

# Senate Select Committee on COVID-19

18 June 2020

## NSW Young Lawyers Submission

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## **The NSW Young Lawyers Communications, Entertainment and Technology Law Committee; Human Rights Committee; Property Law Committee; Public Law and Government Committee; and Taxation Law Committee ('the Committees') make the following submission in response to the Senate Select Committee on COVID-19.**

### **NSW Young Lawyers**

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Communications, Entertainment and Technology Law Committee of NSW Young Lawyers aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to information and communication technology (including technology affecting legal practice), intellectual property, advertising and consumer protection, confidential information and privacy, entertainment, and the media. As innovation inevitably challenges custom, the Communications, Entertainment and Technology Law Committee promotes forward thinking, particularly about the shape of the law and the legal profession.

The NSW Young Lawyers Human Rights Committee comprises a group of over 1,200 members interested in human rights law, drawn from lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law, as well as barristers and law students. The objectives of the Human Rights Committee are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights and their application under both domestic and international law. Members of the Human Rights Committee share a commitment to effectively promoting and protecting human rights and to examining legal avenues for doing so. The Human Rights Committee takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and its development and support.

The NSW Young Lawyers Property Law Committee comprises members interested in all aspects of property law. The Property Law Committee coordinates property-related Continuing Professional Development Programs and keep property practitioners informed by providing regular information bulletins regarding legislative changes, important judicial decisions and current matters of interest in the property industry. The Property Law Committee also provides a networking platform for students and lawyers working across all aspects of property law.

The NSW Young Lawyers Public Law and Government Committee comprises over 1,000 members who include a range of practicing lawyers from the public and private sectors, barristers and law students. The Public Law and Government Committee aims to educate members of the legal profession, and the wider community, about developments in public law and to provide a social environment for young lawyers to develop their skills. The Public Law and Government Committee's areas of interest include, but are not limited to, administrative and constitutional law and the work of government lawyers.

The NSW Young Lawyers Taxation Law Committee consists of tax practitioners from a broad range of organisations including law firms, accounting firms, corporates and the Australian Taxation Office. The Committee covers all aspects of Federal and State taxation, with a primary focus on income tax, GST and stamp duty. The Committee also examines issues relating to Australian international taxation (including tax treaties), superannuation, tax administration, land tax and payroll tax.

## Summary of Observations and Recommendations

The Committees wish to acknowledge the challenging work done by lawmakers in historic and unprecedented circumstances, recognising the many obstacles and pressures therein.

In short, the Committees make the following observations and recommendations in respect of the Select Committee's Terms of Reference:

1. **Tenancy Code:** There was a substantial delay between the Federal Government's announcement as to the proposed "national" tenancy code and the changes being enacted in NSW. This delay could have been mitigated by accompanying the announcement with model legislation, and future national codes of that kind should be accompanied by such model legislation wherever possible.
2. **JobKeeper payment scheme and other tax measures:** The duration of the JobKeeper scheme and other tax relief should be extended, at least for particularly affected industries, and businesses deemed eligible for JobKeeper under the Commissioner of Taxation's discretion should also be deemed eligible for other relief (such as in respect of leases) that is available to JobKeeper-eligible businesses.
3. **Section 127 execution:** For the 6 month period beginning on 6 May 2020 is it now possible for companies to execute documents electronically pursuant to the Corporations Act 2001 (Cth). This was an overdue change and should be kept after the pandemic period.
4. **FIRB changes:** FIRB changes came into force by Treasurer announcement on 29 March 2020, however, the actual legislation/guidance notes were not released for approximately 1 month after. Where future changes are to be made, legislation and/or guidance notes should be released promptly.
5. **Arrangements made with Amazon Web Services regarding the COVIDSafe Application (COVIDSafe App):** In keeping with the recommendation of the Department of Health Privacy Impact Statement at Recommendation 16, the Australian Government should provide further detail of its arrangements made with Amazon Web Services.
6. **The release of technical information regarding the COVIDSafe App:** The Committees support the release of technical information about the application, including source code (as has occurred), this should be continued for any further iterations of the app.

7. **A public standard for de-identification of COVIDSafe App data:** The Committees submit that a public standard of de-identification, and a clear right to the deletion of a user's data at their request, is necessary for the consistent protection of the privacy rights of users.
8. **Online education and healthcare:** The switch to online learning and online provision of health services potentially leaves some people with disability or those without adequate access to technology behind. The Committees submit that the Australian Government should review regulations and policies to ensure adequate access for all.
9. **Migrants' wellbeing:** Temporary migrants in Australia without access to services such as Medicare and financial assistance (i.e. JobKeeper programs) may be left destitute, which could be discriminatory and a failure by the government to provide adequate care and support for those people. The Committees submit that the Australian Government should allow concessions for temporary migrants to access certain public services and benefits, including the JobKeeper scheme if it is extended.
10. **Persons in immigration detention:** The Committees note concerns regarding the welfare of persons in immigration detention, including access to healthcare and pandemic prevention in crowded living conditions that create significant COVID-19 transmission risks. The Committees recommend that the Australian Government release into the community those detainees that may be safely released to reduce this risk. The Committees recommend the Australian Government effects prompt medical transfers of people seeking asylum from Papua New Guinea and Nauru to Australia noting the risk of COVID-19 and the limited availability of medical care in these countries.
11. **Conditions 8107 and 8607 of Schedule 8 of the Migration Regulations 1994 (Cth):** The Committees submit that conditions 8107 and 8607 should be temporarily relaxed.
12. **Visas 417, 462, 485, and 500:** The Committees submit that expiry dates for these temporary visas should be extended if their visa period fully or partially overlaps with the COVID-19 lockdown period.
13. **Racism and social cohesion:** The Committees express concern with the spread of COVID-19-related racism in Australia, the lack of a coordinated national response, and remarks made by public figures in politics and the media. The Committees submit a national policy should be established to address racism and government figures should also speak out on the issue.

## **The National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19 (the Code)**

1. The announcement and implementation of the Code, which was introduced on 7 April 2020, have had a significant impact on the legal profession, landlords and tenants in NSW. The Committees recommend that certain aspects of the Code, along with its implementation, should have been dealt with differently by the Australian Government.
2. The Code should have more clearly addressed the position of landlords and tenants for breaches which occurred *before* the COVID-19 pandemic. For example, it was unclear in leasing principle 1 whether:
  - landlords were prohibited from terminating leases during the COVID-19 pandemic period, regardless of what period the non-payment of rent related to; or
  - alternatively, landlords were only prohibited from terminating leases for non-payment of rent arising during (but not before) the COVID-19 pandemic period.
3. There was a delay between the Australian Government’s announcement of the Code and the Code being regulated by States and Territories. Whilst we appreciate that it is the responsibility of the States to make these types of laws, we note that:
  - the delay in the making of the regulations created uncertainty about how the Code would be applied, and what measures and actions that landlords and tenants could take during that time (in particular, it made it difficult for the legal profession to advise clients with certainty on their rights and obligations during this interim period); and
  - there were material differences between how each of the States and Territories implemented the Code, which we submit created complications for some landlords and tenants who have properties in multiple states.
4. It would have been helpful if the announcement of the Code (which we understand was stated to be formulated in consultation with, and supported by, the National Cabinet) had been accompanied, or closely followed by, model legislation with a view to be implemented by the States and Territories (including NSW) to provide more certainty for business and the legal profession during this period.
5. In making the above recommendations, we also appreciate the unprecedented circumstances at the time the Code was formulated and announced by the Australian Government.

## JobKeeper Payment Scheme and other tax measures in response to COVID-19

6. More broadly, the Committees commend the Australian Government and the Australian Taxation Office (**ATO**) on all measures implemented in response to COVID-19. The efficacy of these measures has further been heightened by the timely support provided to taxpayers and tax practitioners in understanding and applying the COVID-19 response provisions to their circumstances.
7. The Committees also welcome the Australian Government's response in largely implementing and ensuring consistency with the tax policy and administration measures recommended by the Organisation for Economic and Social Development<sup>1</sup> to national governments to assist in dealing with the impact of COVID-19.

## JobKeeper Payment Scheme and associated tax measures

8. The JobKeeper payment scheme, in place from 30 March to 27 September 2020, is intended to assist businesses affected by COVID-19 to cover the costs of wages of their employees. A business that has suffered a substantial decline in turnover can be entitled to a JobKeeper payment of \$1,500 per fortnight for each eligible employee and it is a condition of entitlement that the business has paid salary and wages of at least that amount to the employee in the fortnight. Eligible employers include businesses with a decline in turnover – for those with less than \$1 bn per year, turnover must have fallen by at least 30%, and those with over \$1 bn, turnover must have fallen by at least 50%.<sup>2</sup>
9. The Committees welcome the generosity of the scheme (e.g. more generous than New Zealand's wage subsidy<sup>3</sup>) and the speed in which the Australian Government responded to deteriorating economic conditions (e.g. implemented faster than the UK's wage subsidy scheme<sup>4</sup>). This shows the extraordinary commitment from the Australian Government to support businesses and employees.

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<sup>1</sup> Organisation for Economic and Social Development, *Tax and Fiscal Policy in Response to the Coronavirus Crisis: Strengthening Confidence and Resilience* (15 April 2020).

<sup>2</sup> *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) r 5.

<sup>3</sup> Employment New Zealand, 'Wage Subsidy Scheme', *Subsidy Rates* (Web Page, 26 May 2020) <<https://www.employment.govt.nz/leave-and-holidays/other-types-of-leave/coronavirus-workplace/wage-subsidy/#wagesubsidyredundancies>>.

<sup>4</sup> Katie Burgess, 'Why Australia won't follow UK on coronavirus wage subsidy', *The Canberra Times* (online at 25 March 2020) <<https://www.canberratimes.com.au/story/6696468/why-australia-wont-follow-uk-on-coronavirus-wage-subsidy/>>.

10. Notwithstanding that restrictions have eased, and the current environment has improved since the strictest lockdown, the Committees recommend that the Australian Government revisit aspects of the JobKeeper scheme in order to improve its effectiveness.
11. For example, there are employees who are ineligible for the JobKeeper payment scheme. This includes short-term casual workers who have been employed for less than 12 months with their employer (estimated to almost one million<sup>5</sup>), migrant workers (which excludes New Zealand citizens and is estimated to be 1.1 million<sup>6</sup>) and employees aged between 16-17 years old (unless they satisfy certain conditions) amongst others ineligible. If the intention of the scheme is to support both employees and employers, then the exclusion of these workers is a significant shortcoming, and the Committees recommend that if the scheme is to be extended (as we recommend below) then it be extended to these workers.
12. On the other hand, there have been reports that some employees are receiving more from the JobKeeper payments than they ordinarily would from their employer.<sup>7</sup> The Australian Government has directed that employers must pass on the full amount to employees. However, the Committee notes that this may be an inappropriate outcome given that millions of other employees (like migrant workers) are ineligible for the JobKeeper scheme. New Zealand's Wage Subsidy Scheme provides that employers do not have to pass the full amount received onto the employee in cases where a person's income is normally less than the subsidy amount, in which case they can be paid their normal salary. Any difference should be used for the wages of other affected staff so that employees remain connected with employers.<sup>8</sup> Thus, under this scheme there is opportunity for employers to pass on the subsidy to ineligible employees to help evenly distribute the full amount received. The Committees recommend a similar approach be considered by the Australian Government.
13. The Australian Council of Trade Unions has pointed out that based on recent JobKeeper figures, "[I]t looks like there will be an underspend of the \$130bn, so there is no excuse not to extend it

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<sup>5</sup> Jarni Blakkarly, 'Nearly one million casuals left out of JobKeeper wage subsidy', *SBS News* (online at 31 March 2020) <<https://www.sbs.com.au/news/nearly-one-million-casuals-left-out-of-jobkeeper-wage-subsidy>>.

<sup>6</sup> Anthony Forsyth, 'Australia's \$130billion JobKeeper payment: What the experts think', *The Conversation* (online at 30 March 2020) <<https://theconversation.com/australias-130-billion-jobkeeper-payment-what-the-experts-think-135043>>.

<sup>7</sup> George Roberts, 'Coronavirus JobKeeper payment loophole meant students as young as 16 were pocketing \$1,500 a fortnight — but not anymore', *ABC News* (online at 1 May 2020) <<https://www.abc.net.au/news/2020-05-01/coronavirus-queensland-jobkeeper-discrepancy/12183012>>.

<sup>8</sup> Employment New Zealand, 'Wage Subsidy Scheme', *Subsidy Rates* (Web Page, 26 May 2020) <<https://www.employment.govt.nz/leave-and-holidays/other-types-of-leave/coronavirus-workplace/wage-subsidy/#wagesubsidyredundancies>>.

[JobKeeper] ... there is now no argument in terms of cost”.<sup>9</sup> While the Committees do not consider an underspend to be a problem, it does reduce the need for the government to end the scheme while there otherwise remains a need for it.

14. That being the case, the Government should extend the JobKeeper scheme and other associated measures – at the least in respect of the most affected industries where businesses cannot reasonably be expected to be trading at pre-COVID-19 levels – given that the effects of COVID-19 are expected to last beyond this year.<sup>10</sup> While some businesses may have begun to resume operating, the operating level is predicted not to be anywhere close to that of before COVID-19.<sup>11</sup>
15. Another contributing factor to the reported underspend may be due to difficulties in businesses applying the required turnover test. The Commissioner has acknowledged the difficulties associated with predicting future supplies and understands that actual turnover may differ from the assessment made by an entity when enrolling for the JobKeeper payment.<sup>12</sup> As a result, there may have been businesses which have misinterpreted or misapplied the turnover tests. Other businesses may not have the resources or data to make such a prediction. That being the case, the Committees recommend that the Australian Government extend the enrolment deadlines for JobKeeper so as to ensure that businesses that were not in a position to predict their changes in turnover, but in the event actually were eligible for the program, do not miss out.
16. The Committees also recommend that initiatives to boost cash flow be continued for small and medium sized businesses. For example, by continuing the availability of deferrals on amounts due through the business activity statement, income tax assessments, fringe benefits tax assessments and excise and allowing businesses to vary Pay As You Go instalments amounts.

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<sup>9</sup> Paul Karp, ‘Coalition has “no excuse” not to extend jobseeker to visa holders, ACTU says’, *The Guardian* (online at 6 May 2020) <<https://www.theguardian.com/world/2020/may/06/coalition-has-no-excuse-not-to-extend-jobseeker-to-visa-holders-actu-says>>.

Paul Karp, ‘Labor and the Greens push to extend eligibility for JobKeeper scheme’, *The Guardian* (online at 12 May 2020) <[https://www.futurework.org.au/australians\\_want\\_jobkeeper\\_extended\\_to\\_include\\_all\\_who\\_need\\_it](https://www.futurework.org.au/australians_want_jobkeeper_extended_to_include_all_who_need_it)>.

<sup>10</sup> Damon Cronshaw, ‘How long will the coronavirus last in Australia’, *The Newcastle Herald* (online at 2 April 2020) <<https://www.newcastleherald.com.au/story/6707890/its-a-long-road-ahead-to-beat-the-pandemic-were-facing-months-of-restrictions/>>.

<sup>11</sup> *Ibid.*

<sup>12</sup> Craig Whatman, *JobKeeper – How to calculate GST turnover* (Web Page) <<https://www.pitcher.com.au/news/jobkeeper-how-calculate-gst-turnover>>.

## Impact of JobKeeper provisions on access to commercial rent relief

17. *The Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth) (the Rules)* contain employer eligibility tests for the JobKeeper scheme. An employer is eligible if it has satisfied the decline in turnover test, which broadly looks at the entity's shortfall in projected GST turnover.<sup>13</sup>
18. The ATO has also published that tailored support is available for businesses impacted by COVID-19, for example to large businesses.<sup>14</sup> This can include further assistance in respect of whether a business should be eligible for the JobKeeper scheme, despite not strictly satisfying the provisions in the Rules. This might be due to a number of reasons that would render the application of the Rules not in line with its policy intent. The Committees commend the efforts of the ATO during the pandemic period in providing prompt and tailored assistance to businesses.
19. The Committees recommend that where the Commissioner of Taxation (**the Commissioner**) has deemed a business eligible for JobKeeper (where the business does not strictly satisfy the Rules), that such businesses are able access other COVID-19 related measures. This is recommended as the Rules do not contain a provision which explicitly states that a business is eligible for the JobKeeper scheme if the Commissioner should deem it to be. This may have impacts on access to other COVID-19 response measures such as commercial rent relief.
20. As mentioned above in paragraph 1, the National Cabinet released a mandatory code of conduct which outlines a set of good faith leasing principles for commercial tenancies during the COVID-19 pandemic period. New South Wales implemented the Code in *Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) (the Regulations)*. The Regulations state that access to rent relief is available to those who are defined as "impacted lessees", which are those lessees who are confirmed to have less than \$50 million turnover in the 2018 – 2019 financial year and are confirmed to be eligible for "the JobKeeper scheme under sections 7 and 8 of the [Rules]".<sup>15</sup>
21. The above-mentioned provisions of the Rules refer to the strict eligibility criteria for employers, and do not include circumstances where the Commissioner may deem a business eligible for the

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<sup>13</sup> *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth)* r 7-8.

<sup>14</sup> Australian Taxation Office, 'Support for large business impacted by COVID-19' *Tailored Support Available* (Web Page, 26 March 2020) <<https://www.ato.gov.au/Business/Business-bulletins-newsroom/General/Support-for-large-business-impacted-by-COVID-19/>>.

<sup>15</sup> *Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW)* reg 4(1).

JobKeeper scheme due to other special reasons which fall within the policy intent of the Rules. Therefore, there may be businesses who cannot access commercial rent relief, along with other COVID-19 measures as the provisions governing those other measures are too restrictive in referring to the sections 7 and 8 of the Rules, and not taking into account that a business might have received tailored support from the ATO to deem it eligible for the JobKeeper scheme.

22. It would be against the policy intent of the Rules and other measures if businesses were rejected access to support based on a technical reading of the provisions contained in the Rules and other measures. As such, the Committees recommend that the Australian Government and the ATO ensure that this is clarified, either in the Rules or elsewhere, so that all eligible businesses rightly have access to other COVID-19 measures that are contingent on JobKeeper eligibility based on sections 7 and 8 of the Rules.

## **Corporations (Coronavirus Economic Response) Determination (No 1) 2020 (Cth) (the Determination)**

23. The Committees welcome the Treasurer's determination to modify the operation of provisions in the *Corporations Act 2001* (Cth) (**Corporations Act**),<sup>16</sup> particularly with respect to the electronic execution of documents by companies. The Determination has made it easier for companies to transact when executing documents, particularly in circumstances where directors are physically separated and there are delays and changes with postal and courier services.

24. Valid electronic execution of documents by companies has been long awaited by the legal profession, particularly considering:
- the specific exclusion for company execution from the provisions of the *Electronic Transactions Act 1999* (Cth);<sup>17</sup>
  - the lack of clarity in the *Corporations Act* on whether a "document" for the purposes of s 127 is broad enough to include electronic documents;<sup>18</sup> and
  - judicial decisions on s 127 of the *Corporations Act*<sup>19</sup> that:
    - i. "split" execution of documents by a company might not be valid;<sup>20</sup> and

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<sup>16</sup> *Corporations Act 2001* (Cth).

<sup>17</sup> See regulation 4 and schedule 1, *Electronic Transactions Regulations 2000* (Cth).

<sup>18</sup> *Corporations Act 2001* (Cth) s 127.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Re CCI Holdings Ltd* [2007] FCA 1283 at [6]–[7] per Emmett J.

- ii. there must be a single, static document executed by a company rather than two electronic signatures applied sequentially to an electronic document.<sup>21</sup>
25. Before the Determination was made, we note that during the pandemic period, and in particular during the strictest movement restrictions, companies and those transacting with companies (and the legal profession advising parties to those transactions) often had to deal with considerable logistical issues when having documents executed pursuant to s 127.
26. The Committees view that this legislative change needed to be introduced earlier. However, in making this recommendation, we also appreciate the unprecedented circumstances at the time the Code was formulated and announced by the Australian Government.
27. The Committees encourage the Australian Government to consider permanent changes to the *Corporations Act*<sup>22</sup> in line with the Determination to allow companies to electronically execute documents for the purposes of s 127. We anticipate this would be welcomed by many industries and make future company transactions more efficient.

## Changes to foreign investment framework

28. On 29 March 2020, the Australian Government announced temporary changes to the foreign investment review framework to take effect on and from 10.30pm on 29 March 2020 (**FIRB Changes**).
29. The FIRB Changes included that all proposed foreign investments into Australia subject to the *Foreign Acquisitions and Takeovers Act 1975* (Cth)<sup>23</sup> would require approval, regardless of value or the nature of the foreign investor – achieved by reducing the monetary screening thresholds for all foreign investments under the relevant Act to \$0. The timeframes for the Foreign Investment Review Board to review applications were also extended from 30 days to up to six months.
30. We note that there was a delay between the Australian Government's announcement of the FIRB Changes and the FIRB Changes being regulated by the Australian Government (noting that the Regulations were only published on 16 April 2020). We suggest that the interim period prior to

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<sup>21</sup> *Bendigo and Adelaide Bank Limited v Pickard* [2019] SASC 123 at [70] per Stanley J.

<sup>22</sup> *Corporations Act 2001* (Cth).

<sup>23</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth).

regulation created uncertainty about how the FIRB Changes would be applied and what measures and actions that foreign investors (and persons dealing with foreign investors) could take during that time. In particular, it made it difficult for the legal profession to advise clients with certainty on their rights and obligations during this period.

31. The Committees observe that the Regulations to implement the FIRB Changes should have been published sooner to provide more certainty for the legal profession and businesses regarding the FIRB Changes. In making this observation, we appreciate the unprecedented circumstances at the time the FIRB Changes were formulated and announced by the Australian Government, but note it as a lesson for the future.

## Privacy and the COVIDSafe Application

32. The Committees wish to acknowledge the positive and proactive work already done by the Commonwealth with consideration to privacy during this challenging and extraordinary situation. It is imperative to continue extending public access to appropriate education and the swiftly resolve scams and data breaches where possible, to protect all users of the COVIDSafe application (**COVIDSafe app**).

## Purpose of the Application

33. The Australian Government first announced the introduction of the COVIDSafe app on 14 April 2020, shortly before it was launched on 26 April 2020. The COVIDSafe app aims to locate close contacts of Novel Coronavirus (**COVID-19**) cases and 'slow the spread' of COVID-19, by supporting traditional/manual contact tracing processes. The application expedites the identification of those who have been exposed to COVID-19 by logging Bluetooth handshakes, indicating proximal encounters between users, and providing user contact information to state public health agencies for follow up.<sup>24</sup> Australians have been encouraged to install it on their devices on a voluntary basis.
34. The Department of Health webpage regarding the COVIDSafe app states that:

*'State and territory health officials can only access app information if someone tests positive and agrees to the information in their phone being uploaded. The health officials can only*

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<sup>24</sup> 'COVIDSafe App,' *Australian Government – Department of Health* (Web Page) <<https://www.health.gov.au/resources/apps-and-tools/covidsafe-app>>.

*use the app information to help alert those who may need to quarantine or get tested'.... 'State and territory health authorities can access the information for contact tracing only. The only other access will be by the COVIDSafe Administrator to ensure the proper functioning, integrity and security of COVIDSafe, including to delete your registration information at your request. It will be a criminal offence to use any app data in any other way. The COVIDSafe app cannot be used to enforce quarantine or isolation restrictions, or any other laws.'*<sup>25</sup>

## Storage

35. The Committees echo Recommendation 16 of the Department of Health Privacy Impact Assessment for the COVIDSafe app regarding the confirmation of arrangements with Amazon Web Services.<sup>26</sup> Whilst acknowledging s 7(3) of the *Biosecurity (Human Biosecurity Emergency) (Human Corona Virus with Pandemic Potential) (Emergency Requirements Public Health Contact Information) Determination 2020* (Cth) ('*Biosecurity Determinations*')<sup>27</sup> and s 94F of the *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth),<sup>28</sup> a clearer understanding of the legal relationship between Amazon Web Services and the Digital Transformation Agency would be a valuable step to ensuring public confidence in the legal rights and responsibilities surrounding their data. This is of particular significance given that it remains unclear how COVIDSafe will interact with the American *Clarifying Lawful Overseas Use of Data Act (CLOUD Act)*.<sup>29</sup>

## Informed Consent

36. Consent is a requirement for the collection and use of private information under the Privacy Act 1988 (Cth) (**Privacy Act**), subject to certain exceptions, for example, where the information collected is

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<sup>25</sup> 'COVIDSafe App,' *Australian Government – Department of Health* (Web Page) <<https://www.health.gov.au/resources/apps-and-tools/covidsafe-app>>.

<sup>26</sup> Department of Health, Maddocks Lawyers, *The COVIDSafe Application Privacy Impact Assessment* (PIA 24 April 2020) 11 <<https://www.health.gov.au/sites/default/files/documents/2020/04/covidsafe-application-privacy-impact-assessment-covidsafe-application-privacy-impact-assessment.pdf>>.

<sup>27</sup> *Biosecurity (Human Biosecurity Emergency) (Human Corona Virus with Pandemic Potential) (Emergency Requirements Public Health Contact Information) Determination 2020* (Cth).

<sup>28</sup> *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth).

<sup>29</sup> Max Koslowski, 'US Access of COVID data 'not conceivable', but legal advice not released', *Sydney Morning Herald* (online, 6 May 2020) <<https://www.smh.com.au/politics/federal/us-access-of-covidsafe-data-not-conceivable-but-legal-advice-not-released-20200506-p54qff.html>>; *Clarifying Lawful Overseas Use of Data Act*, Pub L No 115-141, 2018 Stat 2383.

used for a secondary purpose.<sup>30</sup> Consent requires understanding a number of factors, including *how* and *why a person's* private information is being collected and used.<sup>31</sup>

37. A primary consideration of whether valid consent has been provided under the Privacy Act is whether that consent was informed. In respect of the app, this would include an awareness of the risks that are particular to the app. The Committees submit that the provision of technical information to users, whilst important, will not be enough to achieve informed consent under the Privacy Act. Ensuring that all users are aware of their rights, including avenues of complaint and redress in the case of data breach etc, should be an integral aspect of informed consent in relation to the app. The release of the app source code for the application by the Digital Transformation Agency should be recognised as an important step in increasing transparency and public confidence in the COVIDSafe app. The Committees support similar releases of information to encourage, maintain and enhance user confidence to the extent there may be any changes in the app.
38. Education and information around the app and how Australia's various privacy laws interact with it will be very important. This is particularly so for vulnerable users, who may not know what agency holds what data and where they can go for help and information.
39. As a final note on consent, the Committees commend the Government's creation of the offence of requiring a person to download, use, or give consent to the COVIDSafe app.<sup>32</sup> This is an important measure in ensuring that unlawful pressure does not undermine informed consent. This is particularly so where it applies to engaging in lawful or essential public activities such as work.<sup>33</sup>

## Deletion and Obsolescence

40. The current Privacy Amendment Bill defines protected 'COVID app data' as excluding information which has been de-identified,<sup>34</sup> however, the Committees note the importance for identifying a clear standard for the process of de-identification of the data collected. Whilst the information collected by the app is limited by operation, exceptions for de-identification may still be significant in relation to

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<sup>30</sup> For example, *Privacy Act 1988* (Cth) sch 1 pt 2 APP 3, sch 1 pt 3 APP 6.

<sup>31</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law in Practice* (ALRC Report 108, August 2010) [19.8]-[19.10] < <https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/19-consent/background-5/>>.

<sup>32</sup> *Ibid* s 94H(1).

<sup>33</sup> *Ibid* s 94H(2).

<sup>34</sup> *Privacy Amendment (Public Health Contact Information Act 2020)* (Cth) s 94D(5)(d).

privacy and potential breach. Loosely de-identified information may be interpreted to determine a person's identity and behaviours. Whilst there is some guidance from the *Biosecurity Determinations*, which defines 'de-identified' as information which is 'no longer about an identifiable individual' or 'an individual who is reasonably identifiable',<sup>35</sup> the Committee suggests that creating or referring to a publicly available protocol or standard for de-identification, for example, the *Data61 De-identification Decision-Making Framework*,<sup>36</sup> would be a valuable step in ensuring user confidence and uniformity of outcome in the case of breach.

41. Regarding the right of deletion, the Committees support the strong incorporation of a final (if undetermined) date for the deletion of data in the current Privacy Amendment Bill.<sup>37</sup> The Committees additionally support the appropriate emphasis on the ability to delete information on request as considered in the Privacy Amendment Bill.<sup>38</sup> There are some concerns, however, that the technical function of the application does not currently match the requirements of the law, for example with respect to the deletion of the app in some operating systems.<sup>39</sup> The Committees recognise the iterative process of application development, however, emphasise the importance of the legal protections provided under law to be reflected in the technical components of the program.

## **Australian government response to COVID-19 – Electronic Access to Education and Healthcare**

42. Like many other jurisdictions, the restriction of movement and gatherings has been an important component of the Australian Government's response to COVID-19. While there are some exemptions for 'essential' travel (including, relevantly, travel to receive medical care and travel for study),<sup>40</sup> these

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<sup>35</sup> *Biosecurity (Human Biosecurity Emergency) (Human Corona Virus with Pandemic Potential) (Emergency Requirements Public Health Contact Information) Determinations 2020* (Cth) s 5.

<sup>36</sup> Christine M O'Keefe et al, 'The De-Identification Decision-Making Framework' (CSIRO Report EP173122 and EP175702, CSIRO, September 2017) <<https://data61.csiro.au/en/Our-Research/Our-Work/Safety-and-Security/Privacy-Preservation/De-identification-Decision-Making-Framework>>.

<sup>37</sup> *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth) s 94P.

<sup>38</sup> *Ibid* ss 94L, 94N.

<sup>39</sup> Jim Mussared, 'Privacy Issues Discovered in the BLE Implementation of the COVIDSafe Android App' (ABC Security Research Report, last updated: 15 May 2020) 2 <<https://docs.google.com/document/d/1u5a5ersKBH6eG362atALrzuXo3zuZ70qrGomWVEC27U/edit>>.

<sup>40</sup> 'Social gatherings and business closures during the COVID-19 outbreak – Can I leave my home?', *Healthdirect* (Web Page, May 2020) <<https://www.healthdirect.gov.au/coronavirus-covid-19-social-gatherings-and-business-closures#home>>.

restrictions have forced many organisations, including schools,<sup>41</sup> medical providers,<sup>42</sup> and courts,<sup>43</sup> to transition to the online provision of services.

## The Australian Government Response to COVID-19 and the ‘Digital Divide’

43. Engaging with online services requires access to both internet-capable devices and to the internet itself. In 2017, 86% of Australian households had access to the internet in their homes.<sup>44</sup> While this is very high by international standards,<sup>45</sup> in the midst of the COVID-19 pandemic as many as 3,564,876 people could be left without access to vital healthcare and education services.<sup>46</sup>
44. Concerningly, older Australians, First Nations people, rural and remote communities and lower income households are significantly less likely to have access to the internet.<sup>47</sup> Access to the internet is significantly lower in remote and very remote parts of Australia (77%), households without children under the age of 15 (82%),<sup>48</sup> First Nations (63%) and migrant (81.6%) households.<sup>49</sup> Perhaps unsurprisingly, lower income households are less likely to have access to the internet (67.4%) than the highest income households (96.9%).<sup>50</sup> In the COVID-19 pandemic, these already marginalised groups face a heightened risk of being deprived of the healthcare and education services to which they are entitled under international and domestic law.
45. This submission focuses on two minority groups for whom this ‘digital shift’ may have the greatest impact in terms of the right to education and healthcare: students and people with disability.

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<sup>41</sup> ‘Restrictions begin as schools move towards online learning’, *NSW Department of Education* (Web News, 23 March 2020) <<https://education.nsw.gov.au/news/latest-news/restrictions-begin-as-schools-move-towards-online-learning>>.

<sup>42</sup> Damien Angus, Maureen Connolly and Mariella Salita, ‘The shift to virtual care in response to COVID-19’, *PwC Australia – Important Problems* (Blog Post, 9 April 2020) <<https://www.pwc.com.au/important-problems/coronavirus-covid-19/shift-virtual-care-response.html>>.

<sup>43</sup> See eg. ‘COVID-19 updates and information’, *Federal Circuit Court of Australia* (Web Page, 1 May 2020) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/covid/covid-faq/>>.

<sup>44</sup> Australian Bureau of Statistics, *Household Use of Information Technology, Australia, 2016-17* (Catalogue No 8146.0, 28 March 2018).

<sup>45</sup> Organisation for Economic Cooperation and Development, *OECD Telecommunications and Internet Statistics: ICT Access and Usage by Households and Individuals* (Web Page) <<https://data.oecd.org/ict/internet-access.htm>>.

<sup>46</sup> Australian Bureau of Statistics, *Australian Demographic Statistics, Sep 2019* (Catalogue No 3101.0, 19 March 2020).

<sup>47</sup> Julian Thomas, Chris K Wilson and Sora Park, ‘Australia’s digital divide is not going away’, *The Conversation* (Blog Post, 29 March 2018) <<https://theconversation.com/australias-digital-divide-is-not-going-away-91834>>.

<sup>48</sup> Australian Bureau of Statistics, *Household Use of Information Technology, Australia, 2016-17* (Catalogue No 8146.0, 28 March 2018).

<sup>49</sup> Australian Bureau of Statistics, *Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011* (Catalogue No 2076.0, 27 November 2012).

<sup>50</sup> Australian Bureau of Statistics, *Household Use of Information Technology, Australia, 2016-17* (Catalogue No 8146.0, 28 March 2018).

## Students

46. In light of this ‘digital divide’, the mandatory move to online learning has the potential to exacerbate pre-existing inequality.<sup>51</sup> Moreover, a failure to provide adequate access to the internet and technology may amount to a breach of certain students’ right to education as protected under domestic and international law.
47. The Committees welcomes the initiative of the NSW Department of Education to provide laptops to students who otherwise would not have had adequate access.<sup>52</sup> We note the effectiveness of this model to adequately address the needs of all students should be assessed.
48. We submit that the Australian Government work with state and territory governments to ensure that adequate resources are made available in a similar way to primary and secondary students throughout Australia to enable them to effectively participate in online learning where they otherwise would not be able to.

## People with Disability

49. The accessibility of online services is crucial to ensuring that the right of people with disability to education and healthcare is respected during COVID-19.<sup>53</sup> People with disability make up 17.7% of the Australian population,<sup>54</sup> demonstrate lower rates of secondary education participation (33.4%),<sup>55</sup> and frequently require access to a variety of health services.<sup>56</sup>
50. In an increasingly digitised world, inaccessible programs, file formats, and applications are a common point of disadvantage for people with disability.<sup>57</sup> Accordingly, the ‘digital shift’ that has occurred during

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<sup>51</sup> Kate Noble, ‘School closures will increase inequality unless urgent action closes the digital divide’, *The Age* (online, 3 April 2020) <<https://www.theage.com.au/politics/victoria/school-closures-will-increase-inequality-unless-urgent-action-closes-the-digital-divide-20200331-p54fjq.html>>.

<sup>52</sup> ‘Laptop loans help bridge the digital divide’, *NSW Department of Education* (Web News, 31 March 2020) <<https://education.nsw.gov.au/news/latest-news/laptop-loans-help-bridge-the-digital-divide>>.

<sup>53</sup> Antonio Guterres, *Policy Brief: A Disability-Inclusive Response to COVID-19* (May 2020) 9.

<sup>54</sup> Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (Catalogue No 4430.0).

<sup>55</sup> Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (Catalogue No 4430.0).

<sup>56</sup> Australian Institute of Health and Welfare, *Access to health services by Australians with disability* (Report No DIS 70, 3 December 2017) 2–3.

<sup>57</sup> Lainey Feingold, ‘Disability Rights in a Digital World: Protecting digital accessibility is vital to ensuring equal rights for disabled people’ (2018) 104(1) *ABA Journal* 46.

COVID-19 may pose a risk to people with disability where accessibility provisions such as easy-read formatting and screen-reader compatibility have not been considered and incorporated.

51. The Australian Government has a number of disability-specific healthcare and education obligations under the Convention on the Rights of Persons with Disabilities(**CRPD**).<sup>58</sup> Most pertinently, under article 9(2)(g) and (h) of the CRPD, the Australian Government is obliged to take appropriate measures to promote access for people with disability to technology and the internet,<sup>59</sup> as well as to promote the development and production of accessible technology.<sup>60</sup> As an increasing number of valuable services move online, this obligation is becoming more significant in terms of ensuring that basic rights to education and healthcare are preserved for people with disability.<sup>61</sup>
52. The Committees welcome the Australian Government's introduction of the disability information helpline for COVID-19,<sup>62</sup> the Management and Operational Plan for People with Disability,<sup>63</sup> and the establishment of the Advisory Committee for the COVID-19 Response for People with Disability.<sup>64</sup>
53. The Committees submit that the Australian Government review regulation surrounding accessibility of online services, particularly in relation to education and healthcare, and that the Australian Government ensure that all published Government information is made available in a variety of accessible formats.

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<sup>58</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) Arts 9, 21, 23(1)(c), 24, 25, 26.

<sup>59</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) article 9(2)(g).

<sup>60</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 9(2)(h); see also art 2.

<sup>61</sup> See Michelle Phoenix, 'Children with disabilities face health risks, disruption and marginalization under coronavirus', *The Conversation* (Blog Post, 11 May 2020) <<https://theconversation.com/children-with-disabilities-face-health-risks-disruption-and-marginalization-under-coronavirus-137115>>; 'Lebanon: People with Disabilities Overlooked in Covid-19', *Human Rights Watch* (Blog Post, 11 May 2020) <<https://www.hrw.org/news/2020/05/11/lebanon-people-disabilities-overlooked-covid-19>>; 'Immediate Proactive Response To Coronavirus (COVID-19) For Australians With Disability', *People with Disability Australia* (Blog Post) <<https://pwd.org.au/covid-19-plan/>>.

<sup>62</sup> 'Information and referrals for people with disability and their supporters about coronavirus (COVID-19)', *Australian Government Department of Social Services* (Web Page, 11 May 2020) <[https://www.dss.gov.au/disability-and-carers/information-and-referrals-for-people-with-disability-and-their-supporters-about-coronavirus-covid-19?fbclid=IwAR2wElmM\\_IRBPQr22fdRJR1Q\\_pWF1MDLmN6SuYXe-m52ao25h6bf-t5DINA](https://www.dss.gov.au/disability-and-carers/information-and-referrals-for-people-with-disability-and-their-supporters-about-coronavirus-covid-19?fbclid=IwAR2wElmM_IRBPQr22fdRJR1Q_pWF1MDLmN6SuYXe-m52ao25h6bf-t5DINA)>.

<sup>63</sup> Department of Health (Cth), *Management and Operational Plan for People with Disability: Australian Health Sector emergency Response Plan for Novel Coronavirus (COVID-19)* (Report No 12752, April 2020).

<sup>64</sup> 'Advisory Committee for the COVID-19 Response for People with Disability', *Australian Government Department of Health* (Web Page, 6 May 2020) <<https://www.health.gov.au/committees-and-groups/advisory-committee-for-the-covid-19-response-for-people-with-disability>>.

## Australian Government response to COVID-19 – Temporary migrants in the community

54. As of April 2020, there are about 2.17 million temporary visa holders in the community,<sup>65</sup> including:

- over 90,000 asylum seekers (approximately 85,888 applicants for a permanent protection visa<sup>66</sup> and 5,958 applicants for a temporary protection visa<sup>67</sup>), who may or may not hold bridging visas and may or may not have access to Medicare, work rights and social security (Status Resolution Support Services);<sup>68</sup>
- 17,317 refugees who hold temporary protection visas,<sup>69</sup> who have access to Medicare, work rights and limited social security (Special Benefit). However, Safe Haven Enterprise Visa (SHEV) holders trying to qualify for a more beneficial visa who undertake online study or access Special Benefit may become ineligible for the more beneficial visa;
- 672,000 New Zealand citizens holding subclass 444 visas, who have access to Medicare and work rights;
- 565,000 international students;
- 92,500 temporary graduate visa holders; and
- 139,000 temporary skilled workers, all of whom are required to hold private health care insurance and have varying work rights.<sup>70</sup>

55. There are also 50,000–100,000 migrant workers not currently holding any form of visa.<sup>71</sup> Even if irregular, those migrant workers are entitled to basic human rights including health care.

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<sup>65</sup> The Hon David Coleman, 'Coronavirus and Temporary Visa Holders' (Media Release, 4 April 2020)

<<https://minister.homeaffairs.gov.au/davidcoleman/Pages/Coronavirus-and-Temporary-Visa-holders.aspx>>.

<sup>66</sup> Australian Government, Department of Home Affairs, *Monthly Update: Onshore Protection (Subclass 866) Visa Processing – April 2020* <<https://www.homeaffairs.gov.au/research-and-stats/files/monthly-update-onshore-protection-866-visa-processing-april-2020.pdf>>.

<sup>67</sup> Australian Government, Department of Home Affairs, *IMA Legacy Caseload: Report on Processing Status and Outcomes – March 2020* <<https://www.homeaffairs.gov.au/research-and-stats/files/ima-legacy-caseload-mar-2020.pdf>>.

<sup>68</sup> Kerry Murphy, 'COVID-19: Some issues for refugees and asylum seekers in Australia', *Kaldor Centre for International Refugee Law* (Web Page, 17 April 2020) <<https://www.kaldorcentre.unsw.edu.au/publication/covid-19-some-issues-asylum-seekers-and-refugees-australia>>.

<sup>69</sup> Australian Government, Department of Home Affairs, *IMA Legacy Caseload: Report on Processing Status and Outcomes – March 2020* <<https://www.homeaffairs.gov.au/research-and-stats/files/ima-legacy-caseload-mar-2020.pdf>>.

<sup>70</sup> The Hon David Coleman, 'Coronavirus and Temporary Visa Holders' (Media Release, 4 April 2020)

<<https://minister.homeaffairs.gov.au/davidcoleman/Pages/Coronavirus-and-Temporary-Visa-holders.aspx>>.

<sup>71</sup> Marie Segrave, 'The coronavirus risk Australia is not talking about: testing our unlawful migrant workers', *The Conversation* (online at 7 May 2020) <<https://theconversation.com/the-coronavirus-risk-australia-is-not-talking-about-testing-our-unlawful-migrant-workers-137268>>.

56. With respect to some temporary migrants, the lack of visa, Medicare (especially with pre-existing health conditions), and/or financial support exacerbates pre-existing vulnerabilities in a pandemic environment. For example, lack of a visa leaves them unlawful and liable to immigration detention in conditions that effectively preclude physical distancing. Although all states have waived COVID-19-related health care costs,<sup>72</sup> lack of access to Medicare and/or pre-existing health conditions may leave them at greater risk of contracting COVID-19. Lack of access to financial support leaves them vulnerable to destitution, including inadequate housing and/or homelessness, and at greater risk of transmitting COVID-19. All of the above creates a risk to their right to an adequate standard of living (including adequate food, clothing and housing), their right to health and the community's right to health.

## **Australian government response to COVID-19 – Persons in immigration detention**

57. Whilst the *Migration Act 1958 (Cth)* (**Migration Act**)<sup>73</sup> lawfully empowers the Australian Government to detain unlawful non-citizens pending their deportation,<sup>74</sup> the Australian Government also has a duty of care to prevent any reasonably foreseeable harm to immigration detainees and is responsible for providing a range of services to detainees, including health care.<sup>75</sup>

58. This duty of care is well-established under the common law which identifies that the Australian Government has a non-delegable duty of care owed to immigration detainees.<sup>76</sup> The minimum properly to be expected of the Australian Government in virtue of its relationship with detainees in an immigration detention centre is that it ensure that reasonable care is taken of the detainees who, by reason of their detention, cannot care for themselves.<sup>77</sup>

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<sup>72</sup> 'COVID-19 information for refugees and people seeking asylum', *Refugee Council of Australia* (Web Page, 26 April 2020) <<https://www.refugeecouncil.org.au/covid-19-update-for-refugees-and-people-seeking-asylum/2/>>.

<sup>73</sup> *Migration Act 1958 (Cth)*.

<sup>74</sup> See *Chu Kheng Lim And Others v The Minister For Immigration, Local Government And Ethnic Affairs And Another* (1992) 176 CLR 1, 35.

<sup>75</sup> See Department of Immigration and Border Protection, *Detention Services Manual*, Chapter 1: Legislative and Principles Overview – Services Delivery Values, page 7.

<sup>76</sup> Cf *Kondis v State Transport Authority* (1984) 154 CLR 672, 686; *SBEG v Commonwealth* (2012) 208 FCR 235, 251 [69].

<sup>77</sup> Cf *Spicer v Williamson* 132 SE 291 (1926) at 293.

59. In that respect, overcrowding in Australia's immigration detention centres is well-documented. In a February 2020 report,<sup>78</sup> the Commonwealth Ombudsman noted that across the immigration detention network that residential rooms have an occupancy level ranging from one to four people with shared bathroom facilities. The exception to this was the dormitory style accommodation at Blaxland High Security Compound and Melbourne Immigration Transit accommodation which included dormitories that accommodated between four to 16 people.<sup>79</sup> While the report ultimately concluded that the standards of detainee accommodation were appropriate,<sup>80</sup> this report was prepared prior to the outbreak of the COVID-19 pandemic and did not consider the risks associated with communal living and the transmission of a virus like COVID-19 or whether the living arrangements of detainees would preclude them from being able to appropriately self-isolate or socially distance.
60. The risk to detainees, if there is a COVID-19 outbreak within the immigration detention system, is obvious.
61. In March 2020, several UN agencies issued a joint statement<sup>81</sup> advising governments to consider the release of individuals held in formal and informal places of detention and to ensure that their national response to COVID-19 included equal access to health services for all members of the community, including those held in detention.<sup>82</sup>
62. Consistent with that call, the Australasian Society for Infectious Diseases, the Australian College of Infection Prevention and Control, and Doctors for Refugees have all urged the Australian Government to consider the release of detainees into suitable community housing to minimise the risks associated with a potential COVID-19 outbreak.<sup>83</sup> They cited the crowded conditions in detention facilities as a justification for releasing detainees on the basis that it precluded detainees from being able to adequately socially distance or self-isolate.

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<sup>78</sup> Report by the Commonwealth Ombudsman, Review of the Ombudsman's Activities in Overseeing Immigration Detention, February 2020 <[https://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0017/109700/Immigration-Detention-Oversight-Report\\_January-to-June-2019.pdf](https://www.ombudsman.gov.au/__data/assets/pdf_file/0017/109700/Immigration-Detention-Oversight-Report_January-to-June-2019.pdf)>.

<sup>79</sup> Ibid 9.

<sup>80</sup> Ibid.

<sup>81</sup> WHO Press, 'OHCHR, IOM, UNHCR and WHO joint press release: the rights and health of refugees, migrants and stateless must be protected in COVID-19 response' (31 March 2020) <<https://www.who.int/news-room/detail/31-03-2020-ohchr-iom-unhcr-and-who-joint-press-release-the-rights-and-health-of-refugees-migrants-and-stateless-must-be-protected-in-covid-19-response>>.

<sup>82</sup> Ibid.

<sup>83</sup> Australasian College for Infection Prevention and Control and Australasian Society for Infectious Diseases, Open letter in relation to Federal Governments response to COVID-19, 19 March 2020 <<https://www.asid.net.au/documents/item/1868>>.

63. The Committees also support that call, recommending that the Australian Government release detainees, who do not otherwise pose a significant security or public health risk, into suitable housing in the community.
64. For those detainees that are not considered to be suitable for release, for instance, those detainees whose visa has been cancelled due to criminal conduct, the Committees recommend that the Australian Government implement measures that allow for detainees to be held in single rooms with their own bathroom facilities.
65. The Committees note Australia owes a duty of care to all people seeking asylum to whom the Australian Government transferred to Papua New Guinea and Nauru for offshore processing. The Australian Government should protect these people from the risk of a COVID-19 outbreak in those countries as those countries have limited availability of medical care. The Australian Government should effect prompt medical transfers to Australia.

## **Australian Government COVID-19 response to other temporary visa holders**

66. The Committees are concerned by public comments made by Prime Minister Scott Morrison and the Minister for Immigration, Citizenship and Multicultural Affairs David Coleman instructing temporary migrants in the community to support themselves or go home,<sup>84</sup> given that that asylum seekers and refugees cannot go home due to fear of persecution or harm, and many other temporary migrants cannot practicably return home due to international travel restrictions and the unavailability or unaffordability of flights.<sup>85</sup>
67. Further, the Department of Home Affairs has not allowed extensions of visas in response to COVID-19.<sup>86</sup> Of particular concern to the Committees is the position of temporary visa holders such as subclass 462 (work and holiday) and subclass 417 (working holiday), who are subject to work

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<sup>84</sup> Prime Minister of Australia, 'Transcript' (Press Conference, 3 April 2020) <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-030420>>; David Coleman, Minister for Immigration, Citizenship and Multicultural Affairs, 'Coronavirus and Temporary Visa Holders' (Media Release, 4 April 2020) <<https://minister.homeaffairs.gov.au/davidcoleman/Pages/Coronavirus-and-Temporary-Visa-holders.aspx>>.

<sup>85</sup> Tom Stayner, 'Temporary migrants stranded and facing expiring visas told to contact immigration officials', *SBS News* (online at 15 April 2020) <<https://sbs.com.au/news/temporary-migrants-stranded-and-facing-expiring-visas-told-to-contact-immigration-officials>>.

<sup>86</sup> Department of Home Affairs, 'COVID-19 and the Border' *Staying in Australia* (Web Page, 21 May 2020) <<https://covid19.homeaffairs.gov.au/staying-australia>>.

requirements for the continuation of their visas<sup>87</sup>, but whose ability to comply with those requirements has been impacted by the current environment. To strictly enforce those requirements in the present environment is plainly unjust. The Committees accordingly recommend those work requirements be temporarily waived or at least reduced for those visa classes.

68. Although holders of subclasses 485 (temporary graduate) and 500 (student) visas will usually have visa durations of longer than a year, leaving Australia still means that a significant amount of the time on their visa has run out. Holders of visa subclass 500 will need to apply for a new visa to finish their study programs, as they cannot extend their existing visa.<sup>88</sup> Holders of visa subclass 485 will need to apply for an entirely different visa as they only have one opportunity to apply for this visa.<sup>89</sup> The Committees accordingly recommend that temporary extensions also be offered to these visa holders.

### **Skilled work visa holders – Conditions 8107 and 8607**

69. The Committees consider the position of skilled workers on Temporary Work (Skilled) visa (subclass 457) visas (**457 visas**) and Temporary Skill Shortage (subclass 482) visas (**TSS visas**) to be particularly deserving of attention. Both of those visas are subject to conditions – condition 8107 for 457 visas and condition 8607 for TSS visas – that effectively prohibit the visa holder from being out of work for more than 60 days, with their visa able to be cancelled if they do not comply with these conditions.<sup>90</sup>
70. As a result of measures implemented by the Australian Government in response to the COVID-19 pandemic, a significant number of temporary skilled work visa holders were either stood down or laid off by sponsoring employers. Many of these skilled workers are now in search of employment who possess skills and experience of value to the Australian community during times of particular hardship.<sup>91</sup>

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<sup>87</sup> See, eg, Migration Regulations 1994 (Cth) sch 1 cl 1224A(3)(c), 1225(3B).

<sup>88</sup> Department of Home Affairs, 'COVID-19 and the Border' *Staying in Australia* (Web Page, 21 May 2020) <<https://covid19.homeaffairs.gov.au/staying-australia>>.

<sup>89</sup> Migration Regulations 1994 (Cth) sch 2 cl 485.211.

<sup>90</sup> *Migration Act 1958* (Cth) s 140.

<sup>91</sup> The temporary relaxation of working hours for student visas was a clear indication that support was needed in the supply of critical services: Department of Home Affairs, 'Temporary relaxation of working hours for student visa holders' (Web Page, 22 May 2020) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500/temporary-relaxation-of-working-hours-for-student-visa-holders>>. See also Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Migration (LIN 19/048: Specification of Occupations—Subclass 482 Visa) Instrument 2019* (LIN 19/048, 21 March 2019).

71. In response to this situation, David Coleman, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, stated that there are *'around 139,000 temporary skilled visa holders, on either a 2 year or 4 year visa [in Australia]... Those visa holders who have been laid off due to coronavirus should leave the country in line with existing visa conditions if they are unable to secure a new sponsor.'*<sup>92</sup>
72. However, the majority of 457 and TSS visa lodgments since 2016 have been for positions such as Managers, Professionals, and Technicians and Trades Workers, befitting the skilled nature of the visas.<sup>93</sup> Those workers are likely to be required as the economy reopens.
73. Rather than lose these skilled professionals in needed occupations, who have already established themselves within Australia, the Committees recommend that conditions 8107 and 8607 be relaxed for existing visa holders for a period of 6-12 months, during which time visa holders that are stood down or laid off should be permitted to accept temporary work outside their ordinary occupation without being in breach of their visa (so that they may, for example, fill temporary shortages in other industries during the present situation).
74. Without these recommended measures, 457 and TSS visa holders who were stood down or laid off by their sponsoring employer are liable to be lost to Australia entirely. That is not in Australia's interest, nor the affected visa holders who may well (with their families) have established lives in Australia.

## **Wage and income support for temporary visa holders**

75. The Committees are concerned that the Australian Government's COVID-19 response has been discriminatory and has left many temporary migrants in the community at risk of destitution, in breach of Australia's obligations under the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), particularly with respect to the rights to non-discrimination, social security and an adequate standard of living.
76. The Committees further note that most migrant workers are excluded from the Australian Government's primary income support measures, JobSeeker (and supplements) and JobKeeper

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<sup>92</sup> David Coleman, 'Coronavirus and Temporary Visa Holders' (Media Release, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, 4 April 2020) <<https://minister.homeaffairs.gov.au/davidcoleman/Pages/Coronavirus-and-Temporary-Visa-holders.aspx>>.

<sup>93</sup> Department of Home Affairs, Department of Jobs and Small Business, and Department of Education and Training, Submission No 40 to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the effectiveness of the current temporary skilled visa system in targeting genuine skills shortages* (January 2019) 18.

(technically a wage subsidy), contrary to their rights to non-discrimination, social security and/or an adequate standard of living under the ICESCR. With respect to JobSeeker, most migrant workers are ineligible. With respect to JobKeeper, the only temporary migrants who are eligible are New Zealand citizens.

77. Although the Australian Government is assisting temporary visa holders to support themselves by relaxing restrictions on work rights, introducing a new COVID-19-related subclass 408 visa stream and including most migrant workers in early access to superannuation, these measures are insufficient, and early access to superannuation creates a risk of destitution later in life.
78. Although discrimination in the JobSeeker and JobKeeper programs based on immigration status may be pursuant to a legitimate aim it does not appear to be proportional. The Australian Government has devoted the majority of its income support measures and the considerable resources at its disposition to programs which benefit Australian citizens and permanent residents and New Zealand citizens, and unnecessarily exclude non-New Zealand citizen migrant workers. Prime Minister Scott Morrison has stated, *'[O]ur focus and our priority is on supporting Australians and Australian residents with the economic supports that are available.'*<sup>94</sup> In circumstances where migrant workers are contributing to Australia's tax base and wider society on an equal basis to citizens and residents, their exclusion from these support mechanisms is unjust.
79. Meanwhile, many temporary migrants in the community remain at risk of destitution, contrary to their right to an adequate standard of living. Many frontline asylum support services have seen requests for assistance triple since mid-March.<sup>95</sup> A recent Unions NSW survey of 3,700 migrant workers revealed that 50% had lost their jobs, 20% had had their hours reduced and 43% were skipping meals due to their economic situation.<sup>96</sup> Foodbank Australia has seen demand for emergency food increase by 50%, much of it from migrant workers.<sup>97</sup>

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<sup>94</sup> Prime Minister of Australia, 'Transcript' (Press Conference, 3 April 2020) <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-030420>>;

<sup>95</sup> 'Open letter to Prime Minister Scott Morrison – Nobody Left Behind', *Refugee Council of Australia* (Web Page, 7 May 2020) <<https://www.refugeecouncil.org.au/open-letter-covid/3/>>.

<sup>96</sup> Jarny Blakkarly, 'National campaign calls for financial support for people on temporary visas in Australia', *SBS News* (online at 7 April 2020) <<https://www.sbs.com.au/news/national-campaign-calls-for-financial-support-for-people-on-temporary-visas-in-australia>>.

<sup>97</sup> Ben Schneiders and Royce Millar, 'Starved out of Australia: The workers without money or food', *The Sydney Morning Herald* (online at 3 May 2020) <<https://www.smh.com.au/national/starved-out-of-australia-the-workers-without-money-or-food-20200429-p54o8u.html>>.

80. The Committees submit, consistent with Australia's obligations under the ICESCR and the *Refugee Convention* (with respect to asylum seekers), the Department of Home Affairs should grant work rights and/or provide access to social security sufficient to support an adequate standard of living.

## Australian Government response to COVID-19 – Racism and social cohesion

81. The Committees are concerned that the spread of COVID-19 has been accompanied by the spread of COVID-19-related racism throughout Australia. Since February, one third of racial discrimination complaints to the Australian Human Rights Commission have been COVID-19-related.<sup>98</sup> The Asian Australian Alliance has received over 240 reports of abuse against Asian Australians, over 80% of which were COVID-19-related, and only an estimated 12% of which were reported to the police.<sup>99</sup> The Australian Hate Crime Network (**AHCN**) has observed that COVID-19-related abuse targets not only the Asian Australian community, but also other communities including Jewish and Muslim communities. However, it is difficult to determine whether abuse has been increasing 'due to the lack of comprehensive or consistent data collection systems in Australia.'<sup>100</sup>
82. The Committees note that Australia is a party to the CERD<sup>101</sup> and has partly implemented it through the *Racial Discrimination Act 1975* (Cth), which prohibits racial discrimination (including in employment), prohibits offensive behaviour based on racial hatred, and establishes the office of the Race Discrimination Commissioner.<sup>102</sup> CERD recognises that nation-states may discriminate between citizens and non-citizens,<sup>103</sup> and the UN Committee on the Elimination of Racial Discrimination has clarified that differential treatment based on citizenship or immigration status will not be discriminatory if it is pursuant to a legitimate aim (e.g. economic recovery) and proportional.<sup>104</sup>

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<sup>98</sup> Chin Tan, 'COVID-19 has prompted a spike in racist attacks. We need to start tracking them better', *ABC News* (online at 9 May 2020) <<https://www.abc.net.au/news/2020-05-09/coronavirus-covid-19-racist-attacks-data-collection-strategy/12229162?nw=0>>.

<sup>99</sup> 'I Am Not a Virus: Preliminary Findings of the COVID-19 Racism Survey', *Diversity Arts Australia* (Web Page, 24 April 2020) <<http://diversityarts.org.au/not-virus-preliminary-findings-covid-19-racism-survey/>>.

<sup>100</sup> 'COVID-19 and hate crime in Australia', *The University of Sydney Law School* (Web Page, 7 May 2020) <<https://www.sydney.edu.au/law/news-and-events/news/2020/05/07/covid-19-and-hate-crime-in-australia.html>>.

<sup>101</sup> Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>102</sup> *Racial Discrimination Act 1975* (Cth) ss 9, 15, 18C, 19, 20.

<sup>103</sup> CERD art 1(2).

<sup>104</sup> CERD *General Recommendation XXX on Discrimination Against Non Citizens*, 65<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.7/Add.1 (2004) para 4.

83. We welcome government leaders speaking out against racism and supporting culturally and linguistically diverse (**CALD**) communities.<sup>105</sup> However, we also encourage the Australian Government to do more to track incidences of racism and hate crimes,<sup>106</sup> so that it is able to identify policies that can respond appropriately to prevent racism. To that end, the Committees submit that the Australian Government should establish a national database for incidences of racism and hate crimes.<sup>107</sup>
84. Further we submit that the Australian Government should develop a national anti-racism campaign, including condemning racism in mainstream media, supporting anti-racism training and culturally competent counselling for survivors of abuse and supporting participation of CALD communities in addressing racism on their own terms.
85. Finally, the Committees submit that Australian federal politicians across the should regularly speak out against racism, both officially and unofficially, and take great care with any comments in relation to migrants that may be perceived as endorsing racism.

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<sup>105</sup> For example, Scott Morrison has told the community to “Stop it”: Prime Minister of Australia, ‘Transcript’ (Press Conference, 21 April 2020) <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-16>>. Alan Tudge has condemned racism as “completely unacceptable” and committed to condemning and providing guidance about reporting it in multicultural media: Alan Tudge, ‘Transcript’ (COVID19 multicultural media briefing, 29 April 2020) <<https://minister.homeaffairs.gov.au/alantudge/Pages/covid19-multicultural-media-briefing.aspx>>.

<sup>106</sup> ‘COVID-19 and hate crime in Australia’, *The University of Sydney Law School* (Web Page, 7 May 2020) <<https://www.sydney.edu.au/law/news-and-events/news/2020/05/07/covid-19-and-hate-crime-in-australia.html>>.

<sup>107</sup> ‘COVID-19 and hate crime in Australia’, *The University of Sydney Law School* (Web Page, 7 May 2020) <<https://www.sydney.edu.au/law/news-and-events/news/2020/05/07/covid-19-and-hate-crime-in-australia.html>>.

## Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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