



# **Submission re the Criminal Justice (Public Order) Bill 2010**

## **Context**

The Criminal Justice (Public Order) Bill 2010 introduces new laws restricting the activity of begging. It is a response to the judgment of the High Court in *Dillon v. DPP*<sup>1</sup> which found that the previous law in this area, Section 3 of the Vagrancy (Ireland) Act 1847, was unconstitutional.

Section 3 was found to constitute a prohibition against begging in any public place in all circumstances. It was accepted by the High Court that such an unrestricted prohibition was in breach of Art. 40.6.1 which protects the right to freedom of expression. It was also found that, because the offence of begging was “so arbitrary, so vague, so difficult to rebut” [and] “so ambiguous” in the way it was defined,” it was considered to be unconstitutional, violating several articles, namely Arts. 34.1, 40.4.1, 40.1, and 40.3.

However, the High Court also made clear that the right to freedom of expression can be regulated in the interests of the common good, leaving open the possibility of making more clearly defined and nuanced laws to control the location, manner and other circumstances in which begging might take place.

## **Purpose of the Bill**

Since March 2007, there have been no laws in Ireland specifically relating to begging. The current Bill has been introduced to fill this gap. In the Regulatory Impact Analysis carried out by the Department of Justice,<sup>2</sup> it was stated that legislation to control begging is necessary in order to deal with the “unacceptable behaviour” to which it gives rise and to prevent it interfering with daily social and commercial life.

Bearing in mind the findings of the *Dillon* case, the Bill does not seek to impose an overall ban on all forms of begging. Instead, it seeks to make begging an offence only where it is accompanied by unacceptable behaviour such as harassment, intimidation or obstruction. It also gives new powers to the Gardai to direct persons begging within 10 metres of an ATM, a dwelling or the entrance to a business premises to move on. Failure to comply with such directions will also be an offence.

## **Concerns about the Bill**

MLRC has the following concerns about the new Bill:-

1. The new law as established by the Bill suffers from similar defects of vagueness, arbitrariness and ambiguity as did the previous law and is similarly open to misuse by enforcement authorities and violation of constitutional rights.

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<sup>1</sup> [2007] IEHC 480 (4 December 2007) De Valera J

<sup>2</sup> Available at [www.justice.ie](http://www.justice.ie). See section 4(i).

2. The Bill fails to take a holistic approach to the problem of begging and associated behaviours. It focuses on enforcement to the exclusion of rehabilitative intervention and support. Research in the UK has shown that enforcement alone tends only to displace the problems whereas enforcement as part of an overall coordinated approach offering targeted intervention and support is more likely to be successful in dealing with the problems and their underlying causes.
3. The Bill is based on the assumption that there is no objective need for persons to beg given the comprehensive range of income supports available. In fact, a clear gap in the provision of income support has become visible in the case of foreign nationals who have lost their jobs and are unable to access social welfare payments.
4. Some problem behaviours associated with begging, e.g. car window washing, may not be covered by the Bill as they consist of the offer or provision of unwanted services by the person begging. These services may constitute consideration and may exclude the activity from the definition of begging under the Bill.

#### **1. Vagueness, arbitrariness and ambiguity**

Under the Bill, two different types of offences are created. The first makes begging an offence if the person begging “harasses, intimidates, assaults or threatens any other person...or obstructs the passage of persons or vehicles.” This offence can be punished by a fine up to €400 or up to three months in prison. It is a summary offence and therefore by definition considered to be minor.<sup>3</sup>

The second makes it an offence to fail to comply with directions given by the Guards under Section 3 to stop begging and leave the vicinity. This is also a summary offence and is punished by a fine of up to €300. Guards also have the power to arrest persons for either offence without warrant.<sup>4</sup>

What is notable about these offences is that much of the behaviour criminalized by it is duplicated elsewhere. Assault is a criminal offence at common law and under Section 42 of the Offences against the Person Act 1861. In addition, the Criminal Justice (Public Order) Act 1994 contains offences outlawing disorderly conduct (Section 5), threatening, abusive or insulting behaviour (Section 6), obstruction (Section 9) and other more aggravated forms of conduct. Harassment and intimidation are forms of anti-social behaviour which may be made the subject of anti-social behaviour orders breach of which constitutes an offence under Section 117 of the Criminal Justice Act 2006. Failure to comply with the directions of a Guard to move on is an offence under Section 8 of the Criminal Justice (Public Order) Act 1994.

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<sup>3</sup> Section 2 of the Bill.

<sup>4</sup> Section 3 of the Bill.

There seems to be no doubt that all the forms of behaviour criminalized by Section 2 of the new Bill are already covered by criminal law. What, then, is the purpose of creating this new offence? The Regulatory Impact Analysis acknowledges the duplication and justifies it on the grounds that existing offences “do not address the core issue of begging. Under the proposed Bill begging is the activity which is itself being targeted.”<sup>5</sup>

However, “begging itself” is not the activity criminalized by the Bill (as an overall ban would most likely fall foul of the Constitution). What is criminalized is the accompanying behaviour of assault, harassment, etc. What the Bill does not make clear is what kind of behaviour constitutes harassment, intimidation, etc. for the purpose of this offence and how does this behaviour differ from that which is already criminalized? If there is no difference, then the Bill is not necessary. If there is a difference, that difference needs to be clearly spelt out so the public at large knows what kind of behaviour constitutes this offence and what evidence is required to prove it. Is it, for instance, the case that a lesser standard of problematic behaviour is required when the person concerned is begging? Are there perhaps certain rules, a certain ‘etiquette,’ which we feel should apply to begging, as persons who beg themselves agree?<sup>6</sup> What exactly is the “unacceptable behaviour” which accompanies begging and which the Bill seeks to outlaw? If the Bill is, as the Department of Justice says in its Regulatory Impact Analysis, designed to target begging itself, then are the accompanying behaviours to be viewed as optional extras? If that is so, how is one to prevent their being applied in a selective and arbitrary manner?

As things stand, there is a vagueness and ambiguity about what constitutes an offence under this Bill. This creates the possibility that the law will be applied arbitrarily. One should note that, in the UK, evidence of inconsistency has been found in determining what constitutes the appropriate level of harassment necessary for an ASBO application to succeed and the need for guidelines in this area has been identified.<sup>7</sup> Applying for an ASBO is a considerably more weighty matter than the relatively minor offence of begging and the levels of inconsistency are therefore likely to be greater when dealing with begging.

The lack of clarity in the 2010 Bill about what it seeks to outlaw means that its application will be largely dependent on the opinion (and possible prejudices) of individual Gardai at first instance. The Bill will then be open to a range of different judicial interpretations which may allow a situation to develop whereby people in similar situations are treated differently. People carrying

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<sup>5</sup> Regulatory Impact Analysis, section 4(iv).

<sup>6</sup> See the principles that have evolved organically among members of the begging population such as (a) always be polite (even if members of the public are rude or abusive); (b) never persist if someone has refused to give money; (c) never follow anyone; and (d) express gratitude regardless of the amount given - Johnsen, Sarah and Fitzpatrick, Suzanne, *The Impact of enforcement on street users in England* (2007) Centre for Housing Policy, University of York, p.26.

<sup>7</sup> *Ibid*, 34, 56.

out the same behaviour may be subject to significantly different decisions which could, in some cases, result in a term of imprisonment for the person concerned.

The inherent arbitrariness in such a vaguely defined offence also gives rise to the possibility of improper use of these provisions by enforcement officials to unfairly target selected individuals. The potential for unfairness and abuse of power is great. Altogether, there is a strong possibility that the Bill may violate constitutional rights in a similar way to that outlined in the Dillon case.

## **2. Lack of supportive interventions**

If it is proposed to criminalize begging, consideration should be given to the type of people who beg and the reasons why they do it. To our knowledge, no research has been carried out on this matter in Ireland. Research in the UK, however, confirms the intuitive assumption that most, if not all, people who beg are highly vulnerable individuals.

In a study of the impact of enforcement on street users in England, it was found that all bar one of the 'street' population interviewed had substance misuse problems, many had mental health problems, the great majority had a childhood disrupted by traumatic event(s) and all were either homeless at the time of interview (75%) or had a history of homelessness (25%).<sup>8</sup> The evidence is, therefore, that people who beg have significant problems with homelessness, substance addiction, mental health and traumatic childhoods. Prior to introducing criminal sanctions against a group of such vulnerable individuals, the interests of social justice and the common good require that we consider the impact of those measures on those individuals.

The Johnsen & Fitzpatrick study looked at the possible consequences of taking a strict criminal law enforcement approach to begging. These included:

- Geographical displacement (where the person concerned moves on and carries out the same activity elsewhere)
- Activity displacement (where the person turns to alternative means e.g. shoplifting, mugging, prostitution, to fund his/her addiction)
- Continued begging offending which leads to the person becoming trapped in a cycle of ever-increasing sanctions
- Engagement with support services (accommodation, drug/alcohol treatment, mental health services, social and emotional support including counselling, key-working, etc.) leading to modification of the person's behaviour.<sup>9</sup>

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<sup>8</sup> Johnsen & Fitzpatrick, 6. Johnsen and Fitzpatrick write, "[t]he evidence is now overwhelming that begging (in the UK) is very closely associated with alcohol and drug misuse...that the great majority of those involved are 'homeless,' ...[and] most of those involved ...have suffered extremely traumatic life histories," p.1.

<sup>9</sup> Ibid., 44.

A critical examination of these consequences shows that only the fourth offers positive outcomes both for person begging and for the wider community. In the first three scenarios the predicament of the person begging is worsened or deepened.<sup>10</sup> While the community may at first appear to benefit, over time the benefit is shown to be more apparent than real as the problem activity is either moved elsewhere or shifts into deeper criminality which can be significantly more serious than begging. In particular, the study concluded that arresting people for begging, on its own, was largely ineffective and there was virtually universal acceptance that clampdowns on 'sit-down' begging almost inevitably led to an increase in 'mobile' begging (widely acknowledged to be more intimidating for members of the public) as well as other criminal activities.<sup>11</sup>

It seems clear therefore that the most desirable outcome is the fourth which causes the person to modify his/her behaviour through engaging with appropriate support services. It is both just in seeking to bring about the best outcome for the very vulnerable person concerned and it is effective in leading to the desired change in behaviour and a decrease of criminal activity.

In order to bring about such an outcome, it is essential that the use of criminal law enforcement is integrated with intensive support interventions which are tailored towards the person's needs. The Johnsen & Fitzpatrick study demonstrates that careful use of enforcement options can act as a 'crisis point' for the person begging, leading to reflection and change. However, the study also finds that "to be effective, enforcement initiatives must be accompanied by comprehensive packages of *appropriate* and *accessible* support that can be tailored to meet individual needs."<sup>12</sup> This 'carrot and stick' approach appears to be the one that best facilitates the chances of a positive outcome.

Such approaches cannot guarantee the desired result and the impact of such interventions will depend to a large extent on effective interagency working and communication between enforcement agents and support providers and immediate and accessible availability of appropriate accommodation and support. Lengthy delays in accessing drug and alcohol treatment, difficulties in accessing mental health diagnosis and treatment and inadequacy/difficulties in accessing accommodation are problems identified by the study which would also apply in Ireland. Much also depends on an individual's personal circumstances and enforcement

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<sup>10</sup> Even the most benign scenario of geographical displacement means disruption of the person's life and activities and their access to services.

<sup>11</sup> Johnsen & Fitzpatrick, 43, 37.

<sup>12</sup> Johnsen & Fitzpatrick, 47. See viii-x, 46-48, 54-55.

options should not be used without considering whether they are likely to work and whether they are suitable to use with that individual.

The approach taken by the Irish Government does not appear to take account of any of these considerations. There is no reference in the 2010 Bill or in the Regulatory Impact Analysis to the need for enforcement to be accompanied by intensive and appropriate support interventions. Nor is there any evidence (such as consultation with support providers or a concerted effort to improve support options available) of the Government's intentions to use its enforcement options in this manner. Enforcement therefore seems to be seen as a separate, 'stand alone' option even though, given the findings of the Johnsen & Fitzpatrick study, such a situation will almost definitely make the situation worse for both the vulnerable individuals who beg as well as for the wider community. The Bill as it stands is neither in the interests of social justice nor the common good and significant changes require to be made if it is to do either.

### **3. Needs of foreign nationals**

The Regulatory Impact Analysis which accompanies the 2010 Bill states repeatedly that begging cannot be justified on economic grounds due to the comprehensive range of income supports, health care and housing supports available.<sup>13</sup> In fact, a significant number of foreign nationals are unable to access social welfare payments and are thus left with no alternative but to beg in order to survive.

In 2004, the Irish Government introduced the Habitual Residence Condition (HRC) as a test for certain social welfare payments. According to this condition, a person has to prove that he/she is habitually resident in Ireland in order to receive any means-tested social welfare payment. Proof that a person satisfies the HRC is a complex, legal matter. Initial decisions can frequently be overturned on appeal when the person has had the opportunity to access expert advice and assistance.

While people are awaiting the outcome of their appeal, however, they are not entitled to receive the social welfare payment for which they applied. Thus, a person who has lost his/her job and applied for Jobseekers' Allowance is not entitled to receive that payment while the appeal is pending. In such circumstances, an Irish citizen would apply for Supplementary Welfare Allowance (SWA) pending the final outcome of their appeal. However, SWA is also subject to the HRC condition and a foreign national who applies for it is very likely to be refused on the grounds that he/she does not satisfy the HRC. Even though this decision too may be appealed, the person is not entitled to any payment pending the outcome of the appeal which can take up to six months or more.

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<sup>13</sup> Regulatory Impact Analysis, section 4(i), 4(iii) and section 5.

In such circumstances, the foreign national concerned is left without any means of financial support or livelihood unless he/she can obtain alternative employment. If the person is unable to do this, the only option offered by the State is voluntary repatriation to the person's country of origin, by the Department of Justice if they are EEA nationals or by the International Organization of Migration if they are non-EEA nationals.

Foreign nationals who find themselves in such a situation are in dire straits. Apart from failing to access a social welfare payment, access to homelessness services will be refused because of the lack of a social welfare payment/failure to satisfy the HRC. Even access to financial assistance from voluntary organizations such as Vincent de Paul may well be refused because of their lack of an address to be visited. Such people frequently end up sleeping rough and resort to begging simply in order to survive.

Thus, even if a foreign national has immigrant status and has worked here legally and even if he/she might well be able to prove on appeal that he/she satisfies the HRC condition, that person will be left without any access to social welfare or housing support for six months or more while the appeal is being heard. Begging is the only available option for people in such circumstances.

Foreign nationals who have made the requisite number of social insurance contributions (usually two years) may be entitled to the non-means tested Jobseekers' Benefit without satisfying the HRC. An EEA national may also combine social insurance contributions from his/her home country with Irish contributions to qualify. However, there can be technical difficulties with such payments and some foreign workers can find themselves in a situation where their employer has failed to pay their social insurance contributions. Foreign nationals in these situations will need to apply for the means-tested payment which is subject to the HRC and will very likely find themselves in the same situation of being without any income while their appeal is pending.

Anecdotal evidence from NGOs working in this area suggests the number of foreign nationals in this predicament is increasing. The assumption made in the preparation of the Bill that "there is no justification for begging in terms of necessity or income support" must therefore be questioned. In the circumstances, it is incumbent on the Government to investigate the situation prior to adopting the Bill and either put in place adequate social protection for foreign nationals or at least allow the last resort option of begging to remain.

#### **4. Problematic behaviour excluded from Bill**

Begging is sometimes accompanied by problematic behaviour which can seem organized and intimidating and which gives the relatively benign practice of 'passive begging' or begging sitting down a bad name by association. One of these practices would be washing the windows of cars while stopped at traffic lights and then demanding money. Another would be to stop people on

the street ostensibly to advertise a service on offer and then seeking money for giving more information.

It is doubtful whether either of these practices would be criminalized under the new Bill. In order to be an offence under the Bill, the person has to harass and intimidate others “while begging.” In Section 1(2), begging is defined as requesting or soliciting money or goods from another and not offering any money, goods or services in consideration. The people who wash car windows and who advertise various services could claim to be offering services in consideration for the money they seek. If this is the case, they are not begging and they are not guilty of an offence under the 2010 Bill regardless of how intimidating their approach is. They may, of course, be guilty of other offences under the public order legislation such as Section 9 of the 1994 Act which outlaws wilful obstruction.

The fact that such behaviours are not criminalized by the Bill while remaining a crime under existing legislation raises serious questions about the necessity for the Bill and whether it is well-targeted. If the Bill is simply an instrument that can be used arbitrarily against persons who are simply begging, depending solely perhaps on the antipathy of the public as demonstrated by complaints to the Guards, then it seems to be entirely unjust.

## **5. Conclusion**

The above concerns demonstrate the variety of problems which exist regarding this Bill. There is a question as to whether it is required at all as much if not all the behaviour targeted is already a criminal offence. If the existing laws are not being enforced, we need to ask why. We need to clarify if there are problems with taking prosecutions and, if so, what are they? Is the Bill an attempt to circumvent such problems and, if it is, is the attempt legitimate? Are there societal problems caused by not enforcing existing laws? Again, if so, what are they and how best can they be tackled? This is one line of questioning that needs to take place.

Another line of questions concerns the assumption in the Regulatory Impact Analysis that “begging often gives rise to unacceptable behaviour and interferes, without adequate cause, with daily social and commercial life.” This assumption requires examination. Does begging give rise to unacceptable behaviour? What is that behaviour and how does the legislation target it? We need to remember that people beg for different reasons and in different ways.

Research needs to be carried out on why and how people beg and the ways this impacts on members of the public and society at large. Such research does not appear to have been carried out prior to the initiation of this Bill. In consequence, the Bill seems ill-conceived and likely to result in both injustice regarding vulnerable persons who beg and lack of effectiveness in tackling perceived problems. We request that the Bill be withdrawn and research be carried out in consultation with organizations working with people who beg so as to work towards solutions which are just and effective which may require changes in policy and practice rather than legislation.