

TRACING KNOWLEDGE IN SAMOA

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On completion of her PhD Dr Tualima published a report on her studies for the information of her community – Tracing Knowledge in Samoa (VUW, Wellington, 2024). An edited version of the report is presented here for a wider audience.

Après avoir obtenu son doctorat, le Dr Tualima a pris l'initiative de publier un compte rendu de l'ensemble de ses recherches pour en informer la communauté samoane - Tracing Knowledge in Samoa (VUW, Wellington, 2024). Une version éditée de ce compte rendu est aujourd'hui présentée à l'intention d'un public plus large.

I INTRODUCTION

Currently there are multiple intersecting legal frameworks – international, regional, national, and customary laws – that impact on Knowledge rights in the Pacific. Traditional knowledge, intellectual property and customary law have been the focus of international debate and scholarship for several decades. International organisations have led this debate by setting the agenda for research, policies, and legislation.

Across the Pacific, intellectual property policies and legislation have been transplanted from western conceptions of knowledge and property to provide protection for creativity and innovation. Multiple agencies including the World

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The author extends her thanks all those who participated in the fieldwork for her research. It is hoped this research will contribute to practical results to benefit Samoan society. The methodology used in this research could be adapted to other countries in the Pacific.

The Samoan words are here italicised for the purposes of the New Zealand Law Style Guide. The author acknowledges there is a movement to decolonise research which involves the non-use of italics for Indigenous terms.

Intellectual Property Organization (WIPO), United Nations Education, Scientific and Cultural Organization (UNESCO), the World Trade Organization (WTO), and United Nations Environment Program (UNEP), have been engaged in agenda – setting to establish relevant laws and regulations. These organisations have promoted specific regulatory frameworks, hosted awareness raising workshops and offered advice that has been adopted by the Pacific nations.

This body of work has developed an international understanding of 'TK' that highlights how it is different to conventional intellectual property. 'TK' is closely linked to international discussion about the human rights of Indigenous peoples, environmental and developmental agendas, and cultural heritage law. Whilst it is now well understood that western intellectual property constructs have limited universal application, there are ongoing challenges that flow from the methodologies that have been adopted in studying the needs of Indigenous peoples and Pacific States. In particular, there has been a failure to grasp the complexity of Knowledge and its regulation in post-colonial legal systems, where custom and customary law operate at village and in community contexts.

The question of protection and preservation of Knowledge requires an examination of the types of mechanisms that currently exist in Samoa. How and why, we protect and preserve Knowledge is significant to the constitution of what it is to be Samoan. How well these mechanisms function affects our way of life, social and economic benefits for the present and future generations.

As the world looks to learn from the Pacific and First Nations' Peoples to develop TK-driven tools and solutions that can help to address global problems like climate change it is essential to recentre Samoan perspectives on the use and protection of Samoan TK.

Talanoa Research Methodology (TRM)

Research fieldwork explored the fit between expectations of international intellectual property (IP), traditional knowledge (TK) and cultural heritage (CH) law and governance on the ground. This included participant reflection on projects sponsored by international organisations and non-governmental organisations, often carried out in conjunction with 'outsider' academics from western universities.

I conducted 57 interviews across two timeframes from 2019-2022 in Upolu and Savaii. This included a selection of different participants: relevant government officers (GOVT), village matai (VIM), village individuals (VIA), non-governmental organisations (NGO), cultural practitioner (CP), and commercial operators (CO). The initial fieldwork was carried out from February 2019 to January 2020. In addition to interviews, relevant documents were also considered, for example, the

Ministry of Education, Sport and Culture – National Culture Framework 2018 – 2028.

Key findings from the fieldwork can be distilled into three main thematic areas. The details of these thematic areas are discussed throughout the report.

- (1) The universalising impact of concepts such as 'TK' and 'Indigenous knowledge'. Generally, such terms were only familiar to government officers or commercial operators. Village participants gave little meaning to these concepts. Rather, other terms were identified such as material knowledge.
- (2) International agendas have influenced the development of regulatory frameworks that protect and preserve Knowledge. This has posed many challenges including resource allocation, national coordination, and struggles to deliver objectives. Concerns of whether these projects are sustainable were often raised by participants.
- (3) National priorities, including the role of custom and customary law in protecting and preserving Knowledge is often overlooked and challenged by competing international agendas. These agendas can undermine the role of customary institutions such as the village council and the authority of Knowledge holders.

Details relating to these key findings are discussed in this Report and, where possible, incorporating examples referred to by participants. Every attempt has been made to capture the 'voice' of the participants. Practical recommendations conclude providing next steps for addressing needs and expectations raised by participants during fieldwork.

The report is structured in two related parts: Part I identifies themes and issues that arose from the conduct of the Fieldwork; Part II draws upon these discussions to make recommendations that could be adopted to better protect Samoan TK the Samoan way. While the focus here is on Samoa, this body of work may also be of relevance to other Pacific island nations.

II PART I: THEMATIC ISSUES

A Issue 1 Terminology

Interviews interrogated the meaning of 'TK' either in Samoan or English language or both where appropriate. Its nature and characteristics were explained from the perspectives of individuals involved in government, cultural practitioners, village matai members, village individuals, non-governmental organisations, and commercial operators. As the conversations developed, often a distinction between 'TK' and 'Samoan TK' or 'Knowledge' became apparent.

The open-ended nature of the TRM methodology led to participants locating TK within a plural system of law. That is, TK was defined with reference to legislation or state made positive laws, customary law and custom co-existing. Relevant legislation raised included the Copyright Act 1998, Intellectual Property Act 2011, Ministry of Education, Sports and Cultural Affairs Act 1993, Planning and Urban Management Act 2004, Robert Louis Stevenson Foundation Act 1991, Samoa Antiquities Ordinance 1954, Village Fono Act 1990. Generally, 'customary law' was used to refer to cultural protocol that is codified, such as the Village Fono Act 1990. Codification distinguishes customary law from 'custom' or the practices and rituals that are living, breathing, and grounded in everyday life.

To outsiders, customs are often treated as practices and rituals that fall into the social domain and are not considered as an authoritative source of law. This kind of determination leads to misunderstandings about the legal and cultural significance of these practices and rituals as 'TK' and distorts outsider understandings of the complexity of Samoan regulation of Knowledge.

Interviews established that Samoan TK is holistic and deeply rooted in a belief system that existed before colonisation and continues today – TK is the lived practice and experience of being Samoa. Some referred to 'Samoan TK' in distinction to 'western TK'. Samoan TK signalled its cultural meaning as a treasure associated with *fa'asamoa* and was regarded as part of identity.

In Samoa, Knowledge is an interconnected whole linked to protocol, custom, principles, and practice. This is a living form of jurisprudence that governs access to and regulation of knowledge. This foundation for Samoan life governs legal practice irrespective of whether this is acknowledged by positivist law. For example, *'ava o le feiloa'iga* or welcoming *'ava* ceremony is a practice of welcoming guests into the village or beginning meetings including government consultations. It involves matai (chiefs) from the village, untitled men, and one maiden who sit at the kava bowl with guests. It establishes connection between the village and guests. This *ava* ceremony could be classified under current intellectual property terminology as both an expression of customary law and traditional cultural expression. However, the western legal categorisation reduces much of the spiritual, cultural and legal significance of this lived practice.

B The Fluid Construction of Samoan TK

In Samoa sources of law or construction of legal knowledge is comprised of a complex myriad of practices and protocols that can exist outside formally recorded legal frameworks. There is often an uneasy alliance of positivist law and customary law. Both sources of law shape the circular nature of traditional knowledge.

Generally, only participants who had engaged with the intellectual property system or attended IP workshops understood 'TK' as a property concept.

Village participants did not understand TK as a property concept or identify it with codified intellectual property laws. Knowledge has evolved with exposure to technology, the flow-on effect of international obligations through law, and through relationships with diaspora populations. These factors have influenced the development of TK and use of the term today. However, while the content of TK may change in different settings the underlying principles or foundation of Samoan TK is still the same. Thus, TK is a broad multi-layered construct flowing on from practice before European contact to the current day. Participants discussed its different nuances.

Government officers who were familiar with international and regional work identified TK informed by international debates and definitions subsequently adopted in regional and national frameworks. Some also acknowledged the complexity with identifying traditional knowledge within restrictive western taxonomies. For example, the Ministry of Education, Sport and Culture (MESC) identified Knowledge as being far broader in nature than indicated in international discussions. Similar to government officers, commercial operators identified Knowledge according to existing legislative frameworks, such as IP laws. Village participants reflected their own lived experience of Knowledge with reference to everyday examples. For example, a village participant identified canoes as material knowledge. Often Knowledge was identified according to relevant relationships and use.

In Samoa there are different types of Knowledge specific to status, hierarchy, roles, and rituals. This relational complexity is not captured by universalising terms currently used in international fora and academic writing. Terms such as 'TK', 'indigenous knowledge' or 'customary knowledge' are not settled in a Samoan context. Unlike Western usage, such terms are not used interchangeably or used at all in natural conversation. Making sense of these terms requires consideration of the source of lawful authority and form of legal knowledge, for example, custom, positivist law or international law.

C Terminology/Defining Traditional Knowledge

1 Traditional

The term 'traditional' was identified as contentious by participants. 'Traditional' was taken to refer to Samoan society that existed prior to contact and not encompassing knowledge developed post-colonisation. Village participants opposed use of the term, concerned that it freezes understanding of Knowledge and culture.

It was also considered as colonising and implying discontinuation in the Knowledge. 'Traditional' was also associated with the connotation of certain knowledge being 'authentic' and serving as the reference point that discredits Knowledge that has since evolved. Many participants expressed discomfort with ongoing use of the term 'traditional' as it is inconsistent with the dynamic nature of custom and culture. The term traditional has limitations in capturing the lived practice of knowledge and the context where it exists and is experienced today.

2 Customary

The use of the two different terms - 'traditional' to describe a kind of knowledge, and 'customary' to describe the legal practice, denotes a distinction between the theoretical understanding of knowledge and its use. Preference was asserted for use of the term 'customary knowledge' as opposed to traditional. 'Customary' reflects the dynamic and evolving nature of culture whereas 'traditional' suggests stagnation.

Customary knowledge takes into consideration the contemporary evolution of society and culture. Custom reflects a society whose practices, norms or standards have continued irrespective of contact with outsiders. Those customs have adapted to changes.

Custom reflects cultural practices and values that govern Samoa society and protocols. With change customs have been reinterpreted and applied to sustain *fa'asamoa* and cultural knowledge. Custom and customary meaning is needed to understand the law as experienced.

3 TK is not a property right but relational

The construction of TK cannot be considered as a private property right. Interview participants stressed that primarily it must be understood as cultural customs that are specific to context and governed by relational connectedness. Given this complexity, and for unpacking the significance of terminology as discussed by participants, the more open-ended term 'Knowledge' was preferred.

4 *Aganu'u fa'asamoa*

'*Aganu'u fa'asamoa*' or 'culture' is synonymous with Samoan TK. The two terms were used interchangeably by some government participants. In this sense *fa'asamoa* is all things Samoan that is used to disseminate cultural knowledge and practices to outsiders. It includes the way we dress, handicrafts, the stories, the weather, and everything in life. These facets of knowledge are vessels whereby the expression of TK is preserved and maintained.

Fa'asamoa is important to the living memory and heritage of everything that encompasses Samoan life. It is expressed through language, custom, ritual and

practices. *Fa'asamoa* is the Samoan worldview, our identity, our practices and customs. *Fa'asamoa* is the cornerstone of culture and Samoan TK.

Knowledge in Samoa is connected to relationships. Our first place of learning our cultural Knowledge is the *āiga* (family). The cultural norms, principles and practices are taught to us from a young age. We grow up knowing how to conduct ourselves in a culturally appropriate manner and within the confines of existing customary authority.

5 *Samoan language*

All participants agreed language was a key point of access to cultural knowledge and a means for transmitting this knowledge. There are two aspects in transmitting knowledge, namely internally, within the community and externally, outside the community. Interview participants explained that even though those present in the community may understand protocols and practices, access to the Knowledge may still be limited because not all will grasp the cultural or situated nuances of the Knowledge without Samoan language competency. Community outsiders may be able to communicate an understanding of the Knowledge but may misinterpret meanings and significance if the language is inappropriately translated or they do not have fluency in the language. Others identified ways of protecting knowledge such as through stories and proverbs.

6 *Outsider influences*

Interview participants noted that international law has affected how Knowledge is identified. It became apparent that there were also shifts that followed from exposure to changes in international law, such as surrounding the related concepts of protection, promotion, preservation and safeguarding of TK. For government officials the terms such as promote, protect, preserve and safeguard create tensions around what dimension of TK is included, and with what priority. For village participants and in Samoan language, these nuances have no relevance. Other terms that are more analogous with lived experience and practice are preferred by village participants.

7 *Safeguarding culture*

The term 'safeguarding' was used instead of the more common western IP concern for 'protection'. The term 'safeguarding' reflects the definition used by UNESCO in its Heritage Conventions. It primarily describes work related to the governance of cultural heritage and cultural property in archives. No distinction was made between the protection or preservation of TK or cultural heritage because interview participants did not perceive a useful distinction between heritage and Knowledge.

The term safeguarding was used to refer to the promotion or protection or preservation of cultural heritage, with primary beneficiaries being Samoans who may benefit from the documentation efforts.

8 *Biodiversity*

TK was also identified with reference to the Convention of Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

Government participants primarily identified TK in accordance with the specific mandate of their Ministry and relevant international frameworks regarding intellectual property, cultural heritage and genetic resources or biodiversity. This does not mean they disregarded cultural knowledge. For example, the significance and uniqueness of culture or *aganu'u* was identified by one government participant as crucial to promoting Samoa to tourists.

Responses to terminology included discussions of the types of mechanisms for protection and preservation of Knowledge. Crucial to these issues is an understanding of existing protective mechanisms including policies, projects and databases.

D Issue 2 Existing Mechanisms

In outlining the most suitable frameworks for the protection and preservation of Knowledge reference was made to custom, customary practice, current legislation, and the international intellectual property regime. This section will consider whether the available mechanisms are judged as providing an appropriate framework for the protection and the preservation of Knowledge in Samoa in practice.

Generally, government participants explained how policies and legislation relating to intellectual property and heritage are formulated and function in Samoa. This included discussion of the international treaties administered by WIPO, UNESCO and UNEP. Reference was also made to regional obligations, shared experiences with other Pacific countries and national policies and laws. In some contexts it was assumed that certain TK was most appropriately protected through the village customs or village council.

Village participants had varying responses subject to whether they had either interacted with the current positive laws or whether they were familiar only with village custom and protocols or both. Those who had experience with the current legislative regime were sceptical as to whether it could provide sufficient protection and were concerned about the lack of resources available to develop potential pathways to benefit from knowledge in a manner suited to Samoan life experience.

Some village participants had no understanding of current laws relating to intellectual property but believed that the village council could provide the governance system for the protection and preservation of their knowledge.

1 Scope of protection

All participants agreed Knowledge should be protected. However, there were concerns raised by both village and government participants as to the scope of protection and who benefits from legislation. Participants expressed the view that the scope of protection should be consistent with the type of Knowledge, use of the Knowledge, and current norms and practices.

The priority in considering situated Knowledge and authority grounded in personal standing and relationships sits uncomfortably alongside the more abstract western assertions of protection attached to universal Knowledge 'rights'.

Participants were concerned that new initiatives inspired by international law, designed to enhance protection could limit access to Knowledge associated with sites and limit their ability to gain a commercial benefit. Balancing protection and the interests of knowledge holders is an important consideration. Mapping the legal issues and expectations for protection is far more complex than simply matching a knowledge holder's particular location within Samoa to state-based notions of jurisdiction and laws and policies that seek to protect traditional knowledge. An example discussed by a government official referred to legal protections limiting access to tourist sites. Tourist sites such as the To Sua Ocean Trench are normally under the management of the village council. However international regimes, such as World Heritage listings, influence government policy and village governance. The interview participant was concerned that the protection model sponsored by the Government be balanced with local interests and village governance. Protection should not create a hindrance to accessing Knowledge but should be sensitive to existing village interests and customary distribution of benefits.

Balancing the interests of Knowledge holders and protection was stressed as an important consideration.

2 Intellectual property protections

The intellectual property regime was largely only discussed by government officers and commercial operators. Doubts were expressed as to whether the intellectual property regime is sufficient to protect Knowledge, in particular that which concerns the environment and heritage.

Efforts have been made to raise local awareness of IP laws and better integrate the intellectual property framework for the protection of traditional knowledge in Samoa. However, intellectual property remains a foreign concept. It introduces

private property rights into a society where knowledge is collectively held, even though custom may regulate access. Private property constructs create tensions and misunderstandings.

Government and commercial operator participants observed that intellectual property issues were more commonly triggered when outsiders misuse or misappropriate Knowledge. Generally use of Knowledge by Samoans living in Samoa is consistent with protocols and customs. However, IP laws were not thought to be very useful to regulate copying by inappropriately or offensively disseminating Knowledge. Interview participants also raised issues with the cost of bringing legal action. These costs deter the public from engaging with the current intellectual property regulatory framework.

Some government officers expressed frustration with the current intellectual property regime. Participants highlighted the importance of education as a tool to communicate awareness on the use of Knowledge and to regulate access to it. It was suggested that greater education in the form of cultural awareness may prevent potential harm to the community and preserve the integrity of culture and protocol. However, this was explained as involving more than a current concern for teaching outsiders how to act with politeness or good manners. For example, tourists are already often provided education. When a tourist enters a village, they are made aware of what to wear, when to act, when they have curfew, and village etiquette.

3 Useful programmes

Various Knowledge projects, programmes and policies currently existing in Samoa to assist in the regulation of Knowledge. The discussion by the participants included:

- Intellectual property education
- Government Ministries
- Policy implementation
- Ineffective administration due to international agendas
- Policy Implementation
- Databases
- Village Council

4 Intellectual property education

Since early 2000, Samoa started work on the cultural industries. This included intellectual property projects. These programmes largely sought to raise awareness of international and regional obligations. Whilst sporadic, this work did coincide with a growth in handicrafts and designs and the establishment of associations, such

as the Samoa Arts Council. Whether the IP programmes were linked to this growth has not been formally assessed.

Generally, participants spoke positively about the importance of work to support the growth of the cultural industries based upon expressions of Samoan Knowledge and identity. However, participants also reported that the focus of IP workshops and seminars was not necessarily reflective of the needs and expectations of the community. Poor project design plus unresearched presumptions about local needs and aspirations affect the sustainability and effectiveness of these kinds of activities.

Being aware that the foundational concepts in intellectual property are not consistent with the Samoan worldview, I asked if it would be suitable to conduct an assessment of the community to determine their priorities? Are there other systems already operating in Samoa that could be just as effective in meeting expectations of protection? This line of inquiry led to discussion of problems with resourcing.

5 *Government ministries*

Government participants discussed protection of Knowledge with reference to the mandate of the relevant ministry. The Ministry of Commerce, Industry, and Labour (MCIL) is identified as the Ministry primarily responsible for TK and intellectual property. MCIL has established mechanisms including registries for trademarks, patents, designs, and copyright. In coordination with other agencies MCIL has formal responsibility to liaise with local counterparts on intellectual property and with outside agencies. Other ministries were also identified with mandates to preserve and protect Knowledge and culture.

The Ministry of Education, Sport and Culture (MESC) is primarily responsible for the preservation and protection of culture and heritage in the community. Primarily MESC is the focal point for all matters related to Knowledge that are associated with culture and Knowledge that is associated with heritage.

The Ministry of Women, Community and Social Development (MWCSO) is the Ministry which liaises with the village concerning any activities that are conducted by the government. Working with village representatives MWCSO ensures the village is aware of the government programme, and government agencies and officers are compliant with customary protocol for the relevant village. The fragmented regulatory approach to Knowledge regulation and development programmes was recognised by government officials as a significant problem.

A recommendation was made to establish a ministry with the specific mandate on culture. This super-ministry could bring together all the different aspects of culture that are currently scattered throughout government ministries. Participants identified a lack of collaboration and in some cases work is duplicated.

Streamlining Knowledge in one Ministry has the potential to ensure the effective use of resources and use of capacity. However, it is recognised that this will only be effective if the community is aware of these changes and their needs are capable of being addressed by the one ministry. Government is aware of these concerns and is addressing this in current policies (Public Administration Sector Plan 2020/21 – 2024/25).

6 *Policy implementation*

Various policies have been drafted in different government sectors looking at diverse aspects of TK. In 2008, the agenda was taken up by the Samoa Law Reform Commission with a project focused on TK and an Issues Paper went out for public consultation. It took until 2015 for the Final Report to be submitted and endorsed by Cabinet. Government officers expressed doubts that any aspects of the Report were implemented.

7 *Ineffective administration due to international agendas*

Interview participants stressed the need for consistent policy development to create a clear regulatory framework for the protection and preservation of TK.

Also, to be effective policies must be representative of public concerns and seek to provide practical solutions for problems. Without a clear approach and recommendations, policies or projects fail to address needs and result in the misuse of already limited resources. Interview participants referred to stop/start approaches and overlapping work due to the influence of international agencies. Examples referred to included the National Heritage Board Report 2013 which recommended legislation to establish the Samoa Heritage Authority where the definition of heritage was informed by international standards. Recommendations were also made to create a new heritage authority, alongside existing Ministries. The Traditional Knowledge Final Report 2014, recommended development of sui generis TK legislation based on the South Pacific Model Law. There was no consideration of how this would operate, or why it was needed, alongside IP and custom.

The policy terrain was described as a haphazard road of continuous policy discussion and formulation, where agendas are revived, refreshed and sometimes forgotten only to emerge in a different guise at a later stage. The stumbling block identified was not a dearth of policy formulation but of relevance and a problem of carry-through at the relevant community levels within Samoa (and perhaps beyond).

8 *International project funding*

Policy activity identified was often connected to discussion of projects funded to implement policy objectives. Participants discussed cultural tourism projects such as the Palauli Heritage Trail and the Global Environment Facility ABS Access and

Benefit Sharing project (ABS Project) (GOVT3). The ABS Project launched the Biodiscovery Analysis Report for Samoa, the Guidelines on Access and Use of Traditional Knowledge (TK Guidelines) associated with the Genetic Resources of Samoa, the Faleseela Biocultural Community Protocol and the Aopo Biocultural Community Protocol in March 2021. Prior to the launch of these reports, consultations took place with the villages of Faleseela and Aopo.

Consultations focused on building capacity and explained the idea of an ABS regime to participants. Concepts such as ABS are now understood at a superficial level by the community. But the repercussions and value in understanding ABS is yet to be determined. ABS is reliant on implementing programmes and policies such as the TK Guidelines and the Community Protocol that do not exist. Participants expressed doubts that such projects are sustainable.

Participants raised concerns with existing funding mechanisms. International initiatives and related government agendas lead to projects being developed because of access to funding, without working through how the initiative will operate on a day-to-day basis or into the future.

Generally, participants expressed frustration with the lack of attention to how proposed projects are likely to impact on different stakeholders. Being able to understand the relevant issues takes time, open dialogue, communication, and a collaborative approach both at the community and government level. Questions about community involvement are crucial to any of these projects and policies. Participants were not necessarily opposed to initiatives driven by international funding but the lack of on the ground planning and consultation was noted as an ongoing concern.

9 *Databases*

Databases were identified as a potentially useful mechanism for protecting and preserving Knowledge. Examples of effective TK databases included the matai title registration which is held at the Land and Titles Court, a database for access and benefit sharing including TK, and on climate and TK. It is unclear from descriptions whether these databases contain new information or merely compile details from existing sources.

Database projects create new sites of technological and bureaucratic mediation of TK, in anticipation that this Knowledge infrastructure will be useful at some future point to knowledge owners. Concerns were expressed about who would access these databases and how to prevent leaked information, which could result in misappropriation of Knowledge.

Currently, Samoa has not enacted any freedom of information laws, but UNESCO was providing technical assistance on developing one in 2020. It was explained that, if poorly implemented, freedom of information laws could provide outsiders with a direct or indirect means to access kinds of restricted information in databases.

The implications of freedom of information law on the development of government databases is a factor that further complicates consideration of whether databases serve the interests of the community or village. This remains an open question.

Mostly the current database initiatives were reported as assisting in the management of international agendas around TK. They are not linked into current Samoan knowledge-holder expectations around TK protection, preservation and building sustainable businesses. This poses difficulties for ongoing engagement and development of these databases to assist with the protection, preservation and facilitating responsible use of TK in Samoa and beyond.

10 Village council

All participants identified the village council as a crucial institution for the protection and preservation of knowledge. The village council consists of matai from that village. Each family from the village is represented at the village council by the head of each clan and the matai from each of the families. The village council maintains governance in the village and meets on a weekly basis. The village council discusses a range of matters including breaches of village protocol, opportunities and expectations related to government programmes. The village council is aware of all matters taking place in the village. Therefore the village council members serve as guardians of Knowledge and as an avenue for accessing knowledge-holders in the village. This role is significant to the protection and regulating access to Knowledge.

D Issue 3 Reform Considerations

In terms of regulatory design, interview participants identified different frameworks as important. The broader significance afforded to custom and customary law has implications for the regulation of Knowledge and perceived responsibilities to safeguard it.

To village participants, custom and Knowledge are inseparable. Knowledge carries with it an obligation to the community including the village, the church, and the wider Samoan population. Holders of Knowledge, whether they be traditional tattooist or traditional healers, have a responsibility to their families, the village and the wider community to ensure the Knowledge is protected, preserved, and not inappropriately used.

For government officers, familiar with international normative framings, the presumption was that three concepts – custom, customary law and traditional knowledge are required, even though some also expressed doubts about the validity of this formulation.

Respect for existing regulatory frameworks requires consideration of custom and its relationship to Knowledge and how the practice of custom informs codified customary law. The interpretation of customary law and Knowledge can be distorted by the way it is recorded. Thus, there is anxiety as to how customary law and Knowledge can be misinterpreted or distorted for the sake of categorisation. Custom was expressed as the bedrock that must be consulted to capture the significance of the Knowledge and relevant relationships, even where there are aspects that transcend individual and village connections.

1 Is there appropriate terminology?

There are challenges with finding a clear definition of Knowledge or meaningful boundaries around what it connects to in a manner that is able to be translated to outsiders. Due to the pluralist legal system and the relational nature and fluidity of custom its regulation would significantly depart from the subject matter and concepts recognisable to western and international law.

Because international law cannot take into consideration the contextual nuances required to be able to provide a suitable definition of Knowledge it was not thought to be a useful consideration in regulatory design. The consensus was that definitions must come from a national legal framing of Knowledge, as understood in Samoan language. Such framing must consider all sources of law in Samoa including customs and protocols that prevent the inappropriate and offensive use of Knowledge. The interest of Knowledge holders and custodians was considered the primary concern, and their interests must be paramount to prevent abuse or misuse of knowledge.

This means that any definition of Samoan TK would have to consider and accommodate the multiple sources of law. It would include sources of knowledge, such as village laws, customs and protocols. It would also include an examination of the different types of knowledge, where these arise, who is responsible for disseminating these ideas into the public domain, who will ensure that its preserved and sustained, and looking at how Knowledge has evolved with the changes that have taken place.

2 International agendas

Participants expressed the need for caution in implementing overseas frameworks especially in the area of access and benefit sharing. Despite the international development of ABS bringing with it new opportunities for partnerships,

expectations and likely local benefits must be realistically discussed. Participants stressed that any methods adopted for accessing Knowledge must be transparent and consistent with community understandings of consent.

Concern was also raised about the local impact of engaging and collaborating with outsider researchers. Many research projects raise expectations of distributions of significant monetary benefits. Government officials recognise there are difficulties in managing local expectations and also managing potential risks and disappointment.

Where suggested benefits and expected are not realised, participants raised concern about levels of dissatisfaction and discord amongst all those involved that could undermine confidence in working with government. Government participants highlighted the pressure that is created to sign up to new Conventions, and once signed, the great onus placed on the government to fulfil its international reporting obligations and implement international agendas. The availability of funding before implementation obscures national objectives and compels adherence to focal points set by international obligations to secure resources. One participant suggested this led to distortions in local allocation of resources. It contributes to lack of co-ordination between international and national priorities which is cumbersome for government agencies to manage.

Reconciling international and national goals is uneasy; the two have different considerations. At the local level there is the need for cooperation and coordination of all relevant stakeholders; at the international level, there is the need to assess the suitability of international conventions against the national context. It was observed that currently the complexity of local implementation is overlooked, and the methodologies adopted, insensitive to the conditions on the ground. A lack of communication and capacity for co-ordination amongst bureaucracies contributes to the mismatch of international and national goals.

It was suggested that the promise of international funding and resources attracts government officers to sign up to international conventions without considering the context and priorities of Samoa.

3 Intellectual property

Participants expressed mixed reactions about the value of the intellectual property regime. Participants are aware of its potential for protection. For example, a tattoo artist noted it could protect his designs though he was not confident about this. Nonetheless intellectual property is still the main regime promoted for protection, without any evidence of its relevance or the capacity to deliver on the ground.

Individuals and organizations are offered education and being promised protection without clear evidence of efficacy and find this frustrating.

The implementation of intellectual property legislation was also criticised for a lack of consultation about it. This lack of consultation leads to miscommunication with village and intended beneficiaries. The lack of communication endangers the effective implementation of regulatory frameworks and any ensuing projects.

The issue of who owns the intellectual property was also discussed by participants with respect to specific Knowledge and practices. Examples of ownership were discussed with regard to traditional healing, *elei* designs and traditional tattooing. The suggestion was made to establish an association for those who share similar Knowledge. Questions concerning ownership of Knowledge or TK include – who will benefit from using that Knowledge? Included in this line of concerns, participants raised issues with how do you protect Knowledge that is already in the public arena? These questions must be at the forefront for any future work.

4 *Village council*

The village council is an important institution for maintaining and sustaining Knowledge. The village council is the gateway or the guardian of Knowledge that is situated, lived and practised in the village. The village council is a source of legal authority. Although not a court it regulates conduct and maintains harmony in the village in accordance with village custom and usage (Section 2A, Village Fono Act 1990). Each village council upholds cultural customs and protocols in the way meetings are conducted such as the *'ava o le feiloa'iga*.

The village council, while well versed in understanding protocols, customs and practices related to culture is not necessarily acquainted with western intellectual property concepts and laws. There is a need to build capacity in the village council on understanding the western frameworks, including concepts and policies as part of the legal education of the village community. The gap that exists between western regulatory frameworks and village council practices and custom is a significant issue.

The government plays a crucial role to assist the village to preserve its culture. It is for the village to decide what is culture and what obligations and responsibilities are attached to Knowledge in the context of its village. This is why it is important for government to be aware of village perspectives in any of its programmes and regulatory frameworks. Government seeks to preserve culture whilst culture is also a commodity that potentially has economic benefits for all Samoans. This creates tensions.

Trying to preserve culture is very difficult. Outside factors such as technological developments have influenced the evolution of culture. Knowledge has become easily accessible and disseminated into the public domain. Additionally, commercialisation can diminish the cultural value and meaning of customs, protocols, and practices. Cultural value and meaning has given way to commercial benefit.

5 Institutions for protecting traditional knowledge

Participants identified other institutions that could protect and preserve Knowledge. The Land and Titles Court (LTC) has jurisdiction to determine customary land disputes and issues of succession, including chief titles. The LTC has primarily resolved disputes related to custom and customary land. Through this process the LTC can identify and recognise Knowledge that is associated with cultural practice, protocol, and custom.

The National Heritage Board (NHB) has been approved by Cabinet and will be mandated to oversee the management of heritage sites in Samoa. The NHB would be responsible for the protection and preservation of Knowledge attached to natural and cultural heritage sites. Currently (October 2024) the NHB has not been established.

The Language Commission was established to protect and preserve knowledge related to language. The Language Commission was created as part of an on-going international agenda with respect to UNESCO obligations. The roles of these different bodies are crucial to the protection and preservation of Knowledge. Each plays a different role for the different features of Knowledge.

III PART II: RECOMMENDATIONS

These Recommendations emanate from the needs and expectations of participants in the Samoan field. These proposals express the desires of participants to understand the types of situations that could be addressed or improved by this research.

- (1) The term 'TK' not be used to describe Samoan Knowledge. It is not considered as appropriate terminology reflective of Samoan values or experience and the terminology led to local disengagement from international law and WIPO agendas.
- (2) There should be a greater obligation on western academics, NGOs and policy administrators to educate themselves about the communities where they fund projects, and for outsiders to primarily provide support and guidance that progress local priorities.
- (3) There be more discussion about the value of ABS regimes currently being promoted in international treaties such as the proposed International Legal

Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources. There is ingrained scepticism with regard to access and benefit-sharing (ABS). The international adoption of Samoan examples of ABS in best practice case studies, such as by the WIPO, is not welcome.

- (4) There be less focus on the value or significance of IP and IP education. Western IP does not deliver what it promises. The fascination with or fixation on intellectual property in international discourse ignores the links with other issues related to the economy: manufacturing, marketing, branding, finance, free trade and sustainability. Having a wholistic picture of objectives may be more effective rather than focusing on one aspect of legal rights attached to a cultural commodity or research project.
- (5) There be more selective engagement with international programmes, even where funding is attached. International organisations focus on pre-formulated programmes that have clear objectives and reportable items designed to further their own agendas. The regional bureaus or relevant division of these international organisations need to work more closely with nation states and have staff that reflect the regions that they work in. Expertise is not just a matter of accumulating tertiary credentials and academic expertise. It requires actually living and breathing for an extended time in the country experts wish to consult on.
- (6) More local empirical work needs to be done to provide examples of current issues for which international assistance is sought to see whether or how outside frameworks are suitable. National bureaucracies and agencies are receptive to working with international and regional organisations, however, there is difficulty with reconciling regulatory priorities promoted by outsiders with community expectations and needs. The work of international organisations promoting ideals of sustainable development must be reflective of the social, cultural, environmental, and political goals and expectations of the country and its citizens.
- (7) A Whole of Government Engagement Policy and Standard Guidelines would improve understanding of the role of the village fono in articulating village perspectives and engaging with government ministries. Village participation is not just a matter of establishing systems of communication, rather it is ensuring an understanding of village needs and expectations. Having one individual speak on behalf of the village is not a form of genuine representation, nor a reflection of all perspectives in the village. Guidelines could assist the village to identify Knowledge, how it should be protected and why, and who should benefit. These guidelines should not impose a rigid

framework. Rather scope should be provided for the evolving nature of Knowledge and culture as new contexts impact the village circumstances.

- (8) Existing regulatory mechanisms, such as the Land and Titles Court (LTC), could be developed to assist in the regulation of Knowledge. The formulation of guiding principles would provide an authoritative legal basis for the judiciary and staff of the LTC to use as a reference in decision-making. However, without improvement in public access to legal resources and understanding of court processes the judiciary are not sufficiently supported to make appropriate decisions. This foundational issue needs to be addressed before expanding their authority with regard to Knowledge.
- (9) Education can be better targeted as a means to revive Knowledge and practices that are no longer in existence. Educational institutions could help support this through curricula and supporting culturally appropriate use of living knowledge. Appropriate agencies include the Ministry of Education, Sport and Culture, Samoa Qualifications Authority, Ministry of Commerce, Industry and Labour, Ministry of Women, Community, and Social Development, and the National University of Samoa.
- (10) A Samoan Social Engagement and Impact policy and requirement for translation of research in formats suitable for communities should be considered in the Samoan education, research, and training policy. Social engagement and impact agendas are increasingly highlighted as important so that public benefits flow through to the community so they benefit from their participation and can improve agency in engaging with outsider researchers.
- (11) There was consensus that there should be formalisation of law to protect Knowledge, but this regulatory framework would apply only to certain types of Knowledge and custom. The content of this law would be different to international conceptions of TK law.
- (12) A suitable monitoring and evaluation system must be established for government projects, with aims and outcomes assessed against the needs and expectations of the community. Existing Australian and NZ Guidelines on best practice could help inform development of a Samoan whole of government approach to funded researcher projects.
- (13) There is a need to develop a Samoan code of research ethics that applies to everyone. The '*O le Tusi Fa'alupega*' is suggested as a foundation to understand knowledge ownership, obligations, and responsibility. It should govern research design, including project objectives and decisions about research conclusions to be shared. Agreed ethics can inform and supplement Knowledge laws and decision making about documentation of custom/customary law and government practice.