



ARTS LAW CENTRE OF AUSTRALIA

Recognising Artists in prison: a review of the law and policy in Australia^{*}

Position Paper

August 2017

Executive Summary

The impetus for this research project and resulting paper was the Queensland Government's 2009 introduction of sections 28A-28H into the [Corrective Services Act 2006 \(Qld\)](#), provisions that were apparently aimed at 'ensuring that transfer of art are closely monitored and that it is an offence to privately sell prisoner artwork while a prisoner is in a corrective services facility'.¹ These sections were introduced after there was some outcry after a victim of crime discovered a Queensland prisoner's mother was selling artwork on behalf of the prisoner.² Given the detrimental impact of these changes on the rights of artists in Queensland's prisons in contrast to the potential rehabilitative benefits of prisoners developing an arts practice, Arts Law decided it was important to highlight the different legislative and policy positions between the states in an attempt to educate and foster change.

As the prison structure in Australian state and territory differs, the treatment of artwork created by prisoners while incarcerated also varies greatly. All states and territories have made progress in establishing rehabilitation programs.³ However, while it seems clear that prisoners will be able to or even encouraged to engage in arts-related work in all states and territories, intellectual property and moral rights in the resulting artistic work and prisoners' rights in relation to the sale or disposal of such work, is generally less clear.

Arts Law supports the view that the recognition and encouragement of prisoners' involvement in creative activities is beneficial to prisoners and society. Such activities have educational value as well as therapeutic benefits. In addition, prisoners may reveal artistic talents and obtain new career skills empowering them to reintegrate into society. Arts Law also supports the view that prisoners should be entitled to benefit from the sale and/or reproduction of their artwork while they are in prison, in the same way as they are entitled to benefit from other work.

Arts Law's Recommendations

It is Arts Law's position that corrective service departments should develop policies and procedures, which recognise and encourage prisoners' involvement in creative activities and the exhibition and sale of their artworks on the basis of the benefits to the prisoners and society more broadly. Benefits are therapeutic, educational and cultural and provide for prisoner's professional development, rehabilitation and reintegration of prisoners into society.

The following should be included in prisoners' art policies and procedures:

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¹ Explanatory Memorandum to *Corrective Services and Other Legislation Amendment Bill 2009*, p 2.

² See Second Reading Speech on the *Corrective Services and Other Legislation Amendment Bill*, 19 August 2009.

³ See Karen Heseltine, Andrew Day & Rick Sarre's research and public policy study, 'Prison-based correctional offender rehabilitation programs: The 2009 national picture in Australia', Australian Institute of Criminology (2011): <http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp112.html> (viewed 1 December 2015).

- prisoners should be entitled to benefit from the sale and/or reproduction of their artwork while they are in prison, in the same way as they are entitled to benefit from other work;
- as the work involved in making artwork, prisoners should be entitled to ownership/title of work (the valuing of these activities as work could be offset against costs of materials used to create the artwork), rather than the department, regardless of who paid for the materials;
- if the department wishes to be compensated for its expenses in supplying the materials for the prisoners to create art, where a prisoner sells or receives payment for their artwork, the prisoner must reimburse the department for the cost of the materials used in making the work. The prisoner may be required to reimburse the department for the cost of the materials in creating the work as a condition of the prisoner taking the artwork/s with them on release;
- recognition and respect for prisoners' intellectual property rights, including copyright, moral rights and respect for ICIP;
- recognition of copyright is not limited to seeking permission of the artist to reproduce their work but also recognises that copyright is an economic right and that any work used by the department or third parties should be licensed using a simple written agreement (for example, a pro forma document) for fair remuneration;
- if a prisoner does not have ownership/title to their artwork, then in order for a prisoner to utilise their right to licence the work, the department should retain a high resolution image of the artwork for licensing purposes which could be provided to the prisoner when they leave prison;
- recognition of the fact that prisoner artists' moral rights include the right to attribution, the right against false attribution and the right of integrity.
- prohibition upon the department from interfering with a prisoner's moral rights in an artwork without the prisoner's express written consent. This includes the destruction or recycling of prisoners' artworks;
- respect for the ICIP embodied in artworks created by prisoners and development of procedures to ensure that any use of the artwork complies with any ICIP requirements in relation to the work, including the attribution of the custodians of traditional knowledge embodied in the work;
- procedures to ensure that the policies and procedures are clearly communicated to prisoners engaged in artistic activities so that they understand their rights in relation to their artwork created whilst in prison; and
- prisoner programs including education about their copyright, moral rights, ICIP and business skills relevant to earning income from their work eg. understanding of contracts and licensing.

Introduction – The law and policy regarding prisoner art in Australia

Prisoner work is encouraged and rewarded by prison authorities who provide prisoners with an income for their efforts, albeit a low one. All Australian states and territories have general legislative provisions regulating prisoners' work and remuneration, but Queensland is the only state that has specific legislative provisions relating to the creation, sale and transfer of artistic work created in prison.⁴ Unfortunately, Queensland's legislation, while encouraging prisoners to engage in art-related work, prohibits prisoners from selling their artwork while in prison.

In light of the legislative silence on this subject in all other states and territories, prison authorities appear to have a wide discretion to make decisions and introduce new policies about prisoner engagement in art and the disposal of any resulting work. Of real concern is that the rights of artists under Australian law are not taken into account or worse still, specifically undermined, as in Queensland.

There is a distinct lack of clarity around prisoner art in most jurisdictions. However, it should be noted that Western Australia, Victoria and New South Wales do deal with prisoner artwork via policy and supporting documentation, and do permit prisoners to exhibit and sell their artwork and benefit from the revenue generated. However, state-based prisoner artwork policies raise further questions about adequate protection of prisoners' intellectual property and moral rights in the artwork they create.

The following paper provides an overview of the law and policy on prisoner art in the various states and territories. To the extent that prisoners' artwork is recognised by law or policy in some jurisdictions, this paper will explore the implications this has for intellectual property, particularly in relation to rights arising under the *Copyright Act 1968* (Cth) (**Copyright Act**). Finally, Arts Law will make some recommendations for reform and highlight some areas in need of further discussion.

The law and policy in Queensland

It is now widely recognised that art in prisons is an empowering and therapeutic tool for rehabilitation and reintegration of prisoners into society.⁵ In pursuit of this goal, in 2007, the Queensland government launched a program for the online sale of artwork produced by prisoners. This highly successful initiative produced powerful and creative work and by November 2008, had raised over \$9,000 through the sale of donated prisoner artwork. The revenue generated was used to fund art materials to support prison artworks and the balance was used to support charities. Revenue was not distributed to prisoners and this led one of the prisoners to arrange to have an item of his artwork offered for sale through an intermediary on eBay. Media outrage resulted in the 2009 amendment of the [Corrective Services Act 2006 \(Qld\)](#),⁶ governing the sale, gift, transfer or other disposal of prison artwork.

⁴ *Corrective Services Act 2006 (Qld)*, Division 1A.

⁵ Available research shows therapeutic and educational benefits to prisoners able to participate in creative activities whilst in prison. See Alexandra Djurichkovic's article "Art in Prisons: A literature review of the philosophies and impacts of visual arts programs for correctional populations" (Working Paper No 3, UTS Shopfront Student Services, University of Technology Sydney, 2011).

⁶ See also *Corrective Services and Other Legislation Amendment Act 2009 (Qld)*.

The legislation defines 'prisoner's artwork' as "any visual art, performing art or literature made or produced by a prisoner while the prisoner is in a corrective services facility". In essence, the law sets out the Queensland government's position that prisoners are not to profit from the sale of artwork or other creative work while in prison. A prisoner may gift or donate artwork in certain circumstances, subject to the chief executive's approval. However, in either case, the prisoner will gain no pecuniary benefit from the artwork.⁷

Queensland, along with most other states and territories in Australia, provides meaningful employment to prisoners and remunerates prisoners for their work. However, Queensland is the only jurisdiction in which the prisons legislation specifically addresses prisoner artwork. It is disappointing to note that what was once the most progressive state in Australia in relation to prisoner artwork in 2007, had become, by 2009, the most restrictive.

However, it is worth noting that the Queensland legislation deals with *profit* from artwork rather than participation in art. As with most other states and territories, Queensland encourages prisoner participation in art and Queensland Corrective Services has even provided an information fact sheet to help prisoners understand their rights in relation to their artwork while incarcerated.⁸

The Queensland Corrective Services Procedure (**Procedure**) on the art and craft program for offenders⁹ goes to great lengths to avoid abuses of copyright and intellectual property rights generally. According to the Procedure, the copyright and intellectual property rights of art/craft work created by offenders remain with the offender, unless released by them through agreement. The Corrective Services website provides Appendices and Forms for this purpose, including an agreement between the 'Offender Artist' and Queensland Corrective Services, to be completed before the artwork is displayed. However, it is unclear whether the artist's permission will also be sought before being displayed for sale by electronic means on the QCS internet and intranet sites.¹⁰

The Procedure also covers moral rights of prisoners, stipulating that the creator has the right to be attributed for their work, not to have their work falsely attributed and not to have their work treated in a derogatory way. However, these provisions are in direct conflict with the provision in the Procedure for disposal of art or craftwork of discharged inmates, which states that, while prior to disposal of art/craft work all reasonable efforts must be made to contact the relevant

⁷ See *Corrections Services Act 2006* (Qld) ss 28B – 28F.

⁸ Queensland Corrective Services, Fact Sheet: Prisoner Artwork (2009): http://www.correctiveservices.qld.gov.au/About_Us/Legislation/Prisoner%20artwork_prisoners_2009_amend.pdf.

⁹ See Queensland Corrective Services, Procedure - Art and Craft Program for Offenders here http://www.correctiveservices.qld.gov.au/Resources/Procedures/Offender_Management/documents/ofmproprisartwork.shtml (viewed 1 December 2015) [Note - this link appears to be broken as at 19 Jan 2017].

¹⁰ See the webpage for the 'Prisoner art and craft online gallery' here http://www.correctiveservices.qld.gov.au/About_Us/The_Department/prisoner_art/index.shtml. [Note - subsection (e) of Section C: Conditions of the Sale of Art/Craft Work in the [Agreement between the Offender Artists and Queensland Corrective Services](#) dated 21 September 2009, includes an express acknowledgment by the "Offender" that "QCS will place images of my art/craft work on the intranet and/or internet to sell. QCS will endeavour to minimise any reproduction of these images which may breach copyright", while subsection (f) provides that "Should QCS wish to use my art/craft work in promotional materials, or for reproduction in QCS publications, they will obtain my approval in writing."]

prisoner, unclaimed art/craft work may be disposed of through the Public Trustee.¹¹

This disposal provision is also echoed in the legislation. Pursuant to section 28F of the *Corrective Services Act 2006* (Qld), a person holding a prisoner's artwork on behalf of the prisoner may dispose of the artwork if, after the prisoner is released from custody, the person has made a reasonable effort to locate the prisoner and the artwork is not collected by or for the prisoner within 6 months after the prisoner's release.

Legislation and Policy in the other states and territories

The other Australian states and territories have general legislative provisions regulating prisoner's 'work', 'recreation', 'remuneration', 'property' and 'goods', but none have specific legislative provisions relating to the creation, sale and transfer of artwork. Instead, the regulation of artwork is largely left to the interpretation and discretion of the respective prison authorities.

South Australia

For example, under the [Correctional Services Act 1982 \(SA\)](#), prisoners are remunerated for 'work' that they are directed to do, but this is unlikely to include artwork.¹² Any work that prisoners engage in other than work they are directed to do must be approved by the prison authorities.¹³ Art is evident in rehabilitation programs offered by the Department of Correctional Services, which include a 'Sexual Behaviour Clinic' or psychotherapeutic treatment program utilising art therapy.

In relation to prisoner's property, prisoners are not entitled to send, supply or give any goods to a third party without the permission of the prison authorities. If a prisoner fails, on being discharged from prison, to take any goods that have been stored on his or her behalf, the prison authority may deal with or dispose of the goods as it thinks fit.¹⁴ However, any proceeds from the sale of goods will (after deduction of the costs of storage and sale) be credited to the prisoner's account or refunded to the prisoner. Whilst goods are not specifically defined, it may be assumed that it would include all tangible property, including a prisoners' artwork.

Therefore, in South Australia, the ability of a prisoner to engage in creation of artwork and to dispose of it for money or otherwise, is purely at the discretion of prison authorities. The rights of South Australian prisoners in relation to artwork they create whilst incarcerated remain unclear. If relevant clarifying or conflicting policies and procedures exist they are not available on the Department of Corrective Services website.

Tasmania

Similar to Queensland, the Tasmanian Department of Justice is clearly keen to rehabilitate offenders, as evidenced in its plan entitled 'Breaking the Cycle – A Strategic Plan for Tasmanian Corrections, 2010-2020'.¹⁵ A background paper relied on in the development of the plan asserts that vocational

¹¹ See Queensland Corrective Services, [Procedure - Art and Craft Program for Offenders](#), parts 5, 6 and 19.

¹² Part 4, Division 6 of the *Correctional Services Act 1982* (SA), see ss 29 and 31.

¹³ *Ibid*, s 29(5).

¹⁴ *Corrective Services Act 1982* (SA) s 33A.

¹⁵ See http://www.justice.tas.gov.au/correctiveservices/breaking_the_cycle (viewed 1 December 2015).

and educational training programs are effective in breaking the cycle. Furthermore, according to the Tasmanian Department of Justice's website, the Integrated Offender Management (IOM) Unit is responsible for the provision of therapeutic, rehabilitation and reintegration services, sport and recreation, external service provider coordination, prisoner classification and placement, and the operation of prisoner case management and contract systems. The website also states that Sport and Recreation staff organise a range of highly successful sport and recreation activities, including exhibitions of prisoner art.

However, as in South Australia, there is no express legislative provision that deals with prisoner artwork in Tasmania. Rather, prisoners' work is regulated by the [Corrections Act 1997 \(Tas\)](#), which allows the prison authorities to set work for prisoners and entitles prisoners to be paid for such work at a rate determined by the prison authorities.¹⁶ A prisoner or detainee who performs work for which the prisoner or detainee volunteered is also entitled to be paid for that work.¹⁷ According to the Tasmanian Department of Justice's website, prisoners are also able to spend their earnings on 'hobbies'.

Payment is to be held on behalf of the prisoner and given to the prisoner upon the prisoner's release, unless earlier payment is otherwise regulated or ordered by a court.¹⁸

The Act does not specifically deal with ownership and sale of products manufactured or produced by the prisoner's work. However, section 90 entitles the prison authorities to make regulations for the purpose of the Act, including for the mode of sale and disposal of the products of prisoners' and detainees' work and the disposal of the proceeds of those sales and disposals.¹⁹ Furthermore, regulations can be made for the retention of prisoners' and detainees' personal property and the manner in which prisoners and detainees may deal with property so held in custody.²⁰ Regulations have been made for this purpose, providing for circumstances where the prison authority may dispose of the property in such a manner as the authority thinks fit.²¹

In relation to relevant policies, the management of Tasmanian prisons is further governed by 'standing orders' and 'standard operating procedures' but we were unable to find any relevant to prisoners' art or rehabilitation through art on the Tasmanian Department of Justice's website. Given the lack of regulatory guidance or policy, it is unclear whether any artwork can be produced by prisoners outside of the paid work context, and, if so, whether it is classified as the property of the prisoner to be sold and disposed of for the benefit of the prisoner, as contemplated by section 90(2)(l).

¹⁶ *Corrections Act 1997 (Tas)* ss 33 and 34(1).

¹⁷ *Corrections Act 1997 (Tas)* s 34(1A).

¹⁸ Pursuant to s34(3), a court may order, before a prisoner is released from prison, that the whole or any part of the money that the prisoner is entitled to be paid is to be paid towards the maintenance of the prisoner's dependants or in settlement of a judgment debt of that court.

¹⁹ *Corrections Act 1997 (Tas)* s 90(2)(l).

²⁰ *Corrections Act 1997 (Tas)* s 90(2)(j).

²¹ See for example *Corrections Regulations 2008*, regs 16-18, pertaining to the return/disposal of prisoner property. Any money received from the sale of property is to be paid into the Consolidated Fund: reg 17(6).

Australian Capital Territory

The [Corrections Management Act 2007 \(ACT\)](#) provides that Regulations may be made to deal with the kind of work, the place of work, the payment for work and the entitlement and accounting of prisoner payment.²²

While no relevant Regulations have been made, two relevant policies dealing with work and remuneration have been introduced, setting out the process by which prisoners are to be employed and remunerated.²³ Specifically, the prison authorities must ensure that prisoner employment is consistent with the 'Prisoner's Rehabilitation Plan'. The Rehabilitation Plan is not defined or set out, but a case management plan is referred to in the Act itself.²⁴ In light of the rehabilitation benefits of artwork, the broad scope of legislative provisions in the ACT is likely to include art-related or creative activities.

Remuneration rates for prisoners are based on levels of employment.²⁵ Prisoner employment includes participation in programmes as part of the Prisoner Rehabilitation Plan. A prisoner participating in art-related work as part of the Prisoner Rehabilitation Plan would presumably be paid according to such schedules.

Regulations can be made in relation to any payment 'or other return' to which prisoners are entitled for work done.²⁶ Although the legislation does not deal directly with prisoner artwork and its storage or sale, there is a policy dealing with prisoner property.²⁷ Under that policy, the prison authorities determine the type and quantity of property the prisoner is entitled to purchase and possess. The policy specifically lists art/craft materials as 'Recordable Property' held in storage, which is not additional to the limits of private property. Any property in excess of the limits is to be removed and a pick up is to be arranged within a set time period. If the property is not picked up it may be disposed of according to the [Uncollected Goods Act 1996 \(ACT\)](#). The policy does not prohibit the sale of property.

²² See s 83 of the *Corrections Management Act 2007 (ACT)*. Pursuant to s 14, policies and operating procedures are 'notifiable instruments' that may be introduced to facilitate the effective and efficient management of correctional services. Under s 71 a corrections policy or operating procedure may also make provision in relation to a detainee's property.

²³ See the *Corrections Management (Prisoner Employment) Policy 2009 (ACT)* and *Corrections Management (Prisoner Remuneration) Policy 2009 (ACT)*.

²⁴ Section 78 of the *Corrections Management Act 2007 (ACT)* sets out the scope of a 'case management plan' including, amongst the various matters in the plan, an item containing details of the academic, vocational and cultural training and education or training approved under s 52 (news and educational services). Section 52(2) allows the prison authorities to approve such education or training if it would provide suitable vocational skills, promote the prisoner's rehabilitation or reintegration into society or contribute to the prisoner's personal development.

²⁵ *Corrections Management (Prisoner Remuneration) Policy 2009 (ACT)*. The rates set out in the appendix range from \$0.50 per hour to \$1.67 per hour depending on the classification of entitlement. The maximum possible earnings for a 7 day (42 hour) work week is \$70.14.

²⁶ *Corrections Management Act 2007*, s 83.

²⁷ *Corrections Management (Prisoner Property) Policy 2009 (ACT)*.

Northern Territory

Under the [Correctional Services Act 2014 \(NT\)](#), prison authorities may require prisoners to work, for which prisoners must be paid at a rate set by the Commissioner, with their earnings held on trust.²⁸ Prisoners must not engage in any commercial activity without the Commissioner's written consent.²⁹

Prisoners may be allowed to engage in organised leisure time activities or participate in hobbies,³⁰ and the prison authority may authorise temporary leave from the correction facility for purposes considered appropriate, including education and training, employment, recreation, participation in community projects, and reintegration into the community.³¹

Under the repealed *Prisons (Correctional Services) Act (1980)*,³² articles made or produced by prisoners were the property of the Territory. If produced during working time and disposed of by sale, the proceeds were to be used for the benefit of the prisoners in general.³³ However, the proceeds of articles produced during leisure time and disposed of by sale, could be held on trust for the prisoner (after deduction of the value of the Territory supplied material used in the production).³⁴ Under the current Act and Regulations,³⁵ there is no mention of disposal of property created while undertaking hobbies or recreational activities in leisure time.

The Act contemplates acquisition of property on just terms and payment of compensation by the Territory for the acquisition of property.³⁵ This begs the question of whether this provision could be extended to prisoner property, including prisoner artwork created whilst in prison.

Pursuant to section 205 of the Act, the Commissioner may issue written directions in relation to a number of things including the internal management of correctional services. The Commissioner's Directions provide a formal mechanism for the issuing and clarification of operational policy and procedures. Arts Law is currently requesting further information from the Commissioner regarding the treatment of prisoner artwork in the Northern Territory. Arts Law will provide an update once any further information is available.

Western Australia

The Western Australian legislation is similar to the other states and territories in that it does not specifically deal with artwork. The [Prisons Act 1981 \(WA\)](#) provides for activity programs for the wellbeing and rehabilitation of prisoners, including opportunities for "work, leisure activities and recreation".³⁶ The [Prisons Regulations 1982 \(WA\)](#) provide for storage, transfer and disposal of

²⁸ *Correctional Services Act 2014 (NT)* ss 54, 55.

²⁹ *Correctional Services Act 2014 (NT)* s 56.

³⁰ *Correctional Services Regulations 2014 (NT)*, Schedule 2.

³¹ *Correctional Services Act 2014 (NT)* s 118.

³² Repealed by the *Correctional Services Act 2014 (NT)* and *Correctional Services Regulation 2014 (NT)* which came in effect on 9 September 2014.

³³ *Prisons (Correctional Services) Act (NT)* s 83(2).

³⁴ *Prisons (Correctional Services) Act (NT)* s 83(3).

³⁵ See s 203 of the *Correctional Services Act 2014 (NT)*.

³⁶ As well as opportunities for prisoners to "utilise their time in prison in a constructive and beneficial manner by means of educational and occupational training programs and other means of self-improvement": *Prisons Act 1981 (WA)* s 95(2)(f)-(g).

prisoner property,³⁷ which may also be released to a prisoner nominee.³⁸ The regulations also require able prisoners to work as directed but they are entitled to receive gratuities for work done.³⁹

However, in October 2008, shortly before the introduction of the restrictive amendment to Queensland's legislation, the Western Australian Department of Corrective Services introduced a comprehensive policy to govern all aspects of the production, display, sale and disposal of prisoner artwork.⁴⁰ Under Policy Directive 46 – Art Produced by Prisoners (**PD 46**), the Department “recognises the intellectual property held by the prisoner artist in respect to their produced work” and “agrees not to reproduce said work without express written permission from the artist”.⁴¹ All artwork produced in art classes with government materials becomes the property of the state but the prisoner can buy it back for the cost of the materials.⁴² If the artwork is produced without the use of government materials then the artwork is owned by the prisoner.⁴³ The proceeds of sale of the prisoner's artwork are for the benefit of the prisoner, subject to the deduction of an administration charge representing the cost of exhibition and sale.⁴⁴

Copyright implications of Policy Directive 46

There are, however, several aspects of PD 46 that are inconsistent with the intellectual property rights of prisoners, particularly those arising under the Copyright Act.

Prisoners are entitled to rely on the vesting of copyright and moral rights rules under the Copyright Act. In relation to copyright, prisoners are entitled to the same rights as other citizens to the extent that these rights do not conflict with legislative rules and regulations relating to their imprisonment. In particular, prisoners are entitled to own copyright in artwork they create and copyright ownership automatically vests in the author of the artwork, regardless of whether the materials used to make the work have been paid for by the prisoner.⁴⁵ The author of a work is the person who gave “expression” to an idea in material form, not the person who provided the materials necessary to create the work. While PD 46 provides that any prison art created using materials supplied by the relevant prison (that have not been purchased by the prisoner) will be considered the “property” of the Department, it is unclear whether this refers only to the property in the physical artwork, or also the intellectual property in the artwork, namely the copyright and moral rights. While section 2.2 (which provides that “the Department of Corrective Services recognises the intellectual property held by the prisoner artist in respect to their produced work”) and section 3 (which refers to the purchase of physical artwork by prisoners) of PD 46 suggest that PD 46 should be interpreted narrowly so that the copyright in the artwork is

³⁷ Prisons Regulations 1982 (WA), Part V, Division 1.

³⁸ Prisons Regulations 1982 (WA), Reg 36C.

³⁹ Prisons Regulations 1982 (WA), Reg 36C and Reg 45.

⁴⁰ Department of Corrective Services, Government of Western Australia - [Policy Directive 46 – Art Produced by Prisoners, Procedures](#).

⁴¹ Policy Directive 46 – Art Produced by Prisoners, Procedures, s 2.2.

⁴² Policy Directive 46 – Art Producer by Prisoners, Procedures, ss 2 and 3.

⁴³ Policy Directive 46 – Art Produced by Prisoners, Procedures, s 2.3.

⁴⁴ Policy Directive 46 – Art Produced by Prisoners, Procedures, ss 5.1.6 and 5.1.7.

⁴⁵ *Copyright Act 1968* (Cth), s32. Ownership will subsist in the author of an original work where that author is a “qualified person”. There is nothing in the Act which prevents prisoners from falling within this definition.

unaffected, it is not certain that this is in fact how PD 46 has been construed in practice.⁴⁶

Even if PD 46 has been interpreted by the Department to determine that intellectual property rights are deemed to vest in the prisoner, there is a lack of clarity in PD 46 as to how a prisoner artist's intellectual property rights will, in practice, be recognised by the Department. For example, while the Department has explicitly agreed to respect a prisoner artist's intellectual property rights by refraining from reproducing prison artwork without the artist's permission, there is no recognition of the economic rights granted by copyright law, including the ability of a prisoner to licence the work for a fee. In addition, even if the intellectual property rights vest in the prisoner, it is clear that a prisoner would face practical difficulties in exercising those rights without title to or physical possession of their work.

Furthermore, prisoners have moral rights relating to any works they produce,⁴⁷ including the right of attribution, the right against false attribution, and the right of integrity, or to not have work subjected to 'derogatory treatment', including destruction or disposal.⁴⁸ This is inconsistent with the terms of PD 46, which grants the Designated Superintendent the discretion to dispose of or recycle prison art,⁴⁹ and allows for the potential destruction of prison art in accordance with the *Prisons Regulations 1982*.⁵⁰

Accordingly, Arts Law is of the view that PD 46 is inconsistent with the intellectual property rights of prisoner artists, to the extent that it purports to assign rights of copyright or authorise breaches of moral rights in respect of artwork created by prisoners. Furthermore, the requirement of PD 46 that the Department is the owner of the physical property in "prison art" (as defined in [PD 46](#)) unless the prisoner has paid for/acquired the materials used in creating that prison art is inequitable and, as such, results in the erosion of the general rights of those who create an artwork while incarcerated in a prison.

Based on Arts Law's research, prisoners incarcerated in Western Australian prisons are largely either unaware of PD 46 or do not understand its impact on their rights relating to artwork created by them in prison. While the lack of clarity around artwork within the prison system is likely to be more widespread than WA, Arts Law objects in principle to a policy declaring that the physical artworks belong to the Department where the prisoner has not paid for the artworks in circumstances where:

- Prisoners are unaware of this policy;
- Prisoners are not routinely offered the option of being given the right to their artwork upon payment for materials; and
- The value added to the 'raw materials' by the creation of a finished artwork may substantially exceed the cost of those raw materials.

⁴⁶ For further discussion of PD 46, see Arts Law's letter to the Honourable Joe M Francis MLA, Minister for Corrective Services, dated 5/8/14, attached as Appendix A to this paper.

⁴⁷ Part IX of the *Copyright Act 1968* (Cth).

⁴⁸ Reg 37(1)(c) of the *Prison Regulations 1982* (WA) allows for the destruction or disposal of unclaimed prisoner property.

⁴⁹ Policy Directive 46 – Art Produced by Prisoners, Procedures - ss 3.2.

⁵⁰ Policy Directive 46 – Art Produced by Prisoners, Procedures - ss 4.1.

Arts Law has recommended the revision of PD 46 and the Minister for Corrective Services has informed us that PD 46 will be revised to address certain intellectual property concerns. At the date of circulation the revised Policy Directive was still pending.

Victoria

The situation is comparable in Victoria. The [Corrections Act 1986 \(Vic\)](#) and the [Corrections Regulations 2009 \(Vic\)](#) provide detailed conditions under which prisoners must work and sets out the remuneration they receive accordingly.⁵¹ Section 84G(1)(c) of the Act allows the Victorian government to carry on business for prison industries and in particular, to sell goods that are manufactured or produced in the course of business. It is unclear whether this provision is applicable to the production of art or craft objects, or if they fall within the definition of goods produced via prison industry. Prisoners are remunerated for work performed in prison industries and also for work performed in educational, treatment and rehabilitation programmes.⁵² It is unclear whether the Victorian government owns the material produced by prisoners, or whether the prisoners are considered employees.

The provisions relating to prison industries and the sale of goods produced by prisoners are supplemented by the Aboriginal Art Policy Model (**AAPM**), which was introduced in January 2016.⁵³ The Statewide Indigenous Arts in Prisons & Community (**SIAPC**) program, delivered by The Torch Project under the supervision of Corrections Victoria's Aboriginal Programs Unit, aims to reduce recidivism through vocational opportunities and connection to culture, identity and community.⁵⁴ The policy manifests the intention to increase participation in the arts industry, enhancing the SIAPC program's aims by allowing Aboriginal prisoners to sell their artwork while in custody.

The AAPM defines 'art content' as "paintings, drawings and sculpture (including the production of ceremonial dress)". In essence, the AAPM establishes that Aboriginal prisoners are permitted to create artwork for exhibition and sale in conjunction with The Torch project who will remain responsible for the non-financial elements of the display. Payments to prisoners following the sale of artworks are managed according to the Corrections Act and Corrections Regulations 2009 with remuneration held on trust for the benefit of the prisoner.⁵⁵ Prison staff (including Corrections Victoria staff and contractors) are prohibited from receiving donated artworks from prisoners but may seek approval to purchase artwork for their personal possession once the artwork has been made available for sale to the general public. In addition, "prisoners may be permitted to donate or loan artwork to organisations (including Corrections Victoria) either on a permanent basis or for a defined period or purpose".

The AAPM states that prisoners participating in the program who intend to sell their work from the outset are required to purchase materials from the Statewide Indigenous Art Officer (**SIAO**).

⁵¹ See the *Corrections Act 1986*, s 84H, and the *Corrections Regulations 2009*, Division 11. The *Corrections Regulations 2009*, also deal with prisoner's money and prisoner's property, see Division 9 and Division 10, regs 28-39. Essentially these provisions deal with the prisoner's trust accounts into which their entitlements and other transfers are to be held.

⁵² *Corrections Regulations, 2009 (Vic)*, reg 40(1)(b).

⁵³ Department of Justice & Regulation - Corrections Victoria – [Aboriginal Art Policy Model](#)

⁵⁴ See The Torch Project website: <http://thetorch.org.au/index.html>

⁵⁵ *Corrections Regulations 2009, (Vic)*, reg 31.

However recent discussions with The Torch indicate that this is no longer the current practice. Arts Law understands that the AAPM will be updated to reflect the current practice of the prison or TAFE providing prisoners with specialised materials, at no cost⁵⁶. Alternatively, prisoners with limited funds have the option to use art materials provided by Corrections Victoria and to pay for the materials after the artwork has been sold. In Arts Law's view, this is an equitable policy that allows prisoner artists to benefit from any value added to the raw materials through the creation of the artwork.

With regard to ownership of artworks, the AAPM provides that before an artwork is released for exhibition or sale "prisoners will be required to submit an artwork verification form, which will be witnessed by the SIAO, who is familiar with their work". The SIAO must then attest that the artwork is the work of the prisoner attributed as creator of the work. It is Arts Law's position that this may be a helpful step in preserving a prisoner artist's moral right to be attributed as the author of a work in the prison environment.

However, the operational framework of the policy raises concerns in relation to the intellectual property rights of prisoners. Although the policy does not specify that artworks created using materials belonging to the SIAPC remain the property of Corrections Victoria, the delineation of 'art materials' raises concerns in relation to prisoners' intellectual property rights and authorship of the work, as discussed previously in relation to PD 46.

In addition, the policy is silent on prisoner's rights in relation to copyright, moral rights and intellectual property rights generally in the artwork and applies only to artwork created by Aboriginal prisoners. However The Torch also recently informed Arts Law that the forms used in conjunction with the AAPM clearly state that copyright and moral rights stay with the artist⁵⁷. It is Arts Law's position that there is a need for the AAPM to be revised so it is evident that the policy applies to all prisoners, and that it includes a positive acknowledgment of the copyright and moral rights of prisoner artists.

New South Wales

The [Crimes \(Administration of Sentences\) Act 1999 \(NSW\)](#) and the corresponding [Crimes \(Administration of Sentences\) Regulation 2014 \(NSW\)](#) regulate prisoner's work and remuneration in New South Wales. The prison authority may make an order directing a convicted inmate to work and prison authorities may make payments to inmates for any reason, including work.⁵⁸ Any payment for

⁵⁶ On 7 July 2017, Kent Morris, CEO of The Torch informed Arts Law that this is no longer the current practice and that the AAPM will be updated to reflect the current practice of by the prison or TAFE providing prisoners with specialised materials, at no cost.

⁵⁷ Although the AAPM states that "The Torch and the Department of Justice and Regulation will adhere to copyright guidelines when treating with prisoner artwork" (at page 12), the content of such copyright guidelines is not available. However Mr Morris also informed Arts Law that the forms used in conjunction with the AAPM clearly state that copyright and moral rights stay with the artist.

⁵⁸ *Crimes (Administration of Sentences) Act 1999 (NSW)*, ss 6 and 7 and *Crimes (Administration of Sentences) Regulation 2014 (NSW)*, reg 175.

work done does not constitute employment of or a contract of service with, the inmate. Therefore, an inmate who undertakes paid work is not considered a worker or employee by law.⁵⁹

Whilst there does not appear to be a legislative entitlement to remuneration, section 8.2 of the Corrective Services Industries (CSI) Policy Manual relates to the 'Inmates Wages System'. Prisoners who are engaged in corrective services industries are to be remunerated for such work.

The provisions relating to prisoner work, education and training of prisoners are also supplemented by policies. One policy establishes an Operations Procedures Manual, section 5.5 of which contains a detailed procedure dealing with arts and crafts programs.⁶⁰ It also contains other provisions dealing with prisoner private property and prisoner earnings, employment and expenditure, reinforcing the purpose of the arts and crafts program in developing the prisoner's 'creative, artistic, and vocational skills for their successful return into the community'.⁶¹ This policy highlights the need for inmates to participate in education, arts, craft and hobbies as part of their rehabilitation and eventual reintegration into society.

The Girrawaa and Nurra Warra Umer Creative Work Centres were set up for Indigenous inmates to produce a range of art and craft items for sale. According to the Corrective Services Industries website,⁶² the Centres are also for the production of art and craft materials 'on demand', or according to specific commercial requirements. The website also suggests that established Indigenous artists visit the Centres to conduct art classes and talk to inmates. The Centres were designed to provide Indigenous inmates with 'cultural and vocational work place and business management skills',⁶³ with the aim being to promote economic independence and successful rehabilitation on release. Any revenue from the sale of artwork is used to remunerate Indigenous artists and fund the offender development programs.

When an inmate intends to sell their artwork they are encouraged to purchase the materials prior to creating the artwork.⁶⁴ When an inmate is engaged in an art and craft program solely for educational purposes, the correction facility will supply the materials.⁶⁵ Payments to inmates within arts and crafts programs must be made in accordance with the Departmental Arts and Crafts policy.⁶⁶ Section 5.5.1.8 of the Operations Procedures Manual defines the schedule for distribution of returns from the sale of art and craft. While there are various factors that must be considered, the inmate is entitled to receive the greatest percentage after dissection of the proceeds. This can be up to 83.5% depending on the circumstances.⁶⁷ Inmates are permitted and encouraged to make a gift of or

⁵⁹ *Crimes (Administration of Sentences) Act 1999* (NSW), s 7(3).

⁶⁰ Sections 5.2 [Education Programs, Art, Craft and Hobby Materials](#) and 5.5 [Arts and Crafts](#) of the Operations Procedures Manual deal with art materials and art and craft sales, exhibitions, disposal, revenue entitlement and tax obligations. Prisoners are entitled to gift their artwork (subject to approval) to a friend or relative and to sell their artwork through corrective services outlets or exhibitions. If artwork is sold the prisoner is entitled to a substantial portion of the sale revenue.

⁶¹ *Ibid*, s 5.5. See also s 4 [Inmate Earnings and Expenditure](#) and s 9.3.6 [Inmate Private Property – Educational, art, craft and hobby materials](#).

⁶² See Corrective Service Industries website: <http://www.csi.nsw.gov.au/Pages/csi-services/csi-services.aspx> (viewed 1 December 2015).

a. ⁶³ See also part 1.11 [Indigenous Inmates Employment Policy](#) of the [CSI Policy Manual](#).

⁶⁴ Operations Procedures Manual, s 5.5.1.2 [Supply of Raw Materials](#)

⁶⁵ *Ibid*.

⁶⁶ CSI Policy Manual, part 8.2.5.x) [Inmates Wages System](#)

⁶⁷ Operations Procedures Manual, s 5.5.1.8 [Percentage of Return](#).

donate their artwork, subject to the General Manager's approval.⁶⁸ However, in either case, the prisoner will gain no pecuniary benefit from the artwork.

Regarding ownership of the art and craft articles created by inmates, section 5.5.1.13 of the Operations Procedures Manual states that "art and craft articles made by inmates from their own materials are to be considered private property." This begs the question whether the correction facility is of the belief that it owns artwork created by inmates as part of an art and craft program where the correction facility supplies the materials.

However, as previously discussed in relation to PD 46 in Western Australia, prisoners are entitled to rely on the vesting of copyright and moral rights rules under the Copyright Act. Under these rules, intellectual property rights will vest in the relevant prisoner artist as an "author" of an artwork, regardless of whether or not a prisoner has created the artwork from their own materials. Copyright may only be transferred from the artist to the Department by a document signed by the artist. As in Western Australia, it is not clear whether such assignments in writing are obtained; regardless, it is Arts Law's position that the vesting of the copyright in a correction facility simply based on the fact that the materials are funded by the facility is inequitable.

In addition, as is common protocol among corrections facilities in the other states and territories, unclaimed prisoner property (presumably including unsold artwork) may be disposed of at the correctional centre's discretion, and any proceeds of sale in relation to prisoner property are to be held as unclaimed money by the Commissioner.⁶⁹ Again, as discussed in relation to PD 46 in Western Australia, this provision is in direct breach of the moral rights of the prisoner artists and the provisions of the Copyright Act, which provide the "author" of a work (in this case, the relevant prisoner artist) with the right of integrity, or to not have work subjected to 'derogatory treatment', including destruction or disposal.⁷⁰

Summary of law and policy

In summary, only four states specifically deal with the extent to which prisoners can engage in art-related work, create artwork and sell such work. Queensland encourages prisoners to engage in art and has specifically dealt with the sale of artwork in its corrections legislation, prohibiting prisoners from selling their artwork while in prison. Western Australia, New South Wales and Victoria (to a certain extent) specifically deal with prisoner artwork in their policies and supporting documentation, permitting prisoners to exhibit and sell their artwork, and benefit from the revenue generated. However, further review of policy is needed in these and other states and territories, in order to address the intellectual property rights of prisoners. The other Australian states and territories have general legislative provisions regulating prisoner's work and remuneration but none have specific legislative provisions relating to the creation, sale and transfer of artwork.

It seems clear that, to varying degrees, a prisoner will be able or even encouraged, to engage in art-related work in all states and territories. However, ownership and reproduction of the resulting

⁶⁸ Ibid, s5.5.1.11 [Articles sent out from centres](#).

⁶⁹ Operations Procedures Manual, s 11.3.4 [Collection of Personal Property](#) and *Crimes (Administration of Sentences) Act 1999* (NSW), s 76.

⁷⁰ Part IX of the *Copyright Act 1968* (Cth).

artwork and the rights around the sale or disposal of such work is less clear. This is particularly problematic given the prevalence of public exhibitions of prisoner artwork.

Copyright and moral rights in prisoner artwork across states and territories

To the extent that the prisoner is clearly not an employee of the State/Crown at the time of creating the work (such as in New South Wales), the prisoner will most likely be the “author” of the work and therefore the first owner of copyright in the work under the Copyright Act despite residing in a correctional facility.

Where there are specific provisions made for prisoner art and the associated copyright and moral rights in that artwork, policy and procedures are often out of step with reality and the day to day practice of dealing with prisoner artworks in corrections facilities. In some cases (as we have seen with the example of the Western Australian PD 46 above), the policies and procedures themselves threaten to contradict basic tenets of federal intellectual property law.

From an intellectual property perspective, all prisoners are entitled to the same rights as other Australian citizens to the extent that these rights are consistent with the legislative rules and regulations regarding their imprisonment. This includes rights arising under the Copyright Act. Therefore, notwithstanding imprisonment, prisoner artists are entitled to:

- rely on the vesting of copyright and moral rights rules under the Copyright Act;
- own copyright in an original artwork that the prisoner has created; and
- their moral rights in respect of any original artwork they create.

It is not always clear whether prison authorities seek the artists’ permission to use work, or if steps are taken to obtain a formal licence or assignment of rights in artwork. For example, it has come to Arts Law’s attention, through consultation with clients, that prisoner artwork is regularly used by prison authorities without the explicit permission or consent of prisoners.

CASE STUDY

Whilst in prison, PV created a painting as part of a rehabilitation program. In return for agreeing to allow the prison service to hang his painting in a recreation area of the prison, PV was to receive \$120 worth of “buy-ups” at the prison shop. PV never received the “buy-ups”. At a later date, PV saw his painting, without accreditation, reproduced on a poster advertising the rehabilitation program. PV never gave permission for his painting to be reproduced in this way.

OUTCOME

With the assistance of a law firm acting pro bono, Arts Law took up PV’s matter with the prison service and a settlement was reached whereby PV received an appropriate amount of compensation for the infringements of his copyright and moral rights in the painting he created whilst in prison.

Whilst copyright ownership may be a complex question, generally speaking, a person who wishes to use all or a “substantial part” of an artistic work in any of the ways reserved to the copyright owner will generally need permission from the copyright owner, unless copyright has expired or a special exception applies. Even where a special exception applies, the artist will still need to be attributed. Further, even in circumstances where the creator of a work is not the copyright owner, it is still best practice to seek permission from the creator of a work to deal with a work, as that creator will still retain moral rights under the Copyright Act, including a right to attribution and to not have their work treated in a derogatory manner.

Where ownership is unclear, the Copyright Act does not allow use of copyright material without permission merely because the copyright owner cannot be identified or contacted. Furthermore, if copyright material is used without permission, ‘good faith notices’ will not be sufficient to avoid legal liability. Online slideshows and sale of prisoner art is becoming increasingly popular amongst Australian corrections facilities, and Arts Law is concerned about the infringement of intellectual property rights where the law and policy on prisoner artwork is not clear or adequate. In recent correspondence with the Northern Territory Department of Correctional Services, Arts Law sought to clarify the aims of a particular art program and offer assistance to develop a best practice framework for any potential reproduction of the artwork created. We were informed that the Department of Correctional Services was not contemplating commercial reproduction, but rather the artwork was created for sale at the annual “Behind the wire” exhibition, the sale proceeds of which are paid to the respective prisoners less exhibition costs.

Legislative provisions and policies related to the disposal of artwork created by prisoners at the discretion of prison authorities also raise moral rights concerns. For example, the Queensland legislative provision for disposal of artwork permits unclaimed art/craft work to be disposed of through the Public Trustee, a provision echoed across the other states and territories.⁷¹ As previously discussed, despite the perceived practicality of such disposal provisions, this legislative provision is not sufficient to extinguish the prisoner’s moral rights in the artwork, and destruction or ‘disposal’ of artwork will contravene the artist’s moral right not to have their work treated in derogatory way. Whilst the very nature of a prison requires explicit, restrictive rules around prisoner property, each time the law or policy in a state or territory allows for goods to be disposed of at the discretion of the prison authority, the same moral rights issues will arise.

Arts Law also has particular concerns in relation to artwork created by Aboriginal prisoners that embodies traditional cultural knowledge and/or sacred material, which may also raise issues of Indigenous Cultural and Intellectual Property (ICIP). Dealings with artwork embodying ICIP will have an impact not only on the relevant Aboriginal prisoner artist, but their community as a whole. Arts Law is particularly concerned that policies and procedures relating to prisoner art specifically provide

⁷¹ For example, in South Australia, if a prisoner fails, on being discharged from prison, to take any goods that have been stored on his or her behalf, the prison authority may deal with or dispose of the goods as it thinks fit: *Corrective Services Act 1982 (SA)* s 33A. In the ACT, the *Corrections Management (Prisoner Property) Policy 2009 (ACT)* allows for excess property (including artwork) to be disposed of according to the *Uncollected Goods Act 1996 (ACT)*.

for the ICIP of artwork created by Aboriginal prisoners to be respected and that ICIP requirements are complied with as best practice.⁷²

Exhibitions of prisoner artwork – contradictions within the system

The competing policy tensions for prison authorities between retribution and punishment on the one hand and empowerment and rehabilitation on the other hand is highlighted by the array of successful exhibitions and sales of prisoner artworks. Some examples include Fremantle Prison's 'From the Inside: Prisoner Art' exhibition examining the history of prison art and showcasing the work of both current and former inmates in Western Australia;⁷³ 'Behind the Wire', an annual exhibition by prisoners at Correctional Centres in the Northern Territory;⁷⁴ and Prison Fellowship Australia's 'Art from Inside', an annual competition and exhibition encouraging creative expression from current and former inmates and facilitating the sale of artworks on behalf of artists. Prison Fellowship NSW/ACT are now also facilitating 'Art from Inside NSW/ACT Gallery', an online exhibition of art from current and past exhibitions.⁷⁵ In addition, the Torch Indigenous Artists in Prison program supports Indigenous artists who are or who have recently been incarcerated in a correctional facility in Victoria. The annual CONFINED exhibition provides a forum for incarcerated artists to exhibit their work and supports post-release pathways giving artists who have been incarcerated opportunities to contribute to the preparation and promotion of the event and promotes ongoing skills development.

The Queensland Corrective Services art and craft program procedure provides for exhibitions of prisoner artwork, including online. The works can be purchased through Queensland Corrective Services via an online gallery, and proceeds are donated to approved charities.⁷⁶ Where a prisoner transfers artwork to the State, the procedure provides for the contribution of artwork to Queensland Corrective Services for sale to benefit nominated charities.⁷⁷

It appears that any artwork may be exhibited for the purpose of competing in authorised competitions. Although prisoners are not to profit from their artwork through sale, the Queensland Corrective Services art and craft program procedure envisages that, in some circumstances, prizes awarded from registered competitions are passed on to prisoners.⁷⁸ The procedure allows prisoners to elect (assuming the prize is in monetary form) to use the prizes to purchase art materials, donate to worthy causes, transfer to an approved recipient or to deposit the prize in their trust account.⁷⁹

Lack of clarity around prisoner art

⁷² For more information on ICIP, please refer to Arts Law, *Indigenous Cultural & Intellectual Property* (2011), Artists in the Black <http://www.artslaw.com.au/images/uploads/aitb/AITB_information_sheet_-_Indigenous_cultural_and_intellectual_property_ICIP_2.pdf>.

⁷³ 'From the Inside: Prisoner Art' exhibition:

<http://www.fremantleprison.com.au/whatson/Pages/CurrentExhibition.aspx>

⁷⁴ 'Behind the wire' exhibition media release: <http://www.newsroom.nt.gov.au/mediaRelease/9758>

⁷⁵ See 'Art from the Inside' exhibition http://www.prisonfellowship.org.au/artfrominside_145_1.html

⁷⁶ See Queensland Corrective Services Prisoner art and craft online gallery:

http://www.correctiveservices.qld.gov.au/About_Us/The_Department/prisoner_art/index.shtml

⁷⁷ Queensland Corrective Services, [Procedure – Art and Craft Program for Offenders Part A 12](#).

⁷⁸ Queensland Corrective Services, [Procedure – Art and Craft Program for Offenders Part A 8](#); See also [Corrective Services Regulation 2006 \(Qld\)](#), s 20.

⁷⁹ Queensland Government, [Procedure – Art and Craft Program for Offenders, Part A 8](#).

The dearth of legislation and clear policy on prisoner art is at odds with the notion that vocational education and training and other opportunities for self-improvement are necessary and beneficial for the rehabilitation of prisoners and their reintegration into society.⁸⁰ The benefits of creative expression in prisons are largely undisputed. Most governments have openly acknowledged such benefits and encouraged prisoner participation in art programs to develop and foster creativity. Even in Queensland, the QCS Prisoner Artwork Program survived the 2008 legislative changes.⁸¹

The [Standard Guidelines for Corrections in Australia](#)⁸² have been endorsed by all state and territory prison authorities and are intended to state unified goals. While all states and territories have made progress in establishing rehabilitation programs⁸³ not all of them have embraced art as one way of contributing to the achievement of this.

Ultimately, it is not enough for prison authorities to have reached a consensus about rehabilitation goals and to acknowledge the role art has to play in successful rehabilitation programs. Arts Law believes that prison policy and legislation needs to specifically recognise the role of art in prison, and encourage prisoners, while in prison, to actively participate in the creation and exhibition of artwork. Perhaps more contentiously, Arts Law also believes that prisoners should be taught about the commercial aspects of the arts business and be allowed to sell and benefit from the sale of the artwork they create in prisons.

Arts Law's position – benefiting from art

Rehabilitation and skills development

Arts Law believes that prisoners should be encouraged to develop new skills and knowledge by creating art whilst in prison. Art programs provide prisoners with an opportunity for creative expression in an otherwise very restrictive environment. Facilitating the creative process in prisons will provide prisoners with important therapeutic benefits, increasing prisoners' self-esteem and positive attitudes. Learning about art and developing creative skills is also an attractive and viable alternative to prisoners without a background of academic learning.

The sale of artwork while prisoners are in prison can counter the stigma attached to being in prison. The status of "artist" fosters favourable self-identification and helps prisoners to be recognised and included by the outside community, potentially opening doors to creative careers upon release.⁸⁴ As

⁸⁰ This is evidenced in a 2004 document establishing '[Standard Guidelines for Corrections in Australia](#)' setting out guiding principles in the management and rehabilitation of prisoners.

⁸¹ *Corrective Services and Other Legislations Amendment Bill (No 2) 2008* (Qld); Explanatory Notes; Second Reading Speech, 25 November 2008, 3676-3678.

⁸² Australian Institute of Criminology, *Standard Guidelines for Correction in Australia* (2012), Corrections standards and guidelines <http://www.aic.gov.au/media_library/aic/research/corrections/standards/aust-stand_2012.pdf>

⁸³ See Karen Heseltine, Andrew Day & Rick Sarre's research and public policy study, 'Prison-based correctional offender rehabilitation programs: The 2009 national picture in Australia, Australian Institute of Criminology, 2011.' <http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp112.html> (viewed 1 December 2015).

⁸⁴ There have been instances, especially within the Aboriginal community, where prisoners have continued to create art after release and have gained popularity and notoriety as a professional artist as a result. One example is the Syron Collection, painted by Gordon Syron over many years in prison and after release. See the broadcast on this in an ABC radio program on 15 March 2013: <http://www.abc.net.au/worldtoday/content/2013/s3716379.htm>.

Lee Michael Johnson put it in his article 'A Place for Art in Prison', the sale of artwork gives prisoners the chance to engage in "productive exchanges with the community before and after release".⁸⁵ The sale of prisoners' artwork as a form of indirect communication with the public, can allow prisoners to feel less alienated and more connected to the society to which they will ultimately rejoin. Where the voices of prisoners are often ignored or excluded from social discourse, the act of expression through the sale of prisoners' artwork is a signal to the community that prisoners are still a part of the conversation.⁸⁶

By their very nature, prisons provide an environment that is unlikely to prepare prisoners to financially and independently support themselves when they are released from prison. The retention of a small part of the prisoner's prison earnings to defray the costs of reintegration upon release is one way of dealing with this problem. Another way would be to nurture creative talent and encourage the development of creative skills, enabling prisoners to establish new career paths.

For some prisoners at least, a connection with the arts industry while in prison will provide them with a key to rehabilitation and reintegration into society, regardless of whether they can earn an income from their art upon release. It is therefore important that prisoners with an interest in art also develop an understanding of how the art industry works.

Arts Law believes that arts professionals should ideally be used to provide art education to prisoners, not only with a focus on art practice / technical skills, but also with an education on how the arts industry works. This will enable prisoners to properly deal with the art world upon release and develop business skills so they are less likely to be exploited.

Financial gain

Arts Law believes that the proceeds of the sale of prisoner artwork should benefit the prisoners who create the artwork. Prisoners have a right to fair compensation for their creative endeavours and should be able to sell their art and derive benefit from its sale.

As a start, Arts Law proposes that a model similar to the model used in Western Australia and New South Wales be facilitated in Queensland. After the deduction of amounts representing the cost of materials, administration, exhibition and sale, the balance of the proceeds of the sale of artwork should be made available to the prisoners themselves. Alternative and equitable arrangements could be considered so that the balance could, for example, be allocated as follows: (i) reinvested in art supplies; (ii) a predetermined percentage of proceeds over a certain value, perhaps calculated on a sliding scale, could be donated to the prisoners chosen charitable organisations; (iii) if a prisoner is required to make restitution orders then they could use the profits for this purpose; and (iv) some of the proceeds (if above the maximum allowable in the prisoners weekly personal accounts) could be put into the prisoners trust account for controlled use by the prisoner, their family or on release from prison.

⁸⁵ Lee Michael Johnson, 'A Place for Art in Prison: Art as A Tool for Rehabilitation and Management' (2008) 5 (2) *Southwest Journal of Criminal Justice* 100, 107.

⁸⁶ Alexandra Djurichkovic, 'Art in Prisons: A literature review of the philosophies and impacts of visual arts programs for correctional populations' (Working Paper No 3, UTS Shopfront Student Services, University of Technology Sydney, 2011).

Conclusion

To a greater or lesser extent, legislation and prisons policies across Australia give prison authorities the discretionary powers to determine whether or not prisoners engage in art and art-related activity, whether or not to facilitate the sale of the artwork, whether or not to allow prisoners to own or store their artwork, and whether or not to allow prisoners to benefit from the sale of their artwork. The ambiguous legal situation and apparent mixed messages are compounded by general confusion and lack of awareness amongst the prison population. In some cases this is due to a lack of clear information.

Given the far reaching impact that art and art-related activities can have on prisoner wellbeing and rehabilitation upon release, this threat to the ability of prisoners in Australia to create and engage with art in a meaningful way is a concerning one. Arts Law advocates amendments to prison policy and legislation to specifically recognise the role of art in prison and encourage prisoners to actively participate in the creation and exhibition of artwork, while also respecting the prisoner's copyright and moral rights in such artwork.

What's next?

Arts Law would appreciate feedback from stakeholders in relation to this paper. We would also like your views on the need to further progress this issue. Please email any comments to advocacy@artslaw.com.au.

Appendix A

Arts Law letter to the Honourable Joe M. Francis MLA, Minister for Corrective Services WA

Honourable Joe M. Francis MLA
Minister for Corrective Services
10th Floor, London House
216 St Georges Terrace,
PERTH WA 6000

By e-Mail: Minister.Francis@dpc.wa.gov.au

Dear Minister

SUBMISSION REGARDING POLICY DIRECTIVE 46: ART PRODUCED BY PRISONERS -ISSUED BY THE DEPARTMENT OF CORRECTIVE SERVICES IN WESTERN AUSTRALIA

The Arts Law Centre of Australia (Arts Law) requests the Minister to consider the issues set out in this letter relating to the ownership of, and dealing with, the artworks made by prisoners while incarcerated in prison in Western Australia.

Arts Law is the national community legal centre for the arts, a not-for-profit company limited by guarantee. It provides free or low cost specialised legal and business advice, education and resources on a wide range of arts related legal and business matters, including but not limited to contracts, copyright, moral rights, performers rights, trademarks, trade practices, debt recovery, employment, privacy, business structures, defamation, insurance, censorship, employment and taxation to Australian artists and arts organisations across all art forms. We lobby and advocate on arts issues affecting Australia's cultural sector.

A particular focus for our advice and advocacy is Australia's Aboriginal and Torres Strait Islander artistic community. In 2004, with seed funding from the Australia Council, Arts Law established the Artists in the Black (AITB) service. AITB is a tailor-made service that provides culturally appropriate legal advice services, information and professional development to Indigenous artists and their organisations and communities. AITB legal services now account for over 25% of Arts Law's overall advice. The issues raised in this letter while generally applicable to all artists incarcerated in Western Australian prisons are particularly relevant to Aboriginal prisoners who are often particularly

vulnerable due to low literacy levels and who are highly likely to engage in artistic activities in prison as a consequence of a tradition of cultural and artistic expression.

Arts Law refers to "Policy Directive 46: Art Produced by Prisoners" (Policy 46) issued by the Department of Corrective Services in Western Australia (Department).

In summary, based on our research, Arts Law is of the view that:

- a) people incarcerated in Western Australian prisons are largely either unaware of Policy 46 or do not understand its impact on their rights relating to artwork created by them in prison;
- b) the requirement of Policy 46 that the Department is the owner of the physical property in "prison art" (as defined in Policy 46) unless the prisoner has paid for/acquired the materials used in creating that prison art is inequitable and, as such, results in the erosion of the general rights of those who create an artwork while incarcerated in a prison (prisoner artists);
- c) Policy 46 is inconsistent with the intellectual property rights of prisoner artists, in particular those arising under the Copyright Act 1968 (Cth) (Copyright Act) and is not effective to assign rights of copyright or authorize breaches of moral rights in respect of artwork created by prisoners. This opinion is also in accordance with the attached advice received from DLA Piper dated 3 June 2014 (DLA Piper advice).

For the reasons outlined below, Arts Law submits that Policy 46 should be reviewed and amended to (i) reflect the existing Federal law in respect of intellectual property rights (particularly those rights of a prisoner artist that arise under the Copyright Act) and (ii) recognise general prisoner artist rights, reducing the unfair effect of Policy 46 on the prisoner artist.

KEY ASPECTS OF POLICY 46 RELATING TO THE INTELLECTUAL PROPERTY RIGHTS AND GENERAL RIGHTS OF PRISONERS

1. Prisoners in Western Australia have the ability to create artworks (ie prison art) while in prison, either during specifically sanctioned art classes or in recreational time. Policy 46 recognizes this and sets out the Department's view of ownership of such artworks.
2. In purporting to regulate the creation and ownership of prison art, Policy 46 provides that:
 - 2.1. the Department "recognises the intellectual property held by the prisoner artist in respect to their produced work" and will "uphold due process in this regard" ("procedure" section 2.2 and "policy" section 3 of Policy 46);
 - 2.2. artworks produced by prisoner artists while in prison during "recreational time or during art classes" will be "considered the property" of the Department where prisoner artists have

- used materials provided by the prison that have not been purchased by the prisoner artist (sections 2.1 and 2.4 "procedures" of Policy 46);
- 2.3. artworks produced by prisoner artists while in prison are owned by prisoner artists where those prisoner artists have purchased the materials used in making those artworks (section 2.3 "procedures" of Policy 46);
 - 2.4. all artworks created by prisoner artists while in prison "may be disposed of or recycled at the discretion" of the relevant prison Superintendent (section 3.2 "procedures" of Policy 46); and
 - 2.5. all artworks created by prisoner artists while in prison and "owned" by the relevant prisoner artist "may be stored, signed out or destroyed" in line with relevant Prisons Regulations and "Policy Directive 42 - Prisoner Property" (section 4.1 "procedures" of Policy 46).
3. Through our Artists in the Black service, it has come to our attention that some Aboriginal prisoners in Western Australia are unaware or confused about their rights in respect of artwork created in prison. Some are unaware that they could take ownership of an artwork by paying for the materials; some believe they have no right to withhold permission when a prison authority wishes to reproduce their prison artwork or that they will be disadvantaged (treated less favourably) if they object to such use of their artwork; and some are unaware generally that they have any rights in relation to prison artwork let alone that these rights are affected by Policy 46. While these issues have come to our attention in the context of Aboriginal prisoners we assume that they are likely to be applicable to the prison population generally. However, we are particularly concerned at the apparent lack of understanding in the Aboriginal prison population given anecdotal evidence suggesting that prison art classes are particularly popular with Aboriginal prisoners, the issues of Indigenous Cultural Intellectual Property related to the creative and artistic expression of Aboriginal language groups, and the relative vulnerability and disadvantage of Aboriginal artists.

THE RIGHTS ARISING UNDER THE COPYRIGHT ACT RELEVANT TO THE CREATION OF PRISON ART

4. From an intellectual property law perspective, all prisoners are entitled to the same rights as other Australian citizens to the extent that these rights are consistent with the legislative rules and regulations regarding their imprisonment. This includes rights arising under the Federal Copyright Act. Therefore, notwithstanding imprisonment, prisoner artists are entitled to:
 - 4.1. rely on the vesting of copyright and moral rights rules under the Copyright Act;
 - 4.2. own copyright in an original artwork that the prisoner has created; and
 - 4.3. their moral rights in respect of any original artwork they create.

5. In considering these intellectual property rights and applying them to the context of the provisions of Policy 46, it is clear that the operation of Policy 46 infringes on the prisoner artist's intellectual property rights in respect of the prison art they create and are also unduly onerous and inequitable.
6. Below we address these intellectual property rights and the manner in which the application of Policy 46 infringes such rights. We also refer you to the attached DLA Piper advice for a legal analysis of these issues.

The Application of Copyright Principles to the prison art

7. Under Section 32 of the Copyright Act, the copyright in an original visual artwork is owned by the 'author' where that author is a "qualified person". There is nothing under the Copyright Act which prevents prisoner artists from falling within the definition of "qualified person" (unless any such prisoner artists are not Australian citizens or persons resident in Australia).
8. The author of a visual artwork is the person who gave "expression" to the idea in a material form – namely the artist. This is so even if that expression was facilitated through an art class or workshop. A person who merely provides advice, ideas, measurements, plans, guidance or the materials necessary to create the work will not be the author of a work (and thus will generally not be the "owner" of the copyright in the work with some exceptions not relevant here).
9. Furthermore, the "authors" of the prison art (ie the prisoner artists) will also have moral rights (which cannot be transferred or waived) in respect of that prison art (as these arise and vest automatically in the "author" of a work in which copyright subsists).
10. When Policy 46 provides that any prison art created using materials supplied by the relevant prison (that have not been purchased by the prisoner) will be considered to be the "property" of the Department (sections 2.1 and 2.4 "procedures" of Policy 46), there is an ambiguity as to whether this means merely the property in the physical artwork or also the intellectual property in the artwork, namely the copyright and moral rights. Section 2.2 and section 3 of Policy 46 would suggest this aspect of Policy 46 should be interpreted narrowly so as not to affect copyright; however it appears that this may not be the case in practice. To the extent that prisons may have reproduced images of prisoner artwork without seeking the artists' permission, it appears that Policy 46 has been interpreted to give the Department ownership both over the actual artwork and the intellectual property in it.
11. If so, this position fails to recognise (and in fact infringes) the intellectual property rights of the relevant prisoner artist as the question whether or not a prisoner has paid for materials used to

produce an artwork (for example, a blank canvass) cannot determine the ownership of the intellectual property rights which vest in the prisoner artist on and from creation. As a matter of law, copyright in an artwork can only be transferred from an artist to the Department by a document signed by the artist. It is not clear from Policy 46 or our enquiries whether or not such written assignments are obtained; however even if this was the practice in Western Australia, Arts Law's position would be that to take the copyright from the artist just because the materials are funded by the Department is inequitable.

12. Moreover, the powers given to the relevant prison under Policy 46 to destroy and/or modify prison art are inconsistent with and, in fact, contravene Part IX of the Copyright Act/the moral rights of the prisoner artists, as all "authors" (ie the prisoner artists) have certain inalienable moral rights in any work they create.
13. Importantly, the moral right of "integrity of authorship" gives the "author" of the work (ie the relevant prisoner artist) the right not to have their work "subjected to derogatory treatment" which relevantly includes the "distortion", "destruction", "mutilation" of or "material alteration" to the relevant work (ie the prison art).
14. By destroying and/or modifying the prison art under Policy 46 (and/or sanctioning it), the Department as well as the relevant prison are breaching the moral rights of the prisoner artists and the provisions of the Copyright Act.

PRISONER ARTISTS' GENERAL RIGHTS

15. Arts Law objects in principle to a policy declaring that the physical artworks belong to the Department where the prisoner has not paid for the artworks in circumstances where:
 - 15.1. Prisoners are unaware of this policy;
 - 15.2. Prisoners are not routinely offered the option of being given the right to their artwork upon payment for materials;
 - 15.3. The value added to the 'raw materials' by the creation of a finished artwork may substantially exceed the cost of those raw materials.
16. The Western Australian approach of asserting 100% ownership unless prisoners pay for materials prior to sale is inconsistent with equivalent policies in other states including:
 - 16.1. Queensland where prisoners' ownership of the artwork they create is acknowledged but restrictions are placed on the ability to sell or profit from such works while imprisoned;
 - 16.2. New South Wales where sales proceeds from works made in arts and crafts programs are shared between prison authorities and prisoners; and

17. Northern Territory where the sale proceeds of artwork made during leisure time are held in trust for the prisoner after the deduction of the value of the Territory supplied material used in the production.

PROPOSED ACTION / RECOMMENDATIONS

Arts Law believes that prison policy and legislation should specifically encourage prisoners, while in prison, to participate actively in the creation and exhibition of artwork. Prisoners showing talent should be taught about the commercial aspects of the arts business and be allowed to sell and benefit from the sale of the artwork they create in prison. The skills developed in artistic programmes can help to build a career in creative arts on release, while also providing generic transferrable job skills.

Where prisoners create saleable artworks, prison authorities should encourage and reward this activity by offering to sell the resulting artwork and providing the prisoners with income in return. It is the position of the Arts Law that after the deduction of legitimate costs and expenses associated with the cost of materials and the cost of sale, the prisoner should receive the entire balance of the proceeds of sale. To the extent that the amount exceeds the maximum amount that prisoners are allowed to have available to them while in prison, the proceeds can be credited to the prisoner's trust account for use by the prisoner's family or for use by the prisoner on release.

18. Arts Law recommends that Policy 46:

18.1. Should be revised to:

18.1.1. expressly notes that the prison art (and associated copyright) will not be considered to be the "property" of the Department, regardless of whether the materials to make the prison art have been paid for/acquired by the prisoner artist,

18.1.2. expressly recognise the moral rights of the prisoner artists; and

18.1.3. prohibit the prison from interfering with a prisoner artist's moral rights in an artwork without that prisoner artist's express written consent;

18.2. Should be clearly communicated to prisoners engaged in artistic activities so that they understand their rights in relation to art created in prison.

19. If the Department/prison wishes to be compensated for its expenses in supplying the materials for the prisoners to create art, the Arts Law submits that Policy 46 could be amended to include that:

19.1. where a prisoner artist sells/receives payment for their prison art while incarcerated, the prisoner artist must reimburse the relevant prison for the cost of the materials used (and unpaid for) in creating the prison art; or

- 19.2. where a prisoner artist takes his/her relevant artwork(s) with them on departure from prison, the prisoner artist must reimburse the relevant prison for the cost of the materials used (and unpaid for) in creating the prison art.
20. Policy 46 will require amendments in its entirety as there are various sections specifically relating to the current situation whereby prison art is stated to be (automatically) the "property" of the Department where the materials to create the works have not been paid for by the prisoner.

CONCLUSION

Arts Law thanks the Minister for considering our comments on and recommendations to amend Policy 46 and looks forward to hearing your views on this matter.

Please do not hesitate to contact us if you require further information in relation to any of the above.

Yours faithfully

Robyn Ayres, Executive Director

Delwyn Everard, Deputy Director