

CLIENT NEWS

A FREE QUARTERLY LEGAL UPDATE 3RD QUARTER 2008

IN THE DRIVER'S SEAT

Getting your driver's licence in Victoria has never been harder. Gone are the days of just driving a few laps around the block and showing you can reverse, do a three-point turn and park on a hill.

From 1 July 2008, the rules changed.

Learning to drive a vehicle – and stay in control of it – is not easy, a fact to which the road toll bears testament. The new licensing rules are actually good news for all road users, with today's young drivers among the best prepared to venture onto our roads.

Learner drivers must now be on their learner's permit for a year and need at least 120 hours of supervised driving experience – with a log book to verify they've done the time – if they apply for their probationary licence before they turn 21.

Once "P-platers" gain their licence, they are barred from using mobile phones (even "hands free"), and are restricted in the types of high-powered vehicles they can drive and the number of passengers they can carry. In addition, alcohol interlocking devices are now fitted to the cars of first-time drink-driving offenders under 26 years old, or those on their P-plates.

These measures are all part of the Graduated Licensing System, introduced by the Victorian government last year, in a bid to slash the road toll statistics among 18-25 year-olds. Support programs have also been introduced for new drivers, supervising drivers and driving instructors to bolster the new measures and help improve the quality of driving instruction.

From July, the new two-tiered probationary licence system began, extending the probationary licence period from three to four years. An improved 50-minute driving test will also be introduced, with the on road component taking 30 minutes.

VicRoads will also start checking the logbooks of learners for probationary licence applicants under 21 who obtained their learner permit on or after 1 July 2007.

Probationary drivers will have their P1 (red plate) for one year before moving onto their P2 (green plate) for a further three years. The probationary period will be extended for those who commit certain offences.

Probationary drivers aged under 21 when first licensed will have a minimum of 12 months on a P1 licence, and all mobile phone use is banned and a restriction on towing applies (unless it is for work or the P1 driver is under instruction). A P1 driver will only be allowed to carry one passenger aged between 16 to 21. Probationary drivers who are 21 or older when first licensed will move directly to a P2 licence.

Both P1 and P2 licence holders will also be subject to new restrictions on driving high powered cars and will need a good driving record to graduate to the next type of licence.

If a P1 or P2 licence is suspended as a result of a driving offence, accumulation of demerit points, or a penalty imposed by a court, the probationary period will be extended for a further six months plus the suspension period.

The measures are designed to help reduce the number of serious crashes involving young drivers. According to Victorian road toll statistics, one third of the road toll results from crashes involving 18-25 year old drivers. More young people die from road crashes than from any other cause.

The 120 hour driving requirement (which includes 10 hours at night), 12-month minimum learner period and P1 licence applies to people aged under 21 because 90 per cent of first-year P drivers who crash are in this age group. The Victorian government claims there is consistent, scientific evidence that the measures will have a positive effect on safety, based on what has previously happened in Victoria, other Australian states, New Zealand, parts of Canada and the US.

In August 2005, the Victorian government released a discussion paper for public comment on suggested initiatives to reduce young driver road trauma and proposals for a new licensing system. The Law Institute of Victoria (LIV) generally supported the proposals outlined



in the discussion paper, but argued a licensing stage that dealt directly with night driving and passenger restrictions was warranted. It also suggested learner drivers qualify for free use of public transport at night when driving restrictions applied.

It also argued that incentives other than time discounts should be considered to encourage new drivers to undertake driver education courses. These could include reductions or rebates on application fees for licence progression. The LIV also warned that confiscating a vehicle from a driver in regional Victoria could have a far greater impact than a similar order in metropolitan Melbourne. It suggested that the power to make such an order needs to remain with the courts and not be available at first instance to the police. ■

More information

Useful website

VicRoads www.vicroads.vic.gov.au

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COMMUNITY FEELING

Lawyers in Victoria have a long history of providing free and low-cost legal services to disadvantaged people.

In a recent national survey by the National Pro Bono Resource Centre, Victorian lawyers showed the most widespread support for pro bono work, with 84 per cent of respondents indicating that they had undertaken pro bono legal work in the 12 months before the survey, compared with 80 per cent of all respondents across Australia.

The key motivations cited for undertaking pro bono were to help the disadvantaged and a keen sense of professional responsibility.

Any discussion focused on legal bills also ignores the important role played by lawyers in community legal centres (CLCs) and the legal aid system in helping to attain equal access to justice for all.

Many lawyers regularly contribute to law reform through their firm's involvement with CLCs and other pro bono service providers, as well as through their own individual efforts

as volunteers in many areas. Yet, the general public remains largely unaware of the law reform work undertaken in this area, work which has improved a wide range of laws and the way they are administered in Australia.

The role of CLCs in law reform is considered important because they often represent the marginalised members of the community who don't have the necessary power or resources to generate effective change themselves.

Recent research reveals that CLCs, through their casework and experience, have been able to target laws and policies that negatively affect their clients and have influenced changes that have directly improved the justice system.

Collectively, CLCs continue to be active in reforming the law in particular areas, including "indefinite detention", the effect of social welfare reforms on the poor, and the rights of victims in the justice system.

Similarly, CLCs continue to target improved

conditions for asylum seekers in detention, more effective regulation of loan sharks, protection for the rights of tenants in public housing, and the monitoring of energy regulation.

Despite this valuable and successful work, CLCs are currently facing major problems as a result of the reduced availability of legal aid and a severe lack of financial support and resources.

The LIV has declared that the federal government's one-off \$7 million funding announced for legal aid in the May federal Budget does not go far enough.

It has supported Victoria Legal Aid's (VLA) request for federal funding of an extra \$10 million a year to sustain family law services in Victoria. Instead, VLA is set to receive a one-off injection of \$1.9 million, as part of the \$7 million funding package outlined in April. ■

More information

Useful websites

Federation of Community Legal Centres at www.communitylaw.org.au/fedclc.

VLA at www.legalaid.vic.gov.au.



CHARTING THE CHARTER

Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the *Charter*) has kept the state's lawyers busy fighting for the rights of their clients.

Since January this year, human rights issues arising under the *Charter* can be raised in courts and tribunals. The decisions and actions of "public authorities" are also subject to the *Charter* and can potentially have a far-reaching impact on Victorian society.

The *Charter* sets out more than 20 rights under the principles of freedom, respect, equality and dignity. They include the right to vote, freedom of expression and religion, the right to a fair trial and a right to privacy.

Victorian government departments and other "public authorities", such as local councils and the Victoria Police, are now required to take human rights into consideration when making any laws or policies, providing any service, or taking any action. Sub-s 38(1) of the Act states "*It is unlawful for a public authority to act in a way that is incompatible with a human right*

or, in making a decision, to fail to give proper consideration to a relevant human right".

A tenant in community housing recently used the *Charter* to successfully challenge an eviction notice. The notice, which did not contain any reasons for the eviction, required the tenant, who was a pregnant single mother of two young children, to vacate her home within 120 days. The PILCH Homeless Persons' Legal Clinic (HPLC), which took the case to the Victorian Civil and Administrative Tribunal (VCAT), argued that the landlord was subject to the *Charter*. The landlord was a registered housing association that provides community housing to low-income Victorians on behalf of a local council with the assistance of considerable public funding and therefore came within the definition of "public authority" under the *Charter*. Appearing before VCAT, the HPLC submitted that the landlord's actions amounted to an eviction into homelessness and were incompatible with the tenant's and her children's rights to privacy, family, the

home and to life as defined by the *Charter*.

Under the *Residential Tenancies Act 1997* (Vic) (*RTA*), a landlord can serve a 120-day Notice to Vacate without providing reasons. However, landlords are now required to interpret their rights under the *RTA* in a way that is compatible with the *Charter*.

The HPLC filed substantial written submissions and sought an urgent injunction preventing the eviction. The landlord subsequently withdrew the notice, resulting in the family being able to stay in their home.

The Human Rights Law Resource Centre describes the case as "a great example of how the *Charter* can be used to ensure that legislation and powers are interpreted and applied compatibly with rights so as to address disadvantage, ensure accountability and promote human dignity". ■

More information

From the LIV Bookshop

An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities. By Pound & Evans. \$95.

CARING FOR THE ELDERLY

Be nice to your children because they will choose your nursing home. Or they might end up your full-time home carer, given the increasing aversion to institutional care among Australian families.

Jokes aside, the question about who will care for the growing aged population, and how that care will be delivered is one on which legal professionals in the elder law practice area are increasingly focused.

Lawyer David Davis told the Law Institute of Victoria's Elder Law conference in June that there was a growing need for well thought-out legal guidelines to support the many families who chose to care for an elderly relative.

"There is a need for a coherent and structured process to safeguard the security of not only the elderly in need of care, but also the caregivers," he told the conference. Many people make "family agreements" that typically involve the transfer of property or other assets by an elderly person in exchange for care by another family member. Most commonly, agreements are between a parent and a child. Many of these agreements break down, causing homes or life savings to be lost and relationships to be destroyed.

There are several reasons for the rise in these agreements, including limited access to residential aged care and a desire by older people to remain in the community. Others are reluctant to sell the family home to pay for an aged care place or may wish to maintain

their eligibility for social security benefits.

At the same time, high workforce participation and high debt levels have made it harder for adult children to give up work or cut back on their hours to care for their parents. Mr Davis says people who are more likely to use family agreements will have their family home as their only asset, and little or no cash flow, aside from a pension, to pay for care.

Caregivers can also be vulnerable where there is no binding contract. An elderly parent's failing health can place demands on the caregiver which are far greater than first envisaged. There are also occasions where the transfer of assets is challenged by the estate after the death of the senior.

This is compounded by the fact that family agreements are almost always made orally and without legal advice, are usually in broad terms and lack detail.

Many families have a psychological barrier to formalising such agreements as a binding contract. They believe trust should be enough but fail to consider the dire consequences, such as the non-return of money, should the arrangements fail.

Mr Davis believes a national legislative system setting out procedures and guidelines for such agreements, including a coordinated court response to resolving breaches, would be a welcome addition.

In the meantime, consult your lawyer before taking on any commitment to "care for life". ■



More information

From the LIV Bookshop

Older Residents and the Law: Accommodation, Care and Legal Rights in Victoria (2nd ed). By Robert Phillips. \$49.95.

A WORK IN PROGRESS

Industrial Relations laws are changing. First there was "WorkChoices" – now we have "Forward with Fairness".

In March, the federal parliament passed the *Workplace Relations Amendment (Transition to Forward With Fairness) Act 2008* which bans future Australian Workplace Agreements (AWAs), phases out existing AWAs by 2013, and introduces interim individual transitional employment agreements (ITEAs). A more substantial workplace relations Bill will be introduced in Parliament this year and it is expected that the Government's new system will be fully operational by 1 January 2010.

Forward with Fairness will override some changes introduced under WorkChoices in 2006, but not all. It will maintain the federal industrial relations system introduced by WorkChoices.

The new IR platform is based on six key elements:

- a uniform national industrial relations system;
- the creation of a new industrial "one stop shop" called Fair Work Australia which will provide information, advice and assistance to settle disputes and ensure compliance with the new laws;
- the introduction of a safety net of 10 National Employment Standards including hours of work and parental leave, plus up to 10 further minimum conditions enshrined in awards which will provide a base for collective bargaining;
- collective rather than individual bargaining;
- retention of industrial action rules; and
- expansion of the unfair dismissal jurisdiction.

The changes have several implications for employers and employees. The new ITEAs are designed to be a workable alternative to AWAs over the next two years for employers who use individual statutory agreements. Employers who don't want to collectively

bargain with a union will continue to be able to offer employee collective agreements for up to five years.

The new Act replaces the "fairness test" with a "no-disadvantage test", which is administered by the Workplace Authority Director. The director will determine whether an agreement maintains an employee's overall terms and conditions of employment.

The new Federal Government's industrial relations reform continues to be rolled out. It is important that employers and employees keep up with their rights and responsibilities. ■

More information

Useful website

For more information on liquor licensing and control visit the liquor section of the Consumer Affairs Victoria website www.consumer.vic.gov.au

From the LIV Bookshop

Stewart's Guide to Employment Law by Andrew Stewart. \$60.



A WAY OUT OF TROUBLE

of Victoria, with the Victoria Police, piloted the CJDP at Broadmeadows Magistrates' Court. Senior police, the courts and the legal profession then reviewed the pilot and came up with a revised scheme that was introduced at Broadmeadows and Heidelberg Courts in November 2000.

Now available at all Magistrates' Courts, CJDP is aimed at people for whom early intervention may bring about positive lifestyle changes and a reduction in the likelihood of them re-offending.

Prior convictions do not automatically disqualify an offender from the program, but they are considered when an application to enter CJDP is made. However, offences punishable by a minimum or fixed sentence or penalty are not appropriate for the program.

Anyone can seek the application of CJDP during the court process, but it requires the consent of the prosecution in each case.

Before appearing before a magistrate, a diversion coordinator will interview the defendant to identify the major issues and to come up with a suggested outcome.

Victims may be asked to provide information, including the amount of compensation being sought for property damage and whether an apology from the

person charged would be of value.

To be eligible, the defendant must admit the facts and take responsibility for their actions. The offence itself must be one that is triable summarily, and there must be sufficient evidence to gain a conviction. CJDP must also be considered appropriate in the circumstances.

At the diversion hearing the magistrate will assess the suitability of the offender for CJDP and a diversion plan will be drawn up. The plan may require the offender to apologise to and compensate the victim, attend counselling or treatment, help with local community projects or attend road trauma awareness programs or defensive driving courses.

The magistrate can adjourn criminal proceedings for up to 12 months to allow the defendant to participate in a CJDP.

If the conditions of the CJDP plan are satisfied, the charges against the offender are discharged and the outcome is recorded in a similar way as a caution. It will not appear as part of a formal criminal record, is not available to employers, and cannot be alleged as a prior offence.

If the conditions are not met, the matter is referred back to the court as if it was being initially listed for hearing and all the information regarding CJDP is removed from the file. ■

More information

Useful website

Court Support and Diversion Services
www.magistratescourt.vic.gov.au

In trouble with the police? Worried about what a criminal record might mean? Or perhaps someone you know is about to face court for the first time.

You may already have sought legal advice, but did you and your lawyer discuss the Criminal Justice Diversion Program (CJDP), which offers offenders an alternative to a criminal record?

Under CJDP, offenders are offered the opportunity to avoid a criminal record by undertaking court sanctioned conditions designed to help both the offender, the victim and, ultimately, benefit the wider community.

CJDP is designed to break the cycle of crime by keeping offenders out of the formal court system, avoiding first criminal convictions, aiding offenders' rehabilitation, offering better access to community resources for counselling or treatment and making sure appropriate reparation is made to victims of crime.

In January 1997, the Magistrates' Court

AVOID THE LEGAL PITFALLS

Information session for small business

Thursday, 14 August, 3-5.30pm

Email events@liv.asn.au

Ph (03) 9607 9504

Web www.liv.asn.au/events/calendar/SmallBusiness08.pdf

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