

10 November 2004

Dr Jacqueline Goodall
Legislation and Policy Officer
Legislation Review
Public Health
Department of Human Services
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By email jacqueline.goodall@dhs.vic.gov.au

Dear Dr Goodall

Review of the **Health Act 1958** (Vic)

The Law Institute of Victoria (**LIV**) is pleased to have the opportunity to respond to the issues raised by the review of the **Health Act 1958** (Vic) (**Health Act Review**). A working party of members from the LIV's Health Law & Health Law Exchange Committee (**Working Party**) has prepared the attached submission for your review and consideration.

The LIV's comments on specific aspects of the review are noted in the attached submission. In summary, the major issues for comment identified in the submission relate to:

- (a) the proposed new statutory duty not to undertake activity which may result in harm to the health of another person (Issue 30);
- (b) the proposed new offence of causing a risk to health arising from the above proposed statutory duty; and
- (c) issues surrounding the testing of persons who may be infected with a specified infectious disease (Issues 83 and 84).

Specifically, the LIV has not commented on issues relating to health laws and regulations affecting local government and municipal councils. Comments to which the LIV has not provided a response are indicated by 'No Comment' in the attached submission.

The LIV's submission retains the same layout as that provided in the list of issues for comment provided by the Department of Human Services for ease of reference.

1. New statutory duty not to undertake harmful activities

The LIV opposes the creation of a new statutory duty not to undertake activity that may result in harm to the health of another person unless all reasonable and practicable measures to prevent the possibility of harm have been taken.

The LIV believes that this formulation is too wide and uncertain. Many things may have an adverse impact on health and it would be preferable to target such harmful activities directly rather than through the creation of a general duty.

2. New offence of causing risk to health

The LIV has concerns about the proposed creation of a new offence of causing a risk to health in relation to the new statutory duty with respect to harmful activities. The LIV submits that the proposed offence is exceptionally broad, uncertain and does not depend on actual harm having occurred. Further, the proposed defences are inadequate. It is not clear what level of systems or safeguards would be required to be in place to sustain the defence. The examples given in the Discussion Paper of the proposed scope of the offence demonstrate the potentially wide range of activities that could be expanded to catch other undesirable activities. It is our view that it is better to deal directly with, and regulate, potentially harmful activities.

3. Compulsory testing

In relation to the compulsory testing of an individual for specified infectious diseases where an incident has occurred involving a caregiver or custodian, members of the Working Party held differing views.

The majority of members hold the view that the proposed **Health (Testing Orders) Bill** is adequate to cover the situation of the non-competent patient. The Bill would allow for the CEO of a hospital to introduce a system for the authorisation of non-consensual testing with post-testing counselling. The LIV supports the position that this person should be the designated officer under the **Human Tissues Act**.

A minority of members do not support the above approach on civil libertarian grounds.

A further view expressed holds that these specified infectious diseases should not be treated separately to other infectious diseases.

The LIV would appreciate feedback from Department of Human Services on its submission and would also welcome the opportunity to provide follow up advice to the Department or participate in their public consultations on issues raised in its submission.

If you would like to discuss any of the matters raised please do not hesitate to contact me on 03 9607 9311 or Jo Kummrow, Research Solicitor on 9607 9385 (jkummrow@liv.asn.au).

Yours sincerely



Christopher Dale
President