



GRIFFITH JOURNAL OF
LAW & HUMAN DIGNITY



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Volume 7 Issue 1

2019

Published in September 2019, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

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HOMELESSNESS AND PUBLIC SPACE OFFENCES IN AUSTRALIA — A HUMAN RIGHTS CASE FOR NARROW INTERPRETATION

JULIAN R MURPHY*

Laws criminalising ‘vagrancy’ are sometimes studied as an historical phenomenon. However, contemporary Australian laws, particularly ‘public space offences’, continue to have the effect of criminalising homelessness. Public space offences are laws that criminalise otherwise lawful activity – such as sleeping, drinking or hanging about – on the basis that it is done in a public place. Unsurprisingly, homeless people are particularly vulnerable to prosecution under these laws. This article argues that the indiscriminate and expansive application of public space offences would be contrary to international human rights law. That being so, this article suggests that public space offence legislative provisions ought to be construed narrowly so as not to criminalise conduct that is incidental to homelessness. This ‘solution’ is characterised as a process of rights-orientated statutory interpretation. Not only would this give effect to the assumed legislative intention of complying with Australia’s international obligations, but it would also be consistent with the international law orientation of the state and territory Bills of Rights. Most importantly, a narrow interpretation of public space offences so as to exclude conduct incidental to homelessness would protect vulnerable individuals from what many in the international community, and in Australia, consider to be gross human rights violations.

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* Criminal Appeals Manager, North Australian Aboriginal Justice Agency; PhD student, University of Melbourne, School of law. Part of this article was written while I was the beneficiary of a Human Rights Fellowship at Columbia Law School, New York. Thanks to Maria Foscarinis for introducing me to issues at the intersection of law and homelessness. Thanks also to the anonymous referees for their helpful comments.

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I INTRODUCTION

The majestic quality of the law forbids the rich as well as the poor to sleep under bridges.¹

Anatole France’s words retain their acerbic power even now, over a century after they were written. The legal systems of liberal, developed democracies have come a long way since 1910 but not so far as to have abandoned the practice of criminalising homelessness. Australia, for one, continues to enforce laws that have the effect of criminalising homelessness, even in the face of sharp rebukes from the United Nations.²

¹ Anatole France, *Le Lys Rouge* (1910) 3.

² The UN Special Rapporteur Leilani Farha said of a proposed Victorian measure: ‘The criminalization of homelessness is deeply concerning and violates international human rights law. It’s bad enough that homeless people are being swept off the streets by city officials. The proposed law goes further and is discriminatory – stopping people from engaging in life sustaining activities, and penalizing them because they are poor and have no place to live’: ‘Proposed “Homeless Ban” in Australia cause for concern – UN Expert’, United Nations Human Rights: Officer of the High Commissioner (Media Release, 13 March 2017) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21357&LangID=E>>. See also Committee on Economic, Social and Cultural Rights, Concluding Observations, E/C.12/AUS/CO/5 (July 11, 2017) [41c] – [42c]: ‘The Committee is concerned about the ... [p]roposed amendments to a local law in Melbourne that have the effect of criminalizing homelessness. ... The Committee also recommends

One category of such laws can be described as ‘public space offences’. These laws criminalise what would otherwise be lawful activity — such as sleeping, drinking or ‘hanging about’³ — on the basis that it is done in a public place.⁴ Unsurprisingly, homeless people living in public spaces are particularly vulnerable to prosecution under these laws. In this article I argue that, when understood against the backdrop of international human rights law, public space offences in Australia should be construed narrowly so as *not* to criminalise conduct that is incidental to homelessness. On this approach, a ‘sleeping under bridges’ offence would not apply to a person who is only sleeping under a bridge because they are homeless.⁵

This article will proceed in three parts. Part I is concerned with describing the contours of homelessness in Australia particularly, the criminalisation of homelessness through public space offences. In Part II, I put forward a potential ‘solution’, namely, the protections offered by international human rights law. Closer analysis, however, will reveal that these protections are incapable of being *directly* enforced in domestic Australian law, for example, to provide a defence for homeless people charged with public space offences. Accordingly, Part III proposes a means by which the protections of international human rights law can be *indirectly* applied in Australian courts, through a process of rights-orientated statutory interpretation. On this approach, international human rights law would serve as an interpretative guide requiring courts to narrow the operation of Australia’s public space offences so as to exclude their application to conduct incidental to homelessness.⁶

that the State party ... [r]eview existing and draft legislation in states and territories that have the effect of criminalizing homelessness.’

³ ‘Hanging about’ is one judicial synonym for the offence of loitering. See *Samuels v Stokes* (1973) 130 CLR 490, 498 (Menzies J).

⁴ Tamara Walsh, *Homelessness and the Law* (Federation Press, 2011) 71.

⁵ While I am not the first to have made such an argument, I am the first to have framed it as a question of statutory interpretation. Cf Philip Lynch, ‘Begging for Change: Homelessness and the Law’ (2002) 26 *Melbourne University Law Review* 690, 699.

⁶ To be clear, my argument is that conduct that is incidental to homelessness should not attract any criminal liability. It is not sufficient, in my eyes, that such conduct may, post facto, be eligible for a fine waiver. See *Infringements Act 2006* (Vic) s 3(1) (definition of ‘special circumstances’); *Infringements Regulations 2016* (Vic) reg 7.

II CRIMINALISING HOMELESSNESS IN AUSTRALIA – AN INTRODUCTION TO THE PROBLEM

A Definition and Data: 'Homelessness'

The task of defining 'homelessness' is not easy. Scholars,⁷ governmental agencies,⁸ and international bodies all proffer differing definitions.⁹ Of particular complexity is the task of defining homelessness as it affects Indigenous Australians, some of whom have different relations to land and place as compared to non-Indigenous Australians.¹⁰ These definitional issues, while troubling as a matter of public policy formulation, present no obstacle for this article. I am focused on a particular experience of homelessness that is likely to be encompassed within *all* definitions, namely, the experience of residing in streets, parks, public buildings, or other public places not designated or designed for accommodation.

The most recent census data (2016) shows that 8,200 people per night experience this

⁷ See, eg, Chris Chamberlain & David MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues* 274: a proposed three-tiered definition that includes individuals sleeping in public or in improvised shelters, individuals sleeping with friends or relatives, or in homeless shelters, and individuals living in short or long-term insecure housing, including boarding houses or caravan parks). Chamberlain & MacKenzie's definition has been referred to in various government and non-governmental reports. See, eg, Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home: A National Approach to Reducing Homelessness* (Report, 2008) 3; Andrew Bevitt, Journeys Home Research Report No. 6: Complete Findings from Waves 1 to 6 (Report, May 2015) 1; Law Council of Australia, *The Justice Project – Homeless Persons Consultation Paper* (Paper, 2017) 5.

⁸ See, eg, Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness 2016 – Key Findings* (Catalogue No 2049.0, 29 March 2018): 'a person is homeless if they do not have suitable accommodation alternatives and their current living arrangement: is in a dwelling that is inadequate; has no tenure, or if their initial tenure is short and not extendable; or does not allow them to have control of, and access to space for social relations'. See also Australian Bureau of Statistics, *Information Paper: A Statistical Definition of Homelessness 2012; Factsheet: Homelessness in concept and in some measurement contexts* (Catalogue No 4922.0, 4 September 2012): explaining the rationale behind the ABS definition of homelessness and acknowledging its cultural bias.

⁹ See, eg, Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing*, 6th sess, UN Doc E/1992/23 (13 December 1991) at [7] suggesting that a person is homeless if they have anything short of adequate housing allowing them to live in security, peace and dignity.

¹⁰ See, eg, Suzie Forell, Emily MacCarron & Louis Shetzer, *No Home, No Justice? The Legal needs of homeless people in NSW: Access to Justice and Legal Needs* (Report, Volume 2, July 2005) 5 (discussing the Indigenous experience of 'spiritual homelessness' that can arise as a result of geographic isolation from traditional land or family and kinship networks). See also Committee on Economic, Social and Cultural Rights, *Concluding Observations*, E/C.12/AUS/CO/5 (July 11, 2017) [41d]: 'The Committee is concerned about the ... [o]vercrowding and severe shortage of housing for indigenous peoples living in remote areas'. See also Committee on the Elimination of Racial Discrimination, *Concluding Observations*, 2496-2597th sess, CERD/C/AUS/CO/18-20, (26 December 2017) para [23].

type of homelessness.¹¹ This represents a 20 per cent increase since the previous census in 2011.¹² A significant portion (27 per cent) of these people were Indigenous, despite the fact that Indigenous people only make up 20 per cent of the total homeless population, and a mere 3 per cent of the general population.¹³

B Public Space Offences

Homelessness is rarely, if ever, criminalised explicitly. Instead, laws will often prohibit a person from engaging in certain conduct in a public place, where that behaviour would otherwise be lawful in private. These can conveniently be labelled 'public space offences'. Every jurisdiction in Australia has public space offences written into statute.¹⁴ To understand how public space offences effectively criminalise homelessness we can look at three examples: laws criminalising sleeping, drinking, and loitering in public.

An example of a law criminalising sleeping in public can be seen in the controversial by-laws proposed by the Melbourne City Council in 2017. These laws would have made it an offence to sleep in public in the central business district of Melbourne.¹⁵ The laws were not directed at late night travellers who might stop for a nap on a park bench. Rather, they targeted people experiencing homelessness.¹⁶ Nor were these laws particularly novel, they were just the latest in a long line of similar council prohibitions around Australia.¹⁷

The second example can be seen in the Northern Territory's public drinking offences,¹⁸

¹¹ To be exact, this figure described the number of people on census night who were 'living in improvised dwellings, tents or sleeping out'.

¹² Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness 2016 – Key Findings* (Catalogue No 2049.0, 29 March 2018).

¹³ *Ibid.* In reality, the data is likely to underestimate Indigenous homelessness because, as the ABS acknowledges, some Indigenous people report their usual address as a town or locality, which leaves the ABS unable to confirm the housing status of such people.

¹⁴ See, eg, *Vagrancy Act 1966* (Vic) s 6(1)(d); *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 4(1)(k), *Summary Offences Act 1953* (SA) s 12 (1)(a); *Police Act 1892* (WA) s 65(3); *Police Offences Act 1935* (Tas) s 8(1)(a); *Summary Offences Act 1923* (NT) s 47A(1).

¹⁵ See Committee on Economic, Social and Cultural Rights (n 10): 'The Committee is concerned about the ... [p]roposed amendments to a local law in Melbourne that have the effect of criminalizing homelessness'.

¹⁶ Josh Butler, 'Melbourne's Laws Outlawing Homelessness, and the Campaign to Reverse Them', *Huffington Post* (online, 6 April 2017) <https://www.huffingtonpost.com.au/2017/04/06/melbournes-laws-outlawing-homelessness-and-the-campaign-to-rev_a_22027975/>.

¹⁷ James Farrell, 'Councils are Criminalising Homelessness' *ABC News* (online, 8 February 2011) <http://www.abc.net.au/news/2011-02-08/how_councils_are_criminalising_homelessness/43734>.

¹⁸ See, eg, *Liquor Act 1978* (NT), s 101U(1). See also, s101T (defines regulated place as public place).

which turn dual public health problems (homelessness and alcoholism) into a singular 'law and order' issue. The sometimes-tragic operation of such laws can be seen in a 2015 decision of the Northern Territory Coroners Court.¹⁹ There, a homeless Aboriginal man was drinking at a public park in the Darwin region. He was arrested for drinking alcohol in a prohibited place.²⁰ The maximum penalty for that offence was a \$74 fine, however the police arrested the man and took him to the police station. He died in custody a few hours later as a result of his pre-existing heart condition. In an impassioned decision, the Coroner highlighted the 'differential treatment' resulting from laws criminalising public drinking. The effect, the Coroner said, was to allow a large portion of the public to drink freely in licenced establishments on the main entertainment strip in Darwin, while one street away homeless people were being detained, and treated like criminals for drinking in a public park.²¹

Finally, the paradigmatic public space offence is that of loitering, an example of which reads:

Loitering – General Offence

(1) A person loitering in any public place who does not give a satisfactory account of himself when requested so to do by a member of the Police Force shall, on request by a member of the Police Force to cease loitering, cease so to loiter.

Penalty: \$2,000 or imprisonment for 6 months, or both.²²

It is hard not to intuit, even from the bare text, that it presents a danger of being disproportionately applied to homeless persons. Particularly those residing in public spaces. Unsurprisingly, this intuition is confirmed by the limited available data, which is discussed in the following section.

C The Impact of Public Space Offences on Homeless People

Currently no quantitative data is publically available, on the rates at which homeless people are charged with public space offences in Australia. This is because, when

¹⁹ Inquest into the death of Perry Jabanangka Langdon [2015] NTMC 016.

²⁰ *Liquor Act 1978* (NT) s 101U(1).

²¹ Inquest into the death of Perry Jabanangka Langdon [2015] NTMC 016 at [79].

²² *Summary Offences Act 1923* (NT) s 47A(1).

charging people for public space offences, police departments do not request or record their housing status. There are, however, a number of published studies describing this phenomenon in particular locations, which provide some idea of the scope of the problem.

In Queensland, the most informative empirical data relates to the use of police 'move-on' powers. These powers allow police to direct a person to leave a particular public area;²³ if the person fails to leave, the police may charge the person with an offence.²⁴ While state-wide data does not measure the use of move-on powers against homeless people,²⁵ there are small-scale studies that provide some insight. For example, one survey of 132 homeless people in Brisbane found that 77 per cent of respondents had been 'moved on' by police in the last 6 months.²⁶ In addition, at least one reported case reached the Queensland Court of Appeal in which a homeless person was 'moved on' unlawfully.²⁷

Similar to Queensland, New South Wales provides no-state wide dataset describing the rates at which homeless persons are charged with public space offences. There is, however, a wealth of anecdotal accounts and qualitative survey data suggesting that homeless persons in New South Wales are disproportionately charged with public space offences. As early as 1999, the New South Wales Ombudsman observed that police were using move-on powers to regulate behaviour associated with homelessness, such as begging and sleeping on the street.²⁸ More recently, researchers came to the following conclusions after interviewing a number of homeless people that '[b]ecause homeless people ... spend much of their time in the public space, they are highly visible to police. Homeless participants, particularly those who sleep rough in parks, bus stops, and other

²³ *Police Powers and Responsibilities Act 2000* (Qld) s 39. See also *Rowe v Kemper* (2009) 1 Qd R 247, 254 [6]: describing the power as a 'move on' power.

²⁴ *Police Powers and Responsibilities Act 2000* (Qld) s 445.

²⁵ See, *Summary Offences Act 1923* (NT) s 6 and s 18: 'Lack of data ... means that we are unable to answer a key question about whether move-on powers have a disproportionate impact on homeless people' and 'because of the nature of the data provided by the [police], we were unable to determine the impact of the move-on powers on homeless people. Police do not specifically record "homelessness" as a category. Police may record a person's address as "no fixed address" but this does not necessarily mean that person would regard themselves as homeless'.

²⁶ Tamara Walsh and Monica Taylor, "'You're Not Welcome Here": Police move-on powers and anti-discrimination law' (2007) 30(1) *University of New South Wales Law Journal* 151, 160.

²⁷ *Rowe v Kemper* [2009] 1 Qd R 247.

²⁸ Irene Moss, *Policing Public Safety* (Report, New South Wales Ombudsman, 1999) 258-259.

public spaces, commonly report being asked to “move on” by police.’²⁹ The same researchers reviewed data and interviewed legal services in respect to substantive public space offences. The authors concluded that public space offences ‘were a major problem for many homeless people who, because of their lack of private housing and economic disadvantage, were more likely to be publicly visible.’³⁰

That observation was confirmed by focus groups and interviews of people experiencing homelessness in Victoria. It was reported that ‘homeless people are more likely to attract attention from law enforcement officers ... [and] more likely to be fined or charged in relation to their behaviour in public spaces’.³¹ One Victorian homeless person’s story deserves recounting in some detail because it powerfully exposes the need for change to Australia’s current approach to public space offences:

Andy ... used to sleep rough ... He suffers from an acquired brain injury and an intellectual disability. He also suffers from chronic alcoholism, a legacy of trying to cope with life on the street. Between 1996 and 2001, Andy received more than \$100 000 in fines for offences such as drinking in a public place, swearing, urinating, and littering. Most of the fines were issued around Flinders Street railway station — the location of his community, his support network, and his ‘home’. Non-payment of such fines can result in imprisonment for up to one day per \$100.³²

Similar examples are available from other states and territories.³³ Notwithstanding the absence of comprehensive data, the evidence outlined in the preceding paragraphs establishes that public space offences are disproportionately applied to homeless people *as a result of their homelessness*. This is unacceptable; it effectively creates ‘status offences’ contrary to the central tenet of our legal system that criminal liability ought to be determined according to what someone has *done*, not who they *are*.³⁴ The remainder

²⁹ Suzie Forell, Emily MacCarron & Louis Shetzer, *No Home, No Justice? The Legal needs of homeless people in NSW: Access to Justice and Legal Needs* (Report, Vol 2, July 2005) 109.

³⁰ *Ibid* 105 (‘The criminal law issues ... [that homeless people] face reflect their living situation: ... street offences are a result of them being particularly visible to police and other enforcement officers responsible for regulating the use of public space’).

³¹ Beth Midgley, ‘Achieving Just Outcomes for Homeless People through Court Process’ (2005) 15 *Journal of Judicial Administration* 82, 86.

³² Philip Lynch, ‘Begging for Change: Homelessness and the Law’ (2002) 26 *Melbourne University Law Review* 690, 697.

³³ See Priscilla Lavery, ‘Homelessness and Public Spaces Issues in Darwin’ (2014) 27 *Parity* 14, 14–15.

³⁴ See Department of Attorney-General and Justice, *Final Report: Review of the Summary Offences Act*, (Report, August 2013) 13–14, discussing contemporary objections to ‘status offences’ relating to

of this article suggests a route to reforming Australia's current approach to public space offences so as to avoid criminalising homelessness.

III A SOLUTION? – INTERNATIONAL HUMAN RIGHTS LAW

International law protects homeless people and affords them positive rights in a number of ways. In what follows, I map the sources of international law's protections for homeless people. I then suggest that Australian laws criminalising homelessness, including indiscriminate public space offences, are inconsistent with international law. Finally, I explain the difficulty of enforcing international law in Australia.

A Protections and Rights of Homeless People under International Law

The *Universal Declaration of Human Rights* ('UDHR'), under Article 25, provides for a minimum standard of housing, stating that '[e]veryone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, *housing* and medical care and necessary social services ...'.³⁵ While the UDHR is not a treaty, it is recognised as customary international law.³⁶ A number of United Nations (UN) appointed experts have recognised the criminalisation of homelessness as a potential infringement of basic human rights.³⁷

The preamble of the *International Convention on Civil and Political Rights* (the 'ICCPR') states the following: 'the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and

homelessness; Stephen Gray and Jenny Blokland, *Criminal Laws Northern Territory* (Federation Press, 2nd ed, 2012) 274.

³⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), at 71 [art 25] (emphasis added).

³⁶ See Hilary Charlesworth, 'The Universal Declaration of Human Rights', in Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008) [16]: outlining the conflicting literature on whether or not the norms contained in the UDHR have the status of customary international law; Maria Foscarnis et al., 'The Human Right to Housing: Making the Case in the US' (2004) *Clearinghouse Review Journal of Poverty Law and Policy* 97, 110–111; Maria Foscarnis, 'Homelessness, Litigation and Law Reform Strategies: A United States Perspective' (2004) 10 *Australian Journal of Human Rights* 105, 122: 'The Universal Declaration of Human Rights is a declaration, not a treaty, and thus not by its terms binding, though some argue that it has achieved the status of customary international law and therefore is binding'.

³⁷ United Nations Human Rights, 'Moving away from the criminalization of homelessness, a step in the right direction', *Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation* (Press Release, 23 April 2012) <http://sr-watersanitation.ohchr.org/en/Pressrelease_usa_2.html>.

cultural rights'.³⁸ This covering statement is given context by the enumeration of various rights in the body of the Convention, including the following:

- Article 7 protects against 'cruel, inhuman or degrading treatment or punishment'. The UN Human Rights Committee has suggested that this prohibition is implicated by public space offences, such as those criminalising eating, sleeping, or sitting in particular public areas.³⁹
- Article 9 guarantees, amongst other things, that 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention'. The UN Human Rights Committee has referred to this provision when raising concerns about public space offences.⁴⁰
- Article 12 protects the 'right to liberty of movement and the freedom to choose [one's] residence'. This provision has plausibly been argued to have a bearing on homelessness, and specifically domestic laws that criminalise incidents of homelessness.⁴¹
- Article 17 states: '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, *home* or correspondence, nor to unlawful attacks on his honour and reputation'. (emphasis added) This provision was cited by the UN Human Rights Committee when the Committee recently expressed concern about US public space offences.⁴²
- Finally, Article 26 of ICCPR's catch-all discrimination prohibition, might be argued to protect homeless persons from discrimination on account of their status as homeless.⁴³ Some scholars and litigators have argued that domestic laws

³⁸ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

³⁹ See Human Rights Committee, *Concluding Observations*, 110th sess, CCPR/C/USA/CO/4, (23 April 2014) [19]: '[t]he Committee is concerned about reports of criminalization of people living on the street for everyday activities such as eating, sleeping, sitting in particular areas, etc. The Committee notes that such criminalization raises concerns of ... cruel, inhuman or degrading treatment'.

⁴⁰ See *Ibid*, discussing US laws criminalising homelessness and referring to Article 9.

⁴¹ Maria Foscarinis et al., 'The Human Right to Housing: Making the Case in the US' (2004) *Clearinghouse Review Journal of Poverty Law and Policy* 97, 110: describing Article 12 as 'relevant to challenges to laws criminalizing homelessness'.

⁴² See Human Rights Committee (n 39), discussing US laws criminalising homelessness and referring to Article 17.

⁴³ Article 26 protects against discrimination based 'on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, *property, birth, or other status*' (emphasis added).

criminalising homelessness violate this provision.⁴⁴ This view appears to be shared by the UN Human Rights Committee, which has cited Article 26 discrimination concerns in relation to laws criminalising homelessness.⁴⁵

Other than the UDHR and the ICCPR, there are a number of other potential international law instruments protecting homeless people. The *International Covenant on Economic, Social and Cultural Rights* establishes, in Article 11, a multifaceted right to housing but only imposes an obligation on the state to achieve 'progressive realisation' by the allocation of 'maximum available resources'.⁴⁶ The *International Convention on the Elimination of Racial Discrimination* explicitly prohibits racial discrimination in the context of housing.⁴⁷ This provision was referred to by the UN Committee on the Elimination of Racial Discrimination when it was presented with evidence of US laws criminalising homelessness.⁴⁸ The UN Committee on Economic, Social and Cultural Rights has recognised a further six⁴⁹ international instruments protecting the right to adequate housing.⁵⁰ Further, it is arguable that the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* is relevant for the same reasons as

⁴⁴ Philip Lynch & Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as Human Rights Violation' (2003) 4 *Melbourne Journal of International Law* 139, 149; Maria Foscarinis et al., 'The Human Right to Housing: Making the Case in the US' (2004) *Clearinghouse Review Journal of Poverty Law and Policy* 97, 108 ('[the] use of criminal law to punish homeless people for conduct inherent in their status constitutes discrimination based on "property, birth or other status" in contravention of the International Covenant on Civil and Political Rights').

⁴⁵ Human Rights Committee (n 39): 'the Committee is concerned about reports of criminalization of people living on the street for everyday activities such as eating, sleeping, sitting in particular areas, etc. The Committee notes that such criminalization raises concerns of discrimination'.

⁴⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See Committee on Economic, Social and Cultural Rights, General Comment No 4: The Right to Adequate Housing, 6th sess, UN Doc E/1992/23 (13 December 1991)

⁴⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁴⁸ Committee on the Elimination of Racial Discrimination, *Concluding Observations*, 2299-2300th sess, CERD C/USA/CO/7-9 (28 September 2014) [12]: 'the Committee is concerned ... at the criminalization of homelessness through laws that prohibit activities such as loitering, camping, begging, and lying in public spaces'.

⁴⁹ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 14(2); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 27; *Declaration on Social Progress and Development*, GA Res 2542(24) UN Doc A/RES/24/2542 (11 December 1969), art 10; *Vancouver Declaration on Human Settlements* Sales No. E.76.IV.7 and Corr. 1, taken from UN General Assembly, *Habitat: United Nations Conference on Human Settlements*, 31st sess, A/RES/31/109, (16 December 1976) section III (8); *Declaration on the Right to Development*, GA Res 128(41) UN Doc A/RES/41/128 (4 December 1986) art 8(1); International Labour Organisation, *ILO Recommendation Concerning Workers' Housing No. 115*, 45th sess, (28 June 1961).

⁵⁰ Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing*, 6th sess, UN Doc E/1992/23 (13 December 1991) [3] nn 3.

Article 7 of the ICCPR (both of which prohibit cruel, inhuman, or degrading treatment or punishment).⁵¹ Finally, the *UN Declaration on the Rights of Indigenous Peoples* protects the connection of Indigenous people to their traditional land.⁵² This protection could conceivably be implicated by domestic laws criminalising certain uses of public space where that space is traditional Indigenous land.

B Australia's Public Space Offences judged against International Law

With the benefit of the above survey of international law, it must be concluded that many Australian public space offences contravene international law. At least insofar as they criminalise conduct incidental to homelessness. Three examples suffice to justify that conclusion.

Australian laws that make it illegal to drink alcohol in public places have the potential to infringe international human rights when applied to homeless persons,⁵³ especially where those persons are effectively foreclosed from drinking in licenced establishments by virtue of their poverty. The Northern Territory's public drinking laws can be seen to have such an operation. As was adverted to above, such laws are disproportionately applied to homeless people (often Indigenous) who are drinking in public due to their homelessness and their inability to meet the dress codes of licenced establishments.⁵⁴ Where a person is arrested for such behaviour, that arrest is likely to contravene the ICCPR's protection, in Article 9, against arbitrary arrest and detention.⁵⁵

An example of the offence of loitering has already been quoted above. Essentially, it creates a criminal offence for a person spending time in a public space who is not able to give an adequate reason for being there.⁵⁶ Under existing Australian law, it appears that such offence provisions are applied, or threatened to be applied, to homeless people. One homeless person in Darwin described being 'moved on', apparently under the loitering laws, while sleeping under a tree in a park.⁵⁷ This appears to infringe Article 7 of the

⁵¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85, art 16.

⁵² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc. A/RES/61/295 (2 October 2007, adopted September 2007).

⁵³ See, eg, *Liquor Act 1978 (NT)* s 101U(1).

⁵⁴ Inquest into the death of Perry Jabanangka Langdon [2015] NTMC 016 at [78].

⁵⁵ See Human Rights Committee (n 39).

⁵⁶ See, eg, *Summary Offences Act 1923 (NT)* s 47A(1).

⁵⁷ Priscilla Lavery, 'Homelessness and Public Spaces Issues in Darwin' (2014) 27 *Parity* 14, 15.

ICCPR (prohibiting cruel, inhuman, and degrading treatment),⁵⁸ and likely many other international law protections described above in Part IIA.

Finally, one offence that is likely to be more heavily enforced in the new terrorism-alert era is the offence of leaving personal belongings unattended. While not particularly common in Australia at present, it was proposed by the City of Melbourne Council as an amendment to the *Activities Local Law 2009* (Vic). The aim of the proposed law was to allow the Council more powers to disband homeless ‘camps’ and remove items left there.⁵⁹ If such a law had been passed and enforced, it would likely infringe Article 17 of the ICCPR, which relevantly protects against arbitrary interference with a person’s privacy and home.⁶⁰ The United Nations Special Rapporteur has also suggested that such laws would discriminate on the basis of a person’s status as homeless,⁶¹ and thus offend Article 26, the anti-discrimination provision of the ICCPR.⁶²

Having concluded that a number of Australia’s current and proposed public space offences contravene international human rights law, the pressing question for homeless persons and their advocates is: *how can international human rights law be enforced in Australia?* As will be seen in the next section, the answer to that question is somewhat dispiriting.

C Mechanisms for Enforcing International Law in Australia

The question of how to enforce international human rights law within Australia is a vexing one. Currently, ratification of an international agreement does not necessarily make that agreement part of domestic Australian law.⁶³ Nor do we have any enforceable constitutional right — such as the US ‘substantive due process’ or ‘privileges and

⁵⁸ See Human Rights Committee (n 39): ‘the Committee is concerned about reports of criminalization of people living on the street for everyday activities such as eating, sleeping, sitting in particular areas, etc. The Committee notes that such criminalization raises concerns of ... cruel, inhuman or degrading treatment’.

⁵⁹ See Law Council of Australia, *The Justice Project – Homeless Persons Consultation Paper* (Paper, 2017), 27–28.

⁶⁰ See Human Rights Committee (n 39) discussing US public space offences and referring to Article 17.

⁶¹ Leilani Farha, quoted in ‘Proposed “Homeless Ban” in Australia cause for concern – UN Expert’ *United Nations Human Rights: Officer of the High Commissioner* (Media Release, 13 March 2017) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21357&LangID=E>>.

⁶² Article 26 protects against discrimination based ‘on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, *property, birth, or other status*’ (emphasis added).

⁶³ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–287.

immunities' doctrines — through which we can channel international law protections.⁶⁴ The provisions of a ratified treaty only form part of Australian law once they have been enacted in legislation.⁶⁵ Instruments like the ICCPR do not create rights and obligations directly enforceable in Australian law.⁶⁶ Unless and until the Australian parliament make laws implementing international protections,⁶⁷ such protections remain largely unenforceable in domestic Australian law.

While not *enforceable*, international law rights can be *influential* in Australian law in other ways. Firstly, international law arguments can have persuasive power in law reform debates.⁶⁸ Recently, international law arguments were powerfully deployed by opponents to the City of Melbourne's proposal to criminalise homeless camps in the central business district.⁶⁹ Secondly, successful complaints to the UN Human Rights Committee can result in international pressure on the Australian government to change laws infringing human rights.⁷⁰ Finally, and most relevantly to the present discussion, international law can offer guidance as to the proper interpretation of domestic statutes, including public space offences.

III 'DOMESTICATING' INTERNATIONAL LAW THROUGH STATUTORY INTERPRETATION

Statutory interpretation presents as the most effective mechanism for 'domesticating' international human rights. That is, giving these rights legal recognition in Australian

⁶⁴ See Maria Foscariis, 'Homelessness, Litigation and Law Reform Strategies: A United States perspective' (2004) 10 *Australian Journal of Human Rights* 105, 123 (Discussing ways in which 'a right to housing' might be located in the US Constitution.).

⁶⁵ *Victoria v Commonwealth* (1996) 187 CLR 416, 481–482.

⁶⁶ *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, 447.

⁶⁷ With respect to the federal government's constitutional power to make laws giving effect to Australia's international law obligations, see *Commonwealth v Tasmania* (1983) 158 CLR 1: discussing the external affairs power in s 51(xxix) of the Australian Constitution.

⁶⁸ See generally Philip Lynch & Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as Human Rights Violation' (2003) 4 *Melbourne Journal of International Law* 139, 165–166: discussing the persuasive power of framing policy issues in the language of international human rights.

⁶⁹ See, eg, Josh Butler, 'Melbourne's Laws Outlawing Homelessness, and the Campaign to Reverse Them' *Huffington Post* (online, 6 April 2017) <https://www.huffingtonpost.com/2017/04/06/melbournes-laws-outlawing-homelessness-and-the-campaign-to-rev_a_22027975/>. See also, with respect to the removal of homeless camps in Sydney: Cristy Clark, 'Clearing Homeless Camps Compounds the Violation of Human Rights and Entrenches the Problem' *The Conversation* (10 August 2017) <<http://theconversation.com/clearing-homeless-camps-compounds-the-violation-of-human-rights-and-entrenches-the-problem-82253>>.

⁷⁰ Ronald Sackville, 'Homelessness, Human Rights and the Law' (2004) 10 *Australian Journal of Human Rights* 11, 16–17.

courts. There are two particular interpretative methods that might advance this project. First, there is a common law rule (now enshrined in statute) that legislation should be interpreted consistently with Australia's international law obligations if such an interpretation is possible. Secondly, there are more powerful state and territory 'Bills of Rights'. These require, as far as possible, that legislation be interpreted so as to be compatible with certain enumerated human rights.

A Common Law Interpretative Methods

In the case of *Minister for Immigration and Ethnic Affairs v Teoh*, the High Court recognised a common law interpretative rule that, where statutory language is ambiguous or would lead to an unreasonable result, courts may look to Australia's international obligations to inform the interpretation of the particular statutory provision.⁷¹ This rule has subsequently been legislated in each of the state and territory Interpretation Acts.⁷² At first, one might think that this rule would allow Australian courts to use international law sources to compel a narrow interpretation of public space offences so that they do not cover conduct incidental to homelessness. Unfortunately, two limitations to the common law rule suggest that it may not have quite this much interpretative suasion.

First, this rule arguably only permits reference to international treaties entered into *prior* to the enactment of the statute being interpreted (the rationale for this view is that Parliament may only be presumed to legislate against the background of *existing*, not future, treaty obligations.).⁷³ This presents a problem for lawyers trying to invoke international law to argue for narrow interpretations of public space offences as applied to homeless people. Most public space offences were enacted many decades *before* Australia's entry into the ICCPR and the other international instruments surveyed above in Part II A.

The second limitation of such an interpretative argument is that it is only available in circumstances where a court finds the statutory language to be 'ambiguous',

⁷¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–287.

⁷² Legislation Act 2001 (ACT) ss 141-143; Interpretation Act 1987 (NSW) s 34; Interpretation Act 1987 (NT) s 62B; Acts Interpretation Act 1954 (Qld) s 14B; Acts Interpretation Act 1931 (Tas) s 8B; Interpretation of Legislation Act 1984 (Vic) s 35(b); Interpretation Act 1984 (WA) s 19.

⁷³ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

‘unreasonable’ or ‘manifestly absurd’.⁷⁴ These preconditions may be difficult to satisfy, especially given what appears to be a history of public space offences being interpreted to apply to conduct incidental to homelessness. So, for example, if an Australian court were faced with the ‘sleeping under bridges’ offence at the opening of this article, the court would likely find the provision to be unambiguous and thus would refuse to consider international law materials. Accordingly, a more effective way to translate the concerns of international law into the language of domestic Australian law is to use the state and territory ‘Bills of Rights’.

B Statutory ‘Bills of Rights’

Three Australian jurisdictions — the Australian Capital Territory (‘ACT’), Victoria, and Queensland — have enacted statutory Bills of Rights.⁷⁵ These statutes require courts, ‘so far as it is possible’, to interpret State and Territory legislation in a manner that is ‘consistent’ or ‘compatible’ with certain enumerated human rights.⁷⁶ Importantly, the drafters of these Bills of Rights replicated verbatim the language of various international treaties to which Australia is a party — such as the ICCPR. The High Court has explained that when this occurs, Australian courts may look to international law for assistance in interpreting the domestic statute.⁷⁷

In Victoria’s Bill of Rights, there are a number of freedoms and protections that might pose interpretative limits on the application of public space offences to homeless people. These include: the protection from cruel, inhuman, or degrading treatment;⁷⁸ the right to

⁷⁴ See, eg, Interpretation Act 1984 (WA) s 19.

⁷⁵ See Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2019 (Qld).

⁷⁶ See *Human Rights Act 2004* (ACT) s 30(1): ‘So far as it is possible to do so consistently with the its purpose, a Territory law must be interpreted in a way that is consistent with human rights’; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1): ‘So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights’; *Human Rights Act 2019* (Qld) s 48(1): ‘All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights’.

⁷⁷ See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-231 (‘If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty.’). See also DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) [2.20] 54: ‘Where legislation gives effect to an international convention or treaty or portion thereof by adopting the words of the convention or treaty, in the interests of certainty and uniformity it has been recognised that those provisions should be interpreted using the interpretative principles which are applied to the convention or treaty’.

⁷⁸ Charter of Human Rights and Responsibilities Act 2006 (Vic) s 10(b).

free movement;⁷⁹ the right not to have one's privacy or home arbitrarily interfered with;⁸⁰ the right to be free from arbitrary arrest or detention,⁸¹ and the right of Indigenous people to maintain their relationship with land to which they have a traditional connection.⁸² In both Queensland⁸³ and the ACT,⁸⁴ the protections are the same, but with one addition: the ACT statute contains a right to be treated equally and without '[d]iscrimination because of ... property ... or other status.'⁸⁵ Acknowledging this suite of rights, it is necessary to consider how such rights might be utilised to protect homeless people from public space prosecutions in Victoria, Queensland, and the ACT.

Consider, for example, a situation in which Victoria had passed its laws against sleeping in the central business district of Melbourne. If a homeless person was charged with an offence under this law, they would have a strong argument in their defence that, in order to be 'compatible' with rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*,⁸⁶ the statute should be interpreted to exclude conduct incidental to homelessness. The particular rights that could be argued to compel such a narrowing interpretation are the right to freedom of movement,⁸⁷ and the right to be free from cruel, inhuman, or degrading treatment.⁸⁸ The plausibility of these arguments is confirmed by reference to international case law. In the United States, advocates for homeless people successfully challenged similar laws. The court hearing the case held

⁷⁹ *Ibid* s 12.

⁸⁰ *Ibid* s 13.

⁸¹ *Ibid* s 21(2).

⁸² *Ibid* s 19(2)(d). The language of this provision is derived from Articles 25 and 31 of the *United Nations Declaration of the Rights of Indigenous Peoples*.

⁸³ See *Human Rights Act 2019* (Qld) s 17(b) (protection from cruel, inhuman or degrading treatment); s 19 (right to free movement); s 25(a) (right not to have privacy interfered with arbitrarily); s 28(2)(d) (right of Indigenous people to maintain and strengthen their distinct connection to the land); s 29(2) (right to be free from arbitrary arrest or detention).

⁸⁴ See *Human Rights Act 2004* (ACT) s 10(1)(b) (protection from cruel, inhuman or degrading treatment); s 12(a) (right not to have privacy interfered with arbitrarily); s 13 (right to free movement); s 18(1) (right to be free from arbitrary arrest or detention); s 27(2)(b) (right of Indigenous people to the recognition and value of their traditional connection to land).

⁸⁵ See *Human Rights Act 2004* (ACT) s 8(3): entitlement to equal protection of the law without discrimination); s 8: 'Examples of discrimination' (making clear that 'discrimination' includes 'discrimination because of ... property ... or other status').

⁸⁶ The compatibility imperative is contained in s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁸⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12.

⁸⁸ *Ibid* s 10(b).

that laws prohibiting sleeping in public violated a homeless person's right to freedom of movement and their right to be free from cruel and unusual punishment.⁸⁹

A further argument might be engaged if the person prosecuted under the Victorian laws was a local Indigenous homeless person. In such a case, that person might be able to claim that sleeping on their traditional land was part of their way of maintaining their connection to the land. If that argument were accepted, the law would likely be read so narrowly as to exclude such persons, and would thus be compatible with s 92(2)(d) of the Victorian *Charter of Human Rights and Responsibilities* (which protects an Indigenous person's right to maintain connection to their traditional land).

IV CONCLUSION

Homelessness is rarely, if ever, a choice.⁹⁰ Instead, it is better understood as a personal circumstance that is primarily linked to economic status but is also significantly influenced by social factors, including age, gender, Indigeneity, substance dependence, and mental health.⁹¹ We do not normally punish people for social circumstances beyond their control. However, as the previous analysis ought to have made clear, many of our criminal laws punish conduct incidental to homelessness. How might we remedy this situation?

This article proposes that we take a human rights orientated approach to limiting the application of public space offences to homeless people. This approach is admittedly modest, even conservative, in two respects. First, to invoke international human rights law is, to some extent, to engage the very same international power structures of globalised, neo-liberal democracies which have allowed the homelessness epidemic to occur in the first place. Second, to propose a 'solution' at the level of statutory interpretation is to address the problem too late. By the time an issue has made its way to court — the primary forum for statutory interpretation — many opportunities for

⁸⁹ *Pottinger v City of Miami* 76 F3d 1154 (11th Cir 1996). While this case was decided on US constitutional grounds, the reasoning process is analogous to that which would be available in Victoria with reference to the rights under the *Charter of Human Rights and Responsibilities 2006* (Vic).

⁹⁰ Cf Cameron Parsell and Mitch Parsell, 'Homelessness as a Choice' (2012) 29 *Housing, Theory and Society* 420.

⁹¹ Philip Lynch, 'From "cause" to "solution": Using the law to respond to homelessness' (2003) 28 *Alternative Law Journal* 127, 127.

change have been missed. Other theories of change might focus on changes to legislation, police practices, and prosecutorial charging decisions.

Notwithstanding these limitations, there remains considerable value in addressing the criminalisation of homelessness in the field of statutory interpretation. That value is threefold. Firstly, such an approach is capable of being applied immediately and with very real positive consequences for individuals prosecuted under existing public space offences. For example, a person prosecuted tomorrow for a public space offence could advance a statutory interpretation argument of the type proposed here and, if successful, would avoid conviction. Secondly, methods and practices of statutory interpretation carry significant symbolic value — they are indicative of the shared assumptions from legislative and judicial branches of government.⁹² Finally, the successful development and implementation of a rights-orientated approach to interpreting public space offences would further entrench the Australian practice of rights-orientated statutory interpretation, which could then be applied to human rights causes beyond homelessness.

My purpose in this article has not been to argue that a homeless person could never be properly convicted of a public space offence under Australian law. What I have contended is that, by taking appropriate interpretative guidance from international law sources, Australian courts should narrowly construe public space offences so that they do not cover acts incidental to homelessness. Not only would this give effect to the assumed legislative intention of complying with Australia's international obligations, but it would also be consistent with the international law orientation of the state and territory Bills of Rights. Most importantly, a narrow interpretation of public space offences so as to exclude conduct incidental to homelessness would protect vulnerable individuals from what many in the international community, and in Australia, consider to be gross human rights violations.

⁹² *Zheng v Cai* (2009) 239 CLR 446 at [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ): 'Judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws'.

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