Suppression clauses in university health research: case study of an Australian government contract negotiation

Government research contracts routinely contain suppression clauses. Have universities forgotten their role in promoting open enquiry?

In a 2006 survey of a random sample of public health academics in Australia (46% response fraction), 21% of the 302 respondents reported having personally experienced a funding-related suppression event in the preceding 5½ years; ie, a funder had invoked a clause in the funding contract "sanitising, delaying or prohibiting" the publication of research findings.[1] The study also showed that the incidence of sanitisation events had increased over time. According to the respondents, their work was targeted because it "… drew attention to failings in health services (48%), the health status of a vulnerable group (26%), or pointed to a harm in the environment (11%)".[1]

These findings appear to reflect a worrying tendency of Australian governments to seek to control the conduct and reporting of public good research.[2] In this article, I present an account of a recent contract negotiation that arose from a researcher-initiated grant application in a competitive round called by an Australian state government agency. This will be followed by my analysis of the negotiation process, and a proposed research agenda for investigating the extent, causes and implications of such practices.

… universities were prepared to enter into contracts that explicitly limited the capacity for open enquiry and participation in public discourse

The proposed contract and our responses

In 2012, I was the primary applicant on a modest (< $50 000) researcher-initiated grant application proposing a pilot study in an Australian hospital of an alcohol screening and brief intervention program. I was notified that my application had been successful, and this was followed by an email message and draft contract. Included in the email message was the statement: "Some clauses in the Agreement are non-negotiable, particularly those that relate to insurance requirements and Intellectual Property".

I will discuss three clauses that my colleagues and I identified as problematic, together with the responses we sent by email to the funder. Identifying information has been removed.

(1) Intellectual property (IP)

The proposed contract (clause [x]):

> … ownership of Intellectual Property in or in relation to Contract Material vests upon its creation in [the funder]. The University must, upon request by [the funder] do all things necessary to vest ownership and title of Intellectual Property in [the funder].

We responded:

> We're not comfortable with the notion that [the funder] would own the IP given the substantial in-kind contribution of the University in this case, eg, all of the investigator time (mine and Dr [X]'s). We will discuss with the University legal people but suggest either joint ownership of the IP or that we own it and grant [the funder] an irrevocable licence to use it (my preference).

(2) Publication

The proposed contract (clause [y]):

> The University must not publish any articles, statements or any other information arising from this Agreement without [the funder]'s approval in writing beforehand.

Our response:

> We can't accept a restriction on the right to publish findings from this work. As the clause presently reads, [the funder] could deny permission to publish and this is at odds with the University of [X] Act 1989 which requires us to "promote free enquiry".
>
> We are more than happy to notify [the funder] of our intent to publish and to provide a copy of any paper we submit to a scientific journal. Accordingly, we propose an amendment to the clause along the following lines:
>
> "The University will provide a copy of any articles, statements or any other information arising from this Agreement to [the funder] at least 28 days before any such item is published."

(3) Termination for convenience

The proposed contract (clause [z]):

> [The funder] may by notice in writing at any time terminate this Agreement for convenience, such termination to be effective immediately unless stated otherwise in the notice.

Our response:

> This is not acceptable to the research team. Why should the purchaser of a research service be permitted to pull out of the agreement without notice or penalty? We cannot invest our time in the research without knowing that the work will be paid for.

Kypros Kypri
PhD

University of Newcastle, Newcastle, NSW.

kypros.kypri@newcastle.edu.au

doi: 10.5694/mja14.01497

The funder's response to our comments

> Re Clause [Intellectual Property]: … [this is] a [government legal entity]-funded small grants program so IP is vested in [the funder].
>
> Re: Clause [Publications]: [the funder]'s approval is required in writing before publication.
>
> If the IP and Publication are not acceptable then you may chose *(sic)* to relinquish the grant.

In a telephone call that followed this email exchange, I was told by the funder that this was the "standard contract", and that no one had previously complained about these clauses.

The University's position

I also forwarded the draft contract to the University legal office and asked them to examine it. I received the following response:

> The contract is a nice clear contract. The only points which may be of conjecture are clauses [x] and [y] re IP and publishing respectively. Can you read those two clauses and let me know if you would seek changes to them? If you do, we can try and get those changes, but may not necessarily succeed. An example may be that you feel that the publishing rights are too fettered.

I was left with the clear impression that, if my colleagues and I did not object to these clauses, the University would sign the contract.

The outcome

Months later, after several email exchanges and telephone calls with the funder, I was notified that they were willing to accept all the amendments we had specified:

> Clause [x] Intellectual Property: joint ownership of the IP is acceptable to [the funder].
>
> Clause [y] Publications: changes acceptable.
>
> Clause [z] Termination for Convenience: can be deleted.

In relation to the last clause, it was explained to me in a telephone conversation that it had been inadvertently "left in" from another contract.

This notification by the funder, sent by email, was followed by the statement:

> Again I have been asked to stress that these changes are agreed to based on the nature of your application and do not set a precedent for any future contract negotiations.

What was special about our application was not explained.

Analysis

In summary:

- A government agency presented us with a contract that would have enabled it to own all of the intellectual property generated from our research, prohibit publication of our findings, and to shut down the project without notice or explanation;
- The University would probably have signed the contract containing those clauses;
- After lengthy negotiation between the researchers and the funder, the funder relented on all three clauses.

Our experience is consistent with the findings that Yazahmeidi and Holman published in 2007.[1] The statements by the funder that this was a standard contract and that clauses had been "left in" from a previous template, as well as the claim that it was unusual for such an arrangement to be challenged further indicate that suppression clauses may be common.

Australia's universities were each established by Acts of Parliament that specify the object and functions of these institutions. For example, the University of Newcastle Act 1989 stipulates in Part 2, Section 6 ("Object and functions of University"):

> (1) The object of the University is the promotion … of scholarship, research, free inquiry …
>
> (2) The University has the following principal functions for the promotion of its object: … (d) the participation in public discourse.

In our case study, and in the cases documented by Yazahmeidi and Holman, universities were prepared to consent to contracts that explicitly limited the capacity for open enquiry and participation in public discourse. The critical context for our experience was that the funding we were seeking was not for the salary of an existing employee, so we could negotiate robustly, even at the risk of not being funded.

It should be noted that our project was uncontroversial; its aims could not threaten a vested interest, in contrast to other research into alcohol and health that we have undertaken (eg, the impact of controlling alcohol availability on antisocial behaviour[3,4]).

I recently presented our case study at an international conference and asked the audience of about 50 alcohol policy researchers about their experiences. Scientists from Australia, Canada, Switzerland, Sweden and the United Kingdom reported that they had firsthand experience of similarly restrictive contracts in their countries. Several United States scientists affirmed that this type of contract would be unacceptable to their institutions, which, they said, were vigilant about protecting publication and intellectual property rights.

Current policy on public good research contracting

The Australian Government's Coordination Committee on Innovation has developed the "National principles

of intellectual property management for publicly funded research", the purpose of which is to "provide guidance for the ownership, promotion, dissemination, exploitation and, where appropriate, protection of Intellectual Property (IP) generated through Australian Government funded research by public sector institutions", including "grants awarded by the ARC, NHMRC, and other government research funding schemes."[5] The latter category appears to include the researcher-initiated competitive grant scheme discussed in this case study, but it explicitly excludes research purchased by government through requests for proposals and tenders (eg, through AusTender, https://www.tenders.gov.au). How much health research is purchased through tenders is unknown.

The draft contract examined in this article was in direct conflict with these principles, which state that "Ownership and the associated rights of all IP generated as a result of Australian Government competitively funded research will initially be vested in the research institutions receiving and administering the grants as a way of recognising the inventive contribution made by the research institutions."[5]

Neither the "National principles of intellectual property management for publicly funded research" nor the Australian Government Intellectual Property Manual[6] discuss publication rights except in the context of IP. For example, there is advice in the latter document that government agencies should "[c]onsider a review period prior to any disclosure of materials by publication or transfer; provid[ing] opportunity to identify IP and explore protection options" (p. 77). In other words, there is no authoritative guidance about publication policies from the perspective of the public's right to know the outcomes of public good research purchased with public funds. There may be value in the universities and state, territory and federal governments working together to produce model clauses for future research contracts.

Research questions

Our case study generates several research questions about the extent, causes and implications of the practices we have discussed here.

Extent

- What proportion of government-funded health research in Australia is subject to suppression clauses?
- How do contracting practices vary by jurisdiction, department and subject area?
- What do university policies say on the matter of suppression clauses?
- Do universities differ in their willingness to enter such contracts?
- How common are such contracts in other countries?

Awareness

- How aware are university research and legal officers of this problem?
- How aware are researchers of the problem?
- What do the public think about government agencies purchasing research in this way and of universities being party to such contracts?
- Are government funding agencies aware of the potential harms of such research purchasing practices?

Implications for the scientific evidence base

- What are the implications of suppression clauses for the evidence base?
- Are publication clauses documented in reports of research findings?

Ethical and legal considerations

- In what circumstances, if any, are governments justified in asserting a right to secrecy or selective release of health research findings?
- What are universities' and individual researchers' legal and ethical responsibilities?
- Is there scope for using provisions of federal and state freedom of information acts to identify instances of suppression?

Conclusion

It appears that governments in Australia commonly seek the right to limit the freedom of health scientists to report the findings of publicly funded research. It should be noted that there are no such restrictions on research funded by the major competitive grant schemes, those of the National Health and Medical Research Council and the Australian Research Council. Our findings relate to a large number of federal and state departments and agencies for which research is not their primary responsibility, and the problem we have discussed is unlikely to be limited to health research. Lessons from our experience include the fact that non-negotiable clauses sometimes become negotiable — if the researcher persists. Negotiating when the stakes are low (as in our case) and systematic efforts to raise the awareness of universities, funders and the public may help us move toward a more open research funding process. Policy is needed to guide the purchasing of public good research. This may be accomplished via negotiation between the universities and key federal and state agencies, and through extension of the existing policies (eg, those in the Government's IP manual[6]) to cover the publication of research findings for the public good.

Acknowledgements: My research is supported by an NHMRC Senior Research Fellowship and a Senior Brawn Fellowship from the University of Newcastle.

Competing interests: No relevant disclosures.

Provenance: Not commissioned; externally peer reviewed. ■

References are available online at www.mja.com.au.

1 Yazahmeidi B, Holman CD. A survey of suppression of public health information by Australian governments. *Aust N Z J Public Health* 2007; 31: 551-557.

2 Holman CDJ. An end to suppressing public health information. *Med J Aust* 2008; 188: 435-436.

3 Kypri K, McElduff P, Miller P. Restrictions in pub closing times and lockouts in Newcastle, Australia five years on. *Drug Alcohol Rev* 2014; 33: 323-326.

4 Kypri K, Davie G, McElduff P, et al. Effects of lowering the minimum alcohol purchasing age on weekend assaults resulting in hospitalization in New Zealand. *Am J Public Health* 2014; 104: 1396-1401.

5 Coordination Committee on Innovation (Australia). National principles of intellectual property management for publicly funded research. April 2013. https://www.nhmrc.gov.au/grants-funding/policy/intellectual-property-management/national-principles-intellectual-property-man (accessed Apr 2015).

6 Commonwealth of Australia. Australian Government intellectual property manual (version 2). 2012. http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/Documents/IntellectualPropertyManual.pdf (accessed Jan 2015). ■