

HOMELESSNESS AND LEGAL NEEDS: A SOUTH AUSTRALIA AND WESTERN AUSTRALIA CASE STUDY

ABSTRACT

It is well-documented that people experiencing homelessness are often forced to interact with the legal system. This paper reports the results of a study aimed at investigating which legal issues impact most upon people experiencing homelessness in South Australia and Western Australia. A total of 159 homelessness service providers were surveyed across the two States. The three legal issues found to impact most on people experiencing homelessness were the same in South Australia and Western Australia; they were debt, fines and domestic violence. In both jurisdictions, social security law difficulties, child protection intervention and the regulation of behaviour in public places were within the top ten legal issues identified as significant. The results have important implications for policy responses to homelessness and the delivery of legal services to homeless individuals.

INTRODUCTION

The impact of the law on people experiencing homelessness has emerged as a topic of concern to lawyers across Australia in recent years.¹ Legal services specifically targeted at homeless clients have been established in Melbourne, Brisbane, Sydney and Adelaide, and additional services are in development stages elsewhere. Also, a large number of legal research studies have been conducted by both individual researchers and community legal services.²

* LLB, BSW (Hons1), PhD. Senior Lecturer in Law and Fellow of the Centre for Public, International and Comparative Law, T.C. Beirne School of Law, University of Queensland.

+ BA, LLB, LLM, PhD. Senior Lecturer in Law and Fellow of the Centre for Public, International and Comparative Law, T.C. Beirne School of Law, University of Queensland.

¹ Cassandra Goldie, 'Using the Law and Human Rights to Challenge Injustice for People who are Homeless: An Australian Lawyer's Story' in Amy Horton-Newell, *Lawyers Working to End Homelessness*, (2006).

² See particularly Philip Lynch, 'Begging for Change: Homelessness and the Law' (2003) 26 *Melbourne University Law Review* 690; Cassandra Goldie, 'Living in Public Space: A Human Rights Wasteland' (2002) 27 *Alternative Law Journal* 277; Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295; Tamara Walsh, 'Waltzing Matilda One Hundred Years Later: Interactions Between Homeless People and the Criminal Justice System in Queensland' (2003) 25 *Sydney Law Review* 75; Mary-Lynne

Despite this, few formal needs analysis studies have been published over this period. A significant study of this nature was undertaken by the New South Wales Law and Justice Foundation prior to the establishment of the Sydney Homeless Persons' Legal Service.³ This study reported that the key legal areas that affect homeless people are family law, care and protection, domestic violence, victimisation, housing, discrimination, debt, social security and criminal law.⁴ A smaller study, conducted amongst homelessness service providers, was undertaken in Queensland at around the same time and made similar findings.⁵

Analyses of legal needs amongst certain population groups provide invaluable information regarding the ways in which society's laws and policies impact differently upon individuals with certain characteristics. They also provide information to governments attempting to determine which initiatives to support financially, and assist individual services in programme planning and evaluation.

This article documents the results of an analysis of the legal needs of people experiencing homelessness in South Australia and Western Australia. The methodology used in this research was the same as that used in the Queensland study: homelessness service providers were surveyed regarding their views on which legal issues impact most on their clients. Notably, the results obtained in this study mirror the results of similar studies in other Australian jurisdictions. This article then discusses in detail the key legal issues impacting on homeless people, with specific reference to the law in South Australia and Western Australia.

I HOMELESSNESS IN SOUTH AUSTRALIA AND WESTERN AUSTRALIA

Of the almost 100 000 people counted as being homeless in the 2001 census, 11 697 were in Western Australia and 7586 were in South Australia.⁶ In addition to this, 2503 Western Australians and 932 South Australians were counted as being marginally housed in caravan parks.⁷ Western Australia was found to have a higher rate of homelessness, with 64 persons per 10 000 of the population experiencing homelessness on census night, compared with a rate of 51.6 in South Australia.⁸

Griffith, 'By the By: Is the Punishment of Sleeping by the Darwin City Council Legitimate?' (1999) 24 *Alternative Law Journal* 245.

³ Suzie Forell, Emily McCarron and Louis Schetzer, *No Home, No Justice: The Legal Needs of Homeless People in NSW* (2005).

⁴ Ibid 65.

⁵ Tamara Walsh, 'The Overruled Underclass: The Impact of the Law on Queensland's Homeless People' (2005) 28 *University of New South Wales Law Journal* 122.

⁶ Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003) 6.

⁷ Ibid.

⁸ Ibid 5.

Services for people experiencing homelessness are predominantly funded through the Supported Accommodation Assistance Program (SAAP). SAAP is jointly funded by the Commonwealth and States and Territories, and is regulated under the *Supported Accommodation Assistance Act 1994* (Cth). The Act defines homelessness as the state of having inadequate access to safe and secure housing.⁹ A person is taken to have inadequate access to safe and secure housing if the only housing to which the person has access damages or is likely to damage the person's health; threatens the person's safety; marginalises the person through failing to provide access to adequate personal amenities or the economic and social supports that a home normally affords; or places the person in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.¹⁰

The legislative aim of SAAP is to provide transitional supported accommodation and related support services in order to help people who are homeless to obtain the maximum possible degree of self-reliance and independence.¹¹ This is to be achieved through resolving crises, re-establishing family links where appropriate and re-establishing a capacity for independent living.¹² SAAP services are funded to provide or arrange for the provision of support services and supported accommodation to people who are homeless, and help them to obtain long-term, secure and affordable housing and support services.¹³

To this end, SAAP funds crisis accommodation and short and medium term accommodation services, as well as help lines, advocacy services and cafes ('SAAP services'). In practice, however, most SAAP services are directed at providing crisis accommodation and related services. Youth services receive the most funding under SAAP in Australia overall, followed by services for women escaping domestic violence, generalist services, services targeted at single men, services for families and services targeted at single women.¹⁴ However, funding priorities differ between States; in Western Australia, domestic violence services receive the most funding.¹⁵

Of the total amount of SAAP funding provided in 2005–06, Western Australian services received 9.1 per cent and South Australian services received 8.4 per cent.¹⁶ During 2005–06, SAAP funding was provided to 127 agencies in Western Australia

⁹ *Supported Accommodation Assistance Act 1994* (Cth) s 4(1).

¹⁰ *Supported Accommodation Assistance Act 1994* (Cth) s 4(2).

¹¹ *Supported Accommodation Assistance Act 1994* (Cth) s 5(2).

¹² *Supported Accommodation Assistance Act 1994* (Cth) s 5(2).

¹³ *Supported Accommodation Assistance Act 1994* (Cth) s 5(3).

¹⁴ Australian Institute of Health and Welfare, *Homeless People in SAAP: National Data Collection Annual Report 2005/06* (2007) 8.

¹⁵ Australian Institute of Health and Welfare, *Homeless People in SAAP: National Data Collection Annual Report 2005/06: Western Australia Supplementary Tables*, (2007) 3.

¹⁶ Australian Institute of Health and Welfare, above n 14, 9.

and 81 agencies in South Australia.¹⁷ However, South Australian services supplied a greater percentage of support periods (that is, the period commencing when the client begins receiving support from an agency and ending when the support ceases), providing 8.8 per cent of the total Australian support periods, compared with Western Australia's 7.1 per cent.¹⁸ Further, South Australian services dealt with a larger number of clients: they provided services to 10 400 people compared with Western Australia's 8350.¹⁹ South Australian agencies serviced a much greater number of accompanied children than Western Australian services (7000 compared with 5400),²⁰ while Western Australian agencies serviced a much greater number of Indigenous people than South Australian services (3200 compared with 1850).²¹

II HOMELESSNESS AND THE LAW

People experiencing homelessness are faced with a large number, and a wide variety, of legal difficulties.²² In recent years, legal services targeted at people experiencing homelessness have been established in a number of jurisdictions across Australia in recognition of this fact. The first Homeless Persons' Legal Clinic was established in Melbourne in 2001. The Melbourne model was replicated in the creation of the Brisbane Homeless Persons' Legal Clinic in 2002, the Sydney Homeless Persons' Legal Service in 2004 and the South Australian Housing Legal Clinic in 2006. A further homelessness legal service is under development in Western Australia.

These services rely heavily on the pro bono work of volunteer lawyers. The in kind contribution to these services by the legal profession is significant: the Victorian Homeless Persons' Legal Clinic estimates that the amount of time contributed by volunteer lawyers to the Clinic in 2006–07 exceeded a value of \$3.25 million.²³

Australian homelessness legal services are regarded as being an overwhelming success. In order to support their work, and to guide evaluation and planning processes, research on the legal needs of homeless persons has been undertaken in both New South Wales²⁴ and Queensland.²⁵ The study documented in this article

¹⁷ Ibid, 11.

¹⁸ Ibid, 10.

¹⁹ Australian Institute of Health and Welfare, *Homeless People in SAAP: National Data Collection Annual Report 2005/06: South Australia Supplementary Tables* (2007) 6; Australian Institute of Health and Welfare, above n 15, 6.

²⁰ Australian Institute of Health and Welfare, above n 14, 17.

²¹ Australian Institute of Health and Welfare, above n 19, 15; Australian Institute of Health and Welfare, above n 15, 15.

²² See particularly Forell, McCarron and Schetzer above n 3; Walsh, above n 5.

²³ Public Interest Law Clearing House (Victoria), *Annual Report 2006/07* (2007) 17.

²⁴ Forell, McCarron and Schetzer, above n 3.

²⁵ Walsh, above n 5.

was aimed at expanding the scope of this research to include South Australia and Western Australia.

III METHODOLOGY

This study replicated a study conducted in Queensland in 2004 which was aimed at determining which legal issues impact most on people experiencing homelessness.²⁶ All workers employed by agencies funded under SAAP in South Australia and Western Australia were invited to participate in the research. Surveys were sent via ordinary mail to all SAAP services for which a postal address was available. For those services for which a postal addresses was not available, emails were sent, which included a link to a website where the survey could be accessed and completed. The hard copy and online copy were identical in content. Hard copy surveys were returned in reply-paid envelopes and the online surveys were automatically entered into a spreadsheet upon completion. The results were then combined.

The survey required respondents to indicate characteristics of their agency, including its location, target groups and services provided. Respondents were also asked to indicate the nature of their role within the organisation, as well as the number of people experiencing homelessness with whom they had personal contact each day.

Respondents were then asked to indicate the proportion of their clients who encountered certain legal issues in their daily lives. The survey included a list of 31 legal issues, arranged under 11 broad headings: criminal law, social security law, family law, discrimination law, tenancy law, debt law, fines law, mental health law, migration law, electoral law and planning law. Respondents were asked whether 'most', 'some', 'a few' or 'none' of their clients experienced each of the legal issues listed. Respondents were also invited to contribute qualitative comments.²⁷

IV RESULTS

A Results in Brief

A total of 159 responses was obtained, 101 from South Australia and 58 from Western Australia: 305 agencies were invited to participate. Fifteen of the responses were received in online format; 13 from South Australia and two from Western

²⁶ Ibid.

²⁷ Quantitative data was analysed using SPSS Version 13.0. Chi square significance tests were conducted, and significant results are reported on below ($p < 0.05$ denotes statistical significance). Qualitative data was analysed thematically using Miles and Huberman's methods: see Matthew B Miles and A Michael Huberman, *Qualitative Data Analysis*, (2nd edition, 1994).

Australia. Respondents reported that they assisted an average of 14 people each per day; thus the experiences of over 2000 homeless persons may have been accounted for in this research.

Of the South Australian responses received, most were from short to medium term accommodation services (57 per cent), whilst most Western Australian responses came from crisis accommodation services (64 per cent). Most of the services that responded to the survey provided accommodation, meals and counselling services, although respondents from South Australian services were more likely to report that their service provided meals and counselling services than the Western Australian respondents. Around half of all respondents were social workers, youth workers or housing workers. Most were based in the city and metropolitan areas (60 per cent); however, a substantial proportion of respondents worked in regional (23 per cent) and rural (17 per cent) areas.

South Australian respondents were more likely than Western Australian respondents to report that their service targeted women (42 per cent compared with 33 per cent), while Western Australian respondents were more likely than South Australian respondents to report that their service targeted young people (55 per cent compared with 40 per cent) and Indigenous people (40 per cent compared with 23 per cent).

There were, therefore, a number of reported differences between the kinds of services which South Australian and Western Australian respondents provided. Yet, when asked which legal issues affected their homeless clients most, respondents from both States selected the same top three issues. Further, they shared seven of the top ten issues. (see Table 1 below).

Table 1: Top Ten Legal Issues Faced by Respondents’ Homeless Clients by State

Rank	South Australia	Western Australia
1	Debt	Fines
2	Fines	Debt
3	Domestic violence	Domestic violence
4	Residence arrangements for children	Social security breach
5	Petty theft	Social security eligibility
6	Social security breach	Petty theft
7	Social security debt	Property redistribution after separation
8	Public space charges	Child protection
9	Child protection	Move-on directions
10	Move-on directions	Violent crime

Respondents also reported high levels of victimisation amongst their clients: 66 per cent of South Australian respondents and 58 per cent of Western Australian respondents reported that most or some of their clients had been victims of crime. Further, high rates of discrimination were reported: 55 per cent of South Australian respondents and 45 per cent of Western Australian respondents stated that either most or some of their clients had experienced discrimination on the basis of homelessness, race, age and/or drug addiction.

Some interesting trends emerged from the data regarding the extent to which certain subgroups of people experiencing homelessness were faced with specific legal difficulties. Respondents who worked in services targeted at women in South Australia tended to report a higher incidence of domestic violence as affecting their clients,²⁸ while respondents working in services targeted at women or men in Western Australia were more likely to report property redistribution after separation to affect their clients.²⁹ Respondents who worked in services targeted at Indigenous people in Western Australia tended to report a higher incidence of fines as a particular legal problem,³⁰ while respondents who worked in services targeted at young people in South Australia were more likely to report social security eligibility as affecting their clients.³¹

B Comparison with Queensland Results

When compared with the results of the Queensland study, the similarities are striking. The top 10 legal issues for Queensland respondents’ homeless clients were reported to be:

Table 2: Top Ten Legal Issues Faced by Respondents’ Homeless Clients in Queensland

Rank	Legal Issues
1	Domestic violence
2	Child protection
3	Debt
4	Fines
5	Social Security Breaches
6	Blacklisting on tenancy databases
7	Move on directions
8	Social security eligibility
9	Petty theft
10	Public space charges

28

p=0.057.

29

p=0.002 and p=0.000 respectively.

30

p=0.058.

31

p=0.002.

Respondents from South Australia and Queensland shared eight out of their top 10 legal issues, while Western Australia and Queensland shared a different set of eight issues. Similarly high rates of victimisation were reported in the Queensland study. In the Queensland study, 65 per cent of respondents stated that most or some of their clients had been victims of crime, and around 58 per cent reported that their clients had experienced some form of discrimination.

V DISCUSSION

There is a high degree of commonality between the results yielded in each of the three Australian States examined in these two studies. In short, it seems that there are five key legal areas that impact particularly on Australia's homeless persons: debt and fines, domestic violence, child protection, minor criminal offences and social security issues.

Four of these five are State areas of responsibility, and thus the applicable laws vary between States. Social security is an area of federal responsibility, and the same laws and policies are applicable across all States. The ways in which social security law impacts on people experiencing homelessness across Australia has been discussed at length elsewhere.³² The majority of people experiencing homelessness are social security recipients.³³ Others are trying to obtain access to the social security system.³⁴ The high level of interaction between people experiencing homelessness and the social security system makes it inevitable that people experiencing homelessness will experience legal difficulties associated with social security receipt and payments, including eligibility, breach penalties and incurring debts as a result of overpayment. Further to this, it is well established that people experiencing homelessness are more likely than others to breach their participation requirements for reasons associated with homelessness,³⁵ and are more likely to experience difficulty in accessing social security because they often lack the

³² See Peter Horbury, 'Social security law and homelessness' (2004) 17(1) *Parity* 468; Tamara Walsh, 'Breaching the right to social security' (2003) 12(1) *Griffith Law Review* 43; Philip Lynch, 'Homelessness and the Right to Social Security' (2003) 150 *Lawyers Weekly* 10; Philip Lynch, *Homelessness and the Right to Social Security: Submission to the Commonwealth Government Regarding Reform of Income Support for Working Age People*, 2003.

³³ 85 per cent according to Australian Institute of Health and Welfare - above n 14, 72.

³⁴ A further 8 per cent according to Australian Institute of Health and Welfare - above n 14, 72.

³⁵ See particularly Dennis Pearce, Julian Disney and Heather Ridout, *Report of the Independent Review of Breaches and Penalties in the Social Security System*, 2002; Australian Council for Social Service, *Breaching the Safety Net: The Harsh Impact of Social Security Penalties*, 2001. 'Participation requirements' are those requirements, aimed at encouraging participation in the paid labour market which social security recipients must fulfil if they are to continue to remain qualified to receive their payments.

requisite degree of documentary identification.³⁶ Notable suggestions have been made to address this, but only some have been implemented.³⁷

The four areas of State responsibility identified above will be examined in some detail below. Since each of these legal issues has been identified as one of particular concern amongst homeless services, it is worth engaging in some comparative analysis to determine which aspects of the relevant laws may be causing hardship to an already vulnerable group.

A Debt and Fines

Seventy-three per cent of respondents in Western Australia and 63 per cent of respondents in South Australia stated that most or some of their homeless clients experienced difficulty paying government-issued fines. Sixty-three per cent of respondents in South Australia and 59 per cent of respondents in Western Australia indicated that most or some of their clients experienced difficulty repaying civil debts. In many ways, this finding is predictable; those who are homeless obviously suffer from material disadvantage, thus it can be expected that debts and penalties are extremely difficult for them to pay.

People experiencing homelessness often find themselves facing a wide range of debts including tenancy-related debts, Centrelink debts, utility bills, mobile phone bills, credit card debts and debts to loan agencies.³⁸ According to respondents in this study, many of these debts are accrued as a direct result of homelessness. In their qualitative comments, a number of respondents noted that due to their lack of fixed address, homeless individuals may not receive letters demanding payment, hence they accrue more interest. Others stated that literacy problems and lack of education often mean that people experiencing homelessness do not sufficiently understand their obligations under contracts they have signed. Indeed, some respondents noted that their clients face debts associated with legal advice and representation which they accessed in the past.

A number of respondents indicated that their clients' difficulties, both with the law and in a general sense, frequently start with the imposition of fines for a minor criminal offence. Owing to an inability to pay, the fines mount up and the individual may be rendered homeless, or their state of homelessness may be

³⁶ Lynch, *Submission to the Commonwealth Government*, above n 32.

³⁷ For example, suggestions regarding the availability of payment and correspondence nominees have been implemented (a person can now nominate another person to deal with Centrelink on their behalf: see *Social Security (Administration) Act 1999* (Cth) Part 3A), but important notifications are still often sent by ordinary mail and to the wrong address contrary to recommendations by Pearce et al and Lynch: see Pearce, Disney and Ridout, above n 35; Lynch, *Homelessness and the Right to Social Security: Submission to the Commonwealth Government*, above n 32.

³⁸ Forell, above n 3, 95-97; Walsh, above n 5, 131.

perpetuated. The manner in which fines are enforced can make a significant difference to the impact a fine has on a person who is homeless. In Western Australia, in order to pay a fine by instalments, the person must make an application for a 'time to pay' order in an approved form within 28 days of receiving the fine.³⁹ Since many people experiencing homelessness live in a state of crisis, this timeframe may be insufficient to allow them to obtain the form, complete it and lodge it appropriately. Further, although the court officer is to take the means of offenders into account when making a time to pay order,⁴⁰ under the Centrepay system, instalments are deducted from social security payments at the minimum rate of \$25. Since many social security recipients already struggle to provide themselves with the necessities of life, this amount may be unduly burdensome. If a person does not have the means to pay a fine, a work and development order may be served upon him or her as an alternative to payment. The order requires a person to undertake six hours' work for every \$300 that remains unpaid.⁴¹ If the fine is less than \$300, six hours of work must still be completed. However, an order cannot be issued to a person if the person is 'mentally or physically incapable' of performing the requirements of the order.⁴² This alternative to payment may prove unsuitable for many people experiencing homelessness due to mental illness, child care responsibilities or a lack of transport. Ultimately, a person may be imprisoned for fine default in Western Australia under s 53 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).

The South Australian fine enforcement system is in many ways superior to that in Western Australia. For example, under s 8A of the *Expiation of Offences Act 1996* (SA), expiation notices should not be issued for 'trifling' offences.⁴³ If the issuing authority is satisfied that the offence is trifling, the notice must be withdrawn. This has the potential to provide some relief to people who are homeless who have been charged with minor public space offences by police. Further, under s 66 of the *Criminal Law (Sentencing) Act 1988* (SA), if an authorised officer (including the Registrar and officers of the Fines Payment Unit) is satisfied that a person does not have sufficient means to pay a fine, the matter may be remitted to the court for consideration. The court has the power to remit the fine, or revoke the order imposing the fine, if it so chooses.⁴⁴ This is an important safeguard against the enforcement of fines in situations where payment may cause significant hardship. However, if individuals are unable to obtain legal advice and assistance, they may be unaware of these provisions and thus unable to realise their benefits.

³⁹ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 32. See also *Fines, Penalties and Infringement Notices Enforcement Regulations 1994* (WA) r 3A.

⁴⁰ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 35A.

⁴¹ *Fines, Penalties and Infringement Notices Enforcement Regulations 1994* (WA) r 6A.

⁴² *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 48.

⁴³ *Expiation of Offences Act 1996* (SA) s 4.

⁴⁴ *Criminal Law (Sentencing) Act 1988* (SA) s 70I.

The imposition of a fine on a person experiencing homelessness is illogical. People experiencing homelessness will almost certainly be unable to discharge fines unless they are realistic, based on clear and accurate knowledge regarding the person's means to pay. Since around 85 per cent of homeless persons are social security benefit recipients, and as many as 10 per cent have no income at all, the vast majority of people experiencing homelessness are living well below the poverty line.⁴⁵

Fining homeless persons will not meet the traditional goals of sentencing. Imposing a fine on someone who is already struggling to meet their daily living expenses does not meet the goal of 'just punishment', nor can it be considered 'fair'. It does not address the goal of rehabilitation but rather will have the effect of perpetuating a person's state of poverty and homelessness by further depriving them of the necessities of life. Imposing a fine will not successfully deter the offender in question, or other defendants in similar circumstances, from engaging in criminal behaviour; it is axiomatic that the best method of deterrence is to remove the need to engage in offending behaviour in the first place. Further, the goal of consistency in sentencing cannot be met through the imposition of a flat-rate fine, as each defendant's means to pay will vary.⁴⁶

Jurisdictions around the world have developed a number of initiatives aimed at reducing the impact of fines on people experiencing extreme poverty.⁴⁷ For example, many international jurisdictions employ a 'day fines' system, whereby fines are calculated using a formula which takes both the gravity of the offence and the means of the defendant into account; fines as low as a few dollars a week may be imposed if this is appropriate in the circumstances.⁴⁸ Unfortunately, these initiatives have not been trialled in Australia. As a result, many homeless persons receive fines that practically they are unable to pay, and experience significant hardship as a result.

⁴⁵ Australian Institute of Health and Welfare, above n 14, 72.

⁴⁶ See John Raine, Eileen Dunstan and Alan Mackie, 'Financial penalties as a sentence of the court: Lessons for policy and practice from research in the magistrates' courts of England and Wales' (2003) 3 *Criminal Justice: International Journal of Policy and Practice* 181, 183; Victorian Law Reform Commission, *Inquiry into Warrant Powers and Procedures: Final Report*, 2005, 427, 427-248.

⁴⁷ See also Tamara Walsh, *From Park Bench to Court Bench: Developing a Response to Breaches of Public Space Law by Marginalised People*, 2004.

⁴⁸ See particularly Doris Layton MacKenzie, 'Reducing criminal activities of known offenders and delinquents: Crime prevention in the courts and corrections' in Lawrence Sherman et al (eds), *Evidence Based Crime Prevention*, 2002; Michael Tonry, 'Parochialism in US sentencing policy' (1999) 45 *Crime and Delinquency* 48; Sally Hillsman and Judith Greene, 'The use of fines as an intermediate sanction' in James Byrne, Arthur Lurigio and Joan Petersilia (eds), *Smart Sentencing: The Emergence of the Immediate Sanctions*, 1992; Judith Greene, 'Structuring criminal fines: Making an intermediate penalty more useful and equitable' (1988) 13 *The Justice System Journal* 37.

B *Domestic violence*

Fifty-seven per cent of Western Australian respondents and fifty-six per cent of South Australian respondents reported that either most or some of their homeless clients experienced legal difficulties associated with domestic violence.

Research has consistently highlighted the connections between domestic violence and homelessness.⁴⁹ Domestic violence legislation in both South Australia and Western Australia reflects this connection. In South Australia the magistrate must take into account the accommodation needs of ‘family members’ and ‘children of the defendant’⁵⁰ when considering the terms of a domestic violence restraining order. In Western Australia, magistrates are required to consider the accommodation needs of ‘the respondent and the person seeking to be protected’ when considering whether to make a violence restraining order and when setting the conditions of that order.⁵¹ Further, in Western Australia police may make a ‘police order’ to restrain violence; in such cases police are also required to take into account the accommodation needs of ‘the persons involved’.⁵² However, despite the focus on accommodation needs, frequently it is the women and their children who leave the family home when there is domestic violence.⁵³ This suggests that there is a problem in the implementation of the legislation, an issue that is discussed further below.⁵⁴

There is a complex relationship between homelessness and domestic violence. Cate Nunan emphasises that women who leave home to escape violence usually do have a home but it is simply too violent to return.⁵⁵ As noted above, the *Supported Accommodation Assistance Act 1994* (Cth) characterises a person as ‘homeless’

⁴⁹ The American Civil Liberties Union reported that ‘in 2005 50 per cent of US cities surveyed reported that domestic violence is a primary cause of homelessness: American Civil Liberties Union, *Women’s Rights Project, Domestic Violence and Homelessness* (2008) <<http://www.aclu.org/womensrights/violence/index.html>> at 2 June 2008. See also Jana Bufkin and Judith Bray ‘Domestic Violence, Criminal Justice Responses and Homelessness: Finding the Connection and Addressing the Problem’ (1998) 7 *Journal of Social Distress and the Homeless* 227, 229.

⁵⁰ *Domestic Violence Act 1994* (SA) s 6, *Restraining Orders Act 1997* (WA) 13(4).

⁵¹ *Restraining Orders Act 1997* (WA) s 12(1)(d).

⁵² *Restraining Orders Act 1997* (WA) s 30B(e).

⁵³ Although data is scarce, one study has shown that in most cases where women have left the family home as a result of violence, they hold the property in a joint tenancy arrangement with their violent spouse: Paula Wilcox, ‘Lone Motherhood: The Impact on Living Standards of Leaving a Violent Relationship’ (2000) 34 *Social Policy and Administration* 176, 178, 184.

⁵⁴ Rosemary Hunter discusses this problem with respect to intervention orders in Victoria, Rosemary Hunter, ‘Narratives of Domestic Violence’ (2006) 28 *Sydney Law Review* 733, 737.

⁵⁵ Cate Nunan, ‘Women, Domestic Violence and Homelessness’ (1995) 11 *Shelter — National Housing Action* 37, 37.

when they do not have access to safe and secure housing;⁵⁶ thus, women who flee their homes because of domestic violence are considered 'homeless'. However, many women will have left and returned home numerous times,⁵⁷ or will have already moved between the homes of relatives and friends several times before being formally labelled as 'homeless'.⁵⁸ One American study has found that over 40 per cent of homeless women have stayed in abusive relationships because they could find nowhere to go.⁵⁹ This underscores the serious decision many women make when they finally decide to leave rather than stay. Nevertheless, every year many women attempt to escape violent situations and search for shelter or refuge accommodation, often with their children.⁶⁰ In approximately 55 per cent of cases in which women leave such situations and become homeless, they will be accompanied by children.⁶¹ Emergency accommodation is not always available⁶² or is available for only a short period, placing many women in the invidious position of either returning to their violent partners or moving from place to place as they try to find other temporary or more permanent accommodation in an extremely under-resourced environment. Homeless women, especially those with children, have a number of legal needs that may be produced or exacerbated by the combination of domestic violence and homelessness.

The most common legal need of homeless women escaping violence is assistance and advocacy in obtaining a protection order.⁶³ Such orders will be important for many women because, although they have moved away from the violent perpetrator, violence will often continue post-separation.⁶⁴ When applying for a protection order, women in South Australia and Western Australia may request that the order includes a range of conditions, including conditions that violent partners stay away from certain shelters or other places, and the return of items of

⁵⁶ See also Australian Institute of Health and Welfare, 'Female SAAP Clients and Children Escaping Domestic and Family Violence 2003-2004' (2005) 30 *Bulletin* 1.

⁵⁷ David MacKenzie and Chris Chamberlain, *Homeless Careers*, 401

⁵⁸ Crystal Mills and Hira Ota, 'Homeless Women with Minor Children in the Detroit Metropolitan Area (1989) 34 *Social Work* 485, 487.

⁵⁹ American Civil Liberties Union, above n 49, 1.

⁶⁰ Australian Institute of Health and Welfare, above n 14, 37.

⁶¹ Australian Institute of Health and Welfare, above n 56, 5.

⁶² There are high pressures on emergency accommodation in shelters and refuges both in Australia and elsewhere. One Australian study found that around 1 in 2 women were turned away from accommodation: Australian Institute of Health and Welfare, above n 56, 8. See also National Coalition for the Homeless, *Domestic Violence and Homelessness* (2007) <<http://www.nationalhomeless.org/publications/facts/domestic.html>> at 5 December 2007.

⁶³ Australian Institute of Health and Welfare, above n 56, 12.

⁶⁴ See, eg, Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1, 65 in which Mahoney discusses 'post-separation assault'.

property,⁶⁵ such as clothing and small items of furniture. However, women may not be aware of their legal rights in this area and appropriate legal advice may be particularly difficult for a homeless woman to access.

Other legal needs experienced by homeless women escaping violence may be similar to those of other women separating from their partners, including family law issues relating to residence, contact, and property settlement. However the complexity of these matters is exacerbated where there is violence in the relationship, and is probably further exacerbated where a woman is homeless.⁶⁶ For example, research suggests that women who have experienced domestic violence are likely to have a greater disadvantage in relation to property settlement compared with other women.⁶⁷ Further, in relation to child residence applications, recent research suggests that the current family law regime may have shifted the focus to the post-separation conduct of mothers. According to Zoe Rathus, the current family law regime supports the position that time with both parents is generally good and that the hesitancy or reluctance of the mother to facilitate contact with the father may offend this assumption.⁶⁸ If a woman is homeless (and fleeing from domestic violence) it is likely that she will be reluctant to facilitate contact on the basis that this may put her (and her children) at further risk;⁶⁹ it may also be particularly difficult to arrange contact because of practical considerations resulting from homelessness. If the mother is unable to prove at court that further violence will continue, her failure to facilitate time with the father will be seen as inexcusable.⁷⁰ The health effects on women who have experienced domestic violence are well-documented and include depression, anxiety and reduced coping skills;⁷¹ homelessness is likely to exacerbate all of these effects. Rathus points out that ‘erratic and disorganised behaviour’ of mothers may be perceived as a consequence of past abuse, but there is a real risk the behaviour will be used to

⁶⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 25(4); *Restraining Orders Act 1997* (WA) s 13(4); *Domestic Violence Act 1994* (SA) s 5(2).

⁶⁶ Wilcox above n 53, 184.

⁶⁷ See Grania Sheehan and Bruce Smyth, ‘Spousal violence and post-separation financial outcomes.’ (2000) 14 (2) *Australian Journal of Family Law* 102, 111. See also Martha Fineman, ‘Implementing Equality: Ideology, Contradiction and Social Change. A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce’ (1983) *Wisconsin Law Review* 789, 830-833 where she discusses ‘the economics of being female’.

⁶⁸ Zoe Rathus, ‘Shifting the Gaze: Will Past Violence be Silenced by a Further Shift of the Gaze to the Future Under the New Family Law System?’ (2007) 21 *Australian Journal of Family Law* 87, 90. See also *Family Law Act 1975* (Cth) s 60B(1).

⁶⁹ Miranda Kaye, Julie Stubbs and Julia Tolmie, ‘Domestic Violence, Separation and Parenting: Negotiating Safety Using Legal Processes’ (2003) 15 (2) *Current Issues In Criminal Justice* 73, 85.

⁷⁰ Rathus, above n 68, 104.

⁷¹ Kyla Williams, ‘Family Violence and the Shared Parental Responsibility Act’ (2006) 28 (5) *Bulletin of the Law Society of South Australia* 18 19.

prove allegations that the mother is suffering from mental health problems,⁷² and unable to care properly for children.

Rae Kaspiew's research suggests that violence will usually only become particularly relevant in a family law claim where a number of matters can be satisfied. For example, she notes that domestic violence has been taken into account in contested children's cases where the mother has been able to demonstrate that there has been extreme physical violence, where she has suffered post traumatic stress disorder and where there is a high level of corroborative evidence, such as a criminal conviction for assault.⁷³ These matters are always difficult to demonstrate, but are especially so for a homeless woman who has experienced domestic violence. She may not have access to resources to produce the required medical evidence and, in any event, it may be difficult to disentangle the effects of homelessness from those of the domestic violence. Further, she may be reluctant to become involved in criminal law proceedings, given the precarious and stressful environment of homelessness. Attending court for the numerous court appearances often required to ensure a successful criminal prosecution may be impractical and stressful for a homeless woman.⁷⁴ As a result, once women leave the family home and are homeless or housed in temporary accommodation they may find that their family law claims to residence and to refusing contact between children and the violent party are more difficult to support. Homelessness, coupled with domestic violence, increases the complexity of family law claims and in turn increases the need for legal advocacy by homeless women.

Similar to separating parties generally, homeless women escaping violence may have disputes about child support and issues related to shared debts with their former partners.⁷⁵ For example, rent arrears may become due in relation to the family home in which the woman is no longer residing. If the tenancy is in the homeless woman's name, she is placed at risk of being labelled a bad debt or being blacklisted on a tenancy database without even realising the rent has gone into arrears. The failure on the part of the perpetrator, to pay rent or advise of arrears

⁷² Rathus, above n 68, 97.

⁷³ Rae Kaspiew, 'Violence in Contested Children's cases: An Empirical Exploration' (2005) 19 (2) *Australian Journal of Family Law* 112, 141. See also s60K *Family Law Act* 1975 (Cth).

⁷⁴ Kaye, above n 69, 80. Matters heard at the magistrate's courts throughout Australia are generally finalised after two mentions (or court dates). However, in a study of breach prosecutions in Queensland the mean number of times that breach matters were returned to court in this study data was 3.24 and 21 per cent of matters were returned to court five times or more before being finalised: Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30(3) *Sydney Law Review* 439.

⁷⁵ Forell et al, above n 3, 2. In Belinda Fehlberg, 'Violence and Sexually Transmitted Debt: Part 1.' (1997) 3 *Current Family Law* 76 Fehlberg has written about the problem of sexually transmitted debts.

may be part of a tactic of abuse. Due to the particular difficulties associated with being both homeless and escaping from violence, it may be extremely complicated to access relevant records. Assistance and advocacy may be needed to obtain such records or to explain the absence thereof.

Some studies attribute the high level of women's homelessness to the generally weak or ineffective police response to domestic violence.⁷⁶ Research has shown that, in Australia, arrests are not usually made in domestic violence incidents.⁷⁷ Thus, in order to avoid violence, women must often leave the family home, while the violent perpetrator remains. The continued residence of the perpetrator at the family home and stripping the woman of the possibility of living in her home may provide further levels of abuse as part of the power and control relationship in which the parties are involved.⁷⁸

In Australian jurisdictions, magistrates have the power to order, as part of a protection order, that the violent perpetrator be prohibited from entering the family home, regardless of any equitable interest they may have.⁷⁹ Such orders have sometimes been referred to as 'ouster orders'. Ensuring that the perpetrator, rather than the woman and children, is left without a home means that the perpetrator bears the financial and social burdens associated with the violence.⁸⁰ Frequently this approach will also mean that only one person will be homeless rather than several. Generally one person will be easier to house, and the stress on children will be reduced. The negative impact on children of their witnessing domestic violence is well-documented,⁸¹ and it is recognised in the relevant State domestic violence legislation. In South Australia the legislation requires that magistrates consider the welfare of any children 'affected or likely to be affected by the defendant's conduct.'⁸² The Western Australian domestic violence legislation requires

⁷⁶ Donna Chung et al, *Home Safe Home* (Commonwealth Office of the Status of Women, Canberra, 2000), 35; Bufkin and Bray, above n 49, 230.

⁷⁷ See Crime and Misconduct Commission, *Policing Domestic Violence in Queensland*, Queensland Government (2005) 39 where police detained perpetrators in 16 per cent of call-outs. Julie Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Heather Strang and John Braithwaite, *Restorative Justice and Family Violence* (2001) at 52.

⁷⁸ See generally Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (2001) 103.

⁷⁹ *Restraining Orders Act 1997* (WA) s 13(4); *Domestic Violence Act 1994* (SA) s 5(3).

⁸⁰ Belinda Carpenter and Rachel Field, *Domestic Violence and Homeless Children: Are Ouster orders the Answer?* (2003) On line Opinion
<<http://www.onlineopinion.com.au/view.asp?article=587>> at 5 December 2007.

⁸¹ Adam Tomison, 'Exploring Family Violence: The Link Between Child Maltreatment and Domestic Violence' (2000) 13 *Issues in Child Abuse Prevention* 1 at 8. See also Neville Robertson, Ruth Busch et al, *Living at the Cutting Edge, Women's Experiences of Protection Orders: Volume 2 What's To Be Done? A Critical Analysis of Statutory and Practice Approaches to Domestic Violence* (2007), 81.

⁸² *Domestic Violence Act 1994* (SA) s 6(1)(b).

magistrates and police have regard to 'the need to ensure that children are not exposed to acts of domestic violence' when deciding whether to make an order and in relation to determining the conditions of the order.⁸³ One of the key considerations in setting conditions in domestic violence protection orders should be the on-going health and safety of the children who are likely to have already observed domestic violence. Orders which allow the mother and children to remain at home, while the perpetrator is ordered to stay away, provide one way of facilitating children's health and safety.

Yet, despite the positive effects where ouster orders are used,⁸⁴ research has demonstrated that magistrates rarely exercise the ouster power,⁸⁵ increasing the likelihood that women and children will flee the violence. An order requiring the perpetrator to stay away from the family home will be more likely to be granted where the women and children have remained in the home once the perpetrator has left or been removed. Once out of the house, it will be more difficult for women and children to reclaim residence of the home. This can be linked back to effective use of police powers at an early stage of intervention in ensuring that the violent party is removed and the family home rendered safe rather than the focus being on assisting women and children to move away to safer accommodation.

Researchers have noted the wider social and economic benefits of allowing women to remain in the family home including keeping children out of the child protection system.⁸⁶ As noted below, pursuant to child protection legislation, homeless children are likely to be identified as being at risk of harm.

C *Child Protection*

In this study, 43 per cent of respondents in both South Australia and Western Australia reported that either most or some of their homeless clients experienced legal difficulties associated with the child protection system.

This may, in part, be explained by the definitions of 'at risk' and 'neglect' in child protection legislation. For example, under s 6(2)(e) of the *Children's Protection Act 1993* (SA), a child is considered to be 'at risk' if the child is under 15 years and is of no fixed address. In such circumstances, the Chief Executive of the Department for Families and Communities must ensure an assessment is made and effect a response to address the risk to the child.⁸⁷ Since homelessness is explicitly defined

⁸³ *Restraining Orders Act 1997* (WA) s 12 (1) (ba), 30B(c).

⁸⁴ See generally Robyn Edwards, *Staying Home / Leaving Violence: Promoting Choices for Women Leaving Abusive Partners*, (2004).

⁸⁵ Carpenter, above n 80.

⁸⁶ Jan Breckenridge and Jane Mulroney, 'Leaving Violent Relationships and Avoiding Homelessness - Providing a Choice for Women and their Children' (2006) 18 (5) *NSW Public Health Bulletin* 90, 92.

⁸⁷ *Children's Protection Act 1993* (SA) s 19(1).

as a risk factor in the legislation, it is not surprising that child protection systems often play a significant role in the lives of people who are homeless.

The *Children and Community Services Act 2004* (WA) deems that a child is in need of protection if the child is likely to suffer harm as a result of the child's parents being unable to provide adequate care for the child, or provide effective medical, therapeutic or other remedial treatment for him or her.⁸⁸ Under this characterisation of neglect, parents living in poverty may be considered unable to care for their children due to their material deprivation. On this basis, it would be expected that people experiencing homelessness would be subject to a higher rate of departmental surveillance and interference. A further implication of this blanket approach may be that women fear drawing the attention of child protection services. As a result they may be reluctant to apply for domestic violence protection orders or other services and this may have further implications for their safety and the safety of their children.⁸⁹

It is well-established that children who interact with the child protection system overwhelmingly exhibit significant levels of social and economic disadvantage.⁹⁰ Many of the families affected are single-parent, female-headed families, and Indigenous children are invariably over-represented amongst those subject to child protection orders.⁹¹

Many studies have identified poverty as a trigger in child protection intervention. The relationship between poverty or homelessness and child protection intervention may be direct, for example, in circumstances where legislative definitions of 'at risk' include elements associated with homelessness or poverty (such as those that exist in South Australia and Western Australia, outlined above).⁹² Such definitions may have the effect of restricting child protection agencies' focus to 'policing the deviant parent' rather than addressing disadvantage and supporting families to remain intact.⁹³

⁸⁸ *Children and Community Services Act 2004* (WA) s 28(2)(d).

⁸⁹ These concerns are discussed by Donna Coker, 'Race, Poverty, and the Crime-Centered Response to Domestic Violence' (2004) 10 *Violence Against Women* 1331, 1332-1333.

⁹⁰ See particularly Jane Thomson, 'This is Nothing New: Child Protection Concerns and Poverty' (2003) 28(1) *Children Australia* 4.

⁹¹ Australian Institute of Health and Welfare, *Child Protection Australia 2006-06* (2007) 28-29. See also Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families* (1997) pt 6.

⁹² David McConnell and Gwynnyth Llewellyn, 'Social Inequality, the "Deviant Parent" and Child Protection Practice' (2005) 40(4) *Australian Journal of Social Issues* 553.

⁹³ *Ibid.*

The relationship between homelessness and child protection intervention may also be indirect; for example, Jane Thomson and Rosamund Thorpe suggest that the stress caused by poverty may lead to children experiencing harm.⁹⁴ Research undertaken in Queensland suggests that child protection workers identify poverty as 'an issue' but differ in their views as to whether the problems are societal or 'more reflective of poor parental decision-making and priorities.'⁹⁵

The proportion of children who come into contact with child protection as a result of 'neglect' rather than sexual, physical or emotional abuse is high, at around 30 per cent across Australia, and even higher amongst Indigenous children.⁹⁶ Limited research has been conducted in Australia on the extent to which homelessness and poverty are implicated in child protection intervention, and further research will be required to inform this area of law and policy. However, the results of this study add to the existing evidence that such a link does exist. Homelessness legal services must keep this in mind when developing their priorities for practice.

D Petty Criminal Behaviour

Arrests for low-level criminal offending including petty theft, and offences associated with the use and enjoyment of public space, were also reportedly frequent amongst respondents' clients. Forty-eight per cent of respondents from South Australia and 46 per cent of respondents from Western Australia reported that either most or some of their clients had been charged with at least one theft offence. Forty per cent of respondents from Western Australia and 37 per cent of respondents from South Australia reported that either most or some of their clients had been moved on by police. Forty-three per cent of respondents from South Australia and thirty-nine per cent of respondents from Western Australia reported that either most or some of their clients had been charged with at least one public space offence. In their qualitative comments, many respondents referred to the high levels of police interference to which their clients were subject, and the impact this had on their already stressful lives.

High levels of contact with police were also reported amongst respondents to the Queensland survey in 2005, and in subsequent studies that have been conducted in Queensland and elsewhere.⁹⁷ Police officers typically invoke criminal offences related to offensive or disorderly behavior when dealing with people experiencing

⁹⁴ Jane Thomson and Rosamund Thorpe, 'The Importance of Parents in the Lives of Children in the Care System' (2003) 28(2) *Children Australia* 25; Terry Bartholomew, *A Long Way from Home: Family Homelessness in the Current Welfare Context*, Deakin University Press, Melbourne, 1999.

⁹⁵ Thomson, above n 90, 6-7.

⁹⁶ Australian Institute of Health and Welfare, above n 91, 29.

⁹⁷ Forell et al, above n 3; Tamara Walsh, *No Vagrancy: An Examination of the Impact of the Criminal Justice System on People Living in Poverty in Queensland*, University of Queensland (2007).

homelessness. In South Australia, disorderly or offensive conduct or language is criminalised under s 7 of the *Summary Offences Act 1953* (SA). A person who behaves in a disorderly or offensive manner, or uses offensive language, in a public place is guilty of an offence, punishable by a maximum \$1250 fine or three months imprisonment. ‘Begging alms’ is also still an offence in South Australia, the maximum penalty being a \$250 fine.

Further, South Australian police officers may give a ‘move-on’ direction where a person or group is loitering in a public place and the police officer believes on reasonable grounds that:⁹⁸

1. an offence has been or is about to be committed by the person or group;
2. a breach of the peace has occurred, is occurring or is likely to occur;
3. the movement of pedestrians or vehicles is being obstructed; or
4. the safety of a person in the vicinity is in danger.

The maximum penalty for failing to move on is a \$1250 fine or three months’ imprisonment.⁹⁹

Western Australia (along with Queensland) was one of the last states in Australia to decriminalise vagrancy. Prior to recent reforms, being found with ‘no visible lawful means of support or insufficient lawful means’ still amounted to an offence in Western Australia.¹⁰⁰ The act of begging or gathering alms was also criminalised.¹⁰¹ However, the *Criminal Law Amendment (Simple Offences) Act 2004* (WA) repealed these sections.¹⁰² An offence of ‘disorderly behaviour in public’ was retained, making disorderly behaviour (including the use of insulting, offensive or threatening language) in a public place an offence.¹⁰³ The maximum penalty is a \$6000 fine, which seems unduly excessive; however the decriminalisation of vagrancy and begging offences must be regarded as a significant step forward.

⁹⁸ *Summary Offences Act 1953* (SA) s 18(1).

⁹⁹ *Summary Offences Act 1953* (SA) s 18(2).

¹⁰⁰ *Police Act 1892* (WA) s 65(1). The equivalent offence in Queensland was abolished at around the same time, see *Summary Offences Act 2005* (Qld). Vagrancy is no longer an offence in any Australian State.

¹⁰¹ Previously s 65(3) *Police Act 1892* (WA).

¹⁰² See *Criminal Code* (WA) pt 2 div 9.

¹⁰³ *Criminal Code* (WA) s 74A.

Further changes to simple offences laws were made in Western Australia in 2006. One of these changes related to police move-on powers.¹⁰⁴ Consistent with the old law, individuals can be moved on if they are:

1. doing, or about to do, an act causing violence or fear of violence;
2. causing a breach of the peace;
3. hindering, obstructing or preventing any lawful activity being carried on by another person; or
4. committing, had committed, or intended to commit an offence.¹⁰⁵

However, a new sub-section was added, requiring the police officer to take into account the likely effect of the order on the person, including the effect on the person's access to places where he or she ordinarily resides, works or accesses services.¹⁰⁶ This is particularly important in the context of homelessness, as one of the key concerns raised in relation to moving on public space dwellers is that such directions may have the effect of excluding individuals from places that they consider 'home'.¹⁰⁷

The Western Australian amendments have the potential to bring about positive change for homeless persons who experience unwelcome or unwarranted police attention. However, as long as 'offensiveness' is interpreted widely by police and the courts, provisions criminalising such behaviour will continue to catch people experiencing homelessness.¹⁰⁸ It is well-established that those living in poverty and those experiencing homelessness are more likely to come in contact with police.¹⁰⁹ Despite the numerous suggestions for reform which have been made in various foundation reports,¹¹⁰ policing continues to have a differential impact upon the lives

¹⁰⁴ *Criminal Investigation (Consequential Provisions) Act 2006* (WA) s 64.

¹⁰⁵ *Criminal Investigation Act 2006* (WA) s 27, previously s 50 *Police Act 1892* (WA).

¹⁰⁶ *Criminal Investigation Act 2006* (WA) s 27(3). See also *Criminal Code* (WA) ss 64, 66.

¹⁰⁷ For further information on homelessness and move-on powers see Monica Taylor and Tamara Walsh (eds), *Nowhere to Go: The Impact of Police Move-On Powers on Homeless People in Queensland*, University of Queensland, 2006 and Monica Taylor and Tamara Walsh, "'You're Not Welcome Here': Police Move-On Powers and Discrimination Law" (2007) 30 *University of New South Wales Law Journal* 151.

¹⁰⁸ See Tamara Walsh, 'Offensive Language, Offensive Behavior and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24 *University of Queensland Law Journal* 123 for further information on definitions of offensiveness.

¹⁰⁹ See Goldie, above n 2; Lynch, above n 2; Walsh, above n 96.

¹¹⁰ See, eg, Ronald Sackville, *Commission of Inquiry into poverty — Second Main Report: Law and Poverty in Australia* (1976); Elliot Johnston, *Royal Commission into Aboriginal Deaths in Custody — Final Report* (1991).

of society's most vulnerable individuals. As Ronald Sackville noted in the 1975 Commission of Inquiry into Poverty:

The point is not that the use of police discretion can or should be avoided or that its exercise usually produces undesirable results, but that the importance of the discretion, and the opportunity it provides for discriminatory treatment of poor people, should be recognized and studied closely.¹¹¹

CONCLUSION

The results of this study, combined with the results of an earlier study conducted in Queensland, suggest that people experiencing homelessness across Australia encounter a very similar range of legal difficulties. This must be the source of a great deal of hardship, and suggests that indirect discrimination may occur against them. This should be a source of serious concern for governments in Australia; however, it also provides a basis upon which legal services targeted at people experiencing homelessness can be planned and developed. It is extremely important that such legal services provide services related to repayment of debts and fines, domestic violence and family law issues, social security issues and minor criminal charges. Such services also need to take a holistic approach that responds to the various issues without placing homeless people at further risk of surveillance and interference from agents within the criminal justice system. For example, some individuals may be hesitant about taking much-needed legal action for fear that it may bring them to the attention of authorities. The intersections between the myriad of legal difficulties experienced by homeless persons are often extremely complex.

Governments and policy-makers must become more familiar with the impact of the law on society's most disadvantaged individuals. Consultation with service-providers is an effective way of gathering general information quickly and easily, but it is not done enough. Most importantly, the affected individuals require an opportunity to speak out if practical responses to their struggles are to be developed. As one homeless person remarked in a recent Queensland study:

Generally the riff-raff have got an ear to listen, but people who think they are the pillars of society, they wouldn't listen to a word you are saying.¹¹²

¹¹¹ Ibid.

¹¹² Walsh, above n 97, 56.