

Living in public space: a human rights wasteland?

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The state of homelessness can criminalise even the most essential human activity — sleeping.



The evening was 7 August 2001: Australian Census night. Around the country, the search was on high and low to find us, count us, and capture the state of our nation. How old were we now? With whom did we live? Were we having babies? And where did we live? Questions, questions, questions and we answered. Most people answered because we had to. Some of us answered because we thought it might count. Perhaps by telling our stories others might listen — and understand.

Out the back of urban Darwin in the Northern Territory, two men, Sam and John, sat at their camp.¹ The sun was setting. Sam and John are sometimes referred to as ‘long grassers’, people who have camped outside around the outskirts of town, living in the way of their Indigenous culture for years. Through the dusk, two trucks pulled up to their camp, unannounced. One truck carried three or four journalists from ABC TV. The other van was driven by a local welfare worker employed to conduct the Census. Greetings took place, and Sam and John were asked to tell their stories for the cameras: How old were they? With whom did they live? Were there children? Where did they live? Answer: in the long grass.

Sam and John answered, perhaps because they had to but maybe because this time they thought that their story might count. Others might listen — and understand. And then, so quickly, it was over. The questions were answered, the interview was filmed, and the trucks are gone, with their cameras. After all, they only needed a five second grab. Sam and John sat, first in silence and then in protest. Because their story had not been told.

This article is an attempt to share some of the story of Sam and John. Not the story told to the cameras on Census night in 2001, but the story of discrimination and harassment they told to us after the trucks and cameras had gone and the dust had settled into the night.

A large number of people like Sam and John live in public space in and around Darwin, camping around the edges of town, on the beaches and on Crown land. Some people have lived in this way for most of their lives. In more recent times, people living in public space, like Sam and John, have been targeted by a sustained campaign of legal regulation and harassment, particularly by the local councils.² Local council by-laws proscribe even the most basic human activity of sleeping between sunset and sunrise in a public place. This is despite the fact that the Northern Territory has the highest rates of ‘homelessness’³ in Australia.

The criminalisation of sleeping in public places in Darwin and the constant patrolling of public places to move people on and fine them in the context of extreme rates of homelessness raises a vexed legal question: if a homeless person is not even allowed to sleep in a public place, do people living in public space have human rights or is public space to be considered a human rights wasteland?

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Homelessness in Australia today

There is a general view that homelessness in Australia is on the increase, although it is not possible to verify this through available research. The reasons for the lack of reliable data are complex and linked to questions about the nature of homelessness, definitions and associated research methodology.

There is a significant and ongoing debate about the meaning of 'homelessness' and the legitimacy of various definitions. That debate is outside the scope of this article. However, there is some consensus emerging about definition and methodology at least for the development of public policy responses to homelessness in Australia.⁴ The definition was initially proposed by Chamberlain and MacKenzie in 1992 and has been used by the Australian Bureau of Statistics (ABS) with limited modification to conduct both the 1996 and 2001 Census. The definition identifies three segments to the homeless population:

Primary homelessness — people without conventional accommodation, such as those living on the streets, sleeping in parks, squatting in derelict buildings, or using cars or railway carriages for temporary shelter;

Secondary homelessness — people who move frequently from one form of temporary shelter to another. It covers: people using emergency accommodation (such as hostels for the homeless or night shelters); teenagers staying in youth refuges; women and children escaping domestic violence (staying in women's refuges); people residing temporarily with other families (because they have no accommodation of their own) and those using boarding houses on an occasional or intermittent basis.

Tertiary Homelessness — people who live in boarding houses on a medium to long-term basis. Residents of private boarding houses do not have a separate bedroom and living room; they do not have kitchen and bathroom facilities of their own; their accommodation is not self-contained; and they do not have security of tenure provided by a lease.

People like Sam and John would be categorised by the ABS as falling within the 'primary homelessness' grouping. Whilst Sam and John would not describe themselves as homeless, they spend the majority of their time occupying public space and carrying out their daily lives in those places. Accordingly, the Census would categorise them as such.

Following the 1996 Census, the ABS estimated that 105,304 people nationally were homeless on the night of 6 August 1996.⁵ The 1996 figure is conservative, and research methodology was further improved for the 2001 Census, particularly in order to better estimate the number of people living 'rough', 'on the streets' and in public space.⁶ However, the full analysis of the 2001 Census rates of homelessness is not yet available. Accordingly, we must continue to rely on the 1996 figures at this time.

The 1996 Census revealed, perhaps for the first time, the inordinate extent to which the 'homeless' condition is experienced in the Northern Territory, and that the people defined as homeless are overwhelmingly Indigenous men, women and children who are living in public space.

The Northern Territory had by far the greatest rate of overall homelessness on a per capita basis, being 523.1 people per 10,000, compared to the next greatest rate, being Queensland with 77.3 people per 10,000. The lowest rate was in Victoria with 41.0 per 10,000.

Nationally about 20% (19,580) of the total homeless population were people like Sam and John, in the sense of

belonging in the 'primary homelessness' category. Again, this national figure obscures the extensive variations between states and territories. The Northern Territory had by far the highest percentage of homeless people in the 'primary homelessness' category, at 71%, compared to the next highest being 20% for Western Australia, then 19% for Queensland and 7% for Victoria. People in this category are often long term homeless:

[T]hree-quarters of the people living in improvised dwellings were in the same dwelling one year before the census. People who 'sleep rough' often move around, and some families with higher incomes can probably exit from the population. But, overall, this is a *low turnover* group.⁷

The primary homelessness category is acknowledged to be the most difficult 'homeless' population to accurately count. Accordingly, the figures were proportionately more conservative than the estimates of other homeless populations, such as those living in crisis accommodation.

Nationally, 50% of the 19,580 people in Australia who were in the primary homelessness category were Indigenous. Again, this percentage was by far the highest in the Northern Territory, at 89%, compared to the next highest being 54% in Western Australia. The lowest rate was in Victoria (1%).

The findings of the 2001 Census will produce arguably the most comprehensive empirical statistics on the number of homeless people in Australia to date, with improved data collection strategies particularly directed to increasing the accuracy of estimating the number of people experiencing 'primary homelessness'. Hence, Sam and John were found and interviewed by the ABC.

However, the available research suggests that the Northern Territory has the most extreme rates of homelessness in the country and that Indigenous men, women and children make up the vast majority of people who are affected. The research also shows that the condition of being 'homeless' living in public space is not so much a transient passing phase but in the nature of a way of life. These findings are supported by other sources of Darwin-specific data such as interviews and local research.⁸

It is likely that the 2001 Census figures will confirm that the condition of homelessness as defined above is a persistent reality in Australia for a range of social, cultural and economic reasons.

In the Northern Territory, the reasons for the high rates of primary homelessness in the Northern Territory are complex, and a full exploration is outside the scope of this article. However, it is clear that many people live in public space because existing models of public housing and other private space accommodation options are culturally inappropriate for Indigenous living.⁹ In addition, public housing is in limited supply, particularly for larger groups.¹⁰

Legal regulation of living in public space

At the heart of the experience of people like Sam and John, who are classified in the 'primary homelessness' category, is trying to carry out even the most basic human functions in public space.

People experiencing long-term homelessness have few or no private spaces and thus rely on public spaces to fulfil a range of needs, some of which are normally met in public spaces and others which are more usually met in private spaces. Public spaces form the immediate physical context in which homeless people pass much, or all, of their time.¹¹

The legal significance of the statistics on homelessness in Australia is that, in all Australian jurisdictions, many basic human functions, such as sleeping, being naked, having sex and going to the toilet are unlawful or regulated when conducted in public space. This regulation is achieved by a range of legal mechanisms, including state and territory legislation, local council by-laws and civic patrolling interventions. This means that many people are criminalised by reason only of meeting basic human needs whilst living in public space. If these activities were conducted inside a private dwelling, they would be perfectly legal.

In Darwin, local council by-law 103 makes it an offence for a person to fall asleep in a public place between sunset and sunrise. The subject of an earlier article in this journal,¹² by-law 103 provides as follows:

Camping or sleeping in public place

- (1) A person who –
 - (a) camps;
 - (b) parks a motor vehicle or erects a tent or other shelter or places gear or equipment for the purpose of camping or sleeping; or
 - (c) being an adult, sleeps at anytime between sunset and sunrise,
 in a public place otherwise than –
 - (d) in a caravan park or camping area within the meaning of the Caravan Parks Act; or
 - (e) in accordance with a permit,
 commits an offence.
- (2) An offence under clause (1) is a regulatory offence.
- (3) An authorized person may direct a person who is or has contravened clause (1) to do one or both of the following:
 - (a) leave the public place; or
 - (b) remove any motor vehicle, tent, shelter, gear or equipment to a place specified by the authorised person, and the person shall comply with the direction forthwith.
- (4) A person who fails to comply with the directions of an authorised person under clause (3) commits an offence.
- (5) A person who, whether alone or together with others, obstructs or by his, her or their presence intimidates another member of the public from using a public shelter, ablution facility, water supply, barbecue or fireplace commits an offence.

By-law 103 is a regulatory offence. This means that Part 11 of the *Criminal Code* (NT) does not apply. Part 11 sets out the general criminal defences that may usually be relied on for defending a criminal prosecution, such as ‘authorisation, justification or excuse’. Some very limited defences are available when a person is prosecuted for a regulatory offence. However, none of the available defences clearly accommodate an argument that relies on a person’s homeless condition.

Darwin City Council has enforced by-law 103 as part of its strategy entitled the ‘Public Places Program’, a well-resourced patrolling scheme. According to the Darwin City Council policy:

The aim of the Public Places Program is to minimise, as much as possible, breaches of By Law 103, in particular persons camping/sleeping in public places, the obstruction of public facilities and litter. The program also, with help from the Northern Territory Police and the Night Patrol, helps reduce the instances of anti-social behaviour, such as consuming alcohol in non-exempt areas and fighting.

The Public Places Program is fully funded for four officers, two vehicles and various other budget items such as stores issue.

Two shifts operate between 6.00am and 7.00pm Monday to Friday. Starting and finishing times for each is as follows, 6.00am to 2.15pm early shift, and 10.45am to 7.00pm late shift.

...

To gain the most successful outcome for this part of By Law 103 [subsection (1)(c)] you need to observe the person who is over 18 years of age is sleep before sunrise. There is no ability for the By Law to allow defences for prosecution, eg being drunk and falling asleep. If you observe someone asleep 10 minutes after sunrise then that person will need to be interviewed with a caution and admit to sleeping prior to sunrise. Sunrise is determined by the meteorology bureau and both vehicles carry sun set sun rise times for the year.¹³

The by-law has been used extensively against people like Sam and John living in public space in Darwin. In June 1999, it was reported that 62 people had been jailed between January and June 1999 for non-payment of fines imposed by the by-law.¹⁴ Between 1 February 2001 and 31 January 2002, 92 people were fined. This figure does not take into account the many occasions on which people have been moved on, warned and threatened with infringement notices. About 70% of the people fined have been Indigenous people, not interstate or overseas tourists, the purported target group for the operation of the by-law. This is an extraordinary percentage given that only 9% of the total Darwin population is Indigenous. It is not so extraordinary when analysed in the context of the statistics on primary homelessness in the Northern Territory.

The criminalisation and violations of the rights of people living in public space, exemplified by by-law 103, is a regular gap in public policy debates about homelessness. Efforts to date to challenge the legal regulation of basic human functions, such as sleeping in public space in the Northern Territory have been unsuccessful.¹⁵

The Commonwealth Advisory Committee on Homelessness in Australia published its Consultation Paper in August 2001 as a framework for gathering feedback on proposed future strategies for responding to the needs of homeless people.¹⁶ The Consultation Paper made no reference to the extent to which people living in public space are criminalised purely for engaging in essential human activities in a public setting. This is despite the fact that people living in public space in Darwin, with one of the highest localised rates of homelessness in the country, identified the issue as one of their major concerns.¹⁷

Public policy debates in Australia appear to generally assume that public space is not ‘public’, in the sense that we are all entitled to access it provided our behaviour does not interfere with other people directly.¹⁸ It seems difficult to find significant social policy advocacy that directly challenges this position.

Are we to accept therefore that people without rights to private space can be subjected to unfettered regulation and harassment? Or are there some limits to the permissible legal regulation of people’s behaviour in public space? Does a purported adherence by Australia to the recognition of basic human rights during the 20th century have something to offer to the debate?

International human rights of people who are homeless

During the second half of the 20th century, Australia became a party to a series of major international human rights treaties

including the International Covenant on Civil and Political Rights (ICCPR)¹⁹ and the International Covenant on Economic Social and Cultural Rights (ICESCR).²⁰ By acceding to these covenants, Australia made an international commitment to implement domestic systems to ensure the promotion and protection of the rights contained therein.

It is arguable that people living in public space like Sam and John are experiencing a breach of their internationally recognised human rights on a daily basis. It is suggested that denying homeless people the ability to sleep in public spaces is contrary to their human rights, including:

- the right to freedom from torture and cruel, inhuman and degrading treatment or punishment (article 7 ICCPR);
- the right to liberty and security of person (article 9 ICCPR);
- the right to privacy (article 17 ICCPR);
- the right to freedom of expression (article 19 ICCPR);
- the right to enjoy one's culture (article 27 ICCPR); and
- the right to adequate housing (article 11 ICESCR).

Yet, it appears that little progress has been made in promoting and protecting the human rights of homeless people in the Australian context as demonstrated by the story of people like Sam and John. The reasons for this are complex and have not been well documented.

Strategies for protecting and promoting homeless persons' human rights

Australia does not have a bill of rights or a constitution that fully implements its international human rights obligations to protect these basic rights. Accordingly, there is less scope to take a litigious approach to challenging existing regulations of public space compared to other jurisdictions where bills of rights or other general human rights provisions are in place.²¹ For example, in the United States, a national legal advocacy network has facilitated a series of constitutional challenges to regulations associated with behaviour carried out in public space.²² In *Streetwatch v National RR Passenger Corp*,²³ a legal challenge was made to the arrest of people who were homeless or appeared to be loitering in a public area. There was no evidence that the people arrested had committed or were about to commit an offence. The District Court issued a preliminary injunction restraining the police on the basis that the process used was too vague, and that the enforcement policy being implemented by the police infringed the plaintiffs' right to freedom of movement and due process. Not all the challenges have been successful and many people continue to be homeless in the United States, experiencing human rights abuses as a result. However, it is suggested that this litigation is significant in that it has asserted and continues to generate debate about the nature and extent of the basic rights of people living in public space.

In Australia, current debates about the 'human rights' of people experiencing homelessness tend to focus on the concept of 'the right to housing'²⁴ with some limited exceptions. The issue of 'homelessness' is typically perceived to be primarily an aspect of the promotion and protection of economic, social and cultural rights within the established dichotomy of the United Nations international human rights system. Such an approach tends to accept that the protection by the state of the rights of people who are homeless is subject to resources, will only be achieved progressively over time, and is not justiciable in the domestic

legal context. Less attention is given to seeking to articulate and protect the rights of people living in public space.

The majority of advocacy done in support of homeless people occurs outside a legal 'rights-based' setting. More typically, interventions with homeless people are by social workers and other welfare functionaries. Advocates perform essential and often powerful roles in supporting people who are homeless. Significant progress has been made in seeking to put the needs of people who are homeless onto public policy agendas.²⁵ However, this advocacy is usually done using a socio-economic, welfare or 'deserving poor' framework, rather than through assertions of rights.

To the extent that people experiencing homelessness come into contact with legal functionaries, such as lawyers, it is usually as a result of their prosecution for minor criminal offences, such as loitering. Lawyers who may provide advice and duty lawyer assistance to homeless people may not be in a position to identify and act on available defences or other legal and human rights remedies. For example, the Australian legal aid system has never given a priority to representation for people in these circumstances.²⁶

In Australia, whilst there is an extensive body of knowledge dealing with the nature and extent of homelessness from a social policy perspective, limited work has been done on developing a body of knowledge and precedents about the legal and human rights of homeless people, in light of their social condition. Whilst the achievement of a right to housing is an important goal for many homeless people, a legal right to housing does not exist and, in the meantime, people are living in public spaces and are likely to continue to do so. Some people are likely to continue living in public spaces regardless of progress made to implement their right to housing.

It is suggested that there is a need to generate a body of legal and human rights knowledge associated particularly with the experience of living in public space and being considered 'homeless'. This need becomes all the more urgent when indications are that legal regulation of these public spaces is increasingly being seen as a solution to so-called 'anti-social behaviour' and the perceived fears of the 'mainstream' community.

Developing such a body of knowledge about the rights of homeless people would be similar to the area of domestic violence, which has required legal functionaries to develop a broad legal knowledge across family law, criminal and civil law. This expertise in the area of domestic violence has been achieved primarily as a consequence of the establishment of specialist legal advocacy services for victims of domestic violence. A growing body of legal knowledge is developing for working with people who have experienced domestic violence both individually and at a systemic level.

In Australia, there have historically been few specialist, legal rights-based advocacy services for homeless people that might generate a similar body of legal and human rights knowledge. The Shopfront Youth Legal Centre has been providing specialist legal services to homeless young people in Sydney since 1993. A significant recent development is the establishment in 2001 of the Homeless Persons' Legal Clinic in Melbourne, a joint project of the Public Interest Law Clearinghouse and the Council to Homeless Persons, which conducts casework and has developed submissions about reforms to vagrancy laws, the protection of homeless people's right to vote, and reforms to anti-discrimination laws to include 'social status' as a prohibited ground of

discrimination. Plans are under way to establish a service for homeless people in Brisbane. A voluntary beachfront legal advice service has been operated by Darwin Community Legal Service and outreach legal services are being developed. A network of lawyers and advocates working with people experiencing homelessness is being established now with a view to sharing experiences, developing knowledge, using innovative approaches and building solidarity with other networks of homeless people and their supporters.²⁷

We need to find ways to assert, protect and support the full range of human rights — civil, political, economic, social and cultural — of people living in public space in the current Australian legal and human rights setting.

Sam and John quite rightly ask us all: What about their story? What rights do they have?

References

- Names have been changed to respect privacy.
- See Langton, Marcia, 'The Long Grass People of Darwin', (1998) 11(4) *Parity* 24; Griffith, Mary-Lyn, 'By the By!' (1999) 24(5) *Alternative Law Journal* 245. See also Day, Bill, 'A View from the Long Grass' (1999) *Parity*: 'The Mayor of Darwin recently announced that Aboriginal drifters and "white trash" would be harassed and driven from the city. "Tourists like to see Aborigines but begging is getting worse" he told the Northern Territory News on February 11, 1999. The mayor called for a revival of the harassment campaign which began on Clean Up Australia Day in 1996 when the Darwin homeless were blamed for the city's litter problems. Later the Chief Minister of the Northern Territory advocated that Aborigines creating a nuisance in public places should be "monstered and stomped on by the community"' (*NT News*, 17 April 1997).
- The terms 'homeless' and 'homelessness' are used extensively in this article. However, many people who are categorised as homeless consider public space to be their home and would not categorise themselves in this way.
- Chamberlain, Chris and McKenzie, David, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning', (1992) 27 *Australian Journal of Social Issues* 274. See also Chamberlain, Chris, *Counting the Homeless: Implications for Policy Development*, Australian Bureau of Statistics, Canberra, 1999.
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- See Memmott, Paul and Fantin, Shaneen, *The Long Grass: A Strategic Report on Indigenous 'Itinerants' in the Darwin and Palmerston Area*, 2001, p.63, highlighting the problems of definition and methodology regarding assessing the nature and extent of homelessness, particularly amongst Indigenous communities in the urban Darwin setting.
- Goldie, Cassandra, 'Homelessness, Public Housing and Racial Discrimination in the Northern Territory' (2001) 15 *Parity* 18; Indigenous Housing Association Inc, 'Submission to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into Needs of Urban Dwelling Indigenous People', 2000; Memmott, Paul and Fantin, Shaneen, above, ref 8.
- As at 28 November 2001, the estimated waiting periods for public housing in Darwin were: 31 months for one bedroom for a non-pensioner; 30 months for one bedroom for a pensioner; 3 months for two bedrooms; 10 months for three bedrooms; and indeterminate for four bedrooms.
- Coleman, Anne, *Five Star Motels: Spaces, Places and Homelessness in Fortitude Valley, Brisbane*, PhD Thesis, School of Social Work and Social Policy, The University of Queensland, 2001, p.3 (citations omitted).
- Griffiths, Mary-Lyn, 'By the By!' (1999) 24(5) *Alternative Law Journal* 245.
- Darwin City Council, 'Public Places Procedures Incorporating General By Law Work' (undated).
- See *NT News*, 21 June 1999. As a result of the introduction on 1 January 2002 of the *Fines and Penalties (Recovery) Act 2001* (NT), the imprisonment of people living in public space for non-payment of the fines is no longer probable.
- See, for example, *Goyma v Darwin City Council* [1999] NTSC 146, which was an attempt to have by-law 103 declared invalid on the administrative law ground of unreasonableness. A complaint against the Darwin City Council, challenging the validity of by-law 103 as being in contravention of the *Racial Discrimination Act 1975* (Cth) is currently before the Human Rights and Equal Opportunity Commission.
- Commonwealth Advisory Committee on Homelessness, *Working Towards a National Homelessness Strategy*, 2001. In 1998, the Council to Homeless Persons Australia recommended that 'a national statement of rights be developed for people who are homeless as a basis for Commonwealth, State and Local Government in framing legislation and ordinances' <<http://www.chpa.org.au/fedbud.html>> at 2 August 2002.
- Memmott, Paul and Fantin, Shaneen, above, ref 8.
- Coleman, Anne, above, ref 11, p.138.
- International Covenant on Civil and Political Rights, 19 December 1966, (1980) ATS 23 (entered into force generally 23 March 1976 and entered into force for Australia 13 August 1980).
- International Covenant on Economic, Social and Cultural Rights, 19 December 1966, (1976) ATS 5 (entered into force generally 3 January 1976 and entered into force for Australia 10 March 1976).
- See, for example, *The Government of the Republic of South Africa & Ors v Grootboom & Ors* (2000) 11 BCLR 1169, where the South African Constitutional Court dealt with the interpretation of s.26 of the Constitution. Section 26 provides: (1) Everyone has the right to have access to adequate housing. (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.
- See National Law Center on Homelessness and Poverty, *Illegal to be Homeless: The Criminalisation of Homelessness in the United States*, 2001; Foscarinis, Maria, 'Downward Spiral: Homelessness and its Criminalisation' (1996) 14(1) *Yale Law & Policy Review* 1.
- 875 F. Supp. 1055 (SDNY 1995).
- See, for example, Austin, Cassandra, *Rights for the Homeless*, 1996; Sidoti, Chris, 'Housing as a Human Right', Paper presented at the National Conference on Homelessness, Council to Homeless Persons, 4 September 1996; Gaudron, Mary, 'Human Rights for the Homeless' (1999) 8a *Human Rights Defender* 17.
- For example, a 'homelessness strategy' has been developed or is in development at a Federal level and at a State level in Queensland, New South Wales, Victoria, the Australian Capital Territory and Western Australia. See Department of Family and Community Services, *National Homelessness Strategy: A Discussion Paper*, 2000.
- Sackville, Ronald, *Homeless People and the Law*, 1976.
- If you are interested in joining the *National Homeless Persons' Legal Network*, email the author at email: Cassandra_Goldie@fcl.fl.asn.au