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Can We Fix It? Law, Lawyers and Social Change

TAMARA WALSH

Abstract

Social justice advocates often look to the law to solve complex social problems, but what if the law is not able to live up to this challenge? Even successful legal advocacy can have unintended consequences, and well-intentioned changes to the law sometimes do not accord with the wishes of those they affect. With this in mind, it is important to consider the role of lawyers, and the law, in social change, and to appreciate what can and cannot be achieved through changes to the law and legal systems. Here, I reflect on my own advocacy ‘failures’ and explain what I have learned from them. I conclude that lawyers have an important contribution to make to social change movements, however it is important that they listen to, understand and involve people with lived experience in their advocacy efforts.

I Introduction

I acknowledge the traditional owners of the lands on which the Bond University Law School stands, the Kombumerri people. I pay my respects to their elders – past, present and emerging – and I acknowledge the generous contribution of First Nations people to the legal and social services sectors of Queensland. Every day, we live and work on stolen lands. I grew up on Darug lands west of Sydney, and I grow up my children on Jagera and Turrbul lands, and I acknowledge that all the lands on which I have worked and lived are stolen lands. I acknowledge the ongoing custodianship of these lands by First Nations peoples, and I thank them for maintaining and nurturing their cultural traditions and their connections to land and country. We all benefit from their wisdom and knowledge of these lands, their ways and their spirit. Importantly, I acknowledge the pain and trauma that has been caused to all Aboriginal and Torres Strait Islander peoples as a result of colonisation and the Stolen Generations, and I acknowledge the role that we continue to play in this. I look forward to a time when the truth about the history of this country is freely known and told, in the hope that we can together work towards healing.

Whilst some law students expect their teachers to be ‘experts’, I do not consider myself in this way. I try hard not to present myself as all-knowing or infallible. I aim, instead, to guide students in ‘joint intellectual inquiry’.¹ I endeavour to take the same approach to my research and advocacy work. I consider this to be particularly important in view of the fact that, over the years, I have found that I am often wrong about things. Often, I think I have the answers, and I craft a legislative amendment that I think will fix everything, or I have a wonderful idea about how to change the system – and then I find out I’ve been dreadfully wrong.

This has led me to consider my own role, as a lawyer and legal academic, in social change movements. I have concluded that lawyers have much to offer, through their client work and their law reform and advocacy work. However, I believe it is critical that we become better at listening, educating and waiting.

II Law and Social Change: What is It and How Can It Happen?

Paula O’Brien defines ‘social change lawyering’ as the practice of ‘addressing the causes of entrenched legal problems’.² Social change lawyers focus on ‘modifying the causes of social problems’ by ‘invoking existing legal rights’ and ‘using the courts’ to bring about change, not just for individual clients, but for groups and communities, and society more broadly.³

Legal advocacy, and changes to the law and legal systems, can certainly result in social change. Most often, we think of High Court cases when we consider the ways in which law has influenced social change. Several cases come to mind: *Mabo*,⁴ *Wik*,⁵ *Dietrich*,⁶ *Lange*⁷ all had a role in bringing about significant legal and social change. However, higher court litigation is extremely risky, and there are so many ingredients required for a successful result. You need a persuasive legal argument, but you also need the right client and often the right

¹ Mary Pat Treuthart, ‘A Perspective on Teaching and Learning Family Law’ (2006) 75 *UMKC Law Review* 1047, 1054.

² Paula O’Brien, ‘Changing Public Interest Law: Overcoming the Law’s Barriers to Social Change Lawyering’ (2011) 36(2) *Alternative Law Journal* 82.

³ *Ibid* 85. See also Ronald Sackville, ‘Courts and Social Change’ (2005) 33(3) *Federal Law Review* 373.

⁴ *Mabo v Queensland* (1992) 175 CLR 1. See further Larissa Behrendt, ‘*Mabo*: Ten Years On’ (Occasional Paper, Centre for International and Public Law, Australian National University, 2002).

⁵ *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁶ *Dietrich v The Queen* (1992) 177 CLR 292. See further Frances Gibbon, ‘A Decade after *Dietrich*’ (2003) 41(4) *NSW Law Society Journal* 52.

⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. See also Adrienne Stone, ‘*Lange*, *Levy* and the Direction of the Freedom of Political Communication under the *Australian Constitution*’ (1998) 21(1) *University of New South Wales Law Journal* 117.

combination of lawyers and legal services that are willing to act pro bono.⁸

Of course, higher court cases can be lost, and lost badly. The end result may well be a precedent that makes things worse. The case of *Purvis*⁹ provides an apt example. In that case, a teenager with an acquired brain injury, Daniel, was displaying challenging behaviours at school, including acts of aggression against staff and students. He had been suspended a number of times, and ultimately expelled from his state high school. The boy's foster parents argued he had been discriminated against on the basis of his disability, in contravention of the *Disability Discrimination Act 1992* (Cth). By majority, the High Court concluded that Daniel was discriminated against on the basis of his behaviour, not his disability, and therefore the adverse treatment of him was lawful.¹⁰ Since then, it has proven almost impossible to successfully establish disability discrimination in litigation,¹¹ and indeed *Purvis*'s influence has extended beyond disability discrimination into other areas of discrimination law.¹² In *Amery v New South Wales*, a case of sex discrimination, Kirby J commenced his judgment by saying:¹³

This case joins a series, unbroken in the past decade, in which this Court has decided appeals unfavourably to claimants for relief under anti-discrimination and equal opportunity legislation. It was not always so. In the early days of State and federal anti-discrimination legislation, this Court, by its approach to questions of validity and application, upheld those laws and gave them a meaning that rendered them effective... The wheel has turned. In no decision of this Court in the past decade concerned with anti-discrimination laws, federal or State, has a party claiming relief on a ground of discrimination succeeded.

Even where litigation is successful, there is still a risk that parliament will override decisions of the courts,¹⁴ or that the win simply fails to translate into systemic change.¹⁵

⁸ Anne Finlay, 'Legal Change: What Are the Effective Methods of Influencing Changes in the Law in Australia?' (2002) 14(1) *Legal Date* 1.

⁹ *Purvis v New South Wales* (2003) 217 CLR 92.

¹⁰ See especially *ibid* [11] (Gleeson CJ), [228] (Gummow, Hayne and Heydon JJ).

¹¹ Colin D Campbell, 'A Hard Case Making Bad Law: *Purvis v NSW* and the Role of the Comparator under the *Disability Discrimination Act 1992* (Cth)' (2007) 35(1) *Federal Law Review* 111; Tamara Walsh, 'Children with Special Needs and the Right to Education' (2012) 18(1) *Australian Journal of Human Rights* 27.

¹² To my knowledge, there has been only one successful attempt to argue around it: *Woodforth v State of Queensland* [2017] QCA 100.

¹³ *Amery v New South Wales* (2006) 230 CLR 174, [86]–[88] (Kirby J) (citations omitted).

¹⁴ One example is *Corrective Services Act 2006* (Qld) s 132 which makes it an offence for any person (including journalists and researchers) to interview a prisoner, in spite of High Court decisions establishing a freedom of political communication. See further Tamara Walsh, 'Suffering in Silence: Prohibitions on Interviewing Prisoners in Australia, the US and the UK' (2007) 33(1) *Monash University Law Review* 72.

¹⁵ *Teoh's case* provides a good example of this, where the High Court left it open for decision-making to be made based on international human rights principles, but this did not result in a

Of course, higher court cases are not the only means of bringing about significant legal and social shifts. Most law is actually practised in the Magistrates Courts,¹⁶ which deal with more than 95 percent of the criminal caseload, and civil and administrative appeals tribunals, which represent the front-line of complaints about administrative decision-making.¹⁷ How magistrates and tribunal members deal with particular sets of circumstances, how they use legislation to bring about a particular result, and the practices that they develop, can and do have a huge effect on people's lives and 'the law' in a broader sense. Real change is a choice that is available to them, but their high caseloads and resultant time pressures can entrench the status quo.¹⁸

The recent introduction of the *Human Rights Act 2019* (Qld) in Queensland has provided us with an opportunity to observe this. The UQ/Caxton Human Rights Project¹⁹ maintains a database of all published cases in which the *Human Rights Act 2019* (Qld) is mentioned. The Project has found that in the vast majority of cases where the *Human Rights Act 2019* (Qld) is mentioned, only fleeting reference is made to it. In most cases, the matter is being heard in the Queensland Civil and Administrative Tribunal, and the tribunal member simply says something like, 'I have considered the Human Rights Act and I find that the decision was compatible with human rights' without any substantive engagement with the Act, or the rights within it. Of course, it is early days – the *Human Rights Act 2019* (Qld) only came into effect in 2020. However, it brought with it the promise of a new approach. Some of us hoped that evictions to homelessness might be avoided on human rights grounds²⁰ and that additional adjustments might be ordered to support the right of children with disabilities to education in schools.²¹ Both of these are possible using rights-based reasoning.

Other avenues for change are available to the lower courts but have not been pursued. For example, it is possible – right now – for charges

change to administrative decision-making in practice: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. See further Matthew Groves, 'Treaties and Legitimate Expectations: The Rise and Fall of *Teoh* in Australia' (2010) 15(4) *Judicial Review* 323.

¹⁶ See further Sharyn Roach Anleu and Kathy Mack, 'Magistrates, Magistrates Courts and Social Change' (2007) 29(2) *Law and Policy* 183.

¹⁷ As to the history of administrative tribunals in Australia, see Robin Creyke, 'Administrative Justice: Towards Integrity in Government' (2007) 31(3) *Melbourne University Law Review* 705.

¹⁸ See generally Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave Macmillan, 2017).

¹⁹ 'Human Rights Case Law Project', UQ School of Law (Web Page) <<https://law.uq.edu.au/research/human-rights/case-notes>>.

²⁰ Tamara Walsh, 'Social Housing, Homelessness and Human Rights' (2022) 45(2) *University of New South Wales Law Journal*.

²¹ Tamara Walsh and Bridget Burton, 'The UQ/Caxton Human Rights Case Law Database: What Have We Learnt in the First Year?', *Proctor* (Web Article, 2 December 2021) <<https://www.qslproctor.com.au/2021/12/our-uq-caxton-human-rights-case-law-database/>>.

to be dismissed against children in every youth justice matter before the Children's Court where the *doli incapax* presumption has not been rebutted.²² Yet, in practice, *doli incapax* is often not even mentioned.²³ Magistrates could release people experiencing homelessness who have been charged for engaging in 'criminal' survival-related activities (such as shoplifting, begging and trespass),²⁴ but most often, penalties are imposed.

In addition to our case work, there are important opportunities for lawyers to bring about social change by participating in the legislative drafting process, either by making submissions to parliamentary inquiries and committees, or by proposing legal changes to Members of Parliament: Finlay says that 'it is in the preparation phase that there is the opportunity for most influence on the content to occur.'²⁵ Some would argue that, even then, our capacity to influence outcomes is limited.²⁶ And even if 'good law' is drafted, there is always the possibility that it will be worked around or, worse, have adverse unintended consequences.²⁷ Unfortunately, this is what I have discovered through my own work.

III Stories of Legal Advocacy 'Failure'

A *Queensland Vagrancy Laws*

In the early 2000s, I was part of a campaign to repeal the *Vagrants', Gaming and Other Offences Act 1931* (Qld) ('*Vagrants' Act*'). The *Vagrants' Act* was based on English poor law and drawn from the *Vagrancy Act 1824* (UK).²⁸ It criminalised behaviours like 'begging alms', 'habitual drunkenness' and 'being found without visible lawful means of support', so it essentially criminalised homelessness. I was part of an action group – a coalition of lawyers and community legal centres – that was calling for the repeal of this Act.²⁹

²² *Criminal Code Act 1899* (Qld) sch 1 s 29(2). See also *RP v The Queen* (2016) 259 CLR 641.

²³ Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18.

²⁴ See *Penalties and Sentences Act 1992* (Qld) s 19.

²⁵ Finlay (n 8) 2.

²⁶ For example, the parliamentary committee process is often criticised: see further Carolyn M Hendriks, Sue Regan and Adrian Kay, 'Participatory Adaptation in Contemporary Parliamentary Committees in Australia' (2019) 72(2) *Parliamentary Affairs* 267.

²⁷ Martha Minow, 'Law and Social Change' (1993) 62(1) *UMKC Law Review* 171; Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 2nd ed., 2008) 171.

²⁸ Tamara Walsh, 'Waltzing Matilda One Hundred Years Later: Interactions between Homeless Persons and the Criminal Justice System in Queensland' (2005) 25(1) *Sydney Law Review* 75.

²⁹ Rights in Public Space Action Group, Submission to Minister for Police and Corrective Services (Qld), *Review of the Vagrants, Gaming and Other Offences Act* (August 2004) <https://www.lawright.org.au/wp-content/uploads/2020/11/Review_of_Vagrants.pdf>.

The police informed us, and the statistical information we were able to access confirmed, that very few arrests were made under the vagrancy provisions of the Act. In 1999/2000, for example, only 15 people were charged with having no visible lawful means of support, although 282 were charged with begging and 347 were charged with drunkenness.³⁰ Our view was the fact that the vagrancy provisions were seldom used was no answer. We argued that there was no place for these antiquated, discriminatory provisions in a modern legal system, and they should be repealed.

Media support is a critical ingredient to a successful campaign, and in this case the media attention we received was not of the kind we anticipated. We found ourselves speaking with certain radio ‘shock jocks’ about how amusing it was that Queensland still had a law prohibiting being ‘found by night having your face blackened or masked, or wearing felt or other slippers, or being dressed in disguise and having in your possession a dark lantern or silent matches.’ Our central message was somewhat diluted in these exchanges, yet the government began to listen.

Meanwhile, one of the other provisions of the *Vagrants’ Act*, s 7, became the subject of a High Court challenge in the case of *Coleman v Power*.³¹ Section 7 created the offence of ‘obscene, abusive language, etc’, which criminalised ‘profane, indecent or obscene language’ and ‘riotous, violent, disorderly, indecent, offensive, threatening or insulting’ behaviour.³² The case of *Coleman v Power* concerned the validity of the ‘obscene language’ sub-section (s 7(1)(d)). Coleman had been protesting against police in Townsville’s Flinders Street Mall, distributing pamphlets to members of the public declaring Townsville police to be ‘corrupt’. Constable Power approached Coleman and asked to see the pamphlets, and Coleman loudly said, ‘This is Constable Brendan Power, a corrupt police officer.’ Constable Power alleged that Coleman also pushed him. Coleman was arrested and charged with using ‘threatening, abusive or insulting words’ under s 7(1)(d) of the *Vagrants’ Act*, as well as obstructing and assaulting police. Coleman argued that s 7(1)(d) was invalid because it breached his freedom of political communication. By majority, the High Court determined the section was valid, but prior to the handing down of its decision, the Queensland Government had already decided to replace the provision.

In our discussions with Beattie Government representatives, we were informed that the *Vagrants’ Act* would be replaced with a *Summary Offences Act*. Our hope was that they would take this opportunity to repeal all of the vagrancy related offences, including

³⁰ Walsh (n 28) 79.

³¹ *Coleman v Power* (2004) 220 CLR 1.

³² Equivalent 1999/2000 figures are not available, but the CMC reported in 2008 that between 2003/04, 14,052 offensive language/behaviour incidents were recorded by police: .

begging and habitual drunkenness, but this did not eventuate. Instead, they retained the offences of begging and drunkenness (phrased in more contemporary language)³³ and replaced all the other vagrancy offences with a new catch-all offence of ‘public nuisance’.³⁴ This offence had the effect of combining the vagrancy offences with the old offensive language/behaviour offence.³⁵

Under the new public nuisance offence, a person could be considered a public nuisance if they, for example, behaved in a ‘disorderly’ way,³⁶ and their behaviour interfered with or was likely to interfere with peaceful passage through or enjoyment of a public place by a member of the public.³⁷ Those of us who were involved in the campaign knew immediately that this provision would cause considerable problems for vulnerable public space users. The language was so broad and vague that it would likely have been struck down as constitutionally invalid in other jurisdictions.³⁸ Public space offences are routinely selectively enforced against vulnerable people, particularly young people, people who are homeless, and Indigenous people.³⁹ These ‘marginal’ public space users are often not viewed as members of the public who have a right to enjoy public spaces.⁴⁰ Instead, public spaces seem reserved for those who are lucky enough to live somewhere else – for those who are housed but use public space for leisure – rather than for those who call public spaces their home.

³³ *Summary Offences Act 2005* (Qld) ss 8 (begging in a public place), 10 (being intoxicated in a public place). Note, there is currently an inquiry underway to decide whether or not to decriminalise these offences: see Queensland Community Support and Services Committee, Parliament of Queensland, *Inquiry into the Decriminalisation of Certain Public Offences, and Health and Welfare Responses* <<https://www.parliament.qld.gov.au/Work-of-Committees/Inquiries/Inquiry-Details?id=4185>>.

³⁴ To pre-empt the decision of the High Court in *Coleman v Power*, the government hurriedly passed an amendment to s 7 of the *Vagrants Act* first, establishing a new ‘Section 7AA Public Nuisance’; see *Police Powers and Responsibilities and Other Legislation Amendment Act 2003* (Qld) s 50.

³⁵ *Summary Offences Act 2005* (Qld) s 6.

³⁶ *Ibid* s 6(2)(a)(i).

³⁷ *Ibid* s 6(2)(b).

³⁸ See, eg, *Papachristou v City of Jacksonville* (1972) 405 US 156; *Pottinger v City of Miami* (1992) 810 F Supp 1551; *Federated Anti-Poverty Groups of British Columbia v Vancouver (City)* [2002] BCSC 105.

³⁹ Brie Diamond, Ronald Burns and Kendra Bowen, ‘Criminalizing Homelessness: Circumstances Surrounding Criminal Trespassing and People Experiencing Homelessness’ (2021) 33(6) *Criminal Justice Policy Review* 563; Joanna Wang and Don Weatherburn, ‘The Effect of Police Searches and Move-On Directions on Property and Violent Crime in New South Wales’ (2021) 54(3) *Journal of Criminology* 383; Tony Robinson, ‘No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalisation of Homelessness’ (2019) 55(1) *Urban Affairs Review* 41.

⁴⁰ For writings on this at the time, see Philip Lynch, ‘Begging for Change: Homelessness and the Law’ (2002) 26(3) *Melbourne University Law Review* 690; Tamara Walsh, ‘Who is the Public in Public Space?’ (2004) 29(2) *Alternative Law Journal* 81. More recently, see Chris Herring, ‘Complaint-Oriented Policing: Regulating Homelessness in Public Space’ (2019) 84(5) *American Sociological Review* 769; Alison Young and James Petty, ‘On Visible Homelessness and the Micro-Aesthetics of Public Space’ (2019) 52(4) *Australian and New Zealand Journal of Criminology* 444.

Tragically, the early arrest figures confirmed our fears. My own research – which was limited to court observation – suggested that the number of court appearances for offensive behaviour-type offences more than doubled just a few months after the new public nuisance offence was brought in.⁴¹ And those numbers increased substantially over time. In April 2003, there were around 14,000 public nuisance incidents recorded by police.⁴² Within 10 years, there were more than 40,000 incidents when the court figures and the infringement notice figures were combined.⁴³ Indigenous people, and particularly Indigenous girls, were substantially over-represented amongst those charged.⁴⁴

The public nuisance offence could be seen as an example of how well-meaning advocacy efforts can have unintended adverse consequences. For all of our concern about social justice and the rights of vulnerable public space users, the end result went against the population groups we were trying to protect.

B Community Justice Centre

More recently, I was involved in another advocacy effort, an attempt to establish a community court in south-east Queensland. Community courts draw on the drug court model, applying the principles of therapeutic jurisprudence, where the law is used to bring about a therapeutic result.⁴⁵

The aim of a community court is to draw on local resources to solve local problems that contribute to criminal offending.⁴⁶ Typically, community courts focus on lower level offences – offences that are victimless or survival-related, where no real harm is caused to the community.⁴⁷ Defendants appearing before community courts are often socially and economically disadvantaged; indeed, when homeless courts were established in the United States, they were based on the

⁴¹ Tamara Walsh, 'The Impact of *Coleman v Power* on the Policing, Defence and Sentencing of Public Nuisance Cases in Queensland,' (2006) 30(1) *Melbourne University Law Review* 191.

⁴² Queensland Crime and Misconduct Commission, *Policing Public Order* (Report, 2008) 52.

⁴³ Tamara Walsh, 'Ten Years of Public Nuisance in Queensland' (2016) 40(2) *Criminal Law Journal* 59.

⁴⁴ Tamara Walsh, 'Public Nuisance, Race and Gender' (2018) 26(3) *Griffith Law Review* 334. See also Elyse Methven, 'A Little Respect: Swearing, Police and Criminal Justice Discourse' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 58.

⁴⁵ Peggy Fulton Hora, William G Schma and John TA Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionising the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439.

⁴⁶ David R Karp and Todd R Clear, 'Community Justice: A Conceptual Framework' in Charles M Friel (ed), *Criminal Justice 2000: Boundary Changes in Criminal Justice* (National Institute of Justice, 2000) 327; Julius Lang, *What Is a Community Court?: How the Model Is Being Adapted across the United States* (Centre for Court Innovation, 2011).

⁴⁷ As to criminalisation and the 'harm principle', see Joel Feinberg, *Harm to Others*, (Oxford University Press, 1984).

community court model.⁴⁸ Community courts aim to respond differently to these lower level ‘crimes’ in recognition of the fact that many of them are the result of social or health problems.⁴⁹ Instead of processing people through the courts in the usual way – arrest, charge, court, penalty – the court appearance is seen as a point of crisis that can be leveraged to provide support and rehabilitation services to vulnerable defendants.⁵⁰

We decided to advocate for the establishment of a ‘one-stop-shop’ community justice centre in a low-income community in south-east Queensland. We based our model on the existing Neighbourhood Justice Centre in Melbourne.⁵¹ The goal of community justice centres is to meet individuals’ needs to help them stop offending.⁵² Our vision was that when people came to this court, they could have their legal matters dealt with, but they could also get access to all the services they needed. We imagined having drug and alcohol counsellors, financial counsellors, someone from Centrelink, someone from social housing, homelessness services, anger management and other programs, probation and parole, legal services and welfare services actually present at the courthouse, ready to immediately take referrals and deliver treatment and services.

Our hope was that magistrates’ sentences would support this therapeutic approach. We envisaged an adjournment model court, where the court would act as case manager.⁵³ As with the Special Circumstances Court, which was trialled in Brisbane around a decade

⁴⁸ Kyle C Troeger and Anne S Douds, ‘Creating a Home Base for Treatment in Homeless Courts’ in Eileen M Ahlin and Anne S Douds (eds), *Taking Problem-Solving Courts to Scale: Diverse Applications of the Specialty Court Model* (Lexington Books, 2021); Sundip Kundu, ‘Privately Funded Courts and the Homeless: A Critical Look at Community Courts’ (2005) 14(2) *Journal of Affordable Housing and Community Development Law* 170.

⁴⁹ Greg Berman and Aubrey Fox, ‘The Future of Problem Solving justice: An International Perspective’ (2010) 10(1) *University of Maryland Journal of Race, Religion, Gender and Class* 1.

⁵⁰ Julian M Somers et al, ‘Examining the Impact of Case Management in Vancouver’s Downtown Community Court: A Quasi-Experimental Design’ (2014) 9(3) *PLoS ONE* 1:2; Andrew Phelan, ‘Solving Human Problems or Deciding Cases? Judicial Innovation in New York and Its Relevance to Australia’ (Pt 1) (2003) 13(2) *Journal of Judicial Administration* 98, 113.

⁵¹ Stuart Ross, *Evaluating Neighbourhood Justice: Measuring and Attributing Outcomes for a Community Justice Program* (Trends & Issues in Crime and Criminal Justice No 499, Australian Institute of Criminology, November 2015).

⁵² See also Glenna Robson, ‘Community Justice Centres Part 1: A Political Agenda with Possibilities?’ (2006) 170 *Criminal Law and Justice Weekly* 58. Unknown to us at the time, a similar campaign was underway in Western Australia: see Sarah Murray and Suzie May, ‘Envisioning a Community Justice Centre for Western Australia: Feasibility, Challenges and Opportunities’ (2018) 43(1) *University of Western Australia Law Review* 221; Sarah Murray, ‘Keeping It in the Neighbourhood?: Neighbourhood Courts in the Australian Context’ (2009) 35(1) *Monash University Law Review* 74.

⁵³ See further George Mair and Matthew Millings, *Doing Justice Locally: The North Liverpool Community Justice Centre* (Centre for Crime and Justice Studies, 2011); Arie Freiberg, ‘Problem Oriented Courts: Innovative Solutions to Intractable Problems’ (2001) 11(1) *Journal of Judicial Administration* 8.

ago, the magistrate could adjourn matters for a period of weeks, and bring the matter back before them periodically to monitor the defendants' progress towards treatment goals.⁵⁴ If defendants successfully graduated from their programs, magistrates could dismiss their charges completely.⁵⁵ Alternatively, the community justice centre magistrate could make conditional release orders, releasing people to the community on the condition that they engage with certain services.⁵⁶ Our aim was to minimise the use of fines and other inappropriate penalties, and create a safe space where people could come to have their criminal matters dealt with in a way that was appropriate and therapeutic, and also receive the services they needed to heal and rehabilitate and therefore stop offending.

The state and local governments were receptive to this idea, and they funded Robin Fitzgerald and I to undertake a consultation project with a target community on what a community justice centre might look like in their community.⁵⁷

The findings of our consultation exercise were not quite what we expected. Around half of the 92 people we interviewed thought a community justice centre was a good idea. However, the other half, to be honest, tore the idea to shreds. Their message was a 'less oppressive' court 'is still a court'.⁵⁸ They were adamant that, instead, people charged with lower-level offences should be diverted away from the courts altogether. They said that charges that are petty, or associated with survival-related activities, should never be laid, or they should be dropped. Their question was: why are we charging these people in the first place? If the offences are associated with poverty or homelessness, or drug and alcohol use, or mental illness, or the defendants are young and engaging in normal adolescent risk-taking behaviour, why are we charging them at all? Our focus, instead, should be on preventing the charge. Our participants insisted that the charge itself is harmful. It means people are stigmatised, labelled as criminal when often they are engaging in crimes of necessity or survival. A 'criminal' label can make exiting the system very difficult.⁵⁹ Instead, they said, our aim should be to keep them out of 'the system' altogether.⁶⁰

⁵⁴ As to the Special Circumstances Courts, see Meredith Brown et al, "I'm Sorry but You're Just Not That Special...": Reflecting on the "Special Circumstances" Provisions of the *Infringements Act 2006* (Vic) (2013) 24(3) *Current Issues in Criminal Justice* 45; Tamara Walsh, 'Defendants' and Criminal Justice Professionals' Views on the Brisbane Special Circumstances Court' (2011) 21(2) *Journal of Judicial Administration* 93.

⁵⁵ This option is available to magistrates under s 19(1)(a) of the *Penalties and Sentences Act 1992* (Qld) so no new legislation would be required.

⁵⁶ See *Penalties and Sentences Act 1992* (Qld) s 19(2), (2A), (2B).

⁵⁷ Tamara Walsh and Robin Fitzgerald, *Logan Community Justice Centre: Community Consultation and Design Report* (University of Queensland, 2020).

⁵⁸ Ibid 65.

⁵⁹ Ibid 63.

⁶⁰ Ibid 65.

Many of our participants questioned the model itself and wondered whether welfare and health services should ever be delivered by a court under threat of criminal sanction. Instead, they said, services should be delivered in the community, on a voluntary basis.⁶¹ They said people need to want to change – they have to be ready, and we have to respect people's right not to be ready. People should have a right to choose who they disclose certain information to – they might not want to talk about the traumas of their past to a courtroom full of people just because they stole a packet of chips.

Furthermore, several participants questioned whether magistrates were best placed to coordinate these kinds of interventions. They noted magistrates are not qualified to formulate and implement treatment plans.⁶² Some said that defendants should not be encouraged to develop a relationship with the court. The court should retain its position as adjudicator and not stray into a helping role because that blurs the boundaries between fact-finding, penalising and therapeutising.⁶³

Participants also noted that there was a risk that by asking people to keep coming back to court to receive services, defendants might be set up to fail. Requiring repeat court appearances risked additional charges for failure to appear or breaching conditional orders.⁶⁴ There was also a risk that magistrates might be tempted to be hypervigilant – their conditions might have the goal of helping, but the effect of constraining and limiting people's fundamental liberty rights.

The concern amongst many participants was that by creating a new, sympathetic court, we might be exchanging one set of rights violations with another. In the end, we concluded that diversion and decriminalisation should take priority over court innovations.

C *Sentencing Alternatives for People Experiencing Homelessness and Young People*

My most recent research projects have also been characterised by mistakes and misjudgements. Lately, I have been researching sentencing options for people experiencing homelessness and young people. I went into these studies very critical of fines and imprisonment as sentencing alternatives for these vulnerable cohorts.

People experiencing homelessness are the last people in our community who are able to pay fines. Yet they are those who are most likely to receive them. They routinely catch public transport without

⁶¹ Ibid 64.

⁶² Ibid 64.

⁶³ Ibid. See also Stacy Lee Burns, 'The Future of Problem-Solving Courts: Inside the Courts and Beyond' (2010) 10(1) *University of Maryland Law Journal of Race, Religion, Gender and Class* 73.

⁶⁴ Ibid 58. See also Christopher T Lowenkamp and Edward J Latessa, 'Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders' (2004) *Topics in Community Corrections* 3.

paying the fare because they cannot afford the fare.⁶⁵ They are often in public space, so they often receive infringement notices for public space offences, including public nuisance. Those who work in community legal centres know well how common it is for people who are homeless or destitute to accumulate tens of thousands of dollars of fine debt.⁶⁶ This seems ridiculous to me – many people who are homeless will never be able to repay their fines, and the whole reason they receive a fine in the first place is because they are destitute.⁶⁷

Along with a large team of researchers,⁶⁸ I undertook a national study on the criminalisation of homelessness with a view to making recommendations about how we could respond to the ‘criminal offending’ of people experiencing homelessness more effectively. I expected that more appropriate sentencing options would be a key recommendation arising from this research. I expected that we would recommend community-based sentences as an alternative to fines. I saw potential for some therapeutic sentencing options that delivered health, welfare and support services to people experiencing homelessness to address the underlying causes of their offending and assist them to get back on their feet.

Similarly, in a recent study I undertook on children in the youth justice system,⁶⁹ I expected conditional orders to be a focus of the recommendations. In particular, I thought orders that required children to attend school could prevent future offending, based on the research that demonstrates that school is a protective factor for ‘at-risk’ young people.⁷⁰ I expected to recommend an increase in the use of restorative justice approaches and community-based treatment. The number of young people held in detention centres remains very high in

⁶⁵ Paula Hughes and Kurt Maroske, ‘Fare Evasion in Queensland: Compounding Inequity and the Need to Improve Social Inclusion on Public Transport’ (2019) 32(4) *Parity* 18. See further Alexa Delbosc and Graham Currie, ‘Who Do People Fare Evade? A Global Shift in Fare Evasion Research’ (2018) 39(3) *Transport Reviews* 376.

⁶⁶ Queensland Public Interest Law Clearing House (now LawRight), *Responding to Homelessness and Disadvantage in the Fines Enforcement Process in Queensland* (Report, 2013). See also Public Interest Advocacy Centre, *Not Such a Fine Thing: Options for Reform of the Management of Fines Matters in NSW* (Report, 2006).

⁶⁷ Tamara Walsh, ‘Won’t Pay or Can’t Pay?: Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland’ (2005) 17(2) *Current Issues in Criminal Justice* 217.

⁶⁸ There were three other academic partners (from UTS, UNSW, and University of Wollongong) and 10 community legal centre partners: Tamara Walsh et al, ‘National Study on the Criminalisation of Poverty and Homelessness’ (2019) 32(4) *Parity* 25. This study was funded under the ARC Linkage Scheme.

⁶⁹ This study was funded by the Queensland Government.

⁷⁰ Jackie Sanders, Linda Liebenberg and Robyn Munford, ‘The Impact of School Exclusion on Later Justice System Involvement: Investigating the Experiences of Male and Female Students’ (2020) 72(3) *Education Review* 38; Sheryl A Hemphill et al, ‘Does School Suspension Affect Subsequent Youth Non-Violent Antisocial Behaviour?: A Longitudinal Study of Students in Victoria, Australia and Washington State, United States’ (2013) 65(4) *Australian Journal of Psychology* 236.

Queensland, and most of these children are being held on remand.⁷¹ Community based orders seemed to represent an obvious improvement on this horrific situation.

Certainly, imprisonment should never be a sentencing alternative for a person who has committed petty crimes. Whilst a person is unlikely to receive a sentence of imprisonment for their first minor offence, adults and children are sometimes incarcerated because they have a long criminal history of minor offences, they have breached orders, and magistrates feel they have no choice but to impose a short prison sentence. Sometimes magistrates may well not have a choice. In some circumstances, legislation directs magistrates to remand people in custody. Recent changes to the bail laws over the last couple of years have dramatically reduced judicial officers' discretion to grant bail to children, for example.⁷² People can still end up in prison for fine default in Queensland.⁷³ This is absurd when we consider the cost to the community. It costs around \$300 a day to keep an adult in prison – and \$1900 a day to keep a child in youth detention.⁷⁴ Twelve-month recidivism rates for adults are around 60 to 70%, and for children they are as high as 80%.⁷⁵ Clearly, incarcerating people is not effective or cost effective if the goal is to prevent future offending in a fiscally responsible manner.

Yet, when I actually spoke to people who had received these sentences – who had been fined or incarcerated – they had a different perspective. For example, when asked about fines as a sentencing option, many of the people experiencing homelessness we interviewed said that, given the choice, they would choose a fine over any other sentencing alternative. They knew they would never be able to pay the fine, so their fines could accumulate and this had no effect on their lives. Receiving a fine meant they were in and out of court quickly, and their circumstances did not change. Fines imposed no burden on them, unlike community-based sentences that required them to report regularly to police, probation or the court. The people we interviewed were mostly rough sleepers – they had no need of a drivers' licence,⁷⁶ so fines were the least intrusive sentencing alternative for them.

⁷¹ See generally Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2021* (Report, 2021) 34; Childrens Court of Queensland, *Annual Report 2020/21* (Report, 2022) 2.

⁷² See *Youth Justice Act 1992* (Qld) s 48AF which requires certain young people to show cause as to why they should receive bail.

⁷³ *State Penalties Enforcement Act 1999* (Qld) ss 52, 52A.

⁷⁴ Productivity Commission, *Report on Government Services*, Part C – Justice, 8 Corrective Services.

⁷⁵ Australian Institute of Health and Welfare, *Young People Returning to Sentenced Youth Justice Supervision 2018–19* (Report, 2020) iv; Jason Payne, *Recidivism in Australia: Findings and Future Research* (Research and Public Policy Series No 80, Australian Institute of Criminology, 2021).

⁷⁶ Section 105 of the *State Penalties Enforcement Act 1999* (Qld) states that the Registrar can decide to suspend a debtor's drivers' licence. It is important to note that, for those who slept in

Even more shocking to me was what our participants had to say on imprisonment. I spoke to several people who said that they would rather be in prison or youth detention than on the outside. They said that in prison, they are safe, they have a bed, three meals a day, they are warm; but in the community, they are fighting just to survive, just to obtain the necessities of life, just to find a warm place to sleep. I would not want to be misunderstood – I am certainly not suggesting that we should imprison people ‘for their own good’. Instead, what this shows me is that life in our communities is so difficult for some people that prison is preferable to liberty. This is a terrible indictment on our society – especially considering it would be so easy to provide these basic necessities of life in the community. We do not need the criminal law to house people.

People still say it is too expensive to guarantee a right to housing, or a right to an adequate income,⁷⁷ but they are forgetting how expensive it is to run our court system, our police service, our corrections facilities – and our child protection system which, tragically, is so intimately connected with criminalisation.⁷⁸

As a researcher, all of these advocacy failures have made me realise that for all my good intentions, I should think twice before I make a recommendation for law reform that seems obvious to me, looking through my human rights lens, but that may not accord with the experiences or wishes of those who are affected by these laws.

IV Can Law Fix It?

A *The ‘Myth of Rights’*

The experiences I have had in research and advocacy have led me to conclude that the law alone simply cannot fix complex social problems.

When I attend international conferences, what always strikes me is that all of the presenters, from every country in the developed world, discuss the same issues. Regardless of the nature of their laws and legal systems, the same problems exist everywhere – and the same prejudices, and inequalities. No matter what kind of legal system they have, whether they have human rights Acts or not, whatever their constitutions do or do not protect, vulnerable people still seem to suffer in the same ways. Each developed country looks to the others for

their cars, fines were therefore a huge problem because loss of licence could attract additional charges.

⁷⁷ Alan Morris, ‘The Lack of a Right to Housing and Its Implications in Australia’ (2010) 65 *Journal of Australian Political Economy* 28.

⁷⁸ Susan Baidawi and Rubini Ball, ‘Multi-System Factors Impacting Youth Justice Involvement of Children in Residential Out-Of-Home Care’ (2022) *Child and Family Social Work (forthcoming)*.

insight, yet they are all trying the same things and a range of seemingly intractable social problems remain.

That is not to say that laws are irrelevant. Laws, and legal systems, have a huge impact on individuals' day-to-day lives. In fact, for vulnerable people, the law is everywhere. I have researched across a range of areas – homelessness, child protection, social security, mental illness, disability, corrections – and what I have found is that I am speaking about the same cohort of people in every project. The same group of people find themselves homeless, interacting with child protection, reliant on social security, dealing with trauma and mental ill health, and tragically, many of these people end up in prison because the rest of society's institutions have failed them.

These people are surrounded by law. They are governed by legal rules in every aspect of their lives. They need to comply with behavioural rules to keep their social housing; they need to jump through hoops to get their children back from the state; they need to comply with all of Centrelink's requirements and keep on top of the constantly changing social security laws (even the staff struggle to apply the law because it is so complex);⁷⁹ they have to comply with treatment requirements imposed by the health system under mental health legislation; and often they are subject to probation, parole or bail conditions. These people are governed by multiple layers of bureaucracy, surveillance and control all the time, and they feel as if the system is just waiting for them to slip up. I am constantly impressed, and humbled, by how competent they become at navigating these systems, and how resilient they are.

The myriad laws that govern vulnerable individuals' lives have been passed by well-meaning people, but the people who are subjected to them do not experience them as fair or just. Instead, these laws strip them of their dignity. The goal of all of the law reform initiatives I described earlier was to use the law to fix complex social problems, but I have concluded that this might not be possible.⁸⁰

Several scholars have concluded that the law is not, on its own, able to fix complex social problems. Scheingold, for example, discusses the 'myth of rights', arguing that it is a myth to believe that the law can bring about social change.⁸¹ He argues that the law is too closely linked to prevailing political and ideological positions to itself bring about social change.⁸² There is a 'politics of rights', he says, that controls, and

⁷⁹ See, eg, *Filipovski and Secretary, Department of Family and Community Services* [2002] AATA 1148, [47].

⁸⁰ See especially Idit Kostiner, 'Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change' (2003) 37(2) *Law and Society Review* 323.

⁸¹ Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (University of Michigan Press, 2nd ed, 2010).

⁸² *Ibid* 17, 20–1.

cannot easily be separated from, rights themselves.⁸³ Empirical studies that have been done in the United States to assess whether litigation has been successful in bringing about lasting social change have found that it has not.⁸⁴ The law (or politics or ideology) seems to find a way to get back to its equilibrium. This may help explain why getting rid of the *Vagrants' Act* did not solve the problem of the criminalisation of homelessness; and why a sympathetic court will still end up being a court.

B *The Role of Lawyers*

If we accept this myth of rights, and conclude that the law might not be able to solve every social problem on its own, then the logical extension of that is that *we*, as lawyers, cannot – on our own – solve complex social problems. This is disappointing because we are surrounded by complex social problems in our work. The unfortunate reality for us is that lawyers, and the legal system, are often left to deal with problems, and people, who have been let down by every other system.

Lawyers often become the service providers of last resort. Family lawyers, criminal lawyers, social security lawyers, youth lawyers and lawyers in community legal centres all deal with people whose legal problems have arisen from social problems. And so often, their legal problem simply cannot be dealt with in a vacuum. The social problems *need* to be addressed *in order* to resolve the legal problem. Which means that lawyers often find themselves in a position where they have to deal with non-legal issues, like poverty, trauma, and mental ill health.⁸⁵ When individuals see a lawyer, they are often at their most vulnerable; if someone is seeing a lawyer, it is often because something has gone horribly wrong in their life. Lawyers may need to establish trust, by building relationships with people, before they can even obtain the information they need to assist with the legal issue.⁸⁶ These are not skills we teach in law school – in fact, these aspects of legal practice are seldom discussed at all.⁸⁷

⁸³ Ibid 83–5.

⁸⁴ Minow (n 27); Rosenberg (n 27). But see also David Schultz and Stephen E Gottlieb, 'Legal Functionalism and Social Change: A Reassessment of Rosenberg's *The Hollow Hope: Can Courts Bring About Social Change?*' (1996) 12(1) *Journal of Law and Politics* 63.

⁸⁵ Natalia Kasprzyk and Alexandra Psarras, 'A Week in the Life of a CLC Lawyer' (2022) 44(6) *Bulletin* 6; Dharani Rana, 'Bridging Community and Law: The Role of the Community Lawyer' (2022) 44(6) *Bulletin* 18.

⁸⁶ Peter Reilly, 'Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence' (2003) 21(2) *Negotiations Journal* 301; Lindsey P Gustafson, Aric K Short and Neil W Hamilton, 'Teaching and Assessing Active Listening as a Foundational Skill for Lawyers as Leaders, Counsellors, Negotiators and Advocates' (2022) 62(1) *Santa Clara Law Review*, online first.

⁸⁷ Francina Cantatore et al, 'A Comparative Study into Legal Education and Graduate Employability Skills in Law Students through Pro Bono Clinics' (2021) 55(3) *Law Teacher* 314.

With this in mind, I believe there are several things we as lawyers can contribute to social change movements. The law, and by extension lawyers, may not be able to solve complex social problems single-handedly, but that is not to say that what we do is not important. Quite the contrary – our advocacy and our client work is critical. However, we will need to work collaboratively to see lasting social change. I believe the law has a role, and lawyers have a role, to play in bringing about social change, but so do all the other individuals and professions that we work with. Even if they are – or have traditionally been – our adversaries. We must learn, and continue, to work effectively within and between systems. I argue there are three elements to this: listen, educate and wait.

V Listen, Educate, Wait

A Listen

At its most basic, a lawyer's job is to take instructions from a client and follow them. I believe that we need to do this on a broad scale. Our role is not to decide what people need. Our role is to ask, listen and involve people in crafting solutions to their own problems.⁸⁸ We cannot claim to know what people have been through – we only know what we personally have experienced. We cannot assume we know what is 'best' for people because we are not them. We need to ask them.

The campaign around the cashless debit card provides an apt example. Like most other human rights lawyers, I read the *Northern Territory National Emergency Response Act 2007* (Cth) (*NTER Act*) in despair. I could not comprehend how it was possible for an Act to be passed in this century that removed so many rights from people on the basis of their race.⁸⁹ In particular, I found the Basics Card to represent a profound encroachment on individuals' liberty rights. To me, it felt like a return to the rations system.⁹⁰ However, I then read some of the material coming out of the affected communities, and I realised how complicated the issue was. Some women were saying that the cashless debit card had improved their lives – no one was taking their money, they had enough money for food, they were able to have a break from

⁸⁸ Cassandra Goldie, 'Rights versus Welfare' (2003) 28(3) *Alternative Law Journal* 132.

⁸⁹ See, eg, Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians: Delivering Social Justice or Furthering Colonial Domination?' (2012) 35(2) *University of New South Wales Law Journal* 522; Peter Billings, 'Still Paying the Price for Benign Interventions?: Contextualising Interventions in the Lives of Aboriginal Peoples' (2009) 33(1) *Melbourne University Law Review* 1; Jenna Gruenstein, 'Australia's *Northern Territory National Emergency Response Act*. Addressing Indigenous and Non-Indigenous Inequities at the Expense of International Human Rights?' (2008) 17 *Pacific Rim Law and Policy Journal* 467.

⁹⁰ See also Grace O'Brien, 'The Basics card: A Return to the "Rations" Days for First Nations Peoples of Australia?' (2021) 40(4) *Social Alternatives* 34.

alcohol.⁹¹ I no longer felt comfortable commenting on this, as a white, middle-class woman. Law reform activities, including campaigns for change of ‘bad’ laws, must be culturally safe and community driven. I look at the *NTER Act* through my human rights lens and I am appalled and embarrassed that laws like these could arise from our parliament. However, I cannot ignore the voices of those who disagree with my point of view – particularly those with lived experience of the issue.⁹² Human rights is a useful lens, but the heart of human rights is dignity and respect,⁹³ and critical to dignity and respect is being asked what you want, rather than being told what is best for you – even by well-meaning human rights lawyers.

B Educate

Educating is also a fundamental part of our job as lawyers. When I did my practical legal training, one of the lecturers said, ‘the job of a lawyer is not to persuade but to educate’.⁹⁴ This has stayed with me – our role is to provide the decision-maker with all the information they need to make the best decision, so we need to become effective information gatherers, and good communicators. Of course, as social change lawyers, I believe we should aim to support people with lived experience to be heard. Nothing about them without them.⁹⁵

It is often difficult to accept that when it comes to social change, we are playing a long game. The law reform process can take years, or decades. Lawyers have an important role to play in sharing the stories that can change attitudes.⁹⁶ Changed attitudes, rather than law, may be a stronger basis for lasting social change. Litigation and law reform campaigns can mobilise public support. They put an issue on the

⁹¹ Central Land Council, *Reviewing the Northern Territory Emergency Response: Perspectives from Six Communities* (Report, 2008); Australian Institute of Health and Welfare, *Evaluation of Income Management in the Northern Territory* (Occasional Paper No 34, 2010) 59–60. See also ORIMA Research, *Evaluation of the Child Protection Scheme of Income Management and Voluntary Income Management Measures in Western Australia* (Report, 2010) 122, 124, 128–9.

⁹² There is a deeply considered body of Indigenous scholarship on this issue: see Rosie Scott and Anita Heiss (eds), *The Intervention: An Anthology* (NewSouth Publishing, 2016); Nicole Watson, ‘The Northern Territory Emergency Response: Has It Really Improved the Lives of Aboriginal Women and Children?’ (2011) 35(1) *Australian Feminist Law Journal* 147. See also Jon Altman and Susie Russell, ‘Too Much “Dreaming”: Evaluations of the Northern Territory National Emergency Response Intervention 2007–2012’ (2012) 3 *Evidence Base* 1.

⁹³ Klaus Dicke, ‘The Founding Function of Human Dignity in the Universal Declaration of Human Rights’ in David Kretzmer and Eckart Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, 2002).

⁹⁴ Thank you, Craig Smith, QUT Faculty of Business and Law.

⁹⁵ I first heard the phrase ‘Nothing about us without us’ from Debbie Kilroy in the context of advocacy for criminalised women. But see further David Bridges, ‘Nothing about Us without Us’: The Ethics of Outsider Research’ in David Bridges, *Fiction Written under Oath?: Essays in Philosophy and Educational Research* (Kluwer Academic Publishers, 2003) 133.

⁹⁶ Lisa Sarma, ‘Storytelling and the Law: A Case Study of *Louth v Diprose*’ (1993) 19(3) *Melbourne University Law Review* 701.

agenda, attract media attention, and inform the public about the problem itself and about its potential solutions.⁹⁷ This is all part of the education process.

Even if we ‘fail’, our legal advocacy at the very least educates the next generation of lawyers. If nothing else, they can learn from us what not to do.

C Wait

I have now lived long enough to understand what Kirby J said in an address I attended early in my legal career. As I recall, he said social change comes in waves – there is a time for progress in social justice, and then a time for what seems like regression. He said that when we are in those periods of regression, we should be thinking ahead to the next wave.

I have seen in my own legal lifetime regressions being followed by a progressive backlash. Queensland’s Newman Government was known for its broad legislative agenda that encroached on fundamental human rights in the name of public safety. An example of such laws was the *Vicious Lawless Association Disestablishment Act 2013* (Qld) – an Act with an almost comical name but serious implications for the human rights of those suspected of being associated with ‘vicious lawless associations’ (bikie gangs).⁹⁸ During the Newman Government era, those of us in the State of Queensland realised that we actually did not have any rights; there was no legal leg to stand on to challenge these laws. And just a few years later, in 2019, the Queensland Government (quite unexpectedly) passed the *Human Rights Act 2019* (Qld).⁹⁹

Interestingly, in recent years there has been something of a backlash against the public nuisance offence. Whilst the number of charges did increase substantially over many years, more recently we have seen those numbers fall. In 2018/19, for example, there were 8,440 public nuisance charges finalised in the courts, compared with 23,371 in 2008.¹⁰⁰ In the recent national study on homelessness I described earlier, some of the lawyers said that public nuisance charges were no longer the most pressing legal issue their clients faced.

⁹⁷ Finlay (n 8); Minow (n 27).

⁹⁸ See further William P MacNeil, ‘Lacanian Ink and Leather “Down Under”: Queensland’s “Bikie” Legislation and Its Crimes of Fashion’ (2017) 26(4) *Griffith Law Review* 615.

⁹⁹ Following the strong stance of Peter Wellington MP: Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2014, 3753 (Peter Wellington).

¹⁰⁰ Queensland Sentencing Advisory Council, *Public Nuisance: Sentencing at a Glance* (2019). Other statistics obtained from the Queensland Office of Economic and Statistical Research by request in 2018.

VI Conclusions

Despite my own advocacy failures, and my realisation that the law, on its own, may not be able to fix all of the social problems we see around us, I am confident about lawyers' capacity to work towards social change together.

Thankfully, we are not alone in our struggles. Lawyers are not the only ones fighting for social justice – there are many others who walk alongside us in this. And we can achieve much more together. Debbie Kilroy OAM¹⁰¹ said to me once that we are all just links in a chain. This is such a wonderful thought, because when we see ourselves as a link in the chain, instead of the service provider of last resort, we can rely on the other links to get done what we are unable to do ourselves. It is a terrible reflection on our society that lawyers are often the service providers of last resort, but what a privileged position to be in. It is hard work, but it is hard work that changes lives. Our client work provides us with an opportunity to be involved in social change on a micro level every day – and our other legal skills provide us with the ability to work alongside others to achieve social change on a broader scale.

¹⁰¹ Founder and CEO of Sisters Inside Inc: 'About Debbie Kilroy', Sisters Inside (Web Page) <<https://www.sistersinside.com.au/about-debbie-kilroy-oam/>>.