

PANDORA'S BOX 2022

POVERTY AND THE LAW IN AUSTRALIA



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Poverty and the Law in Australia



Editors

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FOREWORD: *Plus ça change, plus c'est la même chose*

The Hon Ronald Sackville AO KC*

Two score and seven years ago I presented a report on *Law and Poverty in Australia*¹ to the Australian Government just three weeks before the Government was dismissed by the Governor General on 11 November 1975. This was the *Second Main Report* of the Australian Government Commission of Inquiry into Poverty.

The *First Main Report* was written by the Chair of the Inquiry, Professor Ronald Henderson.² As Tamara Walsh points out in her essay on 'Poverty in Australian Law',³ the most commonly cited poverty measure even today – nearly half a century later – is the Henderson poverty line.⁴ Professor Henderson's detailed work on establishing the poverty line reflected his view, expressed in the language of the time, that:

... an adequate income is fundamental to a person's security, well-being and independence. It enables him [sic] to provide housing, education, food, transport and other essentials for himself and his family.⁵

* The Honourable Ronald Sackville AO KC is the current Chair of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and Commissioner of the Commission of Inquiry into Poverty (1972-1975).

¹ Commonwealth Government, Commission of Inquiry into Poverty, *Law and Poverty in Australia* (Second Main Report, October 1975).

² Commonwealth Government, Commission of Inquiry into Poverty, *Poverty in Australia* (First Main Report, April 1975).

³ Tamara Walsh, 'Poverty in Australian Law' (2022) 28 *Pandora's Box* 23.

⁴ Ibid 35.

⁵ Commonwealth Government, Commission of Inquiry into Poverty, *Poverty in Australia* (First Main Report, April 1975) vol 1, 2.

I THE LAW AND POVERTY IN AUSTRALIA REPORT

The premise underlying the *Report* was that the pattern of deprivation associated with poverty goes far beyond a person's inability to pay for the essentials of life.⁶ By failing to protect the interests of poor people and in some ways actively discriminating against them, so the *Report* argued, the law reinforced inequalities within society and contributed to the perpetuation of poverty.⁷ The *Report*, perhaps optimistically, envisaged that the law could actually be a positive force for the reduction of poverty and was capable of bringing about social and economic changes.⁸

The *Report* identified the legal system's most significant bias against poor people to be the denial of legal advice and representation to many who could not afford to engage a lawyer.⁹ To address this deficiency, the *Report* recommended that the Australian Government should create a Legal Aid Commission, whose primary task would be to establish and administer a network of local legal centres.¹⁰ Lawyers in those centres, in addition to providing individual legal services to poorer people, would be encouraged to undertake 'test' litigation designed to achieve changes in laws, policies and procedures adversely affecting disadvantaged groups in the community.¹¹

The *Report* also identified areas of substantive law that discriminated against poor people or failed to protect them against injustice and exploitation. Among the areas identified were these:

- » Vagrancy laws originating as long ago as the fourteenth century, together with longstanding legislation penalising public drunkenness, effectively criminalised homelessness and certain

⁶ Commonwealth Government, Commission of Inquiry into Poverty, *Law and Poverty in Australia* (Second Main Report, October 1975) 1.

⁷ *Ibid.*

⁸ *Ibid.* 2.

⁹ *Ibid.* 3.

¹⁰ *Ibid.* 43–48, 52–3.

¹¹ *Ibid.* 47, 53.

forms of poverty.¹² Moreover, those laws were enforced in a discriminatory fashion against Aboriginal people, who were far more likely than non-Aboriginals to be charged and, when convicted, far more likely to receive severe sentences.¹³

- » The laws governing the recovery of debts favoured creditors, with some jurisdictions even allowing a judgment debtor to be imprisoned for non-payment of a judgment debt.¹⁴ Little protection was afforded to debtors against the actions of unscrupulous or overly aggressive creditors and debt collection agencies.¹⁵
- » Although consumer credit had become a major feature of economic life in Australia by the 1970s, credit providers discriminated against certain groups, notably Aboriginal people and single women.¹⁶ Consumers who were able to obtain credit frequently did not understand the terms of the contract they signed.¹⁷ Consequently, credit providers were largely free to impose harsh terms on consumers, including exorbitant interest rates, thereby exacerbating financial distress among the poorest groups in the community.¹⁸
- » The law governing residential tenancies was particularly important, since tenants of both public and private housing were more likely than other income units to be poor or very poor.¹⁹ The *Report* recognised limits in the capacity of the law to protect poorer tenants, largely due to the limited supply of low-cost housing.²⁰ Nonetheless, reforms were needed to give tenants greater security of tenure, protect them against wrongful forfeiture of rental bonds

¹² Ibid 245-7.

¹³ Ibid 252.

¹⁴ Ibid 134-5.

¹⁵ Ibid 123-4, 129-30.

¹⁶ Ibid 105, 115.

¹⁷ Ibid 111.

¹⁸ Ibid 112-14.

¹⁹ Ibid 57-8.

²⁰ Ibid 58.

and provide effective and accessible remedies when landlords failed to comply with their obligations such as maintaining the premises in good condition.²¹

- » The law provided little protection to people reliant on income maintenance programs for their support. The decision-making processes of the then Department of Social Security were neither transparent nor fair, yet applicants were discouraged from seeking legal assistance.²² Following administrative changes in 1975, an aggrieved person could lodge an appeal with an intra-departmental appeals tribunal, but it was not independent and could only make recommendations to the decision-maker.²³ Many applicants, particularly women, were disadvantaged by the so-called ‘cohabitation rule’, which denied support to a person deemed to be living with another person ‘as man and wife on a *bona fide* domestic basis’.²⁴
- » While comprehensive statistics were not available, the limited evidence made it clear that Aboriginal people were subjected to discriminatory enforcement of the criminal law.²⁵ The rates of incarceration of Aboriginal people were vastly greater than for non-Aboriginal people.²⁶ By 1975 Aboriginal Legal Services had been established in a few areas, but most Aboriginal people charged with criminal offences were convicted without legal representation.²⁷ In some States criminal charges could still be determined by lay Justices of the Peace who had no legal training and whose socio-economic and cultural background was very different from that of the people appearing before them.²⁸

²¹ Ibid 62–4, 72, 79–81.

²² Ibid 167–8.

²³ Ibid 167.

²⁴ Ibid 189.

²⁵ Ibid 265–8, 273–4.

²⁶ Ibid.

²⁷ Ibid 278.

²⁸ Ibid 278–9.

- » Non-English-speaking migrants were not only especially vulnerable to poverty, but experienced severe disadvantage when dealing with the criminal justice system – the police, the courts and correctional facilities.²⁹ Many of these disadvantages were due to language barriers exacerbated by the limited availability of interpreting services.³⁰ Others reflected significant cultural issues, for example mistrust of authority or unfamiliarity with the concept of bail.³¹

II BEGINNING THE TRANSFORMATION

Australia is a vastly different country in 2022 than in 1975. Among many other changes in Australian society, the legal landscape has been transformed. That transformation owes much to the actions of the much-maligned Whitlam Government during its brief period in office (1972 – 1975).

Commonwealth legislation enacted during that era has proved to be of enduring significance in providing remedies to poor people seeking to prevent or secure remedies for discriminatory conduct or other injustices. For example, the *Administrative Appeals Tribunal Act 1975* (Cth) for the first time allowed people aggrieved by decisions of the Australian Government to apply to an independent tribunal for merits review of the decisions. The *Racial Discrimination Act 1975* (Cth) broke new ground by giving effect in domestic law to a foundational international human rights convention, the *International Convention on the Elimination of All Forms of Racial Discrimination*.³²

The Whitlam years also saw the first substantial intervention by the Australian Government in the provision of legal aid to people previously shut out of the legal system or denied the means of protecting their rights.

²⁹ Ibid 223–31.

³⁰ Ibid 220–2.

³¹ Ibid 223.

³² *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).

The recognition that the Australian Government has a critical role to play in supporting legal aid agencies, including community legal centres and Aboriginal legal services, marked a turning point in addressing the inequalities perpetuated by the legal system.³³

The enactment of the *Racial Discrimination Act 1975* (Cth) led directly to the High Court playing its part in the transformation of Australia's legal landscape eight years later. In *Koowarta v Bjelke-Petersen*, the High Court interpreted the Australian Parliament's power to make laws with respect to external affairs³⁴ as authorising it to enact legislation giving effect to international human rights conventions.³⁵ In the absence of domestic legislation, international human rights instruments do not have the force of law in Australia.

III POST-1975

The High Court's expansive reading of the external affairs power has permitted significant elements of the architecture of international human rights law to be incorporated into Australian domestic law. For example, the *Convention on the Elimination of All Forms of Discrimination against Women*³⁶ provided the foundation for the *Sex Discrimination Act 1984* (Cth), while the *Disability Discrimination Act 1992* (Cth) in its current form relies on the *Convention on the Rights of Persons with Disabilities*.³⁷

³³ See, Commonwealth Government, Commission of Inquiry into Poverty, *Law and Poverty in Australia* (Second Main Report, October 1975) 11–15.

³⁴ *Australian Constitution* s 51(xxix).

³⁵ (1982) 153 CLR 168. See also *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1.

³⁶ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

³⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 16 August 2008). The original version of the *Disability Discrimination Act* relied in part on the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 10 March 1976) and the *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

The transformation of the Australian legal system has included many of the reforms proposed in the *Report*. This is not to say that the reforms came about because of the *Report*; only that Australian legislatures have recognised the need to remedy egregious injustices imposed or facilitated by the law.

A retrospective assessment of the work of the Poverty Commission was published in 2017, in the form of scholarly essays resulting from a workshop conducted in 2015 to mark the 40th anniversary of the presentation of the *Report*.³⁸ The book explores connections between law and poverty well beyond the topics covered in the *Report*. Indeed some essays point out that matters of contemporary significance, such as discrimination against LGBTIQ+ people or the disadvantages experienced by people with disability, were not addressed.³⁹ Even so, most essays consider the fate of the recommendations made in the *Report*.

The essays record that a great deal has changed in the period since the *Report* was presented. By way of illustration:

- » The active involvement of the Commonwealth in the funding and provision of legal aid has contributed to the systemisation and expansion of legal aid services. This process has included the establishment of a large network of community legal centres and Aboriginal legal services across the country.
- » Laws directly criminalising homelessness and poverty, such as the laws penalising vagrancy and public drunkenness, have been repealed.⁴⁰

³⁸ Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017).

³⁹ See, for example, Andrea Durbach, Brendan Edgeworth and Vicki Sentas, 'Law and Poverty in Australia Today: A Reassessment' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 1, 7.

⁴⁰ Vicki Sentas, 'The Poverty of Criminal Law: Criminalisation and the Limits of Access to Justice' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press,

- » Most of the objectives of the *Report's* recommendations on consumer credit law have been met, albeit 'via a convoluted, winding road'.⁴¹
- » Despite opposition from some quarters, the *Report's* recommendation on residential tenancy laws:
 - ‘came to find receptive ears – and importantly, legislative ears – across Australia almost immediately’.⁴²
- » A ‘relatively robust appeals process’ has been established for people aggrieved by decisions concerning income maintenance entitlements and people have the right to legal representation during the decision-making process.⁴³
- » There has been:
 - ... a list of significant “firsts” for Indigenous Australians that have epitomised a consistent and unflinching attempt to break down the structural barriers [identified in the *Report*].⁴⁴

2017) 249, 256; Eileen Baldry, ‘People with Multiple and Complex Support Needs, Disadvantage and Criminal Justice Systems: 40 Years After the Sackville Report’ in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 103, 107.

⁴¹ Carolyn Bond, ‘Consumer Credit, Debt and Disadvantage: How Far Have We Come in 40 Years?’ in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 134, 135.

⁴² Brendan Edgeworth, ‘Australian Residential Tenancy Law 40 Years After the Sackville Report: A Multi-Level Snapshot’ in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 119, 122.

⁴³ Scarlet Wilcock, ‘Social Security Administration: Producing Poverty and Punishment’ in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 199, 201–2.

⁴⁴ Larissa Behrendt, ‘Indigenous Australia and Social Justice, 40 Years On’ in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 79, 81.

IV A CORRECTION

This account of post-1975 developments perhaps paints a picture, like the Whig version of history, of the law's inexorable progress in alleviating the injustices experienced by poor and disadvantaged people. The principal virtue of the essays in the present collection is their insistence that, although progress has been made, Australia, in the words of The Hon Margaret McMurdo AC, is far from the 'land of the fair go'.⁴⁵

Some contributors specifically recognise the limitations of the legal system as a mechanism for eliminating or minimising poverty. As Bridget Burton so succinctly puts it: 'No; the only thing that moves people out of poverty is money'.⁴⁶ Tamara Walsh says that the word 'poverty' should not even form part of our legal language.⁴⁷

Russell Solomon sees the contribution of housing to the prevalence of poverty in contemporary Australia as largely the product of policy failures leading to 'the marketisation of the housing sector'.⁴⁸ William Mitchell OAM points to the 'profound impact of housing costs on poverty rates among older persons'.⁴⁹

Margaret McMurdo points out that victims of domestic, family and sexual violence are forced to live in poverty in unsuitable and often unsafe short-term accommodation.⁵⁰ Women and girls in this situation may face homelessness and be at risk of becoming enmeshed in the criminal justice system.⁵¹ Reforms of residential tenancy law, important as they may be,

⁴⁵ Margaret McMurdo, 'The Land of the Fair Go?' (2022) 28 *Pandora's Box* 48.

⁴⁶ James Arthur and Asha Varghese, 'An Interview with Bridget Burton' (2022) 28 *Pandora's Box* 63, 65.

⁴⁷ Tamara Walsh, 'Poverty in Australian law' (2022) 28 *Pandora's Box* 40.

⁴⁸ Russell Solomon, 'Advancing Poverty in Australia: Housing, the Law and the Denial of Rights' (2022) 28 *Pandora's Box* 69, 70.

⁴⁹ William Mitchell, 'Older Persons' Right to Economic Security' (2022) 28 *Pandora's Box* 153, 161.

⁵⁰ Margaret McMurdo, 'The Land of the Fair Go?' (2022) 28 *Pandora's Box* 36, 37.

⁵¹ *Ibid* 51, 52.

do not help much in the circumstances where poor people simply cannot find decent, secure accommodation.

The law itself has even taken some backward steps. Karyn Walsh AM forcefully argues that despite the repeal of laws penalising vagrancy and public drunkenness, we still criminalise homelessness.⁵² These days, however, punishment is imposed through imprisonment for non-payment of fines or as the result of convictions for possession of prohibited drugs.⁵³ Walsh might have added that consorting laws can have the same effect.⁵⁴

The disgraceful over-representation of First Nations people in custody, especially First Nations people with disability, has scarcely changed in four decades. Margaret McMurdo⁵⁵ and Debbie Kilroy⁵⁶ rightly condemn the disproportionate representation of First Nations women and girls in prison, but the same disproportionate representation is true of First Nations men and boys. All too often the responses of government are to rely on more severe penalties for criminal offences or even to authorise indefinite preventive detention.⁵⁷

Dr Lyndal Sleep emphasises the importance of social security payments to ‘increasing the resilience of low-income families’.⁵⁸ She criticises the so-called ‘couple rule’, which can have the effect of requiring a survivor of domestic and family violence to combine her income and assets with

⁵² Asha Varghese, ‘An Interview with Karyn Walsh AM’ (2022) 28 *Pandora’s Box* 94, 99-100.

⁵³ *Ibid.*

⁵⁴ Vicki Sentas, ‘The Poverty of Criminal Law: Criminalisation and the Limits of Access to Justice’ in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 249, 258–9.

⁵⁵ Margaret McMurdo, ‘The Land of the Fair Go?’ (2022) 28 *Pandora’s Box* 46-48, 54.

⁵⁶ James Arthur and Asha Varghese, ‘An Interview with Debbie Kilroy’ (2022) 28 *Pandora’s Box* 133, 137-138.

⁵⁷ See, for example, *Garlett v Western Australia* [2022] HCA 30; *High Risk Serious Offenders Act 2020* (WA).

⁵⁸ Lyndal Sleep, ‘Poverty, Domestic Violence and Social Security Law: The Problem with the Couple Rule’ (2022) 28 *Pandora’s Box* 106, 107.

those of the perpetrator for the purposes of the means test.⁵⁹ The result can be that the survivor is denied desperately needed income support or is even ordered to repay amounts assessed to have been wrongly claimed.⁶⁰ The parallels with the operation of the ‘cohabitation rule’ discussed in the *Report* are striking.

Bridget Burton recounts a familiar story. Community legal centres do a superb job, performing in Burton’s words ‘life-changing ... work’ for the people they can help.⁶¹ Despite the expansion of legal aid services, the problem remains that the demand for legal services greatly outstrips the capacity of legal aid agencies to meet the demand.⁶² In an increasingly difficult economic environment, legal aid agencies will have to continue to compete for resources with many other programs and services of great importance to the community. It is as it always was.

Julian Porter argues that the promise of merits review of administrative decisions has not been fulfilled, at least in Queensland. Ironically enough, he attributes this largely to the involvement of lawyers in tribunal proceedings and the adversarial instincts of members.⁶³ Had Porter cast his net a little more widely, he might have remarked on the diminished status and perceived independence of the Administrative Appeals Tribunal following the appointment of a large number of members with political ties to the Government appointing them.

V INTERNATIONAL NORMS

International human rights norms are a source of inspiration for those who see an important role for the law in alleviating poverty. Russell Solomon looks to the panoply of economic and social human rights to

⁵⁹ Ibid.

⁶⁰ Ibid 120.

⁶¹ James Arthur and Asha Varghese, ‘An Interview with Bridget Burton’ (2022) 28 *Pandora’s Box* 57.

⁶² Ibid 67-69.

⁶³ James Arthur, ‘An Interview with Julian Porter’ (2022) 28 *Pandora’s Box* 172-3, 175-6.

support a right to adequate housing in international law.⁶⁴ His analysis correctly identifies limited housing supply as a major contributor to inequality in Australia.⁶⁵ Invoking international norms to support an increase in the supply of social housing as a reason to remove unfair tax advantages for property owners is attractive in principle. Whether it is effective as a practical matter is perhaps less clear.

William Mitchell also looks to international human rights norms as a means of enhancing older people's right to economic security.⁶⁶ This is perhaps indicative of a trend whereby these norms are invoked not so much to shape the development of legal principles, but to influence broader economic and social policies.

VI CONCLUSION

The extent to which the law can be a powerful mechanism for the alleviation of poverty will always be a contentious issue. The essays in this collection suggest that the law does have an important role to play, but perhaps not as great a role as is sometimes assumed. The essays argue that more fundamental economic and social changes are needed to combat the inequalities, injustice and hardship that accompany poverty in Australia as we approach the second quarter of the twenty-first century. They have a point.

To the extent that law does have a part to play in combating the disadvantages associated with poverty, it will always be a work in progress. The Whig version of history does not apply to the relationship between law and poverty. Hard won gains can quite easily be lost.

⁶⁴ Russell Solomon, 'Advancing Poverty in Australia: Housing, the Law and the Denial of Rights' (2022) 28 *Pandora's Box* 71.

⁶⁵ *Ibid* 81, 85-87.

⁶⁶ William Mitchell, 'Older Persons' Right to Economic Security' (2022) 28 *Pandora's Box* 166.

A NOTE FROM THE EDITORS

The theme for this edition of *Pandora's Box* is 'Poverty and the Law in Australia'. This edition broadly considers the question of poverty and sets out to investigate what the law can and should do about it. While undertaking such an investigation is no easy task, the essays in this collection make one thing clear: there is a need for the law to change in accordance with the imperatives of social justice.

We express thanks to Samin Enam for designing the cover of this edition. We are also thankful for the support of our team in the Justice and the Law Society, especially Rory Brown and Clarissa Zhong. Their dedication to the publication and launch of *Pandora's Box* is greatly appreciated.

The Justice & The Law Society acknowledges that this journal was published on Turrbal and Jagera land and pays respects to their elders, past, present, and emerging. We acknowledge that Indigenous sovereignty has never been ceded or extinguished and pay tribute to its laws which sustain and survive.

James Arthur and Asha Varghese

2022 Editors, *Pandora's Box*

ABOUT PANDORA'S BOX

Pandora's Box is the annual academic journal published by the Justice and the Law Society of the University of Queensland. It has been published since 1994 and aims to bring academic discussion of legal, social justice and political issues to a wider audience. The journal is not so named because of the classical interpretation of the story: of a woman's weakness and disobedience unleashing evils on the world. Rather, we regard Pandora as the heroine of the story – the inquiring mind – as that is what the legal mind should be.

Pandora's Box was previously launched each year at the Justice and the Law Society's Annual Professional Breakfast. This year, it was launched at a separate launch event including a panel discussion with some of the contributors to this edition of the journal.

Pandora's Box is registered with Ulrich's International Periodical Directory and can be accessed online through *Informit* and EBSCO. Additional copies of the journal, including previous editions, are available. Please contact secretary@jatl.org for more information or go online at <http://www.jatl.org/> to find the digitised versions.

ABOUT THE CONTRIBUTORS

The Honourable *Ronald Sackville* AO KC is the current Chair of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. Ronald was the Commissioner of a landmark Australian government inquiry into Law and Poverty between 1973-1975 and has conducted or been responsible for a number of other official inquiries since. He was a judge of the Federal Court of Australia from 1994 to 2008 and from 2008 to 2019 he was an acting Judge of Appeal of the Supreme Court of New South Wales. Ronald practiced as a barrister in New South Wales from 1985 to 1994 prior to being appointed to the Federal Court.

Tamara Walsh is a professor of law at UQ. Her research focuses on human rights violations experienced by vulnerable people including children and young people, people experiencing homelessness, people on low incomes, people with disabilities, mothers and carers. Tamara runs the UQ Deaths in Custody Project (established in 2016) and the UQ/Caxton Human Rights Project (established in 2020). She is the lead researcher on the ARC Linkage National Study on the Criminalisation of Poverty and Homelessness. In 2008, Tamara designed and established the UQ Pro Bono Centre, which facilitates student and staff participation in pro bono legal activities, particularly public interest research and law reform. Tamara undertakes pro bono legal practice in the area of child protection, and she lectures in human rights law and child and family law.

The Honourable *Margaret McMurdo AC* was the first woman to be appointed a judge of the District Court of Queensland and the Children's Court of Queensland (1993-98). Justice McMurdo was appointed President of the Court of Appeal, Supreme Court of Queensland in 1998. Her Honour was the second president and first woman appointed as a presiding judge of an appellate court in Australia. In 2001 Justice McMurdo was awarded the Centenary Medal and later appointed a Companion of the Order of Australia (2007) for service to the law and judicial administration in Queensland, particularly in the areas of legal education and women's issues. In 2006 her Honour was presented the Agnes McWhinney Award for outstanding professional contribution by a woman lawyer. Her honour retired as President of the Court of Appeal on 26 March 2017. On 5 May 2017 Justice McMurdo was appointed Chair of the Legal Aid Board of Queensland. Her Honour has been awarded a number of honorary doctorates and is a founding Fellow of the Australian Academy of Law and a member of the American Law Institute. She is patron of Women's Legal Service, Caxton Legal Service and LawRight's Civil Justice Fund. In 2017, Margaret was appointed chair of the Board of Governors of Queensland Community Foundation, the state's largest public perpetual charitable trust. Her Honour chaired the Victorian Royal Commission into the Management of Police Informers from 2018 to 2020. From March 2021 until July 2022, her Honour was chair of the Queensland's Women's Safety and Justice Taskforce

Bridget Burton is Director of Human Rights and Civil Law at Caxton Legal Centre. She acts for clients in human rights, anti-discrimination and sexual harassment cases and leads a team that also focuses on employment law for low-income workers, and on the legal rights of people living in vulnerable housing or who are struggling with debt. Bridget also speaks and writes to support better understanding of existing law, and in pursuit of public interest law reform. She is a member of the Queensland Law Society's Human Rights and Public Law Committee, in 2020/21 she co-led a coalition of Australian NGOs providing input into the UN Periodic Review of Australia's Human Rights Record, and in 2022 is working with an alliance with anti-discrimination lawyers pursuing specific reforms to Queensland's Anti-Discrimination Act 'for a fairer Queensland'. Bridget is a former Director of the UQ Pro Bono Centre and continues to collaborate with Professor Tamara Walsh and UQ students on the Human Rights Case Note database and other projects.

Dr Russell Solomon teaches law in the Global, Urban and Social Studies School at RMIT University. He is a Barrister and Solicitor of the Supreme Courts of Victoria and of Western Australia. His current research interests include Australia's implementation of economic and social rights and his 2021 book, *Australia's Engagement with Economic and Social Rights. A Case of Institutional Avoidance* (Palgrave Macmillan) argues that the protection of these rights is confined to political and policy arenas dominated by neoliberal thinking rather than by enforceable laws. He is also currently engaged in research around post-Brexit rights

in the United Kingdom and issues around juridification and the protection of rights in the European Union.

Karyn Walsh is the CEO of Micah Projects, a Brisbane not for profit organisation committed to social justice through service provision and advocacy to improve the lives of disadvantaged and marginalised people. Over the past 25 years, the organisation has been actively involved in change processes in our service provision and in advocacy for investment toward more effective policy and programs which can end homelessness. As an organisation, Micah Projects is committed to integrated services which provide individuals and families with resources, services and opportunities to have a home, connection with their families and a quality of life. Karyn has actively participated in ministerial, government and non-governmental committees and processes for many years. In 2016, Karyn was awarded a Doctor of Social Work and Nursing *honoris causa* by the University of Queensland in recognition of her work in the not for profit sector for over 40 years. In 2017, Karyn was awarded a Member in the General Division of the Order of Australia for her work in the homelessness sector and in mental health support. Karyn joined the Council because she is passionate about the necessity of integrated housing, healthcare and recovery services. She looks forward to sharing her knowledge about the lifelong impact of childhood adversity and trauma on people's lives.

Dr Lyndal Sleep is currently a Postdoctoral Research Fellow at the Automated Decision Making and Society Centre of Excellence, School of Social Science, University of Queensland. Her qualifications include a Bachelor of Science, Master of Arts (Sociology) and Doctor of Philosophy (Law). She is currently undertaking a Master of Social Work (professional qualifying). Dr Sleep's research primarily focuses on social security decision making, technology and women. Her PhD was on governmentalities and assemblages of the couple rule, and she has undertaken numerous projects focusing on women, social security and poverty since then including Domestic violence, the couple rule and social security law project with Australia's National Research Organisation for Women's Safety (ANROWS), and Debt, Duress and Domestic violence with Economic Justice Australia (EJA). Dr Sleep has served on the management committee of Basic Rights Queensland since 2018, which is a community legal organisation focusing on providing free legal advocacy for social security recipients on social security matters, as well as women in the workplace and on disability discrimination.

Debbie Kilroy OAM is the founder of Sisters Inside, an award-winning advocacy organisation that has been fighting for the human rights of women in the criminal justice system for over 30 years. Debbie is a qualified social worker and one of Queensland's leading criminal solicitors. She was admitted to the legal profession by the Supreme Court of Queensland in 2007 and has her own law firm. In 2003, she

was awarded the Order of Australia Medal (OAM) and in 2004 was awarded the Australian Human Rights Medal.

Bill Mitchell OAM was among the first graduates of James Cook University's Law School in 1991 and was JCU's first admitted solicitor in 1992. He has a Master of Laws from QUT. James Cook University made Bill an Honorary Doctor of Laws in 2021. He holds an appointment as Adjunct Associate Professor with JCU's College of Law, Business and Governance. Bill is Principal Solicitor and Registered Migration Agent at Townsville Community Law. He has been involved with community legal centres since 1991. He was awarded the Australian Human Rights Commission Law Award in 2008 for his work in promoting and advancing human rights in Australia through the practice of law. Bill has written on a wide range of consumer and human rights and related topics for community, academic and professional publications and regularly presents at conferences. He has written and presented extensively on the human rights of older persons and has been involved in program service design in diverse areas including elder abuse and disaster legal response. He has been an expert contributor and presenter to national, regional, and international processes on human rights issues. He was shortlisted for the International Bar Association's Pro Bono Award in 2018. Bill was awarded Queensland Law Society's Community Legal Centre Member of the Year in 2019. Bill was awarded the Law Council of Australia's President's Medal in 2019. He was awarded a Medal of the Order of Australia in 2020. Bill has represented Community Legal Centres

Australia in various UN processes including nine times before the United Nations in New York in debates around a new Convention on the Rights of Older Persons.

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POVERTY IN AUSTRALIAN LAW

Tamara Walsh*

Exactly who comprises 'the poor' may seem self-evident, however there is no reliable legal definition of 'poverty' in Australian law. Indeed, the word poverty is seldom used in legal contexts. Instead, 'hardship' is generally used to denote the concept of poverty, and what constitutes hardship varies depending on the decision being made, as well as the values of the decision-maker. In this paper, I discuss various legal and non-legal definitions of poverty. Drawing on law, social science and the comments of people experiencing poverty themselves, I argue that 'poverty' may not be capable of legal definition. Whilst a shared understanding of what poverty entails, or at least an agreed approach to measuring it, is important to ensure consistency of approach, we may need to accept that this is a concept that is difficult to pin down.

I INTRODUCTION

Historically, legislative attempts were made to define the concept of poverty. The *Destitute Persons Act 1881* (Vic) defined a destitute person as one who “shall have no sufficient means of subsistence” or is “not able to support himself [sic].” Yet current law provides almost no guidance on when a person should be considered ‘poor’.

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In Australian law, ‘poverty’ is operationalised through the concept of ‘financial hardship’ and this phrase is used in various legal contexts. The problem is that ‘financial hardship’ is rarely defined, and indeed the degree of ‘hardship’ that is deemed worthy of legal recognition varies depending on the decision being made, and indeed, the values of the decision-maker.

As lawyers, we rely on legal definitions to provide us with certainty, however the concept of poverty seems to defy definition, not just for lawyers but for social scientists as well. Scholars continue to debate about the best ways to define and measure poverty. Older measures of poverty such as the Henderson Poverty Line are criticised, but no viable alternative has yet been found.

Importantly, people who experience poverty tend not to refer to themselves as ‘poor’. Several alternative terms have been advanced as proxies for ‘poverty’ including social exclusion and vulnerability. However, it may be that these concepts denote something slightly different.

In this paper, I discuss legal and social science definitions of poverty with a view to determining whether poverty can be legally defined. I conclude, as I often do, that unfortunately, I do not have the answers.

II LEGAL DEFINITIONS OF POVERTY

The word poverty is not mentioned in any Australian Acts. Rather, 'hardship' is the term used to refer to something like 'poverty'. This term is used in a range of contexts including social security law, housing law and corporations law.

The *Social Security Act 1991* (Cth) makes a distinction between 'financial hardship', 'severe financial hardship' and 'extreme financial hardship' but fails to explain the difference.¹ Only 'severe financial hardship' is defined in the Act, and the definitions offered vary depending on the circumstances. For the purpose of determining whether a person should be penalised for failing to comply with their participation agreement, a person is considered to be in 'severe financial hardship' if the value of their liquid assets does not exceed \$2500 for a single person without dependents or \$5000 for anyone else.² For the purpose of determining whether they should be subject to a waiting period or not, a person can establish 'severe financial hardship' by proving that they incurred 'unavoidable or reasonable expenditure' within the last four weeks.³ 'Reasonable costs of living' are defined in the Act to be food; rent or mortgage payments; regular medical expenses; rates, water and sewerage payments; gas, electricity and telephone bills; vehicle costs;

¹ *Social Security Act 1991* (Cth) ss 9A(7), 14A(7), 19B, 19C.

² *Social Security Act 1991* (Cth) s 14A(7); *Social Security (Administration) Act 1999* (Cth) s 42NC.

³ *Social Security Act 1991* (Cth) s 19DA(3).

public transport costs; and any other cost the Secretary determines is reasonable.⁴

In all other cases, a person will be considered to be experiencing ‘severe financial hardship’ if the total value of their liquid assets is less than the fortnightly amount of the maximum payment, benefit, pension or allowance that is payable to them.⁵ This, of course, ties the definition of hardship to the value of social security payments which are universally recognised as being woefully inadequate already.⁶

The case law provides limited additional guidance. In the 1980s, the Administrative Appeals Tribunal (AAT) said that severe financial hardship was equivalent to ‘arduous financial suffering’, concluding that this was experienced when a person’s income was ‘materially less than the maximum rate of pension’.⁷ More recently, the AAT found that seeking assistance from a charitable organisation for necessary items such as food and bedding indicated that the person was ‘in significant, if not severe financial hardship’.⁸ In one case, the AAT considered the applicant’s evidence that he had fainted from hunger when determining whether he was experiencing financial hardship.⁹

⁴ *Social Security Act 1991* (Cth) s 19C(5).

⁵ Or double for a member of a couple: *Social Security Act 1991* (Cth) ss 19C, 19D.

⁶ Deloitte Access Economics, *Analysis of the Impact of Raising Benefit Rates* (commissioned by the Australian Council of Social Service), Sydney, Deloitte Access Economics, 2018.

⁷ *Re Lumsden* (1986) 10 ALN 225 [19-20].

⁸ *Cook and Secretary, Department of Social Services* [2017] AATA 1236 [33].

⁹ *Li and Secretary, Department of Social Services* [2013] AATA 724.

In the context of social housing eviction cases, 'hardship' requires something well beyond low income. In fact, even homelessness may not be considered 'sufficient' to prevent an eviction on the basis of 'hardship'.¹⁰

Of course, in social housing and social security contexts, every person being dealt with is necessarily experiencing poverty otherwise they would have no need of those systems. This might explain why 'hardship' is so difficult to establish legally. Decision-makers are required to make so many determinations about people in straightened circumstances that it may well be difficult to draw the line between 'ordinary' hardship and 'serious' hardship. In a recent study of mine, a lawyer explained:¹¹

'I think there is a bit of desensitisation when you're dealing with homelessness all day every day. I've had the other side saying things like "other than the usual homelessness, there's nothing exceptional" about my client's matter, which seems absurd.'

In that study, I analysed 98 published eviction cases to try to determine what was needed for a tenant to establish 'hardship'. I concluded that a combination of adverse circumstances was needed. For example, a risk

¹⁰ Tamara Walsh, 'Social housing, homelessness and human rights' (2022) *University of NSW Law Journal* (online first). See particularly *Kelly v NSW Land and Housing Corporation* [2018] NSWCATAP 154, [51]–[52]; *Department of Housing and Public Works v Simonova* [2017] QCAT 328, [17].

¹¹ Walsh, *ibid*.

of homelessness was not sufficient to amount to ‘hardship’ for the purpose of avoiding eviction, but a risk of homelessness coupled with disability or detrimental impact to a child did suffice in some cases.¹² This indicates to me that the concept of ‘hardship’ is not just about income or adequate housing. Rather, it encompasses something broader. It also confirms that our conception of poverty or hardship varies depending on the decision being made and the circumstances being considered.

There are other (less obvious) circumstances in which courts are required to determine whether a person is experiencing financial hardship. Under the *Migration Act 1958* (Cth), for a person to be found to have a well-founded fear of persecution, they must demonstrate that the persecution involved ‘serious harm to the person.’¹³ An example of such harm includes ‘significant economic hardship that threatens the person’s capacity to subsist.’¹⁴ The Federal Magistrates Court (as it then was) determined in 2010 that this would exclude a person who is ‘totally self-sufficient for their food.’¹⁵ Other courts and tribunals have noted that a person who is able to access ‘basic services’, ‘earn a living’ or ‘support their family’ will not be found to experience the kind of hardship contemplated by this provision.¹⁶

¹² *LPB v Director of Housing* [2018] VCAT 684; *PJO v Director of Housing* [2018] VCAT 361; *INI v Director of Housing* [2018] VCAT 1738.

¹³ *Migration Act 1958* (Cth) s 5J(4)(b).

¹⁴ *Migration Act 1958* (Cth) s 5J(5)(d).

¹⁵ *MZYPB v Minister for Immigration and Anor* [2010] FMCA 226 [91].

¹⁶ *NBFP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 95 [47]; *1605309 (Refugee)* [2017] AATA 3100.

The concept of 'acute economic hardship' is applied to determine whether a person can access alternative payment options for outstanding fines in NSW. The bar is set much lower in this context. Under the *Work and Development Order Guidelines 2017* (NSW), a person will be experiencing 'acute economic hardship' if they are in receipt of income support benefits.¹⁷

The term 'substantial hardship' is used in the National Credit Code when determining whether a person is able to seek a variation of their credit contract.¹⁸ There is no guidance in the Code on what 'substantial hardship' means, and case law adds only that 'substantial' hardship implies 'significant' hardship or 'hardship of substance'.¹⁹ The Australian Securities and Investment Commission's Regulatory Code 209 suggests that hardship may be assessed with reference to objective measures of basic income or poverty, such as the Henderson Poverty Line.²⁰ The courts have refused to confirm that such measures can be used 'as a proxy for substantial hardship' in judicial determinations.²¹

¹⁷ *Work and Development Order Guidelines 2017* (NSW) 11. In Queensland, a person will be eligible for a work and development order if they are unable to pay their SPER debt because they are 'experiencing financial hardship', however this is not defined in the Act: *State Penalties Enforcement Act 1999* (Qld) s 32H(a).

¹⁸ National Consumer Credit Code s 72.

¹⁹ *ASIC v Channic Pty Ltd (No. 4)* [2016] FCA 1174 [1773].

²⁰ *ASIC, Regulatory Code 209: Credit licensing: Responsible lending conduct*, 2019, 54; *ASIC v Channic Pty Ltd (No. 4)* [2016] FCA 1174 [1145], [1737]. See also Paul Ali, Evgenia Bourova and Ian Ramsay, 'The Statutory Right to Seek a Credit Contract Variation on the Grounds of Hardship: A History and Analysis' (2016) 44(1) *Federal Law Review* 77-109.

²¹ See *ASIC v Westpac Banking Corporation (Liability Trial)* [2019] FCA 1244 [38-39].

Regardless, the reference to objective measures of poverty here is notable because this is the only area of law, or quasi-law, in which such ‘objective’ measures of poverty have been referred to as a possible source of guidance.²²

III SOCIAL SCIENCE DEFINITIONS OF POVERTY

The goal of ‘objective’ measures of poverty is to determine the level of income that is needed to meet basic living expenses. This amount is known as ‘the poverty line’. If a person’s income is below this amount, the person is said to be living ‘in poverty’.²³

Social science definitions of poverty incorporate considerations of income and practical living expenses. The poverty line is generally tied to a level of income, but there is much debate on how this level should be determined. The most commonly cited poverty measure in Australia is the Henderson Poverty Line which was developed during the 1973 Commission of Inquiry into Poverty.²⁴ In the 1970s, the Henderson Poverty Line was set at the level of the basic wage (as it was then) plus child endowment, an amount of \$62.70 which equated to 56.5% of

²² Note, however, that banks and other credit providers often use objective measures, such as the Household Expenditure Measure, when assessing loan applications. Previously, they used the Henderson Poverty Index (see further below): *ASIC v Westpac Banking Corporation (Liability Trial)* [2019] FCA 1244 [39-41].

²³ David Johnson, ‘The calculation and use of poverty lines in Australia’ (1987) *Australian Economic Review* 45-55, 45.

²⁴ See also Bruce Bradbury, Peter Saunders and Melissa Wong, *Poverty in Australia 2018*, (ACOSS and UNSW 2018) 18-19.

average weekly earnings.²⁵ Each quarter, the Henderson Poverty Line is updated based on this original 'benchmark income' using an index of per capita household income and equivalence scales to determine different income levels for different family compositions.²⁶

The Henderson Poverty Line is a relative measure of poverty. 'Relative' measures calculate poverty as a proportion of average weekly earnings or some other income measure, whereas 'absolute' measures consider what level of income is needed to afford the necessities of life.²⁷ Relative measures that set poverty lines at 50% or 60% of median income are often used internationally, but such measures have been criticised as arbitrary by Australian policy makers and researchers.²⁸ The creators of the Henderson Poverty Line claimed that it incorporated both relative and absolute measures.²⁹

An alternative approach is one which focuses solely on deprivation. Peter Townsend is often credited as the founder of the deprivation approach.³⁰ In 1979, Townsend proposed that poverty be defined by

²⁵ Johnson (n 23) 46.

²⁶ Ibid 45-46.

²⁷ Ibid 45.

²⁸ Jeff Harmer, *Pension Review Report* (Commonwealth of Australia, 2009) 48; Peter Saunders and Yuvisthi Naidoo, 'Poverty, deprivation and consistent poverty' (2009)85(271) *The Economic Record* 417, 425-426; Commonwealth Standing Committee on Community Affairs, *A hand up not a hand out: Renewing the fight against poverty (Report on poverty and financial hardship)* (Commonwealth of Australia, 2004) [2.24]

²⁹ Johnson (n 23) 46.

³⁰ Peter Townsend, *Poverty in the United Kingdom: A Survey of Household Resources and Standards of Living*, (Allen Lane: London, 1979).

reference to a 'loosely defined set of customs, material goods and social pleasures... which can be said to represent general amenities, of which all or most people in that society are agreed to be entitled.'³¹ He argued that once a member of society has inadequate resources to gain access to these amenities, that person is forced to withdraw from society and can no longer be considered to be participating in social life.³² This was an important development in poverty research because it recognised that the experience of poverty is multifaceted.³³ Poverty affects one's access to an adequate diet, clothing (which is not always listed as a 'necessity' of life), work opportunities and leisure activities.³⁴ The deprivation approach also recognises that poverty is experienced differently by different people. Certain cohorts of people whose incomes are higher than the poverty line may actually be more 'deprived' than other cohorts whose incomes are below the poverty line.

Peter Saunders sought to prove this in an Australian context.³⁵ He analysed the experience and extent of poverty of a random sample of 2704 Australians by developing a list of items that were considered necessary for social participation. He then asked respondents to

³¹ Ibid 399.

³² Peter Townsend, *Poverty in the United Kingdom: A Survey of Household Resources and Standards of Living*, (Allen Lane: London, 1979) 31.

³³ Peter Saunders, *Down and out: Poverty and Exclusion in Australia* (Policy Press: Bristol, 2011).

³⁴ Joseph Rowntree Foundation, *Poverty, Participation and Choice: The Legacy of Peter Townsend* (Report, 2013) 8.

³⁵ Saunders and Naidoo (n 28) 430.

disclose whether they had access to such items, and if not, whether this was out of choice or because they could not afford them. Saunders' list has rapidly become outdated – for example, only 23% of respondents considered a mobile phone to be an essential item and 17% considered a DVD player to be an essential item.³⁶ Regardless, what the research showed was that the overlap between income poverty and deprivation was quite low – only one third to one half of people experiencing income poverty were 'deprived', and many of those with incomes above the poverty line were actually experiencing deprivation.³⁷

Certainly, social security payments in Australia have always fallen well below the poverty line. The Melbourne Institute has been tracking Australian social security benefits and comparing them with the Henderson Poverty Line since 1975. In the December quarter of 2021, the Henderson Poverty Line was \$609 per week for a single person including housing.³⁸ A single person receiving JobSeeker Payment received only \$390 per week, equating to only 64% of the poverty line.³⁹ In my entire working life, I have only seen social security benefits approach poverty line levels once: when the COVID-19 supplement was in place. In September 2020, the poverty line was \$593 a week, and people on JobSeeker were receiving \$632 per week.⁴⁰ Research

³⁶ Ibid 421.

³⁷ Ibid 425, 428-429.

³⁸ Melbourne Institute: Applied Economic and Social Research, *Poverty Lines: Australia – December Quarter 2021*, 1.

³⁹ Melbourne Institute: Applied Economic and Social Research, *Poverty Lines: Australia – December Quarter 2021*, 4.

⁴⁰ Ibid 4.

confirmed that the COVID supplement resulted in a ‘dramatic’ reduction poverty and housing stress in Australia despite the economic downturn at the time.⁴¹

Australian social scientists do not agree on the ‘best’ approach to defining or measuring poverty. In his 2009 *Pension Review Report*, Harmer criticised the deprivation approach, arguing that deprivation analyses are ‘highly dependent on the value judgements of the people involved in establishing them’ and are ‘totally inflexible with regard to the diverse lifestyles of Australians.’⁴² On the other hand, in his 2015 Report on welfare reform, McClure concluded that whilst there was ‘no simple formula’ for determining the level of income necessary to achieve ‘adequacy’, it should reflect basic costs of living considering a ‘broad range of factors relevant to community living standards.’⁴³

All of this tends to support the approach in Australian law – to not to ‘define’ poverty but rather to allow judicial officers to undertake a thorough analysis of the individual’s circumstances to determine whether or not they should be considered ‘poor’ for the purpose of the decision being made. The difficulty with such an approach is that

⁴¹ Ben Phillips, Matthew Gray and Nicolas Biddle, *COVID-19 JobKeeper and JobSeeker impacts on poverty and housing stress under current and alternative economic and policy scenarios*, (ANU Centre for Social Research and Methods, 2020) 8-9.

⁴² Harmer (n 28) 48

⁴³ Patrick McClure, *A New System for Better Employment and Social Outcomes: Report of the Reference Group on Welfare Reform to the Minister for Social Services*, (Report, 2015) 77, 95-96.

different standards and values will influence these determinations, resulting in inconsistencies between cases.

A *Definitions of poverty according to people who experience it*

In my research, I have found that people who are struggling financially eschew the terms 'poverty' and 'poor'. In a study I conducted in 2007, my community legal centre partners assisted me to advertise for interview participants.⁴⁴ The signs we created invited people to participate in a study on 'the criminalisation of poverty.' These signs were erected at a wide range of community agencies that provided services to people experiencing homelessness. Yet, we found that very few people put their hand up to participate. When the service providers asked people why they did not want to participate, they said that they did not consider themselves to be 'in poverty' and, therefore, they must not be eligible.

We changed the signs. However, we retained the original interview questions. We should have anticipated the result. When we asked participants 'what does poverty mean to you?' many of them replied that they were not experiencing poverty. They described themselves as 'struggling', 'broke' or 'not well off' but since they were not 'in Africa' or a third world country, they did not believe they were 'poor'. One of the participants even said: 'I'm not poor, I just have no housing.'⁴⁵

⁴⁴ Tamara Walsh, *No Vagrancy: An Examination of the Impact of the Criminal Justice System on People Living in Poverty in Queensland*, 2007.

⁴⁵ *Ibid* 49.

Since then, I have tried to avoid the term ‘poverty’ in my work, and instead use terms like ‘low socioeconomic status’ or ‘low income’ or ‘homeless’. However, I do not necessarily believe that these terms are adequate substitutes. ‘Low income’ and ‘low socioeconomic status’ embody a slightly different idea, and conjure up a slightly different image in our minds. They are ‘value-neutral’ in that they do not prejudge or degrade their subject, but neither do they convey the normative experience of having a low income. They do not acknowledge the struggle, the distress, or the stigma that is associated with not being able to afford the necessities of life. By referring to people by their ‘socioeconomic status’, we ignore the degree of exclusion that people ‘in poverty’ necessarily experience because they cannot adequately participate in social life.⁴⁶

IV ALTERNATIVE APPROACHES TO POVERTY: HUMAN RIGHTS, SOCIAL EXCLUSION AND VULNERABILITY

Perhaps human rights law provides a viable alternative? The right to an adequate standard of living is a fundamental human right, recognised in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.⁴⁷ Article 25 of the Universal Declaration of Human Rights states that:

⁴⁶ Tamara Walsh, ‘A right to inclusion? Homelessness, human rights and social exclusion’ (2006) 12(1) *Australian Journal of Human Rights* 185.

⁴⁷ *Universal Declaration of Human Rights* art 25(1); *International Covenant on Civil and Political Rights* art 11.

‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’

This is consistent with the deprivation approach to poverty – a person who cannot afford the necessities of life does not enjoy an adequate standard of living. The United Nations (UN) Committee on Economic, Social and Cultural Rights’ General Comment on the Right to Social Security states that social security benefits must be ‘adequate in amount and duration in order that everyone may realise his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care.’⁴⁸ This is consistent with the UK’s approach to poverty which has recently focused on the concept of ‘destitution’.⁴⁹

⁴⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security (Article 9)*, E/C.12/GC/19 23 November 2007 para 22. The importance of adequate social security benefits to the realisation of family rights is noted in ICESCR art 10(2).

⁴⁹ Suzanne Fitzpatrick, Glen Bramley, Filip Sosenko, Janice Blenkinsopp, Jenny Wood, Sarah Johnsen, Mandy Littlewood and Beth Watts, *Destitution in the UK 2018* (Joseph Rowntree Foundation Report, 2018); Grainne McKeever, Mark Simpson and Clara Fitzpatrick, *Destitution and Paths to Justice: Final Report*, (Joseph Rowntree Foundation Report, 2018) 16.

Also in keeping with the deprivation approach to poverty, during the 1990s and 2000s, scholars increasingly drew upon the concept of ‘social exclusion’ to describe something that equated to ‘poverty’. Indeed, the discussion of ‘poverty’ was to some extent supplanted by the concept of ‘social exclusion’, where social exclusion represents forced withdrawal from participation in social life due to material deprivation.⁵⁰ This was consistent with conceptions of individuals as ‘consumers’,⁵¹ but also with the extensive emerging scholarship on the concept of ‘social citizenship’.⁵²

‘Vulnerability’ is another term that is increasingly being used as an alternative to poverty. The Australian Institute of Health and Welfare (AIHW) defines vulnerable groups as those ‘experiencing deep and persistent disadvantage, as measured by social exclusion.’⁵³ The AIHW suggests that markers of vulnerability include living in public housing and being dependent on income support, and that those most likely to

⁵⁰ Peter Saunders and Kayoko Tsumori, ‘Poor concepts: “social exclusion”, poverty and the politics of guilt’, (2002) 18(2) *Policy* 32, 32; Glen Bramley, Suzanne Fitzpatrick and Filip Sosenko, ‘Severe poverty and destitution’ in Glen Bramley and Nick Bailey (eds), *Poverty and Social Exclusion in the UK* (Policy Press: Bristol, 2017).

⁵¹ Michael Bittman, ‘Social participation and family welfare: the money and time costs of leisure’, paper presented at the Australian Institute of Family Studies Conference, *Changing Families, Challenging Futures*, 25-27 November 1998.

⁵² See particularly Desmond King and Jeremy Waldron, ‘Citizenship, social citizenship and the defence of welfare provision’ (1988) 18 *British Journal of Political Science* 415; Ruth Levitas, ‘The concept and measurement of social exclusion’ in Christina Pantazis, David Gordon and Ruth Levitas, *Poverty and Social Exclusion in Britain* (Policy Press: Bristol, 2006).

⁵³ Australian Institute of Health and Welfare, *Australia’s Welfare 2017* (Commonwealth of Australia, 2017) xii.

experience vulnerability include Aboriginal people, children living in single parent families, children in the child protection system, young people under youth justice supervision, and women experiencing domestic violence.⁵⁴

When other definitions of vulnerability are examined, it becomes clear that vulnerability is quite distinct from the concept of poverty, encompassing a range of groups that may or may not be poor. For example, in a criminal justice context, vulnerability may be associated with legal capacity.⁵⁵ Bartkowiak-Theron and colleagues say that whilst vulnerability tends to be linked to social and economic characteristics that are associated with disadvantage including 'age, indigeneity, mental illness, race/ethnicity, cognitive impairment, disability, homelessness, sexuality and/or gender identity, or addiction' there must also be evidence of differential treatment by police.⁵⁶ Thus, whilst there is considerable overlap between this definition and conceptions of poverty, they are very different notions.

⁵⁴ Ibid 47, 110.

⁵⁵ Sarah Parsons and Gina Sherwood, 'Vulnerability in Custody: Perceptions and Practices of Police Officers and Criminal Justice Professionals in Meeting the Communication Needs of Offenders with Learning Disabilities and Learning Difficulties' (2016) 31 *Disability and Society* 553-72; Jennifer D Wood and Laura Beierschmitt, 'Beyond Police Crisis Intervention: Moving "Upstream" to Manage Cases and Places of Behavioural Health Vulnerability' (2014) 37 *International Journal of Law and Psychiatry* 439.

⁵⁶ Isabelle Bartkowiak-Theron, Nicole L Asquith and Karl A Roberts, 'Vulnerability as a Contemporary Challenge for Policing' in Nicole L Asquith, Isabelle Bartkowiak-Theron and Karl A Roberts (eds), *Policing Encounters with Vulnerability* (Palgrave Macmillan, 2017) 1, 2.

V CONCLUSION

Poverty is not a concept that is recognised under Australian law. ‘Financial hardship’ is instead used to refer to something equating to poverty, however even this phrase is not consistently defined. What constitutes hardship varies depending on the decision and the decision-maker.

Given that people who we would characterise as ‘poor’ eschew this term, it is probably appropriate that poverty is not part of our legal language. However, it remains an important concept with no obvious substitute. ‘Financial hardship’ tends to focus on income poverty. ‘Low income’ excludes consideration of the subjective experience of poverty. ‘Social exclusion’ focuses on the participatory aspects of poverty but is value laden and difficult to measure. ‘Vulnerability’ probably represents a distinct concept which overlaps with poverty but is much broader.

Human rights law may provide the answer. The focus there is on an ‘adequacy’. Individuals have a right to an ‘adequate standard of living’ which necessarily requires both a certain level of income, and access to the necessities of life. But what standard of living is adequate? It may be that regardless of the terminology we use, these concepts defy definition. Perhaps the Australian legal approach – which has avoided definition and instead relied on subjective, contextual assessments of poverty by decision-makers – has some merit after all.

THE LAND OF THE FAIR GO?

The Hon. Margaret McMurdo AC*

Australians have long considered themselves to be living in the land of the fair go: if not utopia then certainly a meritocracy, with effective, free education and health systems; safety nets for those in need; a nation where social mobility is enabled and encouraged; a place where everyone can aspire to owning their own home. But is that true? In my post-judicial life as chair of the board of Legal Aid Queensland, as chair of the board of governors of Queensland Community Foundation (Queensland's largest public charitable trust) and most recently, as chair of the independent Queensland Women's Safety and Justice Taskforce¹ (The Taskforce), I have often thought about that question. In this article I will try to answer it.

Australians on average are now the fourth richest people in the world.² This, at first blush, seems to amply support the concept of Australia as

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¹ The Women's Safety and Justice Taskforce was established as an independent, consultative taskforce by the Queensland Government to examine: coercive control and review the need for a specific offence of domestic violence, and the experience of women across the criminal justice system.

² Peter Davidson and Bruce Bradbury, 'The wealth inequality pandemic: COVID and wealth inequality' (Research Report No 4/2022, Australian Council of Social Service and University of New South Wales Poverty and Inequality Partnership,

the land of opportunity. But dig a little deeper. The richest 10% of households own 46% of all Australian wealth while the poorest 60% of Australian households own just 17% of that wealth.³ Wealth inequality rose sharply between 2003 and 2018, then declined slightly.⁴ Any decline in wealth disparity, even a modest one, is surely an encouraging step towards a fair go for all. Unfortunately, this small decline in wealth inequality only reflects that those who bought houses before the most recent property boom have become wealthier, with the gap between the poor who do not own property further widening.⁵

Safe and secure housing is a basic human need. But in my travels with the Taskforce examining the experiences of Queensland women and girls in the criminal justice system, whether along the coastal fringe from the Torres Strait, Cairns, Yarrabah, Townsville, Palm Island and Mackay to the Sunshine and Gold Coasts; in the Northern Peninsula Area of Cape York; west to Toowoomba, Cherbourg, Rockhampton, and Woorabinda; or in the Greater Brisbane area, I heard of the high cost and lack of housing availability. The detrimental impact of this

July 2022) 9 <https://povertyandinequality.acoss.org.au/wp-content/uploads/2022/07/The-wealth-inequality-pandemic_COVID-and-wealth-inequality_screen.pdf>.

³ Ibid.

⁴ Ibid.

⁵ See Peter Davidson and Bruce Bradbury, 'The wealth inequality pandemic: COVID and wealth inequality' (Research Report No 4/2022, Australian Council of Social Service and University of New South Wales Poverty and Inequality Partnership, July 2022) 9 <https://povertyandinequality.acoss.org.au/wp-content/uploads/2022/07/The-wealth-inequality-pandemic_COVID-and-wealth-inequality_screen.pdf>.

housing shortage, is falling disproportionately on the most vulnerable— women victims of domestic, family, and sexual violence and their children.

Without exaggeration, there is a housing crisis in Queensland. Many women victim-survivors of domestic, family, and sexual assault and their children are returning to unsafe living circumstances because they have nowhere else to go.⁶ Those courageous women who refuse to return to abusive partners are living with their children in poverty in unsuitable short-term housing, such as poor quality, unsafe motel rooms.⁷ In rural, regional, and remote areas, support workers are also affected. They are unable to deliver vital programs to keep women victim-survivors and their children safe and hold perpetrators to account because support workers cannot relocate them without suitable accommodation.⁸ Anne Summer's recent report, *The choice—violence or poverty: domestic violence and its consequences in Australia today*,⁹ also powerfully illustrates the devastating impact of domestic violence on women, their children, and our communities throughout the nation.

In my work with the Taskforce, I learned that almost all Queensland women prisoners are victims of domestic, family, and or sexual violence

⁶ Women's Safety and Justice Taskforce, *Hear her voice: Addressing coercive control and domestic and family violence in Queensland* (Report One, 2021) vol 2, 107.

⁷ Ibid.

⁸ Ibid.

⁹ (Research Report, University of Technology Sydney, July 2022) <<https://paulramsayfoundation.org.au/wp-content/uploads/2022/07/TheChoice-violence-or-poverty-web.pdf>>.

and they are often victims of multiple forms of violence. Although women commit far fewer and much less serious offences than men, the number of women in Queensland prisons is growing at four times the rate of male prisoners.¹⁰ Concerningly, the number of women in Queensland prisons is disproportionately higher than in other states.¹¹ Recent reports from the Queensland Productivity Commission, and the Australian Productivity Commission, have questioned the economic and social wisdom of continuing to imprison more people and build more prisons.¹² Prisons are expensive and they are not effective in reducing recidivism or keeping the community safe. The cost of imprisonment is over \$120,000 a year, per prisoner.¹³ While some offenders are a danger to the community unless incarcerated, these are a small minority. For most prisoners, supporting them so that they do not offend in the first place, or assisting them to rehabilitate outside prison, is far more cost-effective and much more likely to reduce crime and keep the community safe.

I was surprised to learn that when people are imprisoned in Australia, they lose their entitlement to Medicare and to most of their National Disability Insurance Scheme (NDIS) entitlements, with all care

¹⁰ Women's Safety and Justice Taskforce, *Hear her voice: Women and girls' experiences across the criminal justice system* (Report Two, 2022) vol 2, 405.

¹¹ *Ibid.*

¹² Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019); Australian Government Productivity Commission, *Australia's prison dilemma* (Research Paper, October 2021).

¹³ Australian Government Productivity Commission, *Australia's prison dilemma* (Research Paper, October 2021) 134.

responsibility handed over to the State Government. Many prisoners have physical and mental health illnesses when they enter detention, and many have disabilities, often undiagnosed. Imprisonment provides an opportunity to address these concerns, which are likely to have contributed to their offending and will hinder their successful rehabilitation in the community. Yet the Taskforce identified significant gaps in prison health care, including in addressing the significant detrimental mental health effects of the trauma women prisoners have experienced.¹⁴ Women in prison, those who had recently left prison, and those who supported these women told me about the inadequate pre- and post-natal care and birthing assistance in Queensland prisons. This poor-quality health care risks condemning innocent new-borns to an inherited cycle of poverty and dysfunction. And I was dismayed to learn that there were few suitable education and rehabilitation programs to help prisoners achieve and maintain a crime-free, pro-social life once released into the community.

My work with the Taskforce also highlighted homelessness and poverty as significant causative factors in women and girls committing offences in the first place. These same factors mean that homeless women charged with offences are spending longer in custody as they are unable to persuade the court to grant bail without a stable place to live. And I was shocked, but no longer surprised, to hear from the parole board

¹⁴ Women's Safety and Justice Taskforce, *Hear her voice: Women and girls' experiences across the criminal justice system* (Report Two, 2022) vol 2, 594-597.

that women in custody who are otherwise eligible for parole are remaining in prison because no one can find them a single room anywhere in Queensland to live.

These problems are magnified for women from culturally and linguistically diverse backgrounds, for those with intellectual disability, and particularly for First Nations women. These vulnerable cohorts of women are especially prone to misidentification by police as perpetrators of violence: a thorough examination of the whole relationship between the parties over time would often reveal that the women were the true victims, reacting to a long history of abusive violence and coercive control.¹⁵

First Nations women and girls are disproportionately represented as criminal offenders. They make up only 4.6% of the Queensland population aged 10 and above, but 31.1% of females sentenced in Queensland between 2005 and 2020 were Aboriginal or Torres Strait Islander.¹⁶ It is concerning that between 2012 and 2021, the number of women in Queensland prisons overall has increased exponentially by 80.3%.¹⁷ It is even more concerning that the number of First Nations women in prison has increased by an astounding 120.5%.¹⁸ Many First

¹⁵ Women's Safety and Justice Taskforce, *Hear her voice: Women and girls' experiences across the criminal justice system* (Report Two, 2022) vol 2, 453-458.

¹⁶ Queensland Sentencing Advisory Council, *Baseline Report: The sentencing of people in Queensland* (Sentencing Profile, May 2021) 16.

¹⁷ *Ibid.*

¹⁸ Women's Safety and Justice Taskforce, *Hear her voice: Women and girls' experiences across the criminal justice system* (Report Two, 2022) vol 2, 406.

Nations women in custody are suffering not only the effects of trauma as victim-survivors of multiple types of domestic, family, and sexual violence, but also the impacts of inter-generational trauma arising from colonisation, including the Stolen Generations. Many of these women live in remote First Nations communities where services and supports are limited. Poor internet access means that even delivering programs, training and support virtually is at best difficult and problematic, and at worst impossible.¹⁹ To effect positive change in First Nations communities, problems must be recognised, and the solutions led and delivered by those within these communities.

What can lawyers do to address these many concerning and complex issues arising from social disadvantage so that everyone has a chance at a fair go? In *Hear her voice Report Two*, the Taskforce makes 84 recommendations about women and girls as offenders.²⁰ The recommendations are based on a public health and justice reinvestment processes, with a much-needed focus on First Nations peoples. They include trauma-informed responses to women and girl offenders who have been victims of violence from all involved in the criminal justice system; more options to support offenders so that they do not enter the criminal justice system; better education and rehabilitation programs; more non-custodial sentencing options; a wider use of pre-

¹⁹ Women's Safety and Justice Taskforce, *Hear her voice: Women and girls' experiences across the criminal justice system* (Report Two, 2022) vol 2, 654.

²⁰ Women's Safety and Justice Taskforce, *Hear her voice: Women and girls' experiences across the criminal justice system* (Report Two, 2022) vol 1, 11-39.

sentence reports; and decriminalising offences that are health issues, like possession of unlawful drugs and drunkenness.²¹ Lawyers will play a key role in many of these suggested reforms, whether in developing and implementing policy, drafting legislative changes, refining and improving practices and procedures in criminal, social justice and human rights areas of law, or even as legislators introducing, refining and passing legislation. At the time of writing, the Queensland Government had not announced its response to the Taskforce's *Hear her voice Report Two*. Law students, lawyers, and organisations like JATL can advocate for recommended reforms to be implemented effectively and can play a key role in identifying and lobbying for further reform.

Lawyers working for community legal centres or Legal Aid Queensland are helping to address disadvantage by ensuring a fair go for those in need by providing access to justice at an early stage before problems escalate. As chair of Legal Aid Queensland (LAQ) since 2017, I never cease to be impressed by the work of community legal centres and LAQ in assisting vulnerable Queenslanders. LAQ's services align with a core organisational value: protecting legal and human rights, promoting fair treatment, and helping those at risk of social exclusion. Services include community legal education, advice clinics, providing wraparound assistance and information (such as organising support from or referrals to other key social services like mental health and housing) and vital duty lawyer schemes in courts dealing with criminal, family, domestic

²¹ Ibid.

and family violence, and child protection law.²² Applying a holistic approach, LAQ provides social workers in some matters. LAQ prioritises support for those impacted by family violence and its wraparound assistance to the most vulnerable is extended to the homeless, those with mental illness, the culturally and linguistically diverse, First Nations clients, those with disability, and clients with multiple complex legal problems.²³

LAQ, as a party to the National Legal Assistance Partnership Agreement, focuses on preventative and early-intervention services. This is a key driver for LAQ's community legal education work, which raises public awareness about legal rights, responsibilities, and remedies.²⁴ LAQ also works with First Nations service providers, networks, and communities to improve access to services and deliver legal education.²⁵ LAQ representatives participate in community events across Queensland such as Homeless Connect, Finance Fairs, and NAIDOC Week, educating the public about the law and available services and discussing legal problems in accessible plain-English. With an active social media outreach, LAQ's podcast channel provides relaxed, comprehensible, chat-based information about common legal

²² 'Our Services', *Legal Aid Queensland* (Web Page)
<<https://www.legalaid.qld.gov.au/Get-legal-help/Our-services>>.

²³ Ibid.

²⁴ 'Community legal education', *Legal Aid Queensland* (Web Page)
<<https://www.legalaid.qld.gov.au/Get-legal-help/Our-services/Community-legal-education>>.

²⁵ Ibid.

issues to members of the public who could not otherwise access legal advice, including community, health, and education workers.

Importantly, LAQ coordinates and administers the Community Legal Education Collaboration Fund, which resources collaborative initiatives and partnerships to extend community outreach. The fund finances community legal centres, the Aboriginal and Torres Strait Islander Legal Service, Regional Legal Assistance Forums, and specialist forums to educate priority communities across Queensland about their legal rights and responsibilities.²⁶ The funded projects are aimed at Queenslanders most in need, including those living with disability, older people, those in detention, young people, those in rural and remote communities, and people experiencing domestic and family violence.

LAQ's client contact centre's provision of legal information and referral services has an astonishingly broad outreach - around 85,000 people each year.²⁷ Prisoners are a particularly vulnerable cohort, given their extremely limited access to legal services and support, leaving them largely forgotten, voiceless and at high risk of social exclusion and financial disadvantage. Their permitted phone call times, even for legal

²⁶ 'Community Legal Collaboration Fund', *Legal Aid Queensland* (Web Page) <<https://www.legalaid.qld.gov.au/Get-legal-help/Our-services/Information-for-community-workers-and-carers/Community-legal-education-collaboration-fund>>.

²⁷ 'Our performance', *Legal Aid Queensland* (Web Page) <<https://www.legalaid.qld.gov.au/About-us/Corporate-publications/Annual-reports/2019%E2%80%9320annual-report/Our-performance#:~:text=The%20client%20contact%20centre%20answered,and%20referral%20services%20via%20email.>>.

services, are severely restricted and waiting in a phone queue counts towards their strict time limits. LAQ gives them priority phone access.

LAQ often partners with other community legal centres. Hub Community Legal and the LAQ Inala office, for example, collaboratively conduct a free domestic violence and child protection advice clinic in the Richlands-Inala area.²⁸ LAQ also works with the Brisbane-based Refugee and Immigration Legal Service to provide a smooth referral pathway for clients with family law, domestic violence, or child protection concerns.²⁹ LAQ's specialist advice clinics cover a broad range of areas including family violence, child protection, consumer credit and financial issues, anti-discrimination concerns, employment law, social security appeals, and NDIS advice and appeals.³⁰ The Youth Legal Advice Hotline provides legal advice to young people questioned by police. Natural Disaster Legal Help gives legal advice and representation to people affected by floods, severe storms, and bushfires in Queensland. Your Story Disability Legal Support helps those with disabilities share their experiences with the Royal Commission. LAQ is also proud to employ a growing number of First Nations staff and lawyers and endeavours to ensure the

²⁸ 'Community Legal Centres', *Legal Aid Queensland* (Web Page) <<https://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/Service-providers/Community-Legal-Centres>>.

²⁹ 'Refugee and Immigration Legal Service – RAILS', *Legal Aid Queensland* (Web Page) <<https://www.legalaid.qld.gov.au/Listings/Organisations-directory/Refugee-and-Immigration-Legal-Service-RAILS>>.

³⁰ 'Our Services', *Legal Aid Queensland* (Web Page) <<https://www.legalaid.qld.gov.au/Get-legal-help/Our-services>>.

organisation is a culturally welcoming place for First Nations clients and staff.

Of course, lawyers do not have to work for community legal centres or Legal Aid Queensland to help address poverty and disadvantage. Most mainstream law firms and many individual lawyers know that pro bono work for those in need, or for organisations helping those in need, not only helps those in need: it helps the helper feel satisfied about their life direction. It also helps maintain public confidence in the legal profession. It is the classic win, win, win. That is why lawyers and law firms donate hundreds of thousands of dollars of pro bono services each year, making a real contribution to ensuring Australia is the land of the fair go.

It is also why I so much enjoy my post-judicial role as chair of the board of governors of Queensland Community Foundation (QCF), Queensland's largest public charitable trust. QCF's capital fund has grown from modest seed funding of \$300,000 in 1997 to over \$100,000,000 today, providing a much-needed perpetual source of annual income to Queensland charities.³¹ It comprises over 250 sub-funds.³² Most are bequests left to specific charities or types of charities. Some have a regional focus, promoting the 'give where you live' philosophy. Others are set up by individuals or organisations – living

³¹ 'About Us', *Queensland Community Foundation* (Web Page) <<https://qcf.org.au/about-us/>>.

³² *Ibid.*

philanthropists who want to foster a spirit of charitable giving within their family or organisation by jointly deciding the charity to receive the income each year. One of my favourite sub-funds is the LawRight sub-fund. Imagine if every lawyer left a bequest of, say, \$1000 to the LawRight sub-fund: LawRight would be able to fund all its programs and expand further, helping to ensure access to civil justice for vulnerable Queenslanders without relying on Government assistance. The QCF general sub-fund holds a grants' process each year to support capacity building so that great charities right across the state, from Cape York to Coolangatta, can do their important work even more effectively. And QCF celebrates and encourages philanthropy in Queensland, not just those giving to QCF, through its annual philanthropy awards so that Queenslanders in need can get a helping hand.³³ My heart always swells with pride when lawyers and legal firms are nominated for these prestigious awards because of their work in providing those having a bad time with a fair go.

Not without justification, some social commentators argue that community legal centres, legal aid and pro bono work and charities are mere band aids, precariously holding together a broken system; early intervention and an entirely different social construct is needed to overcome societal disadvantage and poverty. Legal academics, legally

³³ 'About Us', *Queensland Community Foundation* (Web Page) <<https://qcf.org.au/about-us/>>.

trained policy makers and politicians, lawyers and their professional associations are well placed to identify and lead that change.

A shameful legacy of Australia's colonial history is the over representation of First Nations peoples in our criminal justice and prison systems. The 16-member Referendum Council established by Prime Minister Malcolm Turnbull in 2015 travelled around Australia and consulted with over 1200 people before conducting the four day First Nations National Constitutional Convention near Uluru, Central Australia. On 26 May 2017, the more than 250 Convention delegates issued the *Uluru Statement from the Heart*,³⁴ a petition from First Nations leaders to amend the Constitution of Australia to enshrine a First Nations voice. On 30 July 2022, Prime Minister Anthony Albanese announced his government's support for a referendum to amend the Constitution to provide an Aboriginal and Torres Strait Islander voice to make representations to Parliament and the executive government on matters relating to First Nations peoples.³⁵ While Constitutional referenda in Australia are seldom successful, there are signs that, despite the Turnbull government's rejection of the notion, this referendum may get bipartisan support and that there is popular support for this change.

Some, including some First Nations leaders, have rejected the move as mere symbolism and that actions not words are needed. While it is

³⁴ *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).

³⁵ 'Referendum on an Aboriginal and Torres Strait Islander Voice', *National Indigenous Australians Agency* (Web Page) <<https://www.niaa.gov.au/indigenous-affairs/referendum-aboriginal-and-torres-strait-islander-voice>>.

abundantly obvious that practical improvements in the lives of First Nations peoples are urgently needed, it is also essential that Australia's Constitution at last appropriately recognises the nation's original inhabitants. In fact, Constitutional recognition is likely a crucial prerequisite to achieving lasting positive change in reducing First Nations peoples' overrepresentation in prisons and in improving their health and education outcomes. Words, respect, and recognition matter. We all love to be loved. As the *Uluru Statement from the Heart* explains, when First Nations' history and culture are respectfully recognised and their peoples given a real voice in Australia, their 'children will flourish. They will walk in two worlds and their culture will be a gift to their country.'³⁶ Lawyers are again well-placed to explain these issues to the community and to guide and lead this change.

I return to the question I posed at the beginning of this article, are we Australians living in the land of the fair go? Australia is far from utopia, especially for our First Nations peoples. But on many levels on a world scale Australia is doing OK, in no small measure because of the work of lawyers past. To lawyers present and future, wherever and whatever your field of endeavour, and whether on a macro or micro level, your challenge is to use your intellect, training, experience, and societal role to ensure our next generations, including First Nations Australians and other presently disadvantaged groups, do get a fair go.

³⁶ *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).

AN INTERVIEW WITH BRIDGET BURTON*

James Arthur and Asha Varghese

Bridget Burton talks about the difficulty of working in the community legal sector—an area that is largely under resourced. She considers some of the issues with legal representation and elaborates on the flaws of Queensland's Anti-Discrimination Act, arguing in particular for the need to incorporate social origin into its provisions. Finally, she leaves with some important remarks about what needs to change in Australia's legal system to address the problem of poverty.

PB: In your 2020-2021 Annual Report, it was noted that 78% of clients at Caxton Legal Centre were experiencing financial disadvantage. What does this statistic say about the role of community legal centres in Australia's legal landscape? Are the Commonwealth and State Governments providing enough funding?

BB: Actually, this statistic only tells a small part of the story. Since that report was published, we have taken steps to deal with overwhelming demand and have implemented an eligibility framework that applies, for the first time, an income test for many of our services¹. We have also reduced the areas of law we cover. This should mean that

* Bridget Burton is Director of Human Rights and Civil Law at Caxton Legal Centre.

¹ Caxton Legal Centre, 'The Ways We Can Assist Our Clients', *Eligibility Criteria* (Web Page) <<https://caxton.org.au/how-we-can-help/casework-and-representation/>>.

more than 78% of our clients will be financially disadvantaged in the future. It also means that a lot of working people on modest incomes will be too well off to access most of the services we offer. The other thing that statistic does not tell you is how few of the people we see in the community legal sector receive more than one or two pieces of advice. Providing only advice is often inadequate, but it is all we have the resources to do for the majority of people.

A frustration is that we know we do exceptional, even life-changing, work for the people we can help. Many of our clients rely on the safety net (social housing, welfare benefits, et cetera), and when they come to us some part of the net is on the verge of coming undone. Sometimes they are doing slightly better, holding onto a job and just managing to pay off a loan. When we take on a client, we pick up the sturdy needle and thread supplied by the legal system and get to work shoring up the unravelling parts of people's lives – and we do that work well, with skill and compassion. That we have to turn away so many people who need us, and who we could help, is a real shame. Much of the most impactful work in the sector – the test cases and law reform work – is undertaken by CLC staff lawyers working at least partly in their own time.

You might think, reading that, that governments simply do not value our work but the opposite is true. We generally receive heartfelt bi-partisan support from all levels; in my twenty years in the CLC sector I have never met a politician who did not sincerely thank us for the important work we do. And yet we are never given sufficient resources to do it properly. I often think about what it would be like if we could act for 30% instead of 3% of the people we see. Or if we could start to make inroads into assisting the ‘missing middle’ who are doing too well for public assistance but not well enough to pay privately.²

PB: Do you think it is compatible with the *Human Rights Act 2019* (Qld) and the International Covenant on Civil and Political Rights (ICCPR) for there to be no guarantee of legal representation in criminal proceedings as is current practice in Australia?

BB: This is an interesting question that is often asked and if you scratch it a bit, you find another question, a little more complex. I wonder if we can still justify the idea

² The ‘missing middle’, according to the Law Council of Australia, “is the group of individuals who do not meet eligibility criteria for publicly funded legal services yet lack the resources to afford a private lawyer’s assistance for all or part of their legal matter”: Law Council of Australia, ‘Position Paper – Addressing the legal needs of the missing middle’, (Web Page, 30 November 2021) <<https://lawcouncil.asn.au/resources/policies-and-guidelines/position-paper-addressing-the-legal-needs-of-the-missing-middle>>.

that criminal prosecution is the worst thing a state does to a person, and so be the defining feature of the right to legal representation? It has always struck me that removing a child from the care of their parents is more distressing³ and has serious long-term consequences.⁴ Not facilitating safe passage out of domestic violence does more damage, indeed carries a much higher risk of death.⁵ Even expelling a child from school, taking away their fundamental human right to an education which might underpin successful adulthood, can lead to longer term detriment⁶ than a short stretch in prison.

I think if we slide a feminist lens over our human rights lens, we notice that those areas of state intervention that mostly affect the rights of women and children do not quite receive the same elevated attention. Whenever an individual is facing a serious detriment from an exercise of, or indeed failure to exercise, state power then they

³ Tamara Walsh and Heather Douglas, 'Mothers in crisis: mothers and the child protection system' in Lisa Raith, Jenny Jones and Marie Porter (eds), *Mothers at the Margins: Stories of Challenge, Resistance and Love* (Cambridge Scholars Publishing, 2015) 89.

⁴ Australian Institute of Health and Welfare, 'Aboriginal and Torres Strait Islander Stolen Generations aged 50 and over: updated analyses for 2018-19' (Report Cat. no. IHW 257, 2 June 2021).

⁵ See for example, the Women's Safety and Justice Taskforce, 'Hear her voice – Report two – Women and girls' experience across the criminal justice system' (Report 2, 11 July 2022).

⁶ Australian Law Reform Commission, *Seen and heard: priority for children in the legal process* (Report ALRC 84, 19 November 1997), 10.52.

ought, I think, to have a right to quality legal representation. It should be the scale, not the class/category, of the detriment that determines where resources are allocated. Representation should be provided not only to defend, but also to bring, legal action about matters that affect human rights; it is small comfort to know you have rights if you cannot, for reasons of poverty, compel others to respect them. Thinking about bringing litigation in support of human rights, it is also important to consider whether an effective remedy is available in cases of breaches.⁷ A system that offers proper human rights protections has all these things: access to representation, right to bring actions and availability of substantive remedies.

PB: At the request of the Attorney-General, the Queensland Human Rights Commission is currently conducting a review into the *Anti Discrimination Act 1991* (Qld). In your opinion, does this legislation do enough to address the problem of poverty in Australia, and if not, how might it be fixed?

BB: The *Anti Discrimination Act 1991* (ADA) is now 30 years old. In 1991 when it was introduced, Queensland had

⁷ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2.

very recently been through the Fitzgerald Inquiry, Bjelke-Peterson had left government barely four years prior. By the end of the 1980s Queensland was looking to the future, and the *ADA* was part of that forward vision. It has done a lot of hard work in the ensuing period, not just in the cases that have been run but also supporting broader cultural change. Currently though, the *ADA* is not very interested in poverty and this is a real shortcoming of the legislation in my view.

If we look, for example, at the conditions for women in the last 30 years, equality legislation has been such an important underpinning for social change. Now in 2022 there are plenty of women doing absolutely fine. There are women in power and on boards; we have a woman Chief Justice, Premier and Governor in Queensland and none of them are the first woman in that role. But certainly not all women are doing as well. At this point in our history, we need to look more deeply than just gender to understand inequality for women. Why haven't the gains at the top trickled down consistently to other women? The same questions can be asked across any of the protected attributes that the *ADA* looks after. The divisions within the protected groups are big questions the legislation needs to respond to.

There are two things I think will help with this, both are quite simple and neither is new. One is that we can specifically cover intersectionality in the *ADA* and recognise that people with more than one attribute experience discrimination in a way that is quite distinct. I, for example, am a single mother and my experience of many things is quite different from someone else who is single, a woman or a parent without being all those three things at once. Other countries with similar laws have provisions that recognise this.⁸

The second thing we can do is to specifically cover social origin in the *ADA*. This recognises that within a group, people have different starting positions that heavily influence how they are treated in areas of public life.⁹ The role of social origin in the workplace is recognised in the anti-discrimination provisions of the *Fair Work Act 2009*¹⁰ but it does not appear in the *ADA* itself. Protecting social origin would do two things. One, naming it switches on a light exposing the structures that create and solidify privilege, especially

⁸ For example, the *Canadian Human Right Act* RSC 1985, c H-6, s 3.1 and the *Equality Act 2010* (UK) s 14.

⁹ For more on social origin discrimination see Margaret Thornton, 'Social Status: The Last Bastion of Discrimination' (2018) 1 *Anti-Discrimination Law Review* 5.

¹⁰ *Fair Work Act 2009* (Cth) s 351.

intergenerationally. Two, it makes it possible to label behaviour for the purposes of a complaint.

Will adding social origin to the *ADA* move people out of poverty? No; the only thing that moves people out of poverty is money. Or more specifically the political will to prioritise the financial wellbeing, stability and independence of poorer people. But it will help with challenging decisions around who looks and sounds like they belong, who deserves opportunity or support, who has 'leadership qualities' - just as it did for many women over the past 30 years. It will help us critique and refocus decisions around how to distribute limited resources in areas such as education, health care and policing. It should improve access for many to secure safe and stable accommodation. The benefits are broad and the risks are low, to me it is an obvious and straightforward amendment.

PB: How else is Australia's legal system implicated in the creation of poverty?

BB: Gosh, a big final question. The legal system is deeply implicated in social structures generally. Legislation is a key practical mechanism by which political policy is imposed and enforced. Think about marriage for a moment, or taxation, or employment law. As a means of

giving life to political will, the legal system is just as implicated in poverty as it is in wealth.

For example, income management (the 'basics card') has been a real poverty trap for many.¹¹ The conditionality of social housing, the impacts of a criminal history on future work¹², the range of criminal offences that target homelessness as though it is anti-social behaviour¹³, treating gig-economy workers as independent small businesses¹⁴, and many other laws all serve to create and/or entrench poverty¹⁵ - and that is before we even get to the many things our tax laws do to move resources from poorer to wealthier households¹⁶.

¹¹ Greg Marston et al, 'Hidden Costs: An Independent Study into Income Management in Australia' (Report, School of Social Science University of Queensland, 2020).

¹² Australian Human Rights Commission, 'Reports to the Minister under the AHRC Act', *Human Rights Reports* (AHRC Web Page, 30 May 2022. <https://humanrights.gov.au/our-work/legal/projects/human-rights-reports?_ga=2.47015527.1104337545.1659504726-207044174.1617153619>. ____A range of reports on this web page, including reports 125, 113, 105, 97, 65, and 50, all discuss criminal history discrimination.

¹³ Luke J McNamara et al, 'Homelessness and Contact with the Criminal Justice System: Insights from Specialist Lawyers and Allied Professionals in Australia' (2020) 10(1) *International Journal for Crime, Justice and Social Democracy* 111.

¹⁴ See, for example, *ZG Operations Australia Pty Ltd v Jamsek* (2022) HCA 2. See also *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) HCA 1.

¹⁵ Cameron Parsell et al, 'Introduction to the special issue on welfare conditionality in Australia' (2020) 55 (1) *Australian Journal of Social Issues* 4.

¹⁶ See, for example, Richard Holden, McKell Institute *Switching Gears; Reforming negative gearing to solve our housing affordability crisis* (Report June 2015) 1-36. See also Matt Grudnoff and Eliza Littleton, Australian Institute *Rich men and tax concessions:*

But beyond the laws themselves, the effect of which is obvious, the systems of administering laws also have a role in the exacerbation of poverty. The fact that many poorer people can only access legal advice and not representation is an example of this. Also, there is an inordinate amount of discretion involved in administering the modern social safety net – fewer and fewer safety net provisions are given as of right and they often involve a huge amount of labour or exchange. An example of this is the mutual obligation provisions in social security law.¹⁷ But there is also a hefty engagement burden on many social housing tenants¹⁸, state debtors (i.e. people with fines but no money to pay)¹⁹, parents in the child protection system, NDIS applicants and many others. These areas of discretion lead to a proliferation of administrative decision making, not all of which is sound.

A lot of these requirements (hoops, if you will) are designed to dis-incentivise accessing the safety net when

How certain tax concessions are widening the gender and wealth divide (Discussion Paper April 2021).

¹⁷ Gráinne McKeever and Tamara Walsh, 'The moral hazard of conditionality: restoring the integrity of social security law' (2020) 55(1) *Australian Journal of Social Issues* 73.

¹⁸ Tamara Walsh, 'Social Housing, Homelessness and Human Rights' (2022) 45(2) *UNSW Law Journal* 688.

¹⁹ *State Penalties and Enforcement Act 1999* (Qld) pt 3B.

not actually needed, but they are so onerous that when they are essential, complying with them leaves people too exhausted and demoralised to attempt much else. Dismantling these unnecessary systems would also allow us to spend the money where it is really needed. But first we would need to return to an understanding that the basic conditions of life such as safe housing, food, water, warmth, and a livable income are rights, and to prioritise the dignity and stability of the people who need to access government support for those things.

ADVANCING POVERTY IN AUSTRALIA: HOUSING, THE LAW AND THE DENIAL OF RIGHTS

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Poverty is no longer measured in terms of income levels alone but takes into account a number of essential costs regularly incurred by Australians. High amongst these is housing costs, and to understand why this is so requires a consideration of Australia's regulatory failures in this policy space. Australia's approach to housing has remained in the realm of policy and politics; where laws have been enacted they have been on an ad hoc basis, exhibiting a light touch regulation. These laws have tended to ignore Australia's international rights obligations and allow the private market to dominate in almost all aspects of the housing sector. Australia's institutional framework needs renovation if it is to recognise the interconnected nature of the housing market and adopt a more systemic regulatory approach that addresses the potential for many to slide into either 'before' or 'after' housing poverty. This paper argues that this renovation should be about looking beyond current administrative law and procedural remedies and should reference Australia's international obligations around the right to adequate housing. Ideally it should include a comprehensive federal bill of rights but, as a minimum, there needs to be housing specific laws that focus on housing as shelter rather than a tradeable commodity, that address both affordability and security of tenure and, above all, that treat people as rights-holders.

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I INTRODUCTION – HOUSING RELATED POVERTY

The poverty rate measures employed in Australia are based on a line set at 50% of median equivalised household disposable income and often take into account the costs of housing.¹ These measures thus look beyond just levels of income and see poverty coming in different shapes and sizes. It is important to consider these costs. The increasing disparities in housing costs played a major role in keeping the overall poverty rate at around 12-13 percent from 2009 to 2017. Average costs grew strongly during this period and growth was the strongest among people with low incomes.² This is not necessarily about the level of a person's income and, as Saunders reminds us in his recent revisiting of the Henderson poverty inquiry of the 1970s,³ it is important to consider the various costs that can shift people into a condition of poverty and what can be done to improve the position of those 'who live as if they [are] poor [and] do so because they do not have the means to avoid it'.⁴

Housing stress – identified as being where a household's housing costs represent 30% or more of its disposable income⁵ – can presage a household's slide into poverty. Overall, approximately half of all people

¹ Peter Davidson et al, *Poverty in Australia 2020: Part 1 Overview* (ACOSS/UNSW Poverty and Inequality Partnership Report No 3, 21 February 2020) 4.

² Ibid 24.

³ Peter Saunders (ed), *Revisiting Henderson: Poverty, Social Security and Basic Income* (Melbourne University Press, 2019).

⁴ Stein Ringen, *The Possibility of Politics: A Study in the Political Economy of the Welfare State* (Oxford University Press, 1987) 162.

⁵ AHURI, 'Understanding the 30:40 indicator of housing affordability stress: Comparing household income with housing costs' (Web Page, 23 May 2019) <<https://www.ahuri.edu.au/research/brief/understanding-3040-indicator-housing-affordability-stress>>.

in households living below the poverty line are renting (in private or public housing). The risk of poverty is twice as great (19%) for people in households renting privately than for homeowners (9%) or home purchasers (9%), reflecting the higher cost and/or lower incomes of people in private rental housing with Commonwealth Rent Assistance (CRA) payments failing to seriously address this problem.⁶ The cost of housing has impacted both home purchasers and renters on low to moderate incomes, in particular sole parents and single people in the private rental market. This has led to a greater increase in after-housing poverty (being either through unaffordable mortgages or unaffordable rent) than to before-housing poverty. Of course much of this after-housing poverty is associated with a prior high incidence of before-housing poverty.⁷

Fundamentally, the contribution of housing to the prevalence of poverty in contemporary Australia is largely a product of policy failures that began back in the 1980s and 1990s, the marketisation of the housing sector – with the private market providing the bulk of the housing – and the light regulation of successive federal governments. The lack of affordability that characterises the market for the

⁶ In January 2018 maximum rates of Commonwealth Rent Assistance (\$67pw for singles without children and \$78pw for singles with 2 children) were well below median rents for a one and two bedroom flat in Sydney (\$490pw and \$550pw respectively) and Melbourne (\$360pw and \$440pw respectively): Peter Davidson et al, *Poverty in Australia 2020: Part 2, Who is affected?* (ACOSS/UNSW Poverty and Inequality Partnership Report No 4, 28 May 2020) 52.

⁷ Judith Yates, 'Housing, Housing Costs and Poverty' in Peter Saunders (ed), *Revisiting Henderson: Poverty, Social Security and Basic Income* (Melbourne University Press, 2019) 215, 222 ('Yates').

prospective homeowner and the renter in the low to middle income brackets sits alongside the inadequacy of social housing and the less than systematic approach to addressing homelessness. Policy intervention that has occurred has focused more on the demand side of housing, such as through financial support to first home buyers, rather than addressing the problems of the supply.

The focus on various ad hoc policy measures by federal and state governments failed to recognise that the housing market is a continuum with each segment connected to each other. Those at the receiving end will recognise that struggling to meet mortgage payments or rent could lead to a position of impoverishment and the related stress can create or exacerbate other health conditions. These failings are not accidental but are a product of the neoliberal restructuring of Australia's economy since the 1980s and a bipartisan policy emphasis on deregulation and privatisation. Housing has effectively been recommodified with the primary focus being upon its value as a tradeable asset. Neoliberalism's focus on the individual has meant that governments have placed the 'individual rational consumer' and how she/he uses whatever housing assistance provided at the heart of policy.⁸

Policy interventions have only responded to the symptoms of the housing crisis, be it unaffordability, accessibility or homelessness. In focusing on the individual rather than an identified disadvantaged

⁸ Jago Dodson, 'The "Roll" of the State: Government, Neoliberalism and Housing Assistance in Four Advanced Economies' (2006) 23(4) *Housing, Theory and Society* 224, 237.

collective, policymakers have effectively avoided addressing structural problems. If Australia is to engage with its obligations under international law in relation to the right to adequate housing and to use this legislation to address the role that housing costs play in driving people towards and into conditions of poverty, then Australia's institutional framework must be renovated. In the absence of both a constitutional provision to secure the right to adequate housing and a federal bill of rights to the same effect, there is a need for specific statute law aimed at a more strategic approach and for taking housing policy away from the realm of electorally driven politics and vested interests. This article will consider the rights regime and then through the lens of the sub-rights of affordability, availability and security of tenure consider Australia's policy approach to the housing market from home ownership to homelessness. The article will conclude with some suggestions for rights-based reform.

II RIGHT TO ADEQUATE HOUSING AT INTERNATIONAL LAW

Australia's international human rights obligations relating to housing are to be found in all major international human rights treaties. Article 25 of the *Universal Declaration of Human Rights* (UDHR) refers to the 'health and well-being' of the individual and places housing within a reference to a right to economic security rather than just in terms of property. The *International Covenant on Economic, Social and Cultural Rights*

(ICESCR)⁹ provides the most advanced international standard as part of the broader right to an adequate standard of living. It refers to ‘an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’.¹⁰ This right to adequate housing can best be understood as an aggregated bundle of sub-rights that includes the right to affordable, accessible and habitable housing as well as security of tenure.

The UN Committee on Economic, Social and Cultural Rights (CESCR) has clarified through its *General Comment No. 4 of 1991* that the right to housing is not to be viewed in isolation from other human rights and, of these, the rights to health and social security are amongst the most important. In addition to the principle of non-discrimination, the fulfilment of other rights such as the right to freedom of expression, the right to freedom of association, the right to freedom of residence,

⁹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) Article 11 (1).

¹⁰ There are a number of international instruments that provide protection of relevance to the right to housing. These include the: *International Convention on the Elimination of all forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 30 October 1975, except art 14 which entered into force 4 December 1982) art 5(e)(iii) (‘ICERD’), *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 8 September 1981) art 14(2)(h) (‘CEDAW’), *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 16 January 1991) art 27(3) (‘CRC’), and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, A/RES/45/158 (entered into force 1 July 2003) art 43(1)(d). The International Labour Organisation Conventions also provide protection for the housing rights of workers.

and the right to participate in public decision-making are considered 'indispensable if the right to adequate housing is to be realized and maintained by all groups in society'.¹¹ The *International Covenant on Civil and Political Rights* refers to the freedom from arbitrary or unlawful interference with a person's privacy, family, home or correspondence.¹² Other relevant civil and political rights include the right to life,¹³ liberty and the security of the person.¹⁴

In engaging with Australia's right to housing obligations at international law in terms of the sub-rights of affordability, accessibility and security of tenure, Henry Shue's¹⁵ triptych of the duties to respect, protect and fulfil rights provides a useful guide. These duties also constitute the three basic elements or legal obligations of the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*.¹⁶ In general terms this

¹¹ Committee on Economic, Social and Cultural Rights, *General Comment No 4 (1991): The Right to Adequate Housing*, UN ESCOR, 6th sess, annex 111, 114 UN Doc E/1992/23 (13 December 1991) para 9 ('*Committee on Economic, Social and Cultural Rights 1991*').

¹² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 10 March 1976) art 17(1) ('*ICCPR*'). The right to privacy is particularly relevant for the homeless and in possibly carrying out their personal activities in public spaces they can also be subject to 'move on' and other police powers.

¹³ Consideration of the relationship between the fundamental right to life and the right to adequate housing is important to ensure that the latter is not treated as merely a socioeconomic aspiration: Leilani Farha, Special Rapporteur, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, UN Doc A/71/310 (8 August 2016) 5.

¹⁴ *ICCPR* (n 10) arts 6 and 9.

¹⁵ Henry Shue, *Basic Rights* (Princeton University Press, 1980).

¹⁶ International Commission of Jurists, 'The Maastricht Guidelines on the violations of economic, social and cultural rights' (1998) (20) *Human Rights Quarterly*, 691.

means that governments have a duty to *respect* the right to housing through ensuring that laws and policies do not make the provision of adequate housing more problematic. A duty to *protect* could be exercised by seeking to prevent private actors from breaching the human rights of others such as through either greatly increasing rents or through forcibly evicting tenants. Most importantly, governments need to exercise a duty to *fulfil* their own human rights obligations through, for example, ensuring an adequate supply of affordable housing and shelter for the homeless. The CESCR considers while there are some immediate obligations such as preventing discrimination through a state's housing policy, the right to adequate housing can be progressively realised through 'deliberate, concrete and targeted' steps as part of an overall housing strategy and as a way of monitoring progress.¹⁷

III HOUSING AFFORDABILITY

Housing affordability was central to the CESCR's understanding of housing adequacy. It refers to the need for states to take measures 'to ensure that the percentage of housing-related costs is, in general, commensurate with income levels'.¹⁸ Despite the right to access affordable, adequate and appropriate housing being recognised in Australia's *National Action Plan* of the 1990s,¹⁹ a massive increase in

¹⁷ Committee on Economic, Social and Cultural Rights, *General Comment No 7 (1997): The Right to Adequate Housing*, UN ESCOR, 16th sess, art 11.1, paras 12 and 13, UN Doc E/1998/22 (20 May 1997).

¹⁸ Committee on Economic, Social and Cultural Rights, 1991 (n 9) para 8 (c).

¹⁹ Chris Sidoti, Human Rights and Equal Opportunity Commission, *Housing as a Human Right* (Human Rights Occasional Paper No 2, October 1996) 1, 6-7.

house prices since the early 2000s, especially in Sydney and Melbourne, has meant that this has not been achieved for many Australians. Australia is globally the fifth most expensive housing market²⁰ with house prices in Sydney and Melbourne rising by about 30 percent from 2001 to 2018. The median Sydney house price moved from 5.8 to 8.3 times the median household income while in Melbourne the ratio moved from 4.7 to 7.1.²¹

Despite the high prices, home ownership has remained the 'main game' in Australian housing policy and is the key beneficiary of the focus on the subsidisation of demand *for* rather than the supply *of* housing. Home ownership, constant from the mid-1960s to around 2016 but now declining, has been an important means by which housing costs, especially for older Australians, have been reduced.²² However, despite the support for homeowners over the past 30 years and record low interest rates, the percentage of homeowners owning outright has continued to drop.²³

²⁰ Organisation for Economic Co-operation and Development, 'Focus on house prices' (Web Page). <<http://www.oecd.org/eco/outlook/focusonhouseprices.htm>>.

²¹ Kate Raynor, Igor Dosen and Caley Otter, 'Housing affordability in Victoria' (Research Paper No 6, Parliamentary Library and Information Service, Parliament of Victoria, December 2017) 9.

²² Tax exemption for an owner-occupier's sale of her/his property as well as social security (assets test) concessions after retirement have encouraged home ownership.

²³ In the mid-1990s, 68 percent of households owned their home outright while in 2018 it was just 42 percent of households: John Daley and Brendan Coates, *Housing Affordability. Re-imagining the Australian Dream* (Grattan Institute Report No. 2018-04, March 2018); The census of 2021 revealed that this has now dropped to 31 percent of homeowners: Rachel Ong Viforj, 'More rented, more mortgaged, less owned: what the census tells us about housing', *The Conversation* (online, July 6, 2022)

With high house prices making it difficult for younger Australians to raise the necessary deposit to purchase a home,²⁴ these tax and other incentives have created inter-generational inequities while serving to fuel much higher rentals.²⁵ The relative disadvantages of those unable to purchase a home are exacerbated by the under-supply of social housing and tenancy laws that provide inadequate protection from landlords who are themselves often in receipt of tax benefits.²⁶ For older Australians who are either renting in the private market or have an unpaid mortgage at pension age,²⁷ their financial position can be even worse given the relatively low aged pension, itself predicated on pensioners being homeowners.²⁸ With the common law viewing residential tenancy in terms of freedom of contract and property

<<https://theconversation.com/more-rented-more-mortgaged-less-owned-what-the-census-tells-us-about-housing-185893?cid=108a2e030aac2637386f0a273b5b84a3>> (*Ong ViforJ*).

²⁴ The cost of mortgage insurance was another factor effectively shutting large segments of the population, especially those 25 to 34 years of age, out of owning their own home. From 1996 to 2021, the percentage of homeowners in this age group fell from 50 percent to 43 percent: Ong ViforJ (n 20).

²⁵ The cost of private rentals increased by 75.8 per cent for houses and 91.9 per cent for other dwellings between 2002 and 2012: Human Rights Law Centre et al, *Joint NGO Submission to Australia's 2nd Universal Periodic Review* (Joint Submission, March 2015) 2.

²⁶ Taxation policies, such as negative gearing and capital gains exemptions, favouring investors taking on mortgage debt to purchase houses have added to prices: Mark Berry and Tony Dalton, 'Housing prices and policy dilemmas: a peculiarly Australian problem?' (2004) 22(1) *Urban Policy and Research* 69, 75-6.

²⁷ The proportion of homeowners reaching retirement age while still paying off their mortgage has doubled over the past 20 years: Peter Martin, 'Paying off a home loan used to be easier than it looked. It's now harder', *The Conversation* (online, June 1, 2021) <<https://theconversation.com/paying-off-a-home-loan-used-to-be-easier-than-it-looked-its-now-harder-161873>>.

²⁸ Bruce Bradbury and Peter Saunders, 'Housing costs and poverty: analysing recent Australian trends' (2021) *Journal of Housing and the Built Environment* 1, 2.

rights,²⁹ the courts have been of little assistance to tenants in disputes with landlords; though tribunals have at least been prepared to entertain rights arguments when state-based bills of rights have been invoked.³⁰ Housing supply has also been a major problem from time to time,³¹ a subject of federal-state blame shifting and linked to an increasing population. A recent report has referred to a sizeable surplus of stock from 2001 to 2007 as well as more recently³² indicating that the supply problem is really about the nature and location of vacant homes.

For those who have managed to buy a home in Australia's overpriced market, they have experienced rising debt levels with a recent estimate placing Australia's housing debt as the second highest globally after Switzerland.³³ This estimate, however, was before the recent interest rate rises of 2022. When compared to the last period of high interest rates during the 1990s, these new hikes come with much higher current house prices and require a much higher share of income to service a

²⁹ Justice Kevin Bell, 'Protecting Public Housing Tenants in Australia from Forced Eviction: The Fundamental Importance of the Human Right to Adequate Housing and Home' (2013) 39(1) *Monash University Law Review* 1, 5 ('Bell').

³⁰ See for example Justice Kevin Bell in *Kracke v Mental Health Review Board (General)* (2009) VCAT 646, 793-4.

³¹ The National Housing Supply Council estimated there was a shortage of 228,000 dwellings across Australia in 2011 when compared to the underlying demand though this has been somewhat alleviated in recent years: John Daley and Brendan Coates, *Housing Affordability: Re-imagining the Australian Dream* (Grattan Institute Report No. 2018-04, March 2018) 1, 45.

³² Ben Phillips and Cukkoo Joseph, *Regional Housing Supply and Demand in Australia* (ANU Working Paper No. 1, November 2017) 1.

³³ Jennifer Duke, Domain, "'Perfect storm of issues' leaving Aussies on verge of mortgage crisis' (Web Page Article, 21 August 2018) <<https://www.domain.com.au/news/perfect-storm-of-issues-leaving-aussies-on-verge-of-mortgage-crisis-20170821-gy0k5g/>>.

mortgage. It will take people much longer to pay down their mortgage³⁴ with their debt expected to markedly increase.

The problems experienced in seeking to buy a home are mirrored by those who consider themselves 'locked out' and are forced to rent on the private market. Rental unaffordability as a contributor to poverty is, of course, a product of both low incomes and high rental prices. The potential for rental unaffordability to be a precursor of poverty is not restricted to those on income support payments or parents on a Family Tax benefit. From the 1980s, increasing numbers of low-income households have had to depend on the private rental market as public housing stock was reduced through government sell-offs. Federal governments responded by increasing the amount of funding provided through the *Commonwealth Rent Assistance Scheme* (CRA).³⁵ Even with the introduction of some regulation over the rents that landlords could charge, the CRA has often been inadequate. In addition to facing rising rents the CRA is predicated on the make-up of the household and does not differentiate between expensive capital city markets and the relatively cheaper regional locations. There have been recent calls to not only provide a one-off increase to the CRA but to index the payment

³⁴ Joey Moloney and Brendan Coates, 'The housing game has changed – interest rate hikes hurt more than before', *The Conversation* (online, 7 June 2022) <<https://theconversation.com/the-housing-game-has-changed-interest-rate-hikes-hurt-more-than-before-184553>>.

³⁵ The CRA is a non-taxable income supplement payable to people receiving a social security benefit who rent in the private rental market or in community housing. Indexed to the Consumer Price Index, it has fallen behind private market rents.

to average rents by geographic location to prevent gaps between it and rental increases from widening.³⁶

The Rudd Labor government's *National Rental Affordability Scheme* from 2008 to 2014, with its incentives to private sector investment to build affordable rental housing, did boost the delivery of affordable housing. However, it neither connected to the funding of public housing nor provided for people solely or primarily dependant on income support.³⁷ A similar 2018 Coalition government scheme through a *National Housing Finance and Investment Corporation* sought to create a private investment pathway into social housing for low-risk returns and, while supporting the development of many new and existing properties, also fell short of what was required to meet the demand for social housing.³⁸ A recent study found that in 2016 there was an acute and growing shortage of affordable/available private rental dwellings for those with the lowest quartile of household income and 80 percent of those renting were paying unaffordable rents.³⁹ Many people in receipt of CRA as well as perhaps the Family Tax Benefit were found in 2021 to be in rental properties that were unaffordable while, nationally, 46 percent of

³⁶ Anglicare Australia, *Rental Affordability Snapshot* (National Report, April 2022) 12 (*'Anglicare Australia'*).

³⁷ Alan Morris, 'The Lack of a Right to Housing and its Implications for Australia' (2010) (65) *The Journal of Australian Political Economy* 28, 50.

³⁸ Yates (n 5) 220.

³⁹ Kath Hulse et al, *The supply of affordable private rental housing in Australian cities: short-term and longer-term changes* (AHURI Final Report No. 323, 11 December 2019) 4, 5.

households receiving CRA were considered to still be in housing stress with housing costs at 30 percent or more of their income.⁴⁰

With many people unable to purchase in their chosen locations where they see better access to jobs, transport and other services, their decision to rent in these areas results in pushing out lower-income households from better located rental dwellings.⁴¹ Together with the supply of land being largely in private hands, the result has been less available rental properties overall. This has helped to force up rents while also pushing these lower-income households into areas where there are perhaps fewer, if not inadequate, services as well as lengthy commutes to jobs.

IV SECURITY OF TENURE

The CESCR's minimum core obligations as to the right to adequate housing include a prohibition on unjustified forced eviction as well non-discrimination in housing.⁴² State parties to the ICESCR are required to not implement 'deliberately retrogressive measures' which can be translated into regulating to prevent forced evictions occurring while also proactively providing alternative housing should this occur.⁴³ Within the discretion given to state parties, governments have a responsibility to regulate to ensure that any action to evict is done with

⁴⁰ *Anglicare Australia* (n 33) 9.

⁴¹ *Yates* (n 5) 219.

⁴² Committee on Economic, Social and Cultural Rights 1991 (n 9) paras 6, 8.

⁴³ Committee on Economic, Social and Cultural Rights, *General Comment No 3 (1990): The Nature of States Parties' Obligations*, UN ESCOR, 5th sess, art 2, para 9, UN Doc E/1991/23 (14 December 1990).

due process and addresses the rights of the tenant. Where governments are the landlords, as in the public housing sector, their duty is even more direct and they can be expected to act in a way that is neither arbitrary, unreasonable, or disproportionate in the circumstances. Residential tenancy laws are governed by state or territory legislation, but these statutes allow most public housing tenants to be on periodic tenancies and liable to forced eviction. Only in the Australian Capital Territory are courts provided with a discretion to refuse to make an eviction order on the basis of an individual's circumstances and only in the ACT are public housing landlords required to reconcile a proposed eviction with its human rights obligations to the tenant.⁴⁴

The issue of security of tenure is important not only for those in a condition of homelessness but also for the increasing numbers of people who are either renting or vulnerable to interest rate movements as they purchase their own home. Australia's long-standing dependence on the private market to provide rental properties and its lack of an integrated rental market system as in Germany and the Netherlands,⁴⁵ raises questions about rental affordability and availability and in turn issues around security of tenure. These issues include whether tenants feel they have a choice, whether they can stay in the property, whether they have control over their tenancy arrangements, whether they consider they can meet current and future costs of the tenancy, and

⁴⁴ Bell (n 26) 36.

⁴⁵ These countries' leases are typically longer with longer periods of notice and more limited reasons to terminate a lease: Jane-Frances Kelly et al., *Renovating Housing Policy* (Grattan Institute Report, October 2013) 20.

whether they consider the dwelling and locality to be appropriate for their needs.⁴⁶ In Australian capital cities, and more recently in major regional centres, low vacancy rates have given landlords more bargaining power in relation to leases which are typically only for 6 or 12 months. This provides landlords with maximum flexibility to increase rent or sell the property.

V SOCIAL HOUSING AND ITS RESIDUALISATION

Social housing, be it public housing provided by government or community housing, has been the most marginalised sector and has suffered from successive governments focusing on the individual as a consumer. The provision of social housing has been insufficient to meet demand with state governments reducing their provision of public housing to adopt an indirect role in supporting social or community housing models and providing rental support. Apart from the Rudd Labor government's short-lived funding support through its *National Partnership Agreement on Social Housing* to build 2000 social housing dwellings, federal governments since the 1990s have relied on non-government organisations to provide housing⁴⁷ and these have, not surprisingly, been unable to meet the demand. The 2016 census

⁴⁶ John Minnery et al, The Australian Housing and Urban Research Institute (AHURI) *Tenure security and its impact on private renters in Queensland* (Final Report No. 27, January 2003).

⁴⁷ During the Howard Coalition government years, the public housing stock declined by over 50,000, from just under 390,000 homes in 1995 to 335,259 in 2005 while during the Rudd/Gillard Labor government the proportion of community managed social housing increased from 10 percent to 15 percent: Lucy Groenhart and Terry Burke, 'What has happened to Australia's public housing? Thirty years of policy and outcomes, 1981-2011' (2014) 49(2) *Australian Journal of Social Issues* 127, 130.

revealed around 195,000 households were on social housing waiting lists with 47 percent of these households having waited for more than 2 years.⁴⁸

People in the lowest income category, be they employed or on income support, experience intense competition for social housing including from disabled persons and other disadvantaged persons such as homeless and Indigenous persons. The result was to continue an earlier trend that saw the proportion of those in 'greatest need' being housed in social housing increase from 36 percent in 2003-4 to 77 percent in 2012-13.⁴⁹ The preference to accommodate people with complex needs is not a measure of the success of social housing policies but rather, given the inadequate supply of such housing, an indicator of the further residualisation of social housing. Studies have shown that due to the targeted nature of public housing, tenants in this sector are at higher risk of poverty than any other group.⁵⁰ Giving preference to applicants with complex needs as providers seek to address one social issue is

⁴⁸ Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness 2016* (Catalogue No 2049.0, 14 March 2018) 181 ('ABS 2016').

⁴⁹ Australian Institute of Health and Welfare, *Housing assistance in Australia 2014* (Report, Catalogue No. HOU 275, 15 October 2014). This has occurred in all categories of public housing, community housing and state-owned and managed Indigenous housing while one in three social housing households had a person with a disability: Australian Institute of Health and Welfare, *Australia's Welfare 2019 in brief* (Report, Catalogue No. AUS 227, 11 September 2019); Australian Institute of Health and Welfare, *National Social Housing Survey: detailed results 2016* (Report, Catalogue No. HOU 290, 10 August 2017).

⁵⁰ Where 42 percent of those living in public housing were in poverty in 2001 this had increased to more than 45 percent by 2014: Francisco Azpitarte and Guyonne Kalb, 'Measuring Income Poverty in Australia: A Review of Methods and Recent Trends' in Peter Saunders (ed), *Revisiting Henderson: Poverty, Social Security and Basic Income* (Melbourne University Press, 2019) 179, 194.

contributing to the exacerbation of other problems by increasing the waiting list for other applicants. Many who remain on this list are already exhibiting various indicators of poverty with a strong likelihood of falling into homelessness.

VI HOMELESSNESS AND POVERTY

Homelessness is not only the most extreme case of the violation of the right to adequate housing⁵¹ but is the most obvious example of where housing, or rather the lack of secure affordable and adequate housing, is indicative of being in or close to a condition of poverty.⁵² The 2016 census recorded over 116,000 registered homeless people. This represents an increase of 4.6 percent from the previous 2011 census⁵³ while, in light of domestic violence crisis levels in Australia, the actual figure could undoubtedly be much higher.⁵⁴ Successive governments have adopted a welfare approach rather than a rights-based approach⁵⁵

⁵¹ Committee on Economic, Social and Cultural Rights 1991 (n 9) annex 114, para 7.

⁵² For the UN, homelessness is ‘a condition where a person or household lacks habitable space with security of tenure, rights and the ability to enjoy social relations, including safety’: UN Economic and Social Council, *Affordable Housing and Social Protection Systems for All to Address Homelessness: Report of the Secretary-General*, 58th sess, Agenda Item 3(a), UN Doc E/CN.5/2020/3 (27 November 2019, adopted 10-19 February 2020) 2 [4]. The Australian Bureau of Statistics defines a homeless person as a person without suitable accommodation alternatives and their current living arrangement is in a dwelling that is inadequate, has no tenure or is short and not extendable, or does not allow them to have control of, and access to space for social relations: Australian Bureau of Statistics, *Information Paper – A Statistical Definition of Homelessness* (Catalogue No 4922.0, 4 September 2012) 7.

⁵³ ABS 2016 (n 45).

⁵⁴ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia 2018* (Report, 28 February 2018) 181 (‘AIHW 2018’).

⁵⁵ A welfare approach is focused on the perceived needs while a rights-based approach sees claims as entitlements with claimants as engaged participants.

seeing support for the homeless as being akin to ‘gratuities’⁵⁶ rather than allowing homeless people to participate in the decision-making, speak for themselves and be part of any resolution of their problems.⁵⁷ The approach to homelessness, influenced by neoliberal precepts,⁵⁸ has focused on the individual homeless person and her/his circumstances and/or behaviour and likely to be crisis-driven without an overall strategy to tackle the problem. Even the Rudd Labor government’s *National Partnership Agreement on Homelessness*, that replaced the more individualised service model of the *Supported Accommodation Assistance Program* and which aimed at a more rights-based model to support self-reliance and address structural causes, fell short of what was needed. A lack of exit points through to affordable housing for the homeless continued and the structural or systemic issues around homelessness were not addressed.⁵⁹

The failure of governments to recognise the interconnected nature of the housing market understandably impacts the homeless more than any other sector. While some of the causes as to why they have found themselves in this situation may be specific to the individual such as a disability or the result of domestic violence, others are likely to be the

⁵⁶ Philip Lynch and Jacqueline Cole, ‘Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation’ (2003) (4) *Melbourne Journal of International Law* 139, 140.

⁵⁷ Tamara Walsh, *Homelessness and the Law* (The Federation Press, 2011) 194.

⁵⁸ Wendy Larner, ‘Neoliberalism, Policy, Ideology, Governmentality’ (2000) 63(1) *Studies in Political Economy* 199, 205.

⁵⁹ Anne Coleman and Rodney Fopp, ‘Homelessness policy: Benign neglect or regulation control?’ in Chris Chamberlain, Guy Johnson and Catherine Robinson (eds), *Homelessness in Australia. An Introduction* (UNSW Press, 2014) 11, 26.

product of the systemic failure to provide affordable and adequate housing for people on low to middle incomes. In a market of inflated house price and rents and grossly inadequate social housing, the important issue for the homeless is still one of affordability rather than availability of housing.⁶⁰ Considering the categories of people who risk falling into a situation of homelessness has expanded in recent years,⁶¹ naturally that risk also increases as many homeless people begin to identify as belonging to more than one vulnerable grouping.

VII CONCLUSION

To understand the role of the housing market in contributing to people finding themselves either in a state of poverty or heading in that direction, it is necessary to appreciate not only that it is an interconnected market between home ownership and homelessness but that laws and policies in one sector can have serious implications for the market as a whole. There are vulnerabilities to be found throughout the market from the homeowner seeking to meet her mortgage costs

⁶⁰ Justice Kevin Bell, 'Homelessness and Human Rights in Australia' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Lawbook Company, Vol 2, 2021) 241, 249.

⁶¹ Older women are now the fastest growing cohort experiencing homelessness even without the recognised connection between domestic violence and homelessness. Together with the disabled and Indigenous persons, young people under 24 years of age also feature strongly in homelessness statistics: Australian Human Rights Commission, *Older Women's Risk of Homelessness: Background Paper* (Background Paper, April 2019) 12; AIHW 2018 (n 51) xi, xii, 94; National Association of Community Legal Centres and Kingsford Legal Centre, *Review of Australia Fifth Periodic Report under the International Covenant on Economic, Social and Cultural Rights* (Joint Submission, May 2017), 79.

through to the person trying to find even temporary shelter and finding themselves in inadequate, unsuitable and often dangerous accommodation. The contribution of housing costs to dragging people into or towards poverty is not just a result of the private market's dominance of the sector, though that has been a major factor, but of the failure of policymakers to appreciate the importance of housing as shelter and as a home, rather than a tradeable commodity. Housing decisions have largely been left in the realm of policy and politics which has resulted in ad hoc, populist and often inappropriate policies which have, more often than not, fed higher house prices while ignoring the impact of these policies on those either renting, seeking social housing or finding themselves in some form of homelessness.

Australian governments, other than briefly during the Rudd Labor government, have not considered the development of an overarching housing strategy. Governments have instead been keen to appease what they see as the majoritarian interests of those already owning a home and desirous of ever-increasing house prices. At the same time occasional, and generally inadequate, assistance has been provided to those seeking to enter that market or in need of some rental assistance regardless of the obvious contradictions of these policy positions.

What is needed is specific legislation that looks at the housing market as an interconnected whole and which takes into account the contribution of housing costs to the cost of living of many, regardless of their income level. The international standard of the right to adequate housing and the three elements of a state's obligations to

respect, protect and fulfil this right will provide a useful guide for this legislation. As Australia contextualises the application of these standards, the adoption of ‘deliberate, concrete and targeted steps’ should focus on legislating to remove market distortions, such as the tax incentives for investors and favourable tax treatment of home ownership, and their impact on both revenue and the social security system. Any shared federal-state funding arrangements should address the supply of affordable, available, appropriate and secure housing rather than feeding demand for higher priced housing.

Australia’s current institutional framework is currently not up to the task of securing these rights given its lack of constitutional protection or a federal bill of rights, the limitations of administrative and antidiscrimination law, limited state tenancy laws and the federal parliament’s weak rights monitoring mechanisms. In the immediate term, a national housing statute is needed that will aid the cultural shift to recognise both the structural inequality coming from the current housing market and, through adopting a rights lens, the role of housing as shelter if not a home. It should place government in the driver’s seat to regulate affordability across the market and set targets aimed at reducing housing’s potential as a major necessary cost pushing people into poverty. Such a strategically designed housing law would at least be a good start.

AN INTERVIEW WITH KARYN WALSH AM*

Asha Varghese

In this interview social justice advocate Karyn Walsh AM, founding member and CEO of Micah Projects,¹ discusses the role the legal system can play in alleviating poverty and homelessness. She discusses the indirect and direct ways homelessness is criminalised and how attitudes have changed over time towards homelessness. She also explains the importance of supportive housing and legal representation for those who are homeless or living in poverty.

PB: Karyn Walsh, thank you very much for agreeing to be interviewed for the 2022 edition of *Pandora's Box: Poverty and the Law in Australia*. To start things off, what inspired you to start Micah Projects?

KW: It was a long time ago now, but it wasn't just me. I belonged to a community, the St Mary's community at South Brisbane which was a sort of Catholic community that had people from all over Brisbane come to it, and

* In 2016, Karyn Walsh AM was awarded a Doctor of Social Work and Nursing honoris causa by the University of Queensland in recognition of her work in the not-for-profit sector for over 40 years. In 2017, Karyn was awarded a Member in the General Division of the Order of Australia for her work in the homelessness sector and in mental health support.

¹ Micah Projects is a Brisbane based not for profit organisation committed to social justice through service provision and advocacy to improve the lives of disadvantaged and marginalised people. Micah Projects is committed to integrated services which provide individuals and families with resources, services and opportunities to have a home, connection with their families and a quality of life.

there was a lot of interest in how we as a group could create a not-for-profit. People wanted us to be both providing services and advocating, and there was a gap in that, at that moment there were homeless people sleeping in the backyard, there were homeless people sleeping around the church. Lots of people had a passion for social justice, so I was just lucky to be part of a group that had a vision and then we have tried to be true to that vision for 27 years now. I think what inspires me is that we've all got to collectively work to have a more socially just society, it doesn't just happen, you've got to create it.

PB: Micah Projects provides social justice through service provision, but it also has a particular focus on advocacy. Why do you think legal advocacy in this space is so important?

KW: I think the intersection between health, human services, and the law is really under done in Australia. There are health justice initiatives, there are people advocating about poverty and justice, but they're often not embedded in services. I think that we need both. We need those advocacy groups that are fantastic, we draw on their work all the time. We contribute to it, but we do need more legal representation and legal engagement. Whether it's housing, or whether it's being fined for being a public nuisance, or whether it's being charged for

issues that really you didn't have the capacity to know because you're so mentally unwell, and domestic violence; we often give advice to people who are poor, but we don't represent them. I think that we need more work to be done around how we could represent and provide services together. The Legal Aid budget has been great in this budget cycle, we've seen an increase in the budget for Legal Aid, but Legal Aid is really stretched. People are going to court without representation. You need some specialist lawyers who can work with social services and health providers to get the information they need for a fair and equal legal system. It's got to get that balance between accountability as well as vulnerability.

PB: A service like Micah Projects emphasises the need for individualised support and culturally sensitive care, do you think the Government also has this same holistic approach when providing services?

KW: I think we're all at fault of falling into silos, and it's something that we've got to actively work against every day. We try to work in partnership with Indigenous managed or controlled organisations. We want to be a linker to those organisations, but we also don't want to discriminate. We know that over 30% of people who are homeless are Indigenous, so we really to look at how do we get these partnerships going so that people have choice, but there's also transitions. Sometimes people

will come to our service, and we work with them and say what about going to a culturally led service, and sometimes that takes time. Whilst we really advocate and want Indigenous self-determination, and Indigenous led agencies leading the way, we know that there's a pathway there. That pathway requires mainstream services not to discriminate and provide culturally sensitive services whilst working with Indigenous self-determined organisations.

PB: I was wondering if you could explain the intersection of mental illness and poverty as you see it, and why Micah Projects provides support specifically for those with mental illness?

KW: Mental illness is a very broad term and just about 100% of the people we engage with, their health and well-being is compromised because of homelessness. That could be from acute anxiety, trauma, being exposed to violence whilst being homeless, sexual assault. Or it can be that they have a diagnosed mental illness, have been in acute care, have been discharged without anywhere to go. We don't have the right housing type that can support people to sustain a tenancy who have significant mental illness, but also homelessness creates mental illness. It is a traumatic experience.

PB: Can you think of any ways that the legal system exacerbates the risk of poverty and homelessness for those who have mental illness or a disability?

KW: Well, it's a very hard system to navigate. People with mental illnesses behaviour if they're not getting a assistance to medicate, sometimes their behaviour can lead to breaches of the law, but it's not understood what's going on. I think that when people's capacity is looked at in terms of what capacity did they have, and what happened in this incident, that's something that you need legal advice, as well as mental health contribution, as well as social services. If we're going to support people properly, we need to bring those disciplines together. People do have to be accountable when harm has occurred to others, or property damage has occurred, but what have been contributing factors is also something that needs to be considered and looked at. Then hopefully, instead of it just being a brief for a court case, it could be a direction of setting about what are the services this person needs around them so that they can live more independently without breaching the law, without their behaviour having an impact on other so much. Often the correlation is unmanaged mental illness or unmanaged medication, there's a lot of things that contribute to it. Now some of them are personal choices, but a lot of them aren't.

PB: In your work how have you seen homelessness directly or indirectly criminalised?

KW: It can be indirectly or directly I suppose. Certainly people going to jail for non-payment of fines. Or even the whole idea that a fine is a punishment, when you've got no money, is ridiculous. When people break laws, society also has to accept that we're creating broken people by not having the things in place that people need due to their capacity, their illness, their disability. There's lots of impacts. Drug and alcohol is criminalised when we really to look at where that's not working. How could we have a better holistic health response, alongside the law and order response. We see people who are homeless make a decision to try and do something about their addiction, they go to rehab for whatever period of time, then they come out and their homeless. Drug addiction is often connected with trauma, not always but often. That trauma for some of the people we work with goes right back to their childhood. Many people applying for redress who were in care as children, and now as adults have had the lifelong impact of being in and out of prison, having addictions to try and deal with the pain and deal with the consequences of that trauma.

KW: I don't think that's really understood in our society, that trauma does have impacts that are lifelong. It's not an excuse for some of the actions people take or violence

against other people but when people are left to manage that trauma on their own, the consequences aren't going to be good. I think we need a much more trauma informed legal system, a much more trauma informed health system and social services. If we did that we should provide some sort of trauma informed network to how we all deliver services to people, and understand the links between their childhood and their adulthood, and the experiences in between. People are still experiencing sexual assault as adults and it often doesn't get responded to or they don't report it. Many homeless people, 50% of the homeless people we've surveyed at intake have experienced violence whilst their homeless. Sometimes the perception is that homeless people are violent, people who are homeless are also the victims of violence.

PB: How do you think a homeless person's access to justice is affected in terms of access to legal representation?

KW: We support a lot of people to report crimes that have happened to them and also supporting people who committed crime to have legal representation. That's really important. There's a pattern and accumulation of things that need to be considered, and also that people are being charged for the right crimes. Sometimes people need representation right at that point, because there could be a whole lot of things being said and done that

may not be fact. I think that legal representation is really critical for families who are homeless and are engaged with the child protection system or have their children removed. I think legal representation is really important because often we're confusing neglect with structural neglect, we're expecting families to go and find all these resources that just don't exist. And child safety officers are put in a position of do they remove the children because of these structural issues like housing, lack of access to healthcare.

We would like to see a child protection system that's much more engaged with representation of families, as a special legal support not only through Legal Aid. Basically, what representation of parents needs is the process being followed in a fair and reasonable way not whether they're going to win a case or not. If a child does have to be removed, all the appropriate things should be in place. We're not advocating that shouldn't happen but what we need is a system that gives fairness to both parents as stakeholders as well as to what the department's decision-making is, and through that we would get better outcomes, I think. There are children that should be removed that are maybe not, and there are others that it's really other things out of the parent's control that's putting them in a position where they don't have a roof over their head. The trauma of removing a

child has to be part of the equation. How can we galvanise those resources to make sure everyone gets representation that is fair and administratively fair, and the power imbalance is reduced? We need different models of services. There are new models emerging where you have a social worker, a lawyer, and a peer advocate and they work with the family and the child protection officers and the courts to really develop a realistic plan, that puts responsibility on everybody. To say that in the decision making we need to accept that rents are too high, and we need to look at a way of resolving this and how are we going to help the family get access to the products that the Department of Housing has, to enable them to navigate the system. It's very difficult for families with young children to do all that navigation, and there are consequences that are quite severe that people feel powerless and are traumatised by the experience. Whereas, if there was much more equal balance of resources to parents' representation and some new models of doing that, not just relying on the Legal Aid model.

PB: What is the importance of supportive housing, or an integrated approach to housing?

KW: We've got such a failure in our housing system and just placing people in social housing unsupported. There's a lot of people that just need affordability, they just need

to pay 30% at most of their income on rent, they can navigate the community services. Once they're linked in they might need short term support, you link them in to those services, they're engaged and they do well and are able to access mainstream services. But there's a lot of people, there's an overrepresentation of Indigenous people, people with a mental illness or disability who are homeless because when they're in housing they can't get support. They haven't got enough support to sustain their housing. Brisbane Common Ground is the first intentionally built supportive housing, and you do need to go to scale to do it, so that it is more affordable and cost effective I suppose.

You need to embed healthcare and social support in with tenancy sustainment and doing that in a building that has security, you're running the building like you would a normal high rise. It's normalised, everybody doesn't have the same diagnosis or anything like that, you have a mix of people, but you've got that constant engagement of people with services that are going to maximise their ability to sustain tenancy. There are some people where their capacity doesn't enable them to have a tenancy really, but we put them in situations where they've got to understand and know their tenancy obligations. They can still live independently but they need people watching and supporting, they can easily be exploited, they can

easily not understand the consequences of being asked to do something, so you really need that sense of protection and support around people as well as fostering their independence in the community. Not everyone has the same capacity, whereas, we treat everyone like they've got to sustain the tenancy and do this and do that. You need different options, Brisbane Common Ground is one model but there are many models and you need a variety. Some would be smaller scale, some would be mixed in with other social housing where are some are supportive units. You can have supportive units in private real-estate, but that support is embedded. Some people will be fine if that support is outreach, but there is a group of people where that support does need to be onsite, and it's not based on referral. It's just based on, you live here, you get this support. Supportive housing is a critical parallel setting to social housing. You need a percentage of our social housing to be supportive housing to make sure we redress how many people with mental health and disability, how many Indigenous people, how many with culturally specific needs are on the street.

PB: Do you think the indirect and direct criminalisation of homelessness has gotten better or worse over time, do you think attitudes have changed?

KW: I think that we have seen significant change. Brisbane City Council and institutions that can fine people if

they're sleeping in cars and can move people on, all this creates an enormous amount of anxiety. It's harder to work with people because you've got to keep finding them, and you lose contact and people haven't got phones that are charged and all that sort of stuff. They get disheartened because the system isn't responding. I think it could be better. I think it should be much more like where's the lawyer before you charge some people. The police should be actively making sure they have legal representation when they're questioning them. Certainly for people on the street there's been a shift in that a lot of police do refer first. People need de-escalations skills. Anyone who has intergenerational trauma, experiences racism on a daily basis, experiences gender-based violence, they're going to behave in a particular way when they're confronted with authority. Sometimes that is really misunderstood, and it ends up being criminalised when in actual fact it's an appropriate response to a traumatic situation and to the fear of someone in power. I think there needs to be a lot more focus on how we can create safe engagement that de-escalates that behaviour before charging. All the neuroscience will tell you it's involuntary. It's someone's body and brain reacting to fear and threat, and police are, whether like it or not, images of fear and threat to many people.

PB: For my closing question, is there any other country that Australia should look towards in terms of tackling homelessness and poverty?

KW: There's elements of great innovation all over the world. What we know about homelessness and poverty is that it takes leadership. It takes political leadership, community leadership, NGO leadership, and that we need to constantly understand the experiences of people that are living it. We can all have our judgements about it but we need to ground ourselves in the reality of people's lives and think well how would we be if we were in that situation?

There's some threads, like a housing first approach. Australia's social housing has dropped to 4% of the rental market. We have to keep investment growing. We've got a particular problem with the rental crisis, and that's not going to be easy to resolve. At the same time, we've got to push ahead with building or refurbishing and creating supply somehow. And that takes good leadership and cooperative leadership, all levels of Government have to be involved. We've come through the last 10 years, where it's just been blaming each other. The Commonwealth blaming the States or Councils. Like all over the world you see this dynamic of who's to blame. Where people are really making progress are where they say we're going to focus on solutions. We're

not going to be punitive, we're not going to be demonising people who are homeless. Poverty is a structural reality and COVID has made it worse around the world. It's made it worse for people living in poverty, and it's certainly made it worse for access to healthcare for people who need it. Whilst the mainstream solutions sound great, like telehealth, they're not the right models for the more vulnerable.

I think we have to keep health inequality and poverty, and access to justice, as 3 really important aspects of needs to happen. Most countries that are progressing are really taking on board the whole trauma informed approach to policing, as well as to human services and healthcare. We know that if you get it right, the benefits to the individual are greatly improved, there's reduced reliance. When it was the first year people were living at Brisbane Common Ground, the usage of the Watchhouse was dramatically reduced. We know that there's economic value in doing it differently, but we have to make we don't only invest in services, we need to invest people having an adequate income.

During COVID when people had double the income and had access to housing, it didn't break the country. You've got to really look at the structural things, try and prevent people from becoming homeless in the first place, reduce the number of people that are homeless, and then keep

people housed. They're the elements internationally. Governments that are prepared to look at the cross-government costs, not just the silo costs, like what's the cost of prisons, how much are we putting into healthcare? I think we need that leadership that says these problems are solvable, we just need to find ways of getting through it. Housing is different to poverty in the sense that we'll probably always have poverty, but you don't always have to have homelessness. And if you do have homelessness, it should be rare, brief, and non-reoccurring.

POVERTY, DOMESTIC VIOLENCE AND SOCIAL SECURITY LAW: THE PROBLEM WITH THE COUPLE RULE

Dr Lyndal Sleep*

Victims/survivors of domestic and family violence (DFV) often rely on social security payments for financial support when trying to leave a violent relationship. However, women who have been affected by DFV are more likely to experience difficulty accessing welfare services compared to women who have not experienced violence. The couple rule, Social Security Act 1991 (Cth) section 4(3), plays a significant role in this hardship by tying women's access to social security payments to the income and assets of the perpetrator. This article discusses some of the ways that the couple rule in Australian social security law intersects with the lived realities of DFV, showing how it further entrenches the vulnerability of survivors, and can allow perpetrators to weaponise administrative law processes to further control and harm women. The rule uses five criteria to identify a relationship - financial, social, sexual, household and commitment. This article demonstrates how each couple rule criterium has difficulty reflecting DFV in the decision making process, and also has interpreted some of the realities of DFV as indicators of a "relationship" effectively targeting women survivors with social security debts and/ or imprisonment for fraud. The article concludes with a call for the end of the couple rule in Australian social security law.¹

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I INTRODUCTION

Domestic and family violence (DFV)² in Australia and internationally is widespread, persistent, a devastating human rights violation and a major health and welfare issue. In Australia, the latest Personal Safety Survey (PSS) reported 1 in 4 women (23%) experienced DFV by a current or past intimate partner since the age of 15.³ DFV is an act overwhelmingly committed by men against women and children, and leads to severe health, psychological and social consequences for women and their children.⁴ The need for effective justice and system responses at all levels is critical.⁵

Victims/survivors of DFV often rely on social security payments for financial support when trying to leave a violent relationship and when

² This article adopts the definition of domestic violence used in Council of Australian Governments, 'The National Plan to Reduce Violence against Women and their Children 2010-2022' (Council of Australian Governments, 2011), that "domestic violence includes physical, sexual, emotional and physiological abuse". Domestic violence has been interpreted broadly to include violence experienced in domestic relationships, with a particular focus on violence perpetrated by a current or past intimate partner.

³ 'Personal Safety, Australia', *Australian Bureau of Statistics* (Web Page) <<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>>

⁴ See Australian Institute of Health and Welfare, 'Family, Domestic and Sexual Violence in Australia 2018' (Australian Institute of Health and Welfare, 2018); Julie Ayre et al, *Examination of the Burden of Disease of Intimate Partner Violence against Women in 2011* (Australia's National Research Organisation for Women's Safety, 2016); Shann Hulme, Anthony Morgan and Hayley Boxall, 'Domestic Violence Offenders, Prior Offending and Reoffending in Australia' (2019) (580) *Trends and issues in crime and criminal justice* 1

⁵ Australian Institute of Health and Welfare, above n 3; United Nations, *Sustainable Development Goals: Ending Violence Against Women and Girls* <<https://www.un.org/sustainabledevelopment/ending-violence-against-women-and-girls/>>

trying to establish an independent life for themselves and their dependents.⁶ Social security payments are important for increasing the resilience of low-income families. In the context of DFV, it provides material means of escape and alleviates poverty for many women.⁷ However, Cortis and Bullen⁸ report that women who have been affected by DFV are twice as likely to experience difficulty accessing welfare services compared to women who have not experienced violence.

In Australia, access to social security payment is determined by a couple's joint income and assets. In the context of DFV, a victim/survivor, if married or considered a member of a couple, will have her income and assets assessed with those of the perpetrator's. The couple rule in Australian social security law, *Social Security Act 1991* (Cth) section 4(3) (herein referred to as "the Act" or "the rule"), thus ties women's access to social security payment to the income and assets of the perpetrator.⁹

⁶ Ilsa Evans, 'Battle-Scars: Long-Term Effects of Prior Domestic Violence' (Centre for Women's Studies and Gender Research, Monash University, 2007); Diane M Purvin, 'At the Crossroads and in the Crosshairs: Social Welfare Policy and Low-Income Women's Vulnerability to Domestic Violence' (2007) 54(2) *Social Problems* 188.

⁷ Natasha Cortis and Jane Bullen, 'Building Effective Policies and Services to Promote Women's Economic Security Following Domestic Violence: State of Knowledge Paper' (07, Australia's National Research Organisation for Women's Safety, 2015), 17.

⁸ *Ibid*, 32.

⁹ Lyndal Sleep, 'Domestic Violence, Social Security and the Couple Rule' (Australian National Research Organisation for Womens Safety (ANROWS), 2019) ('Domestic Violence, Social Security and the Couple Rule'); Lyndal Sleep, 'Female Dependents, Individual Customers and Promiscuous Digital Personas: The Multiple Governing of Women through the Australian Social Security Couple Rule'

In the application of this rule, DFV is rarely treated as an exception.¹⁰ Sleep found that of those who had contested a couple rule decision at the Administrative Appeal Tribunal (AAT) between 1992 and 2015, almost all were women and one fifth of them had experienced DFV.¹¹

This article will discuss some of the ways that the couple rule in Australian social security law intersects with the lived realities of DFV, showing how it further entrenches the vulnerability of survivors, and can allow perpetrators to weaponise administrative law processes to further control and harm women. First, it outlines the couple rule. Second, some of the realities of DFV for women will be unpacked in consideration of the couple rule criteria: financial, social, sexual, household and commitment. This will demonstrate how the criteria do not just have difficulty reflecting DFV in the decision making process, but can actually interpret some of the realities of DFV as indicators of a “relationship” and effectively target women survivors. Further, this article shows how the couple rule criteria has been weaponised by some perpetrators to extend their control over women. These processes often further entrench women’s economic, physical and emotional precarity, entrapping them in violent relationships in circumstances where access to independent social security payment may have provided financial means to leave and/or mitigated the harms of financial abuse in the

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<<https://doi.org/10.1177/02610183221089265>> (‘Female Dependents’).

¹⁰ Sleep ‘Domestic Violence, Social Security and the Couple Rule’ above n 8.

¹¹ Lyndal Sleep, *Sex-Snooping in Australian Social Welfare Provision: The Case of Section 4(3) Surveillance* (PhD Thesis, Griffith University, 2016), p. 104-5.

relationship. This article concludes by pointing out that while the Australian Department of Human Services has made some attempts to mitigate the harm the rule can cause women in situations of DFV, these changes do not go far enough. To avoid the harms of the couple rule, a re-think of the Social Security Act's dual income eligibility assessment is needed, moving towards assessing people as individuals rather than as couples. This would render the couple rule obsolete and sever the link between a DFV survivors' access to social security payment and the income and assets of the perpetrator.

II THE COUPLE RULE

Australia has a national social security system which provides regular payments to eligible people. Eligibility is means-tested and depends on both income and assets. If a person is a member of a couple, then eligibility is determined jointly, that is, a couple's income and assets are assessed jointly. In addition, the amount paid varies according to whether recipients are single or in a couple, with single people receiving more than half the couple rate to account for the greater costs of living alone.

However, it is not always clear whether a person should be considered single or in a couple for the purpose of receiving social security payments. For example, a person might be in a de facto relationship, or married, but recently separated.

The couple rule provides legislative guidance for deciding if a person is a member of a couple for social security purposes.¹² The rule identifies five criteria that must be considered. These are:

- financial aspects of the relationship;
- nature of the household;
- social aspects of the relationship;
- presence or absence of a sexual relationship; and
- the nature of the commitment.¹³

If a person is found to have received a single payment, and the Department decides that they were a member of a couple according to the rule, their payment could be terminated, they could be made to repay any overpayment (social security debt), and/or be prosecuted and imprisoned for social security fraud.

¹² The couple rule criteria updated the cohabitation rule, which focused on denying eligibility if a woman was living 'with a man as his wife on a *bona fide* domestic basis although not legally married to him' (*Social Services Act (No. 3) 1975* (Cth) s 7 Interpretation). The cohabitation rule was first legislated with the new women's only Sole Mother's Pension, which was available to single women only. The cohabitation rule received heavy criticism for being invasive to women and difficult to apply in context (Mary Jane Mossman and Ronald Sackville, 'Cohabitation and Social Security Entitlement' in Susan Armstrong, Mary Jane Mossman and Ronald Sackville (eds), *Essays on Law and Poverty: Bail and Social Security*. (AGPS, 1977). Alan Jordan, 'As His Wife: Social Security Law and Policy on De Facto Marriage' (Department of Social Security, December 1981). The couple rule was intended to provide clearer guidance to decision makers, as well as to deflect the cohabitation rule's preoccupation with single mothers' sexual conduct, by explicitly introducing other factors, like the financial aspect of the relationship.

¹³ *Social Security Act 1991*(Cth) s. 4(3). The couple rule criteria have been unchanged since 1989 when they were inserted into the *Social Security Act 1947* (Cth) via the *Social Security and Veterans' Affairs Legislation Amendment Act [No. 3] 1989* (Cth). The statutory criteria were reproduced as s 4(3) when the *Social Security Act 1947* (Cth) was replaced by the *Social Security Act 1991* (Cth).

Women in situations of disadvantage have had particular trouble with the couple rule.¹⁴ DFV survivors may make multiple attempts to leave an abusive relationship, making it difficult for those outside the relationship to discern when it ends. Moreover, the rule is based on an outdated concept of adult relationships as financially dependent, rather than as independent, respectful and consensual. Archaic patriarchal concepts of relationships pervade the five criteria.¹⁵ The result is that the criteria effectively target characteristics of an abusive relationship, and use these as evidence of a relationship. The next section of the article will examine some of the realities of DFV for women related to the couple rule criteria.

A *Couple Rule Criteria: An Axis Of Abuse*

1 *Financial Aspects Of The Relationship*

Financial aspects of the relationship, according to the rule, include factors such as shared responsibility over household expenses, financial support from one person to another, and shared bank accounts. This criterion is designed to focus on financial matters, rather than the

¹⁴ Caroline Doyle, Patricia Eastal and Derek Emerson-Elliott, 'Domestic Violence and Marriage-Like Relationships: Have we begun to Emerge from the Dark Ages?' (2012) 37(2) *Alternative Law Journal* 91; Patricia Eastal and Derek Emerson-Elliott, 'Domestic Violence and Marriage-Like Relationships: Social security law at the Crossroads' (2009) 34(3) *Alternative Law Journal* 173; Sleep, 'Domestic Violence, Social Security and the Couple Rule' above n 8; Lyndal Sleep and Luisa Gras Diaz, 'When Transparency can be Deadly: Reporting of Identifiable and Locatable Personal Information in Administrative Appeal Tribunal Couple Rule Decisions that Involve Domestic Violence' (2020) 8(1) *Griffith Journal of Law and Human Dignity* 11.

¹⁵ Sleep, 'Female Dependents' above n 8.

intimate sexual behaviour of women. However, control over financial resources is a tactic used by perpetrators to isolate, control and intimidate women and their children,¹⁶ and this can, in certain circumstances lead to the rule identifying abusive behaviour as evidence of being in a relationship. For example, in AAT [2001] 282, Karen,¹⁷ who worked at a school, explained that the perpetrator intimidated her to allow him access her bank account after separation:

During the time when I was trying to enforce a separation from [Perpetrator], I changed my bank account at the St George Bank into joint names so that [Perpetrator] could also use the account. It was at [Perpetrator's] insistence that I did this. He said that he would contact the School about my past and made other threats about what he would do if I did not cooperate I did not question why he wanted the account.¹⁸

Karen was pressured to give access to her bank account to her ex-husband. This is evidence of financial abuse. Evidence of the perpetrator stealing money from Karen, and physical and emotional abuse was also provided. The Tribunal found that the perpetrator's:

¹⁶ Prue Cameron, 'Relationship Problems and Money: Women Talk about Financial Abuse' (Wire Women's Information; 2014); Cynthia K Sanders, 'Domestic Violence, Economic Abuse, and Implications of a Program for Building Economic Resources for Low-Income Women' (Washington University, Center for Social Development, 2007).

¹⁷ Titles of reported AAT decisions and names in the reported AAT decisions have been changed through the article to protect the identity of the women.

¹⁸ AAT [2001] 282 [8].

financial abuse of [Karen] was entirely unreasonable, but notes that her response when he attempted to take money from her purse was to ask him to leave some because she needed to buy food for the children. At least at some times there was tacet acceptance of his behaviour insofar as [Karen] knew it was occurring and she did not take measures to stop it.¹⁹

Karen's ex-husband's access to her bank account was used in the AAT decision, along with other evidence, as indicative of the financial nature of the relationship and it was decided that Karen was a member of a couple, with the Tribunal stating that:

Having taken an holistic approach to consideration of the evidence as it applies to the indicia in s4(3) of the Act, the Tribunal is reasonably satisfied that at all relevant times Mrs Perry was a *member of a couple*.²⁰

This decision displays a lack of understanding of coercion and control in DFV. Rather than understand that the nature of the financial arrangements was evidence of a financially abusive relationship, Karen was found to be a member of a couple and was required to repay

¹⁹ Ibid., [99].

²⁰ AAT [2001] 282 [101].

\$4,245.00 in social security debt, further entrenching her financial disadvantage and increasing her risk of homelessness.

Financial abuse as evidence of a relationship in Karen's case was not an isolated occurrence. Sleep²¹ found that financial abuse was identified in 41 percent (24 out of 59) of the AAT couple rule decisions that involved DFV perpetrated by the alleged partner. Financial abuse is being interpreted as evidence of a relationship and this must be addressed.

Further, the role of social security payment alleviating financial harms for women living in abusive relationships is not considered in the criteria. For example, in AAT 1787/2021, Judith was struggling to re-establish her and her two children's lives after leaving an abusive partner, however she received payment at a single rate while still living in the relationship. The relationship involved physical, emotional and financial abuse, where the perpetrator:

... made false statements to Centrelink ... he "did all of her reporting", "he would see all her payslips" and "access her bank accounts without consent". At [the] hearing the applicant said that her ex-partner controlled everything. She never got her pay because "it went straight to her husband". The evidence indicates the applicant's reported income remained significantly

²¹ Sleep, 'Domestic Violence, Social Security and the Couple Rule' above n 8.

less than her actual earnings for the relevant debt periods after 2012.²²

Despite the decision maker sympathising with Judith's hardship,²³ and her not receiving financial benefit from receiving payments while she was "in a couple", Judith was ordered to repay \$42585.05²⁴ because she did not declare her relationship correctly. This further entrenched Judith and her children's financial vulnerability after leaving the abusive relationship.

2 *Nature Of The Household*

The nature of the household includes evidence such as who is living at the address and how frequently an alleged partner stays. However, it is not always a straightforward undertaking to determine who is living at a given address, and decision makers use multiple evidence sources such as rental leases and other official accounts to determine cohabitation. Police records of DFV incidents have also been used in multiple decisions as evidence of the nature of the household.²⁵ For example, in AAT Matter No. 2013/3451 the AAT relied on police domestic violence incident reports as evidence of the alleged couple's address. While the

²² AAT [2021] 1787 [43].

²³ AAT [2021] 1787 [48].

²⁴ *Ibid.*, [9].

²⁵ See AAT [2006] 792 [15], [26]; AAT [2008] 338 [30], [31]; AAT [2008] 516 [7]; AAT [2011] 213 [44]; Lyndal Sleep, 'Entrapment and Institutional Collusion: Domestic Violence Police Reports and The 'Couple Rule' in Social Security Law' (2019) 44(1) *Alternative Law Journal* 17.

decision-maker listed an array of evidence for the residential address of the perpetrator, the first item in the list was:

Reports obtained from the Police....indicate that when they were called to the....premises in relation to domestic violence issues, they were informed on each occasion that Ariana and [Perpetrator] lived at the premises: (T97/834-920). All the reports record the....premises as the residential address of both Ariana and [Perpetrator]. Further, the report dated....records that [Perpetrator] ‘began to consume intoxicating liquor at his home address of...’. They were described in December 2007 as having ‘been in a de facto relationship for the past 15 years’. (AAT Matter No. 2013/345 [43]; italics in original)

These reports were used, along with other records, as evidence that Ariana was cohabiting with the perpetrator because they were records of her seeking assistance to have the perpetrator removed from the premises in a domestic abuse incident. The AAT decision required her to repay \$134,520.85 in overpayments for “incorrectly” claiming single status for Parenting Payment, Pensioner Education Supplement, Child Care Benefit and Child Care Rebate, and Family Tax Benefit. There was no discussion about the possibility of the perpetrator being in that location against Ariana’s wishes, or that he was there to cause her harm.

The reporting of DFV incidents in police reports and DVOs aims to increase women's safety;²⁶ however, when the reports are used as evidence of the nature of the household according to the couple rule, the outcome is to limit access to social security payment and this can financially entrap women in the relationship. Different records of domestic violence have been used as evidence for different stages of the relationship for couple rule decisions — for example, a DVO may indicate a period of separation. This is not the intention of these records. The use of domestic violence police records by social security decision makers as evidence that the parties are cohabiting as a couple displays a disregard for the controlling nature of domestic violence and lack of empathy for the lived experience of violence.

3 *Social Aspects Of The Relationship*

The way the alleged couple present themselves to others, such as signing in as a couple at a club, is considered as evidence for the social aspects of the relationship according to the couple rule criteria. However, a documented reality of domestic violence is the control a perpetrator can develop and maintain over the social presentation of the survivor.²⁷ This can extend to whether the couple present as married to others.

²⁶ Queensland Police, *Domestic Violence* (14 October)
<<https://www.police.qld.gov.au/domestic-violence>>

²⁷ Domestic Violence Prevention Centre Gold Coast, *The Purple Book* (Domestic Violence Prevention Centre Gold Coast, 2015).

In AAT [2007] 1321, the decision maker readily acknowledges the violence and control experienced by Lucy at the hands of her ex-husband:

...from the evidence heard and from the documents read that the relationship between both applicants has been less than harmonious. Indeed there is much evidence of the husband having assaulted his former wife and having been abusive. The records of the Western General Hospital and of Victoria Police bear testament to his behaviour. The assaults and intimidation have occurred by his initiation at the St Albans address, it being the address that he admitted that he frequented on a regular basis to collect his mail and to visit his children.²⁸

However, evidence for a relationship included that the alleged couple were recorded as kin by hospital administrators on presentation to emergency after an assault,²⁹ in addition to evidence by attending police that Lucy referred to the perpetrator as her husband after the date she claimed the relationship ended.³⁰ On these occasions, when Lucy is particularly vulnerable, the very fact that she is being subjected to violence by an intimate partner, is interpreted as being in a couple by authorities and recorded as such. Experience of DFV is viewed as evidence for a social aspect of a relationship.

²⁸ AAT [2007] 1321 [55].

²⁹ Ibid [62].

³⁰ Ibid [69]; [72].

The AAT required Lucy repay \$4455.83 in social security debt, covering the period when she claimed she was separated, but evidence including hospital attendance and police records, she was considered to be a couple. DFV survivors often make multiple attempts to leave a violent relationship as they navigate the complexities of children, violence and financial vulnerability making it difficult to discern exactly when the relationship ended. DFV practitioners identify the period of separating as the highest risk for escalating violence and mortality for women, as the perpetrator attempts to re-establish control over the ex-partner³¹ or to destroy her for leaving.³² However, the perpetrator's presence at Lucy's address when he was assaulting her, and his presence at hospital when she sought medical aid for injuries inflicted by him, resulted in Lucy having to repay thousands of dollars to Centrelink exacerbating her economic vulnerability.

4 *Presence Or Absence Of A Sexual Relationship*

Whether the alleged couple have ever been physically intimate is considered in couple decisions, and evidence of sharing a bedroom, or parenting a child, are evidence of a relationship according to this

³¹ Peta Cox, 'Violence against Women in Australia: Additional Analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012' (Australia's National Research Organisation for Women's Safety, 2015); Jacquelyn C Campbell et al, 'Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study' (2003) 93(7) *American Journal of Public Health* 1089; Leesa Hooker, Rae Kaspiew and Angela Taft, 'Domestic and Family Violence and Parenting: Mixed Methods Insights into Impact and Support Needs' (Australia's National Research Organisation for Women's Safety, 2016).

³² R Emerson Dobash and Russell Dobash, *When Men Murder Women* (Oxford University Press, 2015), 39.

criterion. However, the rule is concerned about the presence or absence of a sexual relationship, not whether it was consensual.

In AAT [2012] 499, under the heading “sexual relationship”, Lin’s experience of repeated rape is explicitly discussed:

According to [Lin] she never loved her husband and she never had sex with him willingly and never once said she loved him. She says he forced himself on her, sometimes tearing her clothes, and he raped her. She says her pregnancies were the result of him raping her. When she locked herself in the bedroom, he would force the door open with an implement such as screwdriver, and then force himself on her. She conceded that there were some occasions when he did not force her to have sex, but only when she was drunk or depressed.³³

The decision maker also mentions evidence from the perpetrator that there was “a normal, consensual sex life throughout their marriage.”³⁴ Although the decision maker says “I think it probable that [Lin’s] version is closer to the truth”, further discussion about whether consent is a necessary consideration under this criterion is absent. Also, while the birth of children is often considered evidence of a sexual

³³ AAT [2012] 499 [85].

³⁴ *Ibid.*, [86].

relationship whether the children were conceived consensually was not considered.

The violence and lack of control experienced by Lin was severe. Lin says she strenuously resisted [Perpetrator's] proposal but pressure was brought to bear on her by him and his family, and then by her parents and extended family. Within three days of their meeting, they went through a form of customary engagement which involved the women of his family inspecting her to establish her virginity.³⁵ After this, she says, he forced her to have sex with him, in effect to ensure she was no longer marriageable to anyone else.³⁶ The level of violent control experienced by Lin is clear. The complicity of Lin's extended family unit with the perpetrator's violence resonates with other research about CALD women's experiences of domestic violence.³⁷ Lin was found to be a member of a couple, but her debt of \$42,036.92 was reduced by half due to special circumstances under s. 1237AAD.³⁸ In this decision, special circumstances included the abuse inflicted on Lin, and impact of this on her health, however, the decision maker did "not think it justifiable to waive the debt wholly"³⁹ and she was required to repay over \$20,000 to Centrelink.

³⁵ AAT [2012] 499 [14].

³⁶ Ibid.

³⁷ See for example Shamita Das Dasgupta, *Body Evidence: Intimate Violence against South Asian Women in America* (Rutgers University Press, 2007); Aisha Gill, 'Crimes of Honour' and Violence against Women in the UK' (2008) 32(2) *International Journal of Comparative and Applied Criminal Justice* 243; Michael Salter, 'Multi-Perpetrator Domestic Violence' (2014) 15(2) *Trauma, Violence, & Abuse* 102.

³⁸ AAT [2012] 499 [107-116].

³⁹ Ibid., [115].

5 *Nature Of The Commitment*

This criterion considers whether there is an “emotional attachment that is qualitatively different to the commitment of either party to anyone else”.⁴⁰ However, this is difficult to prove as finding evidence for an emotional attachment is not straightforward, and the behaviour of the perpetrator exercising power and control over the survivor can be interpreted as an emotional attachment. This is demonstrated in AAT [2006] 792⁴¹ where Ava remained in her abusive husband’s home “only because there was less risk of abuse from [Perpetrator] if she agreed to reside in the same house”.⁴² Although Ava attempted to argue that this was evidence of a special situation outside the normal scope of the couple rule criteria, she was unsuccessful. Instead, the evidence of cohabitation was used by the AAT (among other evidence) as indicative of a commitment to the relationship because there was ‘no evidence before the Tribunal of any current move to leave the house ... or to dissolve the marriage’, in addition, the “abuse, threats and domestic violence” experienced by Ava are described as “low points” in a relationship that had been “under great strain” for 10 years.⁴³ The increased risk to the victim/survivor when attempting to leave the household was not considered. The decision to cancel Ava’s Parenting Payment based on the couple rule was affirmed. This decision may have

⁴⁰ Australian Government, 2.2.5.10 *Determining a de facto relationship* (16 May 2022) <<https://guides.dss.gov.au/social-security-guide/2/2/5/10>>

⁴¹ Sleep, above n 10; Sleep ‘Domestic Violence, Social Security and the Couple Rule’ above n 8.

⁴² AAT [2006] 792 [15].

⁴³ AAT [2006] 792 [35].

further entrenched the control the perpetrator had over Ava and her dependent grandchildren.

The lived reality of DFV is often complex, particularly for women with a disability or health issues where their need for care complicates the situation. Mary, a woman with a disability, had taken out a restraining order against her ex-partner, who was the father of her children. Mary suffered from a number of psychological conditions as well as renal issues, which meant she often found caring for her children on her own difficult. Since Mary did not have family or close friends who she could ask for help, “her only recourse was to ask her estranged husband to help with the children, because she knew that they would be put in foster care otherwise.”⁴⁴ This was interpreted as an indication of commitment to the relationship as a couple and Mary was found to be in a couple relationship with her ex-partner. Her dependence on him for care was not considered a special condition when applying the couple rule, and Mary was required to repay the full amount of debt she incurred while claiming the single rate of payment. Sleep found that, among women in situations of DFV, those in situations of intersectional disadvantage, like social security recipients with a disability or illness, were more likely to have trouble avoiding the impacts of the couple rule than those who were not.⁴⁵ Notably, cases involving financial abuse, control over living arrangements/housing

⁴⁴ AAT [2011] 23 [44(f)].

⁴⁵ Sleep ‘Domestic Violence, Social Security and the Couple Rule’ above n 8.

and control over information flow by the perpetrator, as well as the use of domestic violence police reports and hospital records, are clustered around AAT decisions about women from CALD backgrounds, women with disability and women living in rural or remote areas.⁴⁶

III THE WAY FORWARD

The Department of Human Services has made some attempts to mitigate the harm the couple rule can cause women in situations of DFV by updating the guide to the Act.⁴⁷ For example, it has recently included statements like “The presence of family and domestic violence may indicate the absence of commitment and that the person is no longer a member of a couple” to help guide decision makers to avoid mistaking characteristics of abusive relationships as indications of non-compliance to the couple rule.⁴⁸ However, patriarchal assumptions about relationships are at the core of the couple rule. The financial criterion assumes that a woman is financially dependent on a man in a relationship. The sexual relations criterion does not consider consent. The emotional attachment aspect of the commitment criterion does not consider the power and control dynamics of abusive relationships, nor how these can be complicated for women in situations of intersectional disadvantage.

⁴⁶ Ibid., 6.

⁴⁷ Australian Government, *Using the Social Security Guide* (16 May 2022) <<https://guides.dss.gov.au/social-security-guide>>

⁴⁸ Australian Government, above n 32.

While there is room in the legislation to waive a social security debt under special circumstances, DFV is rarely considered 'special' enough. For example, in AAT [2021] 1916, the decision maker explained:

The Tribunal did not dispute that [Veronica] had suffered her fair share of physical and mental hardships, first through her husband's gambling and alcohol addiction and then through domestic violence at the hands of her partner. Tragically, these situations are neither unusual or uncommon to be considered special circumstances and are the basis on why numerous women are forced onto Centrelink benefits ... [Veronica's] situation was not *unusual*, *uncommon* or exceptional, markedly different from the usual run of cases, special, or out of the ordinary to make it desirable to waive her debt.⁴⁹

The response that DFV is common is unacceptable and reinforces the harms caused by violence on women as well as problematic state responses to this violence by institutions that should support rather than hurt. Veronica's appeal⁵⁰ against a Departmental decision that she owed \$69,493 for not declaring she was in a relationship with a DFV perpetrator was not successful, leaving her in a more dire financial situation and increasing her vulnerability to further harms like homelessness.

⁴⁹ AAT [2021] 1916 [96-7].

⁵⁰ This was Veronica's second appeal, after her initial appeal at Tier 1 of the AAT resulted in the Department's original decision being affirmed.

IV CONCLUSION

The only way to avoid the harms of the couple rule is to reform our social security system to assess an individual's eligibility in terms of separate economic units, not as couples. Economic Justice Australia⁵¹ recommended that the Department of Social Services conduct a community consultation on the merits of abolishing the lower payment rate for coupled women and dual income testing to improve safety of women experiencing domestic violence⁵², however this has not occurred to date.

This would align social security law with taxation law. This would render the couple rule obsolete and sever the link between a DFV survivors' access to social security payment and the income and assets of the perpetrator.

⁵¹ Economic Justice Australia is the nation peak body for community legal centres who focus on social security issues. *Economic Justice Australia* (2021)

<<https://www.ejaustralia.org.au>>

Sally Cameron, 'How well does Australia's Social Security System Support Victims of Family and Domestic Violence' (National Social Security Rights Network, 2018); Sally Cameron and Linda Forbes, 'Debt, Duress and Dob-ins: Centrelink Compliance Processes and Domestic Violence' (Economic Justice Australia, 2021). See also Sleep 'Domestic Violence, Social Security and the Couple Rule' above n 8.

AN INTERVIEW WITH DEBBIE KILROY OAM*

James Arthur and Asha Varghese

Debbie Kilroy reflects on Sisters Inside and its origin as a committee for women's issues inside prison. She explores the nexus that connects crime, poverty and the law not only in Australia but in other Western liberal democracies. Her focus narrows, in particular, on how the institutions of the criminal justice system target the most marginalised in society: Aboriginal and Torres Strait Islander women and children.

PB: What inspired you to start Sisters Inside?

DK: Sisters Inside came about from a group of us who were imprisoned back in the 80s and early 90s in Boggo Road prison. The women's prison at that time was at the back of Boggo Road, but it's been demolished now. What had happened was in early January 1990 one of my close friends got stabbed sitting close beside me and died, so there was a murder. The only murder in a women's prison in this country still.

I came back, and there was a whole heap of trauma for us all and a very violent response from the prison. What also happened was those in charge of the prison all got sacked and a new regime were employed.

* *Debbie Kilroy* OAM is the founder of Sisters Inside, an award-winning advocacy organisation that has been fighting for the human rights of women in the criminal justice system for over 30 years. She was admitted to the legal profession by the Supreme Court of Queensland in 2007 and has her own law firm.

Just before Debbie's murder in January 1990, the Goss Labor government came into power after over 35 years of the Bjelke-Peterson era. The spotlight was on the prison because of the murder and no-one in the community realised that women were imprisoned.

It was overcrowded then, there were just over 100 of us in Queensland prisons, and so the Director-General of Corrective Services at that time had this idea to use us as guinea pigs and set up committees for women's issues inside prison. These committees were centred around issues like food, visits, health and accommodation. There was a streets kids committee because a lot of us were kids that lived on the street, that were criminalized as kids and went through the youth prison system. I was the chair of the street kids committee and part of the 'Lifers and Long-termers' committee.

Committees used to meet with the General Manager of the prison once a month, so we would bring issues to the GM that would lead to reform, and which would make life easier inside the prison. We would do a lot of advocacy at those meetings to get things changed, but really in hindsight it was like rearranging the deck chairs on the Titanic.

It's interesting because these committees and meetings taught us how to think around corners, negotiation skills, problem-solving, looking at situations differently so that we could make living conditions better for us. So that was very important.

When I got parole in 1992 one of the things I said to the women when I got parole was that 'I'll be back'. The screws used to always say to us 'you'll be back' as a prisoner – and so when I started coming back to continue the meetings for the Lifers and Long-termers committee, that's basically how Sisters Inside started. The Lifers and Long-termers group became Sisters Inside.

There was a group of five of us out in the free world and over 10 women in prison. We would go in regularly and we have our committee meetings in the chapel at Old Boggo Road for a very long time, up until 1999 when that prison got closed and the new prison opened out at Wacol. So that's how Sisters Inside started – it just evolved from the committees. And still today we have our management meetings inside the women's prison with a group of women living inside the prison who are on the committee.

PB: How do you think poverty and homelessness influence whether women enter the criminal justice system and how does domestic violence play a role in that?

DK: That's a big question. The prison industrial complex is part of the racial-capitalist world we live in, so for capitalism to thrive it creates marginalized people, usually racialized marginalized people so that others can be employed to make money off the backs of them. Prisons are a big part of racial capitalism – violence of policing, violence of prisons, courts. Even if you think about this country called Australia, we know it is based on a history of colonialism where violent colonial settlers invaded and stole the land, and still to this day sovereignty has not been ceded. What we see is that in this rich, first-world country we have enough resources so no person or child would live in poverty but there is a political choice across all jurisdictions and federally to ensure that there is poverty because you need poverty for racial capitalism to thrive.

The most impoverished people are predominantly Aboriginal people, poor white people, and homeless people who have mental health issues or severe drug or alcohol problems because they're self-medicating from trauma.

We see the increase in homelessness because of the cost of housing, the cost of rentals, and the fact that some people are locked out and can't even afford to get into safe housing. It's very much a part of the racial capitalist structure that we're living in.

It's no surprise that our prisons are exploding. The sad thing is that poverty can be addressed overnight. Even though we say we don't want poverty, we still play a part in it. So many people are employed and are a silent party to racial capitalism and its violence.

Think of all the staff in prisons, people that are employed in the violence of policing, the people who are employed in the welfare industry in this country. I remember a decade ago they had a national homelessness conference here in Meanjin and there were thousands of people there then that were employed to end homelessness.

How is homelessness ever going to end when there are thousands of people employed to apparently end homelessness? Too many people are reliant on that paycheck paying for the house over their heads, paying for the food on their table and for their families. This is the world that we live in. How will we end poverty and homelessness when governments won't build homes but fund people to be employed to work in the welfare

industry? It's like failing to provide food for those that are hungry but providing those hungry with a support worker.

Being an abolitionist is very important in the sense that we imagine another world, another way to live, so that this doesn't occur, and these inequities are addressed. We imagine a society where we are all free and all have our needs met, whether food, safety, shelter, health, education, employment and more importantly ending racism and violence both structurally and individually.

PB: Sisters Inside is of course an abolitionist organisation and abolitionists argue, among other things, that crime is mainly a product of the structures of society. In Australia, what are some of these structures? The Prison Industrial complex, I guess, would be one of them.

DK: Yeah, well that's the main one right. Crime is a theory. Over the years we have seen, for example, the Criminal Code expand massively with all these new offences. Today, one set of behaviours that are not 'crimes' might be criminalised tomorrow by Parliament. Crime is driven by the powerful. The biggest lobby groups we have in Meanjin would be the police unions and the prison unions. They can also threaten the government by going on strike or going to the media and threatening the

community by saying that the all the so-called 'criminals' are going to run around stealing your cars, breaking into your houses, and so people become very fearful. The fear makes the community believe that we need more police for our safety. Police don't stop violence and don't ensure we are safe. Police don't stop crime. The racial gendered violence of policing must be defunded. Many communities don't rely on the violence of policing now. We can create other modes of safety and security ourselves, within our own communities.

We saw just last week that once again police are called out with a 'welfare check'. They're not welfare officers, but people call them to do a welfare check on their loved ones in their homes who aren't doing very well and may have mental health issues. We saw two people shot in two separate incidences by the police. That's the kind of response that you get, the violence of policing.

We know that the racial gendered violence of policing was built up to protect white fella's land. So, we see this racial-gendered violence that's perpetrated against Aboriginal women and girls. Aboriginal women and girls are the fastest growing population that are criminalized and imprisoned in Australia. In the last 14 years the increase of women being imprisoned in this state has

risen by 338%.¹ We also saw that of girls under 12 years old who had been sentenced, Aboriginal and Torres Strait Islanders make up just under 75%.² Then the state and supporters have the cheek to come out and mislead the community and say that there's no racism within those structures, their structures. They were built from colonization from the violence of the theft of the land of this country. We see that play out every day. It's Aboriginal women and girls who experience that violence from the policing more regularly than anybody else; and Aboriginal women and girls will tell you about that and will tell you about their experience of the racial gendered violence of policing, but this usually falls on deaf white ears.

PB: Just building on what you spoke about before, what do you think of the idea that police when they go out to certain situations, should have a psychologist with them or should be trained in mental health?

DK: We have to stop relying on the racial gendered violence of policing. I don't believe that, like I said, police stop 'crime'. The institution of policing is violent. Police are

¹ Hilderley et al, Queensland Sentencing Advisory Council, *Engendering justice: the sentencing of women and girls in Queensland* (Report, 17 August 2022) 46.

² Ibid 27.

called after the fact. The racial gendered violence of policing doesn't de-escalate but escalates the violence for most communities, particularly Aboriginal and Torres Strait Islander communities. We have to stop relying on the violence of policing to come into our homes when we're worried about loved ones. We have to build up other modes of safety and security in our communities where people can rely on that instead. But we don't. Because of racial capitalism, we rely on violent institutions to actually stop harm where in reality they actually bring harm and perpetrate the harm. That's what's got to stop. That's why we talk about 'defunding the police' or 'deauthorizing the police', taking away their powers.

Just imagine the different community we would live in if we took the budget that police and the prison system received in Queensland this year – 4.7 billion dollars – and put it into public housing, which receives only a couple of hundred million. Imagine how differently we would be living. People would be living in their homes and be safe. People could build those new modes of safety and security so that no harm is perpetrated and so they aren't relying on the perpetrators of state violence – police and prisons.

PB: Just on your point about how we need to develop alternate forms of safety. With the situation we find ourselves in now, there's not many other forms of safety aside from police, but of course there's problems with that.

DK: The police only respond to certain people, right? We, white middle, upper class people, could ring the police and they would come, but Aboriginal people ring the police for help, and they don't show up or if they do show up then there's an escalation of violence and usually the Aboriginal person who rang for help will either be arrested or even killed.

Abolition is not a new idea; there are many of us all around the world working every day to re-imagine and build new communities without police and prisons. Just in this country alone there are communities that don't rely on the cops, and they have other modes of safety and security that they have built up.

We know transgender people cannot rely on the State for protection. Their communities, over decades, have developed ways to protect each other and keep each other safe from violence – not only the racial gendered violence of policing, but the violence of others because of homophobia and transphobia.

Aboriginal and Torres Strait Islander peoples have built their own modes of safety and security since the invasion of their country.

Sisters Inside has been going for over 30 years. We've never called the police once, ever. There has still been issues and when there has, we de-escalate. We use the relationships we've built to not cause harm, but to protect each other.

People always ask the question, as abolitionists, 'what about the rapists and murderers?'. The reality is no one is stopping rape and murder now in the system that we have. The police don't stop this violence now. Even if I went to the police station and said a man is threatening to rape me tonight, they'll go 'you can report this tomorrow if it happens, we can't do anything until you've been raped'. The truth is they don't do anything even if I have been raped.

Groups of women have found ways to protect each other. We develop up safety plans for women, so if they decide to stay in a violent situation, there's a safety plan in place that they can get out because they've got nowhere to go. We need to rely on the work we are already doing in the community and not the racial gendered violence of policing.

Engaging psychologists, mental health workers and social workers to work with police fails us all. They are part of the carceral problem. This strategy net widens and ensures more people are criminalized and imprisoned.

Further, we absolutely oppose the new offence that's going to be enacted in the criminal code, 'coercive control'. We know that Aboriginal women and girls are going to be targeted and charged with coercive control, just like they were when the DV laws were enacted back in the 1990s when strangulation was introduced.

PB: The number of women imprisoned in Queensland has risen dramatically, making it the state with the most imprisoned women in the country. Why do you think this is? And is this a structural problem?

DK: Absolutely. In a system built on racial capitalism, where women and particularly Aboriginal and Torres Strait islander women and girls are targeted by the racial gendered violence of policing and the courts, we know that Aboriginal women are sentenced for very small offences and caged in prison.

They're imprisoned for what we call 'survival' offences – public nuisance, stealing food, for example. The other thing that Aboriginal women go to prison for, more than non-Aboriginal women, is bail-type offences. Not

meeting bail conditions. For example, if you had a curfew or a reporting condition that you failed to meet. If you're homeless on the street and you don't know what day of the week it is yet alone the time, you're more worried about getting a roof over your head and food in your belly than reporting between specific hours on a specific day. We're targeting the most marginalized in our community which are Aboriginal and Torres Strait Islander women and girls. We see the racial-gendered violence of policing always targeting Aboriginal women and girls.

As a white woman – as a criminalized and formerly incarcerated woman – I can walk down the street and not really worry about cops in the sense that I would be of notice to them. If an Aboriginal and Torres Strait Islander woman or girl is walking down the street, the police would make a B-line and go straight to them. That's because the racial gendered violence of policing inherently believes that Aboriginal women are a threat and perpetrators of crime. Aboriginal women are never seen as a victim. They're misidentified in relation to domestic and family violence matters.

We saw this in Western Australia with Julieka Dhu, and we see it time and time again. The family had called police because her partner was assaulting her and when they

came, they saw that she had a warrant for an unpaid fine. Ms Dhu was arrested and then died the most horrific death on a cold concrete floor in the watchhouse. Ms Dhu was experiencing a medical emergency. Police took her to the local medical centre 3 times, but they dismissed her as a “junkie and a drug-user”. The family was calling for her safety. This is what racial gendered violence of policing looks like in reality for Aboriginal women.

That’s why I started the ‘Free Her’ campaign back in January 2019 because early that year there was also a young Aboriginal man who was stopped by police while walking in Perth. He’s an Aboriginal performer and artist and he had a warrant issued which he didn’t know about. He said that he’d pay it now, but he wasn’t allowed. Police arrested him and it spread over social media very quickly. We raised the money, and he was released.

When that happened, I started thinking about Ms. Dhu and her horrific killing at the hands of the police and medical. I was thinking of all the other Aboriginal women languishing in prison or watchhouses who had been arrested because of poverty. They can’t afford to pay a fine. People say – and continue to say – ‘well why don’t they use their credit card?’ People living in poverty don’t have credit cards; they don’t have money on tap;

they don't have families to go and ask to say, 'can you pay my fine mum?'. That's a privileged persons response.

PB: I was speaking to a really interesting man a few weeks ago who's actually writing for the journal as well. He's the principal solicitor at a community legal centre on the Sunshine Coast and he was saying one the big intersections between law and poverty for him are SPER debts. And he said if you just forget to look at your mail for a period of time you can suddenly have all these ginormous debts that are enforceable because private companies are able to use the state to enforce them. It messes with your credit.

DK: Yeah, well that's what happening in Western Australia. If you've got a fine and you don't pay it within 28 days, there's a warrant that's automatically triggered and you're imprisoned, and your fine is paid off by the number of days in prison. We're seeing Aboriginal people die because of non-payment of fines because of poverty.

The 'Free Her' campaign has to date raised over 1.3 million dollars and we had freed over 400 women initially until the laws were changed. Part of the campaign was not only to pay the women's fines and get them out of prison or pay the fines so they don't go to prison, but also to email the Attorney-General. The Aboriginal

community in Western Australia had been fighting to stop the imprisonment because of unpaid fines for decades and decades. The advocacy by the Aboriginal community over decades saw the laws changed.

We paid hundreds of thousands of dollars from donations back to the government. We found out that government paid a private company to enforce these debts.

So we have an Aboriginal women couch surfing or living on the streets, trying to put her children somewhere safe, and hiding from the police so she's not caught on that warrant because of the fear that her children might be taken away and she might go and die in prison like Ms. Dhu. And here we have the government funding a private business to enforce those debts. The millions of dollars that crossed hands could have been given to those individual Aboriginal women so they can live in homes and their children can be safe. But that doesn't happen.

This is the racial capitalist world that we live in; and it's horrifying because we see the government treat people as disposable, and disposable people in this country are usually Aboriginal and Torres Strait Islander women and girls.

PB: Is there anything else you would like to add on the intersection between law and poverty?

DK: Oh look you could talk about this all day. But we actually need to call on people to seriously think about the abolition of the prison industrial complex. People think that it's a crazy idea, but when you consider the world that we live in and how many other members of our community it completely fails, that are left languishing in prisons and watchhouses, it makes sense.

There's a number of women whose families I'm representing in coronial inquests. One of them is Aunt Sherry Tilberoo who really should have been taken to the hospital when she was arrested on a warrant in Meanjin and put into the Roma Street watchhouse. She was well known to that system and on this occasion was violently ill and vomiting for days but they never took her to the hospital. They asked the white woman in the next cell who was pregnant and was vomiting from morning sickness if she would like to have an ambulance called to go to the hospital, and she even said 'no, you need to call an ambulance for Aunt Sherry, she's been vomiting for days'. Aunt Sherry later died in that cell.

So, just that blatant racism in two watchhouse cells side by side. The white pregnant woman with morning

sickness gets offered to go the hospital but an Aboriginal women who's been vomiting for days is not asked or taken to a hospital and dies.

The disposability of black bodies and the violence against black bodies in this colony is absolutely shameful and violent, and we as white settlers, as colonial settlers, must address our whiteness, our privilege, our racial-gendered violence within all institutions that have grown up and out of that invasion and land theft from Traditional Owners over 200 years ago.

PB: Thank you for sharing your thoughts, Debbie.

OLDER PERSONS' RIGHT TO ECONOMIC SECURITY

William Mitchell*

The right to economic security would create a powerful tool to address poverty. Conceptually, the right to economic security includes an interplay between a legion of civil, political, economic, social, cultural, and collective human rights. The latent value of a future convention on the rights of older persons (older persons' convention) is that it may articulate a novel, specific right to economic security that is currently absent from the existing human rights landscape. An older person's convention would thereby complement existing treaties, global development goals and agendas that seek to eradicate poverty and provide an enforceable guarantee of economic security for older Australians.

I INTRODUCTION

From its inception, the United Nations has recognized the significance of economic security for wellbeing. Article 25 of the Universal Declaration of Human Rights states that everyone has the right to an adequate standard of living "and the right to security

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*in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.*¹

Conceptually, economic security includes an interplay between various underpinning frameworks including economic policy, social development goals, and human rights. Within a human rights frame, economic security is suggested to engage various human rights,² including the right to an adequate standard of living,³ rights to social security and social protections (including social protection floors),^{4, 5}

¹ United Nations Department of Economic and Social Affairs, *Policy Brief No90: A new global deal must promote economic security* (29 January 2021) 1.

² See an existing conceptual basis for older persons in: Office of the High Commissioner for Human Rights (OHCHR), *Substantive inputs on the focus area, “Economic security” Working document submitted by the Office of the High Commissioner for Human Rights**, UN OEWSGA, UN Doc A/AC.278/2022/CRP.4, (25 March 2022) 1-19.

³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11(1) (‘ICESCR’); *International Convention on the Elimination of all forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 30 October 1975, except art 14 which entered into force 4 December 1982) arts 5(e)(iii) and 7 (‘ICERD’); *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 8 September 1981) art 14(2)(h) (‘CEDAW’); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 16 January 1991) arts 24(2)(c) and 27 (‘CRC’); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 16 August 2008) art 28 (‘CRPD’).

⁴ ICESCR (n 4) art 9; ICERD (n 4) art 5(e)(iv); CEDAW (n 4) arts 11(1)(e) and 14(2)(c); CRC (n 4) art 26; CRPD (n 4) art 28.

⁵ See an existing conceptual basis for older persons in: Department of Economic and Social Affairs (DESA) in collaboration with the Office of the High Commissioner for Human Rights (OHCHR), *Substantive Inputs in the form of Normative Content for the Development of a Possible International Standard on the Focus Areas “Education, Training, Lifelong learning and Capacity Building” and “Social Protection and Social Security (including social protections floors).”*, UN OEWSGA, UN Doc A/AC.278/2021/CRP.2, (6 March 2021) 14-25.

and rights to work and participate in the labour market.^{6, 7} Other potentially relevant rights might include rights to autonomy and independence,⁸ equality and non-discrimination,^{9,10} participation,¹¹ sustainable development,¹² and social inclusion. Given its potential scope, the right to economic security would create a powerful tool to address poverty globally and in Australia. The latent value of a future

⁶ ICESCR (n 4) art 6; ICERD (n 4) art 5(e)(i); CEDAW (n 4) art 14; CRC (n 4) art 32; CRPD (n 4) art 27.

⁷ See an existing conceptual basis for older persons in: Office of the High Commissioner for Human Rights (OHCHR), *Substantive inputs in the form of normative content for the development of a possible international standard on the focus areas “right to work and access to the labour market” and “access to justice”*, UN OEWSGA, UN Doc A/AC.278/2022/CRP.2, (25 March 2022) 2-16.

⁸ See an existing conceptual basis for older persons in: Office of the High Commission for Human Rights, *Analysis and overview of guiding questions on autonomy and independence received from Member States, “A” Status National Human Rights Institutions and accredited non-governmental organizations, Substantive Report to the Open-ended Working Group on Ageing 9th Working Session*, UN OEWSGA (23-26 July 2018) 1-9; and Office of the High Commission for Human Rights (OHCHR), *Substantive Inputs in the form of Normative Content for the Development of a Possible International Standard on the Focus Areas “Autonomy and Independence” and “Long-term and Palliative Care”*, UN OEWSGA, UN Doc A/AC.278/2019/CRP.4, (27 March 2019) 2-8.

⁹ Existing norms include *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 10 March 1976) arts 2, 16, 26 (‘ICCPR’); ICESCR (n 4) art 2(2); ICERD (n 4) arts 1, 2, 4, 5; CRC (n 4) art 2; CEDAW (n 4) arts 2, 3, 4, 15; CRPD (n 4) arts 3, 4, 5, 12.

¹⁰ See an existing conceptual basis for older persons in: Office of the High Commission for Human Rights (OHCHR), *Normative content on the protection of the rights of older persons to equality and non-discrimination received from Member States, “A” Status National Human Rights Institutions and accredited non-governmental organizations, Substantive Report to the Open-ended Working Group on Ageing 9th Working Session*, UN OEWSGA (23-26 July 2018) 1-12.

¹¹ ICCPR (n 10) art 25.

¹² See an existing conceptual basis for older persons in: Department of Economic and Social Affairs (DESA), *Substantive Inputs on the Focus Area “Contribution of older persons to sustainable development”*, UN OEWSGA, UN Doc A/AC.278/2022/CRP.3, (25 March 2022) 1-15.

convention on the human rights of older persons¹³ (older persons' convention) is that it may articulate a novel, specific right to economic security that is currently absent from the existing human rights landscape. An older person's convention would thereby complement existing treaties, global development goals and agendas that seek to eradicate poverty and would provide an enforceable guarantee of economic security for older Australians. But first, what is meant by economic security?

II WHAT IS ECONOMIC SECURITY?

Economic security has been variously described, including conceptually, as a standalone human right, and comprising a cluster of human rights – wherein most articulations describe a combination of economic and social rights attending basic needs. The International Labour Organization (ILO) has suggested it “should be defined in terms of advancing real freedom”,¹⁴ and “that primacy should be given to income security and representation security.”¹⁵ Here, we turn briefly to economic security as a concept.

¹³ William Mitchell, ‘Making the case for a convention on the human rights of older persons’ (2021) 27(3) *Australian Journal of Human Rights* 532 (*Mitchell’s article*).

¹⁴ International Labour Office, *Economic security for a better world* (International Labour Organization, 1 January 2004), xvii.

¹⁵ *Ibid.*

In recent times, economic security has been simply described as “the ability of people to meet their needs consistently.”¹⁶ The ILO suggested that economic security is “composed of basic social security, defined by access to basic needs infrastructure pertaining to health, education, dwelling, information, and social protection, as well as work-related security.”¹⁷ Both ILO characterisations reveal that, conceptually, economic security has been described in ways that reflect a broad spectrum of interrelated and interdependent human rights.

Economic security is also inevitably defined by reference to states of economic insecurity, economic vulnerability, economic disadvantage, and poverty. The UN’s Department of Economic and Social Affairs (DESA) provides a very broad description of economic insecurity:

Giving a precise, practical meaning to economic insecurity is challenging. People’s feelings of insecurity often draw on their past experience—that is, having experienced downside economic shocks creates insecurity—but they also have a prospective dimension related to risk. Insecurity can be caused by actual risks or be based on people’s perceptions. Despite its many facets, two elements are common to most definitions of economic insecurity (1)

¹⁶ International Committee of the Red Cross, ‘What is Economic Security’, *Articles* (Policy Blog, 2015) <<https://www.icrc.org/en/document/introduction-economic-security>>.

¹⁷ The ILO defines ‘work related security’ through a multiplicity of concepts; terms used include ‘income security’, ‘representation security’, ‘labour market security’, ‘employment security’, ‘job security’, ‘work security’, and ‘skill reproduction security’. International Labour Organisation, ‘Definitions: What we mean when we say “economic security”’, *World of Work: Magazine of the ILO*, 2004) <<https://www.ilo.org/public/english/protection/ses/download/docs/definition.pdf>>.

*people's exposure to—or expectation of—adverse events and (2) their (in)ability to cope and recover from the consequences of such events.*¹⁸

Importantly, while economic insecurity is related to other concepts, it can also be differentiated:

*A premise is that, while notions of poverty overlap with notions of insecurity, one could have one without the other. The same is true of the overlap between inequality and insecurity. Inequality is part of insecurity, particularly when that inequality is substantial. And the unequal distribution of insecurities is part of socio-economic inequality.*¹⁹

Clearly, even superficial consideration confirms disparate conceptual notions of economic security, which vary from a checklist of basic needs (access to income, food, housing, health), to overlapping descriptive and statistical concepts (insecurity, vulnerability, poverty), and finally to subjective factors (experiential, contextual, situational). We don't need to reconcile the broad church of meanings to simply appreciate that economic security exists as a multidimensional concept that lacks precise or common definition. What then of Australia's older persons' economic security?

¹⁸ United Nations Department of Economic and Social Affairs, *Policy Brief No90: A new global deal must promote economic security* (29 January 2021) 1 ('*DESA Policy Brief No90*').

¹⁹ International Labour Office, *Economic security for a better world* (International Labour Organization, 1 January 2004), 3.

III OLDER AUSTRALIANS' ECONOMIC SECURITY

Australia, like other countries, uses economic security as a descriptor across various policy areas. For example, within federal gender policy, the Women's Economic Security Statement 2020 seeks to address economic security without actually defining it.²⁰ The 2020 Statement considers older women's' economic security through broad proxies of basic physiological and safety needs: workforce engagement and career transition, access to meal delivery services, concessions, homelessness, housing, and family violence.²¹ Civil Society Organisation Economic Security4Women's (ES4W) 2018 Report also described economic security in relatively conventional terms, suggesting that it:

"... entails a number of basic conditions, but has as a central underpinning an ability, throughout life, to afford to have shelter, food and basic living expenses covered. Financial security also means opening access to opportunities not only at these basic levels of living standards, but to also achieve higher levels of security and well-being through education, training and employment opportunities".²²

²⁰ Australian Government, *Women's Economic Security Statement 2020* (Report, 6 October 2020).

²¹ *Ibid*, 58-59.

²² Stephen Koukoulas, Economic Security4Women, 'White Paper on Policy recommendations to boost women's economic security', *EconomicSecurity4Women* (Web Page) 2 <<https://www.security4women.org.au/boosting-womens-economic-security/economic-security-defined-for-all-women/>>.

Turning to the economic security of older Australians. Australia's current Sustainable Development Goal²³ (SDG) rank is 35 of 165.²⁴ While this appears to be relatively competitive, there are still significant issues for older Australians. One notable area for attention is Australia's progress on Sustainable Development Goal 10, as seen through the Organisation for Economic Co-operation and Development (OECD) indicator of 'older persons' poverty rate'. In 2018, Australia's rate was 23.7, having fallen from 33.5 in 2012.²⁵ By comparison, in 2019, countries with rates far closer to the long-term objective (3.2) included the United Kingdom (15.5), Canada (12.3) and France (4.4).²⁶ Unfortunately, we don't yet understand exactly how the Covid-19 pandemic affected older persons' poverty rates in Australia or globally but in general terms, the impacts on older persons have been significant.²⁷

Despite Australia's relative gains and its comprehensive system of social security and social protections, we still have significant challenges ahead with respect to older persons' economic security. Less is known about our SDG performance in respect of older persons than ought to be,

²³ United Nations Department of Economic and Social Affairs, *Transforming our world: the 2030 Agenda for Sustainable Development*, Un Doc A/Res/70/1 (21 October 2015, adopted on 25 September 2015).

²⁴ Sachs et al, 'Australia: Overview', *Sustainable Development Report* (Web Page, 2022) <<https://dashboards.sdgindex.org/profiles/australia>>.

²⁵ Sachs et al, 'Australia: Indicators', *Sustainable Development Report* (Web Page, 2022) <<https://dashboards.sdgindex.org/profiles/australia/indicators>>.

²⁶ Sachs et al, 'Elderly poverty rate', *Sustainable Development Report* (Web Page, 2022) <<https://dashboards.sdgindex.org/explorer?metric=elderly-poverty-rate>>.

²⁷ United Nations Department of Economic and Social Affairs, *Policy Brief No90: A new global deal must promote economic security* (29 January 2021).

and Australia's policy efforts reveal a lack of direct reporting against the SDGs in areas such as national budget and Covid-19 recovery.²⁸ Australia's national SDG dashboard also lacks substantial data on older persons' engagement with sustainable development or economic security.²⁹

Turning to income security, the Australian Institute of Health and Welfare (AIHW) reports that as of June 2021, 2.8 million Australians aged 65 and over received an income support payment, equating to two in three (67%) of the population in that cohort.³⁰ Furthermore, just over one-third (36%) of retired women relied on their partner's income to meet their living costs at retirement (compared with 7% of retired men).³¹ Critically, the Institute noted that poverty rates for single older women remained highest of all family types, at one-third (34%).³² The Australian Council for Social Service's (ACOSS) 2020 Report on Inequality in Australia³³ notes that recipients of other payments such as age pensions were also likely to be in the lowest 20% of incomes in the

²⁸ Sachs et al, 'Australia: Overview: Policy Efforts', *Sustainable Development Report* (Web Page, 2022) <<https://dashboards.sdgindex.org/profiles/australia/policy-efforts>>.

²⁹ Sustainable Development Goals, Australian Government, 'The SDG Indicators', *Australian Government's Reporting Platform* (Web Page) <<https://www.sdgdata.gov.au/>>.

³⁰ Australian Institute for Health and Welfare, 'Income and Finances', *Older Australians* (Research Web Page, 2021) <<https://www.aihw.gov.au/reports/older-people/older-australians/contents/income-and-finances>>.

³¹ Ibid.

³² See also Emma Dawson, Tanja Kovac and Abigail Lewis, Per Capita, *Measure for measure: gender equality in Australia*, (Report, March 2020).

³³ Peter Davidson et al, ACOSS and UNSW, *Inequality in Australia, 2020 Part 2: Who is affected and why* (Report, December 17, 2020).

country, and older persons who rent were likely to be in the lowest 10% income group.³⁴ ACOSS found that older persons and children were more likely to be found in low-income households: Two-thirds (66%) of persons aged 65 and over were in the lowest 40% by income.³⁵

ACOSS observes that while older persons had the highest rate of home ownership, the rate will diminish among future generations of older persons.³⁶ Given the Productivity Commission's conclusion that older Australians' wealth "has been buoyed by strong real growth in house prices",³⁷ diminishing home ownership will likely impact on future older Australian's retirement wealth.

Housing status is critically important. ACOSS' aged-based poverty data³⁸ reveals that the rate of poverty for single persons 65 and over is just over a quarter (26%).³⁹ People 65 and over who own or are buying their home are less likely to experience poverty than the rest of the population when the 50% poverty line is used (10.3%), but more likely when the 60% poverty line was used (23.7%).⁴⁰ This comparison shows the profound impact of housing costs on poverty rates among older

³⁴ Ibid 7.

³⁵ Ibid 23.

³⁶ Ibid 47.

³⁷ Productivity Commission, Australian Government, 'Wealth transfers and their economic effects' (Research Paper, November 2021) 2.

³⁸ Australian Council of Social Service and UNSW, 'Rate of poverty by age (% of people)', *Data and Figures* (Research Blog, undated) <<https://povertyandinequality.acoss.org.au/poverty/rate-of-poverty-by-age-of-people/>>.

³⁹ Peter Davidson et al, ACOSS and UNSW, *Inequality in Australia, 2020 Part 2: Who is affected and why* (Report, December 17, 2020), 37.

⁴⁰ See Ibid.

persons; the poverty rate among the 10% of older persons who rent their homes is considerably higher than homeowners – 41% when the 50% poverty line is used, and 58.1% when the 60% poverty line is used.⁴¹

A recent study on homelessness in Australia noted limitations for older people experiencing homelessness who need specialised residential care and reported significant gaps in availability in many areas.⁴² Additionally, as with other parts of the social protection system, access to the Commonwealth Home Support Programme and home care packages is much easier when in permanent housing rather than in temporary and marginal housing.⁴³ Older people experiencing homelessness are more likely than not to fall through the gaps.⁴⁴ The study concluded that homelessness in older age shared the same drivers as adulthood but also included the absence of retirement savings or wealth.⁴⁵ Older people are at greater risk of homelessness if they don't own a home and have low superannuation.⁴⁶ It is also concerning that while the rate was rising, specialist services for older homeless persons were significantly lower at 9.6 per 10,000 when compared with all persons at 114.5 per 10,000.⁴⁷

⁴¹ See Ibid.

⁴² Paul Flatau et al, Centre for Social Impact, *Ending homelessness in Australia: An evidence and policy deep dive* (Research Report, November 2021) 196-197.

⁴³ See Ibid.

⁴⁴ See Ibid.

⁴⁵ Ibid 11-13.

⁴⁶ Ibid 182.

⁴⁷ Ibid 32.

Even in Australia, the so-called 'lucky country', the rights of older persons to an adequate standard of living are not effectively guaranteed. None of the human rights acts in Queensland, Victoria or Australian Capital Territory⁴⁸ protect economic rights that fall under the basic needs definition let alone more advanced conceptions of economic security. Further, Australia has no national human rights laws beyond anti-discrimination laws that are a blunt instrument, even further dulled by technical and definitional complexity.

IV ECONOMIC SECURITY & HUMAN RIGHTS

*No social phenomenon is as comprehensive in its assault on human rights as poverty. Poverty erodes economic and social rights such as the right to health, adequate housing, food and safe water, and the right to education.*⁴⁹

Human rights processes have begun to describe a right to economic security, and what a normative formulation of such a right might incorporate. As a starting point, the question needs to be asked: Is there an existing right to economic security and, if so, what is the accepted formulation? The ILO have argued that economic security should be a human right:

⁴⁸ *Human Rights Act 2019* (Qld); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2014* (ACT).

⁴⁹ Office of the High Commission for Human Rights, 'About extreme poverty', *OHCHR and the human rights dimension of poverty* (Web Page, 1996-2022) <<https://www.ohchr.org/en/poverty>>.

*So, is basic economic security a human right? We believe that it should be, and that it should be seen as a claim right, an ideal to which all policies and institutions should try to move. One must recognize that some insecurity is essential for dynamic societies and economies and for personal development.*⁵⁰

The ILO also contend that economic security is linked to broader notions of freedom from morbidity, freedom from fear, control of own development and sustainable self-respect.⁵¹ They advocate key framing issues include freedom and dignity, embedded paternalism, identity, agency and empowerment, social solidarity and community, the impact of conflict and disaster, and work.⁵²

Despite broad-ranging discussion, there appears to be no formulation of a right to economic security in any of the existing human rights instruments. As described earlier, for older persons, the potential, latent right has been foreshadowed as a patchwork quilt of rather obvious normative standards, pieced together from various existing human rights norms.⁵³ Existing general and thematic instruments do provide a base range of relevant protections. The International Covenant on Economic, Social and Cultural Rights guarantees adequate standard of living, including adequate food (including freedom from hunger),

⁵⁰ International Labour Organisation, *Economic security for a better world* (Report, 2004) 5.

⁵¹ See Ibid.

⁵² Ibid 3-17.

⁵³ Office of the High Commissioner for Human Rights (OHCHR), *Substantive inputs on the focus area, "Economic security" Working document submitted by the Office of the High Commissioner for Human Rights**, UN OEWSGA, UN Doc A/AC.278/2022/CRP.4, (25 March 2022) 1-19.

clothing and housing, and the continuous improvement of living conditions.⁵⁴ The UN Committee on Economic, Social and Cultural Rights has reinforced our understanding of this right through General Comments on the right to food,⁵⁵ water,⁵⁶ and housing.⁵⁷ The Convention on the Elimination of all forms of Racial Discrimination guarantees housing,⁵⁸ and the Convention on the Elimination of all Forms of Discrimination against Women speaks to the need for rural women to have adequate living conditions, particularly in relation to housing.⁵⁹ The Convention on the Rights of Persons with Disabilities contains a specific provision on adequate standard of living, including for older persons with disabilities.⁶⁰ These iterations all maintain the basic needs expression of economic security but do little to further it conceptually.

Additionally, and despite these existing standards, the Office of the High Commissioner for Human Rights' reports that human rights frameworks for older persons remain fragmented and inconsistent and that treaty bodies, charter processes and special mandate holders lack a

⁵⁴ ICESCR (n 4) art 11.

⁵⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, UN Doc E/C.12/1999/5 (12 May 1999).

⁵⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)* UN Doc E/C.12/2002/11 (20 January 2003).

⁵⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)* UN Doc E/1992/23 (13 December 1991).

⁵⁸ ICERD (n 4) art 5(3)(iii).

⁵⁹ CEDAW (n 4) art 14(2)(h).

⁶⁰ CRPD (n 4) art 28.

coherent and systemic approach to older person's human rights, and this is directly attributable to the absence of an older person's convention.⁶¹ It seems clear that any aspiration for the right to economic security is let down by the reality. The right begs systemic and contextual description beyond a basic needs articulation, and more particularly it requires expansion if it is to serve older persons' diverse needs and interests.

V COMPLEMENTARITY, INTERSECTIONALITY & CONTEXTUALITY

*States have a duty towards older persons that must not be reduced to a question of affordability.*⁶²

In the event a right to economic security is described in an older persons' convention, how would that right complement and intersect with other relevant human rights processes? Additionally, are there other contextual examples of economic security that are germane?

The economic security of older persons is a key feature of several United Nations resolutions, declarations, and instruments. Two

⁶¹ United Nations Office of the High Commissioner for Human Rights, *Update to the 2012 Analytical Outcome Study on the Normative Standards in International Human Rights Law in Relation to Older Persons, Working paper prepared by the Office of the High Commissioner for Human Rights* (23 March 2021) 4; see also United Nations Office of the High Commissioner for Human Rights, *Normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons*, UN Docs A/HRC/49/70 (28 January 2022).

⁶² Magdalena Sepúlveda Carmona, United Nations Human Rights Council, *Report of the independent expert on the question of human rights and extreme poverty*, UN Doc A/HRC/14/31 (31 March 2010) 4 ('2010 Report of the independent expert').

outstanding examples can be given. Firstly, the eradication of poverty among older persons is a central objective of the 'Madrid International Plan of Action on Ageing' (the Madrid Plan),⁶³ a non-binding, political declaration on social development. The Madrid Plan recognises a broader concept of economic security for older persons through many of its articles, including article 12:

Article 12

*The expectations of older persons and the economic needs of society demand that older persons be able to participate in the economic, political, social and cultural life of their societies. Older persons should have the opportunity to work for as long as they wish and are able to, in satisfying and productive work, continuing to have access to education and training programmes. The empowerment of older persons and the promotion of their full participation are essential elements for active ageing. For older persons, appropriate sustainable social support should be provided.*⁶⁴

The Madrid Plan does go beyond a basic needs articulation and importantly, recognises that human rights and social development are interdependent, complementary and mutually reinforcing in this regard. The Plan describes its own reliance on human rights to be successful in achieving its objectives; a central theme of the Plan includes

⁶³ United Nations, *UN Second World Assembly on Ageing, Political Declaration and Madrid International Plan of Action on Ageing* A/CONF.197/9 (8 -12 April 2002) art 7 ('MIPAA').

⁶⁴ *Ibid* art 12.

“[E]nsuring the full enjoyment of economic, social and cultural rights, and civil and political rights of persons ...”.⁶⁵

Secondly, the non-binding UN Principles for Older Persons⁶⁶ reflects a comprehensive, yet basic needs approach to economic security by noting it as enabler of independence, through “access to adequate food, water, shelter, clothing and health care through the provision of income”⁶⁷ and “the opportunity to work or to have access to other income generating opportunities.”⁶⁸ In both cases – the Plan and the Principles – the nature of those non-binding instruments inevitably leads to inadequate human rights protections.⁶⁹ It is arguable, however, that the Madrid Plan’s central theme to eradicate poverty and the Principles’ aspiration of independence would be significantly strengthened by the realisation of a right to economic security if the scope of the right matched the breadth of their intent.

The United Nation’s DESA has noted that economic security, whilst a centrepiece of social and economic development processes, does not have a dedicated goal in the 2030 Agenda for Sustainable Development.⁷⁰ The DESA notes that progress towards the SDGs, including in the implementation of social protection systems and measures for all, advances towards universal health care coverage,

⁶⁵ Ibid pt 1 paragraph 12(e).

⁶⁶ *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, UN Doc A/RES/46/91 (16 December 1991) (‘Principles for Older Persons’).

⁶⁷ Ibid art 1.

⁶⁸ Ibid art 2.

⁶⁹ *Mitchell’s article* (n 14) 533.

⁷⁰ *DESA Policy Brief No90*, 1.

access to quality education and the promotion of decent work, will all help promote greater economic security.⁷¹ Further, the World Health Organization's Decade of Healthy Ageing recognises the linkages between healthy ageing and economic inequity in its human rights approach based Plan of Action.⁷²

The UN Human Rights Council's special procedures are independent experts with mandates to report and advise on human rights from a thematic or country-specific perspective. Special procedures are a central element of the UN human rights machinery and cover all human rights: civil, cultural, economic, political, and social.⁷³ Many special procedures mandates have considered components of a possible right to economic security.⁷⁴ An important earlier thematic report by the independent expert on the question of human rights and extreme poverty canvassed issues relating to poverty

⁷¹ See Ibid.

⁷² World Health Organization, *Decade of Healthy Ageing Plan of Action* (Core document, 14 December 2020), 3.

⁷³ United Nations Human Rights Office of the High Commissioner, 'Introduction to Special Procedures', *Special Procedures of the Human Rights Council* (Web Page 1996-2022) <<https://www.ohchr.org/en/special-procedures-human-rights-council/special-procedures-human-rights-council>>.

⁷⁴ The United Nations has special procedures mandates on a wide range of areas including on the right to food; adequate housing; extreme poverty and human rights; the promotion and protection of human rights in the context of climate change; the right to development; the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; and Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

and old age with a focus on social security.⁷⁵ Specific intersectional issues identified for older persons included specific determinants of older-age poverty;⁷⁶ the position of older women;⁷⁷ the impacts of migration;⁷⁸ HIV/AIDS;⁷⁹ and the critical importance of social protections.⁸⁰

Much more recently, the Independent Expert on the enjoyment of all human rights by older persons (the Independent Expert) has conducted several relevant inquiries. The Independent Expert's thematic reports reiterated the context of economic insecurity for older persons, including in disasters,⁸¹ during the Covid-19 pandemic,⁸² the clear gender dimensions for older women,⁸³ the links between economic insecurity and ageism,⁸⁴ the impacts of social exclusion,⁸⁵ and the link

⁷⁵ 2010 *Report of the independent expert* (n 63).

⁷⁶ Ibid 5.

⁷⁷ Ibid 6.

⁷⁸ See Ibid.

⁷⁹ Ibid 7.

⁸⁰ See Ibid.

⁸¹ Rosa Kornfeld-Matte, *Report of the Independent Expert on the enjoyment of all human rights by older persons, Enjoyment of all human rights by older persons*, UN Doc A/HRC/42/43 (4 July 2019), 7.

⁸² Claudia Mahler, *Report of the Independent Expert on the enjoyment of all human rights by older persons, Impact of the coronavirus disease (COVID-19) on the enjoyment of all human rights by older persons*, UN Doc A/75/205 (21 July 2020).

⁸³ Claudia Mahler, *Report of the Independent Expert on the enjoyment of all human rights by older persons, Human rights of older women: the intersection between ageing and gender*, UN Doc A/76/157 (16 July 2021), 10.

⁸⁴ Claudia Mahler, *Report of the Independent Expert on the enjoyment of all human rights by older persons, Report of the Independent Expert on the enjoyment of all human rights by older persons*, UN Doc A/HRC/48/53 (4 August 2021), 7.

⁸⁵ Rosa Kornfeld-Matte, *Report of the Independent Expert on the enjoyment of all human rights by older persons, Enjoyment of all human rights by older persons*, UN Doc A/HRC/39/50 (10 July 2018).

with loss of personal autonomy.⁸⁶ The Independent Expert's reports also reinforce the Secretary-General's brief that the economic security of older persons is impacted by many factors, including circumstances forcing them to be breadwinners, such as the economic pressures of privatization,⁸⁷ pandemics,⁸⁸ and natural disasters, including differing needs during crisis and recovery phases.⁸⁹ Many of the same issues keep reappearing, now joined by new issues like climate change and the newly reported impacts of ageism.⁹⁰

Looking to other contextual instruments, the Convention on the Rights of Persons with Disabilities (CRPD) does not define economic security but does include a conglomerate article on adequate standard of living and social protection that includes a right to an adequate standard of living for persons with disabilities and their families, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.⁹¹ Further, the CRPD anticipates older age (or at least retirement) guarantees "equal access by persons with disabilities to retirement benefits and programmes".⁹² In the context of older age, economic security and retirement income security may well be

⁸⁶ Rosa Kornfeld-Matte, *Report of the Independent Expert on the enjoyment of all human rights by older persons, Enjoyment of all human rights by older persons*, UN Doc A/HRC/30/43 (13 August 2015), 3-4.

⁸⁷ Philip Alston, *Note by the Secretary-General, Extreme poverty and human rights*, UN Docs A/73/396 (26 September 2018).

⁸⁸ United Nations, *Policy Brief: The Impact of Covid-19 on Older Persons* (May 2020), 12.

⁸⁹ *Ibid* 4.

⁹⁰ See generally World Health Organization, *Global Report on Ageism* (2021).

⁹¹ CRPD (n 4) art 28.

⁹² CRPD (n 4) art 28(e).

synonymous for many. Importantly, the CRPD's preambular paragraphs connote the connection between participation and economic security and the close relationship between the lived experience of persons with disabilities and poverty.⁹³

A recent normative formulation that addresses economic security is the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (the Peasant Declaration).⁹⁴ The Peasant Declaration refers to the United Nations Declaration on the Right to Development,⁹⁵ and provides a further illustration about how the right to economic security might be contextualised for older persons. The Peasant Declaration is framed around persons who engage, or who seek to engage – alone, or in association with others or as a community – in small-scale agricultural production for subsistence and/or for the market, and who rely significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who have a special dependency on and attachment to the land.⁹⁶

The Peasant Declaration's formulation provides important recognition of the specific rights-needs of older persons. The Preamble notes with concern the circumstances of peasants ageing, and young people

⁹³ CRPD (n 4) preambular paragraph (f), (m) and (y).

⁹⁴ *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, UN Doc A/RES/73/165 (8 October 2019, adopted 28 September 2018) ('*Peasant Declaration*').

⁹⁵ *United Nations Declaration on the Right to Development*, UN Doc A/RES/41/128 (adopted 4 December 1986).

⁹⁶ *Peasant Declaration* art 1.

increasingly migrating to urban areas and turning their backs on agriculture owing to the lack of incentives and the drudgery of rural life.⁹⁷ The Peasant Declaration mentions the rights and special needs of peasants and other people working in rural areas, including older persons,⁹⁸ and specifically lists 'age'.⁹⁹ Additionally, it confirms that peasants' economic security depends on diverse issues such as land tenure, agrobiodiversity conservation and agricultural innovation, bio-cultural rights within food systems, rights to water, water sanitation, and seeds.¹⁰⁰ The Declaration also notes the gender dimension of peasant and rural women's role in economic survival and contribution to the economy.¹⁰¹ We begin to see just how wide the scope of economic security might be, or at least the potential of so many rights issues to be relevant.

Most recently, the United Nations' Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons (UN OEWGA) considered the substantive issue of older persons' right to economic security.¹⁰² The Working Group focused on key basic needs areas of social security, health, adequate

⁹⁷ Ibid Preamble.

⁹⁸ Ibid art 2(2).

⁹⁹ Ibid art 3(1).

¹⁰⁰ Mariagrazia Alabrese et al (eds), *The United Nations' Declaration on Peasants' Rights* (Taylor & Francis Group, 2022).

¹⁰¹ Ibid Preamble.

¹⁰² United Nations' Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons (Website, 2011) <<https://social.un.org/ageing-working-group/index.shtml>> <<https://social.un.org/ageing-working-group/twelfthsession.shtml>>

housing, and work.¹⁰³ The substantive topic of the right to economic security was taken from the Chair's Report to the 7th Working Session which set out a list of thematic rights topics for consideration for inclusion in an older person's convention.¹⁰⁴ The right's normative elements will be considered in the UN OEWSGA's 13th Session in 2023.

VI THE LATENT VALUE OF A CONVENTION ON THE RIGHTS OF OLDER PERSONS

The latent value of an older persons' convention is that it would potentially include a right to economic security, or in the very least catalogue the necessary normative components to guarantee economic security by virtue of the operation of a combination of rights. The UN OEWSGA noted that the challenges faced by older persons that must be addressed by a right to economic security include:

- » the impact of multi-dimensional poverty;
- » gaining access to traditional economic rights including adequate standard of living, social security, healthcare and services, adequate housing, and work; and

¹⁰³ Ibid A/AC.278/2022/CRP.4.

¹⁰⁴ United Nations' Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons (Website, 2011) <<https://social.un.org/ageing-working-group/index.shtml>> <<https://social.un.org/ageing-working-group/documents/seventh/ChairsSummaryOEWG7.pdf>>.

- » the impacts of intersectional discrimination and inequality based on age, gender, race, indigeneity, and other grounds.¹⁰⁵

The UN OEWGA noted that multi-dimensional nature of poverty means older persons face weak social protection coverage, inadequate pension levels, limitations or lack of health and social services, lack of access to regular income and work, age discrimination in employment and lower labour capacity.¹⁰⁶ Economic insecurity at old age is also caused by the negative socioeconomic effects of the Covid-19 pandemic, difficulties in accessing financial services, disinheritance, and limited access to justice.¹⁰⁷

VII CONCLUSION

The contemplated right to economic security is a developing standard, not yet capable of adequate description, let alone normative definition. The right obviously needs careful formulation, especially as it relates to older persons. It seems likely that it will receive its first real consideration at the Thirteenth Working Session of the UN OEWGA when that Group considers the right's possible normative elements.¹⁰⁸

It is encouraging to see that the UN OEWGA's consideration of substantive issues appears to foreshadow that the normative form of

¹⁰⁵ See Ibid.

¹⁰⁶ Ibid 2.

¹⁰⁷ See Ibid.

¹⁰⁸ United Nations' Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons (Website, 2011) <<https://social.un.org/ageing-working-group/>>.

the right to economic security necessarily includes economic rights that directly improve older person's economic security (e.g. the right to adequate standard of living, housing, and social security) but also, and importantly, context (e.g. pandemic, disaster, climate change, rurality) and intersections (e.g. disability and indigeneity) that address the multi-dimensional nature of poverty and the drivers of economic insecurity. Arguably, it might also include third generation rights¹⁰⁹ to self-determination, a healthy environment,¹¹⁰ natural resources, participation in cultural heritage, intergenerational equity, and sustainability and who knows what others.

Older Australians will certainly benefit from a Convention on the Rights of Older Persons, particularly given the absence of normative pressure on policy and legislation relating to older persons and ageing, as distinct from areas governed by existing human rights treaties to which Australia is signatory such as children, women, and persons with disabilities.¹¹¹ An older persons' convention would require national governments to consider economic security beyond basic needs, ensuring that the diversity of older Australians were supported by enforceable rights to ensure happy, healthy and harmonious lives.

¹⁰⁹ Karel Vasak, 'A 30-year struggle; the sustained efforts to give force of law to the Universal Declaration of Human Rights' (1977) *The UNESCO Courier* 28–29, 32.

¹¹⁰ United Nations' General Assembly, *The human right to a clean, healthy and sustainable environment*, UN DOC A/RES/76/300 (Adopted 28 July 2022).

¹¹¹ *Mitchell's article* (n 14) 542 and 546.

AN INTERVIEW WITH JULIAN PORTER*

James Arthur

In this interview, Julian Porter details how QCAT and other state tribunals are becoming increasingly legalistic to the detriment of the people who rely on them the most. Interestingly, he also emphasises the need for policymakers to consider how artificial intelligence might facilitate access to justice, particularly in the context of state courts. He stresses the immense power that SPER debts and the TICA system wield over the most vulnerable in society and finally departs with some comments on how the civil law needs to recognise and adapt to the reality that many people have to represent themselves in the legal system.

PB: Julian Porter, thank you very much for taking the time to talk to me today. You started your legal career as a legal officer for Crown Law. You've spent the last 22 years working in the community legal sector, beginning as Principal Solicitor at QAI and for the past 15 years as Principal Solicitor at Suncoast Community Legal Centre. Why did you pick this career path? What prompted you to enter into this kind of legal work?

JP: Well, I guess I was really under the pump at the time. I was actually studying Journalism and working at Crown Law, and I had quite a high workload. I ran into a bloke on the bus that I knew. He'd been seconded off from

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QAI¹ to work at the Office of the Public Advocate and he said ‘mate, you can take my job if you like’ and I said, ‘that sounds alright’. So, there was no altruism or any particular notion of wanting to serve the people at all. I pretty quickly worked out that while I thought I was serving the public as a public servant at Crown Law – and while certainly I wouldn’t take anything away from those people who do that work – it was probably a more effective way to serve the public by helping them get out of trouble rather than busting their chops when they got into trouble.

I quickly found that I enjoyed it and was there at QAI for six years. I really enjoyed the disability specific work and the mixture of doing case work and running advocacy programs as well as doing media and educational jobs. And then when we moved to the Sunshine Coast, the job at SCLS just came up. One day, one of our neighbours who was President of the organisation just wondered down the street in his board shorts and said, ‘you should apply for this job at the community legal service’. I said, ‘oh I don’t know if I

¹ Queensland Advocacy for Inclusion, formerly Queensland Advocacy Incorporated, is an independent organisation that advocates for the protection and advancement of the needs, rights and lives of people with disability in Queensland.

want to do that', and he said, 'you should give it a try'. Sure enough I got the job. It wasn't actually a very popular job at the time, and I think with what we've turned the place into, if I do ever leave, there will probably be a few applicants because it looks a bit groovier now than it did back then.

Some of my more enlightened legal friends have said to me on the side after a few reds that I've probably got the best legal job in Queensland. And I think it's true because you get to choose the clients who you work with and the matters you work on, you get to help disadvantaged people with their legal problems and you get to live on the Sunshine Coast.

PB: My second question concerns QCAT.² So all parties that come before QCAT have to be self-represented, although they can apply for legal representation in certain circumstances, and they can most certainly seek out legal advice from people like you. How does your work overlap with QCAT and is it a problem that oftentimes people go through that process representing themselves?

² The Queensland Civil and Administrative Tribunal, established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

JP: I think that QCAT— and all the tribunals that the states have created — are well-intentioned. They're a nice attempt to try and bring access to justice to ordinary people. But they're populated by members and even judges who are legally trained, who have legal instincts, and they operate in an adversarial system where those members can't really assist the process, they can only adjudicate a decision. What I suppose happens — every year it seems to me — is that I see people coming in here with more and more complicated directions that have been given by QCAT members about how evidence is to be presented over time frames, when people are going to respond to things by, and when there will be a compulsory conference by; and I just think that it's about as likely that these people are going to fly to the moon. That's about how possible all of this is for them. But I think even that is well-intentioned. This is how we're going to get this matter running and make sure there's proper evidence before us. I just think every time you make it more legalistic it becomes less of what it was trying to be in the first place.

I tell people religiously that QCAT is a people's court, it's not about lawyers and there's no legal costs. I try and give them hope, but as the years go by, I believe that less

and less and it really is becoming an increasingly legalistic place.

PB: Sure. I guess they can always apply for legal representation or hire a lawyer, but I suppose that's an expensive thing to do.

JP: Yeah, look I think there's definitely a tendency for people, particularly with money or people in business, to use lawyers to draft their applications and prepare their evidence and all that sort of thing. Really there's no rule against that, even preparation of submissions by lawyers, as long as they're presented by the person themselves. But that's really getting a long way away from where it was supposed to land. I mean the construction law jurisdiction of QCAT is, I understand, almost completely populated by lawyers because everyone just agrees to each have one. These are complex things; this is big money; this is very serious stuff. So, everyone agrees to have lawyers in this non-lawyer jurisdiction. It's an interesting anomaly.

I feel like while QCAT remains adversarial, it really won't work that well because it makes the member's job really just too hard. I always think the job of a QCAT member is probably the hardest judicial or quasi-judicial role going. The Magistrate's role is probably the next hardest

and the District Court is the next hardest, then the Supreme Court and by the time you get to the Court of Appeal their job is super easy. They sit in their nice, comfortable court room and only hear a handful of cases a day and have the greatest legal minds in the country making submissions to them on fine, interesting points of law. Poor old QCAT man or woman, they've probably got a dozen matters they've got to roll over every 45 minutes. They've got to work out what the evidence is. Usually, nobody is going to tell them what the law is; they've got to work out what that is as well, then make a decision, write it up and get the next person in. What a tough job. I just think the whole model is a bit flawed and isn't ever really going to provide the access to justice that was hoped.

PB: I guess my next question is: would a shift to more inquisitorial proceedings like, for example, a more active fact-finding role for judges, improve those problems?

JP: I think it certainly could. Or more of a 'lets-work-this-out' sort of attitude, but not a mediation model. I suppose it would more like an adjudication model where the person appointed to decide that matter actually tells people what they're going to need to bring to their attention or what evidence they're going to need. That could be a half-way step.

I think we're all fascinated by the idea of an inquisitorial model that we hear they have in Europe, but not many of us have ever worked in it or experienced it and how it works. The first thing you think about is that it must be expensive, but then again maybe it's not as expensive; maybe it's more efficient because it gets things done more quickly. You've presumably got people who are getting paid lesser amounts, doing a lot of this grunt work to find out what the facts are and maybe the judges get through the work quicker. I don't really know how it pans out financially. That said, when you compare the budget for the justice system to health or education or just about anything else, it's just a tiny budget. And how seriously do we take justice? So maybe it's something worth investigating.

But I do wonder if maybe we've already moved past this in history to a point where we question why we are running either of these styles of systems. Why are we running inquisitorial or why are we running adversarial – why are they the only things we are considering. What could technology offer us? I'm appalled every time I go to the QCAT website or even a Magistrates court website and it just tells people 'here's the forms'. In our State courts you mostly can't file online yet, even though Federal courts have been doing it for decades. So, we're

still stuck with this system where you have to download a form; type into it; print it out; do up all your attachments; photocopy it; and stamp it at the court. It's the 1890s still.

I just wonder if, with technology and artificial intelligence, whether one day, particularly for tribunal work, the everyday man or woman on the street could just start typing and some algorithm could work out what the issue is, which jurisdiction it fits, prompt him or her to what evidence they might need, ask them to upload that evidence and get it all into a nice form that is servable. The system could then serve the other party and set down a mediation date immediately. It just seems like that's probably all quite possible right now. And maybe an algorithm couldn't do it all, but maybe it would take a handful of staff at the court keeping an eye on it and pressing a few buttons to send things in the right direction. But gee it would be a lot cheaper than having magistrates – in the regions the magistrates act as QCAT members – to sit on matters that are unprepared, that regularly get adjourned, that haven't got the evidence. I just really wonder if there could be savings. But even if there's not savings, there's going to be more access to justice in a digitalized system.

PB: In your experience, what are some of the features of Australia's legal system that create conditions of poverty and what needs to be done?

JP: I think that the classic civil litigation system that lawyers still operate in, even though so much work is now happening in tribunals, really is a thing that creates poverty particularly in the debt collection world. I don't know the statistics, but I would suggest that at least the majority of debt matters are decided by default judgement where a large powerful player with lawyers behind them is pursuing a minority party with a debt. That minority has neither the capability nor the money to even consider a defence and if they did consider a defence, they really can't take the risk that there's going to be really significant legal costs added on. Weighing it up they're not even bothering to put a defence in or to turn up, the whole thing is just getting rubber stamped and running through the system, and lo and behold that person, having literally had no interaction with the system at all beyond being served has now got a judgement. That judgement automatically turns up on their credit reporting with any of the credit reporting agencies and suddenly they can't get credit. This country survives on credit. I often think the difference between,

if we're going use the parlance of 'rich and poor', is the ability to get credit.

PB: To start a business or to buy a house...

JP: Yeah, and to pay for your groceries next week. There's plenty of reasonably well-paid people who are just paying off the credit card at the end of the month. If you're suddenly unable to get credit, I think you're suddenly quite close to poverty.

So that's one aspect. But it's not just the civil law and default judgement scenario, it's other debts that you can rack up without noticing in a way, like if you just stop looking at your mail for a while. You can really quickly find yourself with SPER³ debts, and we all know they're the worse to get because the government has got much more power to extract money from you than private people do. SPER debts can include payments under victim assistance circumstances. You can have a person who gets done for violent crimes deserving of punishment in the courts, and then the government makes out a payment to the victim of up to \$75,000 and puts it straight onto SPER. Then they might do some jail time and then come out and can they get credit? Probably

³The State Penalties Enforcement Registry (SPER) is established by the *State Penalties Enforcement Act 1999* (Qld) pt 2 s 7.

not. So they'll probably be having that debt for quite a while. You can't be too sympathetic to the violent criminals, but on the other hand entrenching them in poverty makes no sense.

There's a lot of these systems that are operating behind the scenes. The TICA system⁴ is the system that all of the real estate agents are members of that they can go and do a search on prospective tenants. If a tenant has a debt or even quite often a debt that is inaccurately reported, they simply won't get a rental house anywhere in Australia. Each state government has different rules about how those reports can be taken off TICA by QCAT but by that time the person is likely to be homeless.

Across the gamut there's all these sort of 'gotcha moments' where people think 'oh I didn't do too badly out of that, I only copped a little bit of a fine' or 'they stopped chasing me for that debt' but suddenly they find out their credit rating has been stuffed and they're in poverty.

PB: Is there anything else you would like to add?

JP: The first thing I thought about when you asked me about civil litigation and how it entrenches poverty is that the

⁴The Tenancy Information Centre Australasia (TICA), a private company, is the largest tenancy database in Australia.

Uniform Civil Procedure Rules in Queensland⁵ seem to suppose that anyone who is engaged in civil litigation is using a lawyer. So while there's all this emphasis on speedy resolution and keeping matters moving and all that sort of thing, all of the disincentives to slacking off or not fulfilling an obligation are all costs awards. So basically, someone's not doing the right thing on the other side, what do you do? You bring an application, and the court orders them to do it and you get costs. That really breaks down when one party is not represented. They've got no power in that relationship because they can't make one of those applications, or they can make that application, but they won't get costs because they don't have a lawyer. So, I think that needs to be looked at when we know that so many people are self-representing in contested litigation matters and yet they don't have that big stick of making an application and asking for costs as a result. That could be fixed pretty quickly I reckon.

PB: Thank you for your time, Julian.

⁵ Uniform Civil Procedure Rules 1999 (Qld) are made under the *Supreme Court of Queensland Act 1991* (Qld).

