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The Hon. Jill Hennessy
Attorney-General
Level 26, 121 Exhibition St
Melbourne VIC 3000

By email only to: jill.hennessy@parliament.vic.gov.au

Dear Attorney General,

COVID-19 and the Victorian Legal System

The Law Institute of Victoria (**'LIV'**) has been inundated with concerns from our members regarding the impact of COVID-19 on their clients and their own livelihood. We have already received reports of redundancies among the profession, and we can see that sole practitioners are particularly concerned regarding their circumstances. We have been working closely with the Courts to inform their response and are reassured by their stated view that keeping the legal industry operating is a priority.

There are however a number of issues we wish to raise with you that our members have brought to our attention. Please note, we received considerable feedback from members across all practice areas and they are shared with you below.

We should note that there is a combination of suggestions provided. Some of these require immediate attention and resolution, as they relate to the immediate impact of the restrictions, reduced economic activity and implications of financial hardship. Other suggestions are longer term, including recognising the challenges that the present circumstances have exposed and allowing for proper examination of opportunities to be better prepared when we recover from the present pandemic conditions.

The LIV is keen to work with the government and the relevant agencies to ensure that the legal profession and the justice system provide the essential services that we require at this time, and learn from the experience with technological and work practice developments that will serve our community into the future.

Business Support Fund

Whilst we are concerned for the financial independence of all of our members, we are particularly concerned for the financial health of sole legal practitioners. As of November 2019, there are 5,348 sole legal practitioners in Victoria.¹ At present, they are not entitled to receive payroll tax assistance from the

¹ Victorian Legal Services Board, Lawyer Statistics, (Web Page, 18 November 2019) <https://lsbc.vic.gov.au/?page_id=287>

Victorian Government. Sole legal practitioners perform an essential service for the community and so we ask that they be made eligible for the Business Support Fund.

Essential Service Designation

We have been advised that our practitioners would like certainty relating to their status to continue operating, as increasing stages of the response to COVID-19 are announced. Given the advice and assistance that the legal profession is providing their clients and the community more generally at this challenging time, the legal profession seeks confirmation of its status as an 'essential service'. If this status could be confirmed by the Attorney-General, this would bring comfort to a great number of distressed legal professionals and allow for proper business continuity planning.

Practising Certificate Fees & Insurance

The LIV is working with the Victorian Legal Services Board + Commissioner and seeking their consideration on extending the deadline for, or reducing payment of practising certificate fees for practitioners for 2020-21, particularly the principal practising certificate for sole practitioners. We would like your support in creating a flexible arrangement that assists with the challenges faced at this time.

We are also working with the Legal Practitioner Liability Committee (LPLC) on liability insurance and would like your support on seeking stamp duty exemptions.

Court Funding

The LIV, along with the Victorian Bar, believe that priority funding in the legal sector should go to the courts and tribunals that focus on matters of liberty, personal safety and welfare. We believe that these are the Magistrates' Court of Victoria, the County Court Criminal Law jurisdiction, the Children's Court and the Victorian Civil and Administrative Tribunal guardianship jurisdiction.

Moratorium on Housing

The LIV join the calls of the federal opposition to introduce a moratorium to protect mortgage-holders from foreclosure and tenants from eviction, with the exception of situations that involve danger or significant risk if a party or parties remained in the premises. It is our view that the Renting List should only operate to hear urgent application, which should continue to be held remotely. However, where matters are run by telephone, it is our view that VCAT must ensure that there are mechanisms for parties to provide all documentary evidence to VCAT and each other before the hearing. This may be affected by way of requirement that parties file material 24 hours before the hearing.

Urgent applications by landlords may include:

- applications for possession based on danger,
- where a premise is destroyed/unfit for human habitation, or
- where the landlord can show that there is some other matter that needs urgent determination.

Urgent applications by tenants may include:

- applications for urgent restraining orders
- applications for reduction of fixed term tenancies
- family violence applications
- urgent repairs; or
- where the tenant can show that there is some other matter that needs urgent determination.

This needs to be addressed as a matter of urgency. At present, the Victorian Civil and Administrative Tribunal is operating the Renting List to full capacity, listing hearings by telephone. This is putting a large number of people at risk of eviction at a time of high risk.

There is also a need for a moratorium that will prevent any home from having their power, water, gas or phone cut off due to being unable to pay bills due to COVID-19.

Land Tax

As a considerable number of landowners will forgo rental income and/or experience their own job insecurity, the LIV support relief on land tax for landowners for the duration of this health crisis.

Further, premises that are currently vacant are less likely to find a tenant due to restrictions on inspections. This may be exacerbated by the rising number of residential tenants asking to be relieved from their lease after being made redundant. Accordingly, there should also be relief from the vacant residential land tax.

Medical Panel

The Medical Panel has notified that they will cancel all appointments currently booked and not proceed with any more assessments for the time being. They have also stated their intention to explore video-conferencing. The LIV contends that it is both necessary and appropriate for the Medical Panel to proceed operating through video-conferencing assessments. Our members report that a number of psychiatrists are still carrying out assessments using Zoom or Skype without issue. Similarly, some doctors have advised they will carry out some physical examinations using similar technology.

The LIV believe that should the Medical Panel during a video-conference assessment not be able to answer a medical question without an in-person assessment, they should be given the power to deliver a finding stating they need an in-person assessment. Facilitating this will allow matters to proceed.

Guidance on Preserving Evidence

The LIV believes that issues are expected to arise in relation to bedside hearings ('de bene esse') in matters involving terminally ill plaintiffs, for example, in cases of mesothelioma arising from asbestos exposure and cases of delayed diagnosis of cancer. We would be grateful for guidance as to how evidence could be received and preserved whilst minimising social contact with a vulnerable group of plaintiffs.

Moratorium on Termination of WIRC Payments

In relation to the Medical Panels, the LIV are concerned about disputes relating to termination of weekly payments under the *Workplace Injuries Rehabilitation and Compensation Act 2013* (Vic) ('WIRC'). These disputes are referred to the Medical Panels and whilst they are cancelling appointments, a worker would not be able to challenge a termination decision in circumstances where they have a statutory entitlement to do so. The LIV proposes in these circumstances a moratorium on the termination of weekly payments and a review of existing terminations that have not yet been determined by Court or Medical Panel.

Moratorium on Medical Panel Referrals by Defendants and Respondents

In *Wrongs Act 1958* (Vic) matters, referrals to the Medical Panel in relation to the 'significant injury' threshold are made by the Respondent upon receipt of a Certificate of Assessment by an authorised assessor, stating that the Plaintiff reaches the relevant threshold. The threshold must be met before a Plaintiff can recover general damages (pain and suffering/non-economic loss). Cases cannot be resolved until the process has been finalised. The LIV proposes for there to be a temporary moratorium on Medical Panel referrals by Defendants and Respondents, such that service of the Certificate of Assessment made by an authorised assessor is deemed sufficient for a period of time. An additional protective step that may be taken is for the authorised assessor to sign the expert witness code of conduct.

Emergency Legislation to Address Time Limits

There are a significant number of statutes containing time limits, which typically require a party or parties to perform a prescribed act. For example, limits for statutory offers and counter offers and filing of Workcover common law proceedings have strict time limits pursuant to Part 7 of the *Workplace Injuries Rehabilitation and Compensation Act 2013* (Vic). The LIV notes the Courts have minimal discretion to extend time should proceedings, in particular, originating motions, not be issued in time. While the TAC and WorkSafe defendant panel law firms have to date been co-operative and taking a pragmatic approach to time limits, settlement conferences, hearings and trials, the strict time limits are a matter of great concern.

The LIV suggests that emergency legislation be passed that broadly protects parties from the unavoidable violation of time limits prescribed across all Victorian statutes.

Process Servers

As Victoria continues to introduce stricter controls on movement, it is foreseeable that this will interfere with the service of writs by process servers. The LIV recommend that to ensure matters can proceed, the power to make an order for substituted service be relaxed under r 6.10 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) for both the Supreme Court and County Court, r 6.10 of the *Magistrates' Court General Civil Procedure Rules 2010* (Vic) for the Magistrates' Court and r 10.24 of the *Federal Court Rules 2011* (Cth) in the Federal Court. Substituted service should be able to proceed online if the serving party can provide a supporting affidavit that addresses whether the virtual destination is still current for the party to be served and whether there is a clear nexus between the

virtual destination and the party. The determination of substituted service by the Courts should be available via video-conference.

Video-Conferencing to Witness Affidavits

The LIV support the passing of emergency legislation to allow for video-conferencing to witness Affidavits. This has already begun in other jurisdictions. The Federal Court of Australia have introduced such provisions to accommodate remote working arrangements they will accept the filing of unsworn affidavits on the understanding that, if required, these will later be sworn or affirmed when circumstances allow.²

Further, in the recent decision of *Pell v The Queen [2019] VSCA 186* (21 August 2019), the court said that arraigning a jury via video-conferencing was considered 'in the presence of'. There is considerable support amongst our membership for this ambiguity to be clarified by way of legislation to allow for such electronic witnessing in certain circumstances.

Witnessing Signatures

The LIV supports Victoria emulating the *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020* (NSW) proposals for altered arrangements for the signature and witnessing of documents – emergency regulation 29.

*'Enable the making of regulations that may override the provisions of existing acts to prescribe altered arrangements for the signature and witnessing of documents. The regulations may only be made where Parliament is not sitting and is unlikely to sit within two weeks after the regulations are made, and where, in the Minister's opinion, the regulations are in accordance with health advice and reasonable to protect the health, safety and welfare of persons.'*³

The LIV proposes that a video conference be scheduled between a solicitor and a client/deponent. During that call, the deponent either electronically sign a document and immediately email it to the solicitor or physically sign a hard copy document and immediately scans and emails it to the solicitor. The solicitor then co-signs the emailed version of the document.

Independent Assessments in Personal Injury Cases

The LIV supports the use of independent assessments to reduce backlogs in workers compensation matters. This has been a process used by previous Victorian governments in times of dealing with backlogs. An independent assessment panel can be established, consisting of independent solicitors

² Federal Court of Australia, Special Measures in Response to COVID-19 (SMIN-1) 4.2 Signatures on Documents and Affidavits, 23 March 2020 <<https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/smin-1>>.

³ *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020* (NSW), 24 March 2020 <<https://www.lawsociety.com.au/sites/default/files/2020-03/Summary%20-%20COVID-19%20Emergency%20Measures%20Bill.pdf>>

and barristers with considerable TAC and WorkSafe experience, and could ensure that the damages were assessed and where appropriate, expeditiously paid. Many plaintiffs will be unemployed and this would enable vulnerable people to access their entitlements and retain self-sufficiency.

Civil Trials and Technology

The Federal Court is currently piloting a trial with Microsoft Team software to act remotely. This platform may prove appropriate to adopt to the Victorian Courts, to deal with the already significant amount of existing work regarding directions hearings and hearings of straight forward matters. Adjourning matters is not a long-term solution as the consequential backlog will be extraordinary in 2021 and ensuing years. We would ask the Government to explore the effectiveness of such technology to assist with determinations of this type.

Personal Injury Litigation

It is important that personal injury trials proceed, in lieu of juries if required, and that Court ordered mediation proceed. Members practising in personal injury have expressed their clients' distress when reporting that their partner, who since their injury have been the sole breadwinner, has been made redundant or are closing their businesses. These people are already experiencing financial hardship and are being further affected as they face ongoing medical expenses.

Many of these clients are just managing to hold on in the knowledge that they have an upcoming Court ordered mediation or a pending trial date which will move them closer towards receiving the common law damages to which they are entitled. For many, this could be the financial lifeline they desperately require, especially now. As such, it is essential for as many of the current trial dates as possible to be maintained.

Matters currently listed for jury trials should not be adjourned or delayed because juries are not being used, but should be permitted to proceed via video-conferencing as Judge-alone trials. For a trial to be delayed because one party wants a jury, there should be a high threshold as the consequences are significant and the delay is currently indefinite. This should be discussed with the insurers, particularly WorkCover, the TAC and the VMIA.

Macaulay J in his decision of *Mulguiney v Reynolds & Anor [2020] VSC 119* on 16 March 2020 noted the vital importance of the discretion to order that trials be heard as a Cause (by Judge alone) in the current environment. The judicial power in 47.02 of the Supreme Court (General Civil Procedure) Rules should be exercised having regard to the overarching obligations contained in the Civil Procedure Act 2010 - "to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute". Those who were already facing financial hardship, through no fault of their own and prior to the outbreak of this pandemic, should not have the finalisation of their common law matters delayed and face potentially devastating consequences.

Bail

Victorians are presently being asked to avoid all non-essential activity, and moving into stage three restrictions will require even stricter limitations on movement. The LIV therefore believe it is no longer

appropriate for bailed individuals to be reporting to police stations in person. A considerable number of bailed individuals require public transport to perform this duty, which is a heightened risk activity. This requirement puts the bailed individual, the co-habitants of their residence and the police officers in the station at an ongoing risk.

We have heard from the Magistrates' Court that they are exploring bailed individuals being asked to report for bail via some form of video-conferencing such as Facetime, Zoom, Skype or WebX. This raises questions as to how this would operate for those who cannot afford an appropriate device and/or a plan to access the internet to receive the call. Further, it is difficult to ascertain how through video conferencing, a person could be proven to be complying with their bail conditions, particularly if they relate to the person being, or not being, in a certain location at the time. Accordingly, measures that would alleviate the requirement for the identified low risk cohort of bailed individuals should be made available to reduce the need to report in person.

Children's Court Video-Conferencing

In the Children's Court there are no video-conference facilities and teleconference dial-in facilities are in a closed Court internal network. The only option presently is to hold mobile phones up to microphones for practitioners to attend remotely. Until the appropriate resources are assigned to the Children's Court, Child Protection Practitioners will be forced to continue to attend in person in order to properly advocate for their clients. We would ask that more advanced technological opportunities are found for remote attendance and assistance for clients.

Criminal Jury Trials

In addition to concerns of backlog, of greater concern is the liberty of those currently on remand who may be found not guilty at trial. The LIV support the passing of legislation that would allow for an accused Defendant to elect a trial by Judge-alone in the County Court or Supreme Court. This has been an option in NSW for two decades.⁴ These initiatives might reduce the backlog and increase efficiency in the criminal justice system and reduce pressure on the prison system.

Early Prison Releases

The LIV supports Victoria replicating Part 15 of the NSW Government's *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020*, which gives authority to the Commissioner to prohibit entry of particular people or groups of people into prison, if this is necessary to protect the health of inmates or others. The Commissioner can also visit correctional premises during the COVID-19 pandemic and grant parole when appropriate.

Family Violence Preparedness

Isolation is understood to be a high-risk factor for family violence. As such, there needs to be appropriate responses regarding mediation, court access, involvement of DHHS and alternative housing.

⁴ Criminal Procedure Act 1986 s132, 132A and 133

In making court adjournments and interim orders, courts should consider how an order about a child's placement or where a party is going to live, will be affected by lack of government or community support services or reduced staffing. Courts should consider making alternative arrangements for supervised contact given there are likely to be difficulties accessing supervised contact.

Children's Court Permanency Provision

The LIV recommends s294 of the *Children Youth and Families Act 2005* (Vic) be amended to allow the Children's Court to continue making the full range of protection orders in exceptional circumstances, longer than the current timeframes for reunification. As a default it should also be clear that the Court retains this ability where delays are due to the parents be unable to access services or where the hearing is delayed due to COVID-19. This will serve to address the issue of parents accessing support services or having supervised contact with their children during COVID-19 interruptions.

Elder Abuse

As evidenced in overseas countries, and by the unfortunate number of deaths in Australia, older people are particularly affected by COVID-19. Many older people are already heavily dependent on their families. The isolation measures used during this current crisis may amplify that dependence. Sensibly, an older person may not wish to leave their house for fear of infection, thus leaning on the younger members of their families to collect essential items for them. However, given the growing need for isolation, combined with this demographics' high level of dependence, there is the potential for elder abuse or neglect to occur. As people are staying indoors, there is also the chance that this abuse or neglect goes unnoticed for some time. To minimise the chance of this occurring, the LIV submits that the government investigates ways to ensure that older people are supported, throughout this period, by people who are not their immediate family members.

Further, that at the conclusion of this crisis, we suggest that Seniors' Rights Victoria are equipped with resources to deal with any abuse or neglect which may have occurred during this period.

Mental Health

The self-isolation measures are having a profound impact on the mental health of Victorians. It is important that the government continues to inform the public of organisations and support lines which are still operating that provide advice and assistance to those suffering from a mental illness at this time. Moreover, the LIV submits that, at the conclusion of this crisis, the Royal Commission into Mental Health investigate the COVID-19 isolation measures. This is to ensure that, should anything like this happen in the future, the government can be better informed and equipped to deal with any mental health repercussions.

Infringements

At present, the infringements system is still in full operation. Given the resources that are required to enforce and defend a fine, at a time of great financial uncertainty for a large swathe of the population, the LIV recommends a suspension of the priority of the infringement system continuing to operate whilst

the pandemic is ongoing.

Community Legal Centre ('CLC') Resourcing

The LIV has been contacted by CLCs to advise that they are significantly under-resourced, as they are inundated with clients and are struggling to find the resources to transition to an online, remote service. We submit that support be provided to CLCs so they can assist the vulnerable members of the community that turn to CLCs at times like these.

Rural, Remote and Regional (RRR) Access to Justice

The LIV is acutely aware that there is already unmet and pressing legal need for services and assistance to RRR Australians across the State. Specifically, the delivery of legal assistance services are challenged by higher operational costs, workforce challenges and higher levels of disadvantage in RRR areas. Consequently, the current shortages of local legal practitioners will create increased conflict of interest problems, imposing additional cost and distance burdens on residents, who need to travel further to find help, or miss out altogether. This will be further exacerbated by the impact of COVID-19 on the broader economy over the coming months. We ask that the government ensures adequate support to the urgent need for the provision of legal services in Victorian RRR communities who have complex needs and often struggle to access relevant and appropriate information and advice.

Access to LIV Facilities

The LIV would be happy to assist in providing our secure meeting rooms and facilities to assist the Courts with any overflow, should the need arise.

Please feel free to contact us should you wish to discuss any of these issues further.

Yours sincerely,



Sam Pandya
President



Adam Awty
Chief Executive Officer