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CULTURAL EXPERTISE AND INDIGENOUS PEOPLE IN AUSTRALIA

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LEARNING OBJECTIVES

This chapter addresses several ways that anthropologists in Australia have been engaged as expert witnesses in Indigenous land claims and in cultural defences against prosecutions for hunting protected fauna for subsistence. It outlines, with the help of case studies, some illustrations of the types of methodological approaches for anthropological work in legal matters. I draw on my experience of legal expectations of anthropological expertise. These include expert opinions, presented in reports and in court, based on long-term fieldwork, short fieldwork and no fieldwork when carrying out peer reviews of other anthropologists' applied research. A further case study concerns a defence against prosecution for an assault that was based on customary law. After reading this chapter you will have learnt the main typology of anthropological expert witnessing in Australia for Indigenous matters, including land claims and cultural defences against criminal prosecution; the ways anthropologists can realistically engage with cultural expertise in Indigenous matters; and the importance of independent investigations rather than advocacy.

Introduction

Anthropologists in Australia are engaged as expert witnesses particularly in relation to issues involving Indigenous people and culture. The discipline brings a professional social science approach to understanding traditional and changing

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cultural knowledge and practices across Indigenous Australia. The terminology of "cultural expertise" could be regarded as sitting somewhat ambiguously in the Australian context in that it is Indigenous people themselves who would usually be acknowledged as the inheritors and practitioners of their own "cultural" beliefs (see Holden, Chapter 1 in this volume). However, the legal relevance of anthropological expertise has become very clear in the context of cross-cultural translation and explanation. In this chapter I frame the key issues as: what are the legal expectations of anthropological expertise; what can anthropology realistically deliver to assist the court and associated legal processes; and how is the anthropologist's work situated regarding the interests of parties to legal cases?

Theory and Concepts

As decision-makers in the courts, judges and magistrates expect the expert to assist the court and not be an advocate for a party (Blowes 2017). A difficulty for anthropologists who have carried out participatory fieldwork that involves spending considerable informal time in a community, in this case with Indigenous people in Australia, is that the research participants may expect loyalty to their views. The outcomes of applied independent research may lead to conclusions that will not necessarily be accepted by all those with whom ethnographic inquiries have been carried out. A legal case clearly involves focused concerns among participants and the anthropologist may be asked during fieldwork to ensure that the research subjects' interests are supported in a report to the court.

To further complicate the issue, there may not be a unified view shared by all those consulted by the researcher, resulting in conflicting assertions about customary matters. As well, the formal instructions for the study commonly come from legal practitioners based in regional organisations, rather than from local community members where the anthropologist's fieldwork occurs. While the lawyers technically are representing local people as their clients, the issues as framed by legal practitioners do not always translate easily across cultural boundaries. The anthropologist thus addresses multiple sets of expectations: the court's requirement of clear independence; research questions as framed and worded by lawyers; community assumptions about the research necessarily supporting local interests; and the wider anthropology discipline's conventions regarding ethical fieldwork among Indigenous descendants of earlier generations of colonised people (see Cole, Chapter 2 in this volume).

In my experience with Indigenous people in land negotiations and native title claims, in cultural heritage site surveys, in negotiations with industry parties and government and as defendants in criminal cases, those with whom I have worked for lengthy periods on academic studies "may be surprised, baffled or insulted when the anthropologist seemingly suspends the relationship and takes the role of an independent, non-aligned expert" (Trigger 2004, 29). Applied anthropology in legal settings is not the place for a researcher who wishes above all else

to remain everybody's friend. In some cases, the anthropologist may choose not to be engaged as an expert if they feel the work may compromise earlier commitments given to people about the cultural knowledge documented in settings quite different from a contested legal matter some years later.

It is broadly accepted that courts are most impressed by the anthropologist's work when it begins from an independent open-minded approach that transparently does not assume the answer or findings prior to carrying out the empirical investigations. Alternative explanations and lines of inquiry need to be addressed and evaluated before conclusions are presented. It is also important for a clear distinction to be made between findings (understood as expert opinion in law) and the factual basis for them. The anthropologist needs to be aware of the issue of "hearsay", namely that information gleaned from others, who are not available to be tested on its accuracy, is inherently suspect from a court's viewpoint. However, given that much data is typically obtained from what has been said about others by an interlocutor or interviewee, the researcher will record such material and probably argue that it forms a legitimate part of the information on which the investigator relies. The anthropologist should also avoid too great a usage of leading questions (that seem to suggest the answer rather than allowing the subject free rein), and there should be some effort towards including challenges or alternatives that are put to research participants to test the consistency with which information is known across the broad social groups who are the focus of studies.

The anthropologist should be able to speak with authority in relation to their area of expertise. For example, in the Australian context with which I am most familiar, this is the nature of Indigenous cultural traditions, laws and customs. They should be able to demonstrate that they have appropriate formal qualifications and ideally a convincing track record of research to qualify as an expert. The anthropologist should be able to show how they have carried out comprehensive investigations in relation to the matter at hand. While not always feasible, these investigations may include the services of assistants or peers – in which case joint authorship of reports can be appropriate. It is important to clarify the respective roles of joint authors in terms of fieldwork completed, report writing and seniority of supervision over the research process. Cross-examination will be directed to the appropriate author, or more than one, as the case may require, and the court may need to attribute weight to parts of a report based on a record of its particular authorship.

In my opinion, anthropologists should expect to engage with their colleagues, that is, other expert anthropologists in legal cases, with professional respect such that the researchers see their role as working jointly to produce the best advice. This is consistent with the practice in some courts of requiring experts to meet before a trial so as to find their points of agreement along with the reasons for any disagreement (Brunton and Sackett 2003). In some cases, it may be possible to narrow the range of issues in dispute. There will certainly be a rigorous examination of colleagues' work. However, this can be done in a

productive rather than a competitive way. Expert anthropologists at times will agree to disagree. This will not always accord with the view of legal practitioners who may well desire experts to seek to demolish each other's arguments so that a winning version of a matter is clear. While such expectations may be understandable in terms of legal strategy, in my view the expert anthropological report is best regarded as a contribution to knowledge that helps inform the lawyers as well as assist the court. This is also true for various parties to cases, including Indigenous organisations, governments, industry groups or indeed the general public, members of which at times take an interest in the anthropologist's findings.

What Can Anthropology Deliver?

While focused on studies of all aspects of societies across the globe, we can generalise that the discipline of anthropology has always specialised in understanding cultural difference. Hence, the anthropologist brings a suite of concepts honed by the attempt at this cross-cultural understanding. These include such intellectual foci as exploring the nature of diverse worldviews via religious knowledge; rules for social interaction in everyday life as well as in sacred settings; the politics of gender relations; customary ways of owning property and inheriting rights to land; related cultural forms, norms and expectations about proper behaviour and so on.

Anthropologists who have carried out primary fieldwork typically develop communicative competence across socially and culturally diverse populations. Part of the task in legal cases is often to facilitate translation between different bodies of cultural knowledge. Anthropologists in legal cases who evaluate colleagues' reports arising from primary fieldwork may well lack that communicative competence for the particular researched groups, but they draw upon the same suite of theoretical and methodological concepts. The work of peer review involves assessing the cogency of arguments and the factual basis of conclusions in reports under consideration.

A distinctive concern in anthropology is the relationship between what people say and how they actually behave. Thus, if anthropologists in legal cases are elucidating rules of custom, the researcher will typically address not just ideals presented through interviews and informal conversations, but also aspects of actual social action where the practice of such rules can be assessed alongside prescribed norms and values. A related issue is that anthropology does not assume that all aspects of traditional law and custom in a society can necessarily be articulated by all individuals. The significance of age, gender and personal influence and related political processes will commonly be addressed by an anthropologist presenting an opinion about cultural knowledge, belief and behaviour in the society or social field being studied.

Participant observation and semi-structured interviewing are key methods used by anthropologists. This type of fieldwork results in largely qualitative data

in the form of field notes and audio (and at times video) recordings that are partly or fully transcribed. However, anthropologists necessarily rely on subjective interpretations of everyday life and not all conclusions will necessarily be based on recoverable notes or text in the database. It is simply not feasible for the researcher to write or record all of their experiences in the research situation. Certainly, field notes, genealogical charts, maps, photographs and documentary sources should be consistent with the researcher's findings. This means that information in the researcher's database that contradicts the final findings of the study should be explicable as outlier cases.

ANTHROPOLOGY, HISTORY AND LAW

A general point is that anthropological studies have been historically positioned as focused on less powerful parts of societies across the world. While fieldwork has been done amongst influential persons and elites, the tradition is for considerable empathy to be oriented towards understanding the culture and structural circumstances of "subaltern" people, often those who have survived histories of European colonialism. If there is a predominant political position across the discipline it is one that engages with marginalisation amongst those with less power and resources. In legal cases, where anthropologists are engaged by a range of parties, including different groups within marginalised populations and minorities, it is ultimately important for such a political position to be suspended. At least, anthropologists must support expert opinions with clear results of studies, whether or not their findings appear to favour one party against another.

Case Studies

Investigating Traditional Rights in Land Claimed under Legislation: Based on Long-Term Fieldwork

My work in legal cases has included Indigenous land claims and native title cases in Australia where I have been engaged by groups with whom I began academic research in the late 1970s. This has meant addressing legal issues using anthropological concepts and empirical data on customary relationships with lands and waters espoused by Indigenous people who have undergone great cultural change since their forebears were in occupation of areas at the time of British colonisation. The work has included mapping culturally significant sites as well as zones of transition between the traditional lands of different Aboriginal groups. In this type of work, the anthropologist performs the often-difficult task of rendering Indigenous understandings of customary concepts into the categories of information required by legislation.

In the case of the Aboriginal Land Rights (Northern Territory) Act (1976) (Cth), this meant addressing how Indigenous land tenure could be presented through concepts of "local descent groups", "primary spiritual responsibility" for sites on the land, "common spiritual affiliation" with sites on the land and a "right to forage" over the land (Aboriginal Land Commissioner 1985, 1991; Trigger 1982). In cases dealt with under the Aboriginal Land Act (1991) (Qld) there was a broader legal category of "traditional and/or historical association" with the land. Under the Native Title Act (1993) (Cth), key concepts required in law include the identification of "the society" in occupation of lands and waters at the time of the establishment of British sovereignty, the nature of continuity and change in traditional "law and custom" from that time and the issue of "connection" of particular claimants and their forebears with the land and waters concerned (Sutton 2003). Some of my most recent work relates to legal cases seeking compensation under the Native Title Act for the impacts of development projects on traditional connections with land and waters. This area of inquiry is likely to be a significant aspect of anthropological expertise in the coming decade.

In my own case, the anthropologist can become the known repository of information and recordings that have not been passed on (or at least only partially transmitted) to younger generations. Such information in respect of Aboriginal relations with land where I have worked in the Gulf Country of northern Australia has remained largely oral in the communities themselves. However, my reports, publications and related documentation such as maps have for some years now been used and sought after as authoritative sources about traditional knowledge, customary tenure boundaries, genealogical histories and so on. Anthropologists' research materials thus can become a resource valuable in local politics as people engage in internally competitive as well as cooperative efforts of both traditionalism and modernisation (Peterson 2017; Morgan and Wilmot 2010).

With such lengthy research experience in particular communities, the anthropologist needs to be careful to depict and explain adequately changes in everyday life and cultural knowledge, despite what can be a desire amongst both Indigenous people and other parties to identify the "real" or authentic knowledge and practices as they were in the traditional past. My work over the years has involved documenting such views but also placing them in the context of both my own previously recorded information and earlier ethnographic and historical materials where available (see Josev, Chapter 22 in this volume). The influences of local-level politics, traditional tensions and disputes between Indigenous groups and perceived financial and other benefits from new land uses by industry and government have also needed to be worked into my findings as an anthropologist asked to address the nature of continuities and changes in traditional relations with land.

It is important to note that along with the successes of applied anthropological expertise, some difficulties arise whereby legal procedures, concepts and reliance on evidence presented in formal ways can sit awkwardly with Indigenous customary approaches to what constitutes cultural knowledge and proof of tradition-based rights (Burke 2011). As anthropologist Katie Glaskin (2017, 221)

notes, the process of legal recognition can in itself be transformative of connections with "country" and of relationships amongst members of the groups formally recognised as holding rights in lands and waters. Legislation in this area is regarded by some commentators as in many respects an inadequate compromise between Indigenous interests and those of other parties (Pearson 2003; Walker 2015). Moreover, there are debates amongst anthropologists as to the politics and ethics of participating in legal procedures that can be ponderous and onerous for all parties, but particularly in tension with modes of Indigenous social action and aspirations for social justice that go beyond the definitions and requirements of particular legislation (Povinelli 1993; Vincent 2017; Monaghan 2020).

Nevertheless, especially when the involvement of anthropologists in claims has arisen from their broader long-term relationships of collaborative research with Indigenous people of particular regions, the productive outcomes are clear. A usefully indicative exemplar is a recent expression of great appreciation from an Indigenous community in northeast Australia, where the work over many years of anthropologist Athol Chase was celebrated. To quote the Lockhart River community mayor:

> Without his work with our old people, it would have been much harder to get our land back. He has been a warrior for us all and a proper strong friend and countryman. He is our greatest white Elder. We should all keep him and his family in our thoughts and prayers.

This was a case where the anthropologist maintained close relationships with research participants while producing independent outcomes from applied studies that assisted the Aboriginal people of his fieldwork location in obtaining highly valued legal rights to their traditional lands (Trigger 2021).

Investigating Traditional Rights in Land Claimed under Legislation: Based on Short-Term Fieldwork

Applied anthropology in Australia has over recent decades also included work on short-term fieldwork projects where inquiries are done without the researcher having established lengthy relationships with the relevant Indigenous groups. One of the most common such projects has been site surveys for resource industry exploration leases. Here it is broad skills and conceptual knowledge that are brought by the investigator, rather than any particular awareness in the first instance of the relevant people connected with the land, their personal biographies or the regional system of customary land tenure. In such cases, the anthropologist commonly relies on Indigenous organisations and/or industry parties to assist in the formation of the survey team; the investigator should also carry out a review of relevant research literature to establish some basic information about local Indigenous concepts of relations with the land.

Regardless of the short-term nature of such research, it remains essential for the investigator to clearly document the views of those whom they consult about areas

to be disturbed or preserved. While the work may amount to only brief visits to the relevant areas, what people say about the site is a critical aspect of the factual basis for an expert opinion about future impacts and the implications for traditional cultural relations with land. However, the task is not simply recording the comments of Indigenous people in the survey; rather it includes the performance of an analysis that takes into account diversity of opinion among those consulted as well as any broader information available about local systems of rights to speak for "country". An example of short-term fieldwork I undertook in 2017, in relation to a proposed development at a site in the town of Bathurst, New South Wales, encompassed inquiries with several Indigenous groups and corporations. As made clear in publicly available statements regarding this issue, at least two groups disagreed about the nature of the cultural significance and hence the appropriate response to the proposal.[1] In such cases, anthropological opinion may not be able to resolve the matter, and several expert reports will be taken into account in legal procedures and other negotiations.[2]

A further case of anthropological opinion based on only short-term fieldwork is my engagement on a matter involving the prosecution of an Indigenous man under Western Australia's legislation to protect native fauna (the Wildlife Conservation Act 1950, see *Wilkes v. Johnsen*). He was accused of taking for food juvenile freshwater crustaceans known as marron which were a species legally protected. As I was engaged by the defence, the brief was to give an opinion in relation to the man's claim that he was exercising a traditional right to take bush resources, according to Indigenous law and custom (see Bouayad, Chapter 24 in this volume). The legal issues revolved in part around the relationship between the Commonwealth Native Title Act and the state fauna protection legislation.

My role as an anthropologist was to consider the man's assertions of membership of a native-title-holding Aboriginal group in a context where this matter had not at the time been determined by the courts. I recorded some information from his immediate family members, prepared a genealogy and linked the group to the broader landholding population asserting native title rights. The magistrate did not allow my evidence on the issue of relevance to the charge under the law concerning the protection of native species. Subsequently, there was a Western Australian Supreme Court appeal decision that if the defendant could show native title, he would have a defence to the charge of possession of undersized marron, by reason of s211 of the Native Title Act. However, he would not have a defence to the charge of refusing to give his name and address when called upon by the fisheries officer. The appellate court sent the case back to the magistrate for further determination (see www.austlii.edu.au/au/cases/wa/WASCA/1999/74.html).

Expert Opinion Based on No Fieldwork: Evaluation of the Work of Other Anthropologists

Much anthropological work in the area of Australian Indigenous land and cultural issues involves assessing fieldwork-based reports by others against what is known in the anthropological literature. Here the expert's opinions are based not on their

own empirical materials but rather on whether colleagues' findings appear methodologically sound and consistent with the conclusions reported by other scholars. Conferences of experts, ordered by the Court, to resolve areas of agreement and disagreement can be useful – although less so, in my opinion, where lawyers prepare propositions with wording that the experts then need to change, refine or reject because it is not adequate to address the complexities of such issues as religious concepts, kinship relations or cultural continuity and change. Examining and evaluating reports prepared by other anthropologists commonly occurs when an expert is engaged by non-applicant parties in native title or cultural heritage cases, such parties including state governments or industry organisations.

It is plausible to examine conclusions in light of the data and arguments presented by a colleague without having the opportunity to carry out primary fieldwork. An illustration from a case in which I was involved was my consideration of an argument for a cultural defence proposed for two Aboriginal men prosecuted for violence (*Vale v. Hopiga*). The defence argument was that the men were required by their customary law to physically attack two non-Aboriginal men because they were intruding into a sacred area of "country". Their belief was that they had the right to act in this way partly because they had been granted native title rights to the land concerned. The defence engaged the services of a senior experienced anthropologist who had worked in the region on lengthy studies over the years; on the other hand, I was engaged by the prosecution and had not carried out primary fieldwork.

While my colleague and I were able to agree on a range of issues, including that traditional law and custom in the particular region historically allowed for a physically violent response to what was seen as trespass or illegitimate intrusion, we were not in agreement as to assessing changes over time to the system of cultural norms and behaviour. My opinion included a view that establishing the nature of contemporary attitudes to violence required broad investigations across the relevant Aboriginal "jural public", i.e., including both men and women and people across age groups. I was concerned that the view of senior men alone was not sufficient in clarifying the nature of traditional "law and custom" in relation to the practice of violence.

The magistrate decided this case without dealing with the contesting anthropological opinions before him. However, the issues broached in the anthropological opinions were indirectly of significance in his reasons for decision. The question of the assault taking place in the vicinity of a sacred site was left as marginal to the key issues of the unintentional presence of those assaulted, the expectation of self-control on the part of the accused and the lack of any physical provocation from those assaulted. While the anthropological debate was about the extent to which customary law in 2008 at the time of the assault required the accused to punish the victims, the legal decision was based on the finding that even if the cultural expectation were to be accepted (contrary to the prosecution case), customary law of this kind cannot amount to a defence under the Criminal Code. Nevertheless, the magistrate accepted that such matters raised by the defence were relevant to mitigation in respect of penalty.

Conclusion

These case studies illustrate the diversity of cultural expertise in legal matters dealing with Indigenous traditional culture. The typology encompasses expert opinions based on long-term fieldwork, short fieldwork needing to adapt to available time and funding and consideration of colleagues' reports to provide an opinion as to their adequacy in terms of supportive data and disciplinary analysis. This chapter also addresses the range of circumstances in which the professional services of an anthropologist may be sought. According to my experience as an expert in a range of cases, the main requirements are an independent open-minded approach to research inquiries; experience and authority in relation to the subjects to be investigated; and an understanding of relevant legal conventions and practices. The work of providing anthropological expertise relevant to cultural traditions and customary practices contributes to the practical resolution in Australia of legacies of colonialism including Indigenous rights in land and associated aspects of customary law.

Notes

1 See: https://yoursay.bathurst.nsw.gov.au/newscentre/news_feed/statement-aboriginal-cultural-heritage-and-proposed-go-kart-track.
2 See: www.abc.net.au/news/2021-03-31/mount-panorama-go-kart-track-block-aboriginal-heritage-concerns/100040324.

Further Reading

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A collection of chapters concerning applied native title research.

Trigger, David. 2011. "Anthropology Pure and Profane: The Politics of Applied Research in Aboriginal Australia." *Anthropological Forum* 21, no. 3: 233–55.
This article presents an overview of debates in the discipline of anthropology regarding cultural expertise and applied research.

Q&A

1. In what sense can an anthropologist or other social scientist carry out research that is independent of the interests of the party engaging the researcher's services for a scheduled court case or related negotiation?

Key: This is likely to vary as to whether the researcher is investigating cultural issues among Indigenous people with whom the anthropologist has already had a long-term working relationship. It is important to establish, in the case of applied research by an expert, a proper understanding amongst the participants in the research that the resulting findings must be based clearly on the facts found in the study.

2. How can an anthropologist's cultural expertise inform land claim cases in Indigenous Australia?

Key: The key concepts of traditional land tenure, including concepts of spiritual and material connection to areas, will need to be tackled in fieldwork interviews, informal conversations and, where possible, participant observation.

3. What differences, and overlaps, are there between academic anthropological research and projects focused on practical and applied outcomes?

Key: The task of an expert witness is to comprehensively document issues of cultural beliefs and practices, often in a cross-examination setting where there is a greater need for defending the basis of findings than when publishing in academic journals and books.

4. Consider the arguments for and against applied anthropology research involving the descendants of colonised peoples such as in Indigenous Australia.

Key: Clarify the benefits for parties in actual legal cases as against the concern that the intellectual scope of investigations may be compromised through the constraints of a brief provided by a law firm.

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