

**“Overcriminalisation and the Dilution of Crime: A Homeless Perspective”
Workshop Presentation**

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Monica Taylor¹

- Thank you for the opportunity to present today. I hope the international visitors are enjoying the perfect weather our Brisbane has to offer.
- Acknowledge traditional owners

Perhaps nowhere more than on the streets does the rhetoric of overcriminalisation become a reality. Homeless people experience first hand the regulation and criminalization of their presence and behaviour in public space.

In this presentation I hope to do three things:

- Discuss key public space laws in Queensland that disproportionately impact upon homeless people;
- Draw some prescient comparisons with other jurisdictions and offer some (fairly grim) predictions for the future; and
- Finish on a more positive note by noting some current strategies for reform in Queensland.

Homeless Persons’ Legal Clinic – a snapshot

Before I begin I shall give you a quick snapshot of the QPILCH Homeless Persons’ Legal Clinic (HPLC) and the reality of homelessness here in Brisbane.

The HPLC is a project of the Queensland Public Interest Law Clearing House (QPILCH). The HPLC operates a free legal service for people experiencing or at risk of homelessness at 8 outreach locations around Brisbane. Our Clinics are all located at places where homeless people already frequent, such as emergency accommodation hostels, “homelessness hubs” and drop-in centres. The outreach model is deliberate, and goes some way in removing a structural barrier to accessing the law for homeless people. 11 private law firms in Brisbane volunteer their solicitors’ time to operate each Clinic. Approximately 150 lawyers in Brisbane participate in the HPLC by attending their firm’s clinic on

¹ Coordinator, QPILCH Homeless Persons’ Legal Clinic

a rostered basis and providing timely, targeted legal advice and assistance to homeless clients.

In addition to casework, the HPLC is also involved in systemic law reform and legal advocacy to agitate for positive law reform of law and policy issues as they affect homeless people.

Homelessness – overview

Homelessness means more than not simply having a roof over one's head. In Australia, the most recognised definition of homelessness is one which categorises homeless as primary, secondary or tertiary homelessness.²

- *Primary homelessness* refers to people without conventional accommodation, such as sleeping rough in parks or on the streets, squatting, living in vehicles or in improvised dwellings.
- *Secondary homelessness* refers to people moving between various forms of temporary shelter, such as refuges, emergency hostel accommodation or 'couch surfing' between the homes of family and friends.
- *Tertiary homelessness* is where a person lives in a boarding house on a medium to long-term basis, including marginally housed residents who live in caravan parks because they are unable to afford or find alternative accommodation.

In addition to housing status, homelessness also refers to a person's feelings of disconnection and exclusion from society. The Council to Homeless Persons defines a homeless person as someone who is "without a conventional home, who lacks the social and economic supports that a home normally affords."³ Many of our clients lost contact with their family members, and many have mental health and/or substance-abuse issues. Being "at home" therefore incorporates subjective feelings of personal safety, connectedness with one's community and a sense of personal autonomy and control.

How big an issue is homelessness in Queensland?

Homelessness is a significant social issue in Queensland. On any given night, more than 20,000 people are homeless in Queensland. The Australian Bureau of Statistics estimates that on the night of the 2001 census, 24,596 Queenslanders

² Chris Chamberlain and David MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues* 274

³ Council to Homeless Persons Information Sheet Number 1, http://www.chp.org.au/public_library/items/2005/03/00055-upload-00001.doc Accessed 20.06.06

were homeless.⁴ Of that number, an estimated 16% of people were primary homeless, 62% secondary homeless and 22% tertiary homeless. The rate of homelessness for Queensland in 2001 was 69.8 per 10,000, the second highest in Australia. A census by the Brisbane Homelessness Taskforce estimated that on one particular night in 2003, Brisbane had 345 homeless people sleeping rough or in crisis accommodation within three kilometres of Brisbane City Hall.⁵

Causes of homelessness

Causes of homelessness are complex and varied. Drawing on relevant research, the PILCH Homeless Persons' Legal Clinic in Victoria notes that the causes are generally acknowledged to include:

- *structural causes* (poverty, unemployment and inadequate supply of affordable housing);
 - *fiscal, social and public policy causes* (taxation policy and expenditure on public and community housing, health care, education and vocational training);
 - *individual causes* (ill health, mental illness, intellectual disability, substance and alcohol dependency, problem gambling, domestic violence, family breakdown); and
 - *cultural causes* (the provision of culturally inappropriate housing or support services to indigenous communities).⁶

PILCH HPLC notes that, in many cases of homelessness, these causes intersect and interrelate.

The link between structural & public policy causes of homelessness and the consequent criminalisation of homeless people is particularly important.

Public space law in Queensland

Public space law has undergone significant change in the last few years. There is little doubt that vulnerable Queenslanders – the homeless, Indigenous, young people and people with impaired capacity have borne the brunt of the change and that criminalisation has found new meaning in the past 3 years.

⁴ Chamberlain and MacKenzie, 'Counting the Homeless - Queensland' 2004 http://www.salvationarmy.org.au/reports/Counting_The_Homeless/SWI002_Qld_report.pdf Accessed 04.06.06

⁵ See <http://www.qshelter.asn.au/> and City South Homelessness Profile, Brisbane City Council http://www.brisbane.qld.gov.au/bccwr/plans_and_strategies/documents/cs_homelessness_profile.pdf Accessed 04.06.06

⁶ PILCH Homeless Persons' Legal Clinic (Vic) 'Homelessness, Mental Health and Human Rights' Submission to the Senate Select Committee on Mental Health', April 2005.

Vagrants, Gaming and Other Offences Act 1931 (VGOOA)

From 1931 to 1994 (74 years) the main piece of legislation that regulated behaviour in public space was the VGOOA which contained archaic offences including the offence of vagrancy, ie. having no lawful means of support.⁷

At the time of the VGOOA's review and eventual repeal, the Rights in Public Space Action Group (RIPS) of which HPLC is a member, made extensive law reform submissions and recommendations to the Minister for Police and Corrective Services.⁸

Throughout the consultation process, RIPS essentially argued:

- Simply replacing the VGOOA with the foreshadowed *Summary Offences Bill* (SOB) would undermine the Queensland Government's commitment to halving the rate of indigenous incarceration by 2011.⁹
- The offence of public nuisance should require evidence from a member of the public about the defendant's behaviour interfering with their passage through or enjoyment of a public place.
- The objects of the SOB should stipulate that, as far as practicable, vulnerable persons are to be diverted from the criminal justice system.
- Prior to arrest, police officers should be legislatively required to consider appropriate diversion options as alternatives to arrest.
- The financial cost of public order policing and the distraction of police resources away from serious crimes supports a welfare response.

Despite considerable lobbying by RIPS, the VGOOA was ultimately replaced by the *Summary Offences Act 2005*, and the majority of old offences were retained with increased penalties.

Summary Offences Act 2005 (SOA)

Key public order offences under the SOA include:

- Begging in a public place (max. penalty \$750 or 6 months imprisonment). There is no statutory defence
- Being drunk in a public place (max. penalty \$150). No statutory defence.

⁷ Section 4 *Vagrants Gaming and Other Offences Act 1931* (now repealed).

⁸ Rights In Public Space Action Group (RIPS) Submission to the Minister for Police and Corrective Services on the review of the *Vagrants, Gaming and Other Offences Act 1931* August 2004

⁹ Since signing the Aboriginal and Torres Strait Islander Justice Agreement, indigenous incarceration rates have risen by at least 6.8%.

- Public nuisance by behaving in a disorderly, offensive, violent or threatening manner (max. penalty \$750 or 6 months imprisonment). There is no statutory defence.
- Wilful exposure (un-aggravated). Max penalty \$150. Defence or reasonableness.
- Wilful exposure (circumstances of aggravation). Max penalty \$3,000 or 1 year imprisonment.

The literature is critical of public space laws which criminalise behaviour simply because that behaviour is taking place in public space, and which therefore have a disproportionate impact on homeless people who tend to occupy public space more frequently than other members of the general community.¹⁰ Homeless people often do not have a 'private space' to retreat to, and have little choice but to carry out their daily activities (such as urinating, drinking, sleeping and socialising) in public.

None of those daily activities are illegal except for the fact that they take place in public. For example, the legal act of drinking is transformed into a criminal offence simply because alcohol is consumed in public. Public space laws disproportionately target and have a detrimental impact on homeless people, particularly when coupled with selective enforcement of those laws by police officers on people who are clearly impoverished.

Relevant literature and the direct experience of our clients establishes that homeless people are overwhelmingly victims rather than perpetrators of violent crime.¹¹ Pernicious public space laws only compound rather than remove, reduce or redress vulnerability.

Police move-on powers

In 2000, move-on powers were formalised under a piece of legislation that consolidated police powers in Queensland.¹² In a particularly regressive move (and one which breached internal Australian Labor Party policy) move-on powers were recently expanded statewide in June 2006.

Whilst move-on powers do not criminalise behaviour, they target behaviour that is often associated with homelessness. The criminalising effect comes into play

¹⁰ Tamara Walsh, 'From Park Bench to Court Bench – developing a response to breaches of public space law by marginalised people' September 2004, p26. Available on-line at: http://www.law.uq.edu.au/staff/tempprofiles/publications/Walsh_T_ParkBenchToCourtBench_Combined.pdf (Accessed 20.06.06).

¹¹ Courier Mail 'No rest for those who sleep rough' 13, 26 February 2005; Courier Mail 'Violence after dark creating city of fear for homeless' 3, 8 April 2004; Mouzos, J., 'Homicidal Encounters: A Study of Homicide in Australia 1989-1999' (Research and Public Policy Series Paper No 28, Australian Institute of Criminology, 2000) 39.

¹² *Police Powers and Responsibilities Act 2000* (Qld)

when a person contravenes a lawful move-on direction, which attracts a fine of up to \$3,000.¹³

The law states that if a person's 'presence' causes anxiety to another person, this is sufficient for a move-on direction. Clearly, this captures the presence of someone exhibiting symptoms associated with homelessness, such as poor mental health or a disheveled appearance.

It is impossible to contest a move-on direction other than by refusing to move-on when directed, and subsequently defending a charge of failure to comply with a lawful police direction within the court system.

Practically, move-on powers also:

- compromise homeless persons' ability to access vital support services;
- compound feelings of social exclusion and isolation;
- create greater instability for those already experiencing repeated, episodic chaos, which in turn makes it more difficult for people to transition out of homelessness.¹⁴

The disappointing thing is that they work. Already in Brisbane we are witnessing the incredible effectiveness of the move-on powers as a dispersal tool. Numbers of homeless people frequenting food vans in the CBD have dropped and there has been a spike in attendances on the city fringe, with outreach food van services in Spring Hill reporting numbers in excess of 200 people per night presenting for assistance. Our city looks cleaner, but at the expense of those citizens of Brisbane whose rights are most often infringed.

USA – sign of things to come?

If you think we have it bad, let's have a quick look at the USA. Literature and academic work on homelessness and criminalisation is more developed in the United States than Australia. Australia has, in the few years, experienced an explosion in analysis about the criminalising effect of public space laws on marginalised people.¹⁵ This has been going on in the USA for some time.

In a seminal article on Criminalisation and Homelessness, Maria Forcarinis, Executive Director of the National Law Center on Homelessness and Poverty, notes various types of criminalisation measures, including:

¹³ For a thorough critique of move-on powers against homeless people in Brisbane, see HPLC submission to Brisbane City Council on Move-on Power Applications, available on-line at: http://www.qpilch.org.au/dbase_upl/Move%20On%20Powers.pdf (Accessed 30.06.06).

¹⁴ Robinson, C, *Understanding Iterative Homelessness: the case of people with mental disorders* for the Australian Housing and Urban Research Institute (AHURI), July 2003.

¹⁵ Goldie, C, *Using the Law and Human Rights to Challenge Injustice for People who are Homeless: An Australia Story*, American Bar Law Review, 2006.

- Ordinances prohibiting people from remaining in parks for more than 4 hours;
- State police driving homeless people to city limits and literally leaving them there;
- Prohibitions on sleeping & camping in public places.

Of much concern to us is the use of indirect restrictions on organisations which seek to assist the homeless. The New York City Transit Authority mounted a public relations campaign to deter subway riders from giving money to beggars, and San Francisco enforced laws against individuals distributing free food to hungry people in a public park.¹⁶

Of course, legal activists and reformists in the USA have the benefit of being able to constitutionally challenge various public space laws, and have done so with varying degrees of success. You would all be aware that Australia does not have any constitutional civil rights protection, nor a legislative Bill of Rights at a Federal level. Australia remains 1 of 5 industrialised nations without a Bill of Rights. We share this dubious honour with Bhutan, Brunei, Afghanistan, Burma and Libya.¹⁷

There have been recent developments in various states such as the ACT and Victoria to enact rights protection legislation. NSW and Tasmania have also indicated their willingness to consider similar legislation. Queensland, however, is not. QPILCH recently wrote to the Premier requesting community consultation for a possible Charter of Rights in Queensland. The government's view is that Queenslanders have adequate human rights protection already.

Predictions for Future?

Currently in Australia, there is little political will – particularly at a Federal level – to respond to the structural causes that underpin homelessness in Australia. The dearth of significant steps to prevent homelessness and address its causes enables its persistence and growth. At least in part, the failure to address homelessness in an adequate manner now makes its criminalisation possible in the near future.¹⁸

Current ABS and Supported Accommodation Assistance Program (SAAP) statistics on homelessness reveal changes to the typical homeless demographic. The last few years have seen a marked increase in youth, family and ethnic homelessness. Reasons for seeking assistance have also shifted. In the 2004-05 SAAP reporting period, the largest single reason for assistance was domestic

¹⁶ Foscarinis, M., *Downward Spiral: Homelessness and its Criminalization* Yale Law & Policy Review Vol 14:1, 1996. See also *A Dream Denied: The Criminalisation of Homelessness in US Cities*, Report by the National Coalition for the Homeless and the National Law Center on Homelessness and Poverty, January 2006.

¹⁷ Goldie, C, *Telling Stories*, Parity February 2004.

¹⁸ Foscarinis, M above note 16 at 16.

violence (22%), followed by financial difficulty (12%), and usual accommodation unavailable (11%). 6% reported drug / alcohol / substance abuse as the main reason for seeking assistance.

Changes to Australia's welfare system

The federal government's Welfare to Work reforms which were announced in the May 2005 budget commenced this week on 1 July 2006. The underpinning philosophy of Welfare to Work is a desire to transition people into labour force participation and away from welfare dependency, with a view to boosting the economic well-being of welfare recipients and Australia as a whole.¹⁹

A key feature of the welfare to work reforms is the change to the current eligibility requirements for the Centrelink Disability Support Pension. The DSP is subject to the pension income test and is not subject to income tax. By comparison, Newstart and Youth Allowance are both subject to income tax and an allowance income test, a far less generous test to the pension income test.

Up until this week, people with physical, intellectual or psychiatric impairment sufficient to make them unable to work for at least 30 hours per week, would be eligible for the DSP. However as of 1 July 2006, people with disabilities who apply for the DSP will be assessed by a new "comprehensive work capacity assessment." Essentially, if they are able to work only 15 to 19 hours per week, they will be placed on the lower Newstart or Youth Allowance.

What does this mean in practice? People with disabilities but who are able to work between 15 to 19 hours per week will receive up to \$120 a week less money under the new system.²⁰ Our income benefits are already pitched at below the Henderson Poverty Line. Welfare to Work will mean greater financial hardship for people already living in poverty in Australia.

Although beyond the scope of this paper, other noteworthy changes in public policy which will undoubtedly generate increased risk of homelessness, include the recent WorkChoice industrial relations reforms and the diminishing stock of affordable housing, particularly in Queensland.

Positive reform strategies

Clearly, there are a range of initiatives vital to any long-term strategy to reducing the number of homeless people becoming caught up in the cycle of criminalisation. Legislative reform is a clear priority. RIPS considers that diversionary schemes must be integrated at the arrest and sentencing stage, and

¹⁹ Harding, A., et.al, *The Distributional Impact of the Welfare -to-Work Reforms Upon Australians with Disabilities*, Report to the National Foundation for Australian Women NATSEM, University of Canberra 2005

²⁰ Harding et.al above note 19 at 3.

that there be scrutiny of police (possibly indirectly by the courts) to effectively divert people.²¹

There have recently been some 'back end' developments via the implementation of a pilot Homeless Persons' Court Diversion Program for people charged with public space offences in Brisbane. Key objectives of the Program are to:

- support homeless people charged with public space offences through the court system;
- divert homeless people away from sentencing and into support services such as accommodation and health services;
- reduce the number of fines for public space offences for homeless people;
- prevent the entrenchment of homeless people in a cycle of offending and punishment.

The HPLC participates in the governance of the program by sitting on the multi-agency stakeholder reference group and also the client reference group.

Sitting alongside the court diversion program is our new Special Circumstances Court, which focuses on diverting people with impaired decision making capacity (as a result of mental health issues, intellectual disability or brain/neurological disorders) into services & programs to address their underlying 'offending' behaviour.

Both the Homeless Persons' Court Diversion Program and the Special Circumstances Court are in their infancy. There is a lot of positive energy within the Brisbane Magistracy, Department of Justice & Attorney-General and community stakeholder groups about the programs, and there is a genuine desire for the courts to support people by providing positive diversionary mechanisms which successfully help to break the cycle of offending. Obviously there are a number of logistical issues which require ironing out, and this will take time and patience by all involved.

These therapeutic or "soft on crime" initiatives are a positive step, however they are currently situated in a political climate which favours tough 'front end' approaches. One could be forgiven for scratching their head when pondering the policy objectives of a State government which simultaneously introduces state-wide police move-on powers and a diversionary program for homeless people.

Particular criticisms with diversionary programs at the sentencing stage are that they:

- continue to view behaviour as offending behaviour and worthy of criminal sanction, when the vast majority of homeless persons "offending" behaviour is as a result of poverty and/or disability;

²¹ RIPS submission, above note 8 at page 19.

- fail to address the conduct of police officers in the exercise of their discretion at the time of the offence.

The success of the Homeless Persons' Court Diversion Program and Special Circumstances Court is very much a "watch this space".

Finally, the HPLC has just started a 'Criminal Law List' whereby barristers have agreed to provide pro bono representation for homeless people charged with public space offences who seek to contest the charge. This is an exciting development which will enable more of our clients to uphold their legal rights within the court system.

In closing, I would like to thank you all for allowing me to speak today. I hope you will have found something of relevance in this paper as it relates to your own jurisdictions. Criminalisation of marginalised people is a phenomenon that reaches all cities and communities. I look forward to the day when governments resist the temptation of simplistic and populist "law and order" responses and instead respond with compassion and respect.

Thank you.