. This is only an issue if copyright is infringed and if the copyright hasn't been assigned to the publisher (which is common). However, by all accounts it is rare for a copy-right holding author to have to manage such legal issues.

here's the internal sense of what kinds of things we think are ethical when possible". This issue was prompted by discussion that the legal arena of 'moral rights' was still unfolding at that time, and it continues to. In 2003, the *Copyright Amendment (Indigenous Communal Moral Rights) Bill* 2003 was proposed in an attempt to recognise Indigenous communal moral rights. Former Senator Aden Ridgeway highlighted the fact that it was concerning that moral rights laws in Australia did not take into consideration Indigenous communal moral rights. However, the Bill did not proceed to law (see Janke and Company 2018: 8-10).

To conclude, this very brief paper provides a snapshot of the AAS code of ethics as a dynamic document, responsive to broader developments in socio-moral and rights discourses. Though the code is not an enforceable document (and there was no discussion within this process to make it one), ensuring that it does not merely sit in the background as a professional resource wheeled out in name only, but not necessarily engaged with, was also a driver of this revision process. New generations of social anthropologists, and those from other qualitative disciplines, also turn to it for guidance. And so keeping up with their experiences and expectations was also a compelling motivation for these revisions, in order to account for new ways of researching and democratising research knowledge.

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