

9 November 2022

Our ref: [FNLDP:BDK/KS]

Confidential

IK Project Team
IP Australia
47 Bowes Street
Woden ACT 2606

By email: [REDACTED]

Dear IK Project Team

Stand-alone Legislation for Indigenous Knowledge: Interim Scoping Study

Thank you for the opportunity to provide feedback on the Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge (**the interim report**).

Queensland Law Society (QLS) acknowledges Aboriginal and Torres Strait Islander Peoples as the original inhabitants and custodians of Australia. We recognise, respect and celebrate the cultural distinctions of First Nations Peoples and value their rich and positive contribution to not only Queensland but also to the broader Australian society.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of members of the QLS First Nations Legal Policy Committee who have expertise in this area.

The interim report seeks input on the potential elements which should be contained in stand-alone legislation to protect 'Indigenous Cultural Intellectual Property, including Traditional Knowledge and Traditional Cultural Expressions'.¹ We note that the Indigenous Knowledge

¹ 2022, Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge, available at <
https://www.ipaustralia.gov.au/sites/default/files/interimreportscopingstudyonstandalonelegislationtoprotectandcommercialiseindigenousknowledge2022_1.pdf> at p 3.

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Working Group would like the input of Aboriginal and Torres Strait Islander Peoples to be central in the study. We encourage the project team to seek First Nations perspectives in formulating its final response to government in this regard.

The feedback we have received in response to the consultation questions raised in the Interim report is set out below.

Part A: Challenges for Indigenous Knowledge Protection

1. *What other issues affect the capacity of Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK?*

a) No legislative protection

As has been stated numerous times before, there is no legislative framework which provides Aboriginal and Torres Strait Islander Peoples with an avenue to lodge complaints about misuse, misappropriation or unauthorised use of their collective Indigenous Knowledge (IK);

b) Lack of deterrence

There are currently no penalties for perpetrators who misuse or misappropriate IK. This means that as well as there being a lack of consequences for engaging in this conduct, there is also no deterrent effect.

c) Economic feasibility

It is important that there is an accessible regulatory framework established to provide Aboriginal and Torres Strait Islander Peoples with formal processes to protect their IK, particularly in circumstances where it may not be economically feasible for the collective to bring a private legal action.

d) Lack of licensing regime

A licencing regime may be able to record and track licensing of Indigenous Cultural and Intellectual Property (ICIP) rights and form a database of registered ICIP rights. This would assist in enabling the relevant Aboriginal and Torres Strait Islander Peoples to be able to economically benefit from their ICIP rights.

Part B: Models for sui generis legislation

1. *Should each of these four elements should [sic] be part of a stand-alone legislation model for the protection of IK? Why or why not?*

a) *Element 1 - an enforceable communal legal right covering Traditional Knowledge and Traditional Cultural Expressions*

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Yes. A new form of intellectual property right recognising collective or communal rights in TK and Traditional Cultural Expressions (TCE) should be created as the rigidity of the current legal framework does not allow for such IP rights to garner legal protection or deter perpetrators.

- b) *Element 2 - measures to prevent trade in inauthentic product and to promote authentic product*

Yes. Measures aimed at deterring the production and economic exploitation of inauthentic products is essential in deterring perpetrators from engaging in culturally exploitative conduct but also frees up more of the market for Aboriginal and Torres Strait Islander Peoples to economically benefit from their ICIP rights.

- c) *Element 3 - a National Indigenous Knowledge Authority with powers to administer and enforce the new IK rights*

Yes. The National Indigenous Knowledge Authority (or similar regulatory body), would be crucial in providing a fairer IP landscape in which the value of ICIP rights would be recognised. It would also provide Aboriginal and Torres Strait Islander Peoples with avenues to licence their ICIP rights and under circumstances where they are less likely to be exploited.

A complaints process could track and monitor companies or individuals who repeatedly engage in culturally exploitative pursuits. Additionally, any penalties for misuse, misappropriation or unauthorised use of ICIP rights would be meaningless without an adequately resourced regulator to undertake enforcement of any penalties.

- d) *Element 4 - measures to support and build the capacity of Indigenous businesses to manage and commercialise their IK*

Yes. Measures to support Indigenous businesses to economically benefit from their ICIP rights is vital to the economic prosperity of Indigenous peoples to live healthy and prosperous lives under the Westminster system which has historically undervalued and disenfranchised Indigenous peoples and the knowledge they hold. Although this should be available to Indigenous businesses, it should not be mandatory.

2. *Is there anything missing from any of these elements?*

Yes, a complaints process similar to the ACCC's 'Scam Watch' where members of the public can notify the authority of instances of alleged breaches of ICIP rights laws.

Part C: a methodology to assess the costs and benefits of any new legislation

1. *Which element (1 to 4) and combination of elements would deliver most benefit to you?*
 - a) Elements 3 and 2 – which is the creation of the National Indigenous Knowledge Authority or other similar regulatory body to enforce breaches of ICIP rights legislation and measures aimed at deterring the sale of inauthentic products which commodify and capitalise on the unauthorised reproduction of ICIP rights.
2. *What broader benefits, costs or risks would stand-alone legislation like this deliver to Aboriginal and Torres Strait Islander peoples?*

a) Broader benefits

The benefit to the government would be furthering the Reconciliation process. The benefit to Aboriginal and Torres Strait Islander Peoples and Traditional Owners would be formal processes which provide assistance and are economically accessible.

b) Costs

It would cost a lot of money to establish a regulatory body or authority so other than charging a commission on licences, the authority would also need to be able to enforce fines as a source of revenue.

c) Risks

There is a risk that that unless the legislation has bi-partisan support it will be hard to implement an ICIP rights regulatory body as people in society in general are resistant to change. There is also a risk of not implementing the regulatory framework sooner rather than later, as Aboriginal and Torres Strait Islander Peoples and Traditional Owners lose even more economic benefit to perpetrators.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED].

Yours faithfully

[REDACTED]

Kara Thomson
President