25 March 2013

Dr Ian Hardingham QC
Commissioner
Victorian Law Reform Commission
333 Queen Street
Melbourne VIC 3000 lawreform@lawreform.vic.gov.au

Dear Dr Hardingham,

Submission on the Victorian Law Reform Commission's Consultation Paper on Intestacy

The Arts Law Centre of Australia (**Arts Law**) is pleased to provide its submission in relation to the Consultation Paper on Intestacy (**Paper**). Our specific interest is in the reform of Victoria's succession laws as they relate to Indigenous intestate estates. Our submission is informed through being unique in the service we provide, straddling the worlds of both art and law and representing a large group of Aboriginal and Torres Strait Islander artists, including Victorian artists.

Executive Summary

Arts Law supports a specific regime for dealing with Aboriginal and Torres Strait Islander intestate estates which:

- Contains a procedure to deal with proof of family relationships other than strictly by birth certificate evidence;
- Reflects the traditional family relationship structures of Indigenous communities which differ from European concepts of family;
- Accommodates traditional adoptions;
- Does not involve a costly court procedure; and
- Provides targeted assistance for families to help them understand and negotiate the intestacy process.

About the Arts Law Centre of Australia

Arts Law was established in 1983 and is the only national community legal centre for the arts. It provides expert legal advice, publications, education and advocacy services each year to more than 6000 Australian artists and arts organisations operating across the arts and entertainment industries.

About our clients

Our clients not only reside in metropolitan centres, but also contact us from regional, rural and remote parts of Australia, and from all Australian states and territories. Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them.

The comments that we make in this submission are informed by our clients' profile, which is that they are usually:

- earning low/limited incomes;
- both Indigenous and non-Indigenous, and rural, remote or urban;
- limited in their ability to enforce their rights (and as a result increasingly vulnerable to the abuse of those rights);
- dedicated to the creation of art across all disciplines;
- either new, emerging artists or established arts practitioners or arts organisations;
- operating arts businesses;
- working in both traditional and digital media;
- self-reliant in business; and
- eager for accessible legal information, although they typically have limited legal education.

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About our Indigenous clients

Arts Law through the Artists in the Black (AITB) service has provided targeted legal services to Aboriginal and Torres Strait Islander artists and their organisations and communities for the last seven years throughout remote, regional and urban Australia, and across all art forms. Much of that advice has focused on ways of securing effective protection of Aboriginal and Torres Strait Islander cultural heritage as expressed through art, music and performance.

Through the AITB service, Arts Law has been drafting wills for Indigenous artists over the last 5 years. This work is resource intensive, requiring lawyers to visit Aboriginal and Torres Strait Islander communities which are spread over vast geographical regions often in some of the most remote locations in Australia. The wills not only deal with any physical assets of the artist (eg paintings, a vehicle) but also their copyright and resale royalty rights which endure for 70 years after the artist passes away. As the Commission's Paper recognises, having a will in place makes the distribution of the artist's estate, including resale rights and copyright income much easier. We have seen firsthand the issues which arise upon intestacy. Without a will there are often significant problems working out who the beneficiaries should be, causing families additional grief as well as many years delay in the administration of the estate. There are many Aboriginal and Torres Strait Islander artists who have died intestate, a few having significant estates but all having ongoing rights of copyright and, for visual artists, resale rights. In some of these cases the artists' families, often living in impoverished circumstances, have had to wait more than 10 years for the estate to be distributed.

We note at the outset that our experience is limited to situations where the intestate person was an artist; nevertheless a very substantial number of Indigenous Australians wiork in the arts sector and while the assets of the estate include assets of copyright and resale royalty which have very specific attributes, the problems experienced by the families are fundamentally the same.

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Submission

Arts Law's comments are confined to the issue of "Indigenous Intestate Estates" dealt with at pages 40-42 of the Paper and in particular question 115. We do not unfortunately have statistics in response to question 114 but would comment that our experience is that the personal hardship and emotional stress felt by Aboriginal and Torres Strait Islander families dealing with intestacies is so great that reforms are justified even if the statistics are low. We suspect that many families just give up in this situation either forfeiting, or failing to understand, their entitlements.

We would answer Question 115 with an emphatic yes – more flexible provisions are needed in Victoria for the distribution of Indigenous intestate estates. The difficulties faced by Indigenous families under the existing laws include:

a. A high proportion of intestacies as estate planning for death is inconsistent with the cultural traditions of Aboriginal and Torres Strait Islander communities;
b. Important and significant family relationships are generally quite different to the European nuclear family model which gives priority to a spouse or partner then issue. We have written wills for over 500 Aboriginal and Torres Strait Islander artists throughout Australia. The overwhelming majority chose not to include their spouse or partner as a beneficiary due to a cultural expectation that their primary responsibility was to their children or other extended family members and that others would care for their spouse.
c. Children adopted under traditional law are not recognized even if identified by every member of the community as the child of the deceased. In one case, a man identified by everyone in the community as the child of the deceased artist (having been brought up by that artist since a toddler and who cared for her in her old age) could prove no blood connection and, absent other blood relatives, the estate was forfeited to the Crown.
d. In regional areas, there are still a high proportion of Aboriginal and Torres Strait Islander people who either have no birth certificate, whose certificate does not

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identify their father or whose certificate spells or names a parent in a way other than the way used by that person in their lifetime. We were initially amazed at the number of people whose drivers' licences or Centrelink cards showed them as born on 1 January or whose licence and Centrelink cards showed different dates of birth. This is the result of bureaucrats dealing with the absence of a birth certificate by simply nominating an approximate date of birth. It is almost impossible for such people to demonstrate their relationship with the deceased in a way which can satisfy the Public Trustee or a Court looking to issue Letters of Administration.

e. Many families are simply unable to deal with the bureaucracy involved with the intestacy process and unable to afford a lawyer. In those circumstances, no action is often taken leaving uncollected royalties and abandoned bank accounts which ultimately forfeit to the Crown.

The Report of the National Committee on Uniform Succession Laws: Intestacy

We make the following comments on the National Committee's Report (the Report) which provides the framework for the Paper's analysis.

- Our experience is consistent with the finding that it is inappropriate to apply the current intestacy rules to members of Indigenous communities (particularly in remote areas) which have a broader concept of family relationships; however we would not go as far as to suggest that all kinship relations should be recognised. In our view there are four primary problems:
    - The failure to recognize traditional adoptions – contrary to the observations in the Report at para 14.44, this is not addressed by provisions which recognize ex-nuptial children. As para 14.50 notes, a child may be 'given' to a family at birth and brought up as the child of the receiving parents in every way. Such children are still excluded by existing legislative provisions recognising ex-nuptial children.
    - The priority given to spouses and partners over issue.

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- The failure to recognise customary law marriages except to the extent they fit within current definitions of de facto relationships (we would support the Queensland and NT models of a specific recognition of the traditional marriages). The WA legislation is generally dysfunctional and without practical operation and has been repealed.
- The inability to deal with polygamous relationships – our experience is that this is particularly common in the NT where a man will take on a second (or third) wife who is the widow of his deceased brother as custom dictates that he is culturally and morally responsible to care for her and her children as his own. In some states there is provision upon intestacy to deal with two partners where there is a legal marriage AND a de facto relationship but this only incidentally and coincidentally addresses this problem. In most cases where this situation arises within Indigenous communities, both unions are traditional law unions. We do not have any information concerning the occurrence of such relationships in Victoria.

- The Report notes that the legislation in WA and Queensland providing special regimes for dealing with Indigenous estates moves control from families to the Public Trustee. In our view this can work extreme hardship on families, increase the likelihood that the estate will be deemed *bona vacantia* , vastly diminish the size of the estate available for distribution, and has the result that families can wait years for closure. In our view the Western Australian legislation offends the Racial Discrimination Act and we have successfully lobbied for its repeal in WA.
- We absolutely agree with the Report's comments at 14.20 that the Queensland regime creates a substantive distinction which effectively disinherits family members in order to address a merely procedural difficulty of proof where birth certificates are not available – "an alternative method of proof would be a more appropriate response".
- The WA provisions for moral claims (since repealed although the repealing legislation is yet to be proclaimed and will only apply to estates created after that date) are only available if the two years elapse and the Public Trustee can't identify the

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beneficiaries. Effectively, family members without birth certificates just sit and wait for two years then lodge moral claims with no guidance or assistance as to what criteria are required to succeed. The Public Trustee has informed us that they can offer no assistance as to what is required for a successful claim and we find the statement that such "moral claims are regularly made and approved" astounding given our experience in assisting families to file such claims and not even receiving any acknowledgement of receipt of such claims (in one case, 9 months have elapsed since filing).

- We agree (para 14.26 of the Report) that defining Aboriginality by some percentage "of full blood" is inappropriate and does not "accord with the generally accepted definitions of Aboriginality". Feedback we have received from Aboriginal people in Western Australia indicates that such a definition may be regarded as racist.
- We agree (para 14.30) that any dedicated regime for Aboriginal people should not be dependent on whether or not the deceased had entered a marriage under the *Marriage Act*. The fact of such a marriage does not mean the deceased person did not consider himself or herself Aboriginal or otherwise respect traditional cultural norms or traditional family relationships. Our experience suggests that the two circumstances are not related.
- The NT provisions only apply where when traditional relatives are identified and the family cannot accommodate them by agreeing on a distribution plan (para 14.37). We would prefer to see a regime that starts from the fundamental premise that the existing intestacy distribution rules do not reflect Aboriginal and Torres Strait Islander family relationships and establishes a regime that seeks to do so – just as the existing rules are designed to serve a distribution regime that generally accords with a Western European family structure.
- As the above suggests, our experience is NOT consistent with the statement in para 14.23 that the provisions in Queensland and Western Australia "work well informally".
- Our work in all States of Australia leads us to believe that the NT approach works best in theory although the fact that so few cases have been dealt with suggests that

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in practice it has failed to deliver real benefits. In our view, what is needed in the NT is not so much a different approach as more resources invested in assistance to Indigenous families and cultural awareness training for officers of the Public Trustees Office tasked with implementing this system.

- Producing satisfactory genealogies is costly (para 14.52) however this can be resolved by a more lateral approach to proof. In many cases detailed genealogical research has already been conducted for the purpose of native title claims but cannot be accessed by families for use in intestacy actions. In other cases, anthropological research conducted in communities identifies family groups by name and relationship but is rejected by the Public Trustees Office or Courts as falling short of the required standard of proof. Recently in WA, The Public Trustees Office took the laudable step in one case involving the children of a deceased artist all of whom had been born 'out bush' with no formal birth records. It accepted the statement of a local Indigenous cultural organisation holding the native title and other genealogical and anthropological records that those records and its corporate knowledge confirmed the undisputed claims of the family members to be related to the deceased. On these issues it is procedural reform that is needed rather than substantive change. Currently, Indigenous families are being penalised for not having adopted more Western ways of recording family relationships many decades ago. We support the suggestions in 14.52 for confirmation of relationships by statutory declaration as one pragmatic and practical solution.

Essentially, with two qualifications, Arts Law agrees with the recommendation of the Report that provisions based on the NT model be adopted:

1. However, rather than a system requiring a Court application and the attendant costs involved, we suggest a more streamlined procedure which does not involve engagement with the court system such as the procedure used in WA under the former 'moral claims' system whereby an application is lodged with the Public Trustee and submitted for ministerial approval.

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2. A distribution plan should be an option available to all Indigenous families – not just those where there is no next of kin or where there is no valid marriage under the Marriage Act (see 2.121). Where there are next of kin, they must be a necessary party to the acceptance of any such plan. As noted at 2.119, the only reported case in the NT did not address the issue of the interaction between the intestacy rules and the Indigenous distribution plan the subject of that decision because it found that there were no next of kin entitled under the general intestacy provisions. This assumes that where someone can be identified as next of kin under the existing rules, that is the preferred and appropriate solution. As already stated that is often not the case.

Please do not hesitate to contact me if you have any questions.

Yours sincerely

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