

# JOURNAL OF JUDICIAL ADMINISTRATION

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## ARTICLES

### **Path Dependency, the High Court, and the Constitution** – *Jeremy Patrick*

Path dependence is a concept that originally arose in the field of economics before gaining currency with political scientists and historians. The essence of path dependency is that temporality matters: once a decision is made, it often becomes “locked-in” and persists despite the existence of more efficient or otherwise better alternatives that could become apparent later. The tentative hypothesis advanced here is that the concept of path dependency is useful for understanding why some doctrines of Australian constitutional law have changed dramatically since first developed while others remain largely the same. An example of one arguably path-dependent line of doctrine and one arguably non-path-dependent line of doctrine are discussed and analysed to demonstrate the possibilities and limitations of the theory. ....

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### **Homelessness and Contact with the Criminal Justice System: Insights from Magistrates in Australia** – *Julia Quilter, Luke McNamara, Tamara Walsh and Thalia Anthony*

On a regular basis Australian Magistrates sitting in high caseload criminal courts are required to make important high-stakes decisions about a defendant who is homeless. As part of a national study of the relationship between criminalisation and homelessness this article reports the findings of qualitative interviews with 27 Australian Magistrates. Participants identified multiple challenges for judicial decision-making – about matters like bail and sentencing – where the defendant’s homelessness, and associated complex needs and disadvantage, cannot be separated from their “offending” behaviour. Magistrates drew attention to a range of problems including: time pressures that prevented them from gaining a detailed understanding of the defendant’s circumstances; and the conundrum of seeing a fine as the only suitable punishment for a person already experiencing severe socio-economic disadvantage. In addition to recognising the need for wider action to reduce the extent of homelessness, participants identified a range of possible reforms within the criminal justice system which could reduce the compounding effect that people experience when homelessness brings them into contact with the criminal courts, including the adoption of therapeutic jurisprudence approaches. ....

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### **COVID-19: An Exceptional or Surrounding Circumstance for the Purposes of Bail and Sentencing?** – *Natalia Antolak-Saper*

COVID-19 has had a significant effect, globally and domestically, on both individuals and institutions. One of these is the operation of the criminal justice system. Measures aimed at “flattening the curve” such as social distancing and lockdowns, have resulted in significant disruption to bail, criminal jury trials and prisons. Although courts have acknowledged that the pandemic will be an issue of concern, they have been understandably reluctant to express general statements of principle detailing how it should be considered by courts.

This article considers the impact of COVID-19 in the context of bail and sentencing, using the State of Victoria as an example. Through an analysis of Victorian Supreme Court bail and sentencing decisions between the period of February and August 2020, this article demonstrates that an overwhelming number of decisions categorise the pandemic as either exceptional or compelling circumstances for the purpose of bail, and as a mitigating factor for the purpose of sentencing. These decisions are of precedential value for lower courts and may also be relevant to other Australian and cognate jurisdictions. This analysis may also inform policymakers in developing criminal justice measures to appropriately deal with this and future pandemics. .... 81