

23 July 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 and the Victorian Legal System

The Law Institute of Victoria ('LIV') continues to be inundated with concerns from our members regarding the impact of COVID-19 on their clients and their own livelihood, particularly since Stage 3 restrictions have been re-imposed. As you are aware, we have been working closely with the Courts and other justice system stakeholders to inform the ongoing impact on the profession and are reassured by your office that keeping the legal industry operating is a priority.

Considering the recent events in Victoria over the past few weeks, there is overwhelming support from the profession that the current *COVID-19 Omnibus (Emergency Measures) Act 2020* and related Regulations be extended at the very least, until the end of the current calendar year. This will create some stability in the legal profession following the significant change that has arisen from the COVID 19 pandemic.

There are however a number of issues we wish to raise with you that our members have brought to our attention. Please note, we have received considerable feedback from members across all multiple practice areas so we have only outlined the key themes today. Some of these require immediate attention and resolution, as they relate to the immediate impact of the restrictions, reduced economic activity and/or implications of financial hardship. Other suggestions are longer term, recognising the challenges that the present circumstances have exposed and allowing for proper examination of opportunities as we recover from the present pandemic conditions. A more detailed outline of these issues will be provided to you in the coming weeks.

VCAT

- Members strongly support VCAT enabling remote hearings post-COVID-19 as an option for residential tenancies matters as a valuable strategy to facilitate access to justice. Members have reported being able to assist clients more easily in regional Victoria through appearing remotely.
- Members stress the importance of VCAT appropriately managing all residential tenancies hearings to ensure that both tenants and their representatives are dialled into hearings and where necessary, and appropriate, strong efforts are made to facilitate access to justice for the most vulnerable Victorians at VCAT.

- Members consider that videoconferencing is the optimal remote hearing facility to provide procedural fairness, which is particularly important in eviction matters involving complex circumstances. For this reason, members recommend that a VCAT guideline be developed, which provides a presumption in relation to remote hearings when a videoconferencing hearing is provided and whether parties should be asked whether they want videoconferencing. Such a guideline would provide a minimum safeguard for procedural fairness. We recommend, this guideline should be in place for the period that VCAT continues to hold remote hearings in the COVID-19 period and, to the extent that remote hearings continue to be available after the COVID-19 period, we recommend that the guideline continue post COVID-19.
- The COVID-19 residential tenancies protections and supports are currently scheduled to end in September this year with the amendments to the *Residential Tenancies Act* ending on 29 September 2020 and the amendments to the regulations ending on 26 September (together, 'the COVID-19 Amendments').
- Members have expressed significant concern about the continuing challenges faced by vulnerable Victorian renters during the lockdown stages as well as the recovery phase.
- LIV members have seen more people facing housing and financial stress, isolation, health problems including mental health and wellbeing, unemployment and justice system interactions, creating a new cohort of 'future homeless' and financially insecure, as well as compounding difficulties experienced by the most disadvantaged clients. Our members consider that if there is a gap in protections, there will be a significant increase in Victorians who are facing eviction into homelessness.
- In this context and with the recent emergence of the second lockdown, we recommend that it is essential for public health and the prevention of homelessness that the COVID-19 amendments continue until 1 January 2021 after which time, the *Residential Tenancies Amendment Act 2018* amendments should commence in-full.

Civil and Commercial Litigation – all jurisdictions

- Continuation of attendance at simple interlocutory hearings such as Directions Hearings remotely via Zoom for both the County Court and Supreme Court. We note that the Magistrate's Court currently uses the Webex platform and VCAT do not currently utilise audio-visual functions at all.
- We recommend that the jurisdictions apply a form of consistent approach to continue the use of audio-visual/remote hearings.
- Further consideration may be needed where technology adopted as part of the temporary measures does not entirely meet requirements – for example, Zoom/ WebEx/ Skype for virtual hearings in a large and complex commercial matter with multiple parties. Technology will need to be continually developed to meet the experience of a full trial (where an in-person hearing is not possible), and there will be a greater need for either further developed or custom-built platforms.
- Members support the continuation of electronic court books for all civil matters heard in the County and Supreme Courts.
- Members support the retention of electronic and split execution of company documents.
- Members support the continuation of witnesses (including the Plaintiff and lay witnesses) to be able to provide evidence remotely if consented to by the parties and/or with Judicial discretion. For Plaintiffs appearing remotely this is highly relevant:

- In regional/circuit areas. As an example, this can mean that a Plaintiff is not required to travel up to four hours to attend Court daily or have the expense of having to pay for accommodation and/or food whilst the Trial is proceeding.
 - For Plaintiffs living overseas or interstate.
 - At the very least, the Plaintiff may attend their Trial or Hearing remotely after giving evidence in person.
- The ability for medical witnesses to appear remotely will save both time and cost. It minimises disruption to a medical witnesses' practice. There will also be the added benefit of reduction of adjournments or delay in hearings due to a medical practitioner's inability to be available to attend Court to give evidence, as they can much more easily and willingly give evidence via Zoom or other electronic platforms from wherever they are located.
 - Moving forward, for witnesses giving evidence remotely, we recommend that a Practice Note be published (similar to the current Practice Note, Common Law Division: arrangements and expectations during coronavirus (COVID-19) restrictions published by the County Court of Victoria) setting out the Court's requirement that the Plaintiff and lay witnesses give evidence either at Counsel's Chambers or the Solicitor's Office, and in other locations, only with the leave of the Court. This will ensure evidence is given in a controlled environment which mirrors the court room as much as possible.
 - Members support the continued ability to hold mediations and judicial mediations remotely.
 - Members are supportive of extending the COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 allowing legal documents, such as wills and powers of attorney, to be signed electronically and witnessed by audio-visual means. A recent poll was conducted by the LIV during an educational webinar on the Regulations, with an audience made up of practitioners in succession law. When asked if the Regulations should become permanent, 59% responded in the affirmative.
 - However, in that same webinar, when asked whether practitioners had remotely witnessed or signed a document since the regulations came into effect, 91% responded in the negative. This reflects similar observations made by the LIV's Practice Support department, with members reporting that the Regulations are overly detailed, difficult to follow, and time consuming.
 - The LIV is also concerned about the potential exploitation of vulnerable people, particularly where this involves elder financial abuse. With remote signing and witnessing, it is more difficult to assess the decision-making capacity of the person signing and whether they are signing freely and voluntarily, which are mandatory legal requirements for anyone witnessing a power of attorney. This places an additional onus on lawyers to fulfil their ethical duties and ensure that the document signing was voluntary and did not lead to an increase in opportunities for elder abuse. If remote witnessing and execution is to be maintained, the Regulations should provide further guidance around Verification of Identity.
 - Members support the permanent retention of civil trials heard by judge alone, however, if a party has requested a trial by jury, this request should be facilitated.

Family law jurisdiction – including Children's Court

- While each court has its own practice directions, the ability to have documents signed electronically by the deponent or the lawyer on record, has significantly increased efficiency in practice. The Federal Circuit Court of Australia (FCCA) and Family Court of Australia (FCA) *Joint Practice*

*Direction 2 of 2020 – Special Measures in Response to COVID-19*¹ has been well received by members and their clients.

- Remote procedural hearings by phone and video link and filing of consent orders to adjourn matters have been valuable for efficiency of the Court and solicitors' time, as it encourages negotiation between parties and minimises the need for clients to wait at Court for the parties to negotiate.
- Members have identified that for completeness and ease, electronic signing should be extended to divorce applications, which the Courts currently still require to be physically signed.
- The ability to deal with matters via Webex in the Children's Court should be retained as it allows the court to more evenly distribute its workload across its pool of available Magistrates as lists fluctuate rather than confine matters to the venue at which they originated. This will reduce delay in decision-making which is inarguably in the best interests of children. Amidst the new lockdown, urgent listings for recovery applications in relation to children needs further consideration.
- A number of subpoenaed documents (Victoria Police, DHHS and medical records) are still currently available for viewing only, which has proved challenging during the pandemic as the Courts have required parties to write to the Registry to schedule an inspection time, attend at court to inspect and dictate the material in person. Members suggest that this challenge be overcome by making all subpoenaed material available electronically.
- Moving matters between courts as per s600W of the *Children, Youth and Families Act 2005*, due to proper venue issues delaying the progression of matters is useful to reduce the time young clients spend on remand. This would reduce delay in decision-making and would be consistent with promoting the best interests of the children.

Criminal Law Section

Members of the Criminal Law Section remain in regular consultation with other justice system stakeholders, including Victoria Police, Office of Public Prosecutions, Corrections Victoria and Victoria Legal Aid. Views outlined below are shared between these stakeholders.

- Members agree that as long as these new practices (judge alone trial / hearings on the papers remain opt in, they are comfortable with its continuation, as feedback on the reduced need for appearances have been positive. Members have also recommended seeking an extension to judge-alone trials for 12 months to reserve our position on them. Once a sufficient amount of matters have been dealt with by judge-alone, a better idea of the efficacy of this process can be attained.
- We are supportive of resumption of jury trials where it safe for Courts, the profession and the community to do so.
- The LIV recommends the continuation of the Online Magistrates' Court (OMC) during the current stage restrictions and the retention of Webex for certain matters, as a means of dealing with the backlog as Victoria's State of Emergency restrictions are eased. Members report that a significant volume of cases can be abridged and dealt with by Magistrates via the Webex platform. Members believe it should be restricted to facilitating uncontested matters such as pleas and bail applications.

¹ Joint Practice Direction 2 of 2020 – Special Measures in Response to COVID-19
<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/rules-and-legislation/practice-directions/2020/jpd022020>

These hearings should be on the condition of the Defendant 'opting-in'. However, a Webex hearing may not be suitable for contests, committals or when there are multiple witnesses, etc.

- In order to achieve efficiency however, some operational issues currently being experienced with the AVL system, will need to be addressed. Many LIV members have reported they face issues on a daily basis with insufficient and overly rigid time allocation on video links. When matters cannot be concluded within the one sitting, it causes significant delay and disruption. It is suggested that there be a degree of flexibility built into the system to allow for expansion or contraction of a matter, as the case requires.
- An increase in the capacity of prisons which are Webex or AVL capable, would also better facilitate online hearings being able to proceed in greater numbers and with more flexibility. A further increase in capacity could be through the recently introduced informant hubs at police stations for bail applications, which may also be used to facilitate AVLs.
- There may be a need to establish 'Webex centers' for persons to attend when they are due to appear in Court. These locations would need appropriate security, cleaning and social distancing measures, and should be within the same catchment areas as the court, accessible via public transport. To ensure an accused has adequate legal advice normally provided through the duty lawyer service, police should provide details of local legal aid offices or community legal centres when releasing persons on bail, or through summons to Webex court locations. For an accused who is unable to attain legal advice before the day of the hearing, there should be advice available either remotely or by phone on the day they attend the Webex kiosk/centre. These Webex centres could also play an important role post COVID, to reduce the overwhelming number of matters in the Magistrates' courts in Victoria, overcoming the need for additional physical courtrooms, as matters could be dealt with by Magistrates in chambers. Primarily, Webex centres could best deal with lower level offences, to prioritise the more serious matters in physical courts where services and resources are available.
- The LIV suggests that the Magistrates' Court can significantly increase its capacity to hear the backlog of cases through a combination of in person and Webex hearings. Presently, Magistrates are rostered week on, week off. It is our understanding that many Magistrates have received training in Webex, and therefore would have the ability to hear cases even when they are not rostered to physically attend at the Court.
- The LIV recommends increasing the use of diversionary mechanisms to reduce the number of people needing to appear before the Courts. This includes broadening the scope of diversions and allowing for Magistrates' to be able to veto police decisions on diversions. Low level offending, exceptional offending, offending which represents a "first time offender" and where a conviction or a finding of guilt would significantly affect a person's employment are routinely being refused at prosecution level which does not allow for judicial review. The LIV encourages a review of the Diversion system with a view to legislative change removing the eligibility for Diversion being dependent alone upon having the consent of the prosecution, instead making it a sentencing option available to the Court.
- The systemic barriers which relate to the management of low level offending and low-level offenders places a further unnecessary burden on limited Court resources and an urgent review or policy shift is required to address these issues and reduce the burden. This can take the shape of a review of low level offending that can be better dealt with by way of a financial penalty or some other form of diversionary jurisprudence.
- Members encourage these current challenges provide a timely review of the Bail amendments as it is the experience of our members that numerous offenders are being held on remand for offences which would not attract a term of imprisonment but place the offender at risk of remand due to the remote ways in which the Bail Act currently operates making the threshold insurmountable for most

low-level offenders. This is having a disproportionate impact upon those who are homeless, who labour under a mental health conditions, drug addicted or are struggling financially to make ends meet.

- In addition to diversions, provisions of additional funding for CISP and other State based programs have been proven to be cost-effective and successful means of reducing reoffending whilst a person is on bail.² Preventing a person from being remanded keeps them out of the Courts, whilst protecting the community and the individual. This will have the effect of reducing the burden experienced by the Court thereby better enabling it to get through the backlog of cases more easily.
- Similarly, the LIV recommends prioritising a return and expansion of the Assessment and Referral Court ('ARC List'). The ARC List is an effective mechanism to assist people with mental illness and/or a cognitive impairment to manage the contributing factors to their offending behaviours. Through expanding the ARC List to all suburban and regional courts (catchment based), relevant matters can be streamlined through the ARC List.
- Based on the extensive research conducted by the LIV for its submission to the Victorian Law Reform Commission's Review into Committal Hearings, the LIV recommends their retention to effectively reduce the backlog in the County Court.³ Committal Hearings filter out weak cases by testing the strength of the Crown's case. When the Crown presents a strong case, often a Defendant will plead – resolving the matter without proceeding to trial. Particularly when the higher courts are dealing with a significant number of trials which have been delayed due to COVID-19 and the mode of re-introduction of jury trials. A case is better resolved with a preliminary testing of the evidence before a judicial officer resulting in a possible discharge of an offender, a plea of guilty or summary plea in the Magistrates' Court. The introduction by the court of the Emergency Case Management system can only complement the committal system rather than replace it. It is a recognition that some judicial intervention is required to define the issues between parties or resolve cases. Additionally, the disclosure and discovery that takes place during a Committal Hearing is an important case management function that results in shorter trials in the higher Court by narrowing the matters in contention. The benefits of holding committal hearings are experienced by the Magistrates Court, the County and Supreme Courts.

Charter of Human Rights

- The LIV supports the Government's approach to ensure that the COVID-19 Omnibus (Emergency Measures) legislation does not override the Charter of Human Rights and Responsibilities and contains safeguards to limit regulation making power.⁴ It is vital that regulations cannot alter or vary the Charter and that the Charter will continue to apply to the interpretation and application of any changes implemented by regulations.
- We support that corresponding Regulations must be consistent with relevant public health advice, and reasonable for responding to or managing the COVID-19 pandemic. Any justification for limiting

² See for example Stuart Ross, Evaluation of the Court Integrated Services Program: Final Report (Web Page, December 2009) https://www.magistratescourt.vic.gov.au/sites/default/files/Default/CISP_Evaluation_Report.pdf

³ Law Institute of Victoria, Submission to the Victorian Law Reform Commission Review into Committals, (Web Page, October 2019) https://www.liv.asn.au/getattachment/Staying-Informed/Submissions/submissions/October-2019/LIV-supports-retaining-and-improving-committal-hea/20191002_LIV_VLRCCommittalReviewFINAL.PDF.aspx

⁴ COVID-19 Omnibus (Emergency Measures) Act 2020 s 5(1)(a).

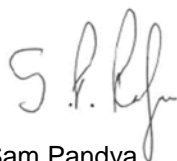
rights should be clearly and regularly re-assessed given the evolving nature of the public health advice.

- The LIV supports robust scrutiny of the operation of the legislation, the ability for either House of Parliament to disallow regulations and provide for sunset of these temporary measures.⁵
- It is vital that lockdowns under the emergency measures directed within specific communities are managed fairly and flexibly to take particular care of people's individual circumstances and vulnerabilities – whether it be disability, mental illness, dependency on drugs and alcohol, or risk of family violence. It must be done with consideration of the needs of Aboriginal people and culturally and linguistically diverse communities. It is also vital that the government facilitates and coordinates access to essential services, including legal assistance, which is crucial to preserving rights during these measures. The rationale for extreme measures needs to be informed as much as possible by public health language and strategies.

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

Please feel free to contact either of us directly, or Gemma Hazmi, General Manager, Policy Advocacy and Professional Standards on ghazmi@liv.asn.au, to discuss any of these matters further

Yours sincerely,



Sam Pandya
President



Adam Awty
Chief Executive Officer

⁵ COVID-19 Omnibus (Emergency Measures) Act 2020 s 10.