

THE OVERRULED UNDERCLASS: THE IMPACT OF THE LAW ON QUEENSLAND'S HOMELESS PEOPLE

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I INTRODUCTION

It is well established that homeless people experience a disproportionate number of legal difficulties relative to the general population.¹ Homeless Persons' Legal Clinics in Australia report that the most common legal difficulties experienced by the homeless people presenting at their services are social security, tenancy, fines and criminal law issues.² However, to date, no quantitative research has been conducted in Australia to empirically confirm this, or to determine which of these may be considered priorities for legal service provision.

In order to fill this evidentiary gap, coordinators, social workers, counsellors and administrators employed by services funded under the Supported Accommodation and Assistance Program ('SAAP'),³ the Community Rent Scheme ('CRS'),⁴ and the boarding house program⁵ in Queensland were invited to complete a survey which asked them to indicate the proportion of their clients that have encountered certain legal difficulties.

The results of the survey demonstrate that people who are homeless are subjected to a broad range of legal difficulties. For some, their state of

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1 See, eg, Philip Lynch, 'Begging for Change: Homelessness and the Law' (2002) 26 *Melbourne University Law Review* 609; Carla Klease, 'Lawyers Helping the Homeless' (2002) 9 *Proctor* 16.

2 Philip Lynch, 'The Homeless Persons' Legal Clinic' (2002) 27(1) *Alternative Law Journal* 30; Klease, above n 1.

3 SAAP is a consolidation of Commonwealth and State programs aimed at providing accommodation and support services to those who are homeless or at risk of homelessness. SAAP services include emergency accommodation facilities, hostels, refuges and soup kitchens. Around 1200 organisations are funded nationally under SAAP.

4 The CRS in Queensland provides funds to community organisations to provide short- to medium-term accommodation to public housing applicants who are in immediate and desperate need of housing. There are 24 CRS services in Queensland.

5 The State-funded boarding house program in Queensland enables community organisations and local governments to establish boarding houses as a short-, medium- or long-term housing option for those who are homeless or at risk of homelessness. There are eight boarding house managers whose services are funded under the Queensland boarding house program.

homelessness renders them particularly vulnerable to the operation of certain laws. For others, their state of homelessness has directly resulted from the operation of certain laws on their lives. This paper will outline the history of the regulation of homeless people by the law in Britain and Australia. The results of the survey will then be reported on and discussed. First, however, homelessness must be defined.

II HOMELESSNESS DEFINED

The most widely accepted definition of homelessness in Australia was proposed by Chamberlain and Mackenzie.⁶ This definition is threefold, whereby homelessness is divided into primary, secondary and tertiary levels. Primary homelessness is where a person is without conventional shelter (for example, people living on the streets or sleeping in parks, 'squatters', people using vehicles as shelter and people living in other improvised dwellings); secondary homelessness is where a person constantly moves from one temporary shelter to another (for example, refuges, hostels or homes of family/friends); and tertiary homelessness is where a person lives in a boarding house on a medium- to long-term basis. In 2003, Chamberlain and Mackenzie added a fourth dimension to their analysis of homelessness, creating the new category of those who live in caravan parks on a long-term basis because they are unable to find or afford alternative accommodation. These people are termed the 'marginally housed'.

The *Supported Accommodation and Assistance Act 1994* (Cth) offers an alternative definition of homelessness. Section 4 defines a homeless person as one who has inadequate access to safe and secure housing, ie, where the 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 by failing to provide access to adequate personal amenities or the economic and social support 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.

Chamberlain describes this definition as a 'service delivery' definition, and argues that the Chamberlain and Mackenzie definition is more inclusive because, for example, it extends to residents of boarding houses who would not be considered homeless under the legislative definition.⁷ However, it could be argued to the contrary that in many ways the legislative definition is more inclusive because, for example, it recognises that not feeling 'at home' is an important feature of homelessness. Many commentators have argued that homelessness should not merely be defined by reference to housing status, but

6 See Chris Chamberlain and David Mackenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27(4) *Australian Journal of Social Issues* 274; Chris Chamberlain, *Counting the Homeless: Occasional Paper* (1999); Chris Chamberlain and David Mackenzie, *Counting the Homeless 2001* (2003).

7 Chamberlain, above n 6, 2.

also by reference to ‘social, personal and relational vulnerability’.⁸ For example, some young people who live with their parents are not ‘houseless’, yet the feelings of insecurity or fear associated with the house in which they live may lead them to consider themselves *homeless*.⁹ Consistent with this, the Human Rights and Equal Opportunity Commission defined homelessness in its *Our Homeless Children* report as:

a lifestyle which includes insecurity and transiency of shelter. It is not confined to a total lack of shelter. For many children and young people it signifies a state of detachment from family and vulnerability to dangers, including exploitation and abuse broadly defined, from which the family normally protects the child.¹⁰

Moreover, Indigenous persons who have adopted an itinerant lifestyle out of choice may not consider themselves to be homeless, despite the fact that they sleep out and thus come within the Chamberlain and MacKenzie definition.¹¹ As Memmott et al note, not all people who live in public space desire alternative accommodation; many Indigenous people socialise in public space, and may or may not camp out there overnight, and others have another place of residence but choose to dwell in the ‘starlight motel’ because they have a social or spiritual connection with a certain place.¹²

A definition of homelessness that incorporates both housing status and subjective experience seems most appropriate. In this paper, reference to the Chamberlain and MacKenzie definition of homelessness will be made, where necessary, to illustrate distinctions between different forms of homelessness, but overall, the paper will approach homelessness as a reflection of both housing status and social exclusion.

III THE HISTORY OF THE REGULATION OF HOMELESS PEOPLE

‘Vagrants’, ‘vagabonds’ and ‘undesirables’ have been targeted by the law, both civil and criminal, since the dawn of the capitalist era.¹³ The Protestant

8 Antonio Tosi, ‘Homelessness and the Housing Factor: Learning from the Debate on Homelessness and Poverty’ in Dragma Avramov (ed), *Coping with Homelessness: Issues to be Tackled and Best Practices in Europe* (1999) 103.

9 Catherine Robinson, ‘“I think home is more than a building”: Young Homeless People on the Cusp of Home, Self and Something Else’ (2002) 20(1) *Urban Policy and Research* 27.

10 Human Rights and Equal Opportunity Commission, *Our Homeless Children: Report of the National Inquiry of Homeless Children* (1989) 7.

11 Cassandra Goldie, ‘Living in Public Space: a Human Rights Wasteland?’ (2002) 27(6) *Alternative Law Journal* 277; Belinda Drew and Anne Coleman, ‘This Place Here is Our Home: Defining Homelessness Beyond Housing’ (1999) 12(2) *Parity* 16; W Bartlett Day ‘A View from the Long Grass’ (1999) 12(3) *Parity* 21.

12 Paul Memmott, Stephen Long, Catherine Chambers and Frederick Spring, *Categories of Indigenous ‘Homeless’ People and Good Practice Responses to Their Needs*, Australian Housing and Urban Research Institute Report (2003).

13 For a thorough discussion on the links between poverty and capitalism, see Tony Novak, *Poverty and the State*, 1988. See also Philip Joseph, ‘Homelessness and Criminality’ in Dinesh Bhurgra (ed), *Homelessness and Mental Health* (1996) 78–81.

work ethic,¹⁴ racism towards Aboriginal people,¹⁵ and paternalistic attitudes towards lone women and children,¹⁶ have meant that itinerant people in Australia have always been vulnerable to regulation by the State. Many of these attitudes, and the laws which embody them, were inherited by Australia from Britain.

Poor laws were among the first 'modern' forms of regulation of the destitute. Poor law dates back to 1601, however it is the ethos and methodology of the 'New' English Poor Law, based on the Poor Law Report of 1834, which has persisted in Australia. This Report advocated a system of government relief which provided assistance only under circumstances where an incentive to work could be maintained. It was believed that where the 'right' attitude towards labour was absent, the system should ensure that an individual was corrected so that public relief would not become a 'bad substitute for industry and forethought'.¹⁷ Thus, government relief was established as an 'instrument of moralisation'.¹⁸ Further, it was thought that relief should only be offered at a level less attractive than independent wage labour, and that it should be looked upon with scorn so that only the truly destitute would submit themselves to the stigma and humiliation it occasioned.¹⁹ The 'workhouse' was thus established which imposed a strict regime on those who required accommodation and welfare assistance, involving social isolation, a requirement to wear a uniform, and harsh menial work.²⁰ Since 'out-relief' was rarely an option, those who were without shelter or income were subjected to a highly regulated lifestyle which sought primarily to re-educate and reform rather than assist them.

'Modern' vagrancy law was established in 1824 in Britain to regulate the lives of the poor and homeless. The *Vagrancy Act 1824* (UK), based on legislation that dates back to the 12th century,²¹ was aimed at removing 'undesirables' from public view.²² Such laws construed homelessness as a form of deliberate

14 See especially Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, (Talcott Parsons, trans, 1976, 2nd ed) [trans of: *Die protestantische Ethik und der Geist des Kapitalismus*]. See also Tony Novak, above 13 and Tamara Walsh, 'Waltzing Matilda One Hundred Years Later: Interactions Between Homeless Persons and the Criminal Justice System in Queensland' (2003) 25(1) *Sydney Law Review* 75, 76–7.

15 See, eg, Ruth Eversley, 'Aboriginal Children and their Families: History and Trends in Western Australia' (1990) 9(2) *Youth Studies* 34; Helen Gregory and John Thearle, 'Hapless Children in the "Lucky Country": An Historical Overview of Childhood Poverty in Australia' in James Nixon, William McWhirter and John Pearn (eds), *Poverty in Childhood* (1990) 3.

16 See, eg, Paula Jane Byrne, 'On Her Own Hands: Women and Criminal Law in New South Wales, 1810–1830' in David Philips and Susanne Davies (eds) *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia* (1994) 35; Susanne Davies, "'Ragged, Dirty ... Infamous and Obscene": The "Vagrant" in Late Nineteenth Century Melbourne' in David Philips and Susanne Davies (eds), *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia* (1994) 144, 147–52; Anonymous, 'A Century of Care: the Church of England Homes' (1985) 30(4) *Church of England Historical Society* 77; Rod Blackmore, 'State Intervention with Children: Two Centuries of History' (1998) 30(1) *Australian Journal of Forensic Sciences* 5; Gregory and Thearle, above n 15, 3–4.

17 Novak, above n 13, 37.

18 Ibid 39.

19 Ibid 46.

20 Ibid 47.

21 Walsh, 'Waltzing Matilda One Hundred Years Later', above n 14, 76–7.

22 Ibid.

deviance and a reflection of idleness, and made it a criminal offence to engage in behaviours associated with extreme poverty.²³ Arrests for vagrancy, which led to committal, were considered to be for the persons' own good, saving them from their own individual moral failings.²⁴

The values and attitudes upon which such laws were based were brought with the settlers to the Australian colonies. Charitable relief for the homeless, in the form of confinement in a 'benevolent asylum', was offered based on paternalistic and educative notions.²⁵ 'Vagrants', once accepted socially as 'tramps' (travellers), were soon re-characterised as 'parasites' and 'brutes', and vagrancy laws were established in most states in response.²⁶ Aboriginal people, who were generally without 'conventional' shelter, were treated as perhaps the lowest form of 'undesirable'. Their regulation under the 'protection' acts extended to restricting their access to townships, compelling them to live in reserves and separating family members from one another.²⁷

There is, therefore, a long legacy of legal intervention in the lives of homeless or transient people in Britain and Australia, and as society has become more highly regulated, the number of laws affecting homeless people has increased. There are now a variety of laws that affect homeless people and, in addition, homeless people report high levels of legal interference in their lives.²⁸ The aim of this project was to determine which of these laws impact most seriously on homeless people in Queensland so that priorities for legal service provision may be set.

IV QUANTIFYING THE IMPACT OF THE LAW ON HOMELESS PEOPLE – METHODOLOGY

Homeless Persons' Legal Clinics throughout Australia report that homeless persons' interactions with the legal system are generally the result of criminal law issues, fines, social security and tenancy law issues.²⁹ However, such services are only able to comment on the experiences of their clients, and it is

23 Ibid.

24 Novak, above n 13, 47; Clem Lloyd, "'Poor Naked Wretches': A Historical Overview of Australian Homelessness" in Patrick Troy (ed) *A History of European Housing in Australia* (2000) 287–8.

25 While most were not strictly 'work-tested', the able-bodied poor were still expected to work. The purpose of the asylums was stated to be the 'discountenance' of 'mendicity and vagrancy', and the lives of their inhabitants were highly regulated: see Lloyd, above n 24; Rosemary Berreen, "'And thereby to discountenance mendicity": Practices of charity in early nineteenth century Australia' in Michael Wearing and Rosemary Berreen (eds) *Welfare and Social Policy in Australia* (1994); Thomas Henry Kewley, *Social Security in Australia, 1900–72* (1973) 4–5.

26 Davies, above n 16.

27 See *An Act to Provide for the Protection and Management of the Aboriginal Natives in Victoria 1869*; *Aborigines Protection Act 1886* (WA); *Aborigines Protection Act 1901* (Qld); *Aborigines Protection Act 1909* (NSW); *Northern Territory Aborigines Act 1910* (SA); *Aborigines Act 1910* (SA).

28 For example, in a recent survey of homeless people in inner-city Brisbane, 72 per cent of the sample stated that they felt police gave them undeserved attention: see Tamara Walsh and Carla Klease, 'Down and Out? Homelessness and Citizenship' (2004) 10(2) *Australian Journal of Human Rights* 77.

29 Lynch, 'The Homeless Persons' Legal Clinic', above n 2; Klease above n 1.

quite possible that the experiences of homeless people who access such services are significantly different from those who do not. Thus, although there is a substantial amount of anecdotal evidence regarding which areas of law impact most upon homeless people in contemporary Australia, empirical data on the subject has not yet been collected from a representative sample.

In recognition of this, the current project obtained information relating to the impact of the law on homeless people throughout Queensland by surveying a large sample of SAAP, CRS and boarding house workers. Workers were asked to indicate on a graded scale the approximate proportion of their clients who had encountered the legal difficulties listed. 10 broad legal areas and 27 specific legal difficulties were listed, however respondents were given the opportunity to add to these. Additional qualitative comments were also welcomed.

In mid-2004, several copies of the survey instrument were sent to coordinators of all SAAP services, CRS services and boarding houses in Queensland, and coordinators were asked to distribute the surveys amongst their staff. A total of 227 services were sent surveys.

SAAP, CRS and boarding house workers were selected as the target group for this survey for a number of reasons. First, interviewing or surveying homeless people themselves might have caused them stress or distress since certain questions, particularly those regarding past prosecutions for criminal offences, may have seemed intrusive. Second, it was concluded that more information could be obtained by collecting it from a central source; workers are able to comment on a wide range of clients, whereas a survey of homeless individuals would only have reflected the experiences of that sample. Third, it was expected that the response rate was likely to be higher if workers rather than homeless people themselves were targeted; homeless individuals may experience language or literacy barriers, privacy concerns, or simply more important things they need to do, all of which might have prevented them from completing a survey or participating in an interview.

The main limitation of this survey is that it focuses only on homeless people who fall into either the secondary or tertiary homelessness categories. While it may be noted that many of those who fall within the secondary and tertiary homelessness categories would have experienced primary homelessness in the recent past,³⁰ the exclusion of those who presently sleep out or live in improvised dwellings has the capacity to skew the results.

V RESPONSE RATE AND RESPONDENT CHARACTERISTICS

A total of 264 responses were received; thus, on average, 1.2 workers from each service surveyed responded to the study. Together, these workers indicated

30 SAAP data indicates that in 2002–03 around 9 per cent of all SAAP clients fell into the primary homelessness category immediately prior to their seeking SAAP assistance: Australian Institute of Health and Welfare ('AIHW'), *Homeless People in SAAP: National Data Collection Annual Report 2002–03, Queensland* (2003) 31.

that they serviced a total of 2156 homeless people per day, an average of just over nine clients per worker per day. Thirty-three percent of respondents were coordinators of their service, 11 per cent were counsellors, 2 per cent were administrative staff, and the remainder categorised themselves as welfare workers, social workers or support workers.

Twenty-six percent of respondents reported that they worked for services targeted at young people, 22 per cent indicated that they worked for services targeted at women and children (ie, domestic violence services), 11 per cent worked for services targeted at families and 5 per cent worked for services targeted at men. A further 10 per cent of workers indicated that they worked for Indigenous-specific services; 6 per cent indicated that they worked for services targeted at young Indigenous people, 3 per cent said they worked for generalist Indigenous services and 1 per cent stated that they worked for Indigenous-specific domestic violence services. Services with no specific target group made up 25 per cent of those surveyed and 1 per cent of respondents did not indicate the nature of their service.

Almost 29 per cent of respondents indicated that their service was located in the Brisbane metropolitan area, and a further 25 per cent stated that they worked in the broader south-east Queensland area. Around 20 per cent of respondents' services were located in regional areas, and a further 20 per cent were located in rural areas. Five percent did not indicate the location of their service.

Ninety-two percent of respondents reported that their service offered accommodation to homeless clients. In addition, 61 per cent said that their service offered counselling, emotional support or psychiatric services, 47 per cent said their service provided meals, 21 per cent said they provided referral services, 6 per cent said they offered transport, 6 per cent said they provided court support, and 3 per cent said they offered health services.

One hundred and two respondents (39 per cent) took advantage of the opportunity to contribute qualitative comments in addition to the quantitative survey data requested.

VI LAWS AFFECTING HOMELESS PEOPLE: RESULTS IN BRIEF

Overall, respondents reported that their clients were most commonly impacted upon by the following areas of law, in descending order:

- (A) fines law;
- (B) debt law;
- (C) family law;
- (D) social security law;
- (E) tenancy law;
- (F) criminal law;
- (G) mental health law;

- (H) migration law;
- (I) electoral law; and
- (J) planning law.

Respondents also provided an indication as to which specific legal difficulties impacted most on their clients. Across all population groups, the top ten legal difficulties encountered by respondents' homeless clients were reported to be:

- (1) domestic violence;
- (2) child protection;
- (3) default on civil debt;
- (4) fine default;
- (5) social security breaches;
- (6) blacklisting on tenancy databases;
- (7) being moved on by police;
- (8) meeting social security eligibility requirements;
- (9) being arrested for petty theft; and
- (10) being arrested for public space offences.

A number of differences were observed, however, between population groups and between service locations. These differences will be canvassed in the discussion of the results below.

VII LAWS AFFECTING HOMELESS PEOPLE: ANALYSIS

Each of the areas of law identified by respondents as impacting adversely on their clients, and the specific legal difficulties that fall under each broad legal heading, will be discussed in turn.

A Fines law

Sixty eight percent of respondents reported that either most or some of their clients experienced difficulty in paying fines. The high incidence of fines law difficulties amongst homeless people in Queensland may be explained by two related facts. First, homeless people are amongst those most likely to receive a fine and second, they are most likely to be unable to pay.

The use of fines as a penalty has become increasingly popular in Australia, and around the world,³¹ particularly for petty offences. For example, a fine is the

31 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(2) *Criminal Justice: International Journal of Policy and Practice* 181, 182; George Cole, 'Monetary Sanctions: The Problem of Compliance' in James Byrne, Arthur Lurigio and Joan Petersilia (eds), *Smart Sentencing: The Emergence of Intermediate Sanctions* (1992) 150ff; Judith Greene, 'Structuring Criminal Fines: Making an "Intermediate Penalty" More Useful and Equitable' (1988) 13(1) *The Justice System Journal* 37, 37-8, 40.

most common penalty imposed for street offences in Queensland.³² Since homeless people are forced to live their lives in public, they are more likely than other members of the population to be arrested for such offences.³³ Homeless people may also be fined for other reasons such as failing to vote and even violating town planning instruments.³⁴

The chief complaint around the world regarding the use of fines as penalties is their inequity: a flat-rate fine will necessarily have a differential effect on offenders depending on their means to pay.³⁵ Social security benefits are the sole source of income for the vast majority of homeless people,³⁶ and since social security benefits are pegged at levels well below the poverty line,³⁷ even a small fine will generally be beyond their means. Moreover, 10 per cent of homeless people have no income at all,³⁸ so a large proportion of homeless people are literally unable to pay a fine of any amount.

Yet, Queensland's fine enforcement agency, the State Penalties Enforcement Registry ('SPER'), does not have the power to waive a fine in the event that it cannot be paid, or where its payment would lead to unjustifiable hardship. SPER is unique in this way; equivalent agencies in New South Wales, the Northern Territory and Victoria do have the power to cancel fines in such circumstances.³⁹ In Queensland, if an offender is unable to pay their fine, the fine amount will continue to increase due to the imposition of 'enforcement fees'. Eventually, property may be seized, a community service order may be imposed and/or an arrest warrant may be issued.⁴⁰

As long as fines remain the most common penalty for street offences, and fine enforcement is insisted upon regardless of the fined persons' financial circumstances, fines law will continue to adversely affect Queensland's homeless people.

32 Tamara Walsh, 'Won't Pay or Can't Pay: Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland' (2005) *Current Issues in Criminal Justice* (forthcoming).

33 See the discussion of criminal law below.

34 See the discussions of electoral law and planning law below.

35 Raine et al, above n 31; Michael Tonry, 'Parochialism in US Sentencing Policy' (1999) 45(1) *Crime and Delinquency* 48, 51; Andrew Ashworth, *Sentencing and Criminal Justice*, (2nd ed 1995) 262; Pat Carlen, 'Crime, Inequality and Sentencing' in Pat Carlen and Dee Cook (eds), *Paying for Crime* (1989) 23. See also Walsh, 'Won't Pay or Can't Pay', above n 32.

36 AIHW, above n 30, 30.

37 Australian Council of Social Service, 'Below Poverty Line Social Security Payments' ACOSS Info Paper 304 (2001).

38 AIHW, above n 30, 30.

39 See *State Penalties Enforcement Act 1999* (Qld). The NSW State Debt Recovery Office, the NT Fines Recovery Unit and the Vic PERIN Court all have the power to cancel fines where the fine cannot be satisfied in any other way: see *Fines Act 1996* (NSW) s 101(2), *Fines and Penalties (Recovery) Act 2001* (NT); Anne Condon and Annie Marinakis, 'The Enforcement Review Program' (2003) 12(4) *Journal of Judicial Administration* 225.

40 Technically, fine default can lead to imprisonment in Queensland (*State Penalties Enforcement Act 1999* (Qld) ss 119–21) however, the Department of Corrective Services reports that no person has been imprisoned for fine default under this section.

B Debt law

Sixty-seven percent of respondents stated that either most or some of their clients experienced difficulties in repaying civil debts. In their qualitative comments, respondents indicated that the most common debts faced by homeless people include utility bills, mobile phone bills, credit card debts, debts to loan agencies, public housing debts and other tenancy-related debts. This, of course, was not an unexpected result. It may be presumed that, due to their extreme poverty, homeless people may frequently come into contact with the legal system because they are unable to pay debts.

In Queensland, debtors may apply for a warrant for payment of debt by instalments,⁴¹ or they may apply for voluntary bankruptcy under the *Bankruptcy Act 1966* (Cth). However, because the law related to civil debt is so complex,⁴² and the agreements consumers and borrowers are forced to sign to obtain utilities and loans are so long and verbose, homeless people often find themselves in a situation where they are unsure what action to take when they find themselves in debt. They often take no action and are therefore unable to take advantage of the legal protections that might have been available to them. As a result, outstanding debts may cause or perpetuate a person's homelessness. For example, if their utilities are cut off, they may be unable to afford the reconnection fee, and if they have incurred public housing debts they may be ineligible for public housing in the future. Legal assistance and/or advocacy is often required to ensure that homeless persons' difficulties with debt are successfully resolved.

C Family law

Around 67 per cent of respondents indicated that either most or some of their clients had experienced family law difficulties. This is consistent with SAAP data in Queensland. Domestic violence is the main reason cited by Queensland's SAAP clients for seeking assistance: a total of 22 per cent of Queensland's SAAP clients in 2002–03 stated that they required assistance due to the effects of domestic violence on their lives.⁴³ A further 18 per cent stated that they required assistance due to the breakdown of a relationship or the need for 'time-out' from a domestic situation.⁴⁴ This is particularly the case for homeless women and children. Fifty percent of women over 25 who sought SAAP assistance in Queensland in 2002–03 reported domestic violence to be the main reason for their need of help.⁴⁵ Consistent with this, in the current survey, respondents who worked in services targeted at women and children reported that family law issues were more likely to impact upon their clients than any other area of law.

41 See *Uniform Civil Procedure Rules 1999* (Qld) ch 19 pt 7.

42 For a Victorian illustration of this, see Amanda Sapienza and Natalie Shekel, 'Water, Electricity and Gas in Victoria: Rights of People with Payment Difficulties' (2004) 17(1) *Parity* 81.

43 AIHW, above n 30, 16, 19.

44 Ibid.

45 Ibid. See also Julie Oberin, Muthama Sinnappan and Akosita Tamanisau, 'Shades of Women's Homelessness' in Council to Homeless Persons (ed), *There's No Place Like Home: Proceedings of the 2nd National Homelessness Conference* (1999) 64–74.

For women who are victims of domestic violence, fleeing the home may be their only means of escaping violence and abuse.⁴⁶ Women may be reluctant, or practically unable, to obtain an order from the court for their protection because they lack access to transport, fear reprisal from their violent partner or because they believe that such an order will not provide them with sufficient protection.⁴⁷ Other key family law issues confronting homeless women include child protection issues and property settlement following the breakdown of a relationship.⁴⁸ Legal proceedings associated with these issues can be complex, protracted, and often unbalanced. Male partners tend to have access to a greater level of resources than do women, and they can devote these to obtaining legal advice and representation. In addition, the two parties may simply have different priorities in the dispute.⁴⁹ Thus, for many homeless women, family law difficulties are prevalent in their lives.

In this survey, family law issues were not only rated highly by workers servicing women and children, but as noted above, domestic violence and child protection issues were reported to be the two most common legal difficulties encountered by homeless people across all population groups. In fact, workers who serviced young people reported child protection issues to be the second most prevalent legal difficulty encountered by their clients, and workers in Indigenous-specific services reported domestic violence to be the second most prevalent legal difficulty encountered by their clients.

Even workers who serviced predominantly male clients reported that family law issues are a problem for their clients, particularly those issues related to parental responsibility for and contact with children, property settlement and domestic violence. Homeless men may choose to leave the family home after separation from their partner, or they may be forced to leave by order of the court. Under s 25(3)(b) of the *Domestic and Family Violence Protection Act 1989* (Qld), where a protection order is granted, the court may impose conditions including exclusion of the subject of the order from the family home.⁵⁰ Indeed, family breakdown was reported by around 15 per cent homeless men in 2002–03 to be the main reason for their need of SAAP assistance.⁵¹

46 See Chris Chamberlain and Guy Johnson, 'Homeless Adults: Understanding Early Intervention' (2002) 26 *Just Policy* 28, 31, 32; Donna Chung, Rosemary Kennedy, Bev O'Brien and Sarah Wendt, 'The Impact of Domestic and Family Violence on Women and Homelessness: Findings from a National Research Project' (2001) 14(2) *Parity* 21, 22; Helen Skeat, 'Losing Out: Women and Post-Separation Income' in Council to Homeless Persons (ed), above n 45, 246–51.

47 Rhonda Cumberland, 'Can the Law Prevent Domestic Violence Homelessness?' (2001) 14(2) *Parity* 36; Cecilia Lenagh, 'Policing Domestic Violence: Policy Meets Practice in Rural New South Wales' (2001) 14(2) *Parity* 38; Tracy Laffan, 'Escaping Domestic Violence and Finding a Home' (2001) 14(2) *Parity* 57.

48 Julie Stubbs, 'Domestic Violence, Laws and Homelessness in Australia' (2004) 17 (1) *Parity* 41.

49 For example, women may be more likely to want proceedings to be over with quickly, or they may wish to avoid conflict; see Skeat, above n 46, 246–51.

50 See Jenny Nunn, '"Sole Occupancy" Orders' (2001) 14(2) *Parity* 35; Mick Boyle, 'Men, Male Family Violence and Homelessness' (2001) 14(5) *Parity* 9.

51 AIHW, above n 30, 19.

The extremely high rating of family law issues by respondents in this survey sends a clear message to homeless legal service providers that family law assistance should be prioritised amongst all population groups.

D Social security law

Respondents reported that social security law difficulties were extremely prevalent amongst their homeless clients, with 62 per cent of respondents stating that either most or some of their clients encountered such difficulties. As noted above, the impacts of the breach penalty regime and problems meeting eligibility requirements were both rated in the top 10 of all legal difficulties which impact adversely on Queensland's homeless people. It seems ironic that respondents reported social security law to impact adversely upon their clients when the system exists to provide assistance to these very people. However, when recent welfare reforms are considered, this result may not appear so remarkable.

Recent years have seen a renewed emphasis on 'mutual obligation' in the Australian welfare sector and the basis of welfare policy has shifted from entitlement to privilege. Consistent with its historical origins, a 'work first – welfare second'⁵² approach is now taken to social security, whereby payments have become more targeted, applications more closely scrutinised and benefits considered to be a 'wage-like payment' for job search activities, retraining and/or engaging in community work.⁵³ Failure to take reasonable steps to comply with these requirements (codified in an activity test 'agreement') results in a person being 'breached', meaning that a penalty is imposed. Such penalties include periods of a reduction, or non-payment, of the benefit claimed, depending upon how many times the person has breached the requirements in the past two years.⁵⁴ Loss of expected income as a result of these penalties has been found to result in extreme hardship to breached persons, often rendering them unable to purchase food and medication, or to pay rent and bills.⁵⁵ Indeed, the Salvation Army reports that such penalties may render up to 16.5 per cent of breached individuals homeless.⁵⁶

Most homeless persons receive a government pension or benefit as their sole source of income,⁵⁷ so the majority of homeless people are subject to social security law and are vulnerable to being breached. Under this punitive regime, homeless people tend to be penalised at a rate much higher than other benefit

52 Peter Dutton MP, 'Helping Disability Support Pensioners into Work' (Press Release, 24 November 2004).

53 'Mutual obligation' originally applied only to those receiving unemployment benefits, but its scope has widened to include single parents, mature age jobseekers and even disability pension recipients; see *Family and Community Services Legislation Amendment (Australians Working Together and Other 2001 Budget Measures) Act 2003* (Cth); Evaluation and Programme Performance Branch Employment Analysis and Evaluation Group, *Job Network Disability Support Pension Pilot: Interim Evaluation Report* (2004).

54 See Tamara Walsh, 'Breaching the Right to Social Security' (2003) 12(1) *Griffith Law Review* 43.

55 The Salvation Army Australia Southern Territory, *Stepping into the Breach: A Report on Centrelink Breaching and Emergency Relief* (2001).

56 Ibid.

57 The main source of income for over 80 per cent of SAAP clients is a government pension or benefit: AIHW, above n 30, 30.

recipients. There are a number of reasons for this. First, Centrelink's chief means of communication with social security recipients is by ordinary mail. Since homeless people almost always lack a fixed address, ordinary mail is the least effective means by which to communicate with them. Homeless people are routinely penalised for failing to reply to letters from Centrelink, or to take action in response to such letters, simply because they were never in receipt of them.⁵⁸ In view of this, the Independent Review of Breaches and Penalties in the Social Security System recommended that Centrelink employ a wider range of communication methods when dealing with transient people, including telephone, email, or messaging through a nominated relative, friend or service provider.⁵⁹ Nomination of a 'correspondence nominee' is a legal possibility under Part 3A of the *Social Security (Administration) Act 1999* (Cth), however it appears to be an option seldom used for reasons related to homelessness. Alternatively, it has been suggested that homeless people be given access to free post office boxes.⁶⁰

Homeless people are also disadvantaged in Centrelink's assessment processes. While alternative programs do exist for those who suffer significant barriers to accessing the job market (including homeless people),⁶¹ research has consistently shown that current interview procedures may fail to identify those disadvantaged jobseekers for whom the usual mutual obligation tasks are inappropriate.⁶² As a result, homeless people may sign off on activity test agreements which will be impossible for them to fulfil and when they breach them, may incur a penalty.

Notably, respondents who worked for services targeted at young people reported social security law to be the area of law which impacted most on their clients, and social security breaches were reported by them to be the most common legal difficulty faced by their clients. This finding is supported by the literature, which has suggested that young people are more likely to be breached than any other age group.⁶³ It has been speculated that this may be related to the fact that they are less likely to question breaches imposed upon them and because they have difficulty navigating the system in general.⁶⁴ Further, respondents who service young people rated meeting benefit eligibility requirements as the fifth

58 Walsh, 'Breaching the Right to Social Security', above n 54; Australian Council of Social Service, *Ending the Hardship: Submission to the Independent Review of Breaches and Penalties in the Social Security System* (2001) 8; Dennis Pearce, Julian Disney and Heather Ridout, *Report of the Independent Review of Breaches and Penalties in the Social Security System* (2002) 25.

59 Pearce et al, *ibid*, [3.6]–[3.10], [3.19].

60 Philip Lynch, 'Homelessness and the Right to Social Security' (2003) 150 *Lawyers Weekly* 10.

61 Namely, the Personal Support Program, see *Social Security Act 1991* (Cth) ss 501B(2)(h), 544B(1)(ia), 601(2)(a)(iv).

62 Sharon Parkinson, 'Opening the Referral Gateway: Integrating Assessment of Employment Assistance Needs of Homeless Job Seekers through Strengthening Collaboration between Centrelink and the Homeless Service System' (Paper presented at 'Beyond the Divide': the 3rd National Homelessness Conference, Brisbane, 6–8 April 2003); Sharon Parkinson and Michael Horn, *Homelessness and Employment Assistance: A Research Report Examining the Effectiveness of Assessment and Job Referral Procedures for Income Support Recipients Experiencing Homelessness* (2002).

63 Carla Mullins, 'Dole Bludgeoned' (2001) June *Rights Now* 10; Australian Council of Social Services, *Breaching the Safety-Net: The Harsh Impact of Social Security Penalties* (2001) 21.

64 Mullins, *ibid*.

most prevalent legal difficulty faced by their clients. Twelve respondents noted in their qualitative comments that young people are discriminated against on the basis of age when accessing social security payments as they are not eligible for Newstart (which pays at a higher rate than Youth Allowance), and will not even be eligible to receive Youth Allowance if they are under the age of 15.⁶⁵

The challenges faced by young people in accessing the social security system are thus worthy of particular attention by homelessness legal services, especially those targeted at young people.

E Tenancy law

Around 50 per cent of respondents reported that tenancy law issues were faced by either most or some of their clients. The specific tenancy-related difficulties reportedly encountered by their clients included unlawful or unjust eviction, the unlawful or unjust withholding of bond funds or possessions by landlords, and blacklisting on tenancy databases. Notably, chi-square significance tests indicated that tenancy-related legal difficulties were significantly less prevalent in rural areas than in Brisbane or other regional centres.

In Queensland, and indeed Australia-wide, there is a critical shortage of affordable housing,⁶⁶ and the demand for supported accommodation and public housing well outstrips supply.⁶⁷ As a result, high numbers of vulnerable people are reliant on the private rental market for housing at prices that are beyond their means. Many low-income individuals and families exist in a perpetual state of housing stress – ie, they spend more than 30 per cent of their income on maintaining their housing.⁶⁸ Research suggests that homeless people often find themselves in situations where they are unable to sustain a tenancy for more than a few months and are forced to move constantly from tenancy to tenancy with no security of tenure.⁶⁹

Around 30 per cent of people requiring emergency accommodation in Queensland come from private rental accommodation, boarding houses or caravan parks.⁷⁰ This suggests that a large proportion of homeless people have experienced difficulties related to tenancy agreements. Indeed, the operation of tenancy law may be the cause of some persons' homelessness. Under the *Residential Tenancies Act 1994* (Qld), failure to pay rent can result in eviction

65 *Social Security Act 1999* (Cth) s 543A.

66 See Mike Berry, Christine Whitehead, Peter Williams and Judith Yates, *Financing Affordable Housing: A Critical Comparative Review of the United Kingdom and Australia* (2004) ch 2.

67 For example, Queensland's SAAP services are forced to turn away around 30 per cent of those who approach them seeking housing assistance. This is the second highest rate of unmet demand for SAAP services in Australia: AIHW, *Demand for SAAP Assistance by Homeless People 2002–03* (2003) 19.

68 Many caravan park residents spend up to 50 per cent of their income on housing; Ed Wensing, Martin Wood, Darren Holloway, *On the Margins? Housing Risk Among Caravan Park Residents*, AHURI (2003) 14. Further, up to 15 per cent of tenant households experience housing stress: Michelle Slatter and Andrew Beer, *Housing Evictions in SA: A Study of Bailiff-Assisted Evictions* (2003) 11. See also Australian Federation of Homelessness Organisations, *Response to Residential Tenancy Databases Inquiry* (2004) 5.

69 Slatter and Beer, above n 68, 11.

70 AIHW, above n 30, 31.

within only 14 days,⁷¹ so for people whose income is extremely low or precarious, homelessness can occur swiftly. Further, the availability of ‘no reason evictions’ to private landlords and boarding house service providers,⁷² and the capacity of private landlords and boarding house service providers to increase rents at will,⁷³ means that those living on the margins may frequently be forced to vacate their place of residence.⁷⁴

Non-payment of rent may also result in a person being ‘blacklisted’ on a tenancy database. Blacklisting on tenancy databases was rated by respondents overall as the sixth most prevalent legal issue amongst their clients. However, respondents who worked in domestic violence services and services targeted at families were significantly more likely to report blacklisting to be a problem for their clients than other service types. Such a listing seriously compromises a person’s chances of obtaining rental accommodation in the future,⁷⁵ so tenancy databases may both cause and perpetuate homelessness. In July 2003, the *Residential Tenancies and Other Legislation Amendment Bill 2003* (Qld) was passed which introduced some controls on the use of residential tenancy databases, including a requirement that landlords give notice to persons whom they intend to list on a database.⁷⁶ However persons who are listed must go to the tribunal to remedy an unjust or incorrect listing.⁷⁷ For vulnerable people who have difficulty navigating the legal system, this requirement is particularly onerous.

In 2001, almost 8000 people in Queensland were living permanently in caravan parks because they were unable to afford alternative accommodation.⁷⁸ Indeed, Queensland has the largest permanent caravan park population in Australia.⁷⁹ For those living in caravan parks, legal protection is only available if they have entered into a tenancy agreement.⁸⁰ In Victoria, caravan park owners avoid entering into such agreements, but in many cases still insist on collecting a bond. Similarly in NSW, even though caravan park residents are provided with certain protections under the *Residential Parks Act 1998* (NSW), the regulations of the Act are not sufficiently policed in inland areas, and many families are

71 Sections 153, 155, 196.

72 See *Residential Services (Accommodation) Act 2002* (Qld) s 81; *Residential Tenancies Act 1994* (Qld) s 65.

73 See *Residential Services (Accommodation) Act 2002* (Qld) s 21; *Residential Tenancies Act 1994* (Qld) s 53.

74 This was confirmed by a study conducted by Slatter and Beer, where it was found that bailiff-assisted evictions in South Australia were concentrated in the lower-end of the rental market after tenancies lasting only a few months; Michelle Slatter and Andrew Beer, above n 68, 19–20.

75 See Eloise Curry and Philip Lynch, *Homelessness and Residential Tenancy Databases* (2003) 12. See also Special Government Backbench Committee, *Report of the Special Government Backbench Committee to Inquire into the Operation of Tenancy Databases* (2002) 49, which reports on the findings of a Tenancy Database Action Group Survey which found that 75 per cent of blacklisted respondents reported that the listing was the primary cause of their homelessness.

76 *Residential Tenancies Act 1994* (Qld) s 284C.

77 *Residential Tenancies Act 1994* (Qld) ss 284D, 284E.

78 Chamberlain and MacKenzie (2003), above n 6, 50.

79 Bea Rogan, *Onsite – Caravan Park Communities – Building Commitment* (1998).

80 *Residential Tenancies Act 1994* (Qld) ss 3A, 5, 7, 8.

unaware of, and do not insist on claiming, their entitlements.⁸¹ One respondent to this survey indicated that this also occurs in Queensland, stating that ‘caravan park residents do not stand up for their rights because they fear eviction’.⁸²

F Criminal law

Only 42 per cent of respondents stated that either most or some of their clients had encountered criminal law difficulties. However, marked differences were observed between population groups. For example, respondents who worked for Indigenous-specific services reported that criminal law was the area of law which impacted most on their clients; and for respondents who serviced young people, criminal law issues were rated second after social security law issues. Thus, criminal law issues are particularly prevalent in the lives of some homeless people.

This is particularly true of street offences such as ‘vagrancy’. The offence of vagrancy was recently repealed by the *Summary Offences Act 2005* (Qld) which was passed in March 2005. However, during the study period, behaviours such as ‘habitual’ drunkenness, and having insufficient lawful means of support were still criminalised as ‘vagrant’ behaviour.⁸³ Respondents from youth and Indigenous homelessness services reported that vagrancy offences impacted significantly on their clients. There was some suggestion that arrests for vagrancy were more common in Brisbane and regional centres than in rural areas, but this difference was not statistically significant.

Until the repeal of the offence of vagrancy, Queensland was one of only two jurisdictions in Australia that still criminalised having insufficient lawful means of support.⁸⁴ While higher courts attempted to restrict the scope of the offence to cases where the police might reasonably suspect that the person is deriving their means from illegal sources, such as drug trafficking or illegal prostitution,⁸⁵ in practice, arrests for insufficient lawful means in Queensland were based on behaviour such as sleeping out and eating out of garbage bins.⁸⁶ Under the *Summary Offences Act 2005* (Qld)⁸⁷ having insufficient lawful means of support is no longer an offence, yet many other elements of the offence of ‘vagrancy’ have been retained. Among these is the offence of begging, despite the fact that it is well-established that the overwhelming majority of people who beg do so

81 Gunyah Aboriginal Tenancy Service, ‘Illegal Evictions Add to Koori Homelessness’ (2001) 14(3) *Parity* 16.

82 While this is only one respondent, it is likely that the same problems related to awareness and enforcement exist in Qld; power differentials, lack of understanding and awareness of rights, and the approach of many park operators appear to be universal: see Wensing, Wood and Holloway, above n 68.

83 *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 4(1).

84 Western Australia is the other; see *Police Act 1892* (WA) s 65(1).

85 See especially *Zanetti v Hill* (1962) 108 CLR 433.

86 See *Moore v Moulds* (1981) 7 QL 227; *Parry v Denman* (Unreported, District Court of Cairns, Queensland, 23 May 1997) in Andrew West, ‘Sentencing for Vagrancy’ (2000) 21(1) *The Queensland Lawyer* 12.

87 The Bill was passed despite a scathing Scrutiny of Legislation Committee report: see Scrutiny of Legislation Committee, Parliament of Queensland, *Alert Digest No 7* (2004) 25–38.

because they are destitute and have no other option for obtaining money to pay for the necessities of life.⁸⁸

Other street offences, such as 'public nuisance' and public drunkenness, were reported to be a particular problem by respondents servicing young and Indigenous people. Young and Indigenous homeless people are particularly vulnerable to being charged with causing a public nuisance (which replaced the old offences of offensive behaviour and obscene language in April 2004)⁸⁹ or public drunkenness, because they tend to occupy public space more frequently than the remainder of the population, and as a result, are more visible to police. Further, because homeless people are forced to live their lives in public, they must by necessity publicly engage in behaviours which may attract a criminal charge, such as drinking alcohol, urinating, defecating, vomiting, socialising with friends, and engaging in verbal arguments.⁹⁰

Respondents who work for services targeted at young and Indigenous homeless people also reported that their clients were frequently 'moved on' by police. Indeed, the operation of police move-on powers was rated by workers from Indigenous services as the most prevalent legal difficulty encountered by their clients. Respondents ranked this as the third most prevalent legal difficulty for young people. Section 39 of the *Police Powers and Responsibilities Act 2000* (Qld) gives police the power to instruct people to move away from a particular location if they are considered to be causing another person anxiety, interfering with trade or business, or disrupting any event or gathering in a public place. The section states that the power should not be exercised unless this is reasonably necessary in the interests of public safety, public order, or the protection of the rights and freedoms of others. However, there is some evidence in the literature to suggest that such powers are routinely selectively enforced against vulnerable groups despite this safeguard.⁹¹ Notably, chi-square significance tests indicated that the use of move-on powers by police was significantly more common in Brisbane than other areas throughout Queensland.

Arrests for petty theft were also rated among the top five most prevalent legal issues facing young homeless people and Indigenous homeless people. This is clearly explicable in view of the extreme poverty experienced by these population groups - particularly young people, since the amount they receive in Youth Allowance is equivalent to only 60 per cent of the poverty line.⁹² The

88 Michael Horn and Michelle Cooke, *A Question of Begging: A Study of the Extent and Nature of Begging in the City of Melbourne* (2001); Tamara Walsh, 'Defending begging offenders' (2004) 4(1) *Queensland University of Technology Law and Justice Journal* 58.

89 See *Police Powers and Responsibilities and Other Legislation Amendment Act 2003* (Qld).

90 See especially Tamara Walsh, *From Park Bench to Court Bench* (2004).

91 Cassandra Goldie, 'Indigenous People and Public Space: the Use of "Move On" Powers in Darwin, Northern Territory, and Associated Legal Challenges' (2004) 17(1) *Parity* 86; Paul Spooner, 'Moving in the Wrong Direction: An Analysis of Police Move On Powers in Queensland' (2001) 20(1) *Youth Studies Australia* 27; Stephen Hall, 'Reform and Change: An Agenda for the 1990s' in Rob White and Christine Alder (eds) *The Police and Young People in Australia* (1994) ch 10.

92 This includes the maximum amount of rent assistance available. Based on poverty line calculations conducted by the Melbourne Institute of Applied Economic and Social Research, University of Melbourne, <<http://www.melbourneinstitute.com/miesi/poverty.html>> at 17 June 2005.

relationship between homelessness and arrests for theft remains unexplored in the literature, and the result obtained here may imply a need for further research on this topic.

Also worthy of note is the fact that an extremely high proportion of respondents noted that their clients had been victims of crime, with 65 per cent of respondents stating that either most or some of their clients had been victims of crime. When compared with victimisation surveys, which generally report a victimisation rate for the overall population of between five and 10 per cent for personal crimes,⁹³ this finding is staggering.

Respondents who serviced women and children were most likely to report that their clients had been victims of crime, followed by those who serviced young people. These findings go some way towards confirming previous anecdotal evidence⁹⁴ that homeless people are more likely to be victims of crime than perpetrators of it.

G Migration law

The results of this survey demonstrated that there are a number of homeless people in Queensland who have recently migrated to Australia and are adversely impacted upon by migration law. Around 20 per cent of respondents reported that either most or some of their clients had experienced migration law difficulties related to social security eligibility or their visa/residence status.

Many migrants face homelessness as a result of their ineligibility for social security benefits. Since 1999, a minimum two year waiting period has applied before newly arrived migrants on some temporary visas become eligible for social security benefits,⁹⁵ despite the fact that they are not permitted to work. In as many as 10 per cent of SAAP support periods in Queensland, clients report having no source of income; many of these are likely to be newly arrived migrants who are ineligible to receive government benefits.⁹⁶ The effects of the legislative changes in 1999 have been clearly reflected in SAAP data. A higher percentage of overseas born SAAP clients now report having no source of income. Indeed, the percentage of support periods for clients born overseas (in countries other than the United Kingdom, New Zealand, South Africa, Canada, Ireland and the United States) who had no source of income increased from 13.5 per cent in 1996–97 to 14.2 per cent in 2000–01.⁹⁷ Thus, it seems that many newly arrived migrants may be rendered homeless as a result of the operation of migration law.

93 See, eg, Office of Economic and Statistical Research, Qld, *Queensland Crime Victimisation Survey 2000* (2001); Office of Economic and Statistical Research, Qld, *Crime and Safety Trends in Queensland* (1996).

94 See, eg, John Eastgate (Presentation at the Aboriginal Environments Research Centre, University of Queensland, 2004).

95 Unless they are considered eligible for Special Benefit, which is solely at Centrelink's discretion: see *Social Security Act 1991* (Cth), ss 7(2), 25, 201AB, 549E, 575E, 623B, 696C, 660YCFB, 729, 771HNB, 1039AB, 1061ZR, 1061ZI, 1061PV; *Migration Act 1958* (Cth), ss 30–8.

96 AIHW, above n 30, 30.

97 AIHW, *Income Status of Homeless People in SAAP 1999-2001* (2002) 55–9, 61–7.

Homeless migrants may also face legal difficulties relating to their residence status.

In this survey, domestic violence service providers were most likely to report that their clients faced visa- or residence-related difficulties. This finding is supported by the literature, which reports that migrant women who leave violent relationships may compromise their residence or visa status, particularly in circumstances where they have fled from their sponsoring partner.⁹⁸ Thus, the higher prevalence of migration law difficulties amongst homeless women and children is entirely explicable.

H Mental health law

Since the rate of mental illness amongst homeless people may be as high as 80 per cent,⁹⁹ it might have been expected that mental health law, including laws associated with adult guardianship and involuntary detention and treatment, would rate fairly highly in a survey of this nature. Yet only 13 per cent of respondents reported that either most or some of their clients experienced such mental health law difficulties.

There are a number of possible explanations for this comparatively low rating. First, mental illness amongst homeless people often remains undiagnosed.¹⁰⁰ Further, rates of certain mental disorders may be higher amongst those who experience primary homelessness,¹⁰¹ but such people were omitted from this survey. Second, since homelessness is associated with a high level of social exclusion,¹⁰² those homeless people who do suffer from mental illness are less likely to receive treatment or supervision for their illness and thus legal interference, on the basis of their mental health, is likely to be minimal. Further to this, three respondents noted in their qualitative comments that mental health services are almost impossible to access in Queensland, which provides another reason why homeless people with mental illness may not receive formal supervision for their illness. Third, for those who do receive supervision for their illness, involuntary psychiatric assessment without a court order may only be instigated by a health practitioner or police officer¹⁰³ and a number of formal procedures must be completed before an involuntary treatment order can be made.¹⁰⁴

98 Although there is some provision for such women to remain in Australia while they apply for permanent residence, domestic violence may prove difficult to establish: see Sherron Dunbar, 'Violence, Domestic Violence and Immigration' (2001) 14(2) *Parity* 19; Meryem Ali and April Pham, 'Migrant Women Trapped in Violence' (2001) 14(2) *Parity* 31.

99 See Gregory Kamieniecki, 'Prevalence of Psychological Distress and Psychiatric Disorders Among Homeless Youth in Australia: A Comparative Review' (2001) 35(3) *Australian and New Zealand Journal of Psychiatry* 352; Catherine Robinson, *Understanding Iterative Homelessness: The Case of People with Mental Disorders*, Australian Housing and Urban Research Institute (2003) 20.

100 Robinson, above n 99; Mental Health Council of Australia, *Interim Report of the Reference Group on Welfare Reform* (2001).

101 See Social Exclusion Unit (UK), *Rough Sleeping* (1998); Robinson, above n 99.

102 See generally (2005) 18(1) *Parity*, 'Inclusion/Exclusion'.

103 *Mental Health Act 2000* (Qld) s 25.

104 *Mental Health Act 2000* (Qld) ch 4, pt 1, div 1.

Thus, while the rate of mental illness amongst homeless people may be high, it appears that few receive close formal supervision of their illness.

I Electoral law

In this survey, 36 per cent of respondents claimed that none of their clients experience electoral law difficulties. Yet, the Australian literature suggests that electoral law does in fact adversely impact on those who experience homelessness.¹⁰⁵ For example, it has been reported that many homeless people do not vote in Federal and State elections. In fact, it has been estimated that up to 90 per cent of homeless people did not vote in the 2001 federal election.¹⁰⁶ In a recent survey of homeless people in inner-city Brisbane, around 50 per cent of respondents stated that they never vote in elections.¹⁰⁷ Homeless people are amongst those members of the electorate who are most likely to face barriers to exercising their right to vote; mental illness and illiteracy may prevent them from voting, as may the need to engage in more pressing activities such as finding food and shelter.¹⁰⁸

Under s 245 of the *Commonwealth Electoral Act 1918* (Cth), failing to vote is an offence punishable by a fine of up to \$50 and Australian Electoral Commission statistics demonstrate that those who contravene this section are indeed penalised.¹⁰⁹ Such fines are virtually impossible for homeless people to pay. Failure to vote is not punishable if a valid and sufficient reason is put forward, however it is not clear whether issues related to homelessness fulfil the Commission's criteria.¹¹⁰

There are also many barriers to homeless people being placed on the electoral roll in the first place. It is an offence to fail to update information regarding place of residence within 21 days of change of address,¹¹¹ and since homeless people are generally forced to change their place of residence frequently, this requirement may be too onerous for them to fulfil. There are provisions in the Act relating to itinerant voters, ostensibly aimed at assisting transient people to exercise their right to vote.¹¹² However, the requirements they impose are particularly burdensome for homeless people: complicated forms must be completed, the subdivision in which they are enrolled may not be that to which

105 See, eg, Walsh and Klease, above n 28; Meg Mundell, 'Giving Voice to the Voiceless: Young People, Homelessness and Democracy' (Paper presented at the Victorian Council of Social Services Congress 2003, Melbourne, 14–15 August 2003); Brianna Harrison and Philip Lynch, *Giving Voice to the Voiceless: Submission to the Inquiry into the 2001 Federal Election* (2002).

106 Harrison and Lynch, above n 105, 9.

107 Walsh and Klease, above n 28.

108 Harrison and Lynch, above n 105.

109 In 1998, 40 396 people paid a \$20 penalty in response to the first penalty notice issued to them for failing to vote in the Federal election and a further 8619 summonses were issued: cited in Harrison and Lynch, above n 105, 15.

110 Harrison and Lynch, above n 105; Walsh and Klease, above n 28.

111 *Commonwealth Electoral Act 1918* (Cth) s 101.

112 *Commonwealth Electoral Act 1918* (Cth) s 96.

they are most closely connected and a person ceases to be enrolled as an itinerant elector once they have been at the same place of residence for one month.¹¹³

It might have been expected that electoral law would be identified as a key legal issue adversely impacting on respondents' homeless clients, particularly in view of the fact that both local and State elections were held during the study period. An explanation for its comparatively low rating was advanced by one respondent, who stated that their clients had 'far more important issues to deal with than voting'. Thus, while voting is a fundamental human right, and indeed a domestic constitutional right,¹¹⁴ the results of this survey seem to suggest that electoral law issues are not a particular cause of distress for most homeless people. While this does perhaps communicate to homelessness legal services that other legal concerns of homeless clients should be prioritised, it must be remembered that political participation is a key indicia of social inclusion.¹¹⁵ If homelessness is viewed as more than mere housing status, the promotion of socio-political participation may be considered an important goal of legal service provision to the homeless.

J Planning law

Forty-six percent of respondents to this survey reported that none of their clients experience planning law difficulties. Yet, a recent Queensland case demonstrates that homeless people are indeed vulnerable to the operation of planning law.

Under the *Integrated Planning Act 1997* (Qld), local town planning schemes in Queensland have the force of law.¹¹⁶ Such schemes outline permissible and prohibited land uses for areas within the scheme. Many of these schemes include prohibitions against the erection of makeshift dwellings in certain areas. This means that people who are homeless or marginally housed in such dwellings may be brought before the Planning and Environment Court if they do not have consent approval to erect their dwelling in the relevant area.

One example of such a case was *Browning & Sargeant v Cairns City Council and Bernstrom*.¹¹⁷ In that case, the respondent and her family were living in caravans, converted vehicles and makeshift canvas accommodation units in an area of Cairns that was zoned 'rural'. The respondent had obtained permission from Cairns City Council to use the land for the purposes of a camping area, however a local law stated that dwellings on the premises were not permitted to be lived in permanently. The Planning and Environment Court held that the

113 Harrison and Lynch, above n 105.

114 There is a (limited) constitutional right to vote in Australia; it was concluded by the court in *McGinty v Western Australia* (1996) 186 CLR 140 that the government does not have the power to take away a general right of enfranchisement from adult citizens in federal elections as this is the current democratic standard: see Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2001) 28 *Federal Law Review* 125.

115 See especially Senate Legal and Constitutional Reference Committee, *National Well-Being: A System of National Citizenship Indicators and Benchmarks* (1996).

116 See ch 2 pt 1 div 4.

117 [2002] QCA 161.

makeshift dwellings erected on the camping area were not ‘tents’ and therefore were not within the scope of the consent approval that had been given by the Council.¹¹⁸ Judge White of the Planning and Environment Court initially showed some leniency towards the respondent and her family on the basis of potential hardship, holding that they should be given 30 days in which to obtain approval from the Council for their living arrangements. However, the respondent failed to obtain approval and failed to dismantle the dwellings and the Court of Appeal imposed a fine of \$3000. The respondent defaulted on this payment and was subsequently imprisoned for three months.

This case demonstrates that it is those homeless people who live in improvised dwellings (ie, the primary homeless) who may potentially be adversely affected by the operation of planning laws. This may explain the low ranking of planning law amongst this sample, since those accommodated in SAAP, CRS and boarding house services are among the secondary and tertiary homeless. However, census data from 2001 suggests that around 4000 Queenslanders live in improvised dwellings,¹¹⁹ so the potential impact of planning law upon such persons may warrant further research.

VIII CONCLUSION

ABS data indicates that around 24 500 people in Queensland are homeless.¹²⁰ Together, the respondents to this survey reported that they service almost 10 per cent of this number. The data reported on here reflects the experiences of a substantial fraction of Queensland’s homeless population and has some important implications for legal service provision to homeless people.

The results of this survey suggest that the law tends to impact adversely on homeless people, rather than being experienced by them as a source of protection or ‘rights’. Homeless people are in need of substantial legal assistance if they are to benefit from the protections the law provides.

The results demonstrate that the provision of family law assistance should be prioritised among homelessness legal services, in addition to the provision of assistance with fines, debts, social security and tenancy matters. The findings also suggest that criminal law assistance should be prioritised in legal services aimed at transient young people and Indigenous people and social security law assistance should be prioritised in legal services aimed at young people. This has serious implications for some homelessness legal service providers. For example, at present, the Brisbane Homeless Person’s Legal Clinic does not offer assistance in relation to criminal or family law matters. Of course, as long as such services are reliant on volunteer lawyers, this may prove difficult to change. Adequate funding is necessary to ensure that such services may successfully meet the needs of their homeless clients.

118 *Browning & Sargeant v Cairns City Council and Bernstrom* [2000] QPELR 289.

119 Chamberlain and MacKenzie, above n 6, 46.

120 *Ibid.*

There is a dire need for well-funded homelessness legal services which can provide assistance primarily with fines, debts, family law, tenancy law, social security law and criminal law matters, while also lobbying to enhance homeless persons' socio-political participation and reduce the level of victimisation they experience. Unless such services are available to address the inequalities and hardships created by the operation of the law, there will continue to be an 'overruled underclass' in Queensland.