T R A N S C R I P T

LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Homelessness in Victoria

Melbourne—Thursday, 2 July 2020

(via videoconference)

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WITNESSES

Professor the Hon. Kevin H Bell, AM, QC, Director, and

Ms Melinda Walker, Co-Chair, Criminal Law Section, Law Institute of Victoria.

The CHAIR: Good afternoon, everyone. I would like to declare open again the Standing Committee on Legal and Social Issues' Inquiry into Homelessness in Victoria. I know it goes without saying to my colleagues, please ensure that your phones are on silent—although I note most of you are muted at the moment.

As I did this morning, I would like to just begin by respectfully acknowledging the Aboriginal peoples, the traditional custodians of the multitude of lands on which we are meeting today, and pay my respects to their elders both past and present and any elders and community members who are here to impart knowledge today, but also anyone who is joining us via the broadcast of these proceedings. In fact welcome to everyone who is joining us via the broadcast.

Mel and Kevin, I have a quick statement to make to you. All evidence taken at this hearing is protected by parliamentary privilege and that is provided under the *Constitution Act 1975* but also the standing orders of the Legislative Council. This means that any information you provide during this hearing is protected by law. However, any comment made outside this hearing may not be protected. Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament.

After that very fierce note, welcome. As you can see, we are broadcasting, and we are also recording so you will receive transcripts of these proceedings in a short time, and I would encourage you to have a look at them because ultimately those transcripts will find their way to the committee's website. We are so pleased that you could make it. Thank you very much for your submissions and also, I think, your ongoing advocacy in this area. I particularly note some of the work that the Castan Centre has been doing. We would welcome you making some opening comments, and then we will open it up to a more general discussion with the committee. Either of you can start.

Prof. BELL: I think by prior arrangement I will be going first, and I have unmuted myself if that is okay. Ms Patten, can I ask who is present? I did not catch which members of the committee were present.

The CHAIR: Yes. We have got Mr Tarlamis, Mr Barton, Ms Lovell and Ms Vaghela.

Prof. BELL: Thank you. I want to thank the committee for the opportunity to give this evidence. I want to begin by acknowledging the traditional owners of the various countries on which we are sitting. I am sitting in the country of the Boon Wurrung peoples of the Kulin nation but, as the Chair has said, there are many peoples who are engaged with the work of the committee. I am bound to observe that an Indigenous person would never have been homeless before colonisation. Homelessness affects our Indigenous as much as if not more than other sections of our population and must be regarded as a consequence of colonisation, so I give that acknowledgement with some grave connection with the subject matter of the committee's work.

My main purpose in being here today is to make the connection between human rights and homelessness. I have had the opportunity to look at many of the submissions that have been made to the committee, and I see that that link has been made by some of the submissions that you have received but not in a way that goes into the detail of the human rights legal framework from which that contention is derived. Therefore we have today filed with the committee, for which we thank the committee, a written document which contains the evidence that we want to give in relation to that framework. That will necessarily shorten the evidence that I need to give today. To that end, I trust that the committee will have resources available to it to enable that document to be accessed and understood.

The committee is of course one that was constituted before the COVID-19 crisis was placed upon us, and yet that crisis has established without a shadow of any doubt that it is within the capacity of the Victorian community, indeed communities worldwide, to end homelessness. I say that with some confidence because it has become necessary, both by way of respecting the rights and dignity of homeless people and by way of protecting the general community, for homeless people to be housed. They were at the greatest risk of infection and therefore death from COVID-19, and I must acknowledge with gratitude and respect the fact that the

Victorian community acted very quickly through its government to ensure that homeless people were housed, and they have indeed been housed for some months as a result of the response action that has been taken.

It is remarkable therefore to be sitting here giving evidence to you today in relation to the problem of homelessness in circumstances where, for the first time in probably Victoria's colonial history, there is in fact no homelessness if we define homelessness to mean people in a position of having shelter, and they are. But of course we do not define homelessness in that way. We do not define homelessness by reference to whether somebody has a roof over their head; we define homelessness, in terms of international humans right law and as a matter of ordinary common sense and respect for those who are homeless, by reference to the security of their housing and by reference to their opportunities to obtain the ordinary means of human life—water, heat, shelter and so on. It is the question of which people who have shelter have long-term security of that shelter to which we must turn. If that is the definition that must be applied, then of course we continue to have a profound problem with homelessness in the Victorian community.

One of my personal motivations for wanting to give evidence to the committee today has been my long-term commitment to housing as a human right. I began work as a lawyer, indeed as a person, in the 1970s. One of my first jobs was as the first legal coordinator of the Tenants Union of Victoria. As a result of that experience I confronted the reality of housing, and I found it shocking—morally, legally, socially. It is unfortunate to observe that the problem of housing from that time has got considerably worse. It has become chronic, to use the medical expression. The submission that I have placed with the committee contains the details, but you will be in the possession of much more evidence than I about that. But I am confident in using the word 'chronic' as a description. Indeed, I think I can say that it is more than likely that the committee regarded the problem as chronic and that was the raison d'être for the establishment of the committee.

I want to congratulate the members of the committee individually for taking personal responsibility for this issue, as do I. I think in the end it does come down to a matter of personal responsibility for us as members of the community to acknowledge that we have done gravely wrong by not resolving this problem and by allowing it to continue for so long as we have. Surely there must come a time when our tolerance for the fact of homelessness must end and our appetite for fundamental measures to end it must begin. I very strongly urge this committee to make direct and powerful recommendations which state the fact as it is and which point directly to the depth of the problem that we have and to its consequences; to not mince words; and to in no way do anything other than to shine a very strong light upon one of the most important and pressing social problems that we confront in this state, in this country and indeed in this globe.

Having made those introductory remarks, can I say that I want to give evidence today in favour of approaching the problem of housing from a particular point of view. And that is from the point of view of housing as a right rather than a privilege. When we see a person who is unhoused, in the street or elsewhere, we have to ask ourselves a very important question: how do we regard that person? With what particular eyes do we see that person sleeping there or being there? Do we see them as a welfare case in need of assistance? Maybe they are. Do we see them as somebody experiencing social injustice? Maybe they are. Or do we see them as a rights bearer to whom the state owes an obligation to prevent the situation arising in which they find themselves? And that is what I am here today to say.

When you see a person who is sleeping there or being there in a state of homelessness, you see a rights bearer, not a welfare case or a victim of social injustice, though the latter two may be true also. I make this observation well knowing I stand before a committee of the upper house of the Victorian Parliament, who represents the very state who owes that obligation, and so it is with particular emphasis in this setting that I make that observation to you.

That way of looking at the matter has certain consequences, because it reverses the relation of responsibility that we would normally bring to bear to the problem. Instead of seeing the problem as one which has been brought about by the individual themselves, somebody who might need our mercy and our sympathy but not anything else, we see that person as a victim of a rights abuse which we ourselves have perpetrated. Instead of seeing that person as somebody for whom on moral grounds we should extend measures of social justice, which may be true and is perhaps a better way of looking at it than the welfare model, we should see them as somebody who does not just deserve our attention as a matter of social justice but is legally entitled to it, because it is only by affording them the right to justice, the right to human rights and their right to housing and to health and all the other rights engaged that we can ensure their inclusion in the Victorian community, their

participation in the Victorian community and the respect for them as individuals that every other member of the Victorian community has.

I want to invite the committee therefore to consider the question of whether the legal framework within which we approach human rights in this state is adequate. We do not yet have the right to housing enshrined in either the Victorian charter or elsewhere. We do not find an explicit obligation to end homelessness in any legal statute, of which incidentally the right to housing would in any event encompass. We do not see the right to health stipulated in the Victorian charter or anywhere else in its full amplitude, though there is a right to receive certain services under the *Mental Health Act*, by way of example, but we do not have a right to health stipulated as such and certainly not in the human rights context, the most obvious place for that being the Victorian charter.

It would make, I want to say to you, a big difference and not just a symbolic difference for that right to be recognised through the Victorian Parliament. It would be a means by which we would say through the Parliament as a people that the right is so important that it ought to be enshrined in law and not just in international law through treaties to which Australia is a party but in Victorian law through statutes that we make ourselves.

It seems very clear that you will recommend, in one way or another, a homelessness action plan to end it. You will, I would think, come to the conclusion that there needs to be formulated some very serious framework of action that only government can take in order to end this problem. That action plan will have social dimensions. That action plan will have service dimensions. That action plan will have health dimensions. That action plan will probably, as a result of submissions that you have received, encompass the inclusion of community organisations, the welfare sector, maybe the philanthropy sector, as well as mainstream government services in the solution to the problem. The plan will probably have an economic dimension, and it will almost certainly recommend significantly greater investment in social housing and in housing for the homeless in order to remedy the very serious gap that has arisen over recent decades in that area. But assuming that you go down that path or some other path that is like it, there is one dimension that will be missing, and that one dimension is the dimension that recognises the legal obligation in human rights terms to achieve the end to which all those other dimensions are directed.

It is for that reason that I invite you to read most carefully the submission in writing that we have made, because that document does make—I hope you will agree—a strong case between the fact of the violation of human rights as a phenomena and the fact of homelessness as a phenomena. Indeed we have really reached the point in terms of human rights scholarship that homelessness is itself regarded as a human rights breach because it is so closely associated with the undermining of human rights in so many different ways.

That is all I want to say, Chair, by way of opening remarks, other than perhaps to rely more generally upon the written document which I hope contains in much greater detail the case that we want to put before you today. Thank you.

The CHAIR: Thank you. I think we have heard that loud and clear. Just so you know, we have only just received your submission.

Prof. BELL: Yes, no time to read it.

The CHAIR: I do not think many of us have had the benefit to read it over our sandwich time. Indeed, yes, we shall.

Prof. BELL: Thank you.

The CHAIR: Mel, would you like to make some comments? We have got your submission.

Ms WALKER: Thank you so much. Can I also first acknowledge the traditional custodians of the land upon which I am situated, the Wathaurong people of the Kulin Nation, and I acknowledge the traditional custodians, First Nations people, of the land upon which each person appearing today is, and those who join us remotely, and I pay my respects to the elders past, present and emerging.

My name is Melinda Walker. I am a private practitioner and an accredited criminal law specialist. I have been practising in the industry now for 20 years, and I have been engaging in community services for the past 30 years. I appear here today as a representative of the law institute and co-chair of the criminal law section for the institute, and I thank the committee for the opportunity to participate and address this inquiry.

I appear before the inquiry today to provide the committee an overview of the impact of homelessness upon people who come into contact with the criminal law and the criminal justice system, as issues of homelessness are often intertwined with legal issues. I will cover or hope to cover three areas which I believe are the most pressing and significant on this topic, those being arrest and bail; sentencing and specialist courts; and overall the cycle of offending and the criminalisation of poverty—more broadly how the criminal justice system impacts disproportionately against this cohort of people who come before it, or more precisely become entangled in a system that creates a cyclical vortex and systematic shunting between services, crisis accommodation and prison. Finally, hopefully I have time to briefly address you with respect to the impact of COVID-19 and the significant difficulties that now face those who appear before the court and the response of the justice system to managing these issues.

Homelessness in which an individual lives without security or privacy, including being subject to CCTV surveillance and frequent police checks, creates a fertile ground for criminal offending. People who find themselves without a home, sleeping rough or street bound have severe feelings of dislocation from community, disconnection from family and society, are stripped of dignity and are often desperate. The impact of homelessness increases a person's sense of invisibility, of worthlessness, and there is a great deal of shame and self-loathing attached to this state of being.

What we see is a significant erosion in a person's mental health, an exacerbation of diagnosed mental illness, which is often untreated, or a decline into psychosis as a direct link to their state of homelessness. Drugs and alcohol are often present and play a very significant role in this cycle, which at first glance may appear to be making bad choices during a trying time, but imagine this: it is easier to keep moving during the night to keep an eye on your possessions and to defend yourself if necessary. Living on the streets, in your car, in crisis accommodation, in boarding houses or even in a tent can be dangerous and frightening. So offending in order to cope with these circumstances, such as substance abuse, trespass, theft, physical altercations or more serious offending are commonplace. When a person comes in contact with the criminal justice system it is a significant opportunity for intervention, to engage services, to encourage rehabilitation and for diversion from the traditional criminal justice response, and that should be the preferred option.

However, the current bail system operates against this proposition. I will propose to you a scenario in common to each of the people that we deal with on a daily basis: where a person is arrested, even for a minor offence of theft or trespass, there is a real risk that their state of homelessness mitigates against some of the risks identified by the Act—those being that they may continue to offend, they are a risk to the welfare or safety of members of the public or they may fail to appear in court. Now, if that person is given the opportunity to be released on bail, to reappear maybe six months later in the year, if they are arrested again for another perhaps minor, indictable offence of theft—say, for example, of food—they will be charged with a substantive offence and the additional offence of committing an indictable offence whilst on bail. They now find themselves having to demonstrate compelling reasons as to why their bail should be granted. They are remanded in custody, but for present purposes let us say they get a second opportunity. The main reason for granting bail in that circumstance is that the offence may not warrant a term of imprisonment, and that is a consideration which must be taken into account when considering a person's bail.

Weeks later, the person, their mental health deteriorating, their desperation becoming more severe, makes a decision to break into an apartment block and takes the opportunity to sleep in a stairwell. Because of their appearance, their demeanour, police are called, and they are arrested, maybe charged with burglary, although on first glance it may be a trespass, and again charged with committing an indictable offence whilst on bail. This combination of circumstances elevates the threshold, and the court now must be satisfied of exceptional circumstances as to why a person should be released on bail.

The reality is that without secure accommodation, available treatment and access to supervision, it is unlikely that a third opportunity would be given, and they will remain in custody. This being said, jail should never be an option for accommodation. Jail should never be an option for a quasi-detoxification facility. It is not the purpose of jail, and this needs to be addressed.

Apart from allegations of further offending, a person may be arrested and brought before the court for breaches of bail conditions such as a breach of a curfew, a failure to report on bail, failing to appear at court or being within an exclusion zone. These are often conditions that are breached by persons who do not have secure accommodation.

The LIV's previous representations and recommendations have been to urgently review the requirement for low-level offending to be the subject of bail and that it could adequately be dealt with by way of either a summons, a notice to the accused or even an on-the-spot caution, or as you will hear in a moment, dealt with in a specialist court which addresses the underlying factors which contribute to their situation and causes of offending—declining mental health, escalating drug use and situational desperation.

One of the conditions of bail that we have currently is under the CISP program, being the Court Integrated Services Program. That was designed to assist persons who did not have accommodation who were being refused bail because of their lack of stable housing. In reality what CISP can now offer, because of the increased need for accommodation, is crisis accommodation that can often be in private motels or boarding houses, which are extraordinarily unsuitable—they are often with other people who are either on parole or bail themselves and who are also dealing with significant issues—not to mention that the delay in assessment for that program, if you were eligible for the program, has increased now to some two to three weeks before an assessment can be undertaken. They are severely under-resourced and require further funding in order to continue to offer even the crisis accommodation that is being offered.

As a means to resolve this issue there was the creation of the Atrium housing support program in early 2019. This was a welcomed program, because it provides a supporting pathway and housing whilst on bail. There are three phases to this program: 24/7 supported accommodation, including mental health support and referral; drug and alcohol services; and employment support. It provides an environment that promotes stabilisation and rehabilitation and builds the capacity to self-manage. Phase 2 is a life skills program and phase 3 assists those and encourages those who are now in transitional housing to take over the lease and live independently. It is a collaborative partnership between Melbourne City Mission, ACSO, Caraniche and Corrections Victoria. An evaluation of the program is continuing; however, its pilot has now ended. The referrals which came through the CISP services were undertaken without funding, and that is no longer sustainable. They are no longer offering accommodation to males. There are only two houses remaining open and operating with a capacity of eight beds, and as I said, that is only for women at this stage.

In terms of specialist courts—which are courts certainly designed to address specific issues that people face—one being Drug Court, we certainly welcome the expansion of this court into other regions and into higher courts. However, Drug Court is only open for offences which would attract a term of imprisonment not exceeding two years. It is also catchment based. For lower-level offending and offending which may not attract a term of imprisonment the person is not eligible, and we seek the expansion of that eligibility. The ARC court—the assessment and referral court—an extremely successful program designed to assist those who are diagnosed and dealing with mental health and/or disability which impacts upon their offending, is a significant program bringing together services to support that person. That includes accommodation. At the present time it is only offered at the Melbourne Magistrates Court and the Moorabbin Magistrates Court.

I would ask the committee to consider homeless court. It is designed and operating in numerous states of America currently. The model is in contrast to a drug court. It is set up for minor offending with the understanding that no-one goes into custody, and it is an opt-in program. What is proposed is that this court be explored and set up with the cooperation and involvement of the major support agencies who have daily contact with homeless for food, shelter or other supports. In America the services are set up in homeless shelters. Homeless court is designed to help homeless persons break through the cycle of life on the streets and the myriad of social problems that emerge from that life and to transcend the traditional adversarial criminal justice system.

Briefly, in relation to sentencing and how that impacts directly on homeless persons, with the abolition of suspended sentences a community corrections order is now the only order that sits between an offender and prison. This is designed and recognised as a punitive order requiring compliance with the conditions of that order, those being community work, assessment and treatment for mental health or drug and alcohol, a curfew, a residential condition or an alcohol exclusion. In relation to curfew accommodation and alcohol exclusion there can also be electronic monitoring to monitor those two conditions. Now, a person who is homeless will

not be considered for a community corrections order where a court deems as critical a curfew or a residence condition being imposed on an order. Fines—we cannot continue to fine persons who no longer have the capacity to pay fines, and it simply increases any warrants of imprisonment that may be imposed upon them.

Diversion is offered at this point for low-level first-time offenders, and an assessment still remains with a police informant or their supervisor and cannot be overridden by a court. There needs to be an urgent review in relation to the diversion system. We have already made submissions in relation to that diversion system, but it should be open for low-level offending, whether it be first offence or not.

As far as COVID-19—and I will try to be brief—apart from the obvious issues that have faced the courts, all matters, in the tens of thousands, who are subject to summons or to bail have been adjourned into late 2020 or 2021. This extends the period that a person is on bail and increases the risk of remand where any offending may occur.

In relation to CISP or a community correction order, there is only phone contact now. There is no face-to-face contact with any persons for any rehabilitation, counselling or supervision appointments. Many of the persons who are admitted to treatment either by way of bail or a correction order cannot cope without face-to-face contact, and the counselling becomes fractured and meaningless. Some have not been considered suitable for some of these programs, purely because they do not have phone contact or a regular contact that can be made with them. Certainly persons who face homelessness, they often break their phones, they lose their phones, their phones are stolen or they cannot simply afford to maintain a phone.

Just to finish, and I certainly welcome some questions, I think I echo His Honour Justice Bell's comments about homeless persons, but can I add this: while our homeless are a significant issue for our community, frustrating and undesirable for some critics of our homeless persons, it is important to remember it is the condition of homelessness that is undesirable and not the people who find themselves homeless. Thank you.

The CHAIR: Thank you both. You have given us quite of lot of food for thought. If I could start with you, Kevin, asking about the charter. I do not think this has been raised before and I think this is quite an innovative concept of changing the charter. Is it commonplace in other charters, Canada or other jurisdictions, where that right to housing and that right to—I know the right to health is in the Canadian charter, I believe—

Prof. BELL: Yes.

The CHAIR: But that right to housing, is that something that is commonplace?

Prof. BELL: Yes. Well, I can send the committee a note on where it is to be found in domestic jurisdictions. The answer to your question is that it is not everywhere but it is common. And of course there are different forms of government in the places in the world, and therefore the way in which that right and therefore that obligation might operate reflects the kind of government which the country has. In civil systems it has a particular role; in common-law systems it has a particular role. Here, it would not be legally enforceable in the way that a contract is legally enforceable.

Assuming that it is included in the charter—and this committee would need to consider recommending the right to health be included also because of the very close connection between those two rights with respect to the homeless, but just focusing on housing at the moment—it would operate to require consideration of the right to health in the exercise of government decision-making across the board. When government was formulating policy, when government was exercising discretion, when government was enacting law, then it would be necessary as a result of that for the government to take into account that right in doing so. If the government were to introduce a law, unthinkable though it may be, which was incompatible with the right to housing—something which I think would be untenable, whatever the shape of the Victorian Parliament—then it would need to be expressly stated in the enacting law that it was intended to do so. But that is very unlikely so I will come to the more likely, which is that the government intended to make laws which were consistent and not incompatible.

The lawmaking provisions with which you will be familiar, Ms Patten, would require a statement of compatibility to be tabled, which makes that linkage. So in short, it is common. The precise legal effect of the right, whether it be in a constitution or in a basic law such as the charter, reflects the nature of the government in the country concerned. In all places the inclusion of the law operates to elevate the right from the strong

moral plane, in which it always stays, to the legal plane, which means that it has a stronger role to play in government policy formulation and hopefully in government lawmaking.

The CHAIR: I have lots of questions. Just following on from that, can you think of any legislation that exists today—maybe I am going down a rabbit hole thinking about bail laws—that would contradict someone's right to housing? I do not think that it is bail.

Prof. BELL: Just let me think that through. I think the obvious answer to your question is: yes, with respect to the *Residential Tenancies Act*. There will be other Acts which empower things to be done which have the consequence of making somebody homeless. I mean, some fines enforcement regulations may have that consequence. Some debt recovery laws might have that consequence because they decouple the person from their home. But the most serious example of actual inconsistency or violation would be those provisions of the *Residential Tenancies Act* which permit eviction for no cause. Now, it is unfortunate in the extreme and in my view a plain breach of human rights for those laws to be present with respect to social tenants, as they are in this state. A social tenant in this state, as can a private tenant, can be evicted without cause. That is quite clearly a breach of their right to housing. In a case where there is not a house to fall back on and the person becomes homeless in consequence, then it also gives rise to that most egregious form of breach of the right to housing.

The CHAIR: And as you said at the start, our charter does not necessarily have many teeth but can act as that conscience and consideration when we are—

Prof. BELL: No, it does not have teeth—that is another question. We are not here to talk about the enforceability mechanism of the charter or the adequacy of our human rights framework, but we can hitch for a ride housing onto the existing mechanism, which I do not consider to be meaningless. I have administered this system for some 15 years as a judge. I think judgements of mine and other judges have established that it can in circumstances work very well, and I can see the right to housing falling into that category.

The CHAIR: I think it is an important consideration. Just finally, quickly, could you imagine, if we included that, that it would be some sort of protective element on things like when we release people from prisons into homelessness?

Prof. BELL: Well, quite. Take the parole board as an example—mind you, the parole board does take into account housing, where the person would go; generally speaking, prisoners are not released into want of housing—that is, homelessness. There are important non-government organisations who are part of the network of support for prisoners, but that works as a matter of grace and favour and government discretion, not as a matter of legal entitlement. So the inclusion of the right to housing in the charter would mean that that was obligatory as a matter of law rather than desirable as a matter of moral purpose.

Ms VAGHELA: Thanks, Professor Bell, for your time and the submission that has come through. I have not had time to have a look at that.

Prof. BELL: I am sorry about the lateness. So it has come in late?

Ms VAGHELA: Yes, it has.

Prof. BELL: I am sorry. I am new in my job, and I would like to say I have actually caught up, but I have not.

Ms VAGHELA: That is all right. I will go through it. And thanks, Mel, for your time and your submission. We have heard you before as well, at the other public hearings. It is always interesting to hear you, Mel.

My question and comment is for Professor Bell. You spoke about how when you started your career, in the early years, you had an interest in homelessness and human rights. I want to know, over the past few decades: how has homelessness changed? You also mentioned that the issue has become worse. What do you think has caused the issue to become worse? If we are fixing or trying to address the issue now, we need to have a look at what is going to happen in the next few decades.

I understand you also acknowledged that due to COVID-19 the government did the work in terms of housing temporarily the homeless people, but that is a short-term plan. So what do you think? Why has this happened, and what should we be looking at in the next three, four, five decades to address this issue?

Prof. BELL: There will be a complex of reasons. I think the reasons that I give you will be inadequate, and that is because I am a lawyer, not an economist and not a social scientist, and there will be those who are more familiar with the way in which the housing market and housing provision are organised in the state to give you an adequate answer. But I can say to you that want of government provision, want of government social investment in housing, is a big part of the problem and the privatisation of the housing market is a big part of the problem.

I grew up myself in social housing. I was born in 1954. I am a baby boomer, obviously. My parents were not people of means. We were tenants, for the first 10 years of my life, of a housing commission house in Broadmeadows and in Moorabbin. In those days social housing and the construction of housing was seen to be a government obligation, which was linked to economic reconstruction in the post-World War II reconstruction period. So there seemed to be a close connection between what the community expected governments to do by way of providing housing and what the community needed in terms of the creation of an economy that provided jobs and provided industry with activity.

Over time we have seen withdrawal of government from the area of provision of social housing and the gradual privatisation of housing as a commodity, as against a social right. The main means by which government has given effect to the aspiration, the desire, indeed the right of the community to housing has been through the private market, and there has been a significant shift from social means for providing housing to private means to providing housing.

Interestingly this is as much a characteristic of Labor governments as it is a characteristic of Liberal and conservative governments. So there has been an underlying trend of the de-emphasis of social engagement in housing and a decoupling of social investment in housing from the economic imperative. That would appear to me to be the main reason why this has happened. I would point to economic policy as the main reason why, as the main driver for the increase, and indeed when one thinks about it, it is the inevitable consequence of an economic policy which emphasises the private nature of housing as a commodity rather than the right to housing as an obligation for governments to fulfil.

Ms VAGHELA: I have to agree with the Chair when she mentioned that you have brought a very different perspective into addressing homelessness and housing issues with talking about human rights now. You also spoke a little bit about a homelessness action plan with short-term and long-term plans. But if you had, say, three strategies which you think that the government would have taken to invest in homelessness, pre-COVID-19, do you think those three strategies would have changed post COVID-19, and if yes, why and how?

Prof. BELL: I think COVID-19 is a game changer. The reason why it is a game changer is that it shines a bright light upon the fact that the solution to this problem is now within our own powers. It has made very clear that we as a community can exercise a moral—and I would argue a legal—choice to end homelessness, or we might not. You opened your remarks by saying that the housing provided to the homeless at the moment is temporary, and it is my fear that it may be. I do ask the committee to contemplate the seriousness of the situation where across Australia at least 10 000 people who would otherwise be sleeping rough or actually in hostel and like accommodation are released back into homelessness. Not only do I think that would be a morally reprehensible thing to do, I think it would be dangerous from the point of view of the rest of the community, because they are likely to be people who would be exposed to all manner of risk and danger. And they are likely to be people who become engaged in all sorts of possibly socially disruptive behaviour as a result of their circumstances, which increases our risk in terms of safety and our ability to undergo our ordinary life.

Now, we can let that happen—and it would have to be a positive choice—or we can not. I am hoping that the fact that we resolved it by reasons of a mixture of self and moral interest now means that we can solve it as a matter of self and moral interest permanently, and, I would add, elevate the moral interest to the legal right in order to underpin the other steps that might be taken. I thought you were going to ask me that terrible question: what three things would you now do? You did not ask me that. My answer to your question would have been that I would decline to name three things that should be done because it is very clear that there needs to be a comprehensive action plan which addresses various pressure points: social, economic, legal, administrative, funding.

Ms VAGHELA: Health.

Prof. BELL: Health, precisely. Mental health we have not had time to go into. The mental health implications of homelessness are terrible, particularly with respect to the young. I am hoping you have received a submission from Orygen and Beyond Blue and other like organisations which make that connection, which is very strong. So an action plan there must be and comprehensive it must be.

Can I end by endorsing the submissions that have been made so eloquently by the Law Institute of Victoria. As a judge for 15 years and a barrister for 20, I found much strength in the submissions that were made, and I would endorse them in principle.

The CHAIR: Yes, we pay particular attention to those.

Mr BARTON: Thank you, Kevin. The Chair asked the first question that I was really interested in, about the Charter of Human Rights, so we will not go over that one again. But it is very interesting, and I think it is something that the committee should consider. The other one is the drug court. Now, we understand it is happening in America. Could you just tell me a little bit about it, because it has been operating for decades.

The CHAIR: I think you mean the homeless court, Rod?

Mr BARTON: Sorry, the homeless court, and how it has been operating and how we can wrap around services so that we can get people help rather than locking them up.

Prof. BELL: I am going to handball that question to the Law Institute of Victoria.

Ms WALKER: Thanks very much, Your Honour. Look, it has been operating for quite some time and it is across a number of states. It has been very successful, and it has been done in the guise of that comprehensive response that needs to be undertaken. You cannot look at this in isolation of those mental health issues, other social issues, particularly health issues. And I think that what certainly COVID has demonstrated is that we can respond to homelessness, and if you look at that from a legal perspective of somebody who is facing imprisonment or remand, that also has consequences. Somebody may have temporary accommodation—they may have accommodation with family—which falls through once a person goes into prison and they come out of prison without those supports any longer.

What the homeless court does is that it takes all of those issues in one. It acts similar to the way that the ARC acts, which is to re-engage somebody with psychiatric services, for example. I do want to say a little bit more about mental health and I will come back to that in a minute. But it re-engages people with them or it has people in contact with mental health services. It also provides access to the drug and alcohol counselling. Without a significant investment in drug rehabilitation centres in this state, that will simply fall through. Counselling is not enough. There are a lot of people who are desirable of going into rehabilitation centres. As a response to COVID-19, none of the—or very few, I should say—residential rehabilitation services are taking new clients. So there is a real gap there now where people see that their opportunity to go into a program or their desirability to go into a program just cannot be followed through at the moment.

I said I would but if I could go back to the mental health services, there is a real chasm, if I could put it that way, between somebody who is deemed to be requiring treatment and supervision going into prison. I am not sure if the committee is aware, but for somebody who has been deemed to be an involuntary patient in a psychiatric service and released back into the community or discharged back into the community on a community treatment order, that is removed once the person goes into prison. The prison cannot facilitate a community treatment order and the community treatment order will fall away. So what happens then is that a person is released back into the community literally with a referral for that person to follow up with their area mental health service. It rarely happens. And if somebody has not got stable accommodation, it does not matter which area you put them in, they certainly cannot be guaranteed to be in that area to then follow up with services.

I have a particular client at the moment who has chronic schizophrenia. He is on a depot injection. He does not even know that he is no longer on a community treatment order, but presents to the hospital for his injection once a month. Now, he is currently back in custody. The stairwell example that I gave to you is him. He is significantly disadvantaged. He really struggles with obeying any conditions, and we are currently in the process of trying to find out really what substantial and comprehensive programs that we can put in place for him, because he has fallen through those cracks. His presentation is really challenging for the community. He

has a tattooed face and when he is in the community he is quite frightening to people within the community and, as I said, undesirable. But every time I see him he is still in the clothes that he was released from prison in. He has no possessions, he has no family support and he has nowhere to go—and he sleeps in the streets. The only time that he is safe is when he goes into prison. And that is a really telling example of the position that we are in at the moment, where these people fall through the cracks at such a cataclysmic point and cannot come back out of it.

So going back to your question, a homeless court certainly would provide somebody with a point of entry, somewhere where they can address the issues, knowing that it is surrounded with or the whole reason that they are there in the first place is because of offending. If they have access to food, they will not steal food. If they have access to accommodation, they will not sleep in someone's stairwell. You know, these are really basic human rights that people have. And I cannot emphasise to you how many people that I have who come into remand who have stolen food or have stolen socks, have stolen underpants and really basic needs that are criminalised and, because of the way that our bail laws act, then come under much higher thresholds.

Prof. BELL: Might I follow up that answer, besides endorsing everything that has been said. A homeless court would regard a homeless person as a point of interaction from the point of view of solving their homelessness rather than penalising their conduct. Now, that is not to say that their conduct which is criminal is overlooked or not dealt with from a sentencing point of view—it is. But a homeless person is normally excluded from society, unknown, not looked at, untreated, but when the person is in court, they are there and so they are interacting with society through the court and society is therefore in a position to act upon the underlying causes of their conduct, and the approach is therapeutic. It is the same with bail, which Mel has mentioned. The purpose of the CISP program is to take the person who is before the court, because we have the person there, and use bail as a means by which to address the underlying causes of their criminal conduct. It is the same with the Drug Court: we have the person there, in a position where we can help them and in a position where they are perhaps more prepared to accept help than otherwise. Therefore the help is delivered. A homeless court would operate in much the same way.

Mr TARLAMIS: My line of questioning was around the homeless court, so it has already been answered, but I will take this opportunity to thank Professor Bell and Mel for your submissions, your advocacy and your contributions and for talking to us today. I do not have any other questions.

The CHAIR: Just in carrying on that conversation around the homeless court and some of the comparisons that we have been making a little bit to the Drug Court, but I take your point, more to ARC. With the Drug Court, the Drug Court requires a guilty plea. Mel, I note your thoughts about reducing the types of offences that could come before the Drug Court. As we saw in spent convictions, that guilty plea can actually come back to bite someone. There may be circumstances where you would be better off not going to the Drug Court and actually trying to not plead guilty, because even a no conviction recorded still has that effect on your criminal record going forward. If we were to take minor offences in there, how could we deal with that so that it was not something that was actually going to stay with them for, if we were successful in getting spent convictions, five years or 10 years depending on their age?

Ms WALKER: I think that the fundamental difference there is that a drug treatment order is for all intents and purposes attached to an imprisonment order, so you are unable to get a non-conviction on a drug treatment order as it presently stands. In contrast, the ARC court does not require a guilty plea in order for you to participate in the ARC court. Obviously by the end of the ARC process a plea of guilty would be entered to appropriate charges. There is still case conferencing and contest mentions that go on throughout the period that the person is assisted in the ARC court, but to finalise matters in the ARC court there has to be ultimately a plea of guilty. It is really not necessarily their compliance but their engagement in the program that then can sway a court as to whether or not a conviction or a non-conviction is imposed. It is quite rare that a term of imprisonment is imposed in the ARC court. A term of imprisonment may be imposed because they have spent some time on remand prior to going into ARC or intermittently they have gone into custody whilst they are on the ARC program and so it simply reflects that, because there still are some serious offences that go through ARC.

In order to deal with more minor offences in Drug Court there would have to be a change in relation to what the effect of the order was. It would have to be able to be an order not attached to imprisonment, which carries with it a conviction automatically, and that is one of the reasons why a lot of people are excluded from drug

treatment orders—because the offending is such low-level offending that it would not attract the imprisonment—and therefore they do not get that intensive support.

A drug treatment order is no easy feat, let me say. It is an intensive period of supervision. There are intensive requirements of urine screening, counselling and any other matters that need to be done in order to get the person to the point where they are no longer offending in order to support a drug problem. There has got to be that connection between drugs and the offending itself.

The homeless court falls probably on the other end of ARC, I would say, because ARC is long term, there is more serious offending, but certainly the engagement is then taken into consideration when considering a disposition at the end of it. And if somebody has complied with ARC, and it can go—

I think it is legislated really for 12 months but they rarely go for 12 months, they usually go—I think I just had one recently, she was subject to the ARC court for two and a half years.

The CHAIR: Wow.

Ms WALKER: And it was almost like the fear of letting her go out of ARC because there was the regularity, there was the contact, there was the support, there was the care. She was also subject to quite serious family violence from her partner who was in and out of jail. She had departmental housing and he would come and stay with her in that housing.

There is one thing I was just thinking of while I was talking. Can I just add something?

The CHAIR: Yes.

Ms WALKER: In terms of female prisoners as well, there is a significant issue with women falling into homelessness or the option of going back to an abusive partner, and sometimes those women who have children cannot go into homelessness—will risk losing their children or losing contact with their children—and so going back to the abusive partner is often the better option.

That sort of leads me to that there needs to be a real investment in the pre- and post-release programs that are offered for prisoners, whether they be male or female. There are some programs that are being offered through ACSO. You must be sentenced, so without the remand period there may be some work that can be done with that person, but you have to anticipate what sentence they are going to get, when they are going to be sentenced, what accommodation they are going to require, and sometimes that does mitigate against somebody being given an order if they are going into crisis accommodation.

The CHAIR: And again, just as a comment, it just shows the failure of the system that those are the options that we are leaving people with and that if we can provide adequate services and housing for people initially escaping family violence, then hopefully we are not going to see ourselves having to provide these services at such a pointy end of the justice system.

Ms WALKER: That is right. I think I have already made this comment to the committee on a previous occasion: the public money that is going to private organisations, to motels, for somebody to be released on bail is so damaging, and it is not a good investment, I am telling you now. It is not a good investment to send somebody to the Coburg Motor Inn. It is not a good investment for somebody to be bailed for one night to accommodation that is extraordinarily undesirable, dangerous—

The CHAIR: And expensive.

Ms WALKER: and really expensive. And it is public money that is going into them. I cannot see why that cannot be reinvested into housing for people who are to be released on bail in the guise of that Atrium program. I will be sorely disappointed if the Atrium program does not continue or at least is not ramped up because—

The CHAIR: Yes, let us hope it gets more than eight beds.

Ms WALKER: Yes.

Ms VAGHELA: Mel, you always give examples of your clients—last time you gave them and also this time—so it makes it easier for us to understand. While helping your clients you would have dealt with so many service providers in the sector of homelessness and housing issues. Do you think we can do better in the coordination of the sector and all its different organisations? Is there an opportunity to fix potential overlap in the sector, maybe in terms of funding or resources?

Ms WALKER: I will give you one example in terms of residential rehabilitation. If we put aside COVID for the moment, residential rehabilitation services do not undertake comprehensive assessments for somebody to go into rehabilitation, apart from Odyssey House. There are a number of drug and alcohol workers that have been funded through the CISP program and also through ACSO that could but do not have the capacity to undertake those assessments for those organisations. Apart from there needing to be more public, accessible rehabilitation and reputable rehabilitation services for people to get access to, the assessment process is severely restricted at the moment. To be told by a service provider, 'We can't assess your client until they're out on bail' is really unhelpful if the whole point of reducing the risk is to assist somebody to go into a residential rehabilitation centre. In terms of my experience with service providers, 'chicken and egg' is an understatement: in order to get somebody into a program, you have to get them out of prison; in order to keep them out of prison, you need to get them into a program. It is a terrible cycle that needs investment and needs examination.

Mr BARTON: I think there is almost a committee inquiry just on this particular subject of the legal side of things. I need to sit down and have a good look at the submissions and everything. But I really thank them. They are really thought-provoking, some of these things.

The CHAIR: Again, thank you both. This is a whole-of-government issue. It is a whole-of-society issue. And just bringing those human rights and justice issues to us today was really fruitful. We are really grateful for the time that you have spent with us today and also for the time that you and your organisations have spent on, I think, some really thoughtful submissions with some solutions and some ideas that we can really take forward and that go beyond building more houses, which we know obviously is probably at the top of this. Thank you both. As I say, you will receive transcripts of this hearing soon.

Prof. BELL: Ms Patten, before thanking you, can I say that if you wanted to get some official evidence in relation to the existence of rights to housing and health in other jurisdictions, the Victorian Equal Opportunity and Human Rights Commission would be able to assist you, I am sure.

The CHAIR: I believe they are on our list. We will be meeting with them shortly.

Prof. BELL: Thank you, and thank you to the committee.

The CHAIR: Thank you both. Thank you very much.

Ms WALKER: Thank you.

Witnesses withdrew.