

We want change!

Calling for the abolition of the criminal offence of begging

November 2010



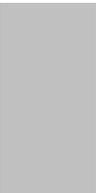
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A special thanks to the people who beg, who told us their stories and for whom we will continue to advocate.



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1. Executive summary

The criminal offence of begging should be abolished

Criminalising begging is tantamount to criminalising poverty. It perpetuates, rather than alleviates, the marginalisation and disadvantage experienced by people who beg. It also violates the fundamental human rights of some of the most vulnerable in our society. The current approach is inconsistent with the Victorian government's stated commitment to human rights and to a fairer Victoria. It disproportionately affects people whom circumstance has already denied basic necessities such as food, shelter and health care, and then adds to their disadvantage by denying them even the basic right to communicate and seek to address their plight.

The use of imprisonment, fines and community based orders as a response to begging fails to address the underlying causes of this behaviour. These punishments ignore the reality that people who beg are among the most marginalised and isolated within society. Begging is usually a last resort activity engaged in to supplement income and meet subsistence needs. Fining people for such activity exacerbates the causes that underlie it and may encourage people to engage in other illegal income supplementation activities such as shop lifting, drug dealing and prostitution. Incarcerating people for such activity also fails to address underlying causes and may further jeopardise often tenuous relationships between the individual, his or her family and friends, and society generally.

The HPLC recently undertook a recent survey of people begging in the Melbourne CBD. The survey revealed the reality of the lives of those who beg. It found that:

- 73% were long term unemployed;
- over 50% had a mental illness;
- 23% had experienced domestic or family violence; and
- almost 90% were sleeping rough or in squats, or lived in a men's refuge or rooming house.

A more effective response to begging is to address its causes: alleviate the disadvantage of those who beg, and particularly address their need for food, shelter and health care.

The criminal offence of begging should be abolished.

2. Begging is a symptom of poverty

2.1. What is poverty?

The Australian Council of Social Services (**ACOSS**) defines poverty as follows:¹

Poverty is a relative concept used to describe the people in a society that cannot afford the essentials that most people take for granted. While many Australians juggle payments of bills, people living in poverty have to make difficult choices – such as skipping a meal to pay for a child's textbooks.

In Australia, the term 'poverty' refers to people living in relative poverty: those whose living standards fall below an overall community standard. People living in poverty not only have low levels of income; they also miss out on opportunities and resources that most take for granted, such as adequate health and dental care, housing, education, employment opportunities, food and recreation.

Part of understanding this issue relates to income poverty and the significant difference between income support payments (pensions, unemployment payments, youth/student payments) and the Henderson Poverty Line. The poverty line measures how much individuals and families require to cover essential living costs. In 2008 the National Welfare Rights Network identified that a single unemployed adult received benefits at 26% below the poverty line and an independent student was paid at approximately 38% below².

But understanding poverty should not be restricted to consideration of income. It is clear that 'poverty erodes or nullifies economic and social rights such as the right to health, adequate housing, food and safe water, and the right to education. The same is true of civil and political rights such as the right to a fair trial, political participation and security of the person.'³ In other words, being poor affects everything.

In defining poverty the Office of the United Nations High Commissioner for Human Rights adopts a 'capability approach' which essentially considers the wellbeing of an individual and their ability to 'do or be' certain things.⁴ In addition to the concept of 'inadequate command over economic resources', this approach also involves the identification of 'certain basic capabilities that would be common to all – for example, being adequately nourished, being adequately clothed and sheltered, preventable morbidity, taking part in the life of a community, and being able to appear in public with dignity.'⁵

An understanding of poverty must address health, shelter, public participation, human dignity and income.

2.2. Who is poor?

Research commissioned by ACOSS and conducted by the Social Policy Research Centre at the University of NSW estimates that the number of Australians living in poverty is increasing. Approximately 2.2 million people, or 11.1 per cent of Australians lived in poverty in 2006 (up from 9.9 per cent in 2004 and 7.6 per cent in 1994).⁶

Adequate income is a prerequisite for an adequate standard of life; it is essential for housing, food, medication and more broadly it is necessary for participation in society and social inclusion. During human rights consultations conducted by the PILCH Homeless Persons Legal Clinic (HPLC) in 2009, we spoke to people with an experience of homelessness about this issue. Of the respondents in receipt of income support (90%), approximately 80% felt that income support payments were inadequate to meet their most basic needs⁷. One workshop participant stated *'social security isn't enough, I run out of food for lunches and it's hard to afford medication and treatment...'*

As discussed above, understanding poverty requires more, however, than merely measuring and comparing income. Indeed, in commenting on the 2009 budget, ACOSS noted 'people's capacity to live on social security payments depends as much on their assets as their income. Although most age pensioners own their homes outright, it is those who rent who face the worst financial hardship.'⁸

The significance of housing and its relationship to poverty was emphasized by recent consultations undertaken by the HPLC in relation to homelessness strategy. Participants during these consultations made the following comments about the lack of housing:

- *Getting around is hard and stressful because you have to think about where you are sleeping and eating that night.*
- *You see all the other people on the trams who have a home and you give up on wanting to be a part of life. Being homeless makes it so much harder to do something than it is for other people to do that.*
- *You become resentful, because bad things happen to you when you're homeless⁹.*

Housing availability and affordability in Victoria is at a critically low level. The Real Estate Institute of Victoria recently stated 'the rental market is in a severe state of imbalance, with too few homes and increasing rents.'¹⁰ Furthermore access to public housing is increasingly difficult with almost 40,000 people currently sitting on the waiting list¹¹. During the human rights consultations one participant stated *'the waiting list means its 15-20 years before you get public housing, I'll be dead and buried by then...'*¹²

People not able to access private rental premises or public housing are required to look to private rooming houses and experience other forms of homelessness including couch surfing, sleeping rough and sleeping in cars. Australian Bureau of Statistics information indicates that in Victoria 20,500 people are homeless and 105,000 Australians are homeless every night. Of this number, 16,300 are sleeping rough or in squats, 20,000 are in crisis accommodation and refuges, 21,000 are in boarding and rooming houses and 47,000 people were staying temporarily with friends and relatives.¹³ Similar to poverty, homelessness has implications for a wide range of human rights including the right to health, adequate housing, food and safe water, the right to education and a range of civil and political rights. Being homeless affects a person's ability to maintain personal relationships and employment and to manage their health.

In addition to housing issues, it is clear that a person's capacity to live on income support payments depends on other factors such as family supports and health issues which can dramatically affect the way in which funds are spent. In relation to health issues we refer again to human rights consultations undertaken by the HPLC with people who had experienced homelessness. These consultations disclosed that 70% of

participants had a current health need and of that number, a further 70% indicated that their health had deteriorated during periods of homelessness¹⁴.

2.3. Begging and poverty

The results of a recent survey of people begging in the Melbourne CBD and inner city area provide a stark example of the way in which poverty, homelessness, ill health and substance misuse intersect. The results revealed that:

- **Income and employment:** 73% of participants were experiencing long-term¹⁵ unemployment. No participant listed any form of employment as their primary source of income. Instead, 26.92% of participants said that a disability support pension was their primary income, while the same number gave begging as their primary source of income.
- **Medical conditions:** 53.85% of participants suffered from mental illness, while 15.38% experienced physical disability and 11.54% suffered from intellectual disability.
- **Dependency:** 38.46% of respondents experienced drug dependency, and 15.38% experienced alcohol dependency; in addition, 15.38% experienced problem gambling.
- **Domestic violence:** 23.08% of participants had experienced domestic or family violence
- **Accommodation:** 50% of participants were sleeping rough at the time of the survey; the next most common forms of accommodation were men's shelters (15.38%), squats (11.54%) and rooming houses (11.54%).

Clearly, begging is a symptom of poverty. In accordance with the OHCHR 'capability approach' discussed above, the survey results demonstrate that begging involves people who have:

- 1) an issue of inadequate control over economic resources, and
- 2) issues of health, shelter, human dignity and participation in public life.

Many of the people interviewed for this project show numerous poverty indicators.

John's story

John, 35, struggles with a significant mental illness and he has a physical disability. John sleeps rough and his only form of income is money earned from begging, which he does for more than six hours a day, every day. He needs to beg in order to pay for food and other essentials. John explained he doesn't enjoy begging as it doesn't make him feel good about himself and is made worse by the physical and verbal abuse he experiences whilst begging.

Consistent with John's comments, survey respondents indicated overwhelmingly that the experience of begging was negative. Comments included that begging was 'very degrading' and that it made the respondent feel 'dead inside'.

A common theme among respondents was that begging is a "necessity", and prevents them from needing to commit other crimes. In fact, participants generally responded to the question of what they would do if they could not beg by answering that they would be forced to steal in order to get by, or, simply that they did not know what else they could do – begging was already their last resort.

When asked what it would take for participants to stop begging, the common answers were a job, pension payments, or accommodation. Other, less common, answers were food and health care.

Anna's story

Anna explained how she feels humiliated and is often harassed by members of the public and told to 'get a job.' And yet she continues to beg because her income support payment is insufficient to meet her basic needs such as food, accommodation (budget hotel stays run to \$30 per night) and to satisfy her drug dependency.

Participants were also asked about their ability to access services during the periods in which they engaged in begging. In response, 57.69% indicated that they had been denied accommodation, and 53.85% that they had been denied food. The next most common responses were that participants had been [denied] general health care (19.23%) and mental health care (15.38%).

It is important to address the drug and alcohol dependency of many people who beg. The results of the survey indicate that an overwhelming majority of respondents had experienced some form of dependency; drug dependency accounted for almost 40% of respondents; alcohol dependency accounted for approximately 15%, and problem gambling accounted for approximately 15%. There is a perception that people who beg to satisfy a dependency have nobody to blame but themselves and can simply 'give up' and turn their lives around. Such ideas do nothing to address or treat the reasons for dependency. They also fail to recognise the way in which drug and alcohol dependency often arises in a context of poverty. Indeed, research has shown 'some people do enter the homeless population because of substance use, but the more important point is that most people engage in substance use after they have become homeless and this often locks them into homelessness for sustained periods of time.'¹⁶

Sam's story

Sam is 55 years old and has been unemployed for a long time. Sam explained she found it very difficult to re-connect with Centrelink services in order to access social security benefits and her only form of income was the money she receives from begging. In relation to the issue of drug dependency Sam explained if she couldn't beg, she would have to resort to something else because 'the body doesn't allow you to give up drugs unless you are networked in to services and have somewhere to sleep and eat. It's a physical illness.' Further, she says that the main thing she needs is to get her 'health in order, so I'm not in pain, so I don't need to self-medicate... [and] a steady form of income. Getting Centrelink at this stage would only mean one day off begging. Centrelink payment need to go hand in hand with a detox program. I'm not well enough to do it on my own.'

Sam's remarks demonstrate the way in which housing and health care affects income and drug dependency.

3. The criminalisation of poverty

3.1. Criminalisation of poverty, public spaces and ‘anti-social behaviour’

Public spaces have long played an important role in urban development,¹⁷ and are increasingly viewed as important for social interaction and contributing to the general wellbeing of a community.¹⁸ Despite this, executive arms of government (including the Victorian government)¹⁹ are increasingly widening the scope of criminalised behaviours relating to the use and regulation of public space.²⁰

This regulation effectively criminalises use of public spaces, poverty and annoying (or so-called ‘anti-social’) behaviours, which have a deleterious effect on the Victorian community’s culture of tolerance, respect and equality. Such an approach is also inconsistent with the Victorian Government’s social policy action plan to address disadvantage and promote inclusion and participation.²¹

Consistent with the survey findings outlined in this report, begging is intimately linked with poverty and homelessness.²² However, the increasing criminalisation of public space offences, including begging, effectively criminalise poverty and disadvantage. Australia’s superior courts have recognised that the criminalisation of public space offences should not be used as a ‘punishment for poverty’.²³ However, according to the United Nations’ Special Rapporteur on Adequate Housing, Miloon Kothari (**Special Rapporteur**).²⁴

In every urban centre in Australia, laws now exist which either criminalize essential human activities, such as sleeping, or create ‘move on’ powers that authorize policing authorities to continuously displace people who occupy and live in public spaces ... Enforcement of public space laws criminalizes the homeless and may violate civil rights, including the right to be free from inhuman or degrading treatment or punishment.²⁵ These regulations do not provide people living in public places and who are threatened with eviction the procedural or substantive rights recognized under international laws regarding forced evictions, and therefore may also violate the right to adequate housing.²⁶

The Special Rapporteur’s comments reiterate the HPLC’s concern that begging and other offences can, and do, act to criminalise poverty and disadvantage.

One reason cited for retaining the offence of begging is the annoyance that those who beg reportedly cause to members of the general public.²⁷ However, the relevant legal question is whether the kind of ‘harm’ occasioned by individual members of society is severe or sufficient enough to attract the attention of the criminal law.²⁸ The HPLC believes that there is no justification for criminalising annoying or so-called ‘anti-social’ behaviour. The most appropriate way to remedy the situation is clearly to meet the needs of the person begging in order to eliminate their need to beg in the first place.²⁹ In a society which tolerates poverty, visible evidence of it must also be tolerated.³⁰ Criminalising begging simply leads to unjustifiable intolerance of people experiencing poverty, including the homeless.

Importantly, following the recent introduction of new police powers, there is no need for the offence of begging to be retained 'on the books'. Under section 6 of the *Summary Offences Act 1966*, police have the power to give a person a direction to leave a public place if they suspect on reasonable grounds that-

- (a) the person is breaching, or likely to breach, the peace; or
- (b) the person is endangering, or likely to endanger, the safety of any other person; or
- (c) the behaviour of the person is likely to cause injury to a person or damage to property or is otherwise a risk to public safety.

In cases where the behaviour of a person who is begging is genuinely breaching the peace or endangering a person, then police may use this power.

3.2. Begging in Victoria's criminal justice system

Begging is a criminal offence in Victoria pursuant to s 49A of the *Summary Offences Act 1966* (Vic) (**criminal begging offence**) and is also prohibited by various local laws made by local councils under the *Local Government Act 1989* (Vic).

Section 49A states:

- 49A. Begging or gathering alms
- (1) A person must not beg or gather alms.
Penalty: 12 months imprisonment.
 - (2) A person must not cause, procure or encourage a child to beg or gather alms.
Penalty: 12 months imprisonment.

Victoria Police statistics show that in 2008/09, 242 people were processed by the Victoria Police for the alleged offence of begging.³¹ 24 of these people were arrested, 1 was cautioned and 212 were issued with summons. This was an increase from 2007/2008 in which 188 people were processed, with 27 arrested and 153 issued summons. Victoria Police Corporate Statistics relating to 'Alleged Offenders processed for begging' are below:

Method of Processing	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09
Arrest	38	42	22	32	20	12	10	10	27	24
Caution	1	3	0	3	3	0	0	1	0	1
Summons	267	296	170	254	180	141	109	89	153	212
Other ³²	11	15	13	23	21	14	5	9	8	5
Total Persons Processed	317	356	205	312	224	167	124	109	188	242

The retention of a criminal offence for begging was recommended by the inquiry of the Scrutiny of Acts and Regulations Committee into the *Vagrancy Act 1966* (Vic) in 2002, but only pending the outcome of a 'comprehensive investigation into the causes of begging, and the linkages between begging, homelessness, poverty, drugs and crime'.¹ The Committee recommended that Victoria investigate the development of 'a just and comprehensive solution to the problem of begging ... that deals with the complex relationship between

begging and homelessness, drug and alcohol dependence, long term unemployment, gambling, crime, and psychiatric and physical disability.’¹

While Parliament acted on the Committee’s recommendation to retain a criminal offence for begging, the HPLC is not aware that any comprehensive investigation has been undertaken in accordance with the Committee’s recommendation.

65.38% of those surveyed by the HPLC had previously been stopped or approached by the police while begging. Over half of these participants had been issued with a summons, and almost a quarter had been arrested; 2 participants had been issued with an infringement notice, and only 1 person had no action taken.

Respondents also commonly indicated that once they were approached by the police, they had been moved on (despite police having no legislative power to do this until November 2009), or threatened or harassed by the police, while several participants had been referred to social services.

Not one of the participants whose police contact resulted in a court appearance was acquitted, although 4 participants had their case dismissed. Four participants had been levied with a fine, 3 had a gaol sentence imposed and 3 had a community based order imposed. At the time of the survey, two participants had upcoming court dates

3.3. Begging as a crime

The criminalisation of begging has traditionally been justified as a preventative measure which promotes public safety.³³

According to Tamara Walsh:³⁴

The ‘broken windows theory’ of community policing suggests that visible signs of lack of repair or street disorder (of which the persistent presence of those who beg may be one) signal to interested persons that social controls are weak, resulting in increased criminal activity,³⁵ and vagrancy offences are still justified as being ‘preventative offences’ aimed at maintaining public safety.

However, an evidence-based approach shows no proof that the coincidence of high crime and ‘vagrancy’ or begging in certain areas evidences a causal relationship.³⁶ Beggars and homeless people are no more likely than members of the general population to be perpetrators of serious crime. In fact, they are generally arrested for minor, victim-less crimes,³⁷ and to be the victims of crime themselves, given their vulnerable state.³⁸

A further justification for criminalising begging relates to the ‘annoyance’ to members of the public caused by begging. Early English cases reference the nature of a person’s request, as well as their ‘persistence or importunity’, ‘whining tone’ or use of ‘deceptive devices’ as relevant to determining whether someone’s solicitation constituted begging in the criminal sense.

This concept of vagrancy that underpins the current criminal begging offence is outdated, inappropriate and manifestly unjust and ignores the individual and systemic factors such as poverty, hunger, homelessness and illness that currently cause people to beg.

A trend against this approach is evident in recent Australian case law with some cases acknowledging the inappropriateness of criminalising an act which is symptomatic of both poverty and homelessness.

The defendant was charged with begging and was sentenced to six weeks imprisonment. On appeal, Justice White held that the fact the appellant was a source of constant nuisance to the court and the community was not sufficient justification for a penalty of this nature to be imposed. Justice White stated that it should not be a criminal offence to be poor, and that 'one has to consider that a more useful approach from the community's point of view would be to effect some treatment of underlying causes of the begging'.

Parry v Denman (Unreported, District Court, Queensland (Cairns), Appeal No 11 of 1997, 23 May 1997)

The Victorian Magistrate's Court dismissed fines for public space offences imposed on an elderly homeless man who suffered from an acquired brain injury. The Court imposed a condition that the defendant comply with a case management plan which would enable the defendant to obtain stable accommodation and aged care support. In sentencing, the Court stated that 'there is great force to the argument that the community should accept responsibility for people in the offender's position'.

R v Mills (Unreported, Magistrates' Court (Melbourne), 14 December 2001); the HPLC appeared on behalf of the defendant in this case.

Recent cases, such as those outlined above, have rejected a link between begging and crime and the portrayal of begging as a public nuisance. Australian courts have instead sought to understand the complex causes of begging and the needs of those who engage in begging.

3.4. Begging as a human rights issue

Following the introduction of the Victorian *Charter of Human Rights and Responsibilities* (**Charter**), the community can now expect certain minimum protections of their human rights. However, the continued operation of the begging criminal offence contravene at least two of these protections; the right to life, and the right to freedom of expression.

The right to life

The criminal begging offence is incompatible with the right to life, which is protected under section 9 of the Charter. The right to life provides that every human being has the inherent right to life and that this right shall be protected by law. The United Nations Human Rights Committee (**HRC**) recognises that the right to life is a 'supreme right' from which no derogation is permitted,³⁹ while the Supreme Court of Canada has remarked that it is a prerequisite to the enjoyment of all other rights.⁴⁰

The right to life should not be interpreted narrowly; the expression 'inherent right to life' cannot properly be understood in a restrictive manner and the protection of the right requires that states adopt positive

measures, including measures to reduce infant mortality, to increase life expectancy, and to eliminate malnutrition and epidemics.

The Supreme Court of Canada, the Supreme Court of India, the European Commission on Human Rights and the European Court of Human Rights all consider that the right to life is to be interpreted broadly and that it imposes positive obligations on states.

The Supreme Court of Canada's view

Freedom from state interference with bodily or psychological integrity is of little consolation to those who ... are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases, one can reasonably conclude that positive state action is what is required in order to breathe purpose and meaning into their ... rights.⁴¹

The Supreme Court of India's view

The question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter ... Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self.⁴²

More recently, the Supreme Court of India has asserted that '*the right to life ... takes within its sweep the right to food ... and a reasonable accommodation to live in*'.⁴³

As noted earlier in this report, people beg to get money for the basic necessities of life. By preventing individuals from accessing food, accommodation and other vital means of survival, the criminal offence of begging interferes with the right to life.

The right to freedom of expression

The criminal begging offence is incompatible with the right to freedom of expression, which is protected Charter, which relevantly states:

15. Freedom of expression

- ...
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether -
- (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by him or her.

- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary -
- (a) to respect the rights and reputation of other persons; or
 - (b) for the protection of national security, public order, public health or public morality.

The criminal begging offence quite clearly engages the right to freedom of expression under s 15 of the Charter, which covers the imparting and receipt of ideas and information. The objective of this right is to ensure individual self-fulfilment in a tolerant society. The right is considered important to the ability of individuals to participate in core democratic processes and is likely to enjoy a high degree of protection.⁴⁴

The right to freedom of expression has been interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others; the right is not confined to political, cultural or artistic expression, and is much broader than the implied freedom of political communication under the Australian Constitution.⁴⁵ The expression protected by the right to freedom of expression includes expression of news and information, such as commercial expression, advertising and works of art.⁴⁶

Internationally, it is well established that prohibitions on begging can violate an individual's right to freedom of expression. Begging, or solicitation, is 'a tool used by those in poverty to engage in dialogue with the rest of society about their plight',⁴⁷ and as such constitutes 'expression' under the right to freedom of expression in the *Canadian Charter of Rights and Freedoms*.⁴⁸ Accordingly, Courts have considered that blanket prohibitions on begging may constitute a breach to the right to freedom of expression contained in the *Canadian Charter*.⁴⁹

Begging as a breach of US Constitutional Rights

In the United States, several cases have found that prohibitions on begging violate the right to freedom of speech under the First Amendment to the Constitution.⁵⁰ Although the First Amendment predates the ICCPR (and refers to freedom of 'speech' rather than 'expression'), it is strongly comparable to the freedom of expression under international, and Victorian, law. In the United States, analysis of begging offences in light of the First Amendment right have considered that begging is an expressive activity,⁵¹ and as such is 'speech' and so protected under the First Amendment.⁵² In considering whether a particular prohibition on begging breaches the First Amendment, courts consider whether the prohibition is narrowly drawn to achieve a compelling state interest, or is aimed more at avoiding annoyances or intrusions to the public. They also consider whether the law or regulation is reasonable, and whether the restrictions imposed on speech are content neutral.⁵³ As this discussion indicates, the United States approach recognises that the First Amendment right is not absolute, and that prohibitions on begging may not violate this right if, for example, there is a reasonable time, place and manner restriction on the prohibition of begging.

It is not possible to interpret Victoria's criminal begging offence in a manner consistent with the Charter right to freedom of expression, as it is a criminal offence to ask for money or goods – to ask, for example 'could you give me money for the tram?', or to say 'I'm homeless and I don't have food – could you give me money to buy some'. Such statements are clearly 'expression' within the meaning of s 15(2). The fact that begging is an activity of last resort, and is a means of communicating the immediate and vital needs of those who engage in it – such as the need for housing, food, and medical treatment, as outlined in the results of the HPLC's survey – is only likely to heighten the extent to which begging is protected by the freedom of expression.

Section 15(3) qualifies the right, and specifies that the freedom of expression may be limited by lawful restrictions where they are reasonably necessary to respect the rights and reputation of other persons or for the protection of national security, public order, public health or public morality. It cannot be argued that the

criminal begging offence is targeted at the protection of public order or safety, as the offence is far more onerous than might be considered 'necessary' to protect either objective, as illustrated by the survey results outlined above, and particularly the fact that no respondents engaged in aggressive begging that might be said to threaten order or safety. Similarly, it cannot be argued that the strict and blanket ban on begging is a reasonable, proportionate or justifiable limitation on Victorians' human rights.⁵⁴

Accordingly, it is not possible to interpret the criminal begging offence consistently with human rights, and this conclusion is sufficient to establish that the criminal begging offence is a violation of the freedom of expression under the Charter.

4. A better policy response to begging

4.1. The need for a new approach

The analysis in this paper of the origins and application of the criminal begging offence under Victorian law, and its violation of the right to freedom of expression contained in the Charter, demonstrates that it is ineffective, unjust and out of step with the values of current day Victorian society to treat begging as a criminal offence.

Accordingly, in this section the HPLC considers an alternative approach to the criminalisation of begging: namely, a human rights based approach, that recognises and addresses the causes of begging in a manner that is consistent with the fundamental human rights embodied in the Charter.

4.2. Benefits of a human rights based approach

The experience in comparative jurisdictions, such as the United Kingdom, Canada and New Zealand, is that a human rights approach to the development by governments of laws, policies and programs can have significant positive impacts. Some of the benefits of using a human rights approach, which are relevant to Australia, include:⁵⁵

- (a) a 'significant, but beneficial, impact on the development of policy';
- (b) enhanced scrutiny, transparency and accountability in government;
- (c) better public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
- (d) 'new thinking', as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers 'see seemingly intractable problems in a new light';
- (e) the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and
- (f) awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.

These benefits demonstrate that legislative human rights instruments have far greater impact at the 'front end' by influencing policy development and service implementation, rather than as an avenue for litigious remedy. In other words, legislative human rights instruments provide mechanisms for a less litigious and less reactive framework that is more focused on individuals. This serves to address some of the underlying, systemic causes of human rights violations such as homelessness.

4.3. What can Victoria learn from policy responses in other jurisdictions?

This section of the submission provides a brief overview of the types of policy responses to begging that have been adopted in countries other than Australia, with a view to identifying policy responses that might be more suitable to addressing the causes and characteristics of begging conduct than the current Victorian approach.

United States of America

Of the 50 American states, four prohibit loitering for the purpose of begging,⁵⁶ two prohibit begging by those able to work⁵⁷ and six prohibit begging or supporting oneself through begging.⁵⁸ A further 13 states, which do not directly prohibit begging, grant local governments statutory authority to do so.⁵⁹ Several cities have exercised this authority, choosing to either regulate begging or to ban it completely.⁶⁰ In June 2008, the National Coalition for the Homeless stated that, of 224 US cities surveyed, 43% prohibit begging in particular public places, 45% prohibit aggressive panhandling and 21% have city-wide prohibitions on begging.⁶¹

There are various examples of how begging is addressed at a State and local level. For instance, some policy approaches have included actively referring people who beg to an appropriate shelter or to social service providers, and assisting these people with transportation and admission to those facilities. For example, the Fort Lauderdale Police Department Policy 511, released by the Fort Lauderdale police, states that their policy aim is to 'provide appropriate law enforcement services to the entire community while protecting the rights, dignity and personal property of the homeless'⁶². In order to achieve this aim, the police work in conjunction with welfare workers to address the needs of people engaging in begging on a more holistic basis than is possible by treating begging as a routine criminal offence.

Canada

In Canada, begging is regulated at a provincial level, and in some areas aggressive begging is specifically prohibited.⁶³ While such prohibitions have been found not to violate the *Canadian Charter of Rights and Freedoms*,⁶⁴ as noted above, cases under the Canadian Charter have considered that more broadly drawn prohibitions may constitute a breach of the Charter.

United Kingdom

In the UK, the *Vagrancy Act 1824* (considered in the early English cases outlined above) still criminalises begging in public places. However this Act has been amended several times, in order to introduce more holistic measures to address conduct previously considered to constitute begging. Today, if a person is found begging or gathering alms for the first time, the police must refer the person to a shelter, or other appropriate social accommodation. For following offences, the person may be issued with a caution, a fine or be committed to the 'house of correction' for up to one calendar month. The UK prohibition does not appear to have been challenged under the UK Charter. Notably, Scotland has repealed the *Vagrancy Act 1824*, and begging has therefore ceased to be illegal.

New Zealand

There is no national legislation criminalising or regulating begging in New Zealand. Local councils have the power to regulate begging (under the *Local Government Act 2002 (LGA)* and in particular under s 145 which give councils the power to make regulations to protect the public from nuisance, promote and protect public health and safety and minimise the potential for offensive behaviour in public places.

Section 55 of the LGA requires councils to ensure that 'a bylaw is the most appropriate way of addressing the perceived problem' and that it is consistent with the *Bill of Rights Act 1990 (BoRA)*. This second requirement is important for it may be argued that a specific law against begging could breach either s 14 BoRA (freedom of expression) or s 19 BoRA (freedom from discrimination).⁶⁵

Europe

There is no unified framework regulation of begging in Europe. Each country has its own particular approach. The trend seems to consist of a national law giving power to councils to issue local regulations relating to vagrancy.

For example, the approach in France adopts approaches from both ends of the spectrum.

- On the one hand, Art 23 of the French *Act on Internal Security* (2003) amended Article 215-12 of the Criminal Code, to increase the penalty for procuring a person to beg: a person who does so is punishable by 3 years imprisonment and a fine of up to 45,000 Euros. The Act defines procuring as: 'assisting someone to beg, benefiting from the involvement of a person in begging activities, receiving the proceeds of a person who regularly begs, or hiring, training or influencing a person to beg or to continue to do so'. If pressure is exerted on a child, a parent of a vulnerable person, the sentence can be of up to 5 years imprisonment and a fine of up to 75,000. Euros. Further, Art 24 of the Act inserted article 312-12-1 in the Criminal Code, which provides that aggressive begging (also defined as threatening begging) is punishable by six months imprisonment and a fine of 7,500 euros
- On the other hand, 'Simple' begging, which does not constitute a criminal offence, is regulated by local councils who usually tend to ban begging in particular places or use move-on powers. They also use holistic approaches such as making public transport freely available to the jobless and the homeless. As the case studies and the statistics outlined earlier in this submission, a fair amount of the money collected by beggars is used to finance transport.

5. Conclusion

This report demonstrates that a variety of policy responses are available to address begging. While it is common in jurisdictions outside of Victoria to criminalise begging, it is also equally common both for the criminal prohibitions to be much more narrowly drawn than the Victorian criminal begging offence, and for jurisdictions to adopt alternative, more holistic measures to address begging, particularly begging that is not aggressive or threatening.

The inappropriateness and inefficacy of a criminal begging offence is reason alone to abandon it in favour of a new, holistic policy response that takes into account the causes of begging and the characteristics of those who engage in it. The criminalisation of begging perpetuates, rather than addresses, begging behaviours and other criminal activity.

By criminalising begging, Victorian law violates fundamental rights of some of the most marginalised and disadvantaged sections of society. It disproportionately affects people whom circumstance has already denied basic necessities such as food, shelter and health care, and then adds to their disadvantage by denying them even the basic right to communicate and seek to address their plight.

The criminal begging offence has no place in the contemporary values of Victorian society, including as established under the Victorian Charter.

The fundamental elements of the human rights based approach to begging must include, as a minimum, the following elements, if it is to address the underlying causes of begging in a way that respects the human rights of those who engage in begging.

- increasing the availability of quality, secure crisis, transitional, supported and low cost accommodation;
- providing income supplements to people who are homeless or at risk of homelessness who have had social security payments reduced or cut off for reasons associated with homelessness;
- increasing the availability and outreach capabilities of quality drug, alcohol and gambling addiction support services;
- developing and implementing protocols and a comprehensive training program for law enforcement officers for the purpose of increasing their understanding of issues underlying homelessness and begging and to encourage them, where appropriate, to make referrals to welfare agencies and service providers; and
- investigating the feasibility of establishing a centralised referral centre to facilitate the provision of services to people who are homeless or at risk of homelessness.

Appendix A - About PILCH and the HPLC

PILCH

PILCH is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice; and
- ▶ foster a strong pro bono culture in Victoria; and, increase the pro bono capacity of the legal profession.

The PILCH Homeless Persons' Legal Clinic

The HPLC is a specialist legal service that provides free legal assistance and advocacy to people who are homeless or at risk of homelessness. Free legal services are offered by the HPLC on a weekly basis at 14 outreach locations that are already accessed by people experiencing homelessness for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services. Since its establishment in 2001, the HPLC has assisted almost 5,000 people at risk of, or experiencing, homelessness in Victoria. The HPLC also undertakes significant law reform, public policy, advocacy, legal education, and community development activities to promote and protect the fundamental human rights of people experiencing homelessness.

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- ²⁴ Miloon Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari – Mission to Australia* (11 May 2007) UN Doc No A/HRC/4/18/Add.2, para 47.
- ²⁵ See, for example, *Jones v. City of Los Angeles & Ors* (Unreported, United States Court of Appeals for the Ninth Circuit, 14 April 2006) in which the court held that the enforcement of a blanket ban on sleeping in public in an area with large numbers of homeless people violated the Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment.
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- ⁴⁰ *Gosselin v Quebec (Attorney General)* 2002 SCC 84, [346] (Arbour J).
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- ⁴³ *Shanti Star Builders v Narayan K Totama* (1990) 1 SCC 520. See also *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 123.
- ⁴⁴ The *Charter of Human Rights and Responsibilities*, chapter 5, p 30, Quote of the New Zealand Ministry of Justice on the *New Zealand Bill of Rights Act* (NZ).
- ⁴⁵ *Lange v Australian Broadcasting Corporation (Lange)* (1997) 189 CLR 520.
- ⁴⁶ Department of Constitutional Affairs, *A Guide to the Human Rights Act (UK) 1998* (3rd ed, October 2006), p 23.
- ⁴⁷ *Ramsden v Peterborough (City)*, [1993] 2 S.C.R. 1084 (Taylor J).
- ⁴⁸ Section 2(d) of the Canadian Charter of Rights and Freedoms states 'Everyone has the following fundamental freedoms: b) freedom of ...expression'.
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