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# 'We're not doing any harm... just leave us alone': Why Street Offences Should be Decriminalised

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➤ **Abstract** *Street offences continue to be used to regulate the behaviour of people experiencing homelessness around the world. Yet, police interference and criminal penalties are generally not required since the 'offending' behaviour of people experiencing homelessness is rarely serious or violent in nature. Furthermore, placing vulnerable people in custody can pose real risks to their safety and well-being. In this paper, I draw on two Australian studies – one on the criminalisation of homelessness, and one on deaths in custody – to show the damaging effects that street offences and their enforcement have on people who are homeless. Since rights-based challenges to street offences may not be effective or forthcoming, I argue that our advocacy should focus on calling for the repeal of these laws.*

➤ **Keywords** *street offences, deaths in custody, criminalisation*

## Introduction

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In Australia, street offences have a long history dating back to colonisation (Walsh, 2005). Laws that traditionally criminalised 'vagrant' behaviour have mostly been repealed, but their legacy remains in the form of similar laws couched in modern terms. Laws that criminalise 'offensive' and 'nuisance' behaviours in public still disproportionately impact people experiencing homelessness because they are more likely to be present in public spaces and are more likely to engage in life

sustaining activities in public spaces. These activities may be considered 'offensive' in public whilst perfectly acceptable in private, leaving people experiencing homelessness disproportionately targeted (Mitchell, 2021).

There is extensive international literature demonstrating that people experiencing homelessness often receive charges, move-on directions, banning notices, fines, and other criminal penalties for street offences, particularly begging, public intoxication, public urination, and camping (Young and Petty, 2019; Herring, 2019; Walsh, 2011). This 'de facto criminalisation of homelessness' is unjust, discriminatory, and in breach of human rights instruments (Justesen, 2023). It causes harm to the affected individuals because contact with law enforcement is stigmatising and degrading, hinders access to services, and prevents people from being able to get back on their feet. Furthermore, being taken into custody can pose serious risks to individuals' physical safety, and even their lives.

In this paper, I discuss two recent studies that have investigated the impact of street offences and their enforcement on people experiencing homelessness. One was a qualitative study involving 164 interviews with homeless individuals from all over Australia. The second was a quantitative study on deaths in custody in Australia. Findings from both studies illustrate the significant adverse impacts that street offences and their enforcement have on people experiencing homelessness and support recent calls for the decriminalisation of these offences.

## **Street Offences in Australian Law**

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Street offences have typically been located within the criminal law; however, the concept and scope of 'criminalisation' is becoming increasingly vague in Australia and elsewhere (Lacey, 2009). Civil orders, such as move-on, banning, and anti-social behaviour orders, now supplement the criminal law, and together, they regulate the use of public space by vulnerable people, particularly those who are homeless (Rankin, 2021; Farmer, 2017). These civil orders are said to be 'preventative' and 'non-punitive', yet they can and do result in criminal charges when people fail to comply with them. Brown (2013, p.607) has concluded that criminalisation now includes both the regulatory effects of the criminal law and associated 'regulatory civil, administrative and contractual hybrids'. With this in mind, when I refer to 'street offences', I mean the criminal laws that create street offences (such as begging, public intoxication, disorderly behaviour) as well as the ancillary regulatory mechanisms that apply to people on the street which can result in offences (such as move-on and banning powers, and powers of search and seizure). This is important because, for people experiencing homelessness,

the practical distinction between a criminal and civil order that bans them from an area or fines them for ‘offensive’ behaviour is irrelevant – the impact on their lives and livelihood is the same.

In Australia, many vagrancy Acts survived the turn of the century – Queensland’s *Vagrants, Gaming and Other Offences Act 1931* remained in effect until 2004 and Victoria’s *Vagrancy Act* was in force until 2005. Even now, their legacies remain. Most Australian jurisdictions retain the criminal offence of begging and catch-all offences like ‘offensive behaviour’ and ‘public nuisance’ are still used to regulate the behaviour of marginalised public space users (Walsh, 2011). Having said this, there is support for the decriminalisation of certain street offences in some jurisdictions. For example, in Queensland, a recent Parliamentary Inquiry recommended the decriminalisation of a range of street offences, such as begging and public drunkenness, emphasising that a ‘health and social welfare-based response’ should instead be taken to offences committed in public space (Queensland Parliament Community Support and Services Committee, 2022).

Laws that criminalise ‘public nuisance’ and ‘drunk and disorderly’ behaviour are broadly framed and grant wide discretionary powers to police, which allows for selective enforcement against certain ‘undesirable’ individuals (Diamond et al., 2021; Young and Petty, 2019). The same is true of ‘preventative’ powers, such as move-on directions and banning notices. Research has consistently found that such powers are disproportionately used against racially marginalised public space users in Australia and elsewhere (Wang and Weatherburn, 2021; Bowling and Phillips, 2007). This means that street offences serve as a ‘common entry point into the criminal justice system’ for people experiencing homelessness, despite the fact that the defendants who are homeless generally demonstrate no criminal intent (Diamond et al., 2021). They are rarely charged for behaving aggressively or violently; rather, their charges commonly result from attempts to seek shelter or food (Diamond et al., 2021). Street offences empower police to intervene in situations where they would otherwise lack a power of arrest (Rankin, 2021; Farmer, 2017; Cooper, 2016), effectively creating a ‘personal criminal law’ for the individuals against whom they are enforced (Ashworth and Zedner, 2008).

Widely framed, vague street offences have survived legal challenge in Australia until now, in part, because of the absence of any binding human rights instruments. The introduction of human rights legislation in three Australian states over the past two decades (Australian Capital Territory’s *Human Rights Act* in 2004, Victoria’s *Charter of Human Rights and Responsibilities* in 2006, and Queensland’s *Human Rights Act* in 2019) has brought some hope that the legality of street offences might be contested; however, this has not yet occurred, and the experience of other

jurisdictions might well suggest that human rights is not capable of bringing about the desired reforms (see Justesen, 2023). Instead, advocating for decriminalisation may present the best opportunity for legal and social change in this area.

## The Studies

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Two recent Australian studies have shed further light on the impact of street offences on people experiencing homelessness.

First, between 2017 and 2022, I undertook a national qualitative study on the criminalisation of homelessness and poverty.<sup>1</sup> This was a collaborative research project involving four universities and 10 community legal centres from all over Australia. We investigated the impacts of criminalisation on people experiencing poverty and homelessness in all Australian states and territories, interviewing 164 people experiencing homelessness across 10 different cities.<sup>2</sup> Participants were recruited by the community legal centre partners, and the staff of those centres also conducted the interviews. This meant that all interviews were conducted by trusted people who could provide assistance, advice, and referrals if necessary (Dempsey et al., 2016). Participants were asked questions about the ways in which the criminal law system impacts their lives, including police, courts, and corrective services. The interviews were audio recorded and transcribed, and the transcripts were subjected to reflexive thematic analysis (Braun and Clarke, 2022). A full write-up of the results is forthcoming elsewhere.

Second, since 2016, I have coordinated an ongoing quantitative project that monitors deaths in custody across Australia. The UQ Deaths in Custody Project is a pro bono research project staffed by volunteer law students.<sup>3</sup> The aim of the project is to make information about coroners' inquest findings on deaths in custody publicly available and searchable. We maintain a public online database that contains information about every publicly reported death in custody in Australia since 1990. There are over 800 deaths in custody cases in our database to date (see further Walsh and Counter, 2018).

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<sup>1</sup> This study was funded by the Australian Research Council (ARC) Linkage Projects Scheme. The chief investigators of the project were: Tamara Walsh (UQ); Thalia Anthony (UTS); Luke McNamara (UNSW); Julia Quilter (UoW). The research assistants for the project are: Jane Beilby (UQ LLB graduate); Lucy Cornwell (UQ LLB graduate); Sienna McInnes-Smith (UQ LLB graduate); Maddy Waldby (UQ LLB student).

<sup>2</sup> The study sites were: Adelaide, Brisbane, Canberra, Darwin, Hobart, Melbourne, Perth, Sydney, Townsville, and Wollongong.

<sup>3</sup> Visit <https://deaths-in-custody.project.uq.edu.au/>. I acknowledge the wonderful work of our recent most student leader, Lucy Cornwell.

These two projects have yielded different but overlapping information about the impact of street offences on people experiencing homelessness. The interviews with people experiencing homelessness demonstrated that homeless individuals experience frequent, often daily, interactions with police. Whilst these interactions do not always result in criminal charges, the people experiencing homelessness we interviewed described them as oppressive, intrusive, and unwelcome. Meanwhile, the deaths in custody data suggests that many vulnerable people find themselves in police custody for street offences. In our database, we found 14 examples of deaths in custody where the deceased person had been arrested or taken into police custody because they were intoxicated and found to be behaving in a disorderly manner.

The findings of these studies support recent calls for the decriminalisation of street offences like begging and public drunkenness. Criminal law interventions for street offences are experienced by people experiencing homelessness as intrusive and degrading, and for some, can pose a serious risk to their well-being.

### ***Street offences and homelessness***

In our interviews with people experiencing homelessness, we found that criminalisation was considered by many to be inevitable and inescapable. Without a home to retreat to, people experiencing homelessness felt they were an 'easy target' for law enforcement officers, and they found it difficult to avoid surveillance and interference from them. One participant said:

When you're homeless, you can't even sleep anywhere without the police just going, excuse me, move along. Do you know what I mean? Like where are you meant to go?

People experiencing homelessness viewed these frequent interactions with police as a form of 'harassment'. They said contact with law enforcement officers was 'embarrassing', 'invading my personal space and privacy', and they felt 'shamed' by it. One said:

They asked to search my bag, which I understand, and just felt quite put on the spot, shamed, and didn't receive no apology or anything like that either... staring and watching me all the time, and I feel like they're expecting me to misbehave.

The people experiencing homelessness we interviewed acknowledged that sometimes police officers were 'just trying to help', but they resented their constant intrusion into their lives. They described being subjected to move-on directions they could not comply with because they had nowhere else to go, or because they needed to access services in the area they were being moved on from. They said they were frequently subjected to searches of their person and bags for 'no reason',

and seizure or disposal of their possessions. A high level of surveillance was accepted as being part of street life, yet they insisted, 'we're not doing any harm' so just 'leave us alone.' One participant said:

I think if you're not done anything wrong, regardless of your situation, leave that person alone. They're going through enough shit.

In our interviews with people experiencing homelessness, many participants said that begging is a common offence that people experiencing homelessness are charged with. They described the injustice of being punished for being destitute. Many said it was 'ridiculous' to fine people for 'begging for money on the street' particularly when, for them, begging was seen as a way of avoiding other forms of criminal activity. One participant explained:

When you're homeless you're more prone to, for example, getting a fine for sitting and asking for money. Which, in that case, yes, a fine. But they're asking for money because they need toiletries, or they need a pair of clothes. Or, in my case, when I asked for money, it was because I didn't want to go into a shop and steal underwear... And when you're giving people that fine for asking for money, I guess they've got no other choice then to go do that petty crime and to go steal some food, or to go steal some clothes or underwear, or toiletries or whatever they need. And on top of that then you've got a fine. Then you get charged for stealing, and then you get a stealing fine, and then a asking for money fine.

Public intoxication or 'drunk and disorderly' was another offence that people experiencing homelessness said they were commonly charged with. Several people experiencing homelessness we interviewed said that these charges were particularly common amongst First Nations peoples.<sup>4</sup> The people experiencing homelessness we interviewed said that First Nations peoples are more likely to be charged with public intoxication because they frequently socialise in public places.

Sometimes when people get together, that's why when they in the past people to get together for a large corroboree, and that's why they're singing, dancing and that's why the different tribes come together, sit in the park, and drink and get along.

The participants, Indigenous or otherwise, who said they drank in public places did so because they had nowhere else to go. Many said they used alcohol to self-medicate for mental illness and depression, 'to make you forget and numb it all'. In this context, they said that criminalising people was harmful and counterproductive. Three participants made these comments:

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<sup>4</sup> 'First Nations Peoples' refers to the first peoples of Australia, the Aboriginal and Torres Strait Islander Peoples.

I think there should be... a little bit of leeway because... these people have been under the influence of drugs and alcohol for the majority of their lives. So what's going to change? You're telling them to move on or they're going to get charged, they're just going to go do it somewhere else.

When they're drunk, cops just pick them up... sometimes [they] don't remember that they were charged, because the police charged them while they were drunk...

"We're taking you to a watch house for being drunk, four or five hours." That's not right... they go to court for drunkenness, disorderly. So, the judge gives them a fine. They come again and they do the same thing. The police do the same thing. Come there and pick them up again.

The people we interviewed recognised the injustice of people experiencing homelessness being charged with public intoxication, while housed individuals could drink freely in pubs or at home without police interference. Two participants said:

People that have got no home, they've got nowhere else... Where else do they go to drink? They can't afford a drink at a pub. That's where I'm coming from, that's the reason why I'm getting stung so much is because I've got no home... because I've got no home I'll just drink on the street and then get busted.

[T]here'll be days when you do want to have a cold beer, but you can't go out the back of your house and light the barbie, can you? So, you just have a cold beer and then the next minute unfortunately a police officer sees you and then next minute you're in trouble.

Those who received fines or infringement notices for street offences were often unable to pay them, and they said that debt they incurred entrenched their disadvantage. One of the people experiencing homelessness we interviewed described this as a 'downhill spiral':

It's so overwhelming that your financial situation is- you've got all these fines and all this money, and you can't get a car, or you can't get a loan or anything like that, you know, it's just extremely compounding.

Some of the people experiencing homelessness who we interviewed said that they had spent time in custody for non-payment of fines. One said: "If you have money, you can pay your way out. Whereas, if you have no money, you end up going to jail."

### ***Street offences and deaths in custody***

In addition to being unjust and potentially discriminatory, the enforcement of street offences can place certain individuals at serious risk of harm. As one of the people experiencing homelessness we interviewed said:

They take you into custody... if you had a health problem... people who have diabetes, or prone to epilepsy, or these sorts of things, they weren't really properly medically screened when they were taken into [custody]. Sometimes they were denied their medications, and there had been a lot of problems and... even deaths in custody as a result of that.

The results of the deaths in custody study confirm that arresting people, or otherwise taking them into custody, for street offences does, on occasion, threaten their safety. When we searched our deaths in custody database, we found 14 examples of deaths that had occurred after the person had been taken into custody for a street offence while they were intoxicated.<sup>5</sup>

Of the 14 deceased, half (n=7) were in custody because they had been arrested and charged with a street offence. Five had been arrested for being drunk in a public place, one had been arrested for 'disorderly behaviour', and one had been arrested for failing to move-on. In the other seven cases, the deceased person had not yet been charged with an offence, but rather had been taken into 'protective custody' because they were intoxicated. In these cases, the coroners consistently recommended that intoxicated persons be taken to hospitals instead of being held in police cells because adequate monitoring and health care cannot be provided to a person in a cell.

Tragically, at least 11 of the 14 deaths in custody associated with street offences and intoxication were First Nations people. In the other three cases, the race of the deceased person was not specified in the coroners' report, so the number may actually be higher. Three of the deceased were Indigenous women who had been dismissed as being drunk and disorderly when they showed signs of physical ill health immediately prior to their death. For example, Tanya Louise Day (Coroners' Court of Victoria, 2020) was arrested and taken into custody for being drunk in a public place when she fell asleep on a train. Police did not respond when she stumbled and fell in her cell, and she later died from a cerebral bleed. Maureen Mandijarra (Coroners' Court of Western Australia, 2017) was arrested and detained by police for 'street drinking'. Her agitation and confusion were dismissed as intoxication, and she died from sepsis as a result of an untreated skin infection she acquired while sleeping on the street. The coroner concluded that Maureen should have been cared for in a hospital rather than being detained in a police cell, and that 'police ought to have taken her to hospital' that night (p.55). The coroner further remarked (p.64):

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<sup>5</sup> These cases all occurred between 2002 and 2021.



[Maureen] should not have spent her last hours in a cell in the lock-up. It is her death in a custodial setting that is so keenly and painfully felt by her family. She ought to have had the possibility of seeking and obtaining the comfort and assistance of her friends or family if she had been able to sense her deterioration that night.

### ***Arguments in favour of decriminalisation***

It is well-established that people experiencing homelessness experience frequent interactions with law enforcement officers (in the UK, see Cooper, 2016; in Denmark, see Justesen, 2023; in the US, see Gonzalez et al., 2018). In a recent US study, for example, Robinson (2019) found that 90% of a sample of people experiencing homelessness had experienced police contact for quality-of-life offences, 70% had been ticketed, and 36% had been incarcerated for these offences.

Street offences tend to be justified as necessary to maintain public order, public amenity, and public safety, and these may be legitimate goals (Justesen, 2023). However, any benefits to the community must be weighed against the detriment, or harm, caused to those whom the laws are enforced against.

The enforcement of street offences has significant ramifications for homeless individuals (Saelinger, 2006). The people experiencing homelessness we interviewed said the constant surveillance and interference from law enforcement officers was humiliating and degrading. Some said they had possessions seized or ruined as a result of being searched by law enforcement officers, which was particularly upsetting considering the limited number of possessions they had. Similar findings have been made by other researchers. Herring (2019) observes that, for people experiencing homelessness, having their belongings taken or destroyed may be considered a worse outcome than arrest, and that loss of possessions is what makes an arrest so burdensome.

Move-on directions and banning notices may be advanced as 'diversionary' but people who are homeless do not view them as benign. Instead, the interviews we did with people experiencing homelessness reflected the findings of Herring (2019) and the perspectives of Ashworth and Zedner (2008) in that diversionary strategies may be experienced as intrusive and punitive. Justesen (2023) adds that such powers may force people experiencing homelessness to become invisible to escape detection, causing them to move away from urban spaces and the services on offer there.

International research has confirmed that the enforcement of street offences can begin a 'downhill spiral' for people experiencing homelessness, and that they can find it difficult to exit the criminal law system after an initial contact. There are several reasons for this. People experiencing homelessness who are found guilty

of a crime are more likely to be refused bail, and to receive a harsher penalty (Diamond et al., 2021). If they receive a fine, they may not be able to pay it, and may be subject to enforcement action as a result, which may include time in custody (Ashworth and Zedner, 2008). Even a short amount of time in custody can result in loss of housing and possessions, entrenching their state of destitution (Cooper, 2016).

However, further to this, the deaths in custody data suggests that time in custody can pose serious risks to individuals' physical safety. Vulnerable people are placed at risk when they are held in police cells, especially if they are intoxicated. Diversionary strategies that involve police taking 'protective' action do not solve this problem, particularly if they take the person away from support people and health and community services.

This leads us to question why a criminal law approach is taken to homelessness in the first place. The reality is that people experiencing homelessness rarely engage in serious offending. They are more likely to be victims of violent crime than perpetrators, and most often, their 'offending' is minor, victimless, and directly related to their state of homelessness or poverty. In Australia, as elsewhere, the belief that people experiencing homelessness are 'anti-social', unsightly, a blight, or a nuisance seems to legitimise their criminalisation (Young and Petty, 2019; Speer, 2019). In public discourse, the relationship between homelessness and crime is 'inverted' – the 'respectable' public are presented as potential victims whereas it is those who are homeless who are most vulnerable (Heerde and Hemphill, 2016).

Begging provides an apt example of this. The offence of begging is justified as being necessary to prevent ordinary people from feeling intimidated or fearful, yet Australian research has suggested that aggressive begging is extremely rare; rather, people who beg tend to do so in a passive manner, for example by sitting or sleeping next to a sign, or asking passers-by for money (Young and Petty, 2019; Hughes, 2017). The people experiencing homelessness we interviewed described begging as a crime of survival and insisted that people should not be questioned or charged merely because they are 'passively begging' (see also Johnsen and Fitzpatrick, 2010).

Decriminalisation, rather than diversion, seems most appropriate given that in most cases a criminal law response is excessive and unnecessary. An alternative approach should be taken that emphasises the health and welfare of the person if future 'offending' is to be prevented.

### ***Alternatives to criminalisation***

In our interviews with people experiencing homelessness, we heard about several programmes that have been developed in Australia as an alternative to criminalisation. The programmes we heard about were invariably highly localised, community-based responses. They were often unfunded and staffed by volunteers.

Several of the people experiencing homelessness we interviewed said there needed to be somewhere for people experiencing homelessness to go during the day to allow them to exit public spaces. They said there needed to be a 24 hour a day, seven day a week service, 'somewhere where they can go, a safe place where they can go'. As one participant said:

They need somewhere to be able to stay most of the day if they need to, especially in winter... we need somewhere so that we've got more places to be during the entire day, say from, whatever, 8: 00 in the morning until 7: 00 at night or something like that when they then can go to wherever they go to sleep.

We heard about one such place in Townsville, a small city in northern Queensland. The 'Reverend Charles Harris Diversionary Centre'<sup>6</sup> was praised as a safe place for people to go to recover from intoxication. It provides accommodation and other support services and is an alternative to police custody for people who need protection, but do not require, or have been turned away by, medical services. The Diversion Centre operates a bus service to transport people from the streets to the Centre and runs rehabilitative and treatment programmes for people who wish to undertake them. One participant said:

The diversionary centre is a safe place for homeless people... you've got the women's side, then you've got the men's side, but we all come together to eat in one big kitchen. It's a safe haven. There's no drinking there though... diversionary centre has programmes available... they take you fishing and all that if you do the program.

We also heard about 'community patrols' run by First Nations organisations which provide an effective alternative to the criminalisation of intoxicated people. Community patrols first arose in the 1980s following the recommendations of the Royal Commission into Aboriginal Deaths in Custody (Blagg and Anthony, 2019; Porter, 2016). Community patrol staff drive around town to collect people on the streets at night and transport them to safe places. Their goal is to minimise intervention by police, and they instead draw on the community itself to provide an alternative form of intervention. They focus on enhancing community safety and welfare by connecting people with support services rather than relying on coercive powers. One such service is run by Larrakia Nation in the Northern Territory. The

<sup>6</sup> <https://yumba-meta.com.au/about/program/reverend-charles-harris-diversionary-centre/>

people experiencing homelessness we spoke to about this service said they are 'probably the only decent ones you get running around' and that they 'should play more of a role.'

## Conclusion

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Not having a private space to retreat to puts people experiencing homelessness at high risk of police contact. Police around the world use street offences to regulate homelessness. These laws are used as a tool to exclude, relocate, and render invisible people who are homeless. It is well-known that these laws do not solve the problem of homelessness; however, their reach seems to be increasing. Whilst street offences used to be located only in the criminal law, additional powers have been created around the world to move on, ban, and censure the behaviour of vulnerable people, including those who are homeless. These powers are said to be non-punitive, but they are far from benign, and their practical effect on people experiencing homelessness is to extend rather than limit the scope of penal punitiveness (Herring, 2019).

Human rights laws have not yet been effective in limiting the application of street offences to situations where there is a real risk of harm to the community. Claims that street offences are needed to maintain public order are not persuasive considering people experiencing homelessness rarely commit violent offences and seldom demonstrate criminal intent.

Criminalising people who are homeless is unfair, unjust, and harmful to those who are affected by the laws. For people experiencing homelessness, move on and banning notices limit access to services, fines entrench their poverty, and even a short period of time in custody can result in loss of housing and possessions. Further to this, deaths in custody can occur when vulnerable people, particularly those who are intoxicated, are held in police cells without adequate monitoring and medical care.

Since a criminal penalty is often an excessive and unnecessary response to the 'offending' behaviour of people experiencing homelessness, calls to decriminalise certain street offences have merit. In particular, the offence of begging should be repealed because it punishes acts of survival, and public intoxication should be repealed because it penalises people for doing something that is perfectly lawful when done inside a home. Since legal challenges to the validity of these offences are likely to fail, decriminalisation in favour of a health and welfare-based response should be the goal of our advocacy.

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