

15 September 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,

Roadmap to Recovery and the Victorian Legal System

The Law Institute of Victoria ('LIV') thanks the Attorney for your response to our previous letter dated 23 July 2020 relating to COVID-19 matters and the Victorian legal system and, as promised, we have provided a more detailed outline of these issues below along with some commentary as a means for feedback on what is and is not working well.

The LIV has continued to receive member feedback and concerns across all practice areas and jurisdictions regarding the impact of COVID-19 on their clients and practice. This is understandable given the unprecedented nature of this evolving and contracted health crisis.

We have also included feedback from members on the opportunities and challenges arising from this crisis to assist legal practices and the justice system going forward as Victoria navigates the road to post pandemic recovery.

Support for legal practices

The recent announcements made by government clearly indicate that on the current Roadmap the legal profession, as part of 'offices and professional services' sector, will remain in the current lockdown phase until at least 26 October, continuing to operate under the justice system and court exemptions where relevant.

The LIV is disappointed that there has not been recognition that legal practices need more support to allow them to continue to practise effectively and support their clients and the courts during the continuing COVID-19 Roadmap to reopening. The LIV has been actively advocating on behalf of members and firms throughout the COVID-19 pandemic and, more recently, in relation to the staged resumption of legal practice and the opening of the justice system under the government's proposed Roadmap.

The LIV, however, would like to put on record the support of your office and the Department of Justice and Community Safety in working with the LIV as the profession seeks to support the justice sector during these challenging times.

Throughout industry consultations with government, we have strongly advocated for measures to assist the profession to continue to operate. While we understand and appreciate the need for consistency across the professional services sector, we have respectfully stated that there is a greater level of accountability for the legal profession given lawyers are 'officers of the Court', with the community expectation that lawyers facilitate access to justice and representation. That said, the legal profession overall has transitioned to working from home where practicable to comply with the expectations of government and the Chief Health Officer.

The LIV continues to appreciate and recognise that the government is seeking to manage the delicate balance between public health and economic and social recovery in Victoria.

To that end, the LIV has been working with the Department of Justice and Community Safety to facilitate a workable solution to support the reopening of the justice sector and legal practice. Key areas of advocacy over the last few weeks include:

- childcare arrangements (whether onsite or in home) should be made available to all parents in Victoria, regardless of whether they are "essential" workers or not, to enable more effective delivery of services across the state
- allowance onsite for key operational requirements to enable businesses to operate effectively working from home
- individual practitioners who are the only occupant of an entire building should be able attend those premises, but must be the only person in attendance at the building
- enabling people at risk or in unsafe home environments to go into the office
- clients permitted to attend onsite legal practices where they are unable to access AVL or where there is significant risk or disadvantage to them
- court and tribunal hearings should be conducted remotely unless otherwise directed by a judicial officer – with the caveat that there should be a process for ensuring consistent application across all jurisdictions and all locations across the state
- amend the Stay at Home Directions to allow limited access onsite for key operational requirements to enable businesses to operate effectively remotely where there are no other practical alternatives available (we would envisage this would enable critical activities such as collecting mail, scanning, archiving, shredding documents, non-critical IT etc)
- there needs to be a regional overlay on facilitating all of the above, where practitioners and firms in regional Victoria should be able to move more swiftly through the 'Roadmap' if deemed to be a lower risk and
- to facilitate clearing the backlog, court and tribunal operations should be considered at both regional and metropolitan levels with consideration given to whether regional courts are able to commence some in-person appearances such as trials ahead of metropolitan courts.

The LIV welcomes the recent announcement that childcare will be available to all workers from 28 September.

However, we request that the government urgently:

- amend the work from home directive to allow limited access onsite for key operational requirements to enable businesses to operate effectively from home (assuming no other practical alternative can be found).

We would envisage this would enable such critical activities such as collecting mail, scanning, archiving, shredding documents, non-critical IT, etc

- enable individual practitioners who are the only occupant of the entire building to be able attend that premises
- enable people at risk or in unsafe home environments to be able to go into the office if they are not safe in the home.

The LIV has canvassed the views of around 30 managing partners from the largest law firms in Victoria over the past week to ascertain the volume of personnel required onsite to support key operational requirements to enable businesses to continue to operate effectively working from home under the extended restrictions for offices and professional services organisations.

We received feedback from more than half of those firms. For context, most of these firms would employ between in the hundreds to nearly 800 staff.

On average the firms needed between two and up to 10 FTE operational staff to be able to be on premises to support the business remotely. For smaller firms this may be on a part time basis (i.e. one day a week or one to two days per month and for larger firms three to five days per week).

Based on larger firms at an average six FTEs on premises, this would equate to around 1% or less of their total workforce required in the office to support 99% of staff working from home. We do not consider this unreasonable if the professional services sector remains potentially closed until at least late October.

Key tasks required to be undertaken on premises include:

- printing, scanning shredding and archiving priority matters
- access and distribution of hard copy office-based files, access to titles, powers of attorney and related documentation retained on premises
- distribution of office-based ergonomic furniture to address safety issues for those working from home
- assisting people to work from home by sending them stationary etc
- receiving and sending couriers with key documents
- distributing hardware (i.e. laptops to new starters, clerkships etc)
- access to the office for people who are unsafe or unwell in their home environment
- attendances to protect a time limit due to expire
- IT staff in the office for some standard maintenance and deployment activities (rather than just critical issues like outages)
- individuals running hearings where it is not possible to run those hearings from home
- managing key finance activities such as trust accounts

We will continue to provide advice to and work with the government regarding critical reforms that will allow the justice system to continue to operate effectively through the various stages of the Roadmap.

Further to our letter of 23 July 2020 and your response of 14 September 2020, we outline below specific feedback received from members practising across the State in multiple areas of law.

Criminal justice

1. The LIV supports the continued use of the Webex platform as an effective means of dealing with the significant Court backlogs. The increase in access in prisons and informant hubs at police stations has been well received. Members are particularly supportive of first remands being heard from police stations via Webex and are supportive of plea hearings, bail applications and committal mentions continuing to be heard via the Online Magistrates' Court.
2. The LIV commends the Courts' commitment to deal with matters via Webex in light of the COVID-19 restrictions. However, a number of issues has arisen from the pilot programs in the Sunshine and Melbourne Magistrates' Courts. First, members have noticed that unless they are forced to, their clients often will not choose to have their matters dealt with at an earlier date. Second, unless access to Webex is provided, a large volume of clients are reluctant or unable to use the technology. A possible solution may be to extend the definition of a 'Magistrates' Court' in s3(1) of the *Magistrates' Court Act 1989* (Vic) ('Magistrates' Court Act') to encompass Webex locations. An amendment to s5A of the Magistrates' Court Act that removes the words 'of the Court' would allow the Chief Magistrate to nominate a venue as a mention Court that can facilitate appearances via specified Webex locations. If matters are unable to be resolved and must be listed for a contested hearing, the case could then be transmitted to a 'proper venue' Court.
3. Members have reported the need for 'Webex centres' (colloquially referred to as 'justice hubs') for people to attend when they are due to appear in Court. These centres should be appropriately clean, secure and socially-distanced with Court security present. Legal aid advice should be available via in-person advice or telephone. The need for these centres has arisen following a number of issues raised by practitioners including:
 - family violence victims not feeling safe appearing where the defendant can potentially determine their location from seeing their video
 - clients who do not have the requisite technology, understanding or capacity to use Webex at home
 - clients who live in inappropriate accommodation such as share houses who are unable to appear with an appropriate amount of privacy and free of distractions
 - young defendants not having supervision and therefore misbehaving throughout Court proceedings such filming proceedings and
 - victims and witnesses with no option but to have their children present as they give graphic evidence.
4. The LIV recommends increasing the use of diversionary mechanisms to reduce the number of matters going before the Courts. Victoria Police should be encouraged to increase its discretionary diversion powers. Low level offending, minor bail offences and offending where a finding of guilt would significantly affect a person's employment are routinely being refused diversions at the prosecution level which does not allow for judicial review. The LIV supports a review of the diversion system with a

view to remove the eligibility for diversion from being solely dependent upon having the consent of the prosecution and ideally, eligibility for diversion should be a sentencing option available to the Court.

5. A large volume of matters in the Magistrates' Court system are low-level driving offences that result in the same outcome regardless of submissions made – a good behaviour bond with or without a loss of licence. The LIV believes that the majority of such matters could be dealt with via Traffic Infringement Notices. Through this process, the penalty imposed would be similar to that of a Court – a fine and potential loss of licence – and would set out avenues for seeking legal advice and the consequences of non-compliance. Additionally, a copy of the police summary of the alleged offence should be included and information on how to contest the matter before a Court for if the accused requires.
6. The LIV is concerned that a growing number of people are being held on remand for offences which would either not attract a term of imprisonment or, due to the significant Court backlog, are being held for considerably longer on remand than any sentence they would be given. This is particularly the case for low-level offenders who have been remanded due to minor low-level offending whilst on bail. Often these individuals lose the stabilising elements of their life whilst on remand such as employment, housing and relationships – the loss of which can significantly contribute to reoffending. The LIV recommends a review of the *Bail Act 1977* (Vic) ('Bail Act') to address reducing the number of individuals held for low-level offending who do not pose a significant risk to the community.
7. Members support the continuance of the power of Registrars to abridge or extend an adjournment of a criminal proceeding or bail. This power is contained in s152 of the Magistrates' Court Act. Further, members support the application of s82 of the Magistrates' Court Act upon the expiry of the *COVID-19 Omnibus (Emergency Measures) Act 2020* ('Omnibus Act'). Members do not support the continuance of s153 beyond the current State of Emergency and submit that accused persons should not be remanded for more than eight days without their consent, as per s82 of the Magistrates' Court Act.
8. The LIV supports the provision of additional funding for Court Integrated Service Programs ('CISP') and other State-based programs. These programs have the effect of reducing the burden on Courts, which will enable them to turn their attention to working through the backlog of cases.
9. Additionally, the LIV recommends prioritising the expansion of the Assessment and Referral Court List. Through expanding this List to all suburban and regional Courts, relevant matters can be streamlined.
10. The LIV recommends the retention of committal hearings to actively reduce County Court case backlogs. By testing the strength of the Crown's case, committal hearings help 'filter out' weak cases. Members report that when the Crown presents a strong case, a matter often resolves as a plea before trial. Given the recent ruling in *Re Application for Bail by Biba* [2020] VSC 536 at [31]-[32] determined that the anticipated delay from arrest to trial is at best approximately two years and seven months, it is imperative that all efforts to reduce the volume of pending trials are made. Additionally, the disclosure and discovery that takes place during a committal hearing is an important case management tool that results in shorter trails by narrowing the matters in contention.

11. The LIV wishes to express its reservations to the concept of offering a further reduction for pleading guilty. There is a high level of ethical concern for lawyers to encourage their clients who have an arguable case to enter a guilty plea. Additional questions arise as to whether the 'bargain' factors in COVID-19 related matters, time served, current sentencing guidelines and the Magistrate's approval. Practitioners have reported that they would prefer offers of therapeutic jurisprudence or alternative measures for their clients' matters to be heard efficiently with procedural fairness.
12. The LIV wishes to emphasise the importance of the resumption of education, rehabilitative programs, mental health programs, anger management counselling and alcohol and drug counselling as soon as practicable. The option of resuming some of these services online/via video would be supported. These programs can change the long-term trajectory of prisoners' lives and, as such, should be prioritised.
13. Whilst the LIV appreciates the safety precautions required to address the high rates of COVID-19 positive children and youths arriving at youth detention, there are concerns over the lack of regulation regarding the isolation of children under s600M of the Omnibus Act. If the health directions are that this isolation clause is required in the second Omnibus Bill, the LIV ask that it include definitive requirements for fresh air and exercise, along with a continuation of the observation provisions under s600M(5) and the register under s600M(7) of the *Children, Youth and Families Act 2005* (CYF Act). This requirement should not be able to be overruled by the Secretary, as is presently the case under s600N(3) of the CYF Act.
14. If a Court considers that a special hearing shall be conducted by judge alone, that Court should have regard to submissions by the accused in addition to those of the prosecution. Currently, s101(3) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* only requires the Court to have regard to the submissions of the prosecution.
15. The LIV has been inundated with requests from our members calling for urgent funding support for The Salvation Army Court Chaplin program, following the 28 August 2020 announcement this service will be discontinued in 2020 due to a lack of funding. We have received countless examples of how this program has helped their clients such as driving people to rehabilitation and medical appointments after being released on bail and providing food and a listening ear to lonely and vulnerable people going through the stress of Court. This program has existed since the organisation's foundation in 1890 and we would support funding to ensure it continues.

Civil litigation

1. Members support the continuance of the procedures that enable applications and hearings in Victorian Courts and Tribunals to be conducted remotely.
2. Members support the continuance of remote attendance by the parties at Directions Hearings via Zoom for both the County Court and Supreme Court. Members note that it would be helpful if VCAT could also provide access to Zoom facilities for attendances and appearances.
3. Members support the retention of the Magistrates' Court's ability to deal with Mentions and Directions Hearings on the papers where there is consent between the parties about the next steps in a proceeding. This is particularly helpful for lawyers who are not located in the CBD. Where there is a

dispute about orders, members support the continuance of the Magistrates' Court holding Directions Hearings and Mentions remotely.

4. Members support the retention of remote mediations and judicial mediations.
5. Members support the provision of both electronic Court Books and Jury Books. This removes the need for physical copying of documents, allows amendments to be made easily when needed and makes it easier for experts, clients and Courts to peruse and locate relevant material as needed.
6. Members support the continuance of witnesses' ability to give evidence remotely. This would save time and cost for witnesses, and minimise disruption to medical witnesses' practices, and assists where witnesses have mobility or health conditions impacting their ability to travel.
7. The processes for witnesses giving evidence remotely could be outlined in a Practice Note to sufficiently address the requisite formality required when giving evidence. This could be based on the County Court's Common Law Division Practice Notes dealing with the COVID-19 restrictions.
8. Members support the ability to receive subpoenaed documents electronically from the Court.
9. Where subpoenaed records have been received in hard copy, members support the release of a Practice Note or amendment to the Court Rules for an extension of time to inspect subpoenaed documents given the significantly reduced available appointment times at the County and Supreme Courts to inspect the material has made it difficult to adhere to Court timelines. In addition, despite restrictions, members support skeleton staff being available in the Court Registry to assist in coordinating hard copy subpoenaed material.
10. Members request that the Courts return to the pre-COVID approach of allocating hearing dates for all civil matters issued in the County and Supreme Courts.
11. Members support the retention of the *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*. In particular, members support the electronic witnessing of documents and affidavits. The continuance of these measures allows people who are unable to physically meet with a lawyer or witness to execute documents.
12. The ability to lodge Accident Compensation Conciliation Service requests without a signature from the injured worker does not derive from the COVID-19 'Omnibus' legislation. However, members support the continuance of this power, which would require an amendment to s28(3) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic). Legislation to continue COVID-19 measures may provide an opportunity to make this change.

13. In relation to WorkCover claims, members support an extension of the period for which nine-months' notice must be given to workers prior to a termination of weekly payments at the 130-week stage (as brought into effect by ss60 and 61 of the *COVID-19 Omnibus (Emergency Measures) Act 2020*).
14. In relation to Medical Panels, members support retaining the option of conducting medical assessments and examinations via video-conferencing. Additionally, members support the retention of e-signing and doctors' acceptance of non-original authorities. Members also support the retention of the provision of material to the Medical Panel electronically, such as medical documents and affidavits.
15. In relation to medical expert material, members support the continuance of hospitals and other medical and allied health providers accepting e-signatures from clients in respect of medical authorities.
16. Members seek confirmation and clarity from Government that medico-legal examinations are able to proceed in person where alternative modes of assessment (e.g. video-conference) are not appropriate or available. Members report that there have been a number of matters that have been suspended or delayed where a Plaintiff is unable to be medically-examined resulting in a delay of benefits and compensation being paid.
17. Members support the retention of the capacity to pay the application and copying fees for Freedom of Information requests to Government institutions by Electronic Funds Transfer.
18. Members support the continuance of systems that streamline insurance searches for deregistered entities. These systems were put in place during the COVID-19 lockdowns and remove the need to attend the County Court Registry to search the register.

Family Law

1. The LIV supports the retention of remote procedural hearings via phone and AVL. This is a valuable process and it encourages parties to negotiate.
2. Members support retaining the electronic filing of consent orders to adjourn matters. This will minimise unnecessary Court appearances by parties and save time for both practitioners and the Court.
3. Members support the retention of the LIV member cards that have allowed practitioners to enter Court buildings without going through security screenings.
4. Members are pleased that the Children's Court has been utilising Webex to hear a large number of matters. It allows cases to be heard that would otherwise be administratively adjourned for lengthy periods.
5. Members support the Courts hearing matters electronically once the COVID-19 period ends. The previous system of adjourning all new matters for 12-20 weeks disadvantaged families and children. The electronic hearing of matters would also allow the Court to distribute its workload amongst its pool of available magistrates.

6. Members support the retention of the electronic filing of subpoenas. This is regarded as a significant efficiency improvement.
7. Members support the ability to amend the timeframes for family reunification orders as laid out in the legislation.
8. Members wish to retain the ability to move matters between Courts as per s600W of the CYF Act. This reduces the amount of time clients spend on remand and also reduces the delays in decision-making.
9. Members support the ability to amend the timeframes for family reunification orders as laid out in the legislation.
10. Members recommend further amendments to the CYF Act to remove the statutory timeframes and provide the Court with access to the full range of protective orders. This would enable decisions to be made in the best interests of the child.
11. Members report that clients have faced difficulties with obtaining referrals from DHHS and have experienced long waiting times for support services, such as drug and alcohol counselling and Court-ordered medical assessments.

Commercial and succession law

1. Members support the retention of the electronic and split execution of company documents.
2. Members support the retention of electronic execution and AVL witnessing of the following documents: affidavits, statutory declarations, powers of attorney, agreements, deeds, mortgages and wills.
3. Members support the retention of electronic filing of all documents in Courts and tribunals, including subpoenaed documents. However, some Courts will require upgrades to their digital portals in order for large documents to be uploaded.
4. Members support the retention of conducting simple interlocutory hearings via AVL.
5. Members are supportive of the retention of mediation and settlement conferences conducted via AVL. However, members' support is conditional on the AVL being optional, and dependent upon the consent of all parties.
6. Members support the retention of permitting witnesses residing interstate or overseas to give evidence via AVL.

7. Members do not support the retention of filing of unsworn affidavits. Since the introduction of the Regulations permitting remote execution options, the filing of unsworn affidavits is no longer an appropriate alternative.
8. Members noted that the electronic execution provision for enduring powers of attorney could be extended to the appointment of a medical treatment decision maker. That document is typically executed as a package of succession planning documents, which is usually executed on the understanding that these provisions will only be used as a step of last resort where in-person execution with the client is impossible.
9. Members have expressed the need for some jury trials to return as Victoria progresses through the Roadmap, utilising technology and social-distancing measures under a COVID-19 Safe plan.
10. Members have indicated that there should be some consideration in extending the 24-hour window to complete the process of executing succession planning documents, however they believe this needs further consultation.
11. Multi-party litigation and lengthy hearings involving numerous witnesses can be problematic when not all witnesses have reliable sufficient technology. Alternative options for participation would help to address this problem, such as utilising the above mentioned Webex centres/justice hubs.
12. It would facilitate ease of access to hearings if state and federal courts continue to work towards harmonising their practices, procedures and platforms.
13. Members have suggested that courts could appoint dedicated personnel to manage online hearings and mediations in order to facilitate efficiency in communications with courts regarding listings and adjournments.

Elder, disability & health law

1. A number of LIV members have expressed hope that the new provisions in the Regulations allowing for the electronic signing and witnessing of several legal documents, including wills and powers of attorney, be extended beyond the impending sunset date of 24 October 2020.
2. 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, when asked whether practitioners had remotely witnessed or signed a document since the regulations came into effect, 91% responded in the negative. Moreover, some LIV members have reported difficulties in adhering to the Regulations, with reports that the requirements are time-consuming and burdensome.
3. Members report that there are valid reservations regarding the potential for exploitation of vulnerable persons and elder abuse under the new Regulations. Remote signing and witnessing can make it more difficult to assess the decision-making capacity and free will of the signing party. It is also harder for the witness to ascertain who is involved in a remote signing. This places an extra onus on lawyers to verify that documents were in fact signed voluntarily by the signatory. Considering this contrast, the LIV recommends that the Regulations should remain in place until a suitable law reform and

stakeholder consultation process can be completed and how the Regulations should provide additional safeguards and guidance around the Verification of Identity.

Administrative law and human rights

1. As with all other practice areas, the members practising in this welcome the retention of remote VCAT hearings as an option for residential tenancy matters beyond the COVID-19 period.
2. The LIV recommends that a VCAT guideline be developed that contains a presumption in relation to remote hearings when a video-conferencing hearing is provided. Such a guideline would help to ensure a minimum level of procedural fairness. Ideally, such a guideline would continue throughout the COVID-19 period and be retained after that period.
3. The LIV endorses the Victorian Government's approach to ensure that the Omnibus Act legislation does not override the Victorian Charter of Human Rights and Responsibilities and limits the power to make regulations. Further, the LIV supports the outcome of the extension of the State of Emergency legislation, allowing for parliamentary oversight. A similar approach should be taken for the second COVID-19 Omnibus Bill.
4. The changes introduced by the *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020* ('Residential Tenancies Regulations') have been well received by members. This includes the reinstatement of a tenant's ability to issue a notice of intention to vacate rented premises, as well as retaining the new bases for issuing such a notice under s545(1) of the *Residential Tenancies Act 1997* (Vic.) ('RT Act'). Although members note that further protection should be provided by introducing minimum notice periods in relation to the making of possession orders under ss549(4), 551, 559(4), 561, 569(4), 571, 582(4), 584, 593(4) and 595 of the RTA (taking a similar approach to the introduction of s549(3A) of the RTA). This change is essential to ensure that in the event a possession order is made that tenants and their families are given a minimum timeframe to enable them to find alternative housing.
5. Further, members support the changing of the word 'endangered' under ss549(2)(b), 559(2)(b), 569(2)(b), 582(2)(b) & 593(2)(b) of the RT Act to 'endangers'. This change removes any confusion about whether the 'danger'; needed to be continuing, resulting in more certainty and protection for renters facing a swift procedure to evict them.
6. Members support the prohibition of Compensation Orders (including for rent) being made following a termination under the RT Act. This will protect tenants from unfair compensation orders resulting from leases broken due to COVID-19 related hardship.
7. Members support the retention of measures that protect tenants from eviction if the tenant cannot comply with their obligations due to a 'COVID-19 reason'. It is important that 'COVID-19 reason' is defined broadly to include illness and an inability to comply without suffering severe hardship.

Members consider that illness includes mental illness. These measures are contained in the Omnibus Act and cover tenants' obligations under a tenancy agreement and/or the RT Act. The economic hardship caused by COVID-19 will likely last for many months into the future, along with a weakened jobs market. The difficulties faced by tenants in paying rent are not likely to end with the repeal of the COVID-19 measures.

8. Members support the continuance of the COVID-19 amendments to the RT Act until 1 January 2021. After that date the *Residential Tenancies Amendment Act 2018* amendments will commence in full. Members are concerned that the removal of the COVID-19 amendments in September 2020 will have an adverse effect on those already experiencing financial stress and unemployment. Members are concerned about the prospect of an increase in the number of Victorians facing eviction into homelessness.
9. Members have noted that some tenants are agreeing to rent deferrals rather than rental reductions because they do not know their rights, or they are too fearful to exercise their rights. Not only does this undermine the intent of the legislation to provide financial relief to tenants via rent reductions, but also leaves tenants with an unmanageable rental debt at the end of the agreement or compels a tenant to leave the tenancy to avoid accruing a large rental debt. The LIV recommends a prohibition on rent deferrals.
10. The use of 'Henry VIII' clauses enabling a minister to amend or repeal provisions in an Act should not be extended and the use of such clauses should be regularly reviewed. Expanded use of such clauses will raise public concerns regarding the lack of parliamentary oversight and accountability.
11. It is vital that the lockdowns directed within specific communities are managed fairly in line with people's individual circumstances – whether it be family violence, mental illness, disability or addiction. These lockdowns must be carried out with consideration of the needs of Aboriginal people and culturally or linguistically diverse communities.
12. The LIV supports a detailed Human Rights Certificate and a corresponding statement to accompany the tabling of a second COVID-19 Omnibus Bill.
13. There should be adequate measures to monitor and report on any restrictions on human rights that are caused due to the Victorian Government's COVID-19 response. This includes the following legislation:
 - the policing of directions restricting movement authorised by the Chief Health Officer under ss199 and 200 of the *Public Health and Wellbeing Act 2008* (Vic)
 - section 600M(1) of the *Children, Youth and Families Act 2005* (Vic) which permits isolation for detection, prevention or mitigation of COVID-19 or other infectious diseases for a period not exceeding 14 consecutive days
 - section 153(2) of the *Bail Act*, which enables detention of people for up to eight days before appearance at Court and
 - Part 10B of the *Corrections Act 1986* which permits restrictions on prison visits, mandatory protective quarantine for 14 days for all new prisoners and additional lockdown restrictions.

Property and environmental law

1. The LIV notes that Regulation 42(2) of the *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020* inserted s549(3A) into the RT Act. This amendment means that VCAT cannot specify a termination date under s549(3) that is earlier than any of the dates in s549(3A). However, there are no equivalent minimum notice periods under s549(4) where VCAT makes a termination order and possession order at the same time. This means that where VCAT makes a termination order and a possession order under s549(4), there is no minimum notice period. This is a problematic for vulnerable tenants and increases the risk of evictions into homelessness and as such the LIV recommends that minimum notice periods be introduced in relation to s549(4) of the RT Act.
2. The LIV recommends the minimum notice periods clause be introduced in the context of the following sections of the RT Act where VCAT orders a termination and possession order at the same time:
 - tenancies
 - rooming houses: s559(4)
 - caravans: s569(4)
 - site agreements in Part 4A parks: s582(4)
 - SDA residency agreements: s593(4).
3. Additionally, the LIV notes that if VCAT makes a possession order under ss551, 561, 571, 584 or 595 of the RT Act there is no timeframe for the earliest date on which a tenant must vacate the rented premises. The LIV therefore recommends that minimum notice periods be introduced in relation to possession orders under ss551, 561, 571, 584 and 595 of the RT Act.
4. The LIV notes that the reference to a Notice to Vacate ('NTV') in s569A(1)(d) of the RT Act appears to be a drafting error. Section 569A(1)(d) provides that VCAT must not award any compensation for loss of future rent to the landlord if the landlord served an NTV on the tenant, unless the notice was served because the tenant terminated or repudiated the tenancy agreement. However, an NTV is of no effect under ss544, 556, 566, 577 and 589 of the RT Act.
5. The LIV notes that the protection against liability for breaking a lease under s546(1) of the RT Act (as modified by reg 40 of the *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020*) does not appear to respectively apply to a NTV ordered under s545 (as modified by reg 39). The same issue arises in relation to protection for liability for compensation or lease break fees for site tenants under s579 (as modified by reg 50). To ensure that the protections of ss546/579 are available to a tenant/site tenant who gives a notice to vacate under ss545/578, the LIV recommends the following two amendments to the RT Act:
 - that sub-s(a) of s546(1) and (2) be amended as follows:

'the tenant has given notice of intention to vacate to the landlord under Subdivision 3 of Division 1 of Part 6 or section 545.'

- that sub-s(a) of s579(1) and (2) be amended as follows:

'the tenant has given notice of intention to vacate to the site owner under Subdivision 3 of Division 1 of Part 6 or section 578.'

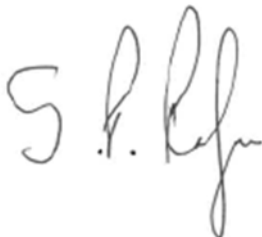
6. Members have reported that when representing clients at VCAT during COVID-19 restrictions, some lawyers were not dialed in to eviction hearings where they were representing highly at-risk clients. The LIV has also received feedback from Justice Connect that it appears that Consumer Affairs Victoria ('CAV') has been exercising discretion regarding whether a party can have legal representation in matters involving the Residential Tenancies Dispute Resolution Scheme ('RTDRS'). According to guidelines issued by the CAV "an advocate, such as a legal adviser or financial counsellor, can act on behalf of the tenant with appropriate authority". However, the same guidelines provide that representation will be considered on a case by case basis. These conflicting statements have caused confusion for some RTDRS users. The LIV recommends that tenants be automatically entitled to legal representation in RTDRS matters if they choose to do so, as opposed to CAV having discretion over whether tenants may have legal representation. This recommendation is made in view of the longstanding power imbalance between tenants and landlords, which has been heightened both by the COVID-19 pandemic and the entitlement of landlords to be represented by real estate agents through the RTDRS.

We hope the above feedback has been of assistance.

The LIV is keen to continue working with government and relevant agencies to provide feedback and learn from members' experiences with technological and work practice developments, to ensure that the legal profession and the justice system continues to provide essential services for the community during the State's Roadmap to recovery, and into the future.

Please feel free to contact either us to discuss any of these matters further.

Yours sincerely



Sam Pandya
President



Adam Awty
Chief Executive