

January 2020

## Homelessness and Contact with the Criminal Justice System: Insights from Specialist Lawyers and Allied Professionals in Australia

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### Recommended Citation

McNamara, Luke J.; Quilter, Julia; Walsh, Tamara; and Anthony, Thalia, "Homelessness and Contact with the Criminal Justice System: Insights from Specialist Lawyers and Allied Professionals in Australia" (2020). *Faculty of Business and Law - Papers*. 109.  
<https://ro.uow.edu.au/balpapers/109>

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### Abstract

Lawyers and allied professionals who have experience supporting, advising and representing people experiencing homelessness are uniquely placed to identify problems with the operation of the criminal justice system—from policing to courts to punishment—and to conceive reform options. This article reports the findings of qualitative interviews with lawyers and allied professionals in all Australian states and territories. Participants identified multiple points where decisions about criminal law enforcement fail to take adequate account of the complex factors that underlie 'offending' by people experiencing homelessness, producing outcomes that exacerbate disadvantage. They advanced a range of proposals for reform directed at breaking the nexus between homelessness and criminalisation, including re-conception of the role of police, adoption of therapeutic jurisprudence (or 'solution-focused') models in criminal courts, and major changes to the use of fines as a criminal punishment.

### Publication Details

L. McNamara, J. Quilter, T. Walsh & T. Anthony, 'Homelessness and Contact with the Criminal Justice System: Insights from Specialist Lawyers and Allied Professionals in Australia' (2020) Online First International Journal For Crime, Justice and Social Democracy 1-19.



## Homelessness and Contact with the Criminal Justice System: Insights from Specialist Lawyers and Allied Professionals in Australia

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### Abstract

Lawyers and allied professionals who have experience supporting, advising and representing people experiencing homelessness are uniquely placed to identify problems with the operation of the criminal justice system—from policing to courts to punishment—and to conceive reform options. This article reports the findings of qualitative interviews with lawyers and allied professionals in all Australian states and territories. Participants identified multiple points where decisions about criminal law enforcement fail to take adequate account of the complex factors that underlie ‘offending’ by people experiencing homelessness, producing outcomes that exacerbate disadvantage. They advanced a range of proposals for reform directed at breaking the nexus between homelessness and criminalisation, including re-conception of the role of police, adoption of therapeutic jurisprudence (or ‘solution-focused’) models in criminal courts, and major changes to the use of fines as a criminal punishment.

### Keywords

Homelessness; rough sleeping; criminalisation; policing; fines; criminal courts.

*Please cite this article as:*

McNamara L, Quilter J, Walsh T and Anthony T (2020) Homelessness and contact with the criminal justice system: Insights from specialist lawyers and allied professionals in Australia. *International Journal for Crime, Justice and Social Democracy*. Advance online publication. <https://doi.org/10.5204/ijcjsd.1742>

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ISSN: 2202-8005



## Introduction

Homelessness is widely recognised as a problem of national and growing significance. Based on 2016 Census figures, it is estimated that more than 100,000 people in Australia (or 1 in 200) are experiencing homelessness at any one time (Australian Bureau of Statistics [ABS] 2012, 2018). Understandably, a heavy focus of research and advocacy on homelessness is to increase the availability of affordable housing, and to address other issues that impede housing security (Herault and Johnson 2016). However, people experiencing homelessness face a large number of other challenges, including those related to crime and criminal justice. In particular, ‘visibly’ homeless people (including ‘rough sleepers’) are subjected to high levels of surveillance and policing. Criminal law enforcement practices—including searches, ‘move-on’ directions, on-the-spot fines, arrest and charges, remand detention and court-imposed punishment—can be especially punitive for a person suffering serious, and often multiple, disadvantages (Brown et al. 2020: 528–29, 569–570, 593–594; Herring et al. 2020).

A diverse range of non-government organisations—from local community organisations (such as the Wollongong Homeless Hub)<sup>2</sup> and national peak bodies (such as Homelessness Australia)<sup>3</sup>—play a critical role in offering support and services to people experiencing homelessness or who are at risk of homelessness. In 2018–2019, more than 290,000 people were assisted by a specialist homelessness service (Australian Institute of Health and Welfare 2019). One such type of service is the specialist legal service offered by a number of Australian community legal centres (CLCs), such as the Homeless Persons’ Legal Service (HPLS) run by the Public Interest Advocacy Centre in New South Wales (NSW),<sup>4</sup> and Justice Connect’s Homeless Law service in Victoria.<sup>5</sup> The depth and breadth of the experience and expertise of lawyers and other professionals who work in these services was one of the primary drivers for the national collaborative study of which this article is a part. The authors partnered with 10 CLCs<sup>6</sup> from every Australia state and territory to document and analyse the relationship between homelessness and criminalisation.

Evidence gathered by Australian service providers suggests that people experiencing homelessness are vulnerable to high levels of criminalisation as a result of their ‘undesirable’ presence in public places (Adams 2014; Walsh 2011a), as well as poverty-related offences such as stealing food and travelling on public transport without paying the fare (Victorian Ombudsman 2016). However, the questions of how, when and why people experiencing homelessness are subjected to police interventions and criminal punishment have not been the subject of systematic analysis.<sup>7</sup> The aims of the larger project are to (i) better understand how homelessness places people at greater risk of criminalisation and punishment; and (ii) identify reforms to law, policy and practice to ensure that the vulnerability of homelessness is not compounded by treating people as a ‘problem’ for which the criminal law is an appropriate solution.

Elsewhere, we present findings from interviews with Australian magistrates (Quilter et al. 2020). In this article, we provide and discuss the data that emerged from focus groups and interviews with 37 lawyers and allied professionals in all Australian states and territories.

## Design

Lawyers (and allied CLC professionals such as social workers) with experience working with people dealing with homelessness were identified as valuable research participants and experts, whose insights could illuminate current practices and problems, and offer evidence-based reform options.<sup>8</sup> The sample for this study was a non-random convenience sample (Liamputtong 2019: 15). The eligibility criterion was experience having worked at a HPLS or other experience providing law-related services to people experiencing homelessness. Participants were recruited through our project’s 10 CLC partners and the authors’ professional networks. Focus groups and interviews ranged in size from one participant to five participants ( $n = 37$ ), and in most locations consisted of a single (face-to-face or tele-) meeting that lasted for between 30 minutes and 60 minutes.<sup>9</sup>

Focus groups and interviews were facilitated by members of the project’s academic research team (i.e., the authors). Focus groups were semi-structured, using a standard set of open-ended prompt questions. This

approach was adopted to allow flexibility in areas of emphasis, both to accommodate location-based differences and to maximally benefit from the specific expertise of participants. Questions invited participants to comment on offences and powers that impact most heavily on people experiencing homelessness; practices that exacerbate/reduce exposure to the criminal justice system; major challenges faced by people who are homeless in relation to their interactions with the police, court and other agencies; best/worst practice examples; adequacy of support services; experience of change (positive/negative) over time; creative alternative approaches to reducing contact with the criminal justice system; and barriers to reform.

Interview data was subjected to thematic content analysis. Data was manually coded, and NVivo was used to manage data, capture categorisation, and to record the outcomes of thematic analysis. Coding and theme development were largely inductive (i.e., without reliance on predetermined codes), with the larger project's aims serving as touchstones for analysis.

We acknowledge a number of limitations of this methodology. First, lawyers in the main convey the experiences of homeless people for whom they have interactions. They are second-hand representations that do not necessarily constitute homeless peoples' experiences or perceptions of the criminal justice system. Second, lawyers are in contact only with homeless people who have access to a legal service. They are not in a position to articulate the experiences of homeless people who lack access to a legal service. This may mean that the most disempowered and marginalised homeless people within the criminal justice system are not accounted for in this data. It follows that our findings cannot be regarded as capturing the totality of the criminalisation of homelessness. We also acknowledge the limitations inherent in focus group methodology, including the potential for participants' comments to be influenced by other participants' comments and/or moderator discourse (Smithson 2000), and the chance that individuals may feel disinclined to express contrary views.<sup>10</sup>

Findings will be presented in two parts—first, insights about the current state of affairs (frequently negative, and occasionally positive); and second, best practice nominations and reform proposals. The presentation of findings in this article allows our participants, as far as possible, to 'speak' directly to the reader, without detailed interrogation or critique from the authors.<sup>11</sup> There are multiple points at which we could have reflected at length on a particular theme or observation or drawn comparisons with findings from homelessness research elsewhere. Where possible, within space constraints, we have done so, but we were determined not to skip lightly over the richness and authenticity of the qualitative data, noting that these are voices that are too rarely heard in the Australian scholarly literature. One of our motivations in undertaking this empirical project—in partnership with CLCs whose mandates include advocacy for law and policy reform—was to generate qualitative data and findings that would not only contribute to the scholarly literature, but also assist in reform advocacy work directed at breaking the nexus between homelessness and criminalisation. The perspectives of homeless law specialists are an invaluable resource in this regard.

### **Findings: Now**

Participants identified multiple points where decisions about criminal law enforcement fail to take adequate account of the complex factors that underlie 'offending' by people experiencing homelessness, with the result that disadvantage is exacerbated. Four major themes emerged:

1. People experiencing homelessness—particularly visible homelessness<sup>12</sup>—are the subject of targeted policing that produces over-criminalisation.
2. There are significant barriers to justice for homeless people when they are required to appear before the criminal courts.
3. Legal services for people experiencing homelessness are important, but lawyers can rarely do more than offer 'bandaid' solutions.

4. The justice system imposes excessively punitive punishments on people experiencing homelessness, including bail denial, financial penalties that compound poverty and prison terms that *cause or entrench* homelessness.

Each of these themes will be explained in greater detail, with illustrative extracts from the transcripts of focus groups and interviews.

### ***Policing and Homelessness***

Laws that criminalise publicly visible poverty—referred to as ‘status offences’ because they criminalise who and where a person is rather than what they have done—have a long history in Australia and abroad.<sup>13</sup> The abolition of ‘vagrancy’ offences across the late twentieth century<sup>14</sup> might have been expected to break the nexus between homelessness and criminalisation, but homeless law specialists from across the country told us that that is not the case. The visibly homeless are still vulnerable to law enforcement targeting and harassment for status offences. Significantly, this is so not only in jurisdictions that stubbornly hold on to antiquated public order offences like begging (see Hughes 2017) and public intoxication,<sup>15</sup> but also occurs in Australian jurisdictions where these classic vagrancy offences have been decriminalised, such as NSW (Brown et al. 2020: 532–533).<sup>16</sup>

People sleeping rough are exposed to high levels of policing because they live their lives outdoors, and they engage in behaviours that most people have the ‘luxury’ of carrying out in the privacy of their own homes:

The park’s their living room. That’s the reality, you know, and I just think there’s not enough public awareness of that being the case. (P25, FG8)

Aboriginal long grassers ... live their life on the outside. They are seen. (P14, FG5)

I think public nuisance can be used to penalise really benign behaviour ... and particularly people who have a visible mental health concern, disability, yes, are often punished for public nuisance, just for existing in a public space. (FG2)

Criminal offences for which people living on the street are likely to be charged are sometimes directly related to the realities of living ‘in public’:

There is a consistent problem with no access to public toilets. ... There’s a link between the lack of public toilets and public nuisance offences. (P33, FG11)

People do carry weapons, knives, for protection, which is not a defence. But, equally, there are people who carry knives, forks. How do you live without having basic utensils and stuff like that? (P16, FG5)

If you’ve got someone who is drug dependant or using drugs, and if they’re homeless, chances are they’re carrying those drugs with them. Like, they don’t have a house where they’re going to be storing all their stuff; they’re carrying them all on the person. (P36, FG12)

These examples evoke what Young and Petty (2019: 447) have described as indirect criminalisation: ‘when homeless persons become subject to criminal regulation for conduct that is shared by all citizens ... what is rendered criminal is their performance of these ordinary activities in particular locations.’



Predictably, interviewees told us that high visibility makes homeless people easy and regular targets for police attention:

Because they're visible and because they're in the public ... the police have a direct line to them and they become a target. (P30, FG9)

Those who are homeless or at risk of it don't have to be doing anything in particular. And there'll be certain police officers that will target them and automatically seek them out and, you know, become quite aggressive, belligerent. (P25, FG8)

The other terrible thing is the police target the park areas where the homeless people live. And so you'll see in the daytime there's one of those portable, huge spotlight things that are on at night. ... For the homeless people who would've stayed there, these lights just burn all night. [They can't sleep.] No. And the police patrol constantly. (P12, FG4)

More surprisingly, interviewees told us that people experiencing homelessness come in for high levels of attention even when they are *not* in public places:

Police were actually entering the refuge and going upstairs and searching residents' rooms and charging them with possession of goods in custody, or whatever else. (P27, FG9)

The police were there [a homelessness service centre] twice a day, every single day—not because they were called, just to do checks, as they would call it. So, they would come in and walk around and then leave and then come back and do that all the time. It obviously had a huge impact because people didn't feel comfortable. Yes, they wouldn't come. (P3, FG1)

This suggests that it is not only public space visibility that exposes people to high levels of attention. The 'status' of being homeless is the justification for policing and provides a further reminder that *formal* decriminalisation through repeal of so-called 'status offences'—like vagrancy and public intoxication—does not necessarily produce *substantive* decriminalisation (Lacey and Zedner 2017).

People experiencing homelessness are targeted and harassed, not only by police officers, but also other 'law enforcement' officers, including public transport officers and private security guards:

Not just police. I think [homeless people] ... have more interactions with authority generally. ... [Public transport officers] look so intimidating; they've got a whole belt of guns or tasers. ... Those people do target people who are experiencing homelessness. (FG2)

I think that there are those quasi police officers and government department representatives who are starting to play more of a role in the problem of stigmatisation of people who are homeless and maybe even creating a gateway into the criminal justice system, particularly for young people. (FG2)

We have a ... shopping centre across the road. ... There's a security guard there all the time and I notice that he particularly watches the Aboriginal groups going through. There is particular concern about Aboriginal people using that sector. Every so often we hear somebody talking about having to ring the police to get a move on because somebody is living on a shop step. (P32, FG11)

A point that is sometimes overlooked in accounts of formal decriminalisation of vagrancy and other public orders offences, like public intoxication (McNamara and Quilter 2015), is that decriminalisation is rarely productive of the complete absence of regulation. Other legal rules that authorise police intervention will often come into being, including 'protective custody' for being 'drunk' in public. Laws of this type may not

create a criminal offence as such, but they may empower the police to act in ways that make the persons on the receiving end feel very much like a criminalised subject (McNamara 2015).

Move-on powers are a potent case in point (McNamara and Quilter 2019; Walsh and Taylor 2007). For example, under pt 5 of the *Police Powers and Responsibilities Act 2000* (Qld) a police officer may issue a move-on direction to a person in a public place if the officer reasonably suspects the person is ‘causing anxiety to a person entering, at or leaving the place’; ‘interfering with trade or business at the place by unnecessarily obstructing, hindering or impeding someone entering, at or leaving the place’; ‘disorderly, indecent, offensive, or threatening to someone entering, at or leaving the place’; or ‘disrupting the peaceable and orderly conduct of any event, entertainment or gathering at the place’ (ss 44–48). Non-compliance with a move-on direction is a criminal offence (s 791).

Unsurprisingly, given the breadth of these criteria—and equivalents in other states and territories (McNamara and Quilter 2019)—rough sleepers are vulnerable to being moved on, despite the ironic reality that compliance is very challenging (if not impossible) if you do not have a home to go to:<sup>17</sup>

A client who is long-term homeless is also completely deaf as well. ... He often comes into contact with the police who are telling him to move on. But he can't express why he's there or [that] he has nowhere else to go. (P23, FG7)

We are getting ... more clients coming in about the move-on laws. (P3, FG1)

With the move-on notices it depended largely on the police officer that was giving you the move-on notice as to how it would be issued or ... if it would be issued at all or if it would be, you know—they'd just be asked to move on without a notice being issued. (P25, FG8)

These quotations highlight the fact that how police officers choose to exercise their considerable discretion is of critical importance to whether and how people experiencing homelessness are criminalised in public places. In the United States (US), Herring et al. (2020: 32) have described ‘move-along’ orders as part of a process of ‘pervasive penalty’ that ‘not only reproduces homelessness, but also widens racial, gender, and health inequalities among homeless and precariously housed people’.

Another form of ‘territorial governance’ (Sylvestre et al. 2020) that disproportionately affects the visibly homeless is the use of ‘banning orders’, which exclude a person from a particular geographical area for a period of time (Farmer et al. 2020). For example, under s 212(1)(a) of the *Liquor Act 2019* (NT) a police officer may issue an ‘on-the-spot’ banning notice for up to 14 days ‘if the officer believes on reasonable grounds that ... the person is committing or has committed a banning offence’. Breach of the banning notice is a criminal offence (s 218).

The destabilising effects of banning notices on people experiencing homelessness can be profound:

We had a fella literally ... [had] an exclusion from the entire CBD. He was banned. How does that affect a homeless person that's denied access to legal service[s]? Without all the other things that are basic necessities. (P16, FG5)

Banning notices can also be used by shopping centre owners, managers and tenants to exclude ‘undesirables’ from shopping centres and malls, and specific stores. Although widely perceived and used as public places, most retail complexes are, in fact, private property. Private property owners have the right to revoke any express or implied licence to enter the premises for a particular individual and then rely on police and the criminal offence of trespass (e.g., *Inclosed Lands Protection Act 1901* (NSW) s 4(1)) to enforce that revocation.



One of our interviewees described the experience of a homeless woman who had been banned from the local shopping centre:

Security ... know them. They look for them. Someone needed to go to the bank because she needed to get her money out ... and she had mental health issues. ... She needed to go there ... to go to the bank. They said, 'no, she can't access it'. I went over to the security guy and said, 'if I escort her to the bank, and stay with her, and escort her out, can she come?' They said, 'yes, okay'. Like, but I had to physically do that. So, it's really tough. (P37, FG12)

Other interviewees highlighted the punitive—and criminalising—effects of restrictions on access to basic requirements like groceries:

You often get them [bans] from the shopping centre. They ban them from the whole thing and from the [supermarket] ... and there's nothing you can do to actually get redress unless the person agrees to drop it. It's really bad. (P13, FG4)

The [supermarket] has ... photographs of the people who [have been banned]. They can't go into the shop. And then I have seen the police pick them up in the paddy wagon if they go to buy milk or something like that. The shopkeeper calls them and the police then paddy wagon right up. And they'll pick them up in the park opposite. It just happens before your very eyes. (P12, FG4)

Unlike legislated police-banning notice schemes, there are no criteria that must be satisfied before a private property can revoke a licence to enter,<sup>18</sup> and no time limit. One of our interviewees described a client who had been banned from the local shopping centre for 10 years. In *Coles Group Property Developments Ltd v Stankovic* [2016] NSWSC 852 the NSW Supreme Court granted a permanent injunction restraining a 71-year-old man from entering or remaining on a shopping centre in north-western Sydney or the adjacent car park.

Our findings on the deployment of move-on directions and banning notices against the visibly homeless reinforces the need to look beyond a list of offences in a statute book to measure the realities of contemporary criminalisation (McNamara 2015). Beckett and Herbert (2010) have described similar processes in the city of Seattle in the US, arguing that the power to 'banish' homeless people from different city locations was introduced to fill the 'void' left by the constitutional invalidation of vagrancy and loitering offences in the 1960s and 1970s (see Goluboff 2016).

In a context where the overwhelming message to emerge from interviews is that over-policing makes a major contribution to the criminalisation of homelessness, the final policing sub-theme is important: not all police officers engage in the over-policing of people experiencing homelessness:

In the last 12 months ... [the police] have been doing a really good job of thinking through the consequences of arresting a person or fining them and instead giving warnings and things like that ... (P1, FG1)

The thing that surprised me ... was that people seemed to have more positive things to say about police than they did 10 years ago. ... In particular, women seemed to be having more positive experiences with police, maybe even to their own surprise, which I thought was a bit of a shift. (FG2)

For clients that I see, I've had a few who've had quite traumatic experiences with police officers, and then others, who say that they're all right, they're just doing their job. (P9, FG3)

There are some good eggs. (P28, FG9)

Such comments may be small consolation to a person who is sleeping rough and has no control over whether the officer who encounters them on the street is personally inclined to be supportive or aggressive. However, the officer-to-officer variation to which interviewees referred does highlight the fact that hostility towards the visibly homeless is not inherent in the policing function. On the contrary, the examples of good policing practice referenced by interviewees suggest that it is possible for police to carry out their responsibilities in a way that, at a minimum, does not exacerbate the disadvantage of people experiencing homelessness and, potentially, facilitates assistance. It also points to the need for clearer legislative (or operational) guidelines to ensure consistency in non-threatening and non-coercive police interventions with people experiencing homelessness.

The insights of interviewees captured above suggests that ‘good practice’ (a topic to which we return below in discussing future reforms) is the result of a combination of individual officers exercising their personal discretion in ways that are sensible, understanding and respectful, *and* wider cultural change in police organisations.

In only one Australian jurisdiction—the Australian Capital Territory (ACT) (where policing is provided by the Australian Federal Police [AFP] through ACT Policing)—did interviewees suggest that their impression was that policing was more likely to be oriented towards support and assistance rather than surveillance, control and punitive enforcement:

It seems like the ACT police have a fairly good reputation when it comes to dealing with people who are homeless. ... It was more the police checking to make sure that they were okay and they had access to other services, and giving them contact details, which I thought was quite nice and quite reassuring. (P7, FG3)

That was something that a client of mine said yesterday, as well. He’d been disturbed by the police in the park, and he’s come down here from Queensland, so he was surprised when they were just checking if he was all right, rather than ... because he’s just come from a situation where he was arrested and assaulted by police, just for no reason that he could decipher. But here they seem to have left him alone. (P10, FG3)

We find police have been pretty good at identifying when other supports are needed, and actually facilitating that. (P9, FG3)

The last part of this article will return to the question of ‘best practice’ when it comes to police interactions with people experiencing homelessness.

### ***Homelessness and the Criminal Courts***

Lawyers and allied professionals who support people experiencing homelessness, whether through specialist HPLSs or other organisations, are well placed to provide insights on the challenges of interaction with the criminal court system. Interviewees identified significant barriers to justice for homeless people when they are required to appear before the criminal courts at *all* stages—from turning up to court, applying for bail and at sentencing.

People experiencing homelessness can find it hard to meet the basic requirements of attending court, including where to go and when to go (day and time):

Even just showing up to court is quite challenging if they don’t have assistance. (P29, FG9)

But from the individual’s perspective it’s just getting to the court, remembering the next court date, not getting mixed up with court dates and then ending up with maybe two or

three interactions with police and getting multiple court dates, and things like that. That's really difficult. (P26, FG8)

If they're sleeping rough or sleeping in their car, that paperwork is not going to be the most important thing on their mind at the moment. (P3, FG1)

The amount of times I've got clients coming in saying, 'I've got court', 'when's your court?' 'I have no idea.' 'Okay, do you have your paperwork?' 'I've lost it', or, 'I'm no longer at the address I was before'. So, it does become a problem. (P3, FG1)

Another barrier to justice identified by interviewees is that busy Magistrates' Courts rarely have time to gather the information necessary to fully understand the reasons for the behaviour that has brought them into contact with the criminal justice system,<sup>19</sup> or to explain the nature and outcome of court proceedings:

The magistrate's just churning through matters and so they don't get the time to really get their story across. It's quite frustrating to see. (FG2)

Something I noticed when we were assisting marginalised clients who were going to court was that the process to them was very opaque. ... They would show up on the day with no understanding of what to expect from the day ahead of them [and] would often just be blindsided by everything that was happening. (FG2)

Below we consider the critical role played by legal and other homelessness services in assisting defendants struggling to negotiate the criminal courts.

Because grants of bail are often tied to being present in a particular location at a known address, people experiencing homelessness—especially *primary* homelessness (Chamberlain and MacKenzie 2008)—face an increase of bail refusal and being remanded, even for offences that would usually be regarded as insufficiently serious to warrant remand:<sup>20</sup>

[It's really hard] trying to apply for bail for someone who doesn't have a phone number. (P15, FG5)

The whole *Bail Act* ... is geared towards western European middle-class, property-owning, stable accommodation people. That's what our *Bail Act* is designed for. It's not designed for the needs of homeless who don't have any billing addresses. (P16, FG5)

If someone is homeless and charged with something, their prospect of getting bail is, I don't know, 5 per cent, I'd say, best-case scenario. (P18, FG6)

It's basically impossible to get bail for someone who's rough sleeping. [Our criminal law specialist] ... does quite a lot of work finding accommodation for people, finding out where someone might be able to go. And I've spent hours of my life, maybe days cumulatively or weeks, of my life on the line to rehabs and shelters, and other places that we might try and get someone bailed to. (P28, FG9)

Homelessness may not only diminish the chance of a person being granted bail, it can be a *result* of bail refusal, as one interviewee explained:

That's one of the key things that we always get down at the Magistrates' Court. Someone comes in on custody. It's, 'look, I need bail to keep my house. If I'm on remand, my house is going to be trashed. My property's going to be stolen or I'm going to go into arrears and I'm not going to be able to keep my place.' (P15, FG5)

Even where bail is granted, homelessness can make it difficult for a person to comply with conditions:

Some of the huge reporting requirements [are onerous]. ... [A person] may have got bail but depending on what the issue is ... they may have to report every day. (P26, FG8)

And if you're sleeping rough it's very, very difficult, you know? ... If you're up all night because you're protecting yourself from whatever else is going on around, then it's very difficult to think that the next day you've got to go and report to someone. (P25, FG8)

Homeless people's access to courts and their capacity to receive a fair outcome is constrained by their access to legal services. The following section considers the limits on resources for specialist or generic legal services. In the course of our research, one of our partners had their specialist housing law service defunded.<sup>21</sup>

### ***Specialist Legal Services: Essential but Underfunded***

HPLSs and other pro bono support services play a critical role in assisting people experiencing homelessness to navigate the courts, as well as court orders and other law enforcement procedures. Their function includes 'translating' the court decisions that are being made about them:

One of the reasons we set up ... [a specialist court liaison program] is because we know that just getting to court in the first place has so many hurdles. ... We often find with people who are pretty chaotic as well, ... even if they know they have court they may forget about it or turn up at the wrong time or things like that. Those little things are really important, and also providing food and things during the court day, which is usually a long day. (P22, FG7)

A lot of our clients do have caseworkers who assist them in coming into court and helping them in sitting down [and] stand[ing] up when you need to. (P29, FG9)

One of the major gaps that interviewees identified is that despite the best efforts of HPLSs and other service providers, homeless defendants in criminal matters often appear unrepresented. Many CLCs involved in advising and supporting people experiencing homelessness are not funded to provide criminal law representation:

Our clients, if they're facing the Magistrates' Court on minor matters, will not have legal assistance in any way, shape or form. They can talk to us and we will give advice. They can talk to a junior solicitor from [Legal Aid] at court, but they will not be represented. And they certainly won't get legal aid unless there is a threat of jail. So, they're in there on their own. (P1, FG1)

We know that many of our clients, despite being very capable in some spaces, have limited ability to communicate quickly and effectively. ... Our clients take time to digest what we tell them and to understand a process. ... They need to be assisted through that, which is just something the [Legal Aid] duty lawyer service, by design, has real difficulties in managing. (FG2)

Even where they are able to assist, lawyers are acutely aware that they can usually offer only 'bandaid' solutions:

We can't do preventative work. The damage is done. (P12, FG4)

As a lawyer it's quite frustrating, because a lot of the times you're helping with a legal issue, and that's not really the issue that's keeping that person in their circumstances. So that's quite frustrating. ... You're treating the symptoms. (FG2)

### ***Punishment for Minor Criminal Offences***

The vast majority of sentences for criminal offences do not involve a prison term. The most common court-imposed form of punishment is a fine (ABS 2020), and a fine is the automatic penalty where police enforce a criminal offence by way of on-the-spot fines (variously referred to as 'penalty notices', 'infringement notices' or 'tickets'). The parsimonious use of incarceration as a form of criminal punishment is a good thing. Imprisonment as a last-resort punishment (e.g., *Sentencing Act 2017* (SA) s 10(2)) is a principle to be keenly defended. However, one of the themes to emerge from our interviews with homeless law specialists and allied professionals is the need to recognise that fines can be extremely punitive (Quilter and Hogg 2018; Walsh 2005) and are an especially pernicious mode of punishment for people experiencing homelessness, given the relationship between homelessness and poverty:

In a lot of cases, fines become pointless. They just get, it's just another fine. They're still paying \$20 a fortnight or whatever off of it. It's just going to be another year or two that they pay it for. (P2, FG1)

People experiencing visible homelessness are especially vulnerable to receiving on-the-spot fines, not only by police officers, but also by other law enforcement authorities such as local council officers and public transport officers:

Those kinds of bodies, where they're not police officers, but they have the authority to ... issue fines, which can often have a financial impact that's much higher than some of the traditional criminal fines that you get if you have an interaction with a police officer. (FG2)

People being moved on or fined, ... it's happening in a more informal way that's harder to monitor and harder as lawyers to try and do anything about. Whereas at least with criminal charges it's a bit easier sometimes because we can actually get involved and there's a level of transparency. (P21, FG7)

In addition to on-the-spot fines (over which judicial officers have no control, save for the very rare occasions when recipients challenge them in court), another reason fines are sometimes imposed—despite the absurdity of imposing a financial burden on a person with no capacity to pay—is that magistrates have no other suitable sentencing options:

We can say straight away that all homeless people are excluded from home detention orders. (P16, FG5)

[In the case of a homeless person who was being considered for community-based electronic monitoring] ... the Corrections' suggestion, ... because he didn't have any place [i.e., a home where he could charge the device], was that he could go to [a] shopping centre and put his ankle monitor into a public socket. (P16, FG5)

The residential rehab options are quite limited ... as well, and often people in criminal matters will be having to pick between, do I go to prison or do I go to a horrible residential

rehab place that didn't work last time? And they don't really want to go, but they don't want to go to prison either. (P8, FG3)

If there is anything like a 'silver lining' on the cloud of fines being imposed on people experiencing extreme poverty and homelessness, it is that a number of Australian jurisdictions have developed sophisticated administrative arrangements for enforcing *and ameliorating* fine debt. One of our interviewees told us, with a degree of irony, 'we love it when our clients get fines!' What they meant was that one of the forms of legal support that can be offered to people struggling with homelessness is assistance with navigating processes for fine debt amelioration. The NSW system, overseen by Revenue NSW, was the subject of favourable assessments by our interviewees (as it has been in previous evaluations: e.g., INCA Consulting 2015):

Revenue NSW ... has been on a 13-year cultural change journey, which ... has involved it doing some really amazing work in partnership with the community and with organisations like Legal Aid and Justice [NSW], recognising that the impact of fines on people experiencing disadvantage is disproportionate. (P28, FG9)

A centrepiece of the NSW system is a mechanism—Work and Development Orders (WDOs)—that allows people with fine debt to 'pay' it off in a variety of ways, including by completing unpaid work, taking a course or receiving treatment (Department of Communities and Justice 2019):

WDOs. ... I mean they are amazing. They're such a good way to engage with different services ... [Some people have] fines for \$10,000. They see that as they're never going to pay that off but the [WDOs] are life-changing. (P35, FG12)

If you stick in mental health treatment for a full year and go to all of your appointments, you can get 12 grand written off, which is just phenomenal. ... People use it, and it's life-changing. It's life-changing, not only because it means that their debt is dealt with, but because it means that they have an incentive to do these really positive things, some of which are things that they'd be doing anyway. (P28, FG9)

However, WDOs are by no means a panacea for the damaging effects of coming into contact with the criminal justice system. They become useful only *after* a person experiencing homelessness has been punished (often for poverty-related 'crimes'), and they do not 'work' for everyone:

For some of our ... [clients], particularly the more complex ones, or really anyone who's rough sleeping, a WDO can be quite difficult to stick with and they have pretty low rates of completion. (P28, FG9)

The difficulty with WDOs is they are often not suitable for clients with young children. So it's not a legitimate option for them, and we're back at square one of how we're going to pay this debt. (FG2)

The harms that can be done by criminal punishment in the form of imprisonment and the reasons why there should be less reliance on incarceration as a crime 'solution' are well known (see Brown et al. 2016; Cunneen et al. 2013). For people experiencing homelessness or housing insecurity, imprisonment can be especially harmful. Our interviewees told us that it places them at increased risk of entering (or re-entering) homelessness:

Jail really creates a massive source of homelessness. (P31, FG10)



[Post-release] ... people will be put in temporary accommodation who have drug and alcohol problems, and they're put in rooms above pubs or rooms across the road from pubs and stuff like that. It's just a recipe for disaster for these people. (P36, FG12)

One of the ongoing problems with getting into housing is having to demonstrate your ability to sustain a tenancy. And I think people who've had interaction[s] with the criminal justice system often have difficulty proving their ability to sustain tenancy and they're, therefore, blocked from housing options. (P7, FG3)

## Improvement and Reform

Although participants painted a mostly bleak picture of the multiple ways in which contact with the criminal justice system exacerbates disadvantage for people experiencing homelessness, they also conveyed a strong message that improvement was possible. This optimism and calls for reform were expressed both in general terms (i.e., tackling the root causes of homelessness), and in the form of specific recommendations for reform of the manner in which the criminal justice system operates in relation to people experiencing homelessness. While recognising the absolutely critical need for housing reform, and the relationship of increased funding for social housing to the broader justice reinvestment paradigm (Brown et al. 2016), the final part of the article will focus on criminal justice system reform. Three main themes emerged from the interviews:

1. Policing should move from what is, currently, primarily a harmful *enforcement* model to a new constructive *service* model.
2. A specialist therapeutic jurisprudence (or 'solution-focused') court model should be adopted so that persons whose offending is related to homelessness are supported rather than punished.
3. There should be a major reduction in the imposition of fines (both court fines and on-the-spot fines) on defendants experiencing homelessness and poverty, and nationwide adoption of the WDO fine amelioration mechanism.

### *A New Model of Policing*

Interviewees recommended statutory reforms to repeal public order offences (like public intoxication and begging) and to curtail police powers. They also called for greater transparency in terms of the Standard Operating Procedures (SOPs) and other guidelines that are intended as touchstones for how police officers use the very significant discretion which is a defining feature of public order offences and police powers (Brown et al. 2020: 433, 535):

How can we create more transparency in that more informal [policing] process? Because I think once people are in the [criminal justice] system it's hideous, but as lawyers there's more transparency and we know what to do and there's ways we can work around it. I think what worries me is that point before people are in the system. (P21, FG7)

However, the strongest change-oriented theme to emerge from our interviews with homeless law specialists and allied professionals was that even more critical than 'black letter' law reform and public availability of SOPs, is the need for a fundamental change to policy, organisational culture and on-the-ground practices when it comes to the policing of people experiencing homelessness:

[Police forces should adopt a] service-based response rather than [an] enforcement-based response. (P21, FG7)

In a perfect world, the police who are out there every day should be the first point of contact for rough sleepers. And in the same way that the council outreach people spend time building relationships, it's non-punitive; it's about getting to know who's there, generally

pointing them in the direction of the right support services or things that might be able to help. I think that that's what public space policing should be about. (P28, FG9)

I think something that might be very helpful for [police forces] ... is to have ... something like a social worker who then can do a needs assessment on, 'all right, this person is homeless and they have a mental health issue'. So, perhaps instead of fining them, what we need to do is get a mental health assessment and see if something like that is relevant. And then they can make a better determination on the client and potentially get them into services that can assist them in getting back into housing, if that's what they need or want, to get them the perfect medical attention that might be needed appropriate for responses—things like that. Something like that would be an amazing start. (P1, FG1)

The transformation advocated by a number of interviewees might appear such a radical departure from 'conventional' approaches to policing in Australia as to be a pipedream.<sup>22</sup> However, they were also able to identify current initiatives and policing practices that already embody the shift from sanction to support that is necessary to unwind the systematic over-criminalisation of people experiencing homelessness, which show that change is possible. For example, the Adelaide Zero Project is a promising initiative that aims to *end* street homelessness in the Adelaide inner city (Don Dunstan Foundation 2018):<sup>23</sup>

[The] Zero Project ... [is run] in conjunction with [the] Department of Community Services SA, and a number of the local emergency response services and also the [city] council. ... To start off with, what they're doing is going around and talking to every rough sleeper, getting their names, getting what they need, ... developing plans for each person. So, they'll go out at night-time and talk with everybody. They'll develop a by-name list, so they know everybody's name. (P1, FG1)

The strategy involves engaging with street sleepers, assessing their health and housing needs, and harnessing a coalition of key stakeholders to address those needs (Tually et al. 2018). Although not a South Australia Police initiative, the Adelaide Zero Project is defined by a fresh, non-punitive model of responding to visible homelessness.

Another existing model that attracted compliments during interviews is the SupportLink<sup>24</sup> service used by the AFP in the ACT. SupportLink is a 'referral management service' that police officers use to connect individuals in need with support services in the community (AFP 2019: 72). We noted earlier that the ACT was the only Australian jurisdiction in which interviewees applauded the police force for having a positive and sensitive approach to dealing with people experiencing homelessness. Police officers' use of SupportLink<sup>25</sup> to assist people dealing with homelessness—rather than a punitive enforcement approach—appears to be an important contributor to this positive assessment:

The police will ... either directly refer [to] some services or contact SupportLink, and then they will identify the right services for [the person]. ... We find police have been pretty good at identifying when other supports are needed and actually facilitating that. (P9, FG3)

### *Therapeutic Jurisprudence for Homeless Offenders*

A strong recommendation to emerge from interviews is that governments should establish a specialist therapeutic jurisprudence (or 'solution-focused') court (or 'list') so that persons whose offending is related to homelessness are supported in a more holistic and constructive way. Such courts exist in a number of Australian jurisdictions, primarily to address drug-related offending, mental health related-offending and offending by Aboriginal and Torres Strait Islander persons (Schaefer and Beriman 2019). Interviewees asserted that homelessness-related offending warrants a similar approach:

If someone is committing an offence because they are homeless, ... I tend to think of it the same as drugs or addiction. If someone is committing an offence because of an addiction,

isn't it better to try and work with them and deal with the addiction? But if someone is regularly ending up in court as a result of being homeless, then surely we should be working with that person to try and end their homelessness? And if that's going to be the solution then that's better than jail or any other penalty. (P2, FG1)

The concept of a specialist homelessness court is not a new one in Australia (Midgley 2005). In its original form, the Brisbane Special Circumstances Court that operated between 2006 and 2012 was focused on defendants experiencing homelessness (Walsh 2011b). This history is highlighted to make the point that a specialist homelessness court or list, of the sort advocated by specialist homeless lawyers and allied professionals, is eminently feasible if governments have the political will to pursue reform.<sup>26</sup>

### *Fewer Fines, More WDOs*

The absurdity of imposing financial penalties on people experiencing extreme disadvantage is abundantly clear to HPLS lawyers and allied professionals. Unsurprisingly, the use of criminal penalties in this form (whether on the spot or court issued) was identified as in need of urgent reform. In addition to calling for a halt to their imposition in the first place, it was suggested that law enforcers and courts should conceive of a homeless person's accumulated fine history differently:

What I will say is if you are seeing someone go through a court system, having multiple fines for issues that are clearly connected to poverty, rather than being an opportunity for punishment, it's a red flag for vulnerability. It's a red flag for appropriate and considered intervention. ... The appropriate response is to try and address the underlying causes of vulnerability, or the underlying concerns, rather than just throwing another fine on that list. (FG2)

Belatedly, a body of international literature has begun to emerge that seeks to render more visible the intensity and destructiveness of fines and other 'legal financial obligations' (e.g., Harris 2016; Faraldo Cabana 2017; Martin et al. 2018; Quilter and Hogg 2018). Our findings reinforce the urgent need to translate these insights and analyses into policy action.

Until such time as governments, police forces and courts take action to radically reduce the volume of fines imposed, interviewees recommended that best practice fine amelioration systems—like the WDO system that originated in NSW—be adopted nationally:

We have a really good fine [amelioration] system ... and I think that that is a model that should be replicated Australia wide. (P28, FG9)

WDOs ... haven't been taken up Australia wide yet, but I think there are other states starting to. I mean they are amazing. ... [WDOs] are life-changing. (P35, FG12)

It is an ironic reality that the sorts of programs offered through WDOs (such as counselling and training) can provide people experiencing homelessness with valuable support of the sort that conventional policing and court processes are not currently set up to offer. It should not be necessary for a person to accumulate a crushing level of fine debt before they are offered support and services of the type that have the best potential for preventing them from further contact with the criminal justice system.

### **Conclusion**

The insights of specialist homeless legal service providers and community legal services summarised in this article present a troubling picture of how relatively little has changed when it comes to the policing and punishment of people experiencing homelessness—particularly 'street' homelessness—despite the steady pattern of formal decriminalisation of 'vagrancy' since the 1970s. The findings suggest that antiquated laws may have been repealed, but they have been replaced with suites of new offences and

expanded police powers. Evidence that people experiencing visible homelessness continue to be subjected to intense surveillance, coercion and the imposition of criminal penalties suggest the need for another chapter of 'vagrancy' decriminalisation.

A valuable insight is that the homelessness–criminalisation link is a two-way relationship: people experiencing homelessness are at additional risk of coming into contact with the criminal justice system *and* justice system contact carries risks of creating or exacerbating homelessness. Despite an overwhelmingly bleak characterisation of the status quo, this study also revealed that experienced legal professionals believe that the seeds of a transformed criminal justice response to homelessness exist—in the form of jurisdiction-specific models (of the present and/or recent past) of service-focused policing and problem-solving courts that should be adopted uniformly across Australia.

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<sup>1</sup> The research on which this article reports was supported by the Australian Research Council Linkage Scheme (LP160101543), in partnership with 10 community legal centres across Australia (see endnote 6). We also acknowledge the contribution of other organisations whose staff participated in focus groups and interviews, and the excellent research assistance of Dr Zahra Stardust.

<sup>2</sup> <https://www.wefh.org.au/wollongong-homeless-hub/>

<sup>3</sup> <https://www.homelessnessaustralia.org.au/>

<sup>4</sup> <https://piac.asn.au/projects/homelessness/>

<sup>5</sup> <https://justiceconnect.org.au/our-services/homeless-law/>

<sup>6</sup> Adelaide: Welfare Rights Centre (SA), Housing Legal Clinic; Brisbane: LawRight, Community and Health Justice Partnerships program (which includes the formerly named Homeless Persons' Legal Clinic); Canberra: Canberra Community Law, Street Law; Darwin: Darwin Community Legal Service; Hobart: Hobart Community Legal Service; Melbourne: Justice Connect Homeless Law; Perth: Street Law Centre WA; Sydney: Public Interest Advocacy Centre, Homeless Persons' Legal Service; Townsville: Townsville Community Legal Service; Wollongong: Illawarra Legal Centre.

<sup>7</sup> We acknowledge the applied research that has previously been undertaken by a number of community legal centres as part of their campaign, advocacy and reform work (e.g., see PILCH Homeless Persons' Legal Clinic [now Justice Connect Homeless Law] 2010; Justice Connect Homeless Law 2016; Schetzer [Senior Policy Officer, Homelessness, Public Interest Advocacy Centre] 2017).

<sup>8</sup> Ethics approval was obtained from the University of Queensland (Approval No. 2017002110).

<sup>9</sup> In one of the 10 locations, three sessions were conducted on three different days, with one, two and four participants, respectively.

<sup>10</sup> These risks are reduced in one-on-one interviews. Only one of our 37 subjects participated in this mode.

<sup>11</sup> To ensure anonymity and compliance with the terms of ethics approval, the source for quotes from focus groups/interviews is provided in the form of an alpha-numeric code ('P' refers to Participant; 'FG' refers to Focus Group; 'I' refers to Interview).

<sup>12</sup> We use the term 'visible homelessness' to refer broadly to uses of public spaces by persons experiencing *primary* homelessness (Chamberlain and MacKenzie 2008), including rough sleepers, 'long grassers', people begging, etc.

<sup>13</sup> One of the early 'homegrown' criminal laws was the *Vagrancy Act 1835* (NSW). Goluboff (2016) provides a fascinating history of vagrancy laws in the United States.

<sup>14</sup> For example, the *Vagrants, Gaming and Other Offences Act 1931* (Qld) was repealed in 2005; although, note that the *Summary Offences Act 2005* (Qld) was enacted in the same year.

<sup>15</sup> Being intoxicated in a public place remains a criminal offence in Queensland (*Summary Offences Act 2005* (Qld) s 10). In August 2019 the Victorian Government announced that public intoxication (*Summary Offences Act 1966* (Vic) s 13) would be decriminalised but, at the time of writing, this has not yet occurred.

<sup>16</sup> All Australian jurisdictions retain a vaguely worded offence to capture 'undesirable' public behaviour, variously styled 'disorderly behaviour', 'offensive behaviour' or 'public nuisance'. For example, see *Summary Offences Act 2005* (Qld) s 6; see generally Trollip et al. (2019).

<sup>17</sup> We interviewed police officers as part of the larger project. Some acknowledged the inherent paradox of 'moving on' homeless people whose 'home' is the street. One officer said, 'it's hard. Where do you move them on to? ... We just say, "you can't sleep here, is there somewhere else that you can go? Or think of somewhere else, somewhere that's a bit more discrete." ... I think there's become a little bit of acceptance now that this is an issue and they don't have anywhere else, so we'll just have to work within that.'

<sup>18</sup> Persons and entities to whom relevant anti-discrimination laws apply must not, in the provision of goods and services, discriminate on the basis of a protected ground (such as race, disability, age, etc.). For example, see *Racial Discrimination Act 1975* (Cth) pt II; *Anti-Discrimination Act 1998* (Tas) pt 4; see generally Rees et al. (2018).

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- <sup>19</sup> Magistrates' perspectives on this challenge (and other challenges) are discussed in Quilter et al. (2020).
- <sup>20</sup> Offence seriousness is one of the factors identified in bail legislation. For example, see *Bail Act 1982* (WA) sch 1, pt C, cl 3.
- <sup>21</sup> As noted, given the nature of the methodology for this project, homeless law specialists' perspectives on the experience of people experiencing homelessness who have not had access to legal services is beyond the scope of this article.
- <sup>22</sup> Much depends on how 'therapeutic policing' is undertaken. Stuart (2016) concluded that the version he documented in Los Angeles' Skid Row 'can cause more problems that it cures' (2016: 20).
- <sup>23</sup> <https://dunstan.org.au/adelaide-zero-project/>
- <sup>24</sup> <https://www.supportlink.com.au>
- <sup>25</sup> SupportLink has also previously operated in Queensland and operates in the Northern Territory; although, this was not mentioned by interviewees in these jurisdictions. A variety of other police referral systems operate in Australian states and territories.
- <sup>26</sup> A specialist court has operated in Aotearoa/New Zealand since 2010: Te Kooti o Timatanga Hou (The Court of New Beginnings). See <https://www.districtcourts.govt.nz/criminal-court/criminal-jurisdiction/specialist-criminal-courts/new-beginnings-court/>

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