

DEFENDING BEGGING OFFENDERS

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I INTRODUCTION

The act of begging constitutes a criminal offence in most Australian States and Territories including Victoria, Queensland, South Australia, Western Australia, Tasmania and the Northern Territory with penalties ranging from a fine of \$50 to two years' imprisonment.¹ In each of these jurisdictions, begging, 'beg alms' or loitering with intent to beg is framed as a strict liability offence, that is, mens rea need not be proved in order to establish the offence. This substantially limits the bases upon which a charge of begging may be defended, and as a result, most of those charged with begging plead guilty and incur a penalty.² The only criminal law defence that may be available to those charged with begging is the defence of necessity (and its derivatives), and as will be shown, the availability even of this defence is a moot point. Thus, in seeking to defend begging offenders, recourse must be had to arguments that go to the validity of the laws that prohibit begging. This paper will argue, to this end, that the criminalisation of begging may be both unconstitutional and contrary to international human rights law.

The offence of begging originated from vagrancy laws inherited by Australia from the UK according to the model provided in the *Vagrancy Act 1824* (UK). One might expect that such provisions remain relatively under-utilised in modern times; yet statistics demonstrate that this is often not the case.³ In 2001-2002 147 people appeared in Queensland lower courts charged with begging alms⁴ and 241 begging charges were recorded in Victoria.⁵

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¹ *Vagrancy Act 1966* (Vic) s 6(1)(d); *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 4(1)(k); *Summary Offences Act 1953* (SA) s 12(1)(a); *Police Act 1892* (WA) s 65(3); *Police Offences Act 1935* (Tas) s 8(1)(a); *Summary Offences Act 1923* (NT) s 56(1)(c).

² T Walsh, 'Waltzing Matilda One Hundred Years Later: Interactions Between Homeless Persons and the Criminal Justice System in Queensland' (2003) 25 *Sydney Law Review* 75, 79, 90; see also *Moore v Moulds* (1981) 7 QL 227, 229.

³ Queensland Police have claimed that these sections are no longer applied, however this is factually incorrect. For discussion, see Walsh, *ibid* 76.

⁴ Statistics obtained from the Office of Economic and Statistical Research, Queensland.

⁵ Statistics obtained from the Statistical Services Division of the Victorian Police Department.

It has been consistently demonstrated that begging is intimately linked with poverty and homelessness.⁶ For the majority of those who beg, it is something done as a last resort to supplement their inadequate income, allowing them to avoid engaging in less acceptable alternatives such as theft, prostitution and drug dealing.⁷ Most people who beg report that this activity causes them to feel humiliated and demeaned,⁸ indeed many state that begging puts them at risk of violence from members of the public, police and/or other people who engage in begging as a means of survival.⁹

Although begging is often distinguished from other types of informal street level economic activity including busking, pavement art, windscreen cleaning and unlicensed street trading, the motivation for engaging in these activities is often the same.¹⁰ Many of those who beg choose to offer some kind of service to their patrons to instil an element of reciprocity into the exchange, to avoid the stigma attached to being considered 'a beggar', or to avoid prosecution by disguising their begging as a lawful activity.¹¹ A distinction is also commonly made between begging and more 'accepted' forms of solicitation such as club fundraisers and charity drives, even though the aim of all such activities is identical: to request money for some public interest purpose where no tangible reward is provided to the donor.¹²

Unfortunately, it seems almost certain that the offence of begging will remain on the statute books of many Australian States and Territories. Indeed, it was resurrected in New South Wales (where begging ceased to be an offence in the 1970s) during the Sydney Olympic Games which tends to suggest that, if anything, begging offences may become more prolific in this country.¹³ Those governments in Australia that have undertaken to reform summary offences law have demonstrated a willingness to repeal

⁶ Scrutiny of Acts and Regulations Committee of Victoria, *Review of the Vagrancy Act 1966: Final Report* (Government Printer for the State of Victoria, 2002) 16; P Lynch, 'Begging for Change: Homelessness and the Law' (2002) 26 *Melbourne University Law Review* 690, 694; M Horn and M Cooke, *A Question of Begging: A Study of the Extent and Nature of Begging in the City of Melbourne* (Hanover Welfare Services, 2001) 6, 7; H Dean, 'Introduction' in H Dean (ed) *Begging Questions: Street Level Economic Activity and Social Policy Failure* (Policy Press, 1999) 1; K Driscoll and L Wood, *A Public Life: Disadvantage and Homelessness in the Capital City* (RMIT Centre for Applied Social Research, 1998) 4-5, 7; A Schafer, *Down and Out in Winnipeg and Toronto: The Ethics of Legislating Against Panhandling* (Caledon Institute of Social Policy, 1998) 3, 12; see also *Federated Anti-Poverty Groups of British Columbia v Vancouver (City)* 2002 BCSC 105, [67] where this was the finding of the court.

⁷ Lynch, *ibid* 4; Horn and Cooke, *ibid* 7; J Hagan and B McCarthy, *Mean Streets: Youth Crime and Homelessness* (Cambridge University Press, 1998) 53.

⁸ Lynch, *ibid* 4; Horn and Cooke, *ibid* 7; H Dean and K Gale, 'Begging and the Contradictions of Citizenship' in H Dean (ed) *Begging Questions: Street Level Economic Activity and Social Policy Failure* (Policy Press, 1999) 19.

⁹ Horn and Cooke, *ibid* 7; H Dean and M Melrose 'Easy Pickings or Hard Profession? Begging as an Economic Activity' in H Dean (ed) *Begging Questions: Street Level Economic Activity and Social Policy Failure* (Policy Press, 1999) 86, 88; G Fooks and C Pantazis 'Criminalisation of Homelessness, Begging and Street Living' in P Kennett and A Marsh (eds) *Homelessness: Exploring New Terrain* (Policy Press, 1999).

¹⁰ Horn and Cooke, *above* n 6, 2; Dean, *above* n 6, 5-6; Dean and Gale, *above* n 8, 14.

¹¹ A Erskine and I McIntosh 'Why Begging Offends: Historical Perspectives and Continuities' in H Dean (ed) *Begging Questions: Street Level Economic Activity and Social Policy Failure* (Policy Press, 1999) 40; J Wardhaugh and J Jones, 'Begging in Time and Space: "Shadow Work" and the Rural Context' in H Dean (ed) *Begging Questions: Street Level Economic Activity and Social Policy Failure* (Policy Press, 1999) 103-104; Dean, *above* n 6, 5-6.

¹² Dean, *ibid* 6.

¹³ See *Sydney Harbour Foreshore Regulation 1999* (NSW) s 4.

other antiquated vagrancy offence provisions, but a reluctance to decriminalise begging. For example, in Victoria, the Scrutiny of Acts and Regulations Committee recently concluded that it was unable to recommend the decriminalisation of begging due to a ‘lack of research’,¹⁴ despite initial suggestions that it would support such an initiative.¹⁵ And in Queensland, former Police Minister Tony McGrady indicated that when the *Vagrants, Gaming and Other Offences Act 1931* (Qld) is repealed and replaced with the *Summary Offences Act* (still in the process of being drafted), the offence of begging alms will be transferred from the old to the new legislation.¹⁶ This trend is consistent with that in the US where in the past few years there has been a rise in the number of cities prohibiting begging and an increase in the number of ‘sweeps’ being conducted to remove homeless people from certain areas.¹⁷

By way of introduction, Part II of this paper will present and evaluate the arguments in favour of the retention of the offence of begging. Part III will discuss whether or not the necessity defence may be available to those charged with begging. Part IV will outline some potential bases upon which it may be argued that the criminalisation of begging is unconstitutional, and Part V will demonstrate the ways in which the offence of begging contravenes international human rights law.

II JUSTIFICATIONS FOR THE OFFENCE OF BEGGING

A Public Safety

Traditionally, one of the main justifications for the creation of vagrancy offences such as begging was crime prevention. It was believed that those who engaged in begging were guilty of ‘idleness’ and moral corruption, and that they would inevitably engage in more serious forms of criminal conduct.¹⁸ Such antiquated notions in relation to ‘vagrants’ persist in Australia today. 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,¹⁹ and vagrancy offences are still justified as being ‘preventative offences’ aimed at maintaining public safety.²⁰

However, an evidence-based approach to these claims suggests they are false. It cannot be proved in accordance with the ‘broken windows theory’ that the coincidence of high crime and ‘vagrancy’ in certain areas evidences a causal relationship.²¹ Homeless people are no more likely than members of the general population to be perpetrators of

¹⁴ Scrutiny of Acts and Regulations Committee of Victoria, above n 6, 16.

¹⁵ See Scrutiny of Acts and Regulations Committee of Victoria, *Review of the Vagrancy Act 1966: Discussion Paper* (2002) 15.

¹⁶ The Hon Mr Tony McGrady, Personal correspondence, 21/10/2002.

¹⁷ National Law Centre on Homelessness and Poverty, USA *Punishing Poverty: The Criminalisation of Homelessness, Litigation and Recommendations for Solutions* (2003) vi; Schafer, above n 6, 2; M Foscarinis, ‘Downward spiral: Homelessness and its criminalisation’ (1996) 14 *Yale Law and Policy Review* 1, 2.

¹⁸ Walsh, above n 2, 76-77, 82-83.

¹⁹ For a good summary of this theory in relation to the presence of homeless people on city streets, see J Waldron, ‘Homelessness and Community’ (2000) 50 *University of Toronto Law Journal* 371, 386. See also Schafer, above n 6, 5.

²⁰ Walsh, above n 2, 82; Law Reform Commission of Western Australia, *Report on Police Act Offences* (1992) para 4.1.

²¹ Waldron, above n 19, 386-7; Foscarinis, above n 17, 57.

serious crime, rather they are generally arrested for minor, victim-less crimes.²² The results of research conducted by Hanover Welfare Services in Melbourne suggest that aggressive begging is extremely rare; beggars tend to engage in passive behaviour while begging, sitting in one place perhaps with a sign or asking for money from passers-by and being easily put off when refused.²³ Thus, public safety fears are more the product of the ill-informed culture of fear within the public consciousness, and the stereotyping of poor and homeless people as troublesome and dangerous, than reality itself.²⁴

B Public Annoyance

Another frequently cited reason for retaining the offence of begging is the annoyance that those who beg reportedly cause to members of the general public.²⁵ Robert C Ellickson, for example, claims that those who beg constitute a ‘chronic street nuisance’ and that while each individual who begs contributes only a minor amount of annoyance to passers-by, the cumulative number of times each individual is viewed by a member of society amounts to severe aggravation.²⁶

This is a quaint theory, 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.²⁷ Jeremy Waldron proposes that the presence of those who beg may bring about two possible responses from individual members of the public. One possible response is something along the lines of: ‘This is awful. I am glad I have found out about this.’²⁸ As Waldron notes, this is not a harm but rather an ethical confrontation, which may be considered a positive good.²⁹ An alternative response to the sight of a person begging might be: ‘It is outrageous that people like this should sit idly around,’ but such a thought process is certainly not a ‘harm’ worthy of a criminal offence to prevent it. 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.³⁰ Further, the value of aesthetics must be given appropriate weight; in a society which tolerates poverty, visible evidence of it must be tolerated also.³¹

Indeed, this was the opinion of the District Court of Cairns in the case of *Parry v Denman*.³² In that case, the appellant had approached some people and asked for money

²² Foscarinis, *ibid* 57; DE Baker, ‘Anti-Homeless Legislation: Unconstitutional Efforts to Punish the Homeless’ (1990/91) 45 *University of Miami Law Review* 417.

²³ A discussion of the results of this survey of 23 people observed begging may be found at Horn and Cooke, *above* n 6. See also Shafer, *above* n 6, 4 and *Federated Anti-Poverty Groups of British Columbia v Vancouver (City)* *above* n 6, [50].

²⁴ Walsh, *above* n 2, 83; R Hogg and D Brown, *Rethinking Law and Order* (1998) 4,8,29,39; R White, ‘Street Life: Police Practices and Youth Behaviour’ in R White and C Alder, *The Police and Young People in Australia* (1994) 114,117.

²⁵ RC Ellickson, ‘Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public Space Zoning’ (1996) *Yale Law Journal* 1165.

²⁶ *Ibid* 1175-1178.

²⁷ Waldron, *above* n 19, 379-80.

²⁸ *Ibid* 379-80

²⁹ *Ibid* 380.

³⁰ *Ibid* 383-4.

³¹ *Ibid* 386-7; Foscarinis, *above* n 17, 55-56; DM Smith ‘A Theoretical and Legal Challenge to Homeless Criminalisation as Public Policy’ (1994) 12 *Yale Law and Policy Review* 487, 496-7

³² Unreported, District Court, Queensland, Cairns, Appeal No. 11 of 1997, 23 May 1997 in A West ‘Sentencing for Vagrancy’ (2000) 21 *Queensland Lawyer* 12.

and cigarettes, something which he apparently did frequently. He was charged with begging and was sentenced to six weeks' imprisonment for the offence. On appeal, Judge White stated that the fact that the appellant was a source of constant nuisance to the court and the community was not reason enough for a penalty of this nature to be imposed. Judge White asserted that the criminal law required more than mere annoyance to impose this kind of penalty, and that since the appellant had not engaged in any conduct which society needed to protect itself against, he should not be imprisoned. Similarly in *CCB v Florida*³³ the Florida Court of Appeal held that mere annoyance was not a compelling enough reason for the retention of an anti-begging ordinance in that State.³⁴

Indeed, the level of annoyance caused by a person begging to a member of the public is not even sufficient to ground a civil action. To support a claim under the law of public nuisance, the damage caused must be 'of a substantial character, not fleeting or evanescent'.³⁵ The level of annoyance occasioned by a person begging might be compared to that caused by being stopped in the street and asked for the time or directions. It would scarce be contemplated that this should be outlawed. Further, many examples may come to mind of other forms of legal behaviour that create more of a nuisance than that caused by the sight of people passively begging in the street, such as telemarketers who adversely affect individuals' private enjoyment of their homes by repeatedly telephoning at inconvenient times during the day and night.³⁶

Admittedly, the degree of annoyance caused by a person begging may be increased if the person begging is 'aggressive' in their attempts at solicitation. However, such behaviour may be regulated under other criminal law provisions, such as offensive behaviour or assault, or alternatively by a more targeted provision which prohibits only certain forms of begging behaviour.³⁷ The criminalisation of all acts of begging cannot be justified on this basis.

C Fraud

The regular claim made in certain news publications is that those who beg may not be what they seem – that they may in fact not be destitute but rather part of an organised begging ring, fraudulently cashing-in on public sympathy.³⁸ Such a claim is both counterintuitive and factually incorrect. Begging tends to increase in times of social and economic downturn, which suggests that it is not a lifestyle choice, and the fact that the

³³ 458 Do. 2d 47 (Fla Dist Ct App 1984).

³⁴ On the other hand, in Queensland, causing mere nuisance is a criminal offence under two separate provisions, s 230 of the *Criminal Code 1899* (Qld) and the new s 7AA of the *Vagrants, Gaming and Other Offences Act 1931* (Qld). I have argued elsewhere that Queensland's criminal law seems to be unreasonably overloaded with offences of this nature. See T Walsh, 'Who is the Public in Public Space' (2004) 29 *Alternative Law Journal* 81.

³⁵ *Benjamin v Storr* (1874) LR 9 CP 400, 407 (Brett J); *Walsh v Ervin* [1952] VLR 361, 371 (Sholl J); see also G Kodilinye, 'Public Nuisance and Particular Damage in the Modern Law' (1986) 6 *Legal Studies* 182.

³⁶ Schafer, above n 6, 9.

³⁷ See Schafer (ibid 14) for a suggestion on how such a provision might be framed. Of course, a more targeted provision would not solve the problem of selective enforcement; for a discussion on such issues, see Walsh, above n 2, and Walsh, above n 34.

³⁸ See, for example, B Martin, 'Beggars Can be Choosers' (1996) 116(6044) *The Bulletin* 30.

vast majority of the population choose not to beg demonstrates that there is probably little truth to the claim that it is an easy way to make a lot of money.³⁹

Various studies have shown that those who beg are most often destitute, and that fraudulent begging is extremely rare. Hanover Welfare Services' survey of 23 people observed begging in Melbourne found that 93% were long-term unemployed, 93% were receiving social security benefits, 71% were sleeping rough or in squats and a further 28% were living in crisis accommodation or temporarily with friends or family.⁴⁰ The researchers concluded that the majority of those surveyed were poor and homeless and engaged in begging to meet their immediate needs.⁴¹ Further, those surveyed reported low success rates and earned only a small amount of income; four hours of begging typically yielded up to 16 donations totalling between \$3 and \$32.⁴² In a similar study conducted in the UK and Scotland, the vast majority of 'beggars' surveyed said they did not beg out of choice but rather that begging was used as a last resort to supplement their inadequate income.⁴³ None claimed to have worked as part of an organised begging ring and the majority of the sample reported begging to be competitive, risky, ineffectual and degrading.⁴⁴ A UK survey of homeless people found that begging was done as a last resort, and that it was considered a demeaning, precarious and largely unremunerative way of obtaining money: an average of only £10-20 per week was earned.⁴⁵

Since it is widely reported that begging is considered shameful, degrading and unrewarding, it is surprising that the claim is so often made that those who beg may be acting fraudulently. However, even if there were any truth to this claim, it provides no support for the continued existence of the offence of begging, as fraudulent behaviour can be prosecuted under separate offences.⁴⁶

It may therefore be concluded that the justifications often cited for the criminalisation of begging are inadequate. The offence of begging is not necessary to ensure public safety, and it should not be defended solely on the grounds of abating the vague sense of annoyance which it may cause to certain members of the public. Since begging of an aggressive or fraudulent nature may be prosecuted under other offences better targeted at that kind of behaviour, there seems to be no logical reason for retaining the offence of begging.

III THE DEFENCE OF NECESSITY

As noted above, begging offences in Australia are strict liability offences, that is, they do not require mens rea to be established for the offence to be made out. This

³⁹ Erskine and McIntosh, above n 11, 37-39.

⁴⁰ Horn and Cooke, above n 6, 14-16.

⁴¹ Ibid 15, 20; M Horn 'Understanding Begging in our Public Places' (2002) 15(1) *Parity* 18.

⁴² Horn and Cooke, *ibid* 24.

⁴³ Dean and Melrose, above n 9, 89.

⁴⁴ Ibid 86, 88, 90.

⁴⁵ 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, 1997) 78-79.

⁴⁶ For example, *Vagrancy Act 1966* (Vic) s 7(1)(a),(b); *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 4(1)(n); *Criminal Law Consolidation Act 1935* (SA) ss 133, 270 (which allow for the continuation of the common law offence of conspiracy to defraud in SA); *Police Act 1892* (WA) s 66(2); *Criminal Code Act 1924* (Tas) s 250; *Summary Offences Act 1923* (NT) s 60A.

dramatically limits the range of defences that are available to those charged under these offences. The only criminal law defence that may apply is the defence of necessity (and its derivatives).⁴⁷

There are few reported decisions on the common law defence of necessity in relation to strict liability offences, however one such case is *Re Appeal of White*.⁴⁸ In that case, a father was charged with speeding while rushing his asthmatic son to the hospital. The District Court Judge held that the necessity defence would be open to a defendant charged with a strict liability offence, provided the criminal act was done to avoid certain circumstances which would have inflicted irreparable harm upon the accused or others, the accused believed on reasonable grounds that he/she was in a situation of immanent peril, and the acts done to avoid that peril were proportionate to the peril avoided.

A liberal reading of this case would seem to create the possibility of a defence for a homeless or destitute person who has engaged in begging for reasons of survival. While the required risk of 'irreparable harm' may be lacking, inability to provide oneself with the necessities of life may indeed be considered perilous, and begging would on its face seem to be proportionate to avoiding this peril, particularly where it can be shown that efforts have been made to seek assistance from other sources.⁴⁹

However, the decision in *Southwark London Borough Council v Williams and Anderson*⁵⁰ seems to suggest otherwise. In that case a group of homeless defendants were charged with trespass having squatted in some empty houses owned by the council. They raised the defence of necessity, in relation to which Lord Denning MR asserted:

if hunger were once allowed to be an excuse for stealing, it would open a way through which all kinds of disorder and lawlessness would pass... If homelessness were once admitted as a defence to trespass, no one's house could be safe... The courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless and trust that their distress will be relieved by the charitable and the good.⁵¹

Although this dictum may disqualify poor and homeless people from raising the necessity defence in relation to certain behaviours directly associated with poverty, the case of a person charged with begging may be distinguishable. It could be argued that *Southwark* did not establish a general rule in relation to the availability of the necessity defence to the poor and homeless, but rather the case turned on the issue of

⁴⁷ The defence of insanity or mental illness may also be available to some defendants who are able to demonstrate the requisite degree of mental impairment. See *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 5, Part 4; *Criminal Code 1899* (Qld) s 27, *Mental Health Act 2000* (Qld) Chapter 3, Part 2; *Criminal Law Consolidation Act 1935* (SA) Part 8A; *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) Part 4; *Criminal Code Act 1924* (Tas) s 16, *Sentencing Act 1997* (Tas) Part 10 (also *Criminal Justice (Mental Impairment) Act 1999* (Tas)); *Criminal Code Act* (NT) Part IIA.

⁴⁸ (1987) 9 NSWLR 427.

⁴⁹ See also A K Fasanelli, 'In Re Eichorn: The Long Awaited Implementation of the Necessity Defence in a Case of the Criminalization of Homelessness' (2000) 50 *American University Law Review* 323; Baker, above n 22, 433, 450-452; *Johnson v City of Dallas* 860 F Supp 344 (1994).

⁵⁰ [1971] 1 Ch 734.

⁵¹ *Ibid* 744.

proportionality. Therefore, it may be open to a court to conclude that begging is more proportionate than trespass to the peril of poverty. Also, Lord Denning assumes that the poor should be able to rely on obtaining relief from the community – this will not be possible if they are not permitted to ask for such relief which would suggest that begging should not be criminalised.

Despite the *Southwark* decision, the defence of necessity may well be open to those who engage in begging as a last resort to meet their immediate needs. An Australian court would not be bound by the decision in *Southwark*, and it may be distinguished on the ground that the case turned on the issue of proportionality

In Queensland, the equivalent of the necessity defence is found in s 25 of the *Criminal Code 1899* (Qld) which states that a person is not criminally responsible for an act done under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise. Case law provides little guidance on the type of emergency required for the defence to be established, except to add that the emergency may be factual or the result of an honest mistaken belief of fact,⁵² that there must be a sense of danger rather than ‘mere apprehension’, and that the onus is on the prosecution to displace the defence.⁵³

It may be possible to argue that having no money with which to obtain the necessities of life may be enough of an emergency to lead a person to beg, particularly if they reasonably and honestly believe that they have no other reasonable means of obtaining assistance. While the wording of the section and the few cases on the subject tend to suggest that the interpretation of the word ‘emergency’ may be narrowly construed,⁵⁴ it may be possible to argue that the fear instilled in a person with no money may be sufficient to justify engaging in begging behaviour.

It appears from the case law outlined above that a necessity-type defence will prove difficult to establish in relation to the offence of begging, however since the argument remains untested, the likely outcome of an attempt to establish such a defence is uncertain.

IV CONSTITUTIONAL ARGUMENTS

A *Freedom of Political Communication*

A begging charge may be defended on the basis that prohibitions on begging infringe relevant persons’ freedom of political communication.

The Australian Constitution contains few private rights or freedoms capable of legal enforcement. However, in *Lange v Australian Broadcasting Corporation*,⁵⁵ the High

⁵² *R v Webb* [1986] 2 Qd R 446.

⁵³ *Simon v Buchanan* (1995) 21 MVR 542, 543.

⁵⁴ For example, in *Simon v Buchanan*, *ibid*, the District Court held that the need to repair a leaky transmission was not enough of an emergency to justify being illegally parked. All other cases in which s 25 of the *Criminal Code 1899* (Qld) are at issue involve motor vehicle accidents where defendant drivers claim that the accident in question was caused by an ‘emergency’ such as a dropped cigarette burning through their shirt (*R v McIntosh* [1968] Qd R 570) or the need to swerve to avoid another car (*R v Beh* (1992) 17 MVR 311).

⁵⁵ (1997) 189 CLR 520.

Court found an implied freedom of political communication in the Constitution based on the needs of the system of representative government which the text authorises. The court unanimously held that in order for elections and referenda to be truly free, members of the public must have ‘an opportunity to gain an appreciation of the available alternatives’ and thus, they must have access to ‘relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.’⁵⁶ A two-stage test was proposed by the court to determine whether or not the freedom of political communication has been infringed. First, the law must effectively burden the freedom of political communication in either substance or form. The law will burden the freedom of political communication if its operation or effect is to inhibit communication about government or political matters. Second, the law must not be appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

The first question which must be asked is whether begging is a form of political communication. If it is, then its prohibition and criminalisation will constitute a burden on the freedom of political communication in accordance with the first requirement in *Lange*. It was established in *Levy v Victoria*⁵⁷ that both conduct and speech may convey a political message, thus the distinction between conduct and speech, which originally acted as a barrier to the constitutional protection of begging in the US,⁵⁸ is not an issue in Australia. However, the true scope of ‘political communication’ is not yet settled law. The relevant case law supports both a broad and a narrow definition of political communication.

According to the broad view, political communication should be defined as communication on public affairs or any matter of public importance.⁵⁹ On the basis of this view, it could certainly be argued that begging is a form of political communication because it imparts a message on the subject of poverty. Begging is ‘the poor man’s printing press’;⁶⁰ it provides a means by which the poor and homeless may convey to the rest of society that the level of support provided to them by the government and by voluntary organisations is insufficient to supply them with the necessities of life.⁶¹ This indeed is a matter of public importance and/or a ‘public affair’.

Case law also supports a narrow view, whereby political communication is defined as communication on political or governmental matters which enables the people to exercise a free and informed choice as electors.⁶² In accordance with this approach, it may be argued that begging is a form of political communication because it provides members of the public with information on the effectiveness of the current government’s policies with regard to social security, housing and the funding of the voluntary sector, thereby assisting electors to make an informed choice in exercising their vote.

⁵⁶ Ibid at 560.

⁵⁷ (1997) 189 CLR 579.

⁵⁸ See *Young v New York City Transit Authority* 903 F 2d 146 (1990).

⁵⁹ M Chesterman, ‘When is a Communication “Political”?’ (2000) 14(2) *Legislative Studies* 5.

⁶⁰ Schafer, above n 6, 9.

⁶¹ Ibid 8-10; H Hershkoff and AS Cohen, ‘Begging to Differ: The First Amendment and the Right to Beg’ (1991) 104 *Harvard Law Review* 896, 901.

⁶² Chesterman, above n 59.

The US and Canadian case law also supports the conclusion that begging amounts to political communication. In *Loper v New York City Police Department*, the US Court of Appeals of the Second Circuit found that both begging and the solicitation of funds by charities may be considered as conveying a ‘social or political message’.⁶³ Similarly in *Federated Anti-Poverty Groups of British Columbia v Vancouver (City)* the Supreme Court of British Columbia held that begging is indeed ‘a tool used by those in poverty to engage with the rest of society about their plight’.⁶⁴

The second question which must be answered in determining whether or not the prohibition and criminalisation of begging infringes the freedom of political communication is whether existing begging offences are appropriate and adapted to meet some legitimate governmental end. Under the second stage of the *Lange* test, a law which burdens the freedom of political communication may still be valid if the burden imposed by the law is proportionate to the attainment of a competing public interest. If a less restrictive provision would be sufficient to meet this end, it may be more readily concluded that the purpose of the restriction is to impair the freedom of political communication.⁶⁵

Begging offences in Australia operate to prohibit begging under all circumstances and in all places. As noted above, any public interest which begging offences may seek to protect (such as public safety or the prevention of fraud) could be served by a less restrictive law. Thus it may be concluded that begging offences are not appropriate and adapted to serve those legitimate ends. This conclusion is consistent with US and Canadian case law. In *Federated Anti-Poverty Groups of British Columbia v Vancouver (City)* the court held that the provision in question, which prohibited begging only in certain circumstances and certain areas of the city, did not impose a complete restriction on the message sought to be delivered, and thus that it did not violate the freedom of expression.⁶⁶ Consistent with this, in *Loper v New York City Police Department* the court held that a blanket provision on begging could not be considered narrowly tailored to achieve a significant state interest as it did not leave open alternative channels for communication by which those who beg could convey their message of indigency.⁶⁷

Thus, it seems that on the basis of the test proposed in *Lange* it may be concluded that begging offences burden the freedom of political communication. The fact that a freedom implied from the Commonwealth Constitution is being applied to State laws poses no problem for two reasons. First, the High Court in *Lange* unanimously concluded that the freedom of political communication applies to laws of the States as well as the Territories and the Commonwealth.⁶⁸ The court stated that due to the existence of national political parties operating at Federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia, discussion of government or politics at State or Territory

⁶³ 999 F 2d 699 (1993) 704.

⁶⁴ Above n 6, [151].

⁶⁵ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (Mason CJ).

⁶⁶ Above n 6, [161-163].

⁶⁷ Above n 63, 705.

⁶⁸ See also *Australian Capital Television Pty Ltd v Commonwealth*, above n 65; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 21 and more recently *Coleman v P* [2002] 2 Qd R 620.

and even local level must be capable of the same protection, and thus that both State and Commonwealth laws were subject to the implied freedom.⁶⁹ The offence of begging is a good example of this interconnectedness between Commonwealth and State matters of concern. Those who beg provide a commentary on the effectiveness of government policies in relation to social security, housing and the funding of the community sector. These are all matters of both Commonwealth and State concern.⁷⁰

Secondly, it is possible that a freedom of political communication may be implied in the State Constitutions. In *Levy v Victoria*⁷¹ it was argued that a freedom of political communication could be implied from s34 of the *Constitution Act 1975* (Vic) which states that members of the State Legislative Assembly 'shall be representatives of and be elected by the electors of the representative districts'. While the court did not find it necessary to decide whether or not the Victorian Constitution contained a freedom equivalent to the Commonwealth freedom of political communication, it remained undisputed that the Victorian Constitution envisaged a system of representative government, which is a chief basis upon which the freedom of political communication is implied from the Commonwealth Constitution.⁷²

Thus, although the application of the Commonwealth freedom of political communication to State laws appears to pose an intergovernmental immunities issue, it has been held by a majority of the High Court that State laws are indeed subject to the freedom of political communication implied from the Commonwealth Constitution, and in the alternative, the State Constitutions probably contain the same freedom.

Since blanket prohibitions on begging burden the freedom of political communication and are not appropriate and adapted towards achieving a legitimate governmental end, it should be concluded that they offend the freedom of political communication.

B *The Rule of Law*

The rule of law in general terms requires that government be conducted in accordance with rules rather than on an arbitrary or highly discretionary basis.⁷³ This allows citizens to exercise personal autonomy in planning their lives according to such rules, as well as

⁶⁹ Above n 55, 571-2.

⁷⁰ It should be noted, however, that this position was applied by only a majority of the High Court in the case of *Levy v Victoria* (above n 57). In that case, the plaintiff had breached a Victorian law which regulated the entry of people into hunting areas. He claimed that he had entered the hunting area in order to protest against the Victorian law. He brought an action in the High Court claiming that the law was invalid as it burdened his implied freedom of political communication. The court concluded that the State law was valid because it was appropriate and adapted to serve a legitimate purpose. On the issue of whether a Commonwealth constitutional freedom could be applied to invalidate a State law, only a majority of the court (Toohey, Gummow, Gaudron, McHugh and Kirby JJ) concluded that State laws were subject to the freedom of political communication implied from the Constitution. Brennan CJ reserved his judgement on the issue and Dawson J did not directly address it.

⁷¹ Above n 57.

⁷² Ibid 643 (Kirby J). See also *Stephens v West Australian Newspapers Ltd*, above n 68, 231 where four judges concluded that an implied freedom of political communication could be inferred from the Western Australian Constitution.

⁷³ J Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195; J Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 270-1.

ensuring that their rights and liberties are recognised and protected.⁷⁴ Adherence to the rule of law is considered a hallmark of liberal democratic societies.⁷⁵ Australia claims to be a rule of law society, indeed, various members of the High Court have stated that a duty to abide by rule of law principles is implied in the Australian Constitution.⁷⁶

The International Commission of Jurists state that the rule of law should seek to ‘create and maintain the conditions which will uphold the dignity of man as an individual’ through the recognition of civil, political rights and social rights.⁷⁷ In order for this to be achieved, the laws imposed in a rule of law society must possess certain characteristics.⁷⁸

First, the law must be capable of being known, that is it must have clarity and specificity. If this is not the case, citizens will not be able to exercise that autonomy which the rule of law is supposed to ensure.⁷⁹ Blanket prohibitions against begging, such as those that exist in Australia, may be criticised for lacking clarity and specificity. Begging is seldom defined in legislation, thus the distinction between begging and other forms of street level economic activity may be unclear. Indeed, it is on this basis that a number of courts in the US have struck down American anti-begging laws under the due process guarantees of the Fourteenth Amendment. In *Papachristou v City of Jacksonville*, the US Supreme Court held that the vagrancy provisions in question were void for unconstitutional vagueness because they failed to give a person of ordinary intelligence fair notice that his/her contemplated conduct was forbidden by the criminal law.⁸⁰ In *Pottinger v City of Miami*, the court said that criminal laws must be ‘clear and precise’.⁸¹ It went on to say:

Before an individual may be criminally punished, he or she must be given fair notice of what type of conduct is prohibited... if a person of ordinary intelligence is unable to ascertain from the language of a statute what conduct will subject him to criminal penalties, the statute is unconstitutionally vague.⁸²

Similarly, the rule of law requires that laws be promulgated, that is, made public. If citizens are not sufficiently apprised of their legal duties and obligations, it will be impossible for them to comply with them. Of course, it is well established that ignorance of the law is no excuse for breaching it,⁸³ however, while this may not be a

⁷⁴ Raz, *ibid*; Finnis, *ibid*.

⁷⁵ See for example E P Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon, 1975) 258-269.

⁷⁶ See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [89]; *Plaintiff S/157 2002 v Commonwealth* (2003) 195 ALR 24 [31] (Gleeson) and [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁷⁷ Clause 1 of the report of Committee I of the International Congress of Jurists, New Delhi, 1959; in Raz above n 73, 195.

⁷⁸ For a description of these principles see Raz, above n 73, 198-202; Finnis, above n 73, 270-1.

⁷⁹ See particularly M Duckworth, ‘Clarity and the Rule of Law: The Role of Plain English Judicial Language’ (1994) 2 *Judicial Review* 69.

⁸⁰ 405 US 156 (1972) 162.

⁸¹ 810 F Supp 1551 (1992) 1578.

⁸² *Ibid* 1578-9. See also *Atchison v City of Atlanta* No. 1:96-CV-1430 (ND Ga July 17 1996) and *Ledford v State* 652 So 2d 1254 (Fla Dist Ct App 1995) in National Law Centre on Homelessness and Poverty (USA), above n 17, 26, 37.

⁸³ *R v Churchill* [1967] 2 AC 224; *He Kaw Teh v R* (1985) 157 CLR 523; *R v Taib; Ex parte Director of Public Prosecutions (Cth)* (1998) 158 ALR 744.

valid legal challenge, the morality of punishing someone for something they were not aware was a criminal offence must be questioned, particularly where the conduct might normally be considered relatively innocent. It is not within the scope of this paper to discuss the causes of or possible solutions to the inaccessibility of the law to members of the general population, however with regard to the population group at issue here, it must be acknowledged as a legitimate moral, if not legal, concern.

There is reason to suspect that many of those who beg are not aware that this activity constitutes criminal conduct. In a study conducted in the UK, approximately half of a sample of people observed begging reported that they were unsure as to whether begging was a criminal offence or not.⁸⁴ A recent survey of homeless people in inner-city Brisbane made similar findings; one respondent stated 'I didn't know it [begging] was illegal. You have freaked me out'.⁸⁵

The rule of law also requires that the law be practicable, that is, it must be physically possible to comply with it. It may be argued that this requirement is absent with respect to the offence of begging. Those who beg may indeed be in a position where there is no alternative source of income available to them other than the community at large. Social security benefits are pegged at levels well below the poverty line, social service providers are sometimes unable to offer assistance to those who request it, and the social/familial support available to homeless people is commonly minimal or non-existent.⁸⁶ Thus those who rely on income support benefits, the community sector or the voluntary sector for their survival may not have any alternative means of supplementing their inadequate income other than strangers in the street. For these people, a prohibition on begging may be considered impracticable.

Another requirement of the rule of law is generality, that is, laws should have equal operation with respect to all citizens. It may be argued that this is a quality that prohibitions against begging do not possess. Anti-begging provisions effectively criminalise poverty and homelessness. Those who are able to meet their immediate needs will have no need to beg and will therefore not be liable for prosecution under such laws. Further, laws that criminalise poverty and homelessness, such as begging offences, may be selectively enforced as a means of sweeping homeless people from the streets or encouraging them to move on. In *Papachristou*, the US Supreme Court noted that vague vagrancy laws may 'encourage arbitrary and erratic arrests and convictions'.⁸⁷ This offends the rule of law requirement of generality.

⁸⁴ Dean and Melrose, above n 9, 86.

⁸⁵ Walsh, above n 34.

⁸⁶ T Walsh, 'Breaching the Right to Social Security' (2003) 12 *Griffith Law Review* 43; Australian Council of Social Service (ACOSS), *Australians Living on the Edge: A Survey of the Community Services Sector* (2003) 11-23; P Mullins and J Western, *Examining the Links Between Housing and Nine Key Socio Cultural Factors: Final Report* (2001) 26-28; K Duffy, 'Free Markets, Poverty and Social Exclusion' in D Avramov, *Coping with Homelessness: Issues to be Tackled and Best Practices in Europe* (1999) 54; S Paugam 'Weakening and Breaking of Social Ties: Analysis of Explanatory Factors' in D Avramov, *Coping with Homelessness: Issues to be Tackled and Best Practices in Europe* (1999) 29-51; I Anderson, 'Homelessness and Social Exclusion: The Situation of Single Homeless in Great Britain' in M J Huth and T Wright (eds) *International Critical Perspectives on Homelessness* (1997) 121-128.

⁸⁷ Above n 80, 162.

The High Court has stated that rule of law principles are implied in our Constitution, however the courts have also indicated that values such as those listed above are not legally enforceable.⁸⁸ While it may not be particularly legally persuasive to argue that begging offences are ‘unconstitutional’ because they offend rule of law requirements such as clarity, specificity, promulgation, practicability and generality, the fact that they breach these fundamental values which underlie our legal system is at least a cause for moral concern.

V CONTRAVENTIONS OF INTERNATIONAL HUMAN RIGHTS LAW

The offence of begging infringes a number of human rights recognised under international law. While international human rights law is not strictly binding if it has not been incorporated into domestic law, the High Court has held that domestic law should be interpreted and applied in a manner consistent with international treaties ratified by the Australian government.⁸⁹ Thus, it may be open to a person charged with begging to argue that a penalty should not be imposed on them because this would offend a number of provisions of international human rights law.

A *The Right to Freedom of Expression*

Article 19 of the *Universal Declaration of Human Rights* (hereafter UDHR) and art 19(2) of the *International Covenant on Civil and Political Rights* (hereafter ICCPR) protect the right to freedom of expression. In both documents, the right is said to include the freedom to ‘seek, receive and impart information and ideas’ of all kinds. It therefore goes beyond the freedom of political communication which exists under Australian domestic law (discussed above), encompassing communication on all subjects, provided the rights and reputations of others, national security, public order, and public health and morals are protected.⁹⁰

Protections of general speech exist under both US and Canadian law. In the US, the First Amendment to the Constitution states that ‘Congress shall make no law... abridging the freedom of speech’. ‘Speech’ has been construed broadly as including expressive conduct where there is ‘an intent to convey a particularised message’.⁹¹ There was initially some debate in the US courts over whether begging constituted expressive conduct. In *Young v New York City Transit Authority*, the majority of the US Court of Appeals of the Second Circuit held that begging was not inseparably intertwined with a particularised message because those who beg are not doing so to convey a message but rather to collect money.⁹² This is despite the fact that a decade earlier in *Village of Schuamburg v Citizens for a Better Environment et al* the US Supreme Court held that solicitations by charities amounted to protected speech because their appeals were ‘characteristically intertwined with informative and perhaps

⁸⁸ See particularly *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 443 [288-298] (Wilcox J) and [430-445] (French J).

⁸⁹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287-8, 315; *Kruger v The Commonwealth* (1997) 190 CLR 1 (Brennan CJ); *Kartinyeri v The Commonwealth*, above n 76 (Kirby J); *Dietrich v R* (1992) 177 CLR 292 (Mason CJ and McHugh J) para 18.

⁹⁰ ICCPR art 19(3).

⁹¹ *Spence v Washington* 418 US 405 (1974) 411.

⁹² Above n 58.

persuasive speech seeking support for particular causes or for particular views on economic, political or social issues'.⁹³

The decision in *Young* was met with some criticism. It was argued by some that people who beg do indeed communicate a particularised message: that they are destitute and need help. People who beg alert the public to the conditions and existence of poverty, as well as presenting a direct challenge to prevailing assumptions about social responsibilities and moral obligations concerning the duty to give to people in need.⁹⁴ By permitting solicitations for money by charities but not individuals who beg, eloquent, selfless and elite speech is unjustifiably privileged over and above other forms of speech.⁹⁵

In *Loper v New York City Police Department*⁹⁶ a different panel of the Second Circuit refused to follow the majority in *Young* and instead held that the distinction between begging by individuals and solicitation by organisations was not justified. The court held that begging, by communicating a request for assistance, both conveys a message of need and involves the communication of a social or political message.

It is now settled law in the US that blanket ordinances that prohibit all forms of begging violate the right to free speech.⁹⁷ However, subsequent courts have held that ordinances that prohibit begging only in certain places or under certain circumstances may still be valid, so long as they are tailored to serve a legitimate governmental interest. Governmental interests which have been considered legitimate include protecting the physical safety of the public (to prevent begging in subways, on narrow sidewalks, etc.)⁹⁸ and protection of the tourism industry,⁹⁹ but not crime prevention¹⁰⁰ or mere annoyance to the public.¹⁰¹

In Canada, s 2(b) of the *Canadian Charter of Rights and Freedoms* protects a general freedom of expression which has been interpreted and applied in a manner very similar to its equivalent in the US. In *Federated Anti-Poverty Groups of British Columbia v Vancouver (City)* the Supreme Court of British Columbia held that begging is indeed a form of speech protected under the Charter as it is 'a tool used by those in poverty to engage with the rest of society about their plight'.¹⁰² Consistent with the US approach, the court held that since the ordinance in question did not place a blanket prohibition on begging but rather was narrowly targeted at preventing certain kinds of begging behaviour and prohibited begging only in a narrowly defined set of circumstances (eg. outside automatic teller machines and banks), it did not violate s 2(b) of the Charter.¹⁰³

⁹³ 444 US 620 (1980) 632.

⁹⁴ Hershkoff and Cohen, above n 61, 898-900.

⁹⁵ Ibid 900, 902, 903, 906.

⁹⁶ Above n 63.

⁹⁷ See *Blair v Shanahan* 775 F Supp 1315 (1991) and dicta in *Roulette v City of Seattle* 97 F 3d 300 (1996).

⁹⁸ *Chad v City of Fort Lauderdale* 66 F Supp 2d 1242 (SD Fla 1998); Note that it is on this basis that *Young v New York City Transit Authority* has been distinguished from *Loper*.

⁹⁹ *Chad v City of Fort Lauderdale*, ibid; *Smith v Fort Lauderdale* 177 F 3d 954 (11th Cir 1999).

¹⁰⁰ See *Benefit v Cambridge* 424 Mass 918 (1997).

¹⁰¹ See *CCB v Florida*, above n33; *Ledford v State* 652 So 2d 1254 (Fla Dist Ct App 1995).

¹⁰² Above n 6, [151].

¹⁰³ Ibid [169], [180].

Thus, in both the US and Canada, the courts have held that begging amounts to ‘speech’ or ‘expression’ in the relevant sense. Further, the courts in both countries have held that incursions on the right to freedom of expression will only be justified under certain circumstances. These exceptions have accorded closely with those listed in the relevant UDHR and ICCPR articles, such as public safety and the protection of the rights and freedoms of others.

The anti-begging provisions that exist in Australia place blanket prohibitions on begging and therefore cannot be considered as narrowly targeted at protecting a legitimate interest. The typical ‘interests’ cited in Australia to justify the existence of the offence of begging such as aesthetics, crime prevention and annoyance have been rejected in the US as providing insufficient justification for encroachment on the right, neither do they fit squarely within the exceptions outlined in the UDHR and ICCPR. Thus, in line with the US and Canadian authority, it should be concluded that the blanket anti-begging provisions that exist in most Australian States and Territories offend the internationally recognised right to freedom of expression.

B *The Right to Liberty*

The right to liberty is recognised in art 3 of the UDHR and art 9 of the ICCPR. Liberty, or freedom of person, encompasses the capacity of individuals to pursue economic, social and cultural development through means of their own choosing. For its operational definition, it may again assist to examine the US and Canadian case law.

In *Benefit v Cambridge Massachusetts*’ highest court held that to prohibit begging is to prohibit individuals from ‘engag[ing] with fellow human beings with the hope of receiving aid and compassion’.¹⁰⁴ Begging prohibitions tell those who are poor that they must suffer in silence.¹⁰⁵ Moreover, they deprive members of the general public of interactions with their fellow human beings who are in difficulty. For some people, an encounter with a beggar might provoke them to action, result in self-enlightenment, create a social or empathic bond, and/or enable them to fulfil moral or religious obligations to assist those in need.¹⁰⁶ Thus, it might be argued in line with this reasoning that anti-begging laws violate certain aspects of the right to liberty.

In *Federated Anti-Poverty Groups of British Columbia v Vancouver (City)* the court held that the ability to provide for one’s self falls within the ambit of the right to liberty and thus anti-begging laws may infringe this right. The court’s reasoning on this issue appears to be based on the fact that if one is not able to provide for one’s self, all other rights lose their meaning. The court stated that: ‘a person who lacks the basic means of subsistence ha[s] a tenuous hold on the most basic of constitutionally guaranteed human rights’ and that ‘[w]ithout the ability to provide for those necessities, the entire ambit of other constitutionally protected rights becomes meaningless’.¹⁰⁷ As noted above, since the ordinance in question in that case did not impose a blanket prohibition on begging, it was held not to result in a loss of liberty, the clear implication being that a blanket offence of begging, particularly one which provided for incarceration upon conviction,

¹⁰⁴ Above n 100, 926.

¹⁰⁵ Hershkoff and Cohen, above n 61, 897; Waldron, above n 19, 388.

¹⁰⁶ Hershkoff and Cohen, *Ibid* 899-900, 910, 914.

¹⁰⁷ Above n 6, [201], [202].

would amount to such a loss.¹⁰⁸ Thus, anti-begging laws which result in the imposition of penalties upon those who beg may amount to an infringement of the right to liberty.

C *The Right to Equality Before the Law*

The right to equality before the law is recognised in art 7 of the UDHR and art 14 of the ICCPR.¹⁰⁹ It may be argued that the creation of laws targeted at regulating the behaviour of homeless people, coupled with the selective enforcement those laws may amount to the infringement of homeless persons' right to equality before the law.

Equality requires that those who are similarly situated should be treated the same, and those who are situated differently should be treated differently – difference should not lead to disadvantage.¹¹⁰ However vagrancy laws, including anti-begging provisions, contravene the principle of equality by criminalising the poor and homeless.¹¹¹ Anti-begging provisions will have no effect with respect to those members of the community who do not need to engage in such behaviour for their survival. As Anatole France said:

The majestic quality of the law forbids the rich as well as the poor to sleep under the bridges, to beg in the streets and steal bread.¹¹²

The Fourteenth Amendment to the US Constitution protects citizens against laws which 'deny to any person... the equal protection of the laws'. In *Papachristou v City of Jacksonville* the US Supreme Court criticised vagrancy laws on the basis that they make certain activities criminal that are 'normally innocent' by modern standards.¹¹³ There was some suggestion in that case that this may contribute to their facial unconstitutionality under the Fourteenth Amendment. In *Blair v Shanahan* the court found the distinction made in *Young* between begging by individuals and the solicitation for funds by charities to violate the Fourteenth Amendment because it did not treat alike all those who approach others and speak to them.¹¹⁴ In *Pottinger v City of Miami* it was held that the selective enforcement of certain criminal laws against homeless people was impermissible since such people were engaging in life sustaining activities and had no private place to retreat to.¹¹⁵

Thus, there is some support in the US case law for the proposition that offences that impact on homeless people either exclusively by virtue of their form, or effectively by virtue of their selective enforcement, criminalise homelessness.

¹⁰⁸ Ibid [229], [237].

¹⁰⁹ The existence of a right of equality under the Australian Constitution has been mooted (see Deane and Toohey JJ in *Leeth v Commonwealth* (1992) 174 CLR 455) but remains largely unaccepted (see *Kruger v Commonwealth* (above n84) where only Toohey J endorsed it). See S Gageler and A Glass 'Constitutional Law and Human Rights' in D Kinley (ed) *Human Rights in Australian Law* (1998) 53-54.

¹¹⁰ Gageler and Glass, *ibid* 53.

¹¹¹ National Law Centre on Homelessness and Poverty (USA), above n 17, v, vii; DM Smith, above n 31, 495.

¹¹² *Le Lys Rouge* (1910).

¹¹³ Above n 80.

¹¹⁴ Above n 97.

¹¹⁵ Above n 81.

Further, anti-begging offences treat like situations differently by drawing a distinction between those who beg and those who request other forms of assistance of strangers such as directions or the time, and by differentiating begging from other forms of informal street level activity, such as trick-or-treating or the sale of raffle tickets in public places. Thus, begging offences treat both differing circumstances alike and like behaviour differently resulting in inequality before the law.

D *The Right to Freedom From Discrimination*

Under arts 2(1) and 26 of the ICCPR, art 2(2) of the ICESCR and art 2 of the UDHR, all persons are entitled to freedom from discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The addition of ‘or other status’ implies that the principle of non-discrimination is intended to be flexible enough to extend to other bases of discrimination which remain un contemplated by the provisions.¹¹⁶ It is proposed that one such status which should be recognised as a legitimate ground of discrimination is socio-economic status,¹¹⁷ and that begging offenders may be defended on this basis.

The impermissibility of punishing status has been recognised in both the US¹¹⁸ and Canada,¹¹⁹ and there has been litigation in both jurisdictions on the subject of whether socio-economic status, homelessness or poverty may properly be characterised as a ‘status’. In *Powell v Texas* the US Supreme Court held that when determining whether status was being punished by a law, the focus should be on whether the act punished was volitional and thus whether the defendant was able to avoid it as a matter of fact.¹²⁰ Similarly, in *Federated Anti-Poverty Groups of British Columbia v Vancouver (City)* the Supreme Court of British Columbia held that in order for a certain ‘status’ to constitute a ground of discrimination under s15(1) of the Charter, it must be established that the relevant characteristic cannot be changed.¹²¹

Courts in both Canada and the US have concluded, on the basis of the evidence presented to them, that poverty is not immutable, the implication being that had more persuasive evidence been led demonstrating that poverty may not be voluntarily alleviated, their conclusions may have been different.¹²²

In an Australian context, persuasive evidence may be led to prove that poverty and/or homelessness are generally immutable and involuntary. Income support benefits are pegged at levels well below the poverty line and are insufficient to enable recipients to meet their immediate needs.¹²³ The community services sector is increasingly unable to meet demand due to increased referrals and cuts to funding, and many agencies have been forced to close their books for certain periods of time as a result.¹²⁴ Further, many

¹¹⁶ P Bailey and A Devereux, ‘The Operation of Anti-Discrimination Laws in Australia’ in D Kinley (ed) *Human Rights in Australian Law* (The Federation Press, 1998) 295.

¹¹⁷ P Lynch and B Stagoll, ‘Promoting Equality: Homelessness and Discrimination’ (2002) 7 *Deakin Law Review* 295; Lynch, above n 6.

¹¹⁸ See especially *Robinson v California* 370 US 660 (1962).

¹¹⁹ Art 15(1) of the *Canadian Charter of Rights and Freedoms*.

¹²⁰ 392 US 514 (1968); see also *Pottinger v City of Miami* above n 81.

¹²¹ Above n 6, [270-273].

¹²² See *Federated Anti-Poverty Groups*, *ibid*; *Pottinger v City of Miami*, above n 81.

¹²³ Walsh, above n 86.

¹²⁴ ACOSS, above n 86, 11-23.

of those who are homeless do not have family or friends who they can turn to for assistance; it is well established that homelessness is often characterised by the breaking of social ties,¹²⁵ and homelessness has been found to correlate highly with social exclusion measures.¹²⁶ Thus, since poverty is often not something which affected persons are able to avoid or alleviate themselves, it may be argued that socio-economic status should be considered another status upon which discrimination should be prevented. Since begging punishes behaviour that is directly associated with poverty, it may be concluded that the criminalisation of begging offends the internationally recognised human right to be free from discrimination on the basis of 'status'.¹²⁷

VI CONCLUSION

The injustice of criminalizing behaviour that is typically engaged in for the purpose of survival is clear. However, social action campaigns aimed at persuading State and Territory governments to repeal begging offences in Australia have met little success. On this basis, it seems that a shift in focus towards identifying successful means of defending begging charges may be warranted. This paper suggests some legal and quasi-legal bases upon which a charge of begging might be defended, including the use of the defence of necessity, constitutional arguments relying on the freedom of political communication and rule of law principles, and arguments based on international human rights law. Each of these remain untested in Australia, but many of them have been argued successfully in other common law jurisdictions, and provide useful guidance in terms of over-arching principles and operational definitions. It is hoped that our first test case in Australia will not be far away.

¹²⁵ Paugam, above n 86, 29-51.

¹²⁶ Mullins and Western, above n 86, 26-28; Duffy, above n 86, 54; Anderson, above n 86, 121-128.

¹²⁷ See also Lynch, above n 6, 692-694.