

THE REGULATION OF PRISONER'S ART
AN OVERVIEW OF THE LEGISLATIVE AND POLICY POSITION WITHIN AUSTRALIA
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1.0 Introduction

This paper will consider the ability of prisoners to create artwork within correctional facilities, whether such works can be transferred and/or sold and, if so, how and when the proceeds from the sale of artwork can be used (if at all). Current Australian legislative provisions dealing with prisoner's work and remuneration will be outlined. Further, policy reasons advanced as to why prisoners should be prohibited from conducting a business within prison and, conversely, why developing an arts practice and body of work is beneficial for prisoners (and their families), will be analysed and discussed. Options for selling prisoner's artwork whilst in prison as well as legislative reform recommendations for Queensland will be proposed.

2.0 Background

The impetus for this research was triggered when, in 2007, the Minister for Police, Corrective Services and Sport (Qld), the Hon Judy Spence MP, launched online a *Prisoner Artwork Gallery*. The public was able to view artwork created by prisoners and, preferably, buy art pieces online. The proceeds from sale of prisoner's artwork were donated to charities and partly used to fund art materials required by prisoners. Since this initiative was launched in 2007 over \$9000 has been raised by the sale of donated prisoner artwork.

The concept of selling prisoner's artwork online was extended in 2008 when a prisoner transferred their artwork to Peter Foster's mother to sell on eBay. An article in the Gold Coast Bulletin on 16 September 2008 highlighted how easy it was for prisoners to make money from art by transferring their works to family members or third parties to sell outside prison facilities.¹ A

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¹ Queensland, *Parliamentary Debates*, House of Representatives, 19 August 2010 (Jann Stuckey, Member of Parliament for Currumbin).

victim of crime “was shocked to see a prisoner’s artwork on the eBay website”² and following media outcry, the general public cried foul of this practice. The main objection being raised was that prisoners should not be able to profit from their crimes and operate a business from inside prison. It is because of objections such as these that Queensland has introduced pioneer legislation that prohibits prisoners privately selling artwork whilst in prison or transferring it to third parties to achieve the same outcome.

3.0 Queensland’s Legislation

Section 27A of the *Corrective Services Act 2006* (Qld) defines *prisoner artwork* to be any visual art, performing art or literature made or produced by a prisoner while in prison. For the purposes of this issues paper prisoner artwork will include; paintings, leatherwork, woodwork, small furniture items³, jewelry, artifact making, screen printing⁴ etc.

4.0 Amendments to Queensland Legislation

In reference to the public concerns raised about prisoners carrying on a business whilst in prison and, more specifically, profiting from the sale of artwork, recent legislative reform has been enacted. The *Corrective Services and Other Legislations Amendment Bill (No 2) 2008* (Qld) was introduced which makes it an offence to privately sell prisoner artwork while a prisoner is in a corrective facility.

Restrictions on prisoners dealing with artwork are addressed under s28A of the *Corrective Services Act 2006* (Qld). Notably, a prisoner must not sell, give, give possession of, or otherwise dispose of prisoner’s artwork.⁵ However, there are exceptions: a prisoner may give a particular item of their artwork to a person as a gift or as a donation to the State.⁶ This requires written

² Queensland, *Parliamentary Debates*, House of Representatives, 19 August 2010 (Jann Stuckey, Member of Parliament for Currumbin).

³ *Corrective Services and Other Legislations Amendment Bill (No 2) 2008* (Qld); Explanatory Notes; Second Reading Speech, 25 Novemeber 2008, 3676-3678.

⁴ Darcy Turgeon, ‘Aboriginal and Torres Straight Islander Family Support Program, Elders Visitation Program, Support worker Scheme, Murrie Chaplaincy, Cultural Interests Program’ (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference, Adelaide, 13 – 15 October 1999).

⁵ *Corrective Services Act 2006* (Qld) s28A(1).

⁶ *Corrective Services Act 2006* (Qld) s28B(1)(a)-(b).

approval by the Chief Executive and certain factors must be considered when gifting artwork.⁷ Artwork may also be given to another person to hold on behalf of the prisoner⁸ or to the state for the purposes of disposal.⁹ The prisoner is not allowed to ask for or accept consideration for the holding of artwork.¹⁰ Furthermore, the person holding the artwork for the prisoner is not allowed to sell, give, give possession of, or otherwise dispose of the prisoner's artwork.¹¹ The purpose for such legislation is to ensure prisoners cannot themselves profit from selling artwork privately, nor give their artwork to someone else to sell it on their behalf.¹²

5.0 Other Legislative Provisions in Australia

Other Australian states and territories have legislative provisions regulating prisoner's work and remuneration. No specific provisions relate to the selling and transferring of artwork but fall within a general legislative framework.

5.1 South Australia

The *Correctional Services Act 1982* (SA) governs the management of prisoners, including work by prisoners¹³ and prisoner allowances and other money.¹⁴ Section 29(1) requires prisoners to perform work as directed by the manager. Work performed under this section will entitle the prisoner to receive an allowance fixed by the minister.¹⁵

Prisoners are not entitled to perform any other remunerated or unremunerated work of any kind, unless with permission from the manager.¹⁶ Therefore, it is conceivable that prisoners could partake in art-related work and possibly sell their artwork with an application made to the manager and approval granted.

⁷ *Corrective Services Act 2006* (Qld) s28B(2)(a)-(e). Considerations include: value of artwork, to whom the artwork is proposed to be given, purpose for making the gift etc.

⁸ *Corrective Services Act 2006* (Qld) s28C(1).

⁹ *Corrective Services Act 2006* (Qld) s28D.

¹⁰ *Corrective Services Act 2006* (Qld) s28E.

¹¹ *Corrective Services Act 2006* (Qld) s28F(1).

¹² Queensland, *Parliamentary Debates*, House of Representatives, 19 August 2010 (Vaughan Johnson, Member of Parliament for Gregory).

¹³ *Correctional Services Act 1982* (SA) s29.

¹⁴ *Correctional Services Act 1982* (SA) s31.

¹⁵ *Correctional Services Act 1982* (SA) s31(1).

¹⁶ *Correctional Services Act 1982* (SA) s29(5).

5.2 Victoria

Legislative provisions under the *Corrections Act 1986* (Vic) provide detailed conditions under which prisoners can work and receive remuneration accordingly. Section 84G(I)(c) allows the Secretary to carry on business for prison industries and in particular, has the power to sell goods that are manufactured or produced in the course the business. This provision relates solely to prison industries and could be used to allow the Secretary to regard art production as a prison industry. The Secretary could sell artwork on behalf of the prisoner. The Executive Director of Police, Emergency Services and Corrections Victoria, Tony Leech, commented that money derived from the sale of prisoner artwork would be returned to the state.¹⁷ This legislative provision cannot be used to facilitate the sale of artwork for private profit. That said, there is nothing in the legislation to prevent prisoners from sending their artwork to friends or family members, who can then store it, dispose of it or sell it on behalf of the artist.

5.3 Tasmania

In Tasmania prisoner's work is regulated by the *Corrections Act 1997* (Tas). Specifically, s33 allows the Director to set work for prisoners and s34 enables the Director to determine pay for such work. Notably, s33(c)(3) provides for prisoners to work outside prison with approval from the Director. It is unclear whether this approval is granted by application and, if so, it is conceivable that prisoners could apply to conduct artwork outside of prison.

Section 90 entitles the Governor to make regulations for the purpose of this act. Specifically, s90(2)(1) allows regulations to be made 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*. It is conceivable that prisoner's artwork could be sold privately or by the Governor on behalf of a prisoner. Equally, the proceeds from the sale of such works could be represented as payment for work and dealt with in the same way as remuneration for work done,¹⁸ made as a charitable donation or used within the correctional services facilities. Thus, the Governor's discretionary powers appear to admit the possibility that artwork may be created and sold within the Tasmanian correctional system.

¹⁷ Letter from Tony Leech to Ms Black and Ms Clare, 9 May 2011.

¹⁸ s34(2) of the *Corrections Act 1997* (Vic) requires the Director to hold on behalf of a prisoner, money that the prisoner is entitled to be paid for work performed. On release, unless subject to other provisions, the prisoner will be entitled to such money.

5.4 New South Wales

The *Crimes (Administration of Sentences) Act 1999* (NSW) and the corresponding *Crimes (Administering of Sentences) Regulation 2008* (NSW)¹⁹ regulates prisoner's work and remuneration. Section 6 of the Act allows the general manager of a correctional centre to make an order directing a convicted inmate to work. The Commissioner *may* make payments to inmates for any reason (including work). This is stipulated under s7 of the Act and further enforced under regulation 165. There does not appear to be a legislative *entitlement* to remuneration.

In a report for the International Confederation of Free Trade Unions, Colin Fenwick suggested that prisoners might be engaged in a production line within eight broad areas.²⁰ One area of particular interest is that of textiles and furniture manufacturing. Therefore, prisoners may be ordered to conduct art-related work and, in accordance with current legislative provisions, *may* be remunerated for such work as determined by the Commissioner. It is not inconceivable that the Commissioner, in exercising his/her discretion, could sell prisoner's artwork for remuneration. Whether the prisoner would be entitled to any proceeds is uncertain. If this was the case, it is likely that such payment would be held on credit for the inmate,²¹ as is any other form of remuneration.

5.5 Northern Territory

Prisons (Correctional Services) Act (NT) enables the Director to require prisoners to be employed in work²² and will be paid at rates determined by the Minister.²³ There appears to be no scope for prisoners to make an application or request to participate in art-related work.

5.6 Australian Capital Territory

The *Corrections Management Act 2007* (ACT) s83, broadly, covers work and payment. Within this provision 'work' is likely to include art-related work. The Corrections Management

¹⁹ Made under the *Crimes (Administration of Sentences) Act 1999* (NSW).

²⁰ Colin Fenwick, 'Private benefit from forced prison labour: Case studies on the application of International Labour Organisation Convention (2001) <<http://www.icftu.org/displaydocument.asp?Index=991212919&Language=EN>> at 7 May 2011.

²¹ *Crimes (Administering of Sentences) Regulation 2008* (NSW) s165(2).

²² *Prisons (Correctional Services) Act* (NT) s66.

²³ *Prisons (Correctional Services) Act* (NT) s69.

(Prisoner Employment) Policy 2009²⁴ outlines a detailed process in which prisoners are to be employed. Specifically, the Prisoner Employment Manager must ensure that prisoner employment is consistent with the “prisoner’s Rehabilitation Plan”.²⁵ In light of the rehabilitation benefits of artwork (see 6.0 below), it is likely that the broad scope of legislative provisions in the ACT would include art-related activities.

In reference to remuneration, the Corrections Management (Prisoner Remuneration) Policy 2009²⁶ outlines remuneration rates for prisoners based on levels of employment.²⁷ It is likely that a prisoner participating in art-related work would be paid according to such schedules. However, regulations can be made in relation to any payment or *any other return* to which prisoners are entitled for work done.²⁸ Therefore, it is not inconceivable that a Commissioner could sell artwork on a prisoner’s behalf and benefit from the return of such sale.

5.7 Western Australia

Western Australian legislation deals mainly with charitable, community or voluntary work. Section 95 of the *Prisons Act 1981* (WA) outlines activity programs for prisoners including the opportunity to *work*.²⁹ Furthermore, prisoners are provided with opportunities to ‘utilize their time in prison in a constructive and beneficial manner by means of educational and occupational training programs and other means of self improvement.’³⁰ In light of the underlying purpose of s95 it is conceivable that prisoners may be able to engage in art-related work. Under the *Prison Regulations 1982* (WA), prisoners are entitled to receive *gratuities* for work done.³¹ This is based on the level of work performed, similar to the remuneration scheme in the Australian Capital Territory. It should also be noted that the Chief Executive Officer may award a higher rate of gratuity in relation to the level of work performed.³² It is unclear whether the Chief Executive

²⁴ *Corrections Management (Prisoner Employment) Policy 2000* (ACT), 1.

²⁵ *Corrections Management (Prisoner Employment) Policy 2000* (ACT), 3.

²⁶ *Corrections Management (Prisoner Remuneration) Policy 2009* (ACT), 1.

²⁷ *Corrections Management (Prisoner Remuneration) Policy 2009* (ACT), 1.

²⁸ *Corrections Management Act 2007* (ACT) s83(c).

²⁹ *Prisons Act 1981* (WA) s95(2)(g).

³⁰ *Prisons Act 1981* (WA) s95(2)(f).

³¹ *Prisons Regulations 1982* (WA) r 45(1).

³² *Prisons Regulation 1982* (WA) r 45(E)(a).

Officer has the power to sell artwork created by prisoners and, potentially, award a higher rate of gratuity based on the proceeds.

The extent to which prisoners can partake in art-related work, create artwork and sell such work is unclear in most Australian states other than Queensland. Simply, no other state has been presented with the controversies surrounding the sale of prisoner artwork like Queensland. Based on current legislative provisions it seems likely that in all states, except the Northern Territory, a prisoner will be able engage in art-related work. Provisions about the selling of such work are less clear. Prison officialdom (the executives, secretaries and managers) have the discretion to make such decisions and it is conceivable that artwork may be sold on behalf of prisoners and remunerated accordingly. However, this has never been entertained. Notwithstanding these conclusions this paper will proceed with a discussion of the benefits of work, specifically artwork, in prisons.

6.0 Benefit of Work in Prison

Well-documented research shows the therapeutic, educational and rehabilitative benefits of prisoners being required to work whilst incarcerated.³³ Such benefits are shown to extend to artistic work.

6.1 Therapeutic Benefits

Art as a creative process is also a formal therapeutic process. It offers prisoners a non-destructive therapeutic release for their feelings of distress associated with prison life and other mental health illnesses.³⁴ Engaging in the art process has shown to increase self-esteem, instill feelings of self worth and promote positive moods.³⁵ Such outcomes are complementary to rehabilitative needs.

6.2 Educational Benefits

The active learning inherent in creating art is educational in its own right.³⁶ It serves to increase communication skills, strengthen cognitive abilities and develop a critical attitude.³⁷ Art programs

³³ Alexandra Djurichkovic, 'Artis in Prisons: A literature Review of the philosophies and impacts of visual arts programs for correctional populations' (Working Paper No 3, UTS Shoptfront Student Series, University of Technology Sydney, 2011).

³⁴ Lee Michael Johnson, 'A Place for Art in Prison: Art as a Tool for Rehabilitation and Management' (2008) SWACJ Journal 100, 103.

³⁵ Ibid.

³⁶ Djurichkovic, above n 33, 6.

are based on a creative and expressive curriculum and, therefore, is a viable alternative for prisoners without basic education skills or who have had little academic success.³⁸ Art programs demonstrate the link between creative education and personal learning, personal learning and rehabilitation.³⁹

6.3 Benefits to Society

The benefits of art programs within prison facilities can extend to society. Prisoner artwork can be displayed in museums and galleries for the public to enjoy.⁴⁰ Also, the skills developed in such programs are both specific, opening doors to creative careers after release, as well as generic transferrable job skills.⁴¹ There have been instances, especially within the Aboriginal community, where artists have continued to paint after release and have gained popularity and notoriety as a professional artist.⁴²

The benefits of creative expression in prisons are largely undisputed. The Queensland government has acknowledged such benefits and further encouraged the participation in art programs to develop and foster creativity. One such example is the QCS Prisoner Artwork Program.⁴³ As a result, increasingly large amounts of prisoner artwork is being created. In some instances, this artwork is displayed in exhibitions on the QCS website and also through facility-based arrangements. However, unless donated for sale to the Queensland government, issues of private sale arise. The following discussion will consider the benefits of prisoners being able to sell their artwork and, conversely, why prisoners should be prohibited from doing so.

7.0 Policy Considerations I: Why prisoners should be able to sell artwork

Policy considerations that favour the legitimacy of prisoners selling their artwork whilst in prison will be discussed from an economic and social perspective. In terms of economic considerations,

³⁷ Johnson, above n 34, 104.

³⁸ Djurichkovic, above n 33, 6.

³⁹ Ibid.

⁴⁰ Johnson, above n 34, 106.

⁴¹ Djurichkovic, above n 33, 6.

⁴² Turgeon, above n 4, 7.

⁴³ Corrective Services and Other Legislations Amendment Bill (No 2) 2008 (Qld); Explanatory Notes; Second Reading Speech, 25 November 2008, 3676-3678.

it will be argued that prisoners should be given the opportunity to earn a legitimate income whilst in prison and, secondly, such income is needed for economic support when released from prison. Social considerations will support prisoners connecting to the outside world through sale and also gaining notoriety as a professional in the hope that prisoners will continue to create artwork on the outside.

7.1 Economic Consideration I: Earn a legitimate income

Most prisoners have the capacity to work, as evidenced by the compulsory work requirements imposed on prisoners. Prisoners also have the capacity to earn an income. This income lacks legitimacy because of the disproportionate relationship between the work performed and the income earned. For example, prisoners in Queensland are unable to receive more than \$57.54 per week⁴⁴ when they may work up to 30 hours per week. Therefore, whilst prisoners have the capacity to work they are restricted from earning a legitimate income. It is proposed that the proceeds from sale of prisoner artwork will represent a more legitimate income reflective of the value of work created/done. Suggestions are made that Aboriginal prisoners, in particular, have the ability to sell their artwork for “hundreds, if not thousands of dollars”.⁴⁵

Opponents of this proposal may argue that earning a legitimate income from the sale of artwork will, firstly, result in some prisoners earning more than other prisoners and, secondly, exceed the maximum weekly income prisoners are entitled to earn. These arguments will be dealt with in turn.

Firstly, a prisoner’s income is solely determined based on the amount and quality of work performed. Some prisoners stand to earn more income because they engage in more hours of work per week, or were they are gratuitously rewarded for their achievements in relation to deadlines, productiveness, conscientious behaviour etc.⁴⁶ Correctional services remuneration and work policies do not intend to create equality between prisoners. Therefore, the ability of some prisoners to earn more should not exclude prisoners from selling their artwork as a form of income.

⁴⁴ Colin Fenwick, ‘Regulating Prisoners’ Labour in Australia: A Preliminary View’ (2003) 16 *Australian Journal of Labour Law* 284, 296.

⁴⁵ Turgeon, above n 4, 7.

⁴⁶ Fenwick, above n 44, 296.

Secondly, depending on the value of the artwork, it is likely that the sale proceeds would exceed the maximum weekly income prisoners are entitled to receive. This issue would need to be addressed by legislative reform and is outside the scope of this paper. However, in light of other legislative provisions throughout Australia, it is not inconceivable that the Queensland government could allow for prisoners to receive payments exceeding their weekly income. For example, in the ACT prisoners are entitled to receive payments from “visitors” provided they are deposited into the prisoner’s trust fund. Whilst this is the very action Queensland is trying to prevent in third parties selling prisoner artwork, it shows that prisoners are entitled to receive payments that exceed what they earn inside prison. If the Queensland government was to control the sale of artwork, it is possible that prisoners could receive the proceeds as an additional form of income to be paid into the prisoner’s trust account.

7.2 Economic Consideration II: Provide economic support outside of prison

Whilst incarcerated, prisoners are solely reliant on the state, especially with respect to work conditions, the ability to earn an income and spend such income accordingly. As a result, prisoners are usually ill-equipped to financially support themselves when they are released from prison. Currently, legislative provisions in Victoria require 20% of a prisoner’s income be reserved for release.⁴⁷ The rationale for this provision is to help prisoners re-integrate into society upon their release by providing them with financial support derived from the income earned in prison. Unfortunately, this percentage is derived from such an insignificant income that it provides inadequate economic support outside of prison. However, the sale of artwork, as a means of earning a legitimate income, could provide more substantial financial support for reintegration outside of prison. Such income would go into the prisoner’s trust account and restrictions would be placed on the ability of prisoners to access this income before release (see Recommendations 9.5.5)

7.3 Social Consideration I: Connection to the outside world through the sale of artwork

⁴⁷ Corrections Victoria, *Prisoner Monies* (2010) Department of Justice Victoria, Australia <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Prisons/Prisoners/Property/JUSTICE+-+Prisoner+Monies>> at 8 May 2011.

Removal from society is inherent in the nature of incarceration; however, most prisoners will ultimately rejoin society after the termination of their prison sentence. The process of reintegration is not without its difficulties⁴⁸ and is a contributing factor to the high rates of recidivism of offenders.

Johnson, in his article *A Place for Art in Prison* argues that the display or selling of artwork gives prisoners the chance to engage in “productive exchanges with the community before and after release”.⁴⁹ Similarly, Djurichkovic suggests that “their [prisoners] voices are ignored or excluded from the community’s larger social conversation” but the act of expression through the sale of prisoner’s artwork is a “signal to the community that they [prisoners] are a part of it”.⁵⁰ Sale, 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. Therefore, the sale of prisoner’s artwork will aim to help with the successful reintegration of prisoners in society and ultimately, reduce the rates of reoffending.

7.4 Social Consideration II: Gaining notoriety as a professional artist

Being incarcerated deprives prisoners of self-identity and self worth.⁵¹ The sale of artwork by prisoners can aim to counter the stigma attached to being in prison. The status of an “artist” fosters favourable self-identification⁵² and helps prisoners to be recognized as a professional in the artistic industry. Such notions accord with prison rehabilitation and reintegration themes.⁵³

The selling of prisoner artwork, not only gives prisoners the status of being a professional in the art industry, but ideally will open doors to creative careers upon release.⁵⁴ Darcy Turgeon, from the Department of Corrective Services in QLD, hopes that some of the Murrie artist prisoners will continue to work at their art when they are released from custody and in some instances “there

⁴⁸ Johnson, above n 34, 106.

⁴⁹ Johnson, above n 34, 107.

⁵⁰ Djurichkovi, above n 33, 13.

⁵¹ Johnson, above n 34, 103.

⁵² Ibid.

⁵³ *Penalties and Sentencing Act 1992* (Qld) s3(b). NB: punishment and rehabilitation, doesn’t state reintegration, *Corrective Services Act 2006* (Qld) s3.

⁵⁴ Turgeon, above n 4, 7.

have been success stories where Aboriginal artists have continued to paint after release”.⁵⁵ It is through the successful sale of artwork whilst in prison that prisoners will have a platform to support themselves outside of prison.

8.0 Policy Considerations II: Why prisoners should not be able to sell artwork whilst in prison

In response to the policy considerations in support of prisoners selling artwork, arguments will be proposed that challenge such claims. Consideration will be given to discrimination against other prisoners, profiting from the status of “prisoner” and victim sensitivity. These will be dealt with in turn.

8.1 Discrimination against other prisoners with specific skill types

Legislative provisions that allow for a specific class of prisoners (artists) to sell their creations, discriminates against other prisoners with different skill types. In response to an enquiry into the Victorian Correctional Services scheme, Tony Leech, acknowledged that artist prisoners are not able to conduct a business from prison because it would be inconsistent to allow this class of prisoners to profit from artwork, while preventing other business operators from earning money through the use of their own specialist skills.⁵⁶ It is hard to justify why one class of prisoners should be privileged by earning an income from their specific skill set over another class of prisoners with a different skill set.

8.2 Profiting from the status of “prisoner”

Depending on prisoner notoriety, prices for artwork could well exceed their true value. Indeed, it is suggested that the value of the artwork sold online by Peter Foster’s mother was considerably enhanced by his status as a notorious conman. This is the premise for the argument that prisoners are profiting from their crimes through the sale of artwork. The term “murderabilia” has been coined in the United States to identify artworks that are being sold by virtue of a prisoner’s status

⁵⁵ Ibid.

⁵⁶ Letter from Tony Leech, above n 17.

as a criminal.⁵⁷ There is evidence of an increasing market for prisoner artwork and perhaps for the wrong reasons - prisoner status - rather than artwork merit. Andy Kahan from the Houston Crime Victims Office (United States of America), who developed the term ‘murderabilia’ suggests that without the identification of the prisoner to the artwork it would be worthless, “it is profit from ill-gotten notoriety”.⁵⁸

However, the term ‘murderabilia’ should be used with caution: Whilst this term represents prisoners relying on their status as criminals to profit from crime, it may also be used to suggest that the artwork created is visually representative of the crime committed. Hence the use of the word “murder” in “murderabilia”. Intentionally or unintentionally, this may be the result of some prisoner artwork, however, it must also be appreciated that some prisoner artwork is in no way representative of the crime committed. In which case artwork should be judged and valued based on artistic merit, not criminal status. This policy consideration will be addressed under Recommendations (see 9.1).

8.3 Victim sensitivity

It may be argued that the selling of prisoner artwork is a form of re-victimisation.⁵⁹ In seeing, hearing or knowing that a prisoner has created a piece of artwork for public sale may upset, distress and enrage victims of crime and their families. Indeed, this was the reaction to Peter Foster’s mum selling prisoner artwork.

Whilst some victims of crime may view the selling of prisoner artwork as a form of re-victimisation, it is relevant to consider the perspective of other victims. In some instances, victims see this practice as a way in which the offender is trying to move forward with their life in a positive, rewarding way and that, indirectly, this helps victims similarly move on.⁶⁰

⁵⁷ Hilary Hylton, *Cracking Down on “Murderabilia”* (2007) TIME <http://www.correctiveservices.qld.gov.au/About_Us/The_Department/Key_Initiatives/Work/index.shtml> at 3 May 2011.

⁵⁸ Ibid.

⁵⁹ See victim accounts in newspaper articles such as, Hylton, above n 57.

⁶⁰ Michael Parker, *How art reaches the parts the prison service cannot* (2010) Astarix.co.uk <<http://www.astarix.co.uk/2010/10/koestler-trust/>> at 28 April 2011.

9.0 Recommendations

The Queensland government, in a kneejerk reaction to a single prisoner selling artwork indirectly through a member of the public, has implemented legislative provisions which widen the scope too broadly for the prohibition of prisoner artwork sales. In light of the advantageous economic and social policy considerations, recommendations will be made which allow for the sale of prisoner artwork. Consideration will be given to the *type* of artwork that can be sold, *which* prisoners can create artwork, *who* should sell prisoner artwork, *how* artwork should be sold and the *use* of profits from artwork.

9.1 Type of artwork that can be sold?

Firstly, it is proposed that the content of the artwork would have to be evaluated before sale could occur. Briefly, artwork that is reflective of a prisoner's crime would not be eligible for sale along with graphic, explicit or offensive material. This would limit the scope for the prohibition of prisoner artwork.

As evidence of the public's reaction to Peter Foster's mum selling prisoner artwork, the public and the media are driving forces behind legislative reform. The public perceive the sale of, and subsequent profit from, prisoner artwork as a way to profit from crime rather than a *bona fide* sale of artwork based on artistic value and merit.

To legitimise the sale of prisoner artwork and create public acceptance of such a practice, it is proposed that a distinction be made between art that depicts crime and that which does not. Artwork reflective of a prisoner's crime, including graphic, explicit or offensive material would not be eligible for sale. This would address public concern that prisoners are profiting from their crime. Conversely, artwork unrelated to crime will qualify for sale. If this condition on the sale of prisoner artwork was enacted, it would allow for the majority of prisoner artwork to be sold given the general nature of the artistic content.

It is foreseeable that a determination of the artwork's content and meaning could be problematic, given the inherently subjective nature of such a task. Undoubtedly, a victim of crime may interpret prisoner artwork in a completely different manner to a prisoner, an art board, independent art connoisseur or general member of the public. An independent regulatory board would need to be established to create guidelines by which to assess the suitability of artwork for sale. It is proposed that within the framework of guidelines, the depiction of particular crimes

would automatically render a piece of artwork ineligible for sale. Notably, artwork portraying crimes against the person such as murder, rape, assault will not be allowed for sale given their severity and offensive nature.

Creating a distinction between artwork that is representative of prisoner's crime and that which is independent of crime and based solely on artistic merit, will aim to generate further public acceptance of the practice of selling prisoner artwork. From this perspective prisoners will not be profiting from their crimes directly. This addresses Policy Consideration 8.2, *Profiting from Status of Prisoner*. Furthermore, it is also suggested that such a scheme will decrease the likelihood of re victimization,⁶¹ especially for victims of serious and brutal crimes, which could have (in the past) been represented through artwork. This addresses Policy Consideration 8.3, *Victim Sensitivity*.

9.2 Which prisoners can create artwork?

Seemingly, the current legislative provisions are intended to target prisoners who have committed serious crimes, repeat offenders or those who already have notoriety among the community, without considering the demographics of the prison population. Queensland's blanket provisions are discriminating against those who are imprisoned for accumulative, minor and non-violent offences and whose artwork would, presumably, not be representative of offensive material or depicting of their crimes.

Prohibiting the sale of artwork created by prisoners who have committed serious offences such as murder or sexual assault would likely garner broad public support. However, it is proposed that a criterion as to *who* is eligible to create and sell artwork is unnecessary and the focus should be on *what* type of artwork is appropriate for sale.

A further consideration is whether prisoner artwork should be sold anonymously. Whilst this may address Policy Consideration 8.3 *Victim Sensitivity*, as victims would be unaware of which prisoners' artwork was being sold, it would contradict Policy Consideration 7.4 *Gaining Notoriety as a Professional Artist*. The ability to sell artwork in prison, and be recognized as a

⁶¹ Jacqui Goddard, *Dealers in 'murderabilia' face legal challenge* (1997) The Telegraph <<http://www.telegraph.co.uk/news/worldnews/1556836/Dealers-in-murderabilia-face-legal-challenge.html>> at 3 May 2011.

professional artist with skills and talents that can be utilized outside of prison, is crucial to prisoner rehabilitation, reintegration into society and the ability to start a productive meaningful life outside of prison. Such considerations are of crucial importance and, therefore, it is proposed that prisoner artists be recognized alongside their work. The consideration of re-victimization is adequately addressed under Recommendation 9.1.

9.3 Who should sell prisoner artwork?

9.3.1 Queensland Corrective Services

Preceding Queensland's legislative amendments, Queensland Corrective Services launched an Online Gallery and Auctioning site.⁶² It could be envisaged that Corrective Services would control the sale of prisoner artwork, including how much it is to be sold for, the actual sale and provide a uniform procedure for dealing with the money after sale.

9.3.2 Prisoner Legal Services and Trust Organizations

Prisoner's Legal Services have in the past conducted auctions of donated prisoner artwork.⁶³ The auction was declared a success.⁶⁴ This could be another avenue for the sale of artwork.

The Koestler Trust is an organization that advocates for prisoner's rights in relation to artwork. They provide for the sale of prisoner artwork. Other similar organizations in Australia, such as Arts Law Australia, may be called upon to conduct the sale of artwork or could be represented on the proposed independent regulatory board to determine whether prisoner artwork is eligible for sale (see Recommendation 9.1). Such organizations, working alongside Correctional Services Queensland may enhance the implementation of the proposed reforms. This would ensure prisoner interests are represented equally while corrective services objectives are also achieved.

⁶² Nicola Hazell, 'Prisoner Art and Craft now available for sale online: Spence' (Media Release, 4 September 2007) <<http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=53850>> at 8 May 2011.

⁶³ Prisoner Legal Services, *Art Auction* (2010) Prisoner Legal Services <http://www.plsqld.com/News/Entries/2010/12/2_ART_AUCTION.html> at 8 May 2011.

⁶⁴ Prisoner Legal Services, *Art Auction Success* (2010) Prisoner Legal Services <http://www.plsqld.com/News/Entries/2010/12/21_Art_Auction_Success.html> at 8 May 2011.

9.3.3 Chief Executive

In light of the current legislation, the Chief Executive has the power to make decisions with respect to the gifting of artwork and take into account other relevant considerations. It is conceivable that he/she could sell artwork on behalf of prisoners or otherwise work alongside organizations controlling the sale of prisoner artwork.

9.3.4 Other matters

It may be preferable to choose an art body, independent of those advocating for prisoner's rights, that can foster professional relationships with artists after their prison sentence has terminated. This may be prearranged by an organization such as Arts Law Australia whilst a prisoner is still incarcerated, especially if they show an interest in pursuing a career in the arts or if they are identified as having exceptional artistic talent that should continue to be fostered and encouraged.

9.4 How should the artwork be sold?

Currently most prisoner artwork is sold through auction. This is a practical option as it reflects the true market value of the piece of work and enables prisoners to earn an income that is representative of what they are capable of earning outside of prison. Setting a pre-determined price on prisoner artwork may require the assistance of art experts, thereby increasing the complexity and expense of selling prisoner artwork.

A combination of online auctions and physical gallery displays accompanied by onsite auctions would be effective in attracting all types of prospective buyers. Selections should be made as to which organizations, services or people (in the art or correctional service industry as distinct from prisoner family members, friends etc) are responsible for selling prisoner artwork. This is the only framework for prisoners selling artwork, they will not have an influence as to *how* their work is sold if they agree to it being sold in the first place. Using official mechanisms, and not general auctioning sites such as eBay, will help ensure the proper and official sale of prisoner artwork.

9.5 Use of profits from artwork

This is the most contentious issue with respect to the sale of prisoner artwork as most opposition stems from the ability of prisoners to make a profit from their crime while serving a sentence in prison.

The way in which profits are used, and by whom, will largely depend on how much profit is generated. If a trust organization is chosen to manage the sale of prisoner artwork, some profits will need to be attributed to the organization for the viable continuation of the service. It is also possible to allow particular percentages of profit to go to different stakeholders. Monies going to prisoners should be managed under existing provisions of the *Corrective Services Act 2006*.⁶⁵ These issues will be dealt with in turn.

9.5.1 Art supplies and other

Collectively, money could be reinvested into prison Arts programs to help buy art supplies etc. Alternatively, individual prisoners could use the profit from the sale of their particular artwork to buy their own personal art supplies. Otherwise, legislative provisions currently allow for prisoners to purchase in-house supplies such as additional toiletries, canteen, foodstuff, phone cards or pay departmental expenses such as storage of property⁶⁶.

9.5.2 Charitable organizations

If prisoners are entitled to the profits generated from the sale of their work, they may be required to donate all or a part of their profit to charitable organizations. It could be proposed that a predetermined percentage of the proceeds from the sale of artwork over a certain value would be required to be donated to charitable organizations. A sliding scale could be used, for example, 5% of the proceeds for work sold between \$100-\$250 would be donated, 10% for \$250-\$500, 15% for \$500-\$1000 and 25% for work exceeding the value of \$1000. The decision as to which charity/charities are to benefit would be a decision left up to the individual prisoner.

Gifted artwork would be a matter for the state to determine whether all or part of the proceeds would be made as a charitable donation. Previous auctions by the Queensland Prisoner Legal Service and Queensland Corrective Services donated the proceeds from prisoner artwork to Regional Services Queensland⁶⁷ and The Abused Child Trust

⁶⁵ *Corrective Services Act 2006* (Qld) ss311-316.

⁶⁶ *Corrective Services Regulations 2006* (Qld) s44.

⁶⁷ Prisoner Legal Services, above n 63.

respectively.⁶⁸ Notably, however, prisoners will not be entitled to any of the proceeds from the sale of their artwork if they gift it to the state.

9.5.3 Payment of restitution orders

If prisoners are required to make restitution orders, such as criminal injury compensation per the *Victims of Crime Assistance Act 2009 (Qld)*, then they could use the profit generated from the sale of their artwork to make such payments.

9.5.4 Prisoner Trust Accounts

There are legislative provisions in most Australian states and territories for the keeping of prisoner trust accounts. Money from artwork sales could be managed in the same manner as money earned from directed work.⁶⁹

9.5.5 Prisoner accounts accessible by families and the prisoner upon release

Victorian legislation requires a percentage of the income earned to be kept on trust for the prisoner on release.⁷⁰ Equally, Queensland could implement such a provision for the compulsory savings of a percentage of prisoner earnings, including money from artwork sales. This addresses Policy Consideration 7.2 *Provide Economic Support Outside of Prison*. Further consideration would need to be given as to what percentage of the income earned should be saved. Possibly, for larger amounts earned, especially through the sale of artwork, a greater percentage should be saved. The remainder of the income earned from the sale of artwork, as has been previously stated, would go into the prisoner trust account. It is proposed that family members may be able to access a prisoner's trust account for essentials weekly expenses such as food, mortgage repayments etc. This may depend on how much money a prisoner has in their account, and whether families members can access this account once it exceeds a certain value. Further consideration would need to be given to this proposal which is outside the scope of this issues paper.

10.0 Conclusion

⁶⁸ Queensland Corrective Services, Corrections News (2007) Queensland Government <http://www.correctiveservices.qld.gov.au/Publications/Corrections_news/2007/September/CN_Sept.pdf> at 8 May 2011.

⁶⁹ *Corrective Services Act 2006 (Qld)* ss311 – 316.

⁷⁰ Corrections Victoria, above n 47.

This research paper has focused on the ability of prisoners to create and sell artwork whilst in correctional facilities. The impetus for this research was the introduction of pioneer legislation in Queensland that prohibited the sale of all prisoner artwork. This was in response to media and public outcry from prisoner artwork being sold on eBay.

Legislative provisions in all other Australian States and Territories have been discussed, which outline general work and remuneration guidelines. There are no specific provisions that allow for or prohibit the sale of prisoner artwork. In light of this, policy considerations as to why prisoners should be able to sell their artwork were proposed from an economic and social perspective. Conversely, policy considerations opposing the sale of prisoner artwork were also discussed. Finally, recommendations were proposed that would provide for the sale of prisoner artwork under certain circumstances. Consideration was given to the type of artwork sold, who should sell prisoner artwork and how it would be sold. Rather than repeal the entire legislation, this paper suggests further equitable reforms to the *Corrective Services Act* to regulate the sale of prisoner artwork in a way that balances the rights of all stakeholders.

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