Fostering community and legal activism in support of people facing homelessness.

Andy’s story of harassment and discrimination through the law whilst living around Flinders Street Station in Melbourne — told by Phil Lynch in his article in this edition — is important to tell, and not unique. From Cairns to Townsville to Darwin to Sydney, government authorities continue to adopt law and order strategies that target people living on the streets and in public space. These laws are often in response to public calls for ‘something to be done’ about homeless people, blamed — and arguably scapegoated — for various social concerns: increasing crime, begging, ‘anti-social behaviour’, noise and nuisance, public fighting, damage to local business, public drunkenness or just the visibility of homelessness and its impact on residential property prices. There appears to be a consensus at public policy level that homelessness in Australia is generally on the increase, including the number of people living in public space in our major urban centres.¹ In Darwin, there is a preponderance of local opinion that the number of people living in public space is at ‘crisis’ or ‘plague’ levels:

Begging and other anti-social behaviour is now rife in most Territory towns. Nearly every shopping centre in Darwin and Alice Springs is plagued by itinerants.²

Beggars are pestering people eating in cafes and restaurants as the Territory’s itinerant crisis worsens. One cafe owner said last night: ‘Now you can’t even enjoy a meal in peace — it’s like being in the Third World’.³

As a person who has resided in the NT for 35 years I have seen the increase in drop-outs, long-grassers and Aboriginals in and around businesses and shopping centres throughout the NT ... we need police seriously involved and laws strengthened. Bring back vagrancy laws with the power to remove them.⁴

And, the pressure on government authorities to ‘do something’ is intense.

Law and order strategies typically include legal regulations that prohibit ‘life-sustaining’ conduct such as sleeping, drinking or leaving belongings unattended in public places. These activities would be lawful if conducted behind closed doors. For example, in Darwin, the local council uses by-laws 100 (prohibits leaving of belongings in public space) and 103 (prohibits sleeping or camping in a public place between sunset and sunrise).⁵ In Andy’s case, the police used a range of laws including prohibitions on public drinking, begging and swearing. The regulations are enforced by repeated warnings, directions to move on, fines and in some cases detention.

While available research, both locally and overseas, questions the long-term usefulness of a law and order approach to ‘dealing with’ people living in public space, the public continues to demand law and order, and governments continue to respond accordingly. The end result is that people living in public space continue to be criminalised for being ‘homeless’.

From a welfare to a rights-based approach to homelessness

Within this context of increasing rates of homelessness, and continuing law and order responses, calls are again being made to assert a
CURRENT LAW AND ORDER STRATEGIES TO DEAL WITH PEOPLE LIVING IN PUBLIC SPACE NOT ONLY FAIL TO SHOW PEOPLE RESPECT BUT ACTIVELY CRIMINALISE THEM.

At the other end of the spectrum, people who are staying in refuges or boarding houses have access to shelter, avoiding harassment through the law in public space, but are still generally considered to be ‘homeless’. It is clear that ‘just because you have a roof over your head doesn’t mean that you have a home’.8

This complexity about who is ‘homeless’ begs the question about the appropriateness of the term ‘homelessness’ in seeking to describe such diversity in experience and concern. Is the term ‘homelessness’ useful in seeking to mobilise action around common areas of concern? Indeed, it has been argued that the term ‘homeless’ is not appropriate for a proportion of people who are labelled in this way.9

Currently, the most accepted definition of ‘homelessness’ for Australian public policy purposes is by reference to a person’s standard of accommodation. If a person’s standard of accommodation falls short of mainstream community standards, then that person is considered ‘homeless’.10 However, that definition suggests that the person’s core problem is that their accommodation falls short of the mainstream standard, an assumption that contradicts the research, for example, about some people living in public space. Whilst the definition may be useful for developing indicators of the number of homeless people in Australia, an alternative definition seeks to better reflect the diversity and complexity associated with the expressed aspirations of people such as those living in public space. The definition proposes that the core concern shared by people generally understood to be ‘homeless’ is that they ‘lack legitimacy and control over the spaces in which they live’.11 This definition acknowledges that some people, although they consider they have a home (eg living in public space) share a common problem with other homeless people who want conventional accommodation: they lack the legitimacy and control over their home that conventional accommodation provides in our social, political and legal system. This alternative definition is significant in supporting a shift from a ‘welfare’ to a rights-based approach to homelessness. A welfare approach fails to listen to people facing homelessness or to engage them in a way that puts homeless people in control of identifying their problems and appropriate solutions. Homeless people have typically been treated as ‘objects’, consumers, or clients who are ‘targeted’ by interventions to secure conventional accommodation, a goal which may or may not match with a person’s genuine concerns. Accordingly, a significant proportion of people resist or actively rejects the interventions that are deployed.

A ‘right-based approach’ to homelessness involves homeless people being at the centre of the processes that develop solutions and in control of decision making that affects them. Law and order strategies that criminalise people living in public space are the antithesis of this approach.

Even amongst advocates and service providers who seek to support homeless people, direct participation by homeless people in decision-making processes and program development remains marginal. With over 1000 people in attendance at the recent 3rd National Homelessness Conference in Brisbane, there were few delegates who had direct experience of homelessness themselves. The notable exception was the participation by members of the Homeless

RIGHTS VERSUS WELFARE

People in control

The first lesson highlighted by Phil Lynch from his observations of legal advocacy in the US was that ‘it is fundamental that people experiencing homelessness are involved at all levels of homelessness service provision’. A rights-based approach acknowledges that functionaries — lawyers, social workers, and public policy managers — cannot assume what homeless people need and determine the best solutions to homelessness.

We understand that you think you are doing your best but until such time as you stop and ask the people themselves what their needs are you will keep going around in circles and wasting money that could be put to good use.6

Homeless people must be supported to speak and be listened to, to organise locally, to come together to articulate their needs, concerns and problems and to be involved in the delivery of solutions.

While these ideas are certainly not new, in Australian public policy development service delivery and advocacy in support of homeless people has typically taken a ‘welfare’ approach. A welfare approach assumes the problems faced by homeless people (eg lack of accommodation) and provides services and intervention based on those assumptions. The responses are driven by dominant, mainstream standards of adequate housing and presume that homeless people aspire to this way of living. A welfare approach to homelessness fails to allow people affected by homelessness to be involved in identifying what their priorities and aspirations actually are.

For example, a ‘homeless’ lifestyle — living on the streets, in transient accommodation, or in public spaces — is, for some, a person’s best effort to live in a way that is congruent with their cultural or individual values, beliefs and needs. They do not necessarily want conventional accommodation. For some people experiencing homelessness, their main desire may be to be treated with respect, or simply left in peace.

Many [Indigenous homeless people] neither seek nor want any form of intervention into the way in which they are living. At the same time they look for acceptance and understanding that the lives that they lead should be respected and with that respect should come supports and assistance at the time, and in the way, which most support their individual views of how their lives should be led.7
Persons Association who gave a number of powerful presentations. The virtual absence of homeless people at this event was but one example of the many processes that have been developed over the years to address homelessness. As one presenter in Brisbane noted:

In the past four years, I have attended many meetings on housing issues in Melbourne. I have met many good people involved in housing issues. Yet, in all those meetings I never, and I repeat never met a person who was homeless or had experienced homelessness. People involved in housing issues are generally professionals, many of them passionate and deeply concerned about the increasing homelessness, the cuts in government spending on public housing, etc etc. I wondered why homeless people were not involved in addressing the issues that confronted them. I also wondered why homeless people are not at the centre of this conference presenting papers and discussing issues that are closest to their heart. It is like having a conference on women’s issues and men make most presentations. I wonder what women would feel about that!!

In legal settings, the story is often similar. As we contemplate the role that lawyers and the law can play in supporting homeless people, the reminder from the US about people participation is perhaps the most important — if most challenging — to apply.

**Human rights**

A rights-based approach also recognises that people have human rights and entitlements for which they can hold government accountable. This is in contrast to a welfare approach that involves the provision of discretionary benefits and services, based on assessment of need, without recognising these services and standards of living as an entitlement. (Note that a rights-based approach, asserting fundamental and inalienable rights as human beings, is not the same as a ‘consumer rights framework’, which seeks to secure certain standards of service-delivery, but not a right to the service itself).

If there is recognition that homeless people have human rights, and that their claims are based on rights, rather than welfare or charity, then legal analysis becomes increasingly significant.

Yet there has been a tendency for functionaries in Australia, including lawyers, to see homelessness as an area where law has little to offer. This attitude is linked to a range of factors including a general ambivalence to international human rights, lack of legal aid, particularly in minor criminal matters, or civil law claims, and the lack of a bill of rights in Australia. Even in human rights areas of legal practice and advocacy, homelessness has often been seen as an aspect of economic, social and cultural rights discourse, in particular the ‘right to adequate housing’ contained in Article 11 of the International Covenant on Economic Social and Cultural Rights, traditionally argued to be less susceptible to justiciability. Accordingly, homelessness has been too easily dismissed as a problem not amenable to legal intervention. Yet, homeless people experience human rights abuses on a daily basis, exemplified by their harassment in public spaces.

There has been relatively limited debate in Australia about the legal and human rights of people facing homelessness, and how people might pursue those rights to assert greater control and legitimacy, inside and out of the domestic courts and at international level. As Lynch argues, the law has the potential to be a tool in the hands of homeless people, rather than a tool used against them. In this regard we can do well look to the United States, Canada and other jurisdictions for lessons to be learned. Whilst many of the factors are different (not least of which is the availability in the United States of a constitutional bill of rights), there are also similarities. Can we challenge, either domestically or at international level, the regulation of public space that criminalises and discriminates against people living in such places? Can we challenge policies that have the indirect effect of excluding or discriminating against certain groups when accessing social housing? Is there a place for using the First Optional Protocol to the International Covenant on Civil and Political Rights or Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination to lodge individual communications with the United Nations monitoring bodies? Can we use human rights discourses to better support homeless people, and to advocate on their behalf?

Back in 1975, Justice Ronald Sackville delivered his seminal report, *Homeless People and the Law*. Over the years, significant papers have been written, and there have been important legal and social campaigns, including the Rent Watchers campaign leading up to the 2000 Olympics in Sydney, the campaign against loitering offences in Port Kembla, and the long grass people’s campaign against anti-sleeping by-laws in Darwin. However, these reports and campaigns have tended to be localised endeavours without the capacity to continue a broader campaign of community and legal activism seeking to define and secure legal protection of the basic rights of people facing homelessness.

Recent events in Australia present fresh opportunities to debate the legal and human rights of people experiencing homelessness, build sustainable collaborations and explore the merits of a rights-based approach to homelessness in Australia, and the role of legal functionaries. In June 2001, the Homeless Person’s Legal Clinic in Melbourne commenced and in December 2002, the Queensland Public Interest Law Clearing House launched the Brisbane-based Clinic as a six-month pilot project based on the Melbourne model. The Public Interest Advocacy Centre’s Public Interest Law Clearing House in New South Wales has now announced similar plans for a specialist legal service for homeless people, based in Sydney. A number of institutions are undertaking research into the legal and human rights of people facing homelessness. Efforts are underway to publish an Australian legal text on homelessness, the law and human rights and papers, forums and training courses are being delivered in a range of contexts. In Melbourne, a new community-based Working Group on Human Rights and Homelessness has been established and a project has been funded to promote housing as a human right in Victoria. A proposal has been developed for a web site dealing specifically with the Australian legal and human rights of people facing homelessness. Most recently, arising out of the National Homelessness Conference in Brisbane in April 2003, the Australian Federation of Homelessness Organisations is investigating the establishment of a working group focused on homelessness, housing and human rights.

The greatest challenge may be to support local community organising and participation by people who have experienced homelessness in these processes. However, the challenge is worth it. A collaboration of localised community organising and campaigns by people...
who are homeless, strategic litigation and national advocacy has the potential to develop a rights-based approach to homelessness in Australia today. It is suggested that a rights-based approach has merit at the present time when we continue to observe, on the one hand, increasing rates of homelessness, and on the other, increasing law and order strategies that criminalise homeless people.

If you are interested in hearing more about this collaboration, join the email list about homelessness, housing and human rights. Contact Philip Lynch from the Homeless Person’s Legal Clinic on projects.pilch@vicbar.com.au, Livia Carusi from the Support and Accommodation Rights Service on livia@cphp.org.au or Cassandra Goldie from the Gilbert + Tobin Centre of Public Law on cassandra.goldie@fcfl.flsn.asu.au.

References


14. It is arguable, for example, that a general prohibition on sleeping in public places, for instance, Article 7 right to freedom from cruel, inhuman or degrading treatment and Article 12 right to freedom of movement of the ICCPR. See, eg, in Pottinger v City of Miami 810 F Supp 1551 (SD Fla 1992), where it was held that the City of Miami’s practice of arresting homeless people for sleeping — an act that was essential to life-sustaining — when they had no where else to go was in breach of the US Constitution’s Eight Amendment prohibition on cruel and unusual punishment.

15. State and territory authorities have developed a range of policies that place conditions on eligibility for public housing. For example, Territory Housing, a Department of the Northern Territory Government, provides public housing under the Commonwealth State Housing Agreement Bilateral Agreement between The Commonwealth of Australia and The Northern Territory 1999–2003, operative from 1 July 1999. It had a policy that required people to provide character references in order to be provided with a standard term lease. If references could not be provided, a person was only eligible for a short-term lease. It may be arguable, for example, that this policy is contrary to principles of administrative law that require decision makers to take relevant considerations into account, including international human rights standards, such as non-discrimination in Article 26 of the ICCPR in accordance with the principles in Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273.


22. Contact Philip Lynch at the Homeless Persons’ Legal Clinic in Melbourne at projects.pilch@vicbar.com.au or Dianne Otto at the Faculty of Law, University of Melbourne at d.otto@law.unimelb.edu.au.


26. Contact the Gilbert + Tobin Centre of Public Law, University of New South Wales.