P I L C H

Public Interest Law Clearing House

Homeless Persons' Legal Clinic

Decriminalising Disadvantage

Submission to the Inquiry into the *Vagrancy Act 1966* (Vic)

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Homeless Persons' Legal Clinic
Public Interest Law Clearing House
Level One, 550 Lonsdale Street
Melbourne VIC 3000
Tel: (03) 9225 6684 Fax: (03) 9225 6686
Email: projects.pilch@vicbar.com.au

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Philip Lynch
Homeless Persons' Legal Clinic
Public Interest Law Clearing House
Level One, 550 Lonsdale Street
Melbourne VIC 3000

Tel: (03) 9225 6684
Fax: (03) 9225 6686
Email: projects.pilch@vicbar.com.au

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Sally Weston – Solicitor, Clayton Utz and volunteer lawyer at the Clinic

1. Executive Summary and Recommendations

1.1 Introduction

> *The law, in its majestic equality, forbids the rich as well as the poor from sleeping under bridges, begging in the streets, and stealing bread.*
>
> - Anatole France, *The Red Lily* (1894).

This submission is made by the Homeless Persons' Legal Clinic. It is endorsed by the organisations and individuals listed in Part 6.

The submission examines the impact of certain provisions of the *Vagrancy Act 1966* (Vic) (**Act**) on people who are homeless or at risk of homelessness. The provisions examined pertain to begging, consorting and loitering.

The submission argues that the identified provisions of the Act need to be repealed or amended so as to account for the social context in which the Act is applied. It considers the disproportionate impact that the application of formally equal laws can have on 'unequals' and concludes that the application of the Act without regard to substantive inequality tends towards the perpetuation of marginalisation and of behaviour that is criminalised by the Act.

The submission makes recommendations in relation to appropriate legal and social responses aimed at addressing underlying causes of behaviour that is criminalised by the Act.

A summary of key findings and recommendations is set out below.

1.2 Begging

It is an offence under section 6(1)(d) of the Act to beg or gather alms.

It is an offence under sections 7(1)(a) and 7(1)(b) of the Act to solicit alms by cheating.

Begging is most often a manifestation of chronic poverty, need and disadvantage.

Begging is usually a last resort activity engaged in for the purpose of income supplementation and the satisfaction of subsistence needs such as food, accommodation, health and addictions.

The view that those who beg misrepresent their circumstances as a 'scam' is a myth.

Begging should be conceived of as a social and economic issue rather than a criminal issue. Responses to begging should address underlying causes of poverty rather than criminalise poor people.

Having regard to these findings, the Clinic makes the following recommendations:

Recommendation 1

Repeal sections 6(1)(d), 7(1)(a) and 7(1)(b) of the *Vagrancy Act 1966* (Vic).

Recommendation 2

Repeal sections 325(d) of the *Transport (Passengers and Rail Freight) Regulations 1994* (Vic)

Recommendation 3

Amend the *Local Government Act 1989* (Vic) so as to render unlawful any Local Laws that criminalise begging or soliciting alms.

Recommendation 4

In conjunction with welfare agencies and service providers, develop and implement a comprehensive public education program to increase understanding of the issues associated with homelessness and begging, to inform the public of the services available to people in need, and to encourage confidence in responding to begging requests.

Recommendation 5

In conjunction with welfare agencies and service providers, develop and implement protocols and a comprehensive training program for law enforcement officers for the purpose of sensitising them to issues underlying homelessness and begging and to encourage them, where appropriate, to make referrals to welfare agencies and service providers.

Recommendation 6

Provide additional funding to increase the availability of secure crisis, transitional, supported and low cost accommodation.

Recommendation 7

Provide additional funding to increase the availability, and outreach capabilities, of drug, alcohol and gambling addiction support services.

Recommendation 8

Provide 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.

Recommendation 9

In conjunction with welfare agencies, service providers and the Law Institute of Victoria Young Lawyers Feeding the Homeless Subcommittee, investigate the feasibility of enacting a 'Good Samaritan Act' to encourage restaurants and catering organisations to donate food to homelessness agencies.

Recommendation 10

In conjunction with welfare agencies and service providers, investigate the feasibility of establishing a centralised referral centre to facilitate the provision of services to people who are homeless or at risk of homelessness.

1.3 Consorting and Like Offences

It is an offence under sections 6(1)(a), 6(1)(b) and 6(1)(c) of the Act to occupy a place frequented by reputed thieves, to be found in the company of reputed thieves, or to habitually consort with reputed thieves.

The consorting provisions of the Act are incompatible with fundamental human rights principles including: the right to be free from guilt by association; the right to be presumed innocent until proven guilty; and the right to freedom of association.

The Clinic considers that the consorting provisions of the Act are capable of having a disproportionate and discriminatory impact on homeless people.

In the Clinic's view, enforcement of the consorting provisions of the Act has the potential to alienate and isolate a designated class of persons, with the effect of perpetuating conditions that underlie such persons being members of that class.

The Clinic submits that the consorting provisions of the Act vest law enforcement officers with excessive, arbitrary and discriminatory powers.

Having regard to these findings, the Clinic makes the following recommendations:

Recommendation 11

Repeal sections 6(1)(a), 6(1)(b) and 6(1)(c) of the *Vagrancy Act* 1966 (Vic).

Recommendation 12

In conjunction with welfare agencies and service providers, develop and implement a comprehensive training program for law enforcement officers for the purpose of educating them about the application of human rights principles including: the right to be free from guilt by association; the right to be presumed innocent until proven guilty; and the right to freedom of association.

1.4 Loitering and Like Offences

It is an offence under section 7(1)(f) of the Act for designated classes of persons to loiter with 'intent to commit an indictable offence'. For the purpose of sustaining a loitering charge under section 7(1)(f), it is not necessary for the Crown to prove that the person charged was guilty of any other act demonstrating intent to commit an indictable offence. It is sufficient, pursuant to section 7(2) of the Act, for the Crown to establish from the circumstances of the case, and from the 'known character' of the accused, that the requisite intention to commit the indictable offence existed.

It is also an offence under section 7(1)(l) of the Act for a person to be found without lawful excuse (the proof of which excuse shall be on such person) in or upon or within the precincts of a building or structure or in a garden or enclosure or in or on board a ship or other vessel in any port harbor or place within the meaning of the *Mineral Resources Development Act 1990*.

The loitering provisions of the Act are incompatible with fundamental human rights principles including: the right to be presumed innocent until proven guilty; the right to freedom of movement and residence; and the right to freedom from discrimination.

The Clinic considers that the loitering provisions of the Act are capable of having a disproportionate and discriminatory impact on homeless people, many of whom rely on public spaces and places such as warehouses and abandoned buildings for accommodation and a sense of community.

In the Clinic's view, enforcement of the loitering provisions of the Act has the potential to alienate and isolate a designated class of persons, with the effect of perpetuating conditions that underlie such persons being members of that class.

The Clinic submits that the loitering provisions of the Act vest law enforcement officers with excessive, arbitrary and discriminatory powers.

Having regard to these findings, the Clinic makes the following recommendations:

Recommendation 13

Repeal sections 7(1)(f), 7(1)(i) and 7(2) of the *Vagrancy Act 1966* (Vic).

Recommendation 14

In conjunction with welfare agencies and service providers, develop and implement a comprehensive training program for law enforcement officers for the purpose of educating them about the application of human rights principles including: the right to be presumed innocent until proven guilty; the right to freedom of movement; and the right to freedom from discrimination.

2. Introduction

Nobody has ever helped me like this before.

- Andy, an elderly homeless man with over $100,000 in fines for 'public order' offences, to the Homeless Persons' Legal Clinic team assembled on his behalf.

2.1 What is the Homeless Persons' Legal Clinic?

The Homeless Persons' Legal Clinic (**Clinic**) is a joint pilot project of the Public Interest Law Clearing House (Vic) Inc (**PILCH**) and the Council to Homeless Persons (**CHP**). It was established in October 2001 to provide free legal assistance to, and advocacy on behalf of, one of society's most disenfranchised groups – people who are homeless or at risk of homelessness. The fundamental objective of the Clinic is to reduce the degree to which homeless people are marginalised and to provide a viable and sustainable pathway out of homelessness.

The Clinic provides civil legal services at crisis accommodation centres and welfare agencies so as to encourage direct access by clients. This is important because, given the range of pressures and issues confronting many homeless people (including financial, familial, social, psychological, medical and health issues), legal problems often remain unaddressed unless services are provided at locations already frequented by homeless people.

The Clinic is staffed by pro bono lawyers from participating law firms and legal departments, including Blake Dawson Waldron, Clayton Utz, Hunt & Hunt, Mallesons Stephen Jaques, Minter Ellison and the National Australia Bank Legal Department.

2.2 Persons Assisted by the Homeless Persons' Legal Clinic

As discussed above, the Homeless Persons' Legal Clinic provides assistance to people who are homeless or at risk of homelessness.

This includes people who are without conventional accommodation (such as people who sleep rough), people who are in temporary accommodation (such as a refuge or crisis accommodation facility) and people who are in insecure or transitional accommodation (such as people who live in rooming houses).

In 1996, there were over 17,800 homeless persons in Victoria.[1]

2.3 Impact of Offences under the Act on Homeless People

The Homeless Persons' Legal Clinic collects and analyses data regarding the legal assistance required by clients.

[1] Australian Bureau of Statistics, *Census* (Canberra, 1996).

This data indicates that, from 15 October 2001 to 30 April 2002, the Clinic provided legal services to more than 165 clients. Of these, 47 (or 28 per cent) required assistance in relation to fines or summonses for minor offences. Anecdotal evidence suggests that many homeless people do not seek assistance with such matters because "there's nothing you can do about it, is there?". The number of clients who actually received fines or summonses for minor offences during this period is therefore likely to be much higher.

For people who are homeless or at risk of homelessness, the Clinic's data indicates that fines and summonses are most commonly issued for:

- travelling without a valid ticket (under the *Transport Act 1983* (Vic));
- begging (under the *Vagrancy Act 1966* (Vic) and, less frequently, section 325(d) of the *Transport (Passengers and Rail Freight) Regulations 1994* (Vic) and the City of Melbourne *Activities Local Law 1999*);
- drinking intoxicating liquor in a public place or being drunk in a public place (under the *Summary Offences Act 1966* (Vic) and, less frequently, the City of Melbourne *Activities Local Law 1999*); and
- loitering or being found without lawful excuse on premises (under the *Vagrancy Act 1966* (Vic) and, less frequently, the *Summary Offences Act 1966* (Vic)).

In light of the number of fines and summonses issued to clients for offences such as begging, loitering and being on premises without lawful excuse, it is the Clinic's view that the *Vagrancy Act 1966* (Vic) disproportionately impacts on people who are homeless or at risk of homelessness.

The reasons underlying the disproportionate impact on homeless people of offences under the Act are set out in detail in Parts 3 (Begging), 4 (Consorting and Like Offences) and 5 (Loitering and Like Offences).

2.4 Impact of Penalties under the Act on Homeless People

The Act stipulates maximum penalties for offences under the Act. Penalties range from imprisonment to fines. In addition to the penalties stipulated under the Act, the Court retains a discretion to invoke other sentencing options provided for under the *Sentencing Act 1991* (Vic). Such options include the imposition of a community based order.

In the Clinic's view, incarceration of, or the imposition of a community based order or fine against, homeless people for offences such as consorting, begging or loitering fails to address the underlying causes of such behaviours.

Incarceration may further perpetuate conditions underlying consorting, begging or loitering behaviours such as social isolation, frustration and a sense of disempowerment and disenfranchisement.

Community based orders impose numerous onerous conditions with which homeless people may be unable to comply, or with which such people find it difficult to comply. These conditions include regular reporting to a community corrections centre or officer and notifying any change of address within two business days. Breach of the conditions of a community based order is an offence punishable by imprisonment.

Fines also disproportionately impact on people who are homeless or at risk of homelessness. Many such people live at, or near, the poverty line. In such circumstances. payment of a fine may occasion severe financial, social and psychological hardship:

> It's common for homeless people to accumulate unpaid fines, but faced with the more urgent demands of finding food, support and a roof overhead, most don't see them as a priority. However, the resulting debt can trigger a downward spiral. Their substance abuse usually escalates, it raises anxiety and can be quite destabilising.[2]

Significantly, this hardship may subsist even after the causes underlying the infringing behaviour are addressed. Kylie, a client of the Clinic, incurred over $4000 worth of fines during 1999 for begging to support her heroin habit. She subsequently overcame her addiction and now has a stable partner and a six month old baby. Unfortunately, the $4000 debt imposes a significant impediment to Kylie obtaining stable accommodation. As Gavin Green, a community lawyer, stated:

> Fines have a lasting impact on homeless people. It adds to their sense of being out of control, of hopelessness. These fines linger long after homelessness issues are sorted out, making it hard to reintegrate. It becomes a lasting legacy of a period of chaos in their lives.[3]

It is the Clinic's view that many penalties rendered for infringements of the Act are effectively issued for manifestations of poverty and disadvantage. For example, a homeless person who is fined for begging has arguably been fined for a manifestation of his or her lack of resources. Such penalties tend towards the perpetuation, rather than the alleviation, of marginalisation and disadvantage.

It is the Clinic's submission that responses to behaviour such as begging, loitering and being on premises without lawful excuse, must account for inequality and context. Responses that address underlying causes, eliminate inequality and promote human dignity (such as the provision of secure and affordable accommodation, a guaranteed minimum income and counselling for drug, alcohol and gambling addictions) are far more appropriate than responses that penalise people for manifestations of poverty.

The Clinic's recommendations as to appropriate legal and social responses to offences under the Act are set out in detail in Parts 3 (Begging), 4 (Consorting and Like Offences) and 5 (Loitering and Like Offences).

[2] Ted Salerno, Ozanam House Support Services, Society of St Vincent de Paul.

[3] Gavin Green, Solicitor, YouthLaw@Werribee Legal Service.

3. Begging

> *Poverty forces people to engage in begging activities and it is morally reprehensible if society brands them criminals for attempting to survive.*
>
> - End the Vagrancy Act, *Briefing Paper No 5* (London, 1991).

3.1 Introduction

Begging behaviours are criminalised under the Act. Such conduct includes:

- Begging or gathering alms or causing or procuring a child to beg or gather alms (section 6(1)(d)); and
- Soliciting alms by cheating (sections 7(1)(a) and 7(1)(b)).

This section considers the nature, extent and underlying causes of begging behaviours generally. It then examines the legal regulation of begging or gathering alms (section 6(1)(d)), and soliciting alms by cheating (sections 7(1)(a) and 7(1)(b)), separately. The section concludes with recommended legal and social responses to begging behaviours.

3.2 The Extent and Nature of Begging

The most significant empirical research conducted in Victoria in relation to the offence of begging is detailed in *A Question of Begging: A Study of the Extent and Nature of Begging in the City of Melbourne*.[4] The study was conducted by Hanover Welfare Services to investigate the extent and nature of begging within Melbourne's central business district, as well as examine the issues that often accompany or underlie begging behaviours. The study revealed that:

- an average of 23 charges per month for begging were laid between January 1999 and December 2000 (for a total of 567 charges over a two year period);
- the majority of persons charged are convicted and fined by the Court in the amount of $50 for a first offence, $100 for a second offence and up to $300 for a third or subsequent offence;
- 43 per cent of persons who beg adopt 'passive' begging techniques (that is, sit or stand in one spot with a sign alerting passers-by that they need money) while 57 per cent adopt 'active' begging techniques (that is, follow passers-by and ask for money);
- no persons charged with begging between January 1999 and December 2000 adopted 'aggressive' begging techniques (that is, used stand over tactics or threatening speech or behaviour); and
- no persons charged with begging between January 1999 and December 2000 were charged with causing or procuring a child to beg.

[4] Michael Horn and Michelle Cooke, *A Question of Begging: A Study of the Extent and Nature of Begging in the City of Melbourne* (Hanover Welfare Services, Melbourne, June 2001).

3.3 Why do People Beg?

The research of Horn and Cooke in *A Question of Begging*, suggests that people who beg are usually the most marginalised, disadvantaged and disenfranchised within society. Horn and Cooke's study found that, of the persons observed to be engaged in begging behaviours over a four month period in 2000:

- 93 per cent were long term unemployed;
- 71 per cent were sleeping rough or in squats and a further 28 per cent were living in crisis accommodation or with family or friends;
- 43 per cent were long term homeless;
- 71 per cent suffered from substance addictions;
- 93 per cent were receiving social security payments. However, 28 per cent of persons had payments reduced or terminated as a result of Centrelink 'breaches'.

The main reasons given for engaging in begging behaviours included:

- the inadequacy of social security payments having regard to the costs of housing, clothing, food and medical treatment;
- psychiatric disabilities and disorders; and
- heroin, alcohol and gambling addictions.

Horn and Cooke found that begging behaviour is generally a last resort activity – a more acceptable means of satisfying immediate needs than resorting to other criminal activity such as theft, drug dealing or prostitution. Those engaged in begging reported it to be a harsh necessity that was humiliating, demeaning, degrading, frustrating and time consuming.

As Horn and Cooke conclude, each of these indicators support the conclusion that begging is an income supplement necessary for survival at some level, related to the need for food, accommodation or addictive behaviour. There are clear associations between begging, substance abuse, homelessness, mental health issues, unemployment and poverty.

The conclusions of Horn and Cooke are supported by Driscoll and Wood, who conducted a study on the incidence of homelessness and chronic disadvantage commissioned by the City of Melbourne in 1998.[5] Their research found that a complex relationship exists between poverty, begging, drug use, psychiatric and physical disability and homelessness. According to Driscoll and Wood, many homeless and poverty stricken individuals use begging as a last resort means through which they can supplement their income for basic survival needs.

The conclusions of Horn and Cooke and Driscoll and Wood are also supported by studies conducted in England and the United States.[6]

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[5] K Driscoll and L Wood, *A Public Life: Disadvantage and Homelessness in the Capital City* (Royal Melbourne Institute of Technology School of Social Science and Social Work, Melbourne, 1998).

[6] See also P A Kemp, 'The Characteristics of Single Homeless People in England' in R Burrows, N Pleace and D Quilgars (eds), *Homelessness and Social Policy* (Routledge, London, 1997); J Hermer, *Policing Compassion: The Governance of*

3.4 Legal Regulation of Begging or Gathering Alms

(a) Victoria

Pursuant to section 6(1)(d) of the Act, any person who begs or gathers alms, or causes or procures a child to beg or gather alms, is guilty of an offence.

The maximum penalty for begging or gathering alms is imprisonment for one year for a first offence and imprisonment for two years for a second or subsequent offence.

Begging is also an offence under various Local Laws, such as the City of Melbourne *Activities Local Law 1999*.

Section 6(1)(d) of the Act has received scant judicial consideration. Similar provisions have, however, been subject to scrutiny in other jurisdictions both in Australia and internationally. The caselaw suggests that while the Courts are not disposed to imposing harsh sentences for begging, they are neither adequately equipped nor the appropriate forum in which to address issues underlying begging behaviours.

In *Parry v Denman*[7] the defendant was charged with being a vagrant in that he loitered in a public place to beg for money. He was granted bail but failed to appear. Subsequently, the defendant was arrested and sentenced to four weeks gaol on breach of bail and six weeks cumulative for the vagrancy matter. On appeal, reviewing the appropriateness of the sentence, Judge White expressed the view that it should not be a criminal offence to be poor, to sleep on a river bank, or adopt a lifestyle that differs from that of the majority.[8] His Honour adopted the view of the English Court of Appeal that:

> the Courts are not dust bins into which difficult members of the public may be swept, but if the courts become disposers of the socially inconvenient, the road ahead will surely lead to the destruction of liberty.[9]

Judge White concluded 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…It is a sad reflection on society that the only way it seems to have of dealing with habitual drinkers is to arrest them for vagrancy.[10]

In *R v Mills*,[11] the defendant, an elderly homeless man who suffered from an acquired brain injury, received $100,000 in fines over a period of five years for offences such as drinking in a public place, travelling without a valid ticket, swearing and begging. The Melbourne Magistrates' Court dismissed all fines against the defendant and imposed a condition that he comply with a case management plan prepared by a community support services centre. In sentencing, the Court stated that:

Begging in Public Space (Oxford University Press, Oxford, 2002); D B Taylor, 'Begging for Change: A Social Ecological Study of Aggressive Panhandling and Social Control in Los Angeles' in *Abstracts International* (Los Angeles, 1999).

[7] *Parry v Denman* (Unreported, District Court, Queensland (Cairns), Appeal No 11 of 1997, 23 May 1997).

[8] See also *Moore v Moulds* (1981) 7 QLR 227.

[9] *Clark v R* [1971] Crim LR.

[10] *Parry v Denman* (Unreported, District Court, Queensland (Cairns), Appeal No 11 of 1997, 23 May 1997).

[11] *R v Mills* (Unreported, Magistrates' Court (Melbourne), 14 December 2001).

> There is great force to the argument that the community should accept responsibility for people in the offender's position.

The plan approved by the Court was designed to enable the defendant to obtain stable accommodation and aged care support. The Homeless Persons' Legal Clinic appeared on behalf of the defendant in this case.

(b) United States

In the United States, several statutes and ordinances that purported to criminalise begging have been struck down on the basis that they infract constitutional rights, including: the right to be free of cruel and unusual punishment; the right to equal protection and non-discrimination; and the right to freedom of expression.

In *Benefit v Cambridge*,[12] the Massachussets Supreme Judicial Court invalidated a state statute that prohibited 'wandering abroad and begging' or 'going about in public or private ways for the purpose of begging or to receive alms'. The Court found the prohibition to be a violation of the plaintiff's right to freedom of speech. The Court also emphasised that the prohibition suppressed 'an even broader right – *the right to engage fellow human beings with the hope of receiving aid and compassion*'.[13] To this, the Clinic would add that the criminalisation of begging behaviours may tend to dissuade fellow human beings from giving aid and compassion.

Out of court settlements of constitutional challenges in the United States have included:

- the redrafting of statutes and ordinances so as to proscribe 'aggressive panhandling' (or aggressive begging) only;
- the development and implementation of training programs for law enforcement officers for the purpose of sensitising them to the struggles and circumstances of homeless people;
- the institution of law enforcement protocols to help protect the rights of homeless people; and
- the establishment of compensation funds to assist aggrieved homeless persons.[14]

(c) Canada

In Canada, begging is regulated at a provincial level.

Proscribed begging behaviour is restricted to aggressive begging. For example, section 2(2) of the *Safe Streets Act 1999* (Ontario) prohibits soliciting in an aggressive manner.

[12] *Benefit v Cambridge*, 424 Mass 918; 679 NE 2d 184 (1997).

[13] See also *Heathcott v Las Vegas Metropolitan Police Officers*, No CV S 93-045 (D Nev, 3 March 1994); *Loper v New York City Police Department*, 999 F 2d 699 (2nd Circuit, 1993).

[14] See, for example, *Pottinger v City of Miami*, 76 F 3d 1154 (11th Circuit, 1996).

Passive and active begging constitute protected conduct under the *Canadian Charter of Rights and Freedoms*.[15]

(d) England

In England, section 3 of the *Vagrancy Act 1824* (UK) prohibits begging in public places.

Notably, police policy requires that when a person is first encountered begging by an officer, the person is provided advice as to where to find accommodation and other assistance. If the individual is encountered again, a formal caution is issued. It is only on third and subsequent occasions that a charge is laid under section 3 of the *Vagrancy Act 1824* (UK).

If a charge is laid and a person is convicted of begging, section 70(1) of the *Criminal Justice Act 1982* (UK) provides that the Court must not sentence the person to imprisonment.

(e) International law

There are no international legal instruments that regulate begging or gathering alms.

However, the Clinic submits that domestic laws which criminalise or prohibit begging infringe basic rights recognised by customary international law and international human rights instruments (including the *Universal Declaration of Human Rights*,[16] the *International Covenant on Civil and Political Rights*[17] and the *International Covenant on Economic, Social and Cultural Rights*[18]) in the following ways:

- Anti-begging laws infringe the right to freedom of expression[19] and political communication[20] in that begging is an expression of the way in which society treats its poor and disenfranchised. Begging involves speech that is fundamental to human welfare and civic responsibility. It is a statement of financial plight, alienation, homelessness, poverty and the effects of an inadequate social safety net;[21]

[15] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982, c 11. See, for example, *Epilepsy Canada v Attorney-General of Alberta* (1994) 115 DLR (4th) 501, 503-4 (Alberta CA).

[16] Universal Declaration of Human Rights, GA Res 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc A/810 (1948).

[17] International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 1980 ATS 23 (entered into force generally 23 March 1976, entered into force for Australia 13 November 1980).

[18] International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 999 UNTS 3, 1976 ATS 5 (entered into force generally 3 January 1976, entered into force for Australia 10 March 1976).

[19] See, for example, articles 18 and 19 of the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 1980 ATS 23 (entered into force generally 23 March 1976, entered into force for Australia 13 November 1980).

[20] See, for example, *Levy v Victoria* (1997) 189 CLR 579; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 550; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Australian Capital Television v Commonwealth* (177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[21] See generally Hershkoff and Cohen, 'Begging to Differ: The First Amendment and the Right to Beg' (1991) 104 *Harvard Law Review* 896.

- Anti-begging laws infringe the right to life, liberty and security of person in that such laws deny economic rights necessary to survival.[22] As discussed above, begging is a necessary form of income supplementation for many poor and homeless people, connected with such subsistence needs as adequate food, clothing and shelter; and
- Anti-begging laws infringe the right to equality before the law and freedom from discrimination[23] in that such laws fail to account for the disadvantaged position of very poor people and the need of such people to gather alms. Those who must beg are subject to substantially less favourable treatment under anti-begging laws, as it is only they who must beg for their subsistence. This less favourable treatment is exacerbated when poor people are targeted for the selective enforcement or sustained application of anti-begging laws.[24] The Clinic supports the view of the Supreme Court of Canada that 'discrimination is unacceptable in a democratic society because it epitomises the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant.'[25]

(f) Comparative analysis and application of international trends to Victoria

The international trend is towards the decriminalisation of begging or the proscription of 'aggressive begging' only. Encouragingly, there is an increasing cognisance of the need to address underlying causes of begging rather than to punish for manifestations of poverty and other societal problems. The Clinic welcomes these trends and comments below on their potential application to Victoria.

The Clinic considers that begging should be decriminalised. The Clinic does not consider that there is a need to specifically proscribe 'aggressive begging' in Victoria. In the Clinic's view, behaviour that would constitute 'aggressive begging' in Victoria is already adequately regulated by Division 1 of the *Crimes Act 1958* (Vic). Division 1 of the *Crimes Act 1958* (Vic) renders unlawful conduct including battery, assault and other crimes against the person. In the Clinic's submission, manifestations of begging behaviour that do not amount to crimes against the person should be decriminalised. The public 'nuisance' or 'affront' caused by passive or active begging does not justify the criminalisation of such conduct having regard to the above discussion regarding underlying causes of begging and the ramifications for people who beg.

The Clinic considers that anti-begging laws are contrary to fundamental human rights principles. As discussed above, anti-begging provisions in the United States have been struck down on the basis of their constitutional invalidity and their incompatibility with

[22] See, for example, article 9 of the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 1980 ATS 23 (entered into force generally 23 March 1976, entered into force for Australia 13 November 1980) and article 11 of the International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 999 UNTS 3, 1976 ATS 5 (entered into force generally 3 January 1976, entered into force for Australia 10 March 1976).

[23] See, for example, articles 14 and 26 of the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 1980 ATS 23 (entered into force generally 23 March 1976, entered into force for Australia 13 November 1980).

[24] A number of clients of the Clinic have been charged with begging up to four times in a single day. See generally *R v Dalton* [1982] Crim LR 375.

[25] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 172, 174.

international human rights law. The Clinic considers that anti-begging provisions in Victoria and Australia generally may be susceptible to similar challenge. In the Clinic's view, provisions of the *Vagrancy Act 1966* (Vic) and Local Laws that proscribe begging behaviour may be subject to legal challenge in that they amount to an infraction of the implied freedom of political communication under the *Australian Constitution*.[26] It is also arguable that anti-begging provisions are invalid in so far as they are inconsistent with customary international human rights law, international treaty law and relevant sections of the *Human Rights and Equal Opportunity Act 1986* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Equal Opportunity Act 1995* (Vic). Of course, the Clinic would prefer to, with State and Local Governments, cooperatively and collaboratively address causes underlying begging behaviours than initiate a legal challenge to anti-begging laws.

3.5 Legal Regulation of Soliciting Alms by Cheating

Pursuant to sections 7(1)(a) and 7(1)(b) of the Act, any person who solicits or collects alms under a false pretence, or who attempts to impose upon any person or charitable institution by a false representation with a view to obtaining money or other benefit, is guilty of an offence.

The maximum penalty for soliciting alms by cheating is imprisonment for two years for a first offence and imprisonment for three years for a second or subsequent offence.

The experience of the Clinic, and the research of Horn and Cooke[27] and Driscoll and Wood,[28] demonstrate that begging is most often a manifestation of chronic poverty, need and disadvantage. The view that those who beg misrepresent their circumstances as a 'scam' is a myth. In the Clinic's view, sections 7(1)(a) and 7(1)(b) of the Act perpetuate this myth. They are predicated on the fallacy that people who beg are likely to be idle, dishonest and deceptive. The law must challenge rather than entrench invidious prejudices and stereotypes about poor people.

The Clinic acknowledges the public interest in protecting individuals and institutions from misleading and deceptive conduct. The Clinic also acknowledges the importance of ensuring that the scant resources of philanthropic individuals and institutions are not misdirected. However, it is the Clinic's view that the conduct proscribed by sections 7(1)(a) and 7(1)(b) of the Act is already sufficiently regulated by:

- section 81 of the *Crimes Act 1958* (Vic) (Obtaining Property by Deception);
- section 82 of the *Crimes Act 1958* (Vic) (Obtaining Financial Advantage by Deception); and
- section 7 of the *Fundraising Appeals Act 1998* (Vic) (False Statements While Seeking Donations).

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[26] See, for example, *Levy v Victoria* (1997) 189 CLR 579; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 550; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Australian Capital Television v Commonwealth* (177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[27] Michael Horn and Michelle Cooke, *A Question of Begging: A Study of the Extent and Nature of Begging in the City of Melbourne* (Hanover Welfare Services, Melbourne, June 2001).

[28] K Driscoll and L Wood, *A Public Life: Disadvantage and Homelessness in the Capital City* (Royal Melbourne Institute of Technology School of Social Science and Social Work, Melbourne, 1998).

The Clinic considers that the identified provisions of the *Crimes Act 1958* (Vic) and the *Fundraising Appeals Act 1998* (Vic) accord the requisite level of public protection without entrenching misconceptions about begging behaviours or punishing people for manifestations of poverty or need.

3.6 Recommended Legal and Social Responses to Begging

It is the Clinic's submission that the criminalisation of begging perpetuates, rather than addresses, begging behaviours and other criminal activity.

As discussed above, people who beg tend to be among the most marginalised and isolated within society. Begging is usually a last resort activity engaged in for the purpose of income supplementation and the satisfaction of 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.

In the Clinic's view, begging should be conceived of as a social and economic issue rather than a criminal issue. We need to work to end poverty, not to criminalise poor people:

> When society silences a beggar or banishes the beggar from places which have traditionally been public places, such banishment comes close to being a denial of recognition. Each of us has a fundamental need to be recognised by our fellow citizens as a person with needs and views. The criminalisation of begging is not only an attack on the income of beggars, it is an assault on their dignity and self-respect, on their right to seek self-realisation through public interaction with their fellow citizens.[29]

Responses to begging behaviour must account for inequality and context. They must address underlying causes, eliminate inequality and promote human dignity.

Having regard to the above, the Clinic makes the following recommendations in relation to begging:

Recommendation 1

Repeal sections 6(1)(d), 7(1)(a) and 7(1)(b) of the *Vagrancy Act 1966* (Vic).

Recommendation 2

Repeal section 325(d) of the *Transport (Passengers and Rail Freight) Regulations 1994* (Vic).

Recommendation 3

Amend the *Local Government Act 1989* (Vic) so as to render unlawful any Local Laws that criminalise begging or soliciting alms.

Recommendation 4

[29] A Schafer, 'Down and Out in Winnepeg and Toronto: The Ethics of Legislating Against Panhandling', Caledon Institute of Social Policy, www.caledoninst.org/full91.htm

In conjunction with welfare agencies and service providers, develop and implement a comprehensive public education program to increase understanding of the issues associated with homelessness and begging, to inform the public of the services available to people in need, and to encourage confidence in responding to begging requests.

Recommendation 5

In conjunction with welfare agencies and service providers, develop and implement protocols and a comprehensive training program for law enforcement officers for the purpose of sensitising them to issues underlying homelessness and begging and to encourage them, where appropriate, to make referrals to welfare agencies and service providers.

Recommendation 6

Provide additional funding to increase the availability of secure crisis, transitional, supported and low cost accommodation.

Recommendation 7

Provide additional funding to increase the availability, and outreach capabilities, of drug, alcohol and gambling addiction support services.

Recommendation 8

Provide 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.

Recommendation 9

In conjunction with welfare agencies, service providers and the Law Institute of Victoria Young Lawyers Feeding the Homeless Subcommittee, investigate the feasibility of enacting a 'Good Samaritan Act' to encourage restaurants and catering organisations to donate food to homelessness agencies.

Recommendation 10

In conjunction with welfare agencies and service providers, investigate the feasibility of establishing a centralised referral centre to facilitate the provision of services to people who are homeless or at risk of homelessness.

4. Consorting and Like Offences

> *I still hear you Mama, the colour of your words saying, "Let her be. She got a right to go where she wants to go, to befriend who she wants to befriend. She got a right to be different. Just let her be." And I be Mama.*
>
> - Sonia Sanchez, 'Dear Mama' in Sonia Sanchez, *Shake Loose My Skin* (Beacon Press, Boston, 1999).

4.1 Introduction

Consorting behaviours are criminalized under the Act. Such conduct includes:

- Occupying a house or place that is frequented by reputed thieves (section 6(1)(a));
- Being found at a house or place in the company of reputed thieves (section 6(1)(b)); and
- Habitually consorting with reputed thieves (section 6(1)(c)).

It is a defence to sections 6(1)(b) and 6(1)(c) to give, to the satisfaction of the Court, a 'good account' of being in the company of, or consorting with, reputed thieves.

The penalty for a first offence is imprisonment for one year. For a second or subsequent offence the penalty is imprisonment for two years.

This section considers the incompatibility of consorting provisions under the Act with the fundamental human rights principles of: the right to be free from guilt by association; the right to be presumed innocent until proven guilty; and the right to freedom of association. The section concludes with recommended legal and social responses to consorting behaviours.

4.2 Guilt by Association

The term 'consorts' means 'associates' or 'keeps company'. The consorting provisions therefore proscribe association with certain classes of person. This proscription is founded on the notion that such persons are 'undesirable' or 'discreditable' and may tempt 'innocent persons' to criminal activity.[30] The offence of consorting is made out if a person regularly associates with or keeps the company of known thieves. It is not necessary that such association be for an unlawful or criminal purpose.

The Clinic agrees with the conclusion of the Scrutiny of Acts and Regulations Committee that 'the provisions are predicated on guilt by association, a principal at odds with contemporary standards of justice.' As Murphy J opined in *Johanson v Dixon*:

[30] *Johanson v Dixon* (1979) 143 CLR 376, 384.

> It is disturbing that a person can be sentenced to imprisonment for twelve months for associating with others even if the association is innocent of 'sinister, illicit or illegal' purpose.[31]

In particular, the Clinic submits that consorting offences which deem it to be a crime to be in the 'company of' or 'consorting with' reputed thieves have a disproportionate impact on homeless persons. As discussed above, many homeless people suffer from drug or alcohol addictions. Many have psychological illnesses or mental disorders and are regularly 'preyed upon'. Some homeless people resort to petty crime to satisfy subsistence needs. Others have spent time in prison and are seeking to reconnect and reintegrate with the community. Each of these classes of person is substantially more likely to associate with reputed thieves than persons who are not in such a position of disadvantage and marginalisation.

4.3 Presumption of Innocence

The presumption of innocence is axiomatic to any meaningful notion of justice:

> The adversarial system developed out of the deep respect for the uniqueness of the individual, the individual's sanctity and for the protection of the individual from interference from the state. From this the Presumption of Innocence was established.[32]

The right to be presumed innocent until proven guilty in accordance with law is a fundamental human right.[33] A concomitant of the presumption of innocence is that the Crown bears the onus of proving a criminal offence.[34]

As discussed above, the offence of consorting is made out if a person associates with, or occupies a place with, 'reputed thieves'. If this is established, the defendant bears the onus of giving, to the satisfaction of the Court, a good account of being in such place or company. 'Good account' requires more than a mere reason for the association, even if such association was innocent or unlawful.[35]

It is the Clinic's view that the consorting provisions of the Act offend the fundamental tenets of the presumption of innocence and the associated burden of proving guilt.

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[31] *Johanson v Dixon* (1979) 143 CLR 376, 393.

[32] D J Harvey, 'The Right to Silence and the Presumption of Innocence' (1995) *New Zealand Law Journal* 181.

[33] See, for example, article 14 of the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 1980 ATS 23 (entered into force generally 23 March 1976, entered into force for Australia 13 November 1980).

[34] *Woolmington v Director of Public Prosecutions* [1935] AC 462.

[35] *Johanson v Dixon* (1979) 143 CLR 376, 385.

4.4 Freedom of Association

The right to freedom of association is guaranteed under international human rights law and domestic law.[36]

It is the Clinic's submission that the consorting provisions under the Act seriously infringe this right.

The offences of consorting are intended to inhibit people from associating with persons of a designated class. This not only offends the right to freedom of association but may operate to ostracise and isolate persons in the designated class, thereby cutting them off from companionship, friendship and support. In the Clinic's view, such isolation and alienation is likely to exacerbate rather than address the underlying causes of a person falling within the designated class.

It is the Clinic's submission that the inconsistency of the consorting provisions under the Act with the right to freedom of association is perpetuated by the manner in which the provisions vest law enforcement officers with arbitrary and discriminatory powers.[37] As the Supreme Court of Illinois concluded in *People v Belcastro*, a person's reputation might be 'good among one class of people or in one section of the city and bad among other classes or in other localities.'[38] The power of law enforcement officers under the Act to make a determination as to a person's reputation and then, on the basis of that determination, to charge associates of that person with the criminal offence of consorting, is vague, excessive, arbitrary and potentially open to differential application or abuse.

4.5 Legal Regulation of Consorting

As outlined in the Discussion Paper of the Scrutiny of Acts and Regulations Committee, only one person was charged with an offence against the consorting provisions of the Act in the period commencing 1 July 1999 and ending 30 June 2000. It is the Clinic's submission that it is clear that these provisions are rarely used. The Clinic agrees with the Committee's submission that 'the frequency of utilisation of a provision is an important factor to consider in making any recommendations as to the continuing relevancy of a provision.'[39]

Consorting offences are currently provided for in New South Wales, Queensland, South Australia, Tasmania and Western Australia. Notably, the Victorian Act imposes the harshest penalties.

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[36] See, for example, article 22 of the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 1980 ATS 23 (entered into force generally 23 March 1976, entered into force for Australia 13 November 1980).

[37] *People v Belcastro* (1934) 190 NE 301, 304.

[38] (1934) 190 NE 301, 304.

[39] Scrutiny of Acts and Regulations Committee, 'Review of the Vagrancy Act 1966, Discussion Paper' (2002) 8.

(a) Queensland

Pursuant to section 4(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) persons who habitually consort with reputed criminals or known prostitutes or persons who have been convicted of having no visible lawful means of support; shall be deemed to be a vagrant, and shall be liable to a penalty of $100 or to imprisonment for six months.

(b) South Australia

Pursuant to section 13 of the *Summary Offences Act* (SA) a person who habitually consorts with reputed thieves, prostitutes or persons having no lawful visible means of support is guilty of an offence. The maximum penalty is $2500 or imprisonment for six months.

(c) Tasmania

Pursuant to section 6 of the *Police Offences Act 1935* (Tas), a person shall not habitually consort with reputed thieves or known prostitutes or with persons who have been convicted of having insufficient lawful means of support. A person who contravenes this section is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding six months.

(d) Western Australia

Pursuant to sections 65(7) and (9) of the *Police Act 1892* (WA), persons found to be the consorting with reputed criminals or known prostitutes or persons who have been convicted of having no visible lawful means of support are liable to a fine not exceeding $500 or imprisonment for any term not exceeding six months.

4.6 Recommended Legal and Social Responses to Consorting

It is the Clinic's view that the consorting provisions of the Act contravene generally accepted human rights standards.[40]

The Clinic is particularly concerned about the potentially disproportionate impact of the provisions on already marginalised and disadvantaged persons.

The Clinic is also concerned about the extensive, arbitrary and potentially discriminatory powers that the provisions vest in law enforcement officers.

Having regard to the above, the Clinic makes the following recommendations:

Recommendation 11

Repeal sections 6(1)(a), 6(1)(b) and 6(1)(c) of the *Vagrancy Act* 1966 (Vic).

Recommendation 12

In conjunction with welfare agencies and service providers, develop and implement a comprehensive training program for law enforcement officers for the purpose of educating them about the application of human rights principles including: the right to be free from

[40] See also *Johanson v Dixon* (1979) 143 CLR 376, 392.

guilt by association; the right to be presumed innocent until proven guilty; and the right to freedom of association.

5. Loitering and Like Offences

> *Flinders Street Station is my home, my community and my support network.*
>
> - Martin, a disabled homeless man, responding to attempts by the Department of Infrastructure to ban him from the vicinity of Flinders Street Station.

5.1 Introduction

Conduct characterised as 'loitering' is criminalised under the Act and attracts a penalty of two years imprisonment for a first offence and three years for any subsequent offence.

A person is regarded as loitering where, she or he, being a suspected person or a known or reputed thief or cheat, loiters in or about or frequents -

(i) any river canal navigable stream dock or basin or a quay wharf or warehouse near or adjoining thereto or a street highway or avenue leading thereto:

(ii) a public place; or

(iii) a place adjacent to a street or highway -

with intent to commit an indictable offence (section 7(1)(f)).

For the purpose of sustaining a loitering charge under section 7(1)(f), it is not necessary for the Crown to prove that the person charged was guilty of any other act demonstrating intent to commit an indictable offence. It is sufficient, pursuant to section 7(2) of the Act, for the Crown to establish from the circumstances of the case, and from the 'known character' of the accused, that the requisite intention to commit the indictable offence existed.

A person is also guilty of loitering if he is she is found without lawful excuse (the proof of which excuse shall be on such person) in or upon or within the precincts of a building or structure or in a garden or enclosure or in or on board a ship or other vessel in any port harbor or place within the meaning of the *Mineral Resources Development Act 1990* (section 7(1)(i)).

This section considers how the operation of these provisions undermines various legal principles and detrimentally impacts on the homeless. It provides recommendations relating to preferable measures that address the underlying causes of homelessness rather than penalising individuals for their impecunious circumstances.

5.2 Presumption of Innocence

As discussed at paragraph 4.3 of this submission, a fundamental tenet of the adversarial system is the presumption of innocence and the associated burden on the prosecution to establish guilt. It is the Clinic's submission that the loitering provisions of the Act infringe these principles.

Section 7(2) of the Act enables the Crown to establish the requisite intention to commit an indictable offence on the basis of the 'known character' of the accused. The provision targets 'suspected persons', 'reputed thieves' and 'cheats'. In the Clinic's view, these terms are vague and liable to abuse by virtue of the wide discretion available to the police to arrest a person merely on the basis of suspicion or reputation. Further, the Clinic considers that capacity to establish guilt by reference to past conduct is a transgression of the principle of the presumption of innocence and the associated principle relating to burden of proof.

The Supreme Court of Victoria has considered the elements necessary to establish 'suspicion' and has found that the suspicion may be established by earlier conduct of the defendant.[41] Further, it has been held that evidence that the defendant was a reputed thief may be provided by any person, whether the informant or not.[42] The Clinic regards this provision as capitalising on the likelihood that the accused will be known to police by virtue of the person subsisting in the 'public eye'. Further, the Clinic considers that the provision is likely to render it difficult for 'suspected persons', many of whom are from marginalised or disadvantaged backgrounds, to move on from past conduct. The association of past conduct with 'present guilt' may render it very difficult for such persons to 'start with a clean slate' or to reconnect or reintegrate with the community.

In the Clinic's view, section 7(1)(i) of the Act also offends the burden of proof principle. It does this by requiring the accused to establish a 'lawful excuse' for using public space. The Clinic is concerned that the necessity for a homeless person to live in a public space (or a place such as an abandoned building or warehouse) is unlikely to be regarded as constituting a lawful excuse.

The Legal and Constitutional Committee of the Parliament of Victoria was critical in 1985 of the high incidence of Victorian statutes at that time that reversed the burden of proof by imposing it on the accused. The Committee recognised the seriousness of departure from the principle by stating:

> The Committee is amazed at the number of statutory exceptions to such a fundamental principle of the common law.[43]

According to the Law Reform Commission of Victoria, the then Government responded favourably to the Committee's Report by accepting that the reversal of the onus of proof should only occur in exceptional circumstances.[44] It is the Clinic's submission that exceptional circumstances are not applicable in these circumstances and the reversal of proof provisions are not justified.

[41] *Forbes* v *Caracatsanoutis* [1974] VR 307.

[42] *Harrison* v *Hegarty* [1975] VR 362.

[43] *Burden of Proof in Criminal Cases*, 1985, 19-20.

[44] *Discussion Paper No. 26: Law Reform Commission of Victoria: Summary Offences Act 1966 and Vagrancy Act 1966: A Review* July 1992.

5.3 Freedom from Discrimination

In the Clinic's view, the loitering provisions of the Act offend the norm of non-discrimination recognised by international[45] and domestic law.[46] For example, article 26 of the *International Covenant on Civil and Political Rights* states:

> All persons are equal before the law, and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Clinic is concerned that sections 7(1)(f) and 7(1)(i) of the Act may infringe the guarantee against discrimination by making a distinction between individuals based on their social origin.

As discussed above, many homeless people rely on public space for basic needs such as accommodation and a sense of community. The profile of such people, many of whom suffer from addictions or mental illnesses, is such that they are more likely than the broader population to be 'suspected' by law enforcement officers. Requiring such persons to justify their occupancy of public space imposes, in practice, a condition on the use of that space that is not imposed on the broader population.

The Clinic is also concerned that this systemic discrimination is liable to be exacerbated, in some circumstances, by the targeted or selective enforcement of laws.

5.4 Freedom of Movement

The right to freedom of movement and the freedom to choose one's own residence is a fundamental human right.[47]

The Clinic considers that sections 7(1)(f) and 7(1)(l) infract these basic rights. They do this by requiring homeless people to justify or substantiate their use of public space or accommodation in certain areas, notwithstanding the reliance of homeless people on such areas and the recognised shortage of affordable, secure accommodation.

The Clinic is concerned that many people who inhabit squats, wharves, abandoned warehouses and the like would not be considered by law enforcement officers to be in such

[45] See, for example, article 26 of the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 1980 ATS 23 (entered into force generally 23 March 1976, entered into force for Australia 13 November 1980).

[46] See, for example, the *Human Rights and Equal Opportunity Act 1986* (Cth); *Disability Discrimination Act 1991* (Cth); *Equal Opportunity Act 1995* (Vic).

[47] See, for example, article 12 of the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 1980 ATS 23 (entered into force generally 23 March 1976, entered into force for Australia 13 November 1980) and article 13 of the Universal Declaration of Human Rights, GA Res 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc A/810 (1948).

places with 'lawful excuse'. For many people, however, sleeping in or occupying such places may be involuntary having regard to acute accommodation shortages.[48]

5.5 Legal Regulation of Loitering

Significantly, most Australian jurisdictions address loitering conduct pursuant to criminal or summary offence legislation rather than in subject specific vagrancy legislation. The relevant legislation is as follows:

(a) South Australia

Section 18(1) of the *Summary Offences Act 1953* (SA) permits a police officer to request a person to cease loitering or request people in a group to disperse where the police officer believes or apprehends on reasonable grounds, inter alia, that an offence has been or is about to be committed by that person, the movement of pedestrians or traffic is obstructed or about to be obstructed, or that the safety of a person in the vicinity is in danger. The maximum penalty that can be received for failing to accede to the police officer's request is $1250 or three months imprisonment.

The introduction of the requirement of an objectively reasonable basis for apprehension on the part of the police officer is preferable to the wide discretion afforded in the Victorian jurisdiction that permits an arbitrary execution.

(b) Tasmania

Pursuant to section 7 of the *Police Offences Act 1935* (Tas), a person is liable when they are a suspected person or reputed thief loitering in a public place with an intention to commit an indictable offence. This mirrors the Victorian provision. Again, intent can be established by reference to 'known character' of the accused. However, the penalty is significantly less in Victoria. A person is liable on summary conviction to imprisonment for a term not exceeding six months.

(c) Western Australia

Section 43 of the *Police Act 1892* (WA) authorises the police to apprehend a person loitering in any street, yard or other place in the absence of 'satisfactory' account and permits the detention of the apprehended person until appearance before the Court.

(d) New South Wales

Section 352 (2)(b) of the *Crimes Act 1900* (NSW) allows the police to apprehend without warrant any person lying or loitering in any highway, yard, or other place during the night whom the police officer suspects, with reasonable cause, of being about to commit any

[48] See, for example, *Johnson v City of Dallas* 61 F 3d 442 (5th Circuit, 1995); *Pottinger v City of Miami* 76 F 3d 1154 (11th Circuit, 1996).

serious indictable offence. The person then may be taken to make appearance before the Court.

(e) Northern Territory

Section 47A(1) of the *Summary Offences Act* provides that a person loitering in any public place who fails to provide satisfactory account on request from a police officer shall cease loitering on request. Contravention of this provision results in $2000 or imprisonment for six months or both.

Section 47A(2) permits a police officer to require a person loitering to cease doing so where the officer believes on reasonable grounds that an offence has been or is likely to be committed, that the movement of pedestrians or vehicles is being or is about to be obstructed by that person or any other person loitering in their vicinity, that the safety of the person or any other person in the vicinity is in danger or that the person is interfering with the reasonable enjoyment of other persons using the public place for the purposes for which it was intended. As with the South Australian provisions, the reference to the reasonableness of belief of the committing of an offence is a preferable component to the wide, arbitrary, character based discretion afforded to law enforcement officers in Victoria.

(f) Queensland

Section 4(g)(i) of the *Vagrants, Gaming and Other Offences* Act *1931* (Qld) reflects the wording of section 7(1)(i) of the Victorian Act by requiring an individual to show lawful excuse for being present in a public place. The same prohibition against loitering with an intention to commit an indictable offence is contained in section 4(h)(iii). The penalty is of less severity than under the Victorian legislation, rendering a person liable for a penalty of $100 or imprisonment for six months.

The Clinic submits that the conduct sought to be regulated by general loitering provisions is sufficiently proscribed by existing criminal laws, including the law of attempt, the law of trespass, and current indictable offence laws. Unlike general loitering provisions, these laws are not so vague or susceptible to arbitrary application as to enable them to be used against homeless people as a 'street sweeping' mechanism. In this context, the Clinic submits that loitering provisions are redundant. The Clinic is particularly concerned that retention of loitering provisions in vagrancy legislation has the effect of essentialising the homeless and of criminalising and penalising people for their disadvantage. The proverb that 'poverty is not a crime' appears to run contra to the prohibition of loitering specifically against the people most likely to be compelled to engage in such conduct.

The Clinic is also concerned that it is antithetical to fundamental human rights principles that a person can be found guilty of a loitering offence on the basis of past conduct, of reputation, of being unable to justify use of public space, or of 'intending' to commit an indictable offence.

5.6 International Trends

(a) United States

In the United States, there is an increasing willingness by the Courts to strike down ordinances that are too wide and vague in operation and which allow for arbitrary enforcement by the police. Further, instances exists where anti-loitering laws have been criticised for punishing necessary behaviour due to a person's status and have therefore been held to constitute cruel and unusual punishment.

In *Justin* v *City of Los Angeles*,[49] a homeless group successfully obtained an injunction to prevent the defendant using anti-loitering statutes on the grounds that police should not order homeless individuals to move from sidewalks unless they are obstructing or unreasonably interfering with the passage of pedestrians.

In *Papachristou* v *City of Jacksonville*,[50] a challenge to the constitutionality of vagrancy ordinances was successfully mounted on the basis of those ordinances being void for vagueness and because they encouraged arbitrary and erratic arrests.

The decision of *Pottinger* v *City of Miami*,[51] relates to the challenge by a homeless group to the defendant's policy of arresting homeless people for conduct such as sleeping, eating and congregating in public. The Court found that the plaintiff's homelessness was involuntary and that the criminalisation of essential acts performed in public when there was no alternative violated the plaintiff's right to travel and due process under the Eighth Amendment, and his right to be free of cruel and unusual punishment under the Fourth Amendment. The Court ordered the city to establish 'safe zones' where homeless people could pursue harmless daily activities without fear of arrest.

Finally, *Streetwatch* v *National R.R. Passenger Corp*,[52] is an example of a challenge against the policy of Amtrak police of arresting or ejecting persons who appeared to be homeless or loitering in the public areas of Penn Station. This policy was effected even in the absence of evidence that such persons had committed or were committing crimes. The District Court issued a preliminary injunction prohibiting Amtrak police from continuing to engage in the practice, finding that the practice implicated the Due Process Clause of the United States Constitution. The Court held that Amtrak's Rules of Conduct were void for vagueness and that their enforcement impinged on the plaintiff's right to freedom of movement and due process.

(b) Canada

The conduct of loitering is regulated by section 175(1)(c) of the Federal Criminal Code. A person will be found guilty of an offence punishable on summary conviction where they are found to loiter in a public place and in any way obstruct persons who are in that place. For the purposes of this provision, section 175(2) provides that in the absence of other evidence, or by way of corroboration of other evidence, a summary conviction court may

[49] *Justin* v *City of Los Angeles* No. CV-00-12352 LGB, 2000 US Dist LEXIS 17881 (CD Cal 5 December 2000).

[50] *Papachristou* v *City of Jacksonville* 405 US 156 (1972).

[51] *Pottinger* v *City of Miami* (1996) 76 F.3d 1154 (11th Cir. 1996).

[52] *Streetwatch* v *National R.R. Passenger Corp* 875 F. Supp. 1055 (S.D.N.Y. 1995).

infer from the evidence of a police officer relating to the conduct of a person or persons that the obstruction was caused.

5.7 Recommended Legal and Social Responses to Loitering

The sections under the Act as they stand clearly criminalise the homeless. It is an inherently flawed premise to punish people who survive in the public space by necessity rather than choice. Punitive responses to homelessness only serve to entrench feelings of hopelessness and disenfranchisement. The Clinic submits that a more socially responsible response is to address underlying causes of homelessness. Hiding people rather than helping people marginalises the homeless and exacerbates negative public sentiment toward those most in need of support.

Having regard to the above, the Clinic makes the following recommendations:

Recommendation 13

Repeal sections 7(1)(f), 7(1)(i) and 7(2) of the *Vagrancy Act 1966* (Vic).

Recommendation 14

In conjunction with welfare agencies and service providers, develop and implement a comprehensive training program for law enforcement officers for the purpose of educating them about the application of human rights principles including: the right to be presumed innocent until proven guilty; the right to freedom of movement; and the right to freedom from discrimination.

6. Endorsements

This submission is endorsed and adopted by the following organisations:

Anglicare – Anglicare provides an extensive range of support services throughout metropolitan Melbourne and Gippsland for children, young people, families and the broader community.

Council to Homeless Persons – CHP is a non-government peak body for approximately 250 agencies which facilitates services to homeless people, educational institutions, and individuals concerned about homelessness. CHP also provides advocacy, policy and program development for and on behalf of homeless people.

Federation of Community Legal Centres – The Federation of Community Legal Centres is the peak body of Victoria's community legal centres. The Federation is committed to the principles of human rights, social justice and equity.

Hanover Welfare Services – Hanover Welfare Services aims to empower homeless people to enable them to take greater control of their lives and to stimulate and encourage change in Australian society to benefit them. This is achieved by delivering services, conducting research, and by advocacy.

Melbourne Citymission Western – Melbourne Citymission works alongside people who are marginalised, at risk, disadvantaged, frail or denied access to other services in order to empower and enhance their well-being and maximise their human potential. The Western Region office offers a range of programs for adults and families who are homeless, women exiting prison, early intervention & employment, education and training programs for young people and a range of disability programs.

North Melbourne Legal Service – North Melbourne Legal Service is an independent, not for profit, community legal centre. NMLS provides essential legal services and assistance, including advice and representation, to the community of North Melbourne, Parkville, West Melbourne and the CBD. These legal services are provided free of charge and are specifically targeted at persons from needy, marginalised or disadvantaged backgrounds.

Salvation Army Adult Services – Salvation Army Adult Services offer a range of support services to marginalised and disadvantaged people. This includes Flagstaff Crisis Accommodation, a crisis accommodation facility and support service for adult males who are homeless or in crisis situations.

Society of St Vincent de Paul Community and Support Services (Ozanam House) – The Society of St Vincent de Paul Community and Support Services offer a range of services to people from disadvantaged backgrounds. This includes Ozanam House, a crisis accommodation facility and support service for adult males who are homeless or severely disadvantaged.

The Big Issue – The Big Issue is an independent, current affairs magazine sold on the streets of Melbourne, Sydney, Brisbane, Geelong and Bendigo by vendors who are homeless or long-term unemployed. The Big Issue exists to help its vendors earn their own income.

Urban Seed – Urban Seed is a non-profit organisation which engages in and raises public awareness about issues including homelessness. It provides support and services to

homeless people who live in the city. These services include Credo Café, which provides free meals to Melbourne's homeless, particularly those with mental health or substance abuse issues.

Victorian Council for Civil Liberties (Liberty Victoria) – Liberty Victoria strives to advance and take the necessary steps to defend and extend civil liberties in Victoria and the rights and freedoms recognised by national and international law.

Victorian Council for Social Services – VCOSS is a non-government peak body that works towards the reduction and eventual elimination of social and economic disadvantage in Victoria. It promotes cooperation between organisations and individuals involved in the field of social and community service in Victoria.

Youthlaw – Youthlaw is Victoria's statewide young people's community legal centre. Youthlaw is based at Frontyard Youth Services in the CBD and provides a free legal advice and casework service for young people. Many of Youthlaw's clients are homeless and receive infringement notices for begging on public transport.

The submission is endorsed and adopted by the following individuals:

Alexandra Richards QC

Brian Walters SC

Chris Maxwell QC

Emma Hunt, Co-Executive Director, Public Interest Law Clearing House

Jack Rush QC

John Manetta, Barrister

Julian Burnside QC

Liz Curran, Lecturer in Law and Legal Studies, La Trobe University

Peter Vickery QC

Sarah Nicholson, Director, Youthlaw

The Reverend Bevil Lunson, Lazarus Centre

The Reverend Ray Cleary

The Reverend Tim Costello, Collins Street Baptist Church