



Homeless Persons Week Conference

*The Cost of Homelessness - A Legal Perspective*

by

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## **Introduction**

I am grateful for the opportunity to address this Conference, held in conjunction with Homeless Persons Week 2014. I welcome all delegates and congratulate the organisers on bringing this Conference together. It is important to take every opportunity to remind the community that notwithstanding our increasing affluence, homelessness remains a significant social problem. It is also important for people working in this field to gather for the purpose of exchanging ideas and experiences, and thereby improve our response to this difficult problem.

The theme of my address, and indeed of this conference, is a relatively simple one. Homelessness undoubtedly has a moral dimension, arising from the shared obligations of humanity. Shelter is a basic human need, and our community long ago accepted the obligation to provide the necessities of life for those who are unable to provide for themselves. But homelessness also has an important economic dimension. Obviously it costs money to provide housing for those who are unable to provide for themselves, but a point that is often overlooked in public debate on this topic is that it also costs money, a lot of money, to not provide adequate accommodation for those who are unable, for one reason or another, to provide it for themselves. The particular focus of my address will be upon the legal dimension of those other costs.

## **Traditional owners**

Before going any further however, I would like to acknowledge the traditional owners of the lands on which we meet, the Whadjuck people, who form part of the great Nyungar clan of south Western Australia, and pay my respects to their Elders past and present. It is more than usually appropriate to acknowledge the traditional owners, given the topic of my address. That is because, as I am sure you are all well aware, Aboriginal Western Australians are significantly overrepresented among the homeless. According to data from the most recent census (2011), Aboriginal Western Australians were more than 17 times more likely than non-Aboriginal Western Australians to be homeless. The rate of Indigenous homelessness in Western Australia was, at the time of that census, the third highest in the country, whereas the homeless rate for non-Indigenous Western Australians was the lowest.<sup>2</sup> It is depressing, and very sad to note that the rate of Indigenous homelessness in this State would be even higher but for the even greater overrepresentation of Aboriginal people in our prisons - where the comparable multiple is 25 - that is, adult Aboriginal Western Australians are 25 times more likely to be in prison than non-Aboriginal Western Australians.<sup>3</sup> Western Australia's rate of Indigenous incarceration remains by far the highest in the country.

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<sup>2</sup> Australian Institute of Health & Welfare (AIHW), *Homelessness among Indigenous Australians* (2014) p 13.

<sup>3</sup> As at 30 June 2013, the Aboriginal imprisonment rate in WA was 4,022.1 per 100,000 while the non-Aboriginal rate was 157.1 (Australian Bureau of Statistics, 4517.0 *Prisoners in Australia* (13 June 2014) Table 20 'Crude Imprisonment Rate - Aboriginal and Torres Strait Islander status, 2003-2013').

## **The cost of homelessness**

Recognition of the economic cost of homelessness is not new. Almost 20 years ago the then Social Justice Commissioner Mick Dodson described the flawed economics in policies of eviction of public housing tenants for rental arrears and tenancy debts in these terms:

Although carried out in the name of good business and cost recovery a strictly enforced eviction policy costs the state dearly - the costs are manifested in dollar terms in the criminal justice system, in welfare agencies, in schools and in health centres and hospitals. The social costs of this approach are also significant - rising crime rates, social unrest and increased levels of violence. The human cost involved, especially to the kids, is enormous - physical, mental and emotional stress which often shapes a child's future.<sup>4</sup>

## **Homelessness - the legal dimension**

It seems that the word 'homeless' did not appear in the Australian Parliamentary lexicon until the seventh decade of the 20th Century.<sup>5</sup> Of course that is not to say that there was no homelessness until then, or that it was not viewed as a problem. To the contrary, over many centuries legislators responded to homelessness by criminalising those who were unable to provide shelter for themselves. In the United Kingdom the 'poor laws' took this approach, and the criminalisation of homelessness was imported, along with British law, when Australia

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<sup>4</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fourth Report* (1996) pp 69, 70.

<sup>5</sup> Emily Schindeler, 'A Genealogy of the Problematic of Homelessness and the Homeless in Australia' (PhD Dissertation, School of Justice, Faculty of Law, Queensland University of Technology) p 40.

was colonised by the British.<sup>6</sup> It was not until 1976 that Professor (now Justice) Ronald Sackville's seminal 1976 Report *Homeless People and the Law* recommended the repeal of vagrancy laws. It was not until 1992 that the Law Reform Commission of Western Australia recommended the repeal of the 'sleeping rough' offence in its Report on Police Act Offences,<sup>7</sup> and it was not until 2004 that this and a range of related offences were repealed in this State.<sup>8</sup> However, at around the same time police were empowered to issue a 'move on' order. Although applying in a much more limited range of circumstances<sup>9</sup> and intended to help defuse antisocial behaviour that was threatening to escalate, at times, that legislation still provides opportunities to criminalise the homeless.<sup>10</sup>

Of course, the criminalisation of homeless people because they are homeless is not the only legal dimension of homelessness. Other aspects of that dimension include:

- Homeless people are more likely to be convicted or imprisoned than those who are not homeless.<sup>11</sup>

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<sup>6</sup> Note 5, p 51.

<sup>7</sup> Law Reform Commission WA, *Police Act Offences Report* (1992) p 30. Section 66(9) of the *Police Act 1892* (WA) stated: 'Every person wandering about or lodging in any outhouse, deserted or unoccupied building, or in the open air, or in any vehicle, not having any visible lawful means of support, and not giving a good account of himself' committed an offence.

<sup>8</sup> See the *Criminal Law Amendment (Simple Offences) Act 2004* (WA).

<sup>9</sup> See the *Criminal Law Amendment (Simple Offences) Act 2004* (WA), s 50. The provision is now found in the *Criminal Investigation Act 2006* (WA) at s 27.

<sup>10</sup> Monica Taylor, 'Overcriminalisation and the Dilution of Crime: A Homeless Perspective' (Workshop Presentation 20th Annual International Conference of the International Society for the Reform of the Criminal Law Brisbane, 2 - 6 July 2006).

<sup>11</sup> See, for example, Australian Institute of Criminology (AIC), 'Homelessness, drug use and offending' *Crime Facts Info* (No 168, 15 April 2008); Paul Flatau, Kaylene Zaretzky, Michelle Brady, Yvonne Haigh & Robyn Martin, *The cost-effectiveness of homelessness programs: a first assessment* (Volume 1 - main report, 2008); Matthew Willis, *Ex-Prisoners, SAAP, Housing and Homelessness in Australia* (2004); Julian M Somers, Stefanie N Rezansoff1, Akm Moniruzzaman, Anita Palepu & Michelle Patterson, 'Housing First Reduces Re-offending among Formerly Homeless Adults with Mental Disorders: Results of a Randomized Controlled Trial' 8(9) *PLoS ONE* (2013) e72946. doi:10.1371/journal.pone.0072946.

- Prisoners who are released to unstable housing (often indicative of homelessness) are almost three times more likely to return to prison than those released to stable housing, and 61% of those released to homelessness return to prison, compared to 35% of those released to adequate housing arrangements.<sup>12</sup>
- Homeless people are significantly overrepresented amongst victims of crime - a UK study found that homeless people were 13 times more likely to have experienced violence and 47 times more likely to have been victims of theft than others. Almost two-thirds of homeless people reported having been insulted publicly and one-tenth had been urinated upon while sleeping.<sup>13</sup>
- While a majority of the harm suffered by homeless people is at the hands of other homeless people - because so many suffer from mental illness and substance abuse, nearly one-third of the violence experienced by homeless people is perpetrated by people who are not homeless. Few homeless people reported being the victim of a crime or anti-social behaviour because of their fear of the police and the social exclusion they may perceive or experience more generally.<sup>14</sup>

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<sup>12</sup>; Dr Eileen Baldry, Dr Desmond McDonnell, Peter Maplestone & Manu Peeters, *Ex-prisoners and accommodation: what bearing do different forms of housing have on social reintegration?* (August 2003) pp 11, 12; and see also AIC, 'The post-release experience of prisoners in Queensland' *Trends & Issues in crime and criminal justice* (No 325 September 2006).

<sup>13</sup> AIC, 'Homeless people: their risk of victimisation' *AICrime Reduction Matters* (No 66, 15 May 2008).

<sup>14</sup> Note 13.

- These characteristics hold true for young people and studies have shown that homeless young people are often the victims of crime rather than the perpetrators.<sup>15</sup>
- Homelessness is often associated with other criminogenic factors - a study of people in police detention in Australia between 1999 and 2006 found that homeless detainees, when compared with their non-homeless counterparts, were more likely to identify as Indigenous and to report key risk factors such as having spent some time in prison in the 12 months prior to their arrest, to report recent and frequent use, as well as dependence on, either illicit drugs or alcohol and to report generating income from illegal activities such as property offences, prostitution and drug-related crimes.<sup>16</sup>
- Other research has demonstrated relationships between other criminogenic factors, such as child abuse and neglect, homelessness and criminal activity. People who have one or other of these three characteristics are more likely to also have the others. Young people, particularly young women, completing a sentence of detention are at greater risk of homelessness than others.<sup>17</sup>
- Studies have found that the circumstances which lead to or maintain homelessness are usually multifaceted and complex. However, homeless people faced with complex interactive

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<sup>15</sup> National Youth Commission Inquiry into Youth Homelessness, *Australia's Homeless Youth* (2008) p 12; National Crime Prevention, *Living Rough: Preventing Crime and Victimization among Homeless Young People* (1999) pp 3-5.

<sup>16</sup> Note 13.

<sup>17</sup> AIHW, *Children and young people at risk of social exclusion: links between homelessness, child protection and juvenile justice* (15 November 2012).

issues and who lack a safe, regular place to live and a stable point of contact with the system, are very poorly placed to deal with that system, including the legal system.<sup>18</sup>

This list of aspects of the legal dimension of homelessness is not meant to be exhaustive. It is, however, sufficient to demonstrate that homelessness comes at a significant cost to the justice system. Professor Paul Flatau, who is to present at this Conference, and his associates at the Australian Housing and Urban Research Institute, attempted to assess the additional financial cost to the justice system for clients of homeless support services in the year before and after accessing support. The study included a comparison of financial costs based on the rate at which those persons were more likely to be a victim of assault or theft, to be stopped, apprehended or held overnight by police, to be in court, in prison, or visited by a justice officer. The additional cost was estimated at almost \$2,000 per person per year, in 2005/6. It is very likely that those costs have significantly escalated since then. For example, in 2006 it cost \$186 per day to place a person in prison, whereas in 2012/13, the daily cost was \$317 (for adults, and \$645 for juveniles).<sup>19</sup> Applying the same escalator to Professor Flatau's estimated costs would suggest that the cost in today's dollars is closer to \$3,000 per person. (Professor Flatau's analysis demonstrated that the costs incurred by the community in health and justice services were substantially greater than the costs of providing programs for the homeless.<sup>20</sup>

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<sup>18</sup> Law and Justice Foundation, *No Home, No Justice? The Legal Needs of Homeless People in NSW* (May 2005) p iv.

<sup>19</sup> Department of Corrective Services, *Annual Report 2012-13* (2013) pp 98, 103.

<sup>20</sup> Paul Flatau, Kaylene Zaretsky, Michelle Brady, Yvonne Haigh & Robyn Martin, *The cost-effectiveness of homelessness programs: a first assessment* (Volume 1 – main report, 2008) p 146. The estimated health costs were almost three times higher (p 143).

So, returning to both my theme and the theme of this Conference, providing support for the homeless isn't just the right or moral thing to do, it's the smart thing to do, because it saves money.

### **Causality**

As I have noted, homelessness is often associated with other criminogenic factors such as mental illness, substance abuse and child abuse and neglect. The direction of causality between these factors and homelessness is not clear-cut and will vary from case to case. Substance abuse, mental illness and social isolation are plausible consequences, as well as causes, of homelessness.<sup>21</sup>

### **The characteristics of the homeless**

The characteristics of those likely to be homeless in Australia are relatively well-known. They include:

- **Indigenous people:** In 2012/13, over 50,000 clients of specialist homelessness services were Indigenous. Those people represented 22% of those accessing such services, as compared to 3% of the general population.<sup>22</sup> More alarmingly, in the same year, almost one in three (31%) of children aged 0-17 who received assistance from the specialist homelessness agency was Indigenous. By comparison, Indigenous children comprise 5.5% of the population of children in this country.<sup>23</sup>

As I have already noted, these disproportions reflect, but are not

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<sup>21</sup> St. Vincent's Mental Health Service & Craze Lateral Solutions, *Homelessness and Mental Health Linkages: Review of National and International Literature* (May 2005) p iv.

<sup>22</sup> AIHW, *Indigenous child safety* (2014) p 16.

<sup>23</sup> Note 22.

as great as, the disproportionate overrepresentation of Aboriginal people in the criminal justice system of this country.<sup>24</sup>

- **Those escaping family violence and experiencing relationship issues:** Domestic violence is the most common factor contributing to homelessness among women and their children<sup>25</sup> and, together with other relationship issues, was the biggest factor leading people to seek supported housing in WA in 2011/12 (43.5%).<sup>26</sup> One of the many anomalies in this area is that a very positive development in social policy - reduced tolerance of domestic violence - has exacerbated the problem of homelessness.
- **Care leavers:** Young people who have been in State care and protection are also over-represented in the homeless population.<sup>27</sup>
- **People with mental illness and cognitive disability:** There is consistent evidence to the effect that people who are homeless have a much higher prevalence of mental illness than the general population<sup>28</sup> and also that mental illness is a key risk factor for homelessness.<sup>29</sup> Mental health issues are also more prevalent among homeless youth than among the overall

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<sup>24</sup> As at 30 June 2013, Indigenous adults comprised 27.4% of the prison population (Note 3, Table 14 'Prisoners, selected characteristics'); On an average night during the June quarter in 2013 Indigenous young people comprised 51% of juveniles in detention (AIHW, *Youth detention population in Australia 2013* (2013)).

<sup>25</sup> Dr Lorana Bartels, *Emerging issues in domestic/family violence research* (April 2010) p 6.

<sup>26</sup> Homelessness Australia, 'Homelessness in Western Australia – Fact Sheet' (30 April 2013).

<sup>27</sup> National Youth Commission Inquiry into Youth Homelessness, *Australia's Homeless Youth* (2008) p 9.

<sup>28</sup> Note 21.

<sup>29</sup> Dr Lauren Costello, Dr Melanie Thomson & Dr Katie Jones, *Mental Health and Homelessness - Final Report* (June 2013) p 1.

population of young people in Australia.<sup>30</sup> There is ample evidence to suggest that the association between mental illness and homelessness is exacerbated by past policy failures. After reviewing the last 30 years of mental health policy in Australia, Professor John Mendoza stated:

Australian mental health reform over the past 30 years is one of world-class policies and strategies let down by inadequate planning, poor implementation and our complex system of government.<sup>31</sup>

These failings have had a profound impact upon the criminal justice system. As I observed last year:

the policies of deinstitutionalisation which have dominated Australia since the closure of the large mental hospitals in almost all jurisdictions about 30 years ago, have resulted in a form of reinstitutionalisation of many of those who would have been treated in those hospitals. However, the institutions to which those persons have been committed are not hospitals, but prisons.<sup>32</sup>

### **A broader structural problem**

Reference to the characteristics of those who are overrepresented in the homeless population carries the risk of creating a false inference that only those who have one or more of these characteristics are

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<sup>30</sup> Note 27, p 10.

<sup>31</sup> Synopsis - Obsessive Hope Disorder available at: [www.sfnsw.org.au/Awareness---Education/Mental-Health-Reports/Mental-Health-Reports](http://www.sfnsw.org.au/Awareness---Education/Mental-Health-Reports/Mental-Health-Reports) (accessed 16 September 2013).

<sup>32</sup> The Honourable Wayne Martin AC, 'At the crossroads of criminal justice and mental illness: where to from here?' (Rural and Remote Mental Health Conference 2013, Northam, 18 September 2013) p 7.

likely to experience homelessness. Reference to these characteristics should not be allowed to obscure the fact that many people that experience homelessness as a consequence of nothing other than economic conditions - perhaps a period of unemployment in a market in which the cost of housing is prohibitively high. As Professor Flatau has observed:

The structural determinants of homelessness are also obviously critical in driving entry into homelessness and creating exit barriers from homelessness.<sup>33</sup>

These include 'the failure of the housing market to provide sufficient affordable housing or the labour market to provide accessible jobs'<sup>34</sup>.

### **Summary - legal dimensions of homelessness**

To summarise, we know that homeless people are more likely to be the victims of crime and also to be the perpetrators of crime; and we know that they are less likely to resort to the legal system for protection or to have access to the information they need about the legal system. We also know those who are at greatest risk of homelessness - they include Aboriginal people, those escaping family violence, those leaving State care or protection, and those with mental health issues.

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<sup>33</sup> Paul Flatau, Elizabeth Conroy, Catherine Spooner, Robyn Edwards, Tony Eardley & Catherine Forbes, *Lifetime and intergenerational experiences of homelessness in Australia* (February 2013) p 4.

<sup>34</sup> Note 33, pp 8, 9.

### **The magnitude of the problem**

We also know that the causes and consequences of homelessness are multidimensional and complex. Thanks to Professor Flatau and his colleagues, we know of the correlation between being homeless and having homeless parents (intergenerational homelessness), especially for Indigenous people.<sup>35</sup> The intergenerational homelessness rate for Indigenous people in Professor Flatau's research was 69%, compared to a rate of 43% for non-Indigenous participants.<sup>36</sup> We also know that the complex interrelations between homelessness and the legal system are also likely to be intergenerational. This in turn leads to the conclusion that we have not been particularly successful in solving these problems in the past, which in turn suggests that the magnitude of the problem is profound, and that there are unlikely to be any quick fixes or magic solutions. Of course, that conclusion should not discourage us from attempting to find solutions - rather, it should harden our resolve.

### **The limited capacity of the courts**

Criminalising homelessness is an ineffective and extremely expensive response to a social problem. Generally speaking, and excluding from consideration for the moment specialty solution-focused courts like our Drug Court and Mental Health Court, courts are not well-equipped to deal with multifaceted social dysfunction. This point is best illustrated by taking two recent cases.

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<sup>35</sup> Note 33.

<sup>36</sup> Note 33, p 2.

The first concerns a case in which a magistrate was confronted by a homeless defendant who had received 463 move-on notices since 2006. The homeless person was before the court because an application had been made for a prohibited behaviour order, banning him from designated areas within the central business district. The magistrate refused to make the order, concluding that it was 'a waste of time and paper' and would 'just create another offence for [him] to commit'.<sup>37</sup> In other words, the magistrate concluded, correctly in my respectful opinion, that a return to criminalisation is not the appropriate response to this multifaceted social problem.

In another case, one of my colleagues heard an appeal brought on behalf of a homeless Aboriginal woman who had been sentenced to 7 months' imprisonment following her conviction for two offences of failing to comply with a move-on order and one offence of carrying an article with intent to cause fear. She had a very long history of substance abuse, had been homeless for 3 years, had a long criminal record and was paying off accumulated fines and intended to obtain a violence restraining order against her former partner. She was on the long waiting list for public housing. Hall J observed:

The appellant's homelessness and her chronic substance abuse issues were factors that significantly contributed to this offending conduct. They were factors that made it inappropriate to make assumptions regarding persistent offending and the importance of personal deterrence. Personal deterrence assumes

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<sup>37</sup> Daniel Emerson, 'Court order "a waste of time"' *The West Australian* (3 December 2013).

an ability to make choices. It assumes an ability to rationalise and to understand the consequences of repeated behaviour.<sup>38</sup>

## **Conclusion**

Of course, this is not to say that the courts can or should throw their hands in the air and say, 'It's all too hard' when confronted with homeless offenders. The courts must perform their fundamental function of enforcing the laws of the State and imposing punishments which are commensurate to the seriousness of any offence committed. However, there are, I think, three points which emerge from this brief overview of the legal dimensions of homelessness.

First, because of the demonstrated association between homelessness and other criminogenic factors, the intersection of a homeless person with the criminal justice system should be seen as an opportunity for beneficial intervention aimed at addressing those criminogenic factors, together with that person's homelessness. If those factors and the person's homelessness are not successfully addressed, further offending is inevitable. A solution-focused approach to offenders with these characteristics is much more likely to protect the community from reoffending behaviour than an approach based on punishment or deterrence.

Second, as I have said many times, the old saying that, 'An ounce of prevention is worth a pound of cure' is nowhere truer than in the criminal justice system. Money spent on programs aimed at reducing homelessness and the problems often associated with homelessness, like mental illness, substance abuse and domestic violence, is much

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<sup>38</sup> *Bropho -v- Harrison* [2013] WASC 250 [34].

more likely to reduce crime and make our community safer than the vast amounts of money we are spending on police, courts and prisons. Leaving to one side issues of morality and humanity, simple economic rationalism suggests that we should be focusing much more effort and money on the front end, the causes of crime, than on the back end - punishing crime after it occurs.

The third conclusion I would draw from this brief review is that the various people and organisations represented at this important Conference, who are working at the coalface providing much-needed support to homeless people, are much better equipped and much more likely to achieve practical and beneficial outcomes for the homeless than I and my colleagues working in the criminal justice system. We can strive to do less harm, and provide opportunities for beneficial intervention, particularly through our solution-focused specialty courts, but ultimately properly planned and developed programs delivered by trained and experienced professionals provided with adequate public resources to address the multifaceted issues associated with homelessness are the only effective means of addressing those problems.