



**PUBLIC TRUSTEE
AND GUARDIAN**

WILLS FOR ABORIGINAL AND TORRES STRAIT ISLANDER PERSONS

This fact sheet has been prepared to provide information on Wills for Aboriginal and Torres Strait Islander Persons who are residents of the ACT. The most recent studies in respect to Indigenous Islander inheritance have been conducted by Professor Prue Vines (UNSW) and this fact sheet is informed by those studies.

Background

- 4,282 people (1.3% of the ACT population and 0.8 of the total Australian Aboriginal and Torres Strait Islander population) identified as Indigenous Islander people at 30 June 2006 (ABS Census data).
- 45% of Australians have a valid Will and Indigenous Islanders have the lowest rate of will-making and home ownership of Australians.
- The majority of Indigenous Islanders die intestate (without a valid Will).

Current situation in Australia

Traditional laws and practices relating to inheritance do not always readily translate to Indigenous Islanders. Issues such as the passing of material goods, dealing with the mortal remains, guardianship of children and

difficulties associated with the passing of customary secret laws are among problems experienced by Indigenous Islanders with these laws.

Only those states with the highest Indigenous Islander populations (ie QLD, WA and NT) have specific inheritance regimes available to aboriginal people, of which only NT has been reasonably successful in dealing with the concept of customary law inheritance issues. Traditional laws fail to recognise different kinship patterns and their impact in inheritance law and to recognise the importance of custodial property for intestacy. The issue is extremely complex and there is no simple cost-effective solution.

The Public Trustee and Guardian for the ACT (PTG) is co-operating with the NSW Trustee and Guardian with a view to creating appropriate instruction protocols and Will precedents to address these issue and to increase the number of Indigenous Islanders who make a valid Will. PTG has also committed to participate in an ARC (Australian Research Council) Linkage study "Families and generational asset transfers: Making and challenging wills in contemporary Australia". The study is being undertaken by the



University of Queensland’s Assets and Ageing Research Team in partnership with Australian Public/State Trustees.

This study builds on an ARC funded project exploring intergenerational expectations, obligations and constraints in providing for old age and on a research project, currently funded by the Public Trustee of Queensland, exploring the prevalence of will making in that State and the views of Indigenous Islander Queenslanders on will making.

Problems and misconceptions

Western kinship ideas focus on blood lines in a linear view of time (referred to as the “beneficiary tree”) whereas Indigenous Islanders see kinship in a circular view of time. This fundamental difference underlies the Aboriginal and Torres Strait Islander practice of devising property on death to close kin, rather than in accordance with the laws of intestacy. This may also explain the low numbers of Aboriginal and Torres Strait Islander people making Wills.

A study conducted by UNSW has found that, whilst being very aware that post-death disputes about a range of issues were common amongst Indigenous Islanders, they do not like to talk about death. Studies also found that decisions

on death of Indigenous Islanders deferred to Indigenous Islander women rather than men.

The study also found that disputes over the burial of bodies were also a major issue, particularly in the case of a non-Indigenous Islander spouse and a traditional Indigenous Islander family. Concern has also been expressed about Indigenous Islanders being defrauded by Aboriginal Burial Funds as well as non-Indigenous Islanders being insensitive to Indigenous Islander requirements in respect to burials including smoking ceremonies, placement of soils from traditional lands in graves etc.

Another issue concerned the practice of surviving Indigenous Islanders not wishing to remain in the deceased person’s dwelling giving rise to a practice of “swapping residences” and the intransigence of Public Housing authorities in respect to this practice.

There is a misconception amongst Indigenous Islanders that many do not have enough property to make a Will, as well as about what happens to debts on death, contributing to an unwillingness to make a Will.

There are also issues about where a Will should be kept and about a Will being lost.



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It was also evident that there is significant uncertainty in the Indigenous Islander community about superannuation entitlements upon death.

The study concluded that the major concern is not so much for the passing of property, but for the prevention of disputes. Many of these problems can be addressed by making a culturally appropriate Will, and by appointing an executor, making it clear who is to make decisions. In this sense a Will can be seen as operating to assist in preventing disputes and problems arising, which is important to members of the Indigenous Islander community.

Public Trustee and Guardian

PTG was established to assist all members of our community to make appropriate decisions in the event of the loss of capacity or death through the making of Wills and Enduring Powers of Attorney as well as acting as executor or administrator.

PTG plays an important role in providing will-making services for Aboriginal and Torres Strait Islander Persons.

The Public Trustee and Guardian employs professional legal personnel and does not charge fees to make Wills for Aboriginal and

Torres Strait Islander Persons, providing that they –

- are 18 years and older;
- have legal competence to make a Will;
- are resident in the ACT; and
- appoint the Public Trustee as their executor in their Will.

The Public Trustee and Guardian charges a fee for administering estates in accordance with a determination of the ACT Attorney-General. The Public Trustee and Guardian may adjust these fees in cases of demonstrated hardship. A free safe-custody service for Wills and legal documents is also available for persons who make their Will with PTG.

The Public Trustee and Guardian is working with the NSW Trustee and Guardian and UNSW to develop instructions and precedents appropriate to the making of Wills for Aboriginal and Torres Strait Islander Persons. For further information, contact our friendly qualified Wills officers on (02) 6207 9800.