



Law  
Institute  
Victoria

State Election 2010 | KEY ISSUES

**CALL TO THE PARTIES**



**ADVOCATING JUSTICE FOR ALL**

## The LIV calls on all parties to commit to:

- 1 Funding Legal Aid
- 2 Protecting Rights
- 3 Reviewing the Charter of Human Rights & Responsibilities
- 4 Improving Access to Justice in RRR Areas
- 5 Reforming Substitute Decision-Making
- 6 Providing Access to Interpreters in Civil Matters
- 7 Reforming Tort Law
- 8 Ensuring Better Integrity & Anti-Corruption Systems
- 9 Reforming Stamp Duties
- 10 Improving Privacy Protections
- 11 Moving Towards a Unified National Legal Profession

## Victorian State Election 2010

The LIV is the peak body for the legal profession in Victoria and represents over 14,500 members' views and interests to industry and government, and advocates justice for all. The LIV, through its Practice Section Committees, actively seeks to influence policy by making submissions to government, the courts, parliamentary committees and other bodies.

## 1 Funding legal aid

Legal Aid  
Matters

### The LIV is calling for

- The legal profession to be involved in the negotiation of national partnership agreements
- Minimum levels of guaranteed state funding, which is maintained regardless of variations in public purpose funds
- Funding levels to be maintained regardless of any increase in Commonwealth funds

### Background to the issue

Chronic underfunding over the past 10 years means that it is increasingly difficult to qualify for legal aid, so many Victorians are unable to get legal advice or be represented by a lawyer in court.

In the same period, legal aid fees for private lawyers have fallen well below what should be fair payment for the work that is done, and many lawyers report that they can no longer afford to take on legally aided criminal and family law matters.

In the 2010/11 Budget, the Victorian government committed an additional \$50 million legal aid funding over two years.

### What the LIV has done to date

The LIV has campaigned for the past two years for an increase in legal aid funding at both a state and federal level, including:

- Making submissions and meeting with key government ministers and MPs
- Commissioning a report from PricewaterhouseCoopers, with the LCA and Victorian Bar, to analyse the extent of the legal aid shortfall
- Launching the Legal Aid Matters campaign, including the Legal Aid Matters rally on 28 April 2010, and the Legal Aid Matters website, hosted by the LCA
- Encouraging members to write to their local MP

The LIV is participating in the VLA Criminal Fee Structure Review Steering Committee, to ensure a fair deal for criminal lawyers.

### Advocacy partners

Victorian Bar; LCA; VLAF; PILCH; Federation of Community Legal Centres

## 2 Protecting Rights

### The LIV is calling for

- Less restrictive means for protecting the community from high-risk offenders, and transfer of resources from post-sentence detention to programs that aim to rehabilitate offenders rather than to further stigmatise them
- The protection of judicial discretion and the abolition of mandatory penalties
- The retention of suspended sentences and the protection of judicial discretion
- Appropriate limitation and oversight of police powers, in accordance with human rights protected in the Charter

### Background to the issue

The criminal justice system hinges on a few important principles, including: the presumption of innocence; the burden of proving the guilt of a defendant falls on the prosecution; the double jeopardy rule where no person should be punished more than once for the same offence; the right to silence; and the principle that the punishment must be commensurate to the crime.

Post-sentence detention offends against the principles of double jeopardy and the presumption of innocence, and relies upon risk assessments which the Sentencing Advisory Council found in 2007 are notoriously difficult.

Mandatory sentences erode judicial discretion and limit the ability of a judicial officer to impose a sentence commensurate to the offence.

Suspended sentences are an important element in the array of sentencing options open to judicial officers in Victoria, and allow Judges and Magistrates to impose a fair and just sentence, taking into account all the facts of the case.

Extended police stop-and-search powers erode citizens' rights to freedom of movement and the right to privacy.

### What the LIV has done to date

- Made submissions to the Sentencing Advisory Council:
  - Opposing continued indefinite detention for high risk offenders, on the basis that it seriously restricts the human rights of those convicted of past offences without a convincing, evidence-based justification (2007)
  - Supporting the abolition of mandatory penalties (2005)
  - Supporting the retention of suspended sentences, arguing that judges or magistrates are best placed to impose an appropriate, fair and just sentence after hearing all the facts of the case (2003 and 2007)
- Developed a lengthy submission in response to the *Serious Sex Offenders (Detention and Supervision) Bill 2009* (Vic).
- Continued to campaign strongly in the media for the abolition of mandatory sentencing, the retention of suspended sentences, and the protection of the principle of judicial discretion.
- Monitored legislation and made submissions to government and to the Scrutiny of Acts and Regulations Committee where human rights and civil liberties suffer incursions.

### Advocacy partners

Smart Justice; Federation of Community Legal Centres

### 3 Reviewing the Charter of Human Rights & Responsibilities

#### The LIV is calling for

- An independent panel to be appointed to conduct the Charter review, with a broad mandate and sufficient resources
- The Charter to be amended to include:
  - improved access to remedies
  - an independent cause of action
  - inclusion of economic, social and cultural rights

#### Background to the issue

The Charter came into full operation on 1 January 2008. Under s44, the Attorney-General must undertake a review of the operation of the first four years of the Charter by 1 October 2011.

#### What the LIV has done to date

Published a report assessing the impact of the Charter on legal practice. The report outlines results of a pilot questionnaire, including observations about how the Charter has begun to influence the practice of law within Victoria. The pilot questionnaire will assist the LIV to develop future initiatives and will contribute to the development of the LIV's submission to the 2011 review.

#### Advocacy partners

Federation of Community Legal Centres Human Rights Working Group; VEOHRC

### 4 Improving Access to Justice in RRR Areas



#### The LIV is calling for

- Monetary allowances or bonuses for relocation
- Increased opportunities for clinical placements for law students and graduates
- Further collaboration with VLA on traineeships
- A scholarship scheme for law students
- Cash incentive payments upon completion of a specific time period in RRR areas
- State tax incentives such as payroll tax exemptions or holidays

#### Background to the issue

The July 2009 LCA–LIV Report into the Rural, Regional and Remote Areas Lawyers Survey revealed that there is a significant access to justice issue in RRR areas of Australia, with one key issue being recruitment and retention of lawyers in these areas.

#### What the LIV has done to date

At the request of the LIV and Northern Territory Law Society the LCA established a Recruitment and Retention of Lawyers Working Group.

The Recruitment and Retention of Legal Practitioners to Rural, Regional and Remote Areas: Discussion Paper, prepared by the LIV on behalf of the working group, identified a range of possible actions by government, the legal profession and employing firms to recruit and retain new and experienced practitioners in RRR areas.

Submissions have been made to the federal Attorney-General and Treasury. In response, the Attorney-General's Department recently approved \$250,000 for the development of a national website, information packages and DVD to promote job vacancies in the regions.

#### Advocacy partners

LCA RRR Working Group; NACLC

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## 5 Reforming Substitute Decision-Making

### The LIV is calling for

- The Victorian government to enact a single, comprehensive law to provide a principled framework for substitute decision-making and a single test for assessment of capacity

### Background to the issue

The ability to determine a person's decision-making capacity is key under current laws which provide for the appointment of another person to "stand in the shoes" of a person who lacks capacity to make their own decisions.

Currently, substitute decision-making is dealt with differently in various pieces of legislation, including:

- *Mental Health Act 1986* (Vic);
- *Guardianship and Administration Act 1986* (Vic);
- *Instruments Act 1958* (Vic); and
- *Medical Treatment Act 1988* (Vic).

The *Mental Health Act 1986* (Vic) is under review by the Department of Health and a new Bill is expected this year. The *Guardianship and Administration Act 1986* (Vic) is currently under review by the VLRC and a final report must be provided to the Attorney-General in 2011. The VPLRC has undertaken a review of powers of attorney.

### What the LIV has done to date

- Made submissions on mental health, guardianship and powers of attorney laws:
  - Arguing that the current approach to the issue of legal capacity in Victoria is fragmented and overly complex.
  - Advocating reform of laws relating to substitute decision-making.
- Hosted a roundtable discussion on capacity law reform (October 2009).

### Advocacy partners

Office of the Public Advocate; Mental Health Legal Centre; VLA

## 6 Providing Access to Interpreters in Civil Matters

### The LIV is calling for

- **Stage One:** A 12-month pilot program to provide interpreters at the legal advice stage of civil proceedings targeting CLCs and practitioners who provide pro bono services
- **Stage Two:** A 12-month pilot program to provide interpreters at the court stage of civil proceedings, particularly in the Magistrates' Court - Stages One and Two could occur in parallel
- **Stage Three:** Building on Stages One and Two, establishment of a grants program to provide civil justice interpreting services in a more specific way

### Background to the issue

In March 2008, the VLRC's Civil Justice Review examined the use of interpreters in Victorian civil litigation. The VLRC found that a language barrier or hearing impairment could cause difficulty in the basic communication required between a litigant and the court, affect access to court services and discourage people from taking their case to court even where they had a good chance of success. The VLRC proposed the establishment of an Interpreting Fund to pay for interpreters in civil proceedings in Victorian courts in appropriate cases.

### What the LIV has done to date

- Following the VLRC's recommendations, the LIV was granted funding by the VLF to undertake the Interpreting Fund Scoping Project.
- The project found that non-English speakers, Indigenous people and those with a speech or hearing difficulty are missing out in the Victorian civil justice system because they are unable to access interpreters.

### Advocacy partners

PILCH; VLA; CLCs, including: Consumer Action Legal Centre; Darebin Community Legal Centre; Fitzroy Legal Service; North Melbourne Community Legal Service; Springvale Monash Legal Service; St Kilda Community Legal Service

## 7 Reforming Tort Law

### The LIV is calling for

Amendment of the *Wrongs Act 1958 (Vic)*, so that:

- The threshold of 5 per cent whole person impairment (WPI) applies to all injuries, other than psychiatric, and is not limited to musculoskeletal injuries under Chapter 3 of the *American Medical Association Guides to the Evaluation of Permanent Impairment* (4th Edition)
- If the threshold for injuries, other than psychiatric, is lowered to 5 per cent (WPI), the effect of the decision in *Mountain Pine Furniture v Taylor* [2007] VSCA 146 is overturned
- The impairment threshold for a primary psychiatric injury is 10 per cent WPI
- In addition to prescribed injuries under s28LF, a narrative test of “significant injury” is included as an alternative means of assessing common law damages for pain and suffering

### Background to the issue

Unlike the WorkCover and TAC schemes, there is no narrative test in the *Wrongs Act 1958 (Vic)* to allow for common law rights for pain and suffering damages. Nor is there a no-fault scheme to act as a safety net for injured persons claiming under the Act.

### What the LIV has done to date

Made confidential written submissions to the Victorian Department of Justice.

### Advocacy partners

Victorian plaintiff law firms

## 8 Ensuring Better Integrity & Anti-Corruption Systems

### The LIV is calling for

- The following safeguards to be part of a new Victorian Integrity and Anti-Corruption Commission to ensure accountability, transparency and independence, consistent with the Charter:
  - Clear and transparent processes for investigations
  - Exercise of coercive investigatory powers only by warrant application to the Supreme Court
  - Special attention to safeguarding the rights of witnesses, including privileges and immunities, presumption of private hearings and a guaranteed right to legal representation

### Background to the issue

In November 2009, the Premier requested that the Public Sector Standards Commissioner, Peter Allen, and Special Commissioner Elizabeth Proust review the efficiency and effectiveness of Victoria’s integrity and anti-corruption system.

The current system includes the Auditor-General, Local Government Investigations and Compliance Inspectorate, the Office of Police Integrity, the Ombudsman and Victoria Police. The government has announced that it will set up a body with sufficient expertise and powers for the investigation of serious corruption in the public service.

### What the LIV has done to date

- Passed a resolution calling for a comprehensive, independent review of current crime and corruption bodies and legislation in Victoria (LIV Council, August 2009).
- Made a submission to the Integrity and Anti-Corruption System Review and met with Elizabeth Proust and Peter Allen to provide further information to the review.
- Supported the Proust Review proposals for a new Victorian Integrity and Anti-Corruption Commission and Integrity Coordination Board.

### Advocacy partners

AMA through the Joint LIV/AMA Medico-Legal Committee

The LIV is the peak body for the legal profession in Victoria and represents the views and interests of over 14,500 members.

## 9 Reforming Stamp Duties

### The LIV is calling for

Amendment to the *Duties Act 2000 (Vic)* to ensure that leases, other than long term leases granting rights akin to freehold ownership, are not dutiable under the Act

#### Background to the issue

In late 2008, the state government announced that duty would be payable on long term leases which confer rights on the lessee akin to freehold ownership. Unfortunately, the wording of the *Duties Amendment Act 2009 (Vic)* has resulted in most leases potentially attracting duty where there is "consideration" other than "rent reserved".

#### What the LIV has done to date

- Made numerous submissions stating that leases other than long-term leases should not be dutiable under the *Duties Act 2000 (Vic)*.
- Liaised with the State Revenue Office to ensure that the administration of all duties legislation is fair, transparent, and accountable.

## 10 Improving privacy protections

### The LIV is calling for

- Government to consider privacy impacts when implementing any new policy initiative and to ensure that matters relating to privacy are easy to use and understand, inexpensive and flexible
- A statutory cause of action for invasions of privacy
- Reform of Victorian laws, such as the *Surveillance Devices Act 1999 (Vic)*, to provide more comprehensive regulation of surveillance practices
- An independent body to oversee and monitor the implementation of those laws

#### Background to the issue

Rapid advances in information, communication, storage, surveillance and other relevant technologies have significant implications for individual privacy. There are gaps in privacy protection and potential discrimination related to the lack of comprehensive regulation and independent review of surveillance practices and the use of material generated by surveillance. Persons have a right not to have their privacy unlawfully or arbitrarily interfered with (see for example, Article 17, International Covenant on Civil and Political Rights).

#### What the LIV has done to date

- Monitored government reforms affecting the right to privacy, including those relating to:
  - Covert means of collecting data by law enforcement agencies and other agencies and organisations
  - Application of privacy principles by and regulation of public and private organisations
  - Use of privacy impact assessments or statements by government and private organisations
  - Protection of health and biometric information
- Lobbied to ensure additional privacy protections in coronial matters were included under the *Coroners Act 2008 (Vic)*.
- Made submissions to the VLRC on privacy (including workplace privacy and public surveillance), to the ALRC inquiry into privacy.

## 11 Moving to a Unified National Legal Profession

### The LIV is calling for

- Continued representation for the legal profession and the ability to contribute to the legislative consultation process
- Implementation of reforms during 2011

### Background to the issue

On 5 February 2009, the Council of Australian Governments (COAG) agreed that further work needed to be done to nationalise regulation of the legal profession in Australia. Regulation of the legal profession remains overly complex and inconsistent, with each state and territory applying different sets of rules.

The specialist National Legal Profession Reform Taskforce was created to make recommendations and prepare draft uniform legislation to form a single national profession regulatory scheme.

A consultative group representing the courts, regulators, consumers and the legal profession, including the LIV, was created to advise and assist the Taskforce.

### What the LIV has done to date

- Continued to help shape a uniform, consistent and sensible system to regulate the practice of law in Australia. The LIV supports the idea that national legal profession reform should create a single national market for legal services, which will simplify and increase the effectiveness of regulation of the legal profession.
- Together with the LCA and Council of Law Societies (COLS), developed a comprehensive and workable co-regulatory model which was submitted to the Taskforce in November 2009.
- Regularly met with the Department of Justice executive director. The LIV is considering the proposed draft legislation and is consulting further with the Taskforce on various issues.

### Advocacy partners

National Legal Profession Reform Taskforce; LCA; Department of Justice

The LIV State Election *Call to the Parties Key Issues* document is part of a larger *Advocating Justice for All* agenda setting out the LIV's platform for change in 2010, and providing an overview of our advocacy work under four key themes: Supporting access to justice; Protecting rights; Advancing government transparency, access and accountability; and Focusing on the future.

This document is available at [www.liv.asn.au](http://www.liv.asn.au).

### Glossary of Terms

ALRC	Australian Law Reform Commission
AMA	Australian Medical Association
CLC	Community Legal Centre
COAG	Council of Australian Governments
CISP	Court Integrated Services Program (Magistrates' Court Victoria)
The Charter	<i>Charter of Human Rights and Responsibilities 2006 (Vic)</i>
LIV	Law Institute of Victoria
LCA	Law Council of Australia
NACLC	Natural Association of Community Legal Centres
PILCH	Public Interest Law Clearing House
RRR	Rural, Regional and Remote [areas]
TAC	Transport Accident Commission
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
VLA	Victoria Legal Aid
VLAf	Victorian Legal Assistance Forum
VLF	Victorian Law Foundation
VLRC	Victorian Law Reform Commission

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