

From 'cause' to 'solution'

USING THE LAW TO RESPOND TO HOMELESSNESS

Philip Lynch

The law as a help not a hindrance to homeless people.

Andy used to sleep rough on the numerous nights that crisis shelters in Melbourne were full. He is an elderly man who suffers from an acquired brain injury and an intellectual disability. He also suffers from chronic alcoholism, a legacy of trying to cope with life on the street. Between 1996 and 2001, Andy received more than \$100,000 in fines for offences such as drinking in a public place, begging, swearing, and littering. Most of the fines were issued around Flinders Street Station — his community, his support network and his home. Non-payment of such fines can result in imprisonment of up to one day per \$100. Andy was one of the first clients of the Homeless Persons' Legal Clinic, a joint project of the Public Interest Law Clearing House and the Council to Homeless Persons in Melbourne.

Sarah lives in her car. She is one of over 500 so-called 'vehicularly housed' residents of San Francisco. Earlier this year, Sarah approached the Coalition on Homelessness in San Francisco for assistance after she was evicted from her car pursuant to an ordinance that prohibits, on the ground of 'public amenity', 'habitation' of a vehicle between 10.00 pm and 6.00 am.

The problem of homelessness is one of the most serious socio-economic issues confronting Australia and the United States. In 1996, the Australian Bureau of Statistics counted over 105,000 people as homeless on Census night.¹ In 2002, it was estimated that at least 3.5 million people experience homelessness across the United States each year.² As the United Nations Committee on Economic, Social and Cultural Rights has remarked, this is, at best, a 'grave concern' and, at worst, a gross violation of human rights given the 'enviable wealth' of countries such as Australia and the United States.³

Drawing on my experiences as the Coordinator of the PILCH Homeless Persons' Legal Clinic in Melbourne and the lessons gleaned from a recent study trip to the United States to examine the provision of legal services to disadvantaged groups, this article argues that the law can operate both as a cause of, and a solution to, homelessness. It examines strategies and initiatives employed by advocates of people who are homeless in the United States, and challenges homelessness legal service providers in Australia to move from law as a 'cause' to law as a 'solution' to homelessness.

Law as 'cause'

In both Australia and the United States, the pathways into homelessness are complex and varied. They include structural causes (such as poverty, inadequate affordable housing and unemployment), government fiscal and social policy causes (such as economic reform, privatisation, the availability of public housing and welfare expenditure), cultural causes (such as the dispossession of land and the provision of culturally inappropriate accommodation to indigenous populations) and individual causes (such as mental illness, substance and alcohol addiction, gambling, domestic violence and family fragmentation).⁴ In many

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He recently spent two weeks in the US examining the provision of legal services to people experiencing homelessness.

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cases of homelessness, these causes are intersectional and related.

During my time in Melbourne, Los Angeles, San Francisco and Washington DC, I observed that the law itself can also cause, or at least contribute to, homelessness in the following ways.

First, many homeless people are disproportionately and discriminatorily affected by laws that are enacted and enforced without regard to socio-economic status.⁵ Legislation that prohibits begging — a demeaning but harsh necessity for some people experiencing homelessness — is the starkest example of this. Other examples include social security provisions that impose onerous payment access requirements with which many homeless people are unable to comply, and voter registration laws requiring, in effect, that people have a fixed residential address to enrol to vote. The discriminatory impact of legislative enactment and law enforcement will persist until homeless people and their advocates are empowered to participate in the legislative process — to have a say in the formulation of laws and policies that affect them.

Second, homelessness can ‘criminalise’ behaviours that would be lawful if performed in a home.⁶ Laws that criminalise conduct such as sleeping, bathing, lying down, drinking or storing belongings in public space impact on homeless people on the ground of their housing status and the necessary location of their conduct. In the course of my trip to the United States, the Los Angeles Police Department conducted a ‘street sweep’ of downtown Los Angeles to ‘clean up’ public space infractions. In the case of Andy, the client of the Homeless Persons’ Legal Clinic with more than \$100,000 in fines, it was the location rather than the nature of his conduct that rendered it unlawful. Andy would not (and could not) have been charged had he been drinking, swearing or urinating in a conventional home. While we all have an interest in pleasant public places and safe streets, this interest will only be realised through the development and implementation of solutions to homelessness, not through its criminalisation.

The third respect in which the law can contribute to or exacerbate homelessness arises from the arbitrary or selective enforcement of laws.⁷ A homeless person in Swanston Street, Melbourne, is far more likely to be ‘moved on’, harassed or fined for drinking in public than a non-homeless person consuming alcohol at a picnic beside the Yarra River. Andy received up to 13 fines from three Melbourne police officers in one day. The San Francisco Homeless Advocacy Project reports that police in San Francisco issued over 17,000 public space citations to homeless people in 2002. While such conduct is often in response to pressure from traders or shoppers, law enforcement officers could do more to soften the often harsh impact of the law on people experiencing homelessness. This potential has been recognised and harnessed in San Francisco where law suits alleging police victimisation have been settled on the basis that law enforcement officers undergo compulsory homelessness sensitivity and response training.

The final manner in which the law can operate as a cause of homelessness stems from the inadequacy of anti-discrimination legislation protecting the rights of disadvantaged socio-economic groups, along with the lack of access of such groups to legal representation or redress.⁸ These factors combine to mean that the rights of many

homeless people are violated by individuals or organisations that can act with relative impunity.⁹ In fact, with the exception of Minnesota in the United States, discrimination on the ground of socio-economic status is lawful in every state of the United States and Australia. Discrimination against the homeless is particularly widespread in the areas of public transport, accommodation and the provision of goods and services.¹⁰ Amendment of equal opportunity legislation to prohibit discrimination on the ground of socio-economic status would constitute a significant step towards protecting socially and economically marginalised groups.

Law as ‘solution’

However, while the law most often contributes to or exacerbates homelessness, the law is also being used in both Australia and the United States to alleviate and ameliorate homelessness.

In Australia, homeless persons’ legal clinics in Melbourne and Brisbane provide free legal assistance to, and advocacy on behalf of, people experiencing homelessness.¹¹ They also undertake law reform work and public policy advocacy, including in relation to vagrancy laws, voting rights, welfare reform, the right to adequate housing and socio-economic discrimination.

In the United States, a range of organisations engage in direct service provision, litigation, law reform work, public policy advocacy, community organising and public education for the purpose of ending homelessness. Below I discuss the organisations that I observed in Los Angeles, San Francisco and Washington DC.

- The Public Counsel Law Centre in Los Angeles is a public interest law organisation that provides, and facilitates the provision of, free legal services to community organisations and to people who live at or below the poverty line. Public Counsel also operates a number of projects which focus on the rights of marginalised groups. These projects include the Homelessness Prevention Law Project which strives to reduce the incidence of homelessness in Los Angeles (currently estimated at around 86,000 people per night) by providing free legal advice to homeless people and by advocating on behalf of those at risk of becoming chronically homeless.¹²
- The Coalition on Homelessness in San Francisco is a community organisation that works with homeless people to vindicate their rights and achieve economic justice. It does this through an integrated approach that links outreach, peer support, leadership development, public education, advocacy and community organising.¹³
- The Homeless Advocacy Project, a project of the San Francisco Bar Volunteer Legal Services Program, is an organisation that provides integrated legal and psychosocial services to people who are chronically homeless.¹⁴
- The National Coalition for the Homeless in Washington DC is a network of advocates, service providers and homeless people who aim to prevent and end homelessness through law reform work, public policy advocacy and public education, particularly in relation to housing, income, health care and civil rights.¹⁵
- Washington DC is also home to the National Law Centre on Homelessness and Poverty. The National Law Centre is a community organisation that works, through

litigation, education and lobbying, to use domestic law and international human rights to address causes of homelessness. It is the peak law reform and public policy advocacy body for homeless people across the United States.¹⁶

- The Washington Legal Clinic for the Homeless is a homeless persons' law firm that provides free civil and administrative legal assistance to homeless people, conducts law reform work, and engages in advocacy aimed at policy development. The Legal Clinic provides services at ten locations, including crisis shelters, domestic violence refuges and soup kitchens, on a weekly basis. Services are provided on a rotational basis by five staff attorneys and about 200 volunteer attorneys.¹⁷

With up to 20 years involvement in homelessness legal service provision, these organisations represent a vast repository of expertise and experience to homeless persons' advocates in Australia. Each organisation employs an array of strategies to combat law as a 'cause' and use the law as a 'solution' to homelessness. I have identified seven notable lessons to be drawn from legal service provision to the homeless in the United States.

Lesson 1

It is fundamental that people experiencing homelessness are involved at all levels of homelessness service provision. The words of Aboriginal activist, academic and author Larissa Behrendt are apposite here: 'A community must always decide for itself what is best for its members. Only the community knows what is best for the community.'¹⁸

The National Coalition for the Homeless involves homeless people in corporate governance through a constitutional requirement that at least 40% of its board be homeless or formerly homeless.

In San Francisco, the Coalition on Homelessness involves homeless people in direct service delivery by engaging them to undertake street outreaches to distribute pamphlets about homeless people's rights.

Lesson 2

It is imperative that homeless people and their advocates have a say in the formulation of laws and policies that affect them.

The Washington Legal Clinic involves homeless people in public policy formulation by encouraging them to contribute to law reform submissions and assisting them to give testimony at public hearings and parliamentary inquiries. To this end, the Legal Clinic distributes a monthly newsletter to clients to advise them of forthcoming hearings. It also convenes regular workshops to prepare them for these hearings. In Washington DC, I attended a session of the District of Columbia Oversight Committee for the Department of Human Services at which six clients of the Legal Clinic provided compelling testimony in relation to the human impact of reductions in housing and social security expenditure.

A parliamentary committee or an independent statutory body (such as a community services commissioner) that critically examined all proposed legislation for the purpose of assessing its potential impact on marginalised and disadvantaged groups, *including by directly consulting those groups*, would be a positive and timely innovation in Australia at both state and federal levels.

Lesson 3

A holistic approach to service provision can resolve a person's legal problems as well as any underlying psychosocial issues. By integrating legal and psychosocial services, providers can identify those factors that may be common to homelessness and its attendant legal problems *and* work to address those factors in a sustainable way.

The Homeless Advocacy Project in San Francisco assists homeless clients not only to defend public drinking fines, but to obtain stable accommodation and attend alcohol rehabilitation if necessary. Every client has the option of being attended by both a lawyer and a social service provider.

In Los Angeles, a homeless persons' court seeks to identify and address the causes of a homeless person's 'offending behaviour' by linking misdemeanour adjudication with social service intervention. A person who is homeless and pleads guilty to an offence may be referred to the court for 'sentencing'. The focus of sentencing is rehabilitation and restoration. Only people who make the commitment to taking the long road to putting their lives back on track are eligible for referral to the court. Thus, rather than fining or incarcerating homeless offenders, the court refers them to an appropriate service provider to obtain vocational training, health care, housing, drug and alcohol treatment, family counselling or gambling support as necessary. Like the drug courts in Victoria, South Australia and New South Wales, the court retains an ongoing supervisory function, with offenders being required to report back to the court as directed.

Lesson 4

Given the pressing problems that many homeless people confront, legal services must be appropriately targeted and delivered.

The homeless persons' court sits monthly in the PATH Mall in downtown Los Angeles. PATH (People Assisting the Homeless) is a collaboration of homelessness organisations offering counselling, housing information and referrals, emergency accommodation, education, training, medical treatment, personal grooming and legal services under the one roof. Sentencing by the homeless persons' court usually involves referring an offender to one or more of the PATH organisations for assistance, rehabilitation or treatment.

As already mentioned, the Washington Legal Clinic outreaches to ten locations accessed by homeless people for basic subsistence needs, such as food and shelter. The Homeless Persons' Legal Clinic in Melbourne now provides services on a weekly basis at eight welfare agencies.

Lesson 5

Homeless people and their advocates can work closely with law enforcement agencies to end homelessness.

The Washington Legal Clinic provides training to police officers to sensitise them to issues pertaining to homelessness and to equip them to refer homeless people to an appropriate support service or to contact an outreach worker rather than issue a citation.

In San Francisco, homeless people and their advocates from the Coalition on Homelessness regularly meet with the San Francisco Police Department to provide testimony in relation to the violation of homeless people's rights and to lobby with respect to reform of the regulation of public

spaces. With the assistance of the Coalition, Sarah and her vehicularly housed comrades recently met with the San Francisco Board of Supervisors for the same purpose.

Lesson 6

Responding to homelessness in a human rights framework can be a powerful strategy.¹⁹ Human rights enable marginalised and disadvantaged people to make claims against governments *as of right*. Human rights norms impose obligations on governments to respect, protect and fulfil fundamental rights, including the right to adequate housing, the right to health, the right to education, the right to social security, the right to be free from discrimination, and the right to life, liberty and security of person. Crucially, they also impose an obligation on governments to take steps, to the maximum of their available resources, to progressively realise all homeless persons' human rights and to remedy violations.

The National Law Centre on Homelessness and Poverty uses an international human rights framework as an effective tool by which to measure and, to some extent, enforce the realisation of homeless people's rights. This can be a useful and scrutinising approach, as Maria Foscarinis, the Executive Director of the National Law Centre, identifies:

[T]he appeal to international norms places debate outside the US and current political climates. By invoking the world stage, it appeals to US policy makers to consider a bigger perspective. How will the US be perceived? How are its national policies affecting its international standing? How can homelessness and dire poverty be tolerated in a country with resources? An international perspective encourages us to look at the US reality from a stranger's perspective, one in which these questions may appear more starkly.²⁰

Homelessness legal service providers across the United States also use international human rights law as a framework within which to analyse and challenge the impact of facially neutral laws on marginalised and disadvantaged groups. In *Pottinger*, the Eleventh Circuit Court upheld a challenge to laws prohibiting conduct such as sleeping, bathing and lying in public on the ground that they violated homeless people's rights to freedom of movement and to be free from cruel and unusual punishment.²¹ In *Loper*, the Second Circuit Court held that begging constitutes expressive activity and that the criminalisation of begging amounts to an infraction of the right to freedom of expression.²²

In Australia, international human rights law may have a powerful bearing on the development of the common law,²³ the interpretation and application of statutes²⁴ and the Constitution,²⁵ the process of administrative decision making (and the review of administrative decision making),²⁶ and the development and application of social justice policies. Test case and 'public interest' litigation can be a powerful tool for social change. Lawyers and advocates working with, and for, people experiencing homelessness need to think constructively and creatively about how the important influence of international human rights law could be used to transform the law from 'cause' to 'solution'.²⁷

Lesson 7

Law reform for the benefit of marginalised and disadvantaged groups is normally a consequence of pressure being brought to bear on decision makers by an informed polity. Homeless people's advocates can play a crucial role in public education.

Every homelessness legal service provider that I visited in the United States was involved in a partnership with at least one law school to provide clinical legal education and services. Such partnerships can avail service providers of the assistance of skilled volunteers, at the same time as providing volunteers with practical experience in an environment that fosters the development of a strong sense of ethical obligation with respect to the provision of legal services to marginalised and disadvantaged people.

The National Coalition in Washington DC convenes a panel of people who have experienced homelessness — the 'Faces of Homelessness' panel — to address schools, universities, civic organisations and special events. The panel addressed over 250,000 people in 2002.

The National Coalition also campaigns effectively in relation to the 'costs of homelessness', not only to the individual who is denied rights and is disenfranchised, but to governments and our community. Recent studies conducted in the United States demonstrate that establishing long-term solutions to homelessness reduces the use of other government services and substantially reduces the total cost to government. For example, a New York study which monitored 4679 mentally ill homeless people over a seven-year period from 1995 to 2001 found that it costs three times more to provide basic subsistence services to homeless people than it does to provide supported accommodation.²⁸ The social and economic costs of homelessness are also being recognised by Australian state governments. As the Victorian Homelessness Strategy recognises:

There is a compelling case for government to provide quality homelessness services as a way of containing expenditure across a broad range of social programs used by people who have multiple or complex needs.²⁹

Conclusion

The law has the potential to operate as both a cause of, and a solution to, homelessness. Realisation of this potential, one way or the other, is the challenge for us. Increasingly, advocates and activists in Australia are seeking to counter law as 'cause' and leverage law as 'solution' through direct service provision, law reform work, public policy advocacy and public education. For Andy, this meant that the Melbourne Homeless Persons' Legal Clinic was able to provide representation in the Magistrates' Court which dismissed the fines and imposed a condition that Andy comply with a case management plan prepared by St Vincent de Paul Support Services. The plan is designed to enable Andy to obtain stable accommodation and aged care support — that is, to address causes underlying Andy's homelessness.

Drawing on the initiatives, strategies and successes of our colleagues in the United States, we must continue this fomentation.

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