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22 April 2020

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 Omnibus (Emergency Measures) Bill 2020

Upon review of the Emergency Measures Bill, the LIV are pleased to note that a number of our recommendations from our letters to the Attorney-General (all available on the LIV COVID-19 Hub) have been included in the Bill. This includes amendments to allow for altered arrangements for the signing and witnessing of affidavits and other documents, extension for termination of weekly payments under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), and *Accident Compensation Act 1985*, bail, increased video-links in courts, judge alone trials, and presumption against remanding of vulnerable prisoners.

We are broadly supportive of the proposed Bill and thank Government's efforts to ensure the legal and justice system continues to function efficiently and safely, despite the current circumstances.

We note below some issues for consideration:

Charter of Human Rights and Responsibilities - Override Provisions

The LIV acknowledges that the Charter will not be overridden however clarification is required as to whether the Equal Opportunity Act 2010 (VIC) (EO Act) may be overridden by this Bill. The LIV advocates that the override provision is expanded to include the EO Act to ensure that during the pandemic period, anti-discrimination is protected.

Limitation to Rights

The LIV appreciates that during the COVID-19 emergency, individuals' rights will be limited. However, it is important that any limitation of rights in the Bill are proportionate and justified clearly in the Bill.

The LIV notes that proportionality and the justification of limiting rights are evolving therefore we ask that Government continuously monitors the Bill after it passes to carefully scrutinise whether certain limitations are necessary at any given time.

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The LIV will be monitoring the proportionality of the Bill and are keen to work with the Government to ensure that the infringement on rights is balanced within human rights frameworks and the coronavirus restrictions.

Right to Life – Prison Population

The LIV urges that the Bill recognises the right to life in relation to prisoners' increased vulnerability to COVID-19 as expounded in the s 9 of the Charter. The LIV would like further clarification as to whether the Bill will allow for reduced prison populations. There have been concerns by some members that social distancing measures are unable to be observed in prisons which has an impact on prisoners' right to life. Reducing prison population also ensures that the Bill recognises a prisoner's right to human treatment when deprived of liberty (s 22 Charter). The LIV believes that this is particularly important during the COVID-19 emergency.

Part 3.2—Amendment of Bail Act 1977

Section 34C - Appearing or being brought before a Court

(1) If a provision of this Act requires that a person be brought before a court, that requirement is satisfied by either of the following persons appearing before the court–

(a) a legal practitioner **representing** the person; or

(b) another person empowered by law to appear for the person.

The LIV questions the definition of 'representing'? If a practitioner were on a record representing a person who is subsequently remanded, instructions are presently unable to be taken due to difficulties in accessing clients in the cells. The LIV is concerned this will lead to legal practitioners appearing before the court without instructions from their client. 'Representing' cannot supplant the requirement to have instructions from a client.

An additional concern is when this is read with section 53, which gives the Court the power to remand without consent for not more than eight days. The LIV is concerned how this works in practice. If for example a person was interviewed and remanded, does a list of remandees get given to VLA with the briefs? What assurances will there be given that instructions have been able to be taken? If they are not brought in person or on video-link, then it is foreseeable that some individuals may fall through the system unrepresented.

Section 79C - Court may decide issue without hearing

The LIV supports the proposed amendments of the *Workplace Injury Rehabilitation and Compensation Act 2013* and the *Accident Compensation Act 1985*. The proposed amendments would enable a limited number of long-term injured workers to receive weekly payments of compensation for a longer period than would otherwise apply. This initiative would help by providing support to vulnerable workers who are unable to return to work or who are unable to find employment because of the effect that COVID-19 has had on the community. Additionally, in the context of the COVID-19 crisis the proposed temporary changes to court, tribunal and justice procedural laws generally seem reasonable. However, the LIV is concerned about the proposed section 79C of the *County Court Act 1958*, and

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section 129B of the *Supreme Court Act 1986*. Both state:

> *(1) The court may decide any issue (other than a prescribed issue) in any proceeding, or determine any proceeding (other than a prescribed proceeding), entirely on the basis of written submissions and without the appearance of the parties—*
>
> *(a) if the court is satisfied that it is in the interests of justice to do so; and*
> *(b) whether or not the parties consent to the court doing so.*

It is not clear what 'a prescribed issue' and 'a prescribed proceeding' refer to. Additionally, these provisions confer a broad discretion on the courts to decide any issue, entirely on the basis of written submissions and without the appearance of the parties; whether or not the parties' consent to the court doing so, and some litigants may feel aggrieved that they have been deprived of their "day in court". This contrasts with the proposed judge-alone trials amendment, which requires consent from the defendant. Proceedings held without the parties present raises concerns as it is a difficult balance between its intention to reduce delays; and the risks of encroaching on procedural fairness and requires further consideration.

Part 3.3—Amendment of Children, Youth and Families Act 2005

Section 600N 'Entitlement of person placed in isolation under section S.600M'

S 600M guarantees certain entitlements to the person who is placed in isolation pursuant to s 600M(1) such as:

- isolation must not exceed 14 consecutive days - s 600M(3) (minimum period)
- person in isolation must be closely supervised and receive medical and mental health support and treatment - s 600M(5)(a) & (b).
- access to outdoors and outdoor recreation at least once per day for a period of time – s 600N(1).

The LIV is concerned that s 600M(2) permits those in youth detention to be placed in isolation '*whether or not the person isolated is suspected of having … COVID-19 or any other infectious disease*' & s 600N(3).

The LIV is concerned that this will allow a young person to be placed in isolation without proper justification. The terminology of 'suspected' is too broad to allow a person to be placed in isolation whilst in youth detention without appropriate justification. Further, s 600M(8) allows the Secretary to extend the minimum period in isolation over the 14 day period. In the LIV's view, this provision may be abused in order to keep a child in isolation without proper cause. The LIV recommends that if a child is kept in isolation for a subsequent period over the 14 day minimum period, that the Secretary provide evidence in writing along with supportive material. Alternatively, in accordance with the reporting requirements enumerated in S 6000O and 600T, the LIV recommends the Children's Commissioner be notified of any period of isolation, including periods where entitlements are suspended.

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In the LIV's view, considerations in determining the minimum period of time spent in isolation, pursuant to S 600M(4), should be mandatory by replacing 'may have regard to—' with '*must have regard to*'.

Section 600S 'Requirements relating to attendance at a youth justice unit'

This provision potentially provides the Secretary power to exclude independent visitors, such as the Children's Commissioner from attending a youth justice unit. The LIV recommends the provision be amended to allow the Secretary the 'discretion' to direct the manner in which an independent visitor 'attends' the youth justice centre in the appropriate circumstances or for the purposes of COVID-19.

Section 600U 'Requirements relating to certain interim accommodation proceedings'

The LIV is concerned the operation of this provision may have an unintended consequence of a child being prevented from accessing legal representation where a parent refuses to allow a child to attend court. In these circumstances, this provision may contravene Article 40 of UNCRC (United Convention on the Rights of Child).

The LIV recommends this provision allow the court to compel attendance by the child in order to obtain legal representation in the circumstances where a child's legal guardian is preventing the child from being legally represented.

Section 600X(1)(b) 'Additional methods of service – section 593'

This provision unnecessarily places a heavy burden on practitioners to ensure their clients are notified of their matter should the solicitor be served on the client's behalf. Given the nature of the child protection jurisdiction, solicitors often find it difficult to contact the clients with regards to upcoming court matters. Therefore, should this occur the parent and/or child would not be aware of their matter being listed in Court.

In this instance, the LIV recommends service on legal practitioners should only be accepted if practitioners are willing to accept service on their client's behalf. Additionally, the LIV seeks clarification on the definition of an 'authorised legal representative'.

Section 600ZA 'Requirements relating to bail justices'

The LIV is concerned in the circumstances where a protection application is made by DHHS after 1:00 pm on a Friday, DHHS have sole discretion to deal with the child as they wish (which includes limiting the child's contact with the parents), until the next available business day, being the Monday afterwards in the usual circumstances.

The LIV recommends bail justice hearings occur remotely with the use of audio and/or visual technology, in order to avoid parents and children being subject to the unfettered discretion of DHHS for what is considered by LIV members to be a lengthy period of time.

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Part 2.2—Regulations temporarily modifying law relating to retail leases and non-retail commercial leases and licences

Section 15(1)(g)(iii) – modification of "common law"

The LIV questions whether this is an opportunity for the lowering of the threshold for doctrine of frustration, which permits a tenant to terminate a lease, potentially under a lower threshold then usually required under the common law doctrine.

S.15(1)(i) – 'deeming a provision of the regulations as forming part of an eligible lease'

In the LIV's view, this provision is analogous to implied covenants at common law. The LIV recommends robust stakeholder consultation be undertaken in introducing implied terms in a lease by Regulation.

Section 15(1)(l) – 'requiring landlords and tenants under an eligible lease who are in dispute about the terms of an eligible lease to have a mediation certificate before commencing proceedings in VCAT or a court in relation to the dispute'. There is a minor typographical error in this provision where it states 'requiring **a** landlords and tenants'.

This provision seems to contradict s 15(2)(b). This provision requires a 'mediation certificate' to be produced before commencing VCAT or litigious proceedings, whereas s 15(2)(b) refers to Regulations made under s 15 (1)(l) which must not prevent a landlord/tenant who are in dispute about the terms of an eligible lease from, 'commencing proceedings in a court in relation to that dispute at any time'.

In the LIV's view, injunctive relief ought to be permitted in urgent circumstances. Alternatively, where proceedings are issued without a mediation certificate, the proceedings should not be invalidated where the Small Business Commissioner finds that there is a valid lease and mediation cannot resolve the dispute. As a result, proceedings could not be nullified by the introduction of future Regulations.

Section 15(3)(e) – 'imposing a penalty not exceeding 20 penalty units for a contravention of the regulations'.

The LIV does not support penalty provisions in these circumstances. There seems to be sufficient powers which can be enforced by introduction the relevant Regulations, such as s 15(1)(b), (1)(c) and (1)(d), which limit's the landlord's and/or tenant's legal rights which they usually enjoy under the provisions of the Lease, the *Retail Leases Act* and common law.

Section 17(2) – 'to avoid doubt, any regulations made under section 15 that have retrospective effect are taken always to have had effect on and after the day they took effect'

The LIV seeks clarification on how parties can effectively enforce legal rights prior to Regulations being introduced. That is, if Regulations apply retrospectively, a tenant may be able to enliven the terms of the lease and/or re-negotiate rent relief if a Landlord has pre-emptively terminated for a failure to pay rent, prior to commencement of the Regulations. The LIV queries how landlord's actions will be assessed under the rent relief scheme if a landlord has enforced their legal rights which has adversely impacted the tenant (either by terminating the lease, or seeking recover of default costs), before the introduction of Regulations.

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The LIV recommends that retrospectivity is layered and refers to the WA Bill definition of 'emergency period' be considered (s 3 *Commercial Tenancies (COVID-19 Response) Bill 2020*). The WA Bill operates retrospectively from 30 March 2020. Any actions taken between that date and the commencement of the legislation (such as calling on securities) are not invalidated, but are considered incomplete actions and stayed for the time being.

Additionally, it is not clear why all of the Acts referred to throughout Part 2.2 are vulnerable to new Regulations. That is, to the *Crown Land (Reserves) Act 1978, Land Act 1958, Settled Land Act 1958* and *Transfer of Land Act 1958*.

The LIV would welcome an invitation to be involved in ongoing consultations, in order to provide an opportunity to properly consider and comment on any Regulations introduced pursuant to Part 2.2, once they are made available.

Part 3.13—Amendment of Oaths and Affirmations Act 2018

We are supportive of the proposed temporary amendments to the Oaths and Affirmations Act, to allow for electronic witnessing of affidavits and other documents, referred to under Clauses 3, 3.13 and 4.

We note that clause 4(l) confers power to the Governor in Council to make amendments regarding the *witnessing, execution or signing of legal documents such as affidavits, statutory declarations, deeds, powers of attorney, contracts or agreements, undertakings and wills.*

As highlighted in our Guidance (attached), practitioners seek clarification not only for the witnessing of affidavits and statutory declarations, but also for other testamentary documents flagged in our letter to the Attorney General on 7 April, including wills, deeds, powers of attorney, and medical treatment decision-maker appointments. We understand that Clause 3 under the "Justice Act provision" is defined, followed by Clause 4 which empowers the making of Regulations to change certain aspects of Justice Act provisions.

We note that these clauses propose amendments of various Justice Act provisions via Regulations to be introduced which encompasses all the relevant Acts without naming them in the actual Emergency Measures Bill.

We therefore seek to ensure that the following is made clear in any proposed Regulations:

49C Requirement that a thing be done in the presence of another person

A requirement under this Act that a deponent or an authorised affidavit taker do a thing in relation to an affidavit in each other's presence may be satisfied by the deponent and the authorised affidavit taker doing the thing by means of audio link or audio-visual link.

The LIV recommends making it clear that this applies to the execution of a will.

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There should also be references made to:

- the appointment of a medical treatment decision-maker or supportive decision-maker, or
- the appointment of an advance care directive

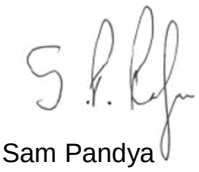
We understand that these appointments are administered by the Health Minister and the relevant legislation is not under a "Justice Act" by definition.

The proposed Regulations must also address Regulation 6 of the *Electronic Transactions (Victoria) Regulations 2010* expressly excludes wills, codicils or any other testamentary instrument that are created, executed or revoked from operation of the s7(1) and division 2, part 2 of the ETA (Vic).

As outlined above, the LIV would welcome an invitation to be involved in ongoing consultations, in order to properly consider and comment on any Regulations introduced, once they are made available. We thank the Government's continued efforts in supporting the legal profession and we will continue to work with Government to ensure the legal and justice system operates efficiently and safely in the COVID-19 environment, and beyond.

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

Yours sincerely,



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