

14. Indigenous people

- Indigenous kinship
- Incidence of intestacy among Indigenous people
- Current provisions
- Possible approaches
- National Committee's conclusion

14.1 Indigenous¹ concepts of family and time may well be incompatible with the assumptions underlying the general law relating to intestacy. It is, therefore, questionable whether it is appropriate, or always appropriate, for the general law to apply without qualification in cases where an Indigenous person dies intestate. The extent to which different distribution rules can, and should, apply is dealt with in this chapter.

14.2 There are many different types of Indigenous communities in Australia: rural, urban, traditional and historical communities, including groups that have gathered together from different regions. Indigenous people live in a diversity of lifestyles. This makes it difficult to formulate a general scheme that would be inclusive of all the diversity in Indigenous communities throughout Australia.

INDIGENOUS KINSHIP

14.3 In general in Australia, the distribution of property on intestacy is based on a relatively narrow range of family relationships that are reflective of English, or at least Western, law and society. It may, therefore, be inappropriate to apply the current general intestacy rules to members of Indigenous communities, who may have a broader concept of family relationships.² For example, the Australian Law Reform Commission, in a 1986 report, stated that, unless the particular nature of Indigenous family relationships was recognised in the intestacy provisions, the application of the general principles, with their fixed lists of next of kin, would remain inappropriate. The Commission noted that, “[t]he Aboriginal kinship system may include persons who are not blood relations at all (as distinct from classificatory relations), and yet there may be important obligations and rights existing between the deceased and such a person”.³ Other commentators have observed:

It is very important to note that Aboriginal kinship structures are very different from Western kinship structures and that customary law obligations flow from those kinship relationships.

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1. In this Report, “Indigenous” refers to Aboriginal people of Australia and Torres Strait Islanders.
 2. See R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 32.
 3. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 227.

This applies whether or not the Aboriginal people seem to have traditional lifestyles.⁴

14.4 It has also been noted that “the extreme emphasis on lineal, bloodline relationships in the common law contrast with the acceptance of collateral, adopted and maritally linked relatives in Aboriginal customary law”.⁵ Examples of such differences include:

- willingness to recognise kinship without blood relationship, including adoption and by marriage;
- equivalence of some relatives (eg all sisters’ sons may be regarded as brothers, while opposite-sex siblings may be regarded as cousins);
- non-lineal view of time - kin names like ‘father’ may be repeated at what non-Aborigines would regard as different generational levels. This reflects a more circular view of time with regards to kinship.⁶

14.5 The possibility has been raised that the relationships specified in the legislation could, for the purposes of that legislation, be interpreted more broadly than they would be at common law. As Justice McPherson said:

I am conscious of the fact that the designation of Aboriginal relationships such as mother, brother, sister and so on, may not necessarily be the same as those relationships in western society, which is evidently the criterion used as the basis for distribution on intestacy under the Succession Act. It is possible (I say no more) that for succession purposes relationships are capable in some circumstances of being understood in ways that are broader than would ordinarily be the case at common law...⁷

INCIDENCE OF INTESTACY AMONG INDIGENOUS PEOPLE

14.6 It has been suggested that it is quite common for Indigenous people to die intestate.⁸ The Queensland Department of Aboriginal and Torres Strait Islander Policy has reported that “very few” Indigenous people leave a will. This observation is based on the

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4. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 33; P Vines, “Wills as shields and spears” (2001) 5(13) *Indigenous Law Bulletin* 16 at 16.
 5. P Vines, “Wills as shields and spears” (2001) 5(13) *Indigenous Law Bulletin* 16 at 16.
 6. P Vines, “Wills as shields and spears” (2001) 5(13) *Indigenous Law Bulletin* 16 at 16.
 7. *Jones v Public Trustee of Queensland* (2004) 209 ALR 106 at para 20 (McPherson JA).
 8. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 32.

Department's experience in administering the cases where the eligible claimants have died under the Compensation for Non-Payment of Award Wages and the Indigenous Wages and Savings Reparations processes.⁹ In Queensland, a number of factors have been suggested as contributing to the incidence of intestacy among Indigenous communities, including literacy, mobility, and differing cultural practices.¹⁰ For example, cultural attitudes towards death may mean that Indigenous people are unwilling to record their succession plans in a will.¹¹

14.7 In the NT, Indigenous intestate estates are mostly small or have had superannuation benefits paid into them. Large estates are uncommon now because more Indigenous people are being advised to put their property into joint names.¹²

CURRENT PROVISIONS

14.8 Only a few jurisdictions make special provision for Indigenous persons in relation to intestacy. Broadly, these provisions fall into two categories. First, there are those that recognise Indigenous customary marriages for the purpose of distribution according to the general intestacy rules. Secondly, there are those that provide for a separate or additional distribution regime for Indigenous people in certain circumstances.

Recognition of customary marriage

14.9 At its most basic level, the recognition of Indigenous customary marriages for the purposes of intestacy is simply a means of bringing Indigenous persons into the general scheme for distribution on intestacy by including customary marriage in the definition of spouse. The recognition of customary marriage took on a greater importance in times before the legal recognition of de facto partnerships and ex-nuptial children. The general law of intestacy did not recognise the claims of persons who were not legally married, or ex-nuptial children.¹³ Persons who were married according to Indigenous customs

9. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 1, 4.

10. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 1.

11. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 2.

12. G Flaye, *Consultation*.

13. See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at para 2704.

and their children, therefore, could not take part in any distribution on intestacy. This problem was alleviated in Queensland, for example, in 1939 by a special provision which applied where “an aboriginal man and woman have lived together as husband and wife in accordance with recognised tribal practice”. In such cases, the children of the union were to be considered legitimate, and the claims of the surviving spouse and children to the deceased’s estate were not to be prejudiced.¹⁴ In WA, the non-recognition of customary marriage was overcome by an enactment that passed all Indigenous intestate estates to the Chief Protector to distribute accordingly.¹⁵ This replaced an earlier informal arrangement, whereby the Curator of Intestate Estates simply paid the residue of Indigenous estates to the Chief Protector who had been “given authority to distribute the proceeds of the estate as he appears morally bound to do”.¹⁶

14.10 In the NT, Indigenous customary marriages are recognised in intestacy. The relevant provision states that:

an Aboriginal who has entered into a relationship with another Aboriginal that is recognized as a traditional marriage by the community or group to which either Aboriginal belongs is married to the other Aboriginal, and all relationships shall be determined accordingly.¹⁷

14.11 WA recognises some Indigenous marriages for the purposes of distribution to Indigenous persons on intestacy. The relevant provisions state that a person may be the spouse of the deceased “according to the social structure of the tribe to which [s]he belonged”. The intestate’s children and parents may also be determined in the same manner.¹⁸ However, these provisions only apply in cases where the deceased “had not married in accordance with the laws relating to marriage”.¹⁹

14.12 A provision recognising Indigenous customary marriages was included in proposed intestacy provisions published by the Queensland Law Reform Commission in 1992:

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14. *Aboriginals Preservation and Protection Act 1939* (Qld) s 19(2). Regulations under the Act also recognised the claims of any ex-nuptial children of an Indigenous intestate, as well as the claims of any adopted or foster children: *Aboriginals Regulations 1945* (Qld) reg 16.
 15. *Aborigines Act 1905* (WA) s 33A inserted by *Aborigines Act Amendment Act 1936* (WA) s 21.
 16. WA, *Parliamentary Debates (Hansard)* Legislative Council 22 September 1936 at 716.
 17. *Administration and Probate Act 1969* (NT) s 6(4).
 18. *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) reg 9(1).
 19. *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) reg 9(1)(b).

Where a relationship between two persons is recognised by Aboriginal or Torres Strait Island customary law that relationship is recognised for the purposes of this Part unless recognition of the relationship would confer rights which would not be conferred by customary law.²⁰

However, this provision was not included in the Commission's final report.²¹

Polygamy

14.13 It is possible that an intestate may have been, at death, in a polygamous customary marriage. Despite the decline of polygamy, especially in urban Indigenous communities, it has been observed that, "...it is not uncommon for second and third marriages to be concealed from authorities where those authorities disapprove of polygyny...At present one must assume that polygyny will be around for an indefinite future, even if it continues to decline in gross terms."²² The presence, albeit declining, of polygamous customary marriage between Indigenous people was identified by the Australian Law Reform Commission in its report into the recognition of Aboriginal customary laws.²³

14.14 The above comments about the incidence of polygamous unions were now made more than 20 years ago. However, the current NT provisions specifically provide for situations where Indigenous people leave more than one spouse. In such cases, the spouse's entitlement, including the value of personal chattels, will be divided equally among the spouses.²⁴

The relevance of de facto relationships provisions

14.15 Notwithstanding the fact that a union involving Indigenous people may not comply with the *Marriage Act 1961* (Cth), the union may be recognised for the purposes of intestacy if it fulfils the requirements for a de facto relationship under State or Territory

20. Draft s 34(3) in Queensland Law Reform Commission, *Intestacy Rules* (Working Paper 37, 1992) at 31.

21. See Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 13.

22. P Sutton, "Aboriginal Customary Marriage – Determination and Definition" (1985) 12 *Aboriginal Law Bulletin* 13 at 14.

23. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 169.

24. *Administration and Probate Act 1969* (NT) s 67A. This position is similar to the general provisions in SA and NZ, which divide the spouse's entitlement equally between the spouse and the de facto regardless of the length of their relationships or their living arrangements: See para 6.10 above.

law.²⁵ Distribution can then be made according to the general provisions.²⁶

Additional/separate distribution regimes

14.16 Only three Australian jurisdictions make additional or separate provisions for the distribution of estates of intestate Indigenous persons. The provisions in two of these jurisdictions appear to draw on attitudes and approaches that are more appropriate to the old Aboriginal protection systems. One commentator has noted that the effect of the WA and Queensland regimes has been to remove control over intestate estates from Indigenous next of kin (as administrators) and give control to government officials.²⁷ Such a removal of control from Indigenous people in the management of their families' affairs is inappropriate.

Queensland

14.17 Queensland has separate regimes for both Aboriginal people and Torres Strait Islanders who die intestate. The basic form of the current provision dates from 1934.²⁸

14.18 If an Aboriginal person or Torres Strait Islander dies intestate and it proves "impracticable to ascertain the person or persons entitled in law to succeed to the estate ... or any part of it", the chief executive of the Aboriginal and Islander Affairs Corporation may determine "which person or persons shall be entitled to so succeed or whether any person is so entitled".²⁹ This distribution is entirely at the chief executive's discretion and, although he or she may have reference to Indigenous customary law, the distribution is not required to accord with any customary practices.

14.19 If the chief executive is unable to determine that any person is entitled to succeed to the estate or a part of the estate, that property shall "vest in the chief executive who shall apply the moneys or the proceeds of the sale of any property (less the expenses (if any) of such sale) for the benefit of [Aborigines/Islanders] generally". The proceeds

25. See Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 175.

26. See para 3.17-3.18 and para 3.73-3.76.

27. P Vines, "Wills as shields and spears" (2001) 5(13) *Indigenous Law Bulletin* 16 at 17.

28. See *Aboriginals Protection and Restriction of the Sale of Opium Act Amendment Act 1934* (Qld) s 26(1) item (5). See also *Aboriginals Preservation and Protection Act 1939* (Qld) s 16(3); *Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld) s 31; *Aborigines Act 1971* (Qld) s 40.

29. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 60(1); *Community Services (Torres Strait) Act 1984* (Qld) s 183(1).

are applied under the schemes whereby the chief executive grants aid to Indigenous persons who apply for it on such terms as the chief executive may think fit.³⁰

14.20 The Queensland provisions are said to have been retained because the births and deaths of many Indigenous people are not registered. Certificates evidencing such registration are said to be required for distribution of an estate in accordance with the *Succession Act 1981* (Qld).³¹ Practitioners in Queensland have also commented on the difficulty in proving relationships in Indigenous communities owing, in some cases, to the adoption of traditional names.³² However, the proof of family relationships for the purposes of intestacy is a matter of procedure that does not need to be resolved by establishing an entirely separate system of discretionary distribution for Indigenous people.³³ An alternative method of proof would be a more appropriate response. For example, relationships could be proved by statutory declarations from elders or other family members, or evidence from anthropologists.³⁴

14.21 The original Queensland provisions were part of a raft of provisions introduced in 1934 which rendered the will of an Indigenous person invalid if entered into without the consent of the Protector of Aboriginals; prevented Indigenous people from purchasing on credit without similar permission; and sought to appropriate monies otherwise belonging to certain Indigenous people for the welfare of Indigenous people generally.³⁵ According to the Queensland Home Secretary, who introduced the bill, the provision was chiefly about raising revenue to support Indigenous welfare programs:

If these people have no immediate relatives it is desirable that any funds they possess should on their death go to a fund that will be used for the benefit of aborigines generally.³⁶

30. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 56, s 60(4); *Community Services (Torres Strait) Act 1984* (Qld) s 179, s 183(4).

31. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 4.

32. Succession Law Section, Queensland Law Society, *Consultation*. See also Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 286, 292-293.

33. Compare with the practice in NT of obtaining statutory declarations about family relationships from elders and other family members: see para 14.52.

34. See also Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 292-293.

35. See *Aboriginals Protection and Restriction of the Sale of Opium Act Amendment Act 1934* (Qld).

36. Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 20 November 1934 at 1555.

14.22 Regulations made under an equivalent 1939 provision constrained the Director's discretion to distribute rather more closely than the chief executive's discretion is now. The Director was required to distribute according to the Statute of Distributions, and an estate would only be paid into the Welfare Fund if the deceased left no spouse, sibling, parent, grandparent, grandchild, nephew or niece. The chief purpose of the regulation was to recognise, within the pattern established by the Statute of Distributions, the rights of ex-nuptial children and adopted or foster children of the deceased.³⁷

Western Australia

14.23 In WA, the property of all people of Aboriginal descent who die intestate vests in the Public Trustee, to be distributed according to the State's intestacy rules. If those entitled under the general regime cannot be found, distribution is to be made by reference to the Regulations. The *Aboriginal Affairs Planning Authority Act 1972 (WA)* states that the Regulations should, to the extent that it is practicable, "provide for the distribution of the estate in accordance with the Aboriginal customary law as it applied to the deceased at the time of his death".³⁸

14.24 However, the current provisions recognising customary law really only acknowledge "tribal marriage", and then provide for a more limited range of relatives who are entitled than the regime that applies to the general community allows.³⁹ There is no consideration of a category of customary next of kin any wider than the spouse, children and parents of the intestate. This arrangement has been subject to some criticism⁴⁰

14.25 If no valid claim is made within two years of the intestate's death, a beneficial distribution may be made to a person with a moral claim, or the estate may be held in trust by the Aboriginal Affairs Planning Authority to be "used for the benefit of persons of Aboriginal descent".⁴¹ It has been reported that such "moral claims" are "regularly made and approved".⁴²

37. *Aboriginals Regulations 1945 (Qld)* reg 16.

38. *Aboriginal Affairs Planning Authority Act 1972 (WA)* s 35(2).

39. *Aboriginal Affairs Planning Authority Act Regulations 1972 (WA)* reg 9.

40. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 228; P Vines, "Wills as shields and spears" (2001) 5(13) *Indigenous Law Bulletin* 16 at 17; Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 286.

41. *Aboriginal Affairs Planning Authority Act 1972 (WA)* s 35(3).

42. Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 287.

14.26 The Act defines an Aboriginal person as “a person of Aboriginal descent only if he is also of the full blood descended from the original inhabitants of Australia or more than one fourth of the full blood”.⁴³ This definition does not accord with the generally accepted definitions of Aboriginality contained in other legislation.⁴⁴ Given the small size of the estates of many Aboriginal intestates, such a requirement may prove relatively costly, as the blood descent of each claimant must be determined.⁴⁵ The application of the provisions is further limited by the additional requirement that the Aboriginal person must not have been married under the *Marriage Act 1961* (Cth).⁴⁶

14.27 It has been suggested that, while the provisions outlined above appear to apply to all Indigenous estates, there may be many cases in which they are not used. The Public Trustee may not necessarily be notified of all deaths, nor know whether a person who dies is an Indigenous person.⁴⁷ It has been suggested that the provisions have been useful in small estates where it is often difficult to find an administrator.⁴⁸ In some cases, distributions are made informally after consultation with family and community of the deceased.⁴⁹

14.28 The WA provisions were first adopted in 1936,⁵⁰ following the Queensland model introduced in 1934. The provisions aimed to do two things. First, they overcame the consequences of the failure to recognise customary marriages by vesting all Indigenous intestate estates in the Chief Protector. This failure of recognition prevented an Indigenous intestate estate passing to the Crown in cases where there was no “lawful” spouse or legitimate children. Secondly, when distribution was not feasible, they allowed for payment into a special purpose fund for the benefit of Indigenous people to supplement government funding.⁵¹

14.29 The Law Reform Commission of Western Australia, in its 2006 report on Aboriginal customary law, has recommended a number of amendments to the regime in WA, including that:

43. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 33.

44. See Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 285-286.

45. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 229.

46. *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) reg 9.

47. T Hands, *Consultation*; Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 285.

48. WA, Succession Law Implementation Committee, *Consultation*.

49. WA, Succession Law Implementation Committee, *Consultation*.

50. *Aborigines Act 1905* (WA) s 33A. See also *Native Welfare Act 1963* (WA) s 26.

51. See WA, *Parliamentary Debates (Hansard)* Legislative Council 22 September 1936 at 716.

- the current definition of “person of Aboriginal descent” be deleted;
- the intestate estate should not vest automatically in the Public Trustee, so that persons entitled may apply to administer the estate; and
- the limited distribution provided for in the current rules be removed and replaced with a provision that recognises a person’s “classificatory kin relationship with the deceased under the deceased’s customary law” but only as a factor that the Minister for Indigenous Affairs can take into account in assessing a “moral claim” for distribution from the estate.⁵²

Northern Territory

14.30 The NT has a separate regime for distributing the intestate estate of an Indigenous person, but only in relation to a person who “has not entered into a marriage that is a valid marriage under the *Marriage Act 1961* of the Commonwealth”.⁵³ This requirement may prove to be limiting in some cases, especially for older Indigenous persons, as “a *Marriage Act* marriage is one of the few things that Aborigines living on reserves run by missions did have performed in a non-Aboriginal manner”.⁵⁴ In such cases, a marriage under the *Marriage Act 1961* (Cth) may be entirely incidental to other relationships of kinship of which some individuals may be a part. However, the number of people affected may be small, as it has been estimated that at least 90% of marriages between “traditional Aborigines” were not made according to the requirements of the Commonwealth Act.⁵⁵

14.31 A person who claims to be entitled to take an interest in an intestate Indigenous person’s estate under the customs and traditions of the community or group to which the Indigenous intestate belonged, or a professional personal representative, may apply to the Court for an order for distribution of the estate. In the NT, a professional personal representative is defined as either the Public Trustee, a trustee company, or a legal practitioner.⁵⁶ The application must be accompanied by a plan of distribution of the intestate estate prepared

52. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Final Report, 2006) at 235.

53. *Administration and Probate Act 1969* (NT) s 71(1)(a). See Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 290.

54. P Vines, “Wills as Shields and Spears” (2002) 5(13) *Indigenous Law Bulletin* 16 at 17.

55. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 173.

56. *Administration and Probate Act 1969* (NT) s 6(1).

in accordance with the traditions of the community or group to which the Indigenous intestate belonged.⁵⁷

14.32 An example of the application of such a plan can be found in a recent judgment of the NT Supreme Court:

[3] The estate comprises cash only in the hands of the Public Trustee amounting to approximately \$28,700.

[4] The affidavit evidence of each of three deponents, senior members of clan groups making out the Jawoyn people, asserts that she or he is qualified and authorised by Jawoyn tradition to say who is entitled to take an interest in the estate under the customs and traditions of the Jawoyn. That evidence is consistent in showing that the intestate was the last member of another clan, that he was “grown up” by the late Gerry Mumbin who has three living children, Kevin, Kathleen and Lisa. Those children, in classificatory terms, were the “wives” and “brother-in-law” of the intestate. As the deceased had no children, the Mumbin siblings were his close family. The evidence also shows that Kevin, Kathleen and Lisa Mumbin succeeded to the non Aboriginal estate of the intestate in accordance with the customs and traditions of the Jawoyn and are entitled in equal shares. A letter to the Public Trustee from the Executive Director of the Jawoyn Association confirms that evidence. ...

[6] The plan of distribution proposes that the estate be divided into three parts (I assume equal parts) and that one of each part be distributed to Kevin, Kathleen and Lisa Mumbin.

[7] I am satisfied that in all the circumstances it would be just to order that the estate be distributed in accordance with the plan and order accordingly.⁵⁸

14.33 An application must be made within six months after a grant of administration. However, the Court may extend this time subject to any conditions the Court thinks fit, whether or not the six months has expired. No application will be allowed after the intestate estate has been lawfully and fully distributed.⁵⁹

14.34 The Court may order that the intestate estate (or part thereof) be distributed in a specified manner. In making the order for distribution, the Court must take into account the traditions of the community or group to which the intestate belonged, and the plan that accompanied the application. In any event, the Court will not make

57. *Administration and Probate Act 1969* (NT) s 71B.

58. *Application by the Public Trustee for the Northern Territory* [2000] NTSC 52.

59. *Administration and Probate Act 1969* (NT) s 71C.

any order for distribution “unless it is satisfied that to make the order would, in all the circumstances, be just”.⁶⁰

14.35 The Court may distribute any or all of the Indigenous intestate’s estate, including that which has been distributed by the administrator before the administrator has had notice of any application. Where the administrator has made a distribution, before or after receiving notice of an application, the Court will not disturb such a distribution as long as it was “made for the purposes of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate Aboriginal [person] immediately before his or her death”.⁶¹

14.36 As with the general provisions, the debts and liabilities of the estate, the funeral and testamentary expenses, the costs and expenses of administering the estate and estate duties, succession duties and other duties and fees are not included in the estate of an intestate Indigenous person.⁶²

14.37 The NT provisions are used infrequently.⁶³ The Office of the Public Trustee in the NT usually distributes Indigenous estates according to the general scheme of distribution established by statute. In most cases, the families accept such general distributions. Distribution plans are only required when traditional relatives are identified and the family of the intestate cannot agree on an alternative distribution to accommodate them.⁶⁴ Distribution plans can also prove useful in cases where the estate would otherwise pass to *bona vacantia*. Avoidance of *bona vacantia* was the reason for the distribution plan quoted above,⁶⁵ as the deceased had no surviving blood relatives.⁶⁶ There would appear to be no examples of cases where there have been competing claims for distribution between persons entitled at general law and those entitled to apply for a customary distribution.⁶⁷

60. *Administration and Probate Act 1969* (NT) s 71E.

61. *Administration and Probate Act 1969* (NT) s 71F.

62. *Administration and Probate Act 1969* (NT) s 71A.

63. The WA review could identify only one occasion where the NT provisions were applied: Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 291.

64. G Flaye, *Consultation*.

65. Para 14.32.

66. See T Hands, *Consultation*.

67. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 291.

New Zealand

14.38 New Zealand has established a scheme of entitlement in relation to Maori freehold land on intestacy. The scheme applies when the owner of any beneficial interest in Maori freehold land dies intestate. Distribution is made *per stirpes* and will go first to any of the intestate's issue who survive him or her. If there are no surviving issue, then the land will go to the intestate's siblings or the issue of these siblings, if a sibling has not survived the intestate, but has left issue. Should no such relatives be found, the chain of title shall be followed and priority granted to "the issue, living at the deceased's death, of the person nearest in the chain of title to the deceased who has issue living at the deceased's death".⁶⁸

14.39 If the intestate leaves a surviving spouse, that spouse is entitled to a life interest, or an interest until remarriage, in the intestate's land, unless a separation order or separation agreement is in force in respect of the marriage between the surviving spouse and the intestate. The spouse is entitled to surrender his or her entitlement.⁶⁹

14.40 Aside from the scheme of entitlement to Maori freehold land, all other property devolves according to the general scheme of distribution on intestacy.⁷⁰

POSSIBLE APPROACHES

14.41 Broadly, the National Committee has considered three possible approaches to distribution of intestate estates of Indigenous people:

- make no special provision, leaving distribution of estates of Indigenous people to the general law;
- leave it to each jurisdiction to make special provision for its Indigenous communities;
- make special provision for identifying Indigenous kinship structures.

Make no special provision

14.42 Despite the distinctive and important role that kinship and marriage plays in Indigenous society, the Queensland Law Reform Commission, in 1993, recommended against the recognition of customary rules:

68. *Te Ture Whenua Maori Act 1993* (NZ) s 109(1).

69. *Te Ture Whenua Maori Act 1993* (NZ) s 109(2)-(4).

70. *Te Ture Whenua Maori Act 1993* (NZ) s 110(1).

Until extensive work has been done to bring knowledge of customary law clearly into focus and widespread consultation has been initiated and brought to fruition, the Commission is of the view that it could be counter-productive, even misleading, to introduce legislation at the present time purporting to affect customary law, or to recognise it, in the narrow context of intestacy rules.⁷¹

Deeds of family arrangement, which do not require legislative backing, are always available for cases where entitled family members can agree to an alternative distribution.⁷²

Leave regulation to each jurisdiction

14.43 Some submissions supported the recognition of Indigenous customs and practices being made on a jurisdiction by jurisdiction basis.⁷³ At present, this would mean that some jurisdictions will provide no assistance at all, while others will offer a regime that operates exclusively in relation to intestate estates of Indigenous people. There are some arguments for the retention of provisions in Queensland and WA, chiefly on the grounds that they work well informally. However, in their current form, the provisions are not desirable, since they no longer accord with practice and were generally designed to meet a situation that no longer applies, namely the failure of intestacy law to recognise relationships outside of marriage and ex-nuptial children.

14.44 Amendment is one option which could be pursued by each jurisdiction. For example, the Law Reform Commission of WA has proposed a series of amendments to the WA provisions which overcome some of the shortcomings of the current model. However, even as amended, the WA provisions are undesirable. First, one of the reasons for the original provision - accommodating the failure to recognise customary marriages - has long been superseded by laws recognising relationships other than marriage and according full rights to ex-nuptial children. Secondly, in any case, the amended provisions, as proposed by the Law Reform Commission of WA will

71. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 13.

72. See Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 286.

73. Trustee Corporations Association of Australia, *Submission* at 21; Public Trustee NSW, *Submission* at 15; *Sydney Consultation 2*; Public Trustee of Queensland, *Submission* at 4.

only come into effect when there is no-one entitled under the general scheme for distribution on intestacy.⁷⁴

14.45 Allowing provision on a jurisdiction by jurisdiction basis runs counter to aims of national uniformity in the administration of intestate estates. The results that are being achieved informally, by consultation with the relevant families and communities, can still be achieved by implementing a model along the lines of the one in the NT that seeks to incorporate Indigenous custom in an appropriate and consultative way, when the circumstances demand it.

Make special provision for identifying Indigenous kinship structures

14.46 Another option is to make special provision for dealing with Indigenous kinship structures within the intestacy rules. This is the approach adopted by the NT. One of the chief advantages of this approach is that it can accommodate “the diversity of customary laws on succession”.⁷⁵ One submission highlighted the desirability of having a single scheme within succession legislation “which provides for distribution of an intestate Indigenous person’s estate according to Aboriginal and Torres Strait Islander customs and traditions”.⁷⁶

14.47 The NT model has been considered appropriate by a number of commentators. The Australian Law Reform Commission supported it in its 1986 report on the recognition of Aboriginal customary laws.⁷⁷ Professor Vines has usefully suggested that:

The first step in legislation should be to extend the kinship group entitled on intestacy to one matching customary law patterns. If the requirement not to have been in a *Marriage Act* marriage is removed, the Northern Territory model is the best one on offer because it allows for the recognition of different patterns of customary law amongst different groups.⁷⁸

74. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 292.

75. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 289.

76. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 1.

77. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at para 340.

78. P Vines, “Wills as shields and spears” (2001) 5(13) *Indigenous Law Bulletin* 16 at 18. The ALRC also supported the removal of the *Marriage Act* requirement: Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at para 340.

14.48 The Law Reform Commission of Western Australia has more recently identified a number of advantages to the NT model⁷⁹ although ultimately did not adopt it.⁸⁰ There was some support for the NT model in consultations.⁸¹ One submission supported it as a “sound starting point”.⁸² In one consultation, there was general support for Indigenous communities being able to apply for distributions according to traditional kinship structures.⁸³

14.49 One view is that the NT model provides a useful mechanism for the complex cases where there is uncertainty or families cannot agree. In such cases, the availability of a mechanism that recognises traditional or customary relationships can be a comfort to the family and community of the deceased.⁸⁴

14.50 The NT model, while allowing that somebody may claim to be entitled to a distribution under Indigenous customs and traditions, also allows distribution to be made according to the general rules, which may be the most appropriate response in the circumstances. It can also accommodate children who have been brought up under traditional child-rearing practices, whereby children are sometimes permanently transferred, by mutual consent, from their birth families to other individuals or families. In most Australian jurisdictions, succession legislation does not currently accommodate traditional child-rearing practices either directly or indirectly.⁸⁵

14.51 However, some reservations have also been expressed about the NT model. One concern is that its introduction in other parts of Australia might create unrealistic expectations among Indigenous people, especially in light of the infrequent use of the provisions in the NT.⁸⁶

14.52 It is also possible that such a scheme may prove costly for individual estates. Reasons for this include the move in recent years to put public trustee offices on a commercial footing, the need to produce genealogies, often in the absence of adequate documentation, and the

79. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 289-290.

80. See Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Final Report, 2006) at 233-239.

81. G Flaye, *Consultation; Sydney Consultation 1*.

82. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 2.

83. WA, Succession Law Implementation Committee, *Consultation*.

84. See G Flaye, *Consultation*.

85. See Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 3-4.

86. T Hands, *Consultation*.

charging of court fees. The costs involved in such administrations may be especially problematic for small estates.⁸⁷ However, such problems may not be so great, as even where births and deaths have not been registered, most communities can confirm the relevant relationships and, if necessary, statutory declarations can be obtained from elders of the relevant communities.⁸⁸ It is reported that the NT Public Trustee Office has “strong working relationships with several legal and community organisations which help in the provision of an intestate deceased person’s family tree”.⁸⁹

14.53 It has also been suggested that six months is too short a period for making an application in light of extensive mourning periods in some communities. Applications to the Supreme Court for an extension of time may prove costly, especially in the case of smaller estates.⁹⁰

14.54 Another submission opposed giving any preference to the Public Trustee or trustee companies in the procedures.⁹¹ The NT provisions currently single out the Public Trustee, trustee companies and legal practitioners as “professional personal representatives” who are entitled to make an application.

NATIONAL COMMITTEE’S CONCLUSION

14.55 The National Committee recommends that NT provisions be adopted so that Indigenous kinship structures can be identified where required in order to administer an intestate estate appropriately.

14.56 The National Committee expects that distribution plans will only need to be used in a small number of cases. This has been the experience in the NT where the vast majority of Indigenous intestate estates are administered as they would be for the general

87. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 2-3.

88. G Flaye, *Consultation*; Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 2. Such simple procedures would obviate the need for an applicant to seek from, for example, the Minister for Indigenous Affairs a certificate of conclusive evidence as to his or her family relationships as proposed by the Law Reform Commission of WA: Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Final Report 2006) at 238.

89. Queensland, Department of Aboriginal and Torres Strait Islander Policy, *Submission* at 2.

90. Law Reform Commission of WA, *Aboriginal Customary Laws* (Project 94, Discussion Paper, 2005) at 290.

91. Law Society of Tasmania, *Submission* at 16.

community.⁹² The distribution plans are only required in exceptional cases where, for example, there are traditional or customary relatives and the family cannot agree to a deed of family arrangement to accommodate them or to avoid an estate passing to *bona vacantia*.

14.57 It is also expected that the provisions will be used chiefly to identify established kinship structures for the purposes of distribution on intestacy, rather than to identify customary methods for dealing with the property of deceased persons, especially where these may not translate easily into the modern environment.

14.58 Notwithstanding concerns about the recognition of Indigenous customary law, the NT provision appears to provide an appropriate framework for the recognition of the aspects of Indigenous customary law that may be relevant to identifying an intestate's kin in the rare circumstances in which such questions may arise.

14.59 Allowing the Court to extend the time for making applications will ensure that appropriate account can be taken of the extensive periods of mourning in some Indigenous communities.⁹³ However, in light of the costs involved in applying to the Supreme Court, the National Committee is of the view that the period of six months should be extended to 12 months.

14.60 In making this recommendation, the National Committee considers that the fact that the intestate entered into a marriage under the *Marriage Act 1961* (Cth) should not preclude that person's estate from being dealt with under the proposed provisions. The National Committee also sees no reason why "professional" personal representatives should be singled out as being appropriate persons who can apply for an order for distribution of the estate of an Indigenous person. Any personal representative should be able to apply for such an order.

14.61 An alternative form of drafting that is to the same effect as the NT provisions may be found in the recommendations of the Australian Law Reform Commission in its 1986 report on the recognition of Aboriginal customary law.⁹⁴

92. G Flaye, *Consultation*.

93. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at para 340.

94. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 2 at 260.

RECOMMENDATION 45

A person who claims to be entitled to take an interest in an Indigenous person's intestate estate under the customs and traditions of the community or group to which the Indigenous intestate belonged or a personal representative may apply to the Court for an order for distribution of the estate. A plan of distribution of the estate, prepared in accordance with the traditions of the community or group to which the Indigenous person belonged, must accompany the application.

An application must be made within 12 months of the grant of administration. The Court may extend this time subject to any conditions it thinks fit, whether or not the 12 months has expired. No application will be allowed after the intestate estate has been fully distributed according to law.

The Court:

- (a) may order that the intestate estate (or part thereof) be distributed in a specified manner;
- (b) must, in making an order, take into account the traditions of the community or group to which the intestate belonged and the plan of distribution;
- (c) must not make any order for distribution unless it is satisfied that it would, in all the circumstances, be just.

The Court order may include property which the personal representative distributed within the 12 month period before he or she had notice of any application. The Court will not disturb any distribution if it was made for the purposes of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate immediately before his or her death.

See Intestacy Bill 2006 **Part 4**.