



Law Council
OF AUSTRALIA

Inquiry into the Australian Government's response to the COVID-19 pandemic

Select Committee on COVID-19

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the contributions of the Queensland Law Society, the Law Society of New South Wales and the Law Society Northern Territory to this submission. The Law Council also acknowledges input received from its Business Law Section, the Charities and Not-for-Profits Committee of the Law Council's Legal Practice Section, the Migration Law Committee and the Alternative Dispute Resolution Committee of the Law Council's Federal litigation and Dispute Resolution Section.

The Law Council also appreciates input received from its following Advisory Committees:

- National Access to Justice Committee;
- Business and Human Rights Committee;
- National Human Rights Committee; and
- National Elder Law and Succession Committee.

Executive Summary

1. The Law Council notes that the Australian Government's response to the COVID-19 pandemic was made in unprecedented circumstances and in the context of a global crisis which saw profound changes on an almost daily basis. It should be acknowledged that overall, Australia has managed the pandemic situation well, given the relatively low rates of infection and death at the time of writing.
2. The Terms of Reference for the present inquiry are exceptionally broad, and could potentially include a very wide range of legal and policy matters of interest to the Law Council and its Constituent Bodies. In light of this broad scope and the two-year timeframe in which to report, the Law Council is of the view that the Committee should, as a next step, engage in a more targeted process by calling for specific responses to key and emerging themes, including those set out within this submission.
3. The Law Council looks forward to engaging with the Committee over this period to ensure that lessons learnt from the COVID-19 response are used to inform future policy and decision making. At this early stage of the Committee's work, the Law Council makes the following recommendations:

Supporting the legal profession

- The JobKeeper scheme and any future workplace subsidies of a similar nature should explicitly account for special purpose entity structures to ensure that the legal (and other) sectors are not inadvertently excluded from coverage or subjected to uncertainty as to whether they are covered.
- The effectiveness of the JobKeeper scheme should be examined in detail, including by reference to its delivery (or not) of equitable and fair outcomes and its provision (or not) of adequate financial support.
- In the event that future lockdown measures are considered, there should be a clear declaration that the legal sector as a whole is designated as an essential service.
- Consideration should be given to the possibility of harmonising, where possible, processes for signing and witnessing documents (including in times of lockdown) across the states and territories, given that commercial and personal transactions regularly cross jurisdictional boundaries.
- Consideration should be given to whether further statutory guidance is needed with respect to force majeure clauses in commercial and consumer contracts, with reference to examples of situations where these became problematic for one or more parties to a contract during the COVID-19 pandemic.
- Rural, remote and regional (**RRR**) access to justice strategies should be developed to ensure an appropriate level of legal services in areas of critical need, including through rural placement, targeted mentoring and incentive schemes.

Supporting the justice system

- A national review of the resourcing needs of the judicial system should take place, incorporating the challenges and benefits that have been identified in the context of the COVID-19 pandemic.
- Courts, tribunals and the legal profession should be consulted to assess the challenges and benefits associated with the processes that were introduced or considered during the COVID-19 pandemic to address actual or potential delays and backlogs, including the increased use of technology.
- The Law Council recommends an evidence-based approach to the delivery of online dispute resolution processes, including mediation, which takes into

account the effects of online proceedings on all participants and the digital exclusion of many members of marginalised and vulnerable groups.

- The Australian Government should invest significant and ongoing resources in Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services, and Family Violence Prevention Legal Services to ensure that Australians impacted by a crisis such as the COVID-19 pandemic can have access justice in times of need.

Human rights of vulnerable communities

- The Australian Government should adopt measures to reduce COVID-19 risks in immigration detention facilities by releasing, with appropriate support, persons who do not pose a genuine danger to the community. Priority should be given to persons with health conditions or other characteristics (e.g. age) which place them at greater risk.
- The Committee should seek information regarding the measures adopted to ensure appropriate levels of health care throughout the pandemic for persons in onshore immigration detention facilities, and for refugees and asylum seekers who remain in Papua New Guinea and Nauru under Australia's offshore processing regime.
- The Australian Government should extend temporary safety net measures such as JobKeeper and JobSeeker to temporary migrants and asylum seekers who are in need.
- The development of the new National Action Plan to Combat Modern Slavery 2020-24 and the International Strategy on Human Trafficking and Modern Slavery specifically recognise and respond to the COVID-19 pandemic as a likely new driver of modern slavery.
- The development of broader Australian Government domestic and foreign policy during and following the COVID-19 pandemic specifically has regard to measures' likely impact on modern slavery outcomes.
- The Australian Government should develop and fund an evidence-based approach to the delivery of legal and justice services online which takes into account:
 - the effects of online proceedings on all participants and the digital exclusion of many members of marginalised and vulnerable groups; and
 - the continued need within the justice system to provide for face-to-face interactions, or by telephone where needed.
- The Australian Government should invest in adequate technology and increased resourcing for internet reliability to ensure RRR communities have equal access to and opportunities for education and participation, particularly if the current flexible arrangements are maintained into the future post COVID-19.
- The Australian Government should seek to quantify the extent to which the pandemic has given rise to circumstances of racial vilification and to consider measures to address the risk of this occurring again, including through education and awareness campaigns, and the adequate resourcing of the Australian Human Rights Commission.

Specific human rights concerns

- The Australian Government should adopt a Federal Charter of Human Rights, as well as measures to increase public awareness of human rights, including targeted measures aimed at service providers.
- Australia's human rights obligations should explicitly inform the ongoing COVID-19 law and policy response, including during the recovery period.

- The Committee should seek detailed information regarding the transparency, independence and adequacy of oversight measures adopted for places of deprivation of liberty throughout the pandemic, including for immigration detention facilities, aged care, and with respect to National Disability Insurance Scheme participants, having regard to international human rights standards.
- The Australian Government, working with state and territory governments, should act quickly to implement the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**)¹, including through:
 - developing compliance frameworks with clear accountability and transparency mechanisms;
 - documenting core elements of OPCAT implementation in legislation or, at minimum, in a formal agreement;
 - adopting an expansive interpretation of the definition of 'places of detention', given the unique opportunity to develop a systematic and cohesive oversight system across both private and public institutions where people are subjected to the care or authority of others;
 - ensuring adequate resourcing, including for the Commonwealth Ombudsman as central National Preventive Mechanism (**NPM**) and federal NPM; and
 - improving links and communication with civil society representatives as part of this process.
- The Committee should continue to monitor the privacy and safeguard concerns inherent in the rollout of the COVIDSafe app, including with respect to areas of concern highlighted by the Parliamentary Joint Committee on Human Rights. This should include consideration of legislative amendments to address outstanding concerns.
- During the COVID-19 pandemic and recovery period, statements of compatibility should accompany all legislative measures, including non-disallowable instruments, which significantly impact upon human rights.
- The Committee should consider whether Australia needs further legislative guidance with respect to the exercise of emergency powers by the executive and the review mechanisms in place to ensure those powers have been exercised appropriately.
- The Committee should have regard to the findings of the Royal Commission into National Natural Disaster Arrangements Commission in respect of legal frameworks and other issues involving coordination between the Commonwealth and the states and territories, risk management, preparedness, resilience and recovery.

Matters relating to the charitable and not-for-profit sector

- There should be greater clarity as to how the JobKeeper scheme (and future workplace subsidies) will apply to the not-for-profit sector, including universities.
- The Australian Government should consult with the not-for-profit sector on urgent measures to improve fundraising regulation, particularly in the context of the COVID-19 pandemic.

Additional matters

- The Committee should consider measures to offset the impact on people whose eligibility for benefits under the Paid Parental Leave scheme has been affected by the pandemic.

¹ Opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

- The Committee should consider how best to address issues caused by the early access by persons of their superannuation, including by working with stakeholders to offer support such as financial literacy education.
- The Committee should consider workplace health and safety issues arising from the COVID-19 pandemic and assess whether future guidelines can be produced and/or whether other measures from Government are needed.

Introduction

4. The Law Council welcomes the opportunity to provide a submission to the Select Committee on COVID-19 (**Committee**) as part of its inquiry into the Australian Government's response to the COVID-19 pandemic (**Inquiry**).
5. The COVID-19 pandemic has had an immense and far-reaching impact on Australian society which makes it difficult to adequately cover all matters relevant to the Law Council in a single written submission. The Law Council notes that the Committee is expected to deliver its final report on or before 30 June 2022. Given this two-year timeframe, it is envisaged that there will be further opportunities to provide submissions on key themes as they arise throughout the Inquiry, and the Law Council would welcome the opportunity to further contribute to the work of the Committee as it continues its deliberations.
6. Noting this opportunity for additional consultation, the Law Council has not sought at this preliminary stage to provide detailed input on all legal and policy issues arising in connection with the Australian Government's response to the COVID-19 pandemic. Rather, this submission highlights certain areas that the Law Council believes the Committee should focus on going forward, along with a more detailed commentary on some of the key issues which have emerged for the legal profession up to this point.
7. The Law Council notes that the Terms of Reference for the Inquiry are exceptionally broad, namely that the Committee inquire and report on:
 - the Australian Government's response to the COVID-19 pandemic; and
 - any related matters.
8. In light of the broad scope of the Inquiry, and the two-year timeframe in which to report, the Law Council suggests the Committee should, as a next step, engage in a more targeted process by calling for specific responses to key and emerging themes, including those set out below, arising from this initial round of consultation.

General comments and themes

9. The Law Council commends the Commonwealth, state and territory governments' early intervention and, consultation with key experts, as well as their significant co-operation during highly uncertain times. Before exploring some of the issues that have emerged and key areas requiring consideration for the future, the Law Council wishes to recognise the efforts of these governments throughout the pandemic, and the efforts of essential workers. The Law Council's contributions to the Inquiry should be viewed in this context.

Coordination between the Australian Government, states and territories

10. The response to COVID-19 has required nation-wide coordination. As such, a recurring theme throughout the Inquiry is likely to be the need to further encourage co-ordination and planning between the states, territories and Australian Government. It is noted that many of the measures required in responding to the pandemic have been driven by agreements of the National Cabinet, however, ultimately fall under the responsibilities of state and territory jurisdictions.
11. The Law Council commends the development of the National Cabinet, collaboration across the various jurisdictions, and demonstrated willingness to cooperate in challenging circumstances. However, more can be done. Indeed, the pandemic has demonstrated the need to increase collaboration on future emergency response

planning and decision-making to ensure clarity and harmony in law and policy in the future, and on other ongoing areas of urgent policy and law reform which have become even more important as a result of the pandemic. The Australian Government must continue to play a fundamental role in fostering this collaboration, while still recognising that in a federation, there are responsibilities which will remain with the states and territories. Continuing inter-governmental collaboration, including through the development of clear processes for doing so, should be a key theme for consideration throughout the Committee's work over the next two years.

12. Another key argument made in this submission is the need for the Committee to consider the success, adequacy and proportionality of the Australian Government's actions in response to the pandemic by resolving the conflicting interests of public safety and the sustainability of the health system, taking into account the rights to life and health, when tensions arise regarding the curtailment of other basic human rights. The impact of the pandemic on decision-making processes affecting vulnerable members of the community in particular must be considered through a human rights lens, and the Law Council encourages the Committee to use such a lens throughout the course of the Inquiry. Further, the lack of a Federal Charter of Rights has been brought into sharp focus by the human rights considerations of COVID19 and responses to it. As recommended later in this submission, the Law Council believe that this is the time to adopt a Federal Charter of Human Rights.

Matters specific to the legal profession

13. The COVID-19 pandemic has had a profound impact on the legal profession and has brought significant challenges for those engaged in the legal services industry as well as their clients.
14. Since the early stages of the pandemic, the Law Council has been actively engaging with the Commonwealth Attorney-General, the Federal Courts, the Administrative Appeals Tribunal, and the legal profession in an attempt to develop constructive solutions to minimise the adverse impacts of the virus and its associated containment measures.² This has included recommendations to the Australian Government on reforms and measures to ensure the justice system can continue to operate despite lockdown procedures, engaging with policy-makers to support the legal profession through the pandemic, and contributing to multiple policy debates on matters arising from the pandemic, including measures to contain and limit the spread of the virus.

Application of JobKeeper to the legal sector

15. On 8 April 2020, the Australian Government introduced a legislative package containing a number of bills to implement the Government's economic response to the COVID-19 pandemic, including giving effect to the JobKeeper payment system.
16. The package was passed by the Australian Parliament on the same day, and the Law Council commends the Australian Government on these significant social welfare measures. However, as set out below, there have been some concerns with the application of the JobKeeper program to the legal profession, particularly for law firms operating under certain corporate structures.
17. The *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth) (**JobKeeper Act**) establishes a framework for the Treasurer to make rules which provide for the Commissioner of Taxation to make JobKeeper payments to eligible entities.

² See, Law Council of Australia 'Information for the legal profession on the COVID-19 outbreak' <<https://www.lawcouncil.asn.au/media/news/information-for-the-legal-profession-covid-19>>.

Using this power, the Treasurer released the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) on 9 April 2020 (**JobKeeper Rules**).

18. The JobKeeper Rules set out which employers are eligible for the payment, the employees to which the payment relates, the amount payable, the timing of payments and the obligations of recipients.
19. However, the JobKeeper Rules, as initially drafted, did not recognise the nature of employment relationships within a corporate or other trading group in which there may be a service entity. Service entities are used in many businesses in the Australian professional services sector, including many private sector law and accounting firms. In this regard, a significant number of firms are comprised of a professional services entity (generally a partnership), which provides services to external clients in exchange for revenue, and a separate internal service entity (a service trust or company), which employs the staff in exchange for a fee from the professional services entity. This is quite a common structure, which is similar to corporate structures where one entity in a corporate group may provide certain services such as staff for the benefit of other entities in the group.
20. Under the initial JobKeeper Rules, if a trading entity suffers a 30 per cent or greater reduction in revenue, staff who are employed by an associated service entity may not, depending on the activities of the service entity, qualify for JobKeeper payments. This created an inequitable outcome for any business that uses an employing service entity separate from its trading, revenue generating entity.
21. On 24 April 2020, the Treasurer announced a number of changes to the initial JobKeeper Rules, including in relation to the application of the decline in turnover test to special purpose entities.³ However, the Law Council has maintained concerns that the revised rules would still not be sufficiently broad to capture many professional advisory practices.
22. On 1 May 2020, updated JobKeeper Rules were released.⁴ The amendments included a new modified turnover test for certain group structures that involve service/employer entities (**special purpose entities**). The scope of this modified test is limited, broadly, to circumstances where an entity:
 - is a member of a consolidated group, consolidatable group, or GST group; and
 - is supplying other members of the group with services (employee labour services) consisting of the performance of work by individuals the employer entity employs; and
 - does not supply employee labour services to entities that are not members of the group (disregarding supplies that are merely incidental to the principal activity of the employer entity).
23. Where the modified test applies, the turnover can be calculated on an aggregated basis. However, the requirement for the service/employer entity and the business/trading entity to be members of the same tax consolidated (or consolidatable group) or GST group will in reality mean that many professional partnerships (such as legal practices) may not qualify for the JobKeeper payment under the modified test.
24. To address these concerns, on 1 May 2020, the Commissioner of Taxation (**Commissioner**) released *Practical Compliance Guide 2020/4: PCG 2020/4 Schemes in relation to the JobKeeper payment*, which states that the Commissioner generally will

³ The Hon Josh Frydenberg MP, *Jobkeeper Update* (online, 24 April 2020)

<<https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/jobkeeper-update>>.

⁴ *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020* (Cth).

not apply compliance resources to consider the application of section 19 of the JobKeeper Act – which gives the Commissioner the ability to determine that a recipient entity that has carried out a scheme in order to become entitled to a JobKeeper payment is not so entitled – if, in relation to an entity (such as a special purpose entity):

- the external operating environment is affected by factors beyond the control of the entity (and its related parties); and
 - that affected external operating environment significantly impacts the business of the entity or another entity the entity's employees serve in; and
 - the entity enters into the scheme in response to that impact and satisfies the decline in turnover test; and
 - the JobKeeper payment the entity receives is for individuals who were employed by the entity and serving in the significantly impacted business prior to that time and who remain employed as a result of that JobKeeper payment.⁵
25. It is important to note that this approach does not sanction or permit a special purpose entity from accessing the JobKeeper scheme (in the same way as an amendment to the JobKeeper Rules might). It simply highlights that the risk of the Australian Taxation Office (ATO) deploying compliance resources is 'low'.
26. The uncertainty that is inherent in this approach has posed difficulties for the legal sector, with many firms having difficulty in determining whether they are able to make use of the JobKeeper scheme.

Recommendation

- **The JobKeeper scheme and any future workplace subsidies of a similar nature should explicitly account for special purpose entity structures to ensure that the legal (and other) sectors are not inadvertently excluded from coverage or subjected to uncertainty as to whether they are covered.**

Further issues relating to JobKeeper

27. In addition to the above concerns in relation to the application of the JobKeeper scheme to special purpose entities, the Law Council notes other concerns which have emerged with the scheme and warrant further consideration.
28. In particular, it is understood that the JobKeeper package has in some instances resulted in unjust outcomes for both employees and employers. The Law Council has become aware of a number of disputes over the payment, particularly stemming from the employer's role as the key decision-maker on eligibility for the payment. Examples of unjust outcomes that have resulted include:
- employers requiring greater work hours from salaried employees to compensate for a reduction in hours for lesser-paid award employees;
 - employers terminating award-free employees earning over the *Fair Work Act 2009* (Cth) remuneration threshold for bringing a claim of unfair dismissal as a purely short-term cost-saving measure, where the legal remedies of those employees are limited;
 - an employer standing down an employee subject to JobKeeper payments, subsequently terminating that person's employment on notice and only paying

⁵ Australian Taxation Office, *Practical Compliance Guide 2020/4: PCG 2020/4 Schemes in relation to the JobKeeper payment* (PCG 2020/4, 1 May 2020).

them the amount of the JobKeeper payment for the notice period of several weeks;

- casual employees having difficulty in establishing whether their employment was regular and systematic; and
 - an employee refusing to nominate their eligibility for JobKeeper payments in an effort to avoid potential changes to their hours of work.
29. The Law Council is also concerned that many workers are ineligible to receive the JobKeeper payment. This includes most temporary visa holders (including asylum seekers, migrant workers and international students) as well as casual workers who had not been employed with the business in question for over 12 months before the commencement of the scheme, as required. Similar concerns about the application of the JobKeeper scheme have been raised in the charity and not-for-profit sector, as further detailed at page 46 below.
30. It is recommended that the Committee examine in detail the effectiveness of the JobKeeper program, including the extent to which it has delivered equitable and fair outcomes in terms of who has been able to access the payments, as the adequacy of the financial support provided.

Recommendation

- **The effectiveness of the JobKeeper scheme should be examined in detail, including by reference to its delivery (or not) of equitable and fair outcomes and its provision (or not) of adequate financial support.**

Definitions of 'essential services' and the legal profession

31. During the initial COVID-19 response period, the Australian Government referred repeatedly to 'essential' services when referring to services and businesses that were still able to operate despite lockdown measures being in force. With messages differing between jurisdictions, there has been a degree of confusion across many sectors, including the legal sector, as to what was or was not considered 'essential'.⁶
32. It is submitted that the Committee should give consideration to the role of the Australian Government in defining 'essential services', and measures required to ensure that critical sectors (including legal professionals) were, and are, able to continue to function during and after lockdown measures with the requisite certainty.
33. To illustrate one ambiguity with which the legal community was confronted in the messaging around what was covered by this term, an early determination made under the *Biosecurity Act 2015* (Cth) (**Biosecurity Act**)⁷ did not specifically list legal services as an essential activity, but did deem as essential 'conducting, or taking part in, a sitting of a court or tribunal in the area'.⁸ Despite this ambiguity, it is clear that parties appearing before a court or tribunal should also have access to legal services and legal representation. The Law Council submits that these two concepts must therefore be connected and dealt with together in future emergency declarations.
34. Further, in the Law Council's view, it is impossible to delineate the differences between the 'essential' and the 'non-essential' functions of the legal profession; by extension all

⁶ Gary Mortimer, 'What actually are 'essential services' and who decides?' (online, 31 March 2020) *The Conversation* <<https://theconversation.com/what-actually-are-essential-services-and-who-decides-135029>>.

⁷ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020*, made under subsection 477(1) of the *Biosecurity Act 2015* (Cth).

⁸ *Ibid*, s 4, *definition of 'essential activity'*.

its functions are, in fact, essential. The ongoing functioning of Australian society is made possible by the advice, support and advocacy of legal experts who assist individuals and businesses alike (including those that may have already been deemed essential in their own right) in navigating the complex regulatory systems that underpin every aspect of civil life. This assistance is particularly crucial in times of uncertainty and crisis.

35. Accordingly, ensuring the legal sector can function during and after the imposition of lockdown measures is vital. Should the need to identify essential services arise in future under similar circumstances to those stemming from the COVID-19 pandemic, the Law Council submits that there is a need for greater certainty and clarity in relation to the services covered. The Law Council is of the strong view that legal services as a whole must be classified as essential services in these circumstances.

Recommendation

- **In the event that future lockdown measures are considered, there should be a clear declaration that the legal sector as a whole is designated as an essential service.**

Signing and witnessing of documents

36. The ability to sign and witness documents during lockdown measures has been particularly difficult for members of the legal profession and their clients.
37. The Law Council commends the temporary measures introduced to assist the signing of documents for corporations.⁹ Consideration as to the ability to sign and execute documents electronically ought to remain a priority law reform area. This issue will re-surface during future natural disasters, it remains a regular issue in RRR areas and Australia must also keep pace with modern global business practises.
38. This has been of particular relevance where the COVID-19 pandemic has forced consideration of solutions for the witnessing of solemn documents such as wills. However, the Law Council notes that caution should be exercised when developing emergency powers in areas such as succession law, noting that the complexity of some of the emergency measures have raised concerns as to compliance by legal practitioners, and possible liability for noncompliance. The need for such measures must always be justified, as the Law Council understands that, at least in Western Australia, practitioners have been able to continue to have wills and enduring documents validly witnessed without the need for additional legislation.
39. This Inquiry also provides an opportunity to explore the possibility of harmonising, where possible, electronic signature (**e-signature**) processes across the states and territories, given that commercial and personal transactions regularly cross jurisdictional boundaries.
40. It is noted, however, that in examining this issue, many of the solutions to challenges regarding the witnessing of documents during a time of lockdown have, to date, been – and are likely to be – reliant on technology. Critically, some vulnerable and marginalised populations, such as communities in remote areas and disadvantaged and homeless people, do not have access to adequate technology. Therefore, accommodations must be made for these individuals to access the necessary legal services, and further funding arrangements made to this end.
41. A further challenge for the profession is the facilitation of practitioners' needs to cross state and territory borders to attend legal services. This has been a challenge for the

⁹ See, for example, *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020*.

legal profession during COVID-19 lockdown measures, and could perhaps be resolved if the definition of 'essential services' is clarified in line with the above.

42. The Law Council is of the view that legal practitioners, as providers of an essential service, should be permitted to cross borders for the purposes of delivering legal services. Sufficient proof of travel could include:
- membership card for a legal practitioners' association, or other form of identification of being a legal practitioner; or
 - a form of personal identification and a business card (noting that some jurisdictions do not provide membership cards).
43. Finally, the Law Council notes that electronic witnessing of documents does not remove the obligation on the practitioner to assess the client's mental capacity and the absence of due influence or coercion,¹⁰ and also raises additional issues relating to privacy and confidentiality.¹¹

Recommendation

- **Consideration should be given to the possibility of harmonising, where possible, processes for signing and witnessing documents (including in times of lockdown) across the states and territories, given that commercial and personal transactions regularly cross jurisdictional boundaries.**

Force majeure

44. The pandemic has highlighted a need for greater clarity with respect to force majeure clauses in contracts, and the common law doctrine of frustration. The common law doctrine operates so that if circumstances arise, through no fault of either party to a contract, which result in the obligations under the contract becoming incapable of being performed, the contract is terminated at the point those circumstances arise and the outstanding obligations of both parties are discharged.¹² Force majeure clauses seek to further govern an outcome between parties in such a scenario via contractual agreement.
45. The Committee should consider whether further statutory guidance is needed with respect to commercial and consumer transactions in the case of force majeure clauses. This may be particularly relevant in light of the Unfair Contract Term provisions under the Australian Consumer Law, which have application to contracts with consumers and small businesses.¹³

Recommendation

- **Consideration should be given to whether further statutory guidance is needed with respect to force majeure clauses in commercial and consumer contracts, with reference to examples of situations where**

¹⁰ See, e.g. Queensland Law Society 'Practice Note for Queensland practitioners taking Will and Enduring Power of Attorney Instructions during COVID-19' (March 2020) <www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Practice_Note_for_Queensland_practitioners_taking_Will_and_Enduring_Power_of_Attorney_Instructions_during_COVID-19>.

¹¹ See, e.g. Law Society of New South Wales 'Implications of the Electronic Witnessing Provisions' (May 2020) <www.lawsociety.com.au/sites/default/files/2020-06/Implications%20of%20Electronic%20Witnessing%20Provisions_0.pdf>.

¹² *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729.

¹³ *Competition and Consumer Act 2010*, Schedule 2 'The Australian Consumer Law', s 23.

these became problematic for one or more parties to a contract during the COVID-19 pandemic.

Lawyers in rural, remote and regional Australia

46. The Law Council notes that lawyers practising in RRR locations play an enormous role in their communities and this would be seriously compromised if they could not continue to offer their services. The COVID-19 pandemic has had a significant impact on this section of the profession where the work of legal practitioners has been hampered during COVID-19 lockdown measures when freedom of movement across regions has been restricted. This could perhaps be resolved if the definition of 'essential services' is clarified in line with the above.
47. This situation adds to existing concerns regarding general challenges for both public and private legal practitioners in RRR locations. Community legal services have reported being stretched thin across RRR areas, with staff facing huge caseloads. One public legal assistance service in regional Western Australia, for example, has reported engaging a single solicitor to cover a geographical area more than twice the size of the United Kingdom.¹⁴
48. The Law Council submits that the Australian Government, guided by the work of the Committee, should recognise the economic impact of the pandemic on RRR communities, including the impact on legal practitioners within those communities, and respond accordingly.

Recommendation

- **Rural, remote and regional access to justice strategies should be developed to ensure an appropriate level of legal services in areas of critical need, including through rural placement, targeted mentoring and incentive schemes.**

Courts and tribunals

Resourcing and supporting the needs of courts and tribunals

49. The Law Council notes that courts and tribunals have needed to adapt to a radically different way of operating due to COVID-19 containment measures. Judicial bodies have embraced virtual hearings and virtual alternative dispute resolution processes,¹⁵ and some benefited greatly by having e-filing systems in place prior to the outbreak of the pandemic.¹⁶
50. However, the Law Council notes that federal courts and tribunals have been chronically under-funded and under-resourced for a substantial period of time.¹⁷ The COVID-19 pandemic has served to underscore this situation, particularly the challenges faced by many courts and tribunals in attempting to accommodate shifts to online proceedings due to poor infrastructure.

¹⁴ Law Council of Australia, *Justice Project* (Final Report, August 2018), Regional, Rural and Remote Chapter, 10.

¹⁵ See, for example, Family Court of Australia, *Notice to the Profession* (online, 9 April 2020)

<<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/covid-notice-090420>>.

¹⁶ For example, the Family Court of Australia, the Federal Circuit Court of Australia, and the High Court of Australia.

¹⁷ Law Council of Australia, *Justice Project – Final Report* (2018), 'Courts and Tribunals chapter'.

51. It is submitted that the Committee should consider the adequacy of responses to the resourcing needs of courts and tribunals to ensure that essential elements of the legal system can continue to operate effectively throughout the pandemic and beyond.
52. In particular, it is suggested that the Committee should consult closely with the relevant courts and tribunals and the legal profession, in order to best evaluate both the support and infrastructure in place during the initial stages of the outbreak, and the identified ongoing needs. Consultation should ideally be across all state and territory court jurisdictions as well as federal courts and tribunals, so that whatever measures are resolved for future operation can be adopted across all jurisdictions to facilitate the adoption of such measures.
53. Such a measure aligns with the findings of the Law Council's 2018 Justice Project Final Report, which found that:

...It is of critical importance that the Commonwealth Government, working with state and territory governments, commission a full review of the resourcing needs of the judicial system, noting that there has not been any such review in recent decades. Alongside this review, governments should facilitate an open public discussion about the economic, social and civic importance of meeting the resourcing needs of courts and tribunals.¹⁸

Recommendation

- **A national review of the resourcing needs of the judicial system should take place, incorporating the challenges and benefits that have been identified in the context of the COVID-19 pandemic.**

Addressing backlogs and changes to court procedures

54. Timely resolution of legal issues and disputes is a key aspect of the rule of law. Accordingly, public confidence in the justice system to uphold the law and determine disputes fairly may be affected by the incapability of the courts to provide timely and efficient processes. The Law Council notes that as far as is possible in the given circumstances, courts and tribunals have endeavoured to ensure that matters are resolved as efficiently as possible, including through shifts to remote proceedings.
55. Due to the COVID-19 pandemic, the High Court of Australia, the Federal Court of Australia (**Federal Court**), the Federal Circuit Court of Australia (**Federal Circuit Court**) and the Family Court of Australia (**Family Court**) have each reduced or removed in-person operations, including hearings, and shifted operations to information and communications technology systems where possible.
56. However, public health and emergency management restrictions have in many cases inevitably resulted in increased delays and a backlog in hearings. In some cases, delays have also been exacerbated by increased demand for court resources in relation to particular matters, such as domestic violence.
57. Areas where further delays are likely to have significant mental health and/or human rights impacts include Family Court matters involving children, matters involving offenders being held on remand, and matters involving persons in juvenile detention, immigration detention, or other forms of detention.
58. Some marginalised and vulnerable groups were disproportionately impacted in the early weeks of the pandemic, when matters were adjourned for uncertain periods. For example, the pandemic prompted the suspension of bush courts in the Northern

¹⁸ Ibid, recommendation 4.1.

Territory.¹⁹ The Law Council notes that some jurisdictions have now begun to publish dates for when ordinary services may resume.²⁰

59. Some courts were in a position to respond promptly. For example, on 26 April 2020 the Family and Federal Circuit Courts announced a new court list, the COVID-19 List, for quickly dealing with parenting disputes that required urgent attention due to events arising from the pandemic.²¹ Examples of applications suitable for the new list include those related to: family violence;²² supervised contact;²³ border restrictions;²⁴ and medical factors.²⁵ The new list commenced on 29 April 2020 and will be assessed after three months.
60. As more judicial bodies at all levels will doubtlessly look towards utilising technology to modernise court processes, it would be beneficial for the Committee to assess the challenges, benefits and existing best practice guidelines with respect to introducing and maintaining these processes. Specifically, this analysis should consider the practical implementation of technology in the courts and tribunals, access to justice, and maintaining trust in the judiciary.²⁶
61. In the Law Council's view, it may be advantageous to approach the adoption of technology across the courts in a harmonised way. The Commonwealth is well-placed to play a key role in fostering a harmonised uptake of technology throughout courts and tribunals and where appropriate, and to allocate funding to ensure that all courts and tribunals can implement new processes, thereby providing greater access to justice.

Recommendation

- **Courts, tribunals and the legal profession should be consulted to assess the challenges and benefits associated with the processes that were introduced or considered during the COVID-19 pandemic to address actual or potential delays and backlogs, including the increased use of technology.**

Online alternative dispute resolution

62. Online dispute resolution, including mediating, offers many benefits to parties in terms of accessibility and reduced costs, and has proved an effective model for many parties during the COVID-19 lock down measures. However, the Law Council understands that technological systems that have been adopted have not always allowed for appropriate

¹⁹ Melissa Mackay, 'Justice in remote NT bush courts is 'grinding to a halt', legal group says', *ABC News* (online, 27 April 2020) <<https://www.abc.net.au/news/2020-04-27/nt-bush-court-justice-indigenous-communities-coronavirus/12185974>>.

²⁰ See, for example, Supreme Court of the Northern Territory, 'Courts and Tribunals COVID-19 Response' (online, 21 April 2020) <<https://supremecourt.nt.gov.au/about/whats-new/2020/courts-and-tribunals-covid-19-response>>.

²¹ Family Court and Federal Circuit Court, *Media Release: The Courts Launch COVID-19 List to Deal with Urgent Parenting Disputes* (online, 26 April 2020) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr260420>>.

²² Note, this applies where there has been an increase in risk due to the restrictions imposed on families during the pandemic.

²³ Note, this applies where the current parenting arrangements involve supervised contact and the contact centre is closed.

²⁴ Note, this applies where the parties live in different jurisdictions and the child cannot travel between residences due to border restrictions.

²⁵ Note, this applies where the parties have tested positive for COVID-19.

²⁶ For a detailed discussion on these issues, see Chief Justice Allsop AO, 'Technology and the Future of the Courts' (Speech, Special Lecture Series on Technology and the Future of the Legal Profession, University of Queensland, 26 March 2019) <<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20190326>>.

levels of conversing, and in geographical areas where the internet service is unreliable or not available, can result in the promise of settlement being lost at crucial junctures.

63. The Law Council suggests that further research into the effectiveness and utility of online mediations should be undertaken before there is a continued reliance on such formats in the post-COVID-19 climate.
64. Further, and as elaborated upon below at page 29, there are potential risks in an overreliance in online dispute resolution in the context of digitally excluded communities, which should be taken into account when these matters are discussed into the future. The appropriate design of dispute resolution mechanisms, whether online, in person or hybrid models need to be considered for careful adaption for implementation for use by vulnerable people and communities. Generally, the Law Council regards that there are likely to be considerable benefits to all parties if online dispute resolution is appropriately evaluated beyond the COVID-19 pandemic.

Recommendation

- **The Law Council supports an evidence-based approach to the delivery of online dispute resolution processes, including mediation, which takes into account the effects of online proceedings on all participants and the digital exclusion of many members of marginalised and vulnerable groups.**

COVID-19 and vulnerable communities

Access to justice and legal assistance services

65. Marginalised groups face formidable systemic and personal barriers in accessing justice. This is despite the fact that these groups are disproportionately represented in the legal system, often being more vulnerable to multiple civil and criminal legal problems and having greater and more complex legal needs than the general population.²⁷
66. The COVID-19 pandemic has seen the introduction by Australian governments of far-reaching public health and emergency management responses, including in the form of restrictions on gatherings and movement. The community has been required to adapt to a new reality based around social distancing, and to new restrictions on gatherings and movement.
67. As noted above, the COVID-19 pandemic has also seen the rapid introduction of remote hearings by Australian courts and tribunals. By mid-March 2020, most courts were moving to delay hearings in all but the most urgent cases. Subsequently, most Australian courts have begun to utilise digital solutions to allow remote or 'virtual' hearings. As noted by McIntyre, Olijnyk and Pender, 'the speed with which the judiciary and the profession have managed to adjust to the digital-only landscape is striking'.²⁸
68. Indeed, the Law Council considers that courts and tribunals have been extremely proactive in responding to the challenges posed by COVID-19, and in particular their recognition of the impacts on vulnerable communities. For example, the abovementioned Family and Federal Circuit Court's creation a new court list for quickly dealing with parenting disputes that required urgent attention due to events arising from

²⁷ Law Council of Australia, *Justice Project – Final Report* (August 2018), 'Overarching Themes' 6.

²⁸ Joe McIntyre, Anna Olijnyk and Kieran Pender, 'Courts and COVID-19: Challenges and Opportunities in Australia', *Australian Public Law* (online, 4 May 2020) <<https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/>>.

the pandemic.²⁹ Moves to accommodate remote hearings have also accommodated those who are particularly vulnerable to travel during the pandemic, and has allowed individuals on remand to have an opportunity to appear without undue delay.

69. These public health and emergency management responses, and the movement to online courts and dispute resolution mechanisms, have presented particular risks and challenges, as well as opportunities for the delivery of justice to marginalised and vulnerable groups.
70. In terms of risks and challenges, COVID-19 has significantly impacted the availability and delivery of legal and justice services in the community. Public health and emergency management restrictions on gatherings and movement have made it more difficult for the legal system to reach people at risk, whilst at the same time increasing the need for marginalised and vulnerable groups to have effective access to legal advice, representation and oversight in order to ensure the protection of their rights. COVID-19 has also tested the principle of open justice in Australia, with the rapid shift to online or 'virtual' courts and tribunals curtailing the ability of the general public and the media to access hearings.
71. Private firms facing financial difficulties due to the pandemic may need further support as well. Practitioners who provide pro-bono legal assistance, offer reduced rates or who are considered preferred suppliers by Legal Aid, perform a vital role within the community ensuring access to justice.
72. In terms of opportunities, COVID-19 has fast-tracked consideration of technological responses to the delivery of legal and justice services. For some, moving online and trialling new ways of working may result in system efficiencies and reaching some marginalised and vulnerable groups more effectively, particularly those with high levels of digital capability.

Increased demand for legal assistance services

73. Public health and emergency management restrictions on gatherings and movement have led to an increase in certain legal problems and a corresponding demand or anticipated demand for particular legal services and courts. For example, there was a documented increase in family violence as states and territories first entered lockdown.³⁰ There will be increased need from clients seeking advice, in relation to: domestic and family violence; credit matters; insurance matters; superannuation claims; hardship applications; insolvency matters; tenancy disputes; and employment law.
74. Legal assistance services already faced insecure and insufficient resourcing prior to the pandemic. COVID-19 exacerbated these difficulties, such as through a lack of basic technological infrastructure to enable staff to work and attend upon clients remotely.
75. Therefore, the Law Council welcomed the Federal Government's injection of an additional \$63.3 million into frontline legal services to support Australians impacted by the pandemic, announced on 6 May 2020.³¹ \$20 million of this funding will be directed to domestic violence matters; \$29.8 million to other COVID-19 issues; and \$13.5 million

²⁹ Family Court and Federal Circuit Court, *Media Release: The Courts Launch COVID-19 List to Deal with Urgent Parenting Disputes* (online, 26 April 2020) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr260420>>.

³⁰ Rick Morton, 'Family Violence Increasing During Covid-19 Lockdown', *The Saturday Paper* (online, 4-10 April 2020) <<https://www.thesaturdaypaper.com.au/news/law-crime/2020/04/04/family-violence-increasing-during-covid-19-lockdown/15859188009641>>.

³¹ Attorney-General, *Media Release: Funding Boost to Ensure Struggling Australians Can Get Legal Assistance* (online, 6 May 2020) <<https://www.attorneygeneral.gov.au/media/media-releases/funding-boost-ensure-struggling-australians-can-get-legal-assistance-6-may-2020>>.

to service providers to improve their information technology capabilities as they shift to online service delivery.³²

76. However, while these measures are welcome and desperately needed, they fail to address the chronic underfunding of the sector by the Australian Government. Ongoing, sufficient and certain funding must be a priority for Commonwealth, state and territory governments to ensure that the legal assistance sector can meet the demands placed on it in times of crisis such as the COVID-19 pandemic, and beyond.
77. Key elements of Australian democracy, including equality before the law, access to justice and the rule of law are dependent on all members of the community being able to access legal assistance when necessary to uphold their rights. A consistent theme identified by the Law Council throughout the Justice Project was that the cost of legal assistance is a frequent and formidable barrier for people with complex and intersectional disadvantage.³³ For a great number of Australians, no-cost or minimal cost services are critical in addressing legal needs and government-funded legal assistance services are often the first and most fundamental port of call.
78. Against an ongoing backdrop of the COVID-19 pandemic, these services should be considered to form a key safeguard in protecting the rights of vulnerable Australians, and a preventative policy tool going forward. The Law Council submits that legal assistance funding to adequately support this sector is particularly scarce and requires urgent attention by the Australian Government.

Recommendation

- **The Australian Government should invest significant and ongoing resources in Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services, and Family Violence Prevention Legal Services to ensure that Australians impacted by a crisis such as the COVID-19 pandemic can have access justice in times of need.**

Marginalised and vulnerable groups of particular concern

79. The Law Council has identified the following marginalised and vulnerable groups as of particular concern in relation to legal and justice service delivery as a result of COVID-19:
 - people who are at risk and may be experiencing legal problems which are likely to be exacerbated by the pandemic or by the restrictions on gatherings and movement, such as people experiencing family violence, elder abuse or homelessness;
 - people with less ability to adapt to legal services moving online, including older persons, people with poor legal knowledge, particular language or communication needs, cognitive impairment or mental health conditions, or limited technological capability or access;
 - people living in RRR areas where legal services or courts have been cancelled (for example, bush courts), or for whom travelling to obtain legal services or attend court has been made impossible, or significantly more difficult or unsafe (for example, fewer flight routes, remote communities closures, State and Territory border closures); and

³² Ibid.

³³ Law Council of Australia, *Justice Project – Final Report* (August 2018), 'Legal Services' 6.

- Aboriginal and Torres Strait Islander persons in locked down remote communities, people in group homes, and people in closed residential settings (for example, prisons, juvenile detention centres, aged care facilities, residential disability settings, residential psychiatric settings, and immigration detention) who are at greater risk of neglect, abuse and exploitation due to fewer visits, decreased access to legal advice and decreased independent oversight.
80. It is submitted that concerns for these communities should form a key part of the Inquiry, including a consideration of how the ongoing and pre-existing vulnerability of these communities has heightened their vulnerability during the COVID-19 pandemic. Further specific submissions on a number of these vulnerable cohorts are provided below.

Victims of domestic violence

81. Reports suggest that there has been a significant increase in domestic and family violence since the beginning of the COVID-19 pandemic. For example, in March 2020, referrals through the NSW Government's Safer Pathways program for victims of domestic violence were up 10 per cent compared to the same period in 2019.³⁴ Across Australia, other states have recorded similar spikes in domestic violence reporting during the pandemic³⁵ and the same trend is present internationally.³⁶ The Law Council therefore welcomed the announcement of targeted funding from the Federal Government to support Australians experiencing domestic, family and sexual violence as a result of COVID-19 related containment measures.³⁷
82. As noted above, the Law Council has also welcomed the announcement of an additional \$63.3 million for frontline legal services to support people impacted by COVID-19, \$20 million of which has been earmarked for domestic violence.³⁸ As previously noted, while the importance of accessible legal assistance is heightened in times of crisis, these services are continually in high demand, and without long-term and substantive funding, some of Australia's most vulnerable people will continue to slip through the cracks.
83. More broadly, the increases in rates of domestic violence during the COVID-19 pandemic has exposed additional dangers for the victims of family violence, particularly women and children. It is in this context that the Law Council expressed its frustration with the majority report of the bipartisan Legal and Constitutional Affairs References Committee which was delivered in May 2020 (three months ahead of schedule), without

³⁴ Lucy Cormack, 'Domestic violence victims seeking help rises 10 per cent after COVID-19 lockdown', *The Sydney Morning Herald* (online, 1 May 2020) <<http://www.smh.com.au/national/nsw/domestic-violence-victims-seeking-help-rises-10-per-cent-after-covid-19-lockdown-20200501-p540xt.html>>.

³⁵ Ruchika Talwar, 'Coronavirus lockdown: Domestic violence complaints in Australia rise even as reports by phone fall', *SBS News* (online), 17 April 2020 <<http://www.sbs.com.au/language/english/audio/coronavirus-lockdown-domestic-violence-complaints-in-australia-rise-even-as-reports-by-phone-fall>>; Kate Hedley, 'Huge spike in family violence in WA could be the 'tip of the iceberg': McGurk', *WA Today* (online, 12 May 2020) <<http://www.watoday.com.au/national/western-australia/huge-spike-in-family-violence-in-wa-could-be-the-tip-of-the-iceberg-mcgurk-20200512-p54s4l.html>>; Sumeyya Ilanbey and Simone Fox Koob, 'Closed doors won't protect you': Police ramp up response to family violence', *The Age* (online, 21 April 2020) <<http://www.theage.com.au/national/victoria/closed-doors-won-t-protect-you-police-ramp-up-response-to-family-violence-20200421-p54lqx.html>>.

³⁶ Andrew M. Campbell, 'An increasing risk of family violence during the COVID-19 pandemic: Strengthening community collaborations to save lives' (2020) 2 *Forensic Science International: Reports*.

³⁷ Prime Minister of Australia, *Media release: \$1.1 billion to support more mental health, Medicare and domestic violence services* (online, 29 March 2020) <<http://www.pm.gov.au/media/11-billion-support-more-mental-health-medicare-and-domestic-violence-services-0>>.

³⁸ Commonwealth Attorney-General, *Media release: Funding boost ensure struggling Australians can get legal assistance* (online, 6 May 2020) <<http://www.attorneygeneral.gov.au/media/media-releases/funding-boost-ensure-struggling-australians-can-get-legal-assistance-6-may-2020>>.

the accepting submissions or holding public hearings.³⁹ The Law Council viewed this as a missed opportunity to examine and improve the programs that are working well to support and protect the vulnerable members of society, which has taken particular significance in the context of the COVID-19 pandemic.

84. For these reasons, the Law Council was pleased to note the Government's announcement on 31 May 2020 of a new inquiry into family, domestic and sexual violence, to be conducted by the House of Representatives Standing Committee on Social Policy and Legal Affairs (**Standing Committee**).⁴⁰ In the context of the current Inquiry, the Law Council is particularly pleased that the Standing Committee will be examining the impact of natural disasters and other significant events such as COVID-19, including health requirements such as staying at home, on the prevalence of domestic violence and provision of support services.
85. The Law Council calls on the new inquiry to address issues within the justice system including the chronic underfunding of the family law system by successive governments over many years and for Commonwealth, state and territory governments to ensure stable and adequate funding of legal assistance services for victims and perpetrators of family violence. The Law Council looks forward to engaging with the Committee and the Australian Parliament on this important inquiry.

Persons in immigration detention

86. While the efforts of the Federal, state and territory governments to bring the COVID-19 pandemic under control have been welcome and particularly effective, the Law Council retains its concerns about the continued possibility of an outbreak within immigration detention facilities. This remains a clear risk, noting the devastation by the pandemic caused in other closed residential settings such as aged care.⁴¹
87. The Australian Government has identified that those who are most at risk of catching the virus include people in detention.⁴² Moreover, people in group residential settings, and with chronic medical conditions, are among those at a greater risk of serious illness if they do become infected.⁴³ It has also indicated that people in high-risk settings, including immigration detention, will be regularly monitored, and that rapid response plans will be activated if individuals develop fever or respiratory symptoms.⁴⁴
88. However, the Law Council maintains its view that the Australian Government should be proactively reducing COVID-19 immigration detention risks by releasing individuals who do not pose a genuine danger to public safety or health into the community, with appropriate levels of support. It is conscious that Australia's obligations to respect,

³⁹ Law Council of Australia, *Media release: Law Council President, Pauline Wright, statement on abject failure of domestic violence inquiry* (online, 20 May 2020) <<http://www.lawcouncil.asn.au/media/media-releases/law-council-president-pauline-wright-statement-on-abject-failure-of-domestic-violence-inquiry>>.

⁴⁰ See, Law Council of Australia, *Media release: Statement on announcement of new inquiry into domestic violence from Law Council President, Pauline Wright* (online, 31 May 2020) <<https://www.lawcouncil.asn.au/media/media-releases/statement-on-announcement-of-new-inquiry-into-domestic-violence-from-law-council-president-pauline-wright>>

⁴¹ For example, 16 elderly residents with COVID-19 have died at Newmarch House, a Western Sydney aged-care facility, and as at 6 May 2020, 66 people at the facility had been infected. It has become Australia's 'second biggest cluster of coronavirus deaths': Kevin Nguyen, *How Newmarch House became a 'pseudo hospital' for coronavirus*, ABC News (online, 29 April 2020).

⁴² Australian Government Department of Health, *What you need to know about coronavirus* (online, undated) <www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19#who-is-most-at-risk>.

⁴³ Lorna Knowles and Jeremy Story Carter, 'Asylum seekers plead to be released from detention centres amid coronavirus fears', ABC news (online, 25 March 2020) <<https://www.abc.net.au/news/2020-03-25/coronavirus-fears-asylum-seekers-plead-for-release-detention/12084604>>.

⁴⁴ Australian Government, 'What You Need to Know About Coronavirus (COVID-19)', *Coronavirus Health Alert*, 20 May 2020.

promote and fulfil the right to the enjoyment of the highest attainable standard of health,⁴⁵ as well as the right to life,⁴⁶ apply not only to asylum seekers, but to all persons in immigration detention. The Law Council calls on Australia to uphold its obligations under this treaty and other core human rights treaties.⁴⁷

89. On 25 March 2020, the United Nations High Commissioner for Human Rights, Michelle Bachelet, called upon governments to take urgent action to prevent COVID-19 from ‘rampaging through places of detention’, including immigration detention.⁴⁸ She noted that addressing the situation of detained people was vital in order to protect detainees, staff, visitors and wider society. Under international human rights law, States have an obligation to take steps to prevent foreseeable threats to public health and have a duty to ensure that all who need vital medical care can receive it. In particular, the High Commissioner urged governments to work quickly to reduce the number of people in detention, in line with the ‘detention as a last resort’ principle, particularly those who are most vulnerable to COVID-19, including older and sick persons.⁴⁹
90. The Law Council suggests that in the current circumstances and having regard to Australia’s international obligations, it is not necessary, reasonable and proportionate to continue to hold in immigration detention facilities populations who do not pose genuine community risks, particularly vulnerable populations with underlying health conditions. By comparison, the Law Council notes that the United Kingdom has reduced the number of people held in immigration centres by more than two thirds during the pandemic.⁵⁰
91. Should the Australian Government adopt similar measures, it will be critical to develop appropriate supports for released individuals, including access to bridging visas with work rights, income support, housing and medical care. The Law Council is also conscious that those left in detention must be able to access protection from COVID-19, and prompt, specialist medical care.
92. The Law Council is concerned that there is little transparency or independent oversight over onshore and offshore arrangements during the pandemic. It notes that the Commonwealth Ombudsman, to protect the health of its staff and detainees, has temporarily suspended its physical inspections of detention facilities.⁵¹ The situation for refugees and people seeking asylum who are still in Papua New Guinea and Nauru under Australia’s offshore processing regime is particularly precarious and uncertain. Clarity should be sought regarding the measures which are being adopted to ensure their health and safety during the pandemic.
93. The results of the inquiry by the Committee into these matters should be used to inform the Government’s treatment of persons in immigration detention in the case of future circumstances involving similar issues.

⁴⁵ *International Convention on Social, Economic and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 12.

⁴⁶ *Universal Declaration of Human Rights* GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), art 3; and the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 6.1.

⁴⁷ Law Council Policy Statement, *Human Rights and the Legal Profession: Key Principles and Commitments*, (2017), 3.

⁴⁸ United Nations Human Rights Office of the High Commissioner, ‘Urgent action needed to prevent COVID-19 ‘rampaging through places of detention’, Geneva, 25 March 2020.

⁴⁹ *Ibid.*

⁵⁰ Diane Taylor, ‘Home Office releases 300 from detention centres amid Covid-19 pandemic’, *The Guardian* (online, 22 March 2020) <<https://www.theguardian.com/uk-news/2020/mar/21/home-office-releases-300-from-detention-centres-amid-covid-19-pandemic>>.

⁵¹ The Commonwealth Ombudsman states that it is instead remotely monitoring the operations of detention facilities and is continuing to prepare assessments of the circumstances of individuals in long term immigration detention. It is also continuing to handle complaints from detainees. See, Commonwealth Ombudsman, ‘COVID-19: FAQs’ <<https://www.ombudsman.gov.au/what-we-do/covid-19/covid-19-faqs>>.

Recommendations

- **The Australian Government should adopt measures to reduce COVID-19 risks in immigration detention facilities by releasing, with appropriate support, persons who do not pose a genuine danger to the community. Priority should be given to persons with health conditions or other characteristics (e.g. age) which place them at greater risk.**
- **The Committee should seek information regarding the measures adopted to ensure appropriate levels of health care throughout the pandemic for persons in onshore immigration detention facilities, and for refugees and asylum seekers who remain in Papua New Guinea and Nauru under Australia's offshore processing regime.**

Temporary migrants

94. The Law Council welcomes the Australian Government's provision of a strong safety net through increased access to JobSeeker payments to support people who have lost their jobs or face reduced hours due to the pandemic, and the JobKeeper wage subsidy to assist employers in retaining employees whose jobs are at risk. These temporary measures have been vital in maintaining public confidence throughout this challenging period. Permanent residents have been granted most of the same protections as Australian citizens, including access to welfare, removal of waiting periods for entitlements, and access to Medicare.
95. By contrast, the Law Council is concerned that most temporary migrants have been ineligible to benefit from COVID-19 crisis measures. They are also among the groups whose work opportunities (for example, casual employment in catering and retail and the gig economy) have been rapidly constricted during COVID-19 restrictions. As noted by the Refugee Council of Australia, JobKeeper is not available to temporary visa holders,⁵² including refugees on Temporary Protection Visas (TPVs), Safe Haven Enterprise Visas (SHEVs) and people seeking asylum on Bridging Visas. Further, people seeking asylum on Bridging Visas and other temporary visa holders⁵³ cannot access JobSeeker payments. Refugees on TPVs or SHEVs can access the equivalent of JobSeeker via Service Australia's Special Benefit payment for people in severe financial hardship who cannot otherwise access income support, but face strict limitations.⁵⁴ International students have also been disproportionately affected by the pandemic, noting that many worked in industries adversely affected by forced business shutdowns such as in hospitality and ride sharing.⁵⁵
96. This state of affairs has been characterised by a range of policy, business, legal and social experts as a 'serious gap in the government's response that needs to be filled as soon as possible'.⁵⁶ The majority of migrants in Australia are temporary and Australia

⁵² However, Special Category Visa 444 New Zealand citizens who meet other eligibility requirements will be eligible for all welfare payments, including the JobSeeker and JobKeeper payments. People who are not protected SCV New Zealand citizens and hold a TY444 visas will still be eligible for JobKeeper payments. See, Department of Home Affairs, *COVID-19 and the border: Frequently Asked Questions* (online, undated) <<https://covid19.homeaffairs.gov.au/frequently-asked-questions>>.

⁵³ See previous footnote concerning certain exceptions for New Zealand citizens.

⁵⁴ Refugee Council of Australia, *Open letter to Prime Minister Scott Morrison – Nobody Left behind* (7 May 2020).

⁵⁵ Mary Anne Kenny, 'COVID-19: Civil liberties and the role of the state: Temporary visa holders left behind in Australia' (online, 14 May 2020) *UWA University News* <www.news.uwa.edu.au/2020051412083/uwa-public-policy-institute/covid-19-temporary-visa-holders-left-behind-australia>.

⁵⁶ Peter Whiteford, 'Open letter to the Prime Minister: extend coronavirus support to temporary workers' (online, 7 April 2020) *The Conversation* <<https://theconversation.com/open-letter-to-the-prime-minister-extend-coronavirus-support-to-temporary-workers-135691>>.

has one of the highest rates of temporary migration of any democracy.⁵⁷ Temporary migration has been characterised as ‘integral to Australia’s economic success story.’⁵⁸ Temporary migrants fill key skills shortages, pay Australian taxes and are financially beneficial, with their input critical to Australia achieving budget surpluses.⁵⁹ Failing to provide a safety net to temporary migrants who lose their jobs may undermine their health and welfare, create future labour shortages in vital sectors when the economy restarts, and breach Australia’s international responsibilities.

97. The Law Council acknowledges the Australian Government’s moves to enable most temporary visa holders with work rights to access their Australian superannuation to support themselves during the pandemic.⁶⁰ Measures have also been adopted to enable temporary visa holders to remain in key industries, such as health, aged and disability care, and to offer greater flexibility to many temporary migrants to assist them to avoid breaching their visa conditions.⁶¹
98. On the other hand, official advice has been provided that temporary migrants who cannot support themselves should leave Australia.⁶² The Law Council is concerned that many temporary migrants have been unable to do so and are reportedly at risk of destitution and homelessness.⁶³ Some may be driven into conditions of labour exploitation or modern slavery in order to survive – outcomes which the Australian Government has worked hard in recent years to avoid.⁶⁴ Women who are temporary migrants may be at greater exposure to family violence as they are unable to leave dangerous homes due to limited financial resources.⁶⁵ People seeking asylum who are living in the community also lack access to Medicare.⁶⁶
99. The Law Council notes that in addition to the above factors, Australia has obligations to temporary migrant workers under a range of United Nations human rights law treaties and International Labour Organization (**ILO**) conventions. These obligations span many areas, including:
 - the right to work in favourable conditions;⁶⁷
 - the right to be free of modern slavery and compulsory labour;⁶⁸

⁵⁷ Anna Boucher, ‘Covid-19 is not only a health crisis, it’s a migration crisis’ (2 April 2020) *The Interpreter* (Lowy Institute).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ The Hon David Coleman MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, *Joint media release with the Hon Michael McCormack and the Hon David Littleproud MP - Supporting the agriculture workforce during COVID-19* (online, 4 April 2020) <<https://minister.homeaffairs.gov.au/davidcoleman/Pages/supporting-agriculture-workforce-covid-19.aspx>>.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Joo-Cheong Tham, ‘Why temporary migrants need JobKeeper’, *The Conversation* (online, 7 April 2020) <<https://theconversation.com/why-temporary-migrants-need-jobkeeper-135688>>.

⁶⁴ See, for example, the historic introduction of the *Modern Slavery Act 2018* (Cth).

⁶⁵ Marie Segrave and Jane-Maree Maher, ‘Coronavirus: Family violence and temporary migration in the time of COVID-19’, *Monash University Lens* (online, 2 April 2020) <<https://lens.monash.edu/@politics-society/2020/04/02/1379949/coronavirus-family-violence-and-temporary-migration-in-the-time-of-covid-19>>.

⁶⁶ Refugee Council of Australia, ‘Open letter to Prime Minister Scott Morrison – Nobody Left behind’, 7 May 2020.

⁶⁷ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 6(1), 7.

⁶⁸ International Convention on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 8(1), 8(2) (**ICCPR**); Convention concerning Forced or Compulsory Labour (C29), opened for signature 28 June 1930, International Labour Organisation (**ILO**) (entered into force 1 May 1932) (**C29 Convention**); Convention concerning the Abolition of Forced Labour (C105), opened for signature 25 June 1957, International Labour Organisation (ILO) (entered into force 17 January 1959) art 1 (**C105 Convention**). See also Australia’s obligations to prevent trafficking and protect trafficking victims under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,

- the right of children and young persons to be free from exploitation in the workplace;⁶⁹
- the right to be free of discrimination;⁷⁰
- the right to enjoy the highest attainable standard of health;⁷¹
- the right to an adequate standard of living, including adequate food, water, clothing and housing;⁷² and
- the right to access health⁷³ and social security benefits.⁷⁴

100. The effect of the pandemic on migrant workers exacerbates the risks of modern slavery occurring both in Australia and in our supply chains, as discussed below.

101. The United Nations Human Rights Office of the High Commissioner has recently emphasised that ‘COVID-19 does not discriminate, nor should our response’,⁷⁵ and that migrants must be included in measures to mitigate the economic downturn caused by the pandemic, as they are often disproportionately affected by such events as low-paid workers.

Recommendation

- **The Australian Government should extend temporary safety net measures such as JobKeeper and JobSeeker to temporary migrants and asylum seekers who are in need.**

Modern slavery risks

102. The Law Council considers that Australia has a strong criminal law framework that criminalises human trafficking, slavery and slavery-like practices, regardless of whether they occur in Australia or overseas. However, the COVID-19 pandemic has created additional challenges in this area, and has re-emphasised the need to develop a strong, evidence-based National Action Plan to Combat Modern Slavery 2020-24 to drive Australia’s efforts to combat modern slavery over the next five years, planning for which is currently underway.⁷⁶ The Law Council recommends that this new plan, as well as the new International Strategy on Human Trafficking and Modern Slavery, under development⁷⁷ specifically recognises and responds to the COVID-19 pandemic as a likely new driver of modern slavery.

Supplementing the United Nations Convention against Transnational Organised Crime, signed 15 November 2000, United Nations General Assembly, art 9.

⁶⁹ ICESCR, art 10(3).

⁷⁰ ICCPR arts 2(1), 26; ICESCR art 2(2).

⁷¹ ICESCR art 12.

⁷² CESCR arts 11(1), 11(2). See also ICESCR art 11; CEDAW art 14(2); Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 16(1) and 27(3) (CRC); International Convention on the Elimination of All Forms of Racial Discrimination, signed 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(e)(iii).

⁷³ ICESCR art 12; CERD art 5(e)(iv); CEDAW arts 12, 14(b); CRC arts 24, 25.

⁷⁴ ICESCR art 9; CRC art 26.

⁷⁵ United Nations Human Rights, Office of the High Commissioner, *COVID-19 does not discriminate; nor should our response* (online, undated)

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25730&LangID=E>>.

⁷⁶ See, Law Council of Australia submission to the Australian Border Force ‘National Action Plan to Combat Modern Slavery 2020-24’ (21 February 2020) <www.lawcouncil.asn.au/resources/submissions/national-action-plan-to-combat-modern-slavery-2020-24-public-consultation-paper>.

⁷⁷ Law Council, International Strategy on Human Trafficking and Modern Slavery: Consultation Paper, Submission to the Department of Foreign Affairs and Trade, 11 May 2020.

103. First, the virus exposes vulnerable cohorts to greater risk. There are many people who are working and living in increasingly unstable, crowded, dangerous and unsanitary conditions without avenues to call for increased protections.
104. Second, as flagged above, the pandemic risks pushing greater numbers of workers into exploitative situations, both globally and domestically. Government restrictions, as well as the downturn in certain industries, have led to millions of job losses and fostered a climate where people's financial futures are uncertain. This risks forcing more people into exploitative labour conditions as they attempt to find any new job or keep hold of their existing job in a worsening market.
105. Third, the pandemic is placing significant pressure on business, particularly in terms of guaranteeing continuity of supply or meeting increased demand. The pressure on business to guarantee supply of materials and products risks their engagement with new suppliers without conducting the necessary due diligence, including an increase in orders placed with companies that have a history of human rights abuses. Containment measures such as lockdowns and travel restrictions have also increased the difficulties for large entities to undertake thorough human rights due diligence through the inability to visit and inspect workplaces. The Law Council has welcomed the information provided by the Department of Home Affairs regarding the *Modern Slavery Act 2018* (Cth) and risks of COVID-19 to assist reporting entities in this regard,⁷⁸ while reiterating the need to maintain momentum in this area and to ensure that safeguards for vulnerable workers are in place.
106. Longer-term, COVID-19-related pressures are likely to require targeted policy and program attention by the Australian Government, including preventative responses to stem the incidence of modern slavery. This will require domestic responses, including safety nets for temporary migrants at risk (as discussed above) and specific supports for those who are 'hidden' from public view and liable to exploitation, such as those in RRR areas. In the international context, there may be pressures flowing from COVID-19 on Australia's foreign aid and development budget. Should this be reduced, there may be additional numbers of people in poverty who are subject to exploitation and modern slavery, particularly in the Asia-Pacific region.⁷⁹

Recommendations

- **The development of the new National Action Plan to Combat Modern Slavery 2020-24 and the International Strategy on Human Trafficking and Modern Slavery specifically recognise and respond to the COVID-19 pandemic as a likely new driver of modern slavery.**
- **The development of broader Australian Government domestic and foreign policy during and following the COVID-19 pandemic specifically has regard to measures' likely impact on modern slavery outcomes.**

Persons experiencing digital exclusion

107. The circumstances surrounding the COVID-19 pandemic have required the Australian Government to reduce regulatory requirements and adopt flexible practices across a range of settings: for example, conducting remote hearings in federal courts and

⁷⁸ Department of Home Affairs 'Modern Slavery Act: Information for reporting entities about the impacts of coronavirus' (21 April 2020) <www.homeaffairs.gov.au/about-us/our-portfolios/criminal-justice/people-smuggling-human-trafficking/modern-slavery-act-coronavirus>.

⁷⁹ See Law Council of Australia, International Strategy on Human Trafficking and Modern Slavery: Consultation Paper, Submission to the Department of Foreign Affairs and Trade, 11 May 2020.

tribunals, expanding Medicare telehealth services, and providing access to government services, such as Centrelink, without the need for contact meetings.

108. The Law Council understands that such arrangements have provided greater accessibility and inclusion for groups who may otherwise experience accessibility challenges, such as people with disability, the aged, and those living in RRR areas. The Law Council supports initiatives that promote accessibility and inclusion for all groups and recommends that the Australian Government consider maintaining suitable flexible arrangements into the future post the COVID-19 pandemic.
109. However, as working and accessing some services remotely has become essential during the COVID-19 pandemic, existing telephone and internet connectivity issues in RRR communities have become critical.

Access to online justice system

110. As noted by McIntyre, Olijnyk and Pender,⁸⁰ in the last decade online dispute resolution (ODR) systems and techniques have begun to transition from the private sphere into the public dispute resolution system. Jurisdictions internationally are beginning to consider the possibilities presented by ODR, and some have adopted ODR systems. As at May 2020, perhaps the most established of these public ODR systems is the Civil Resolution Tribunal in British Columbia. The United Kingdom is reportedly investing nearly A\$2 billion in digital justice solutions, including a proposed Online Solutions Court. Australian examples of ODR include initiatives in the Victorian Civil and Administrative Tribunal.⁸¹
111. The Law Council considers it critical that moves towards online courts and ODR initiatives generally, and technological responses to the delivery of legal and justice services driven by COVID-19 in particular, take into account the digital exclusion of people who have limited access to technology and reliable internet connections, or lack the skills to utilise technology and online services. These include older persons, people experiencing homelessness or poverty, and people living in RRR areas.
112. Online proceedings can adversely impede communication by and amongst participants, and add to existing stress, particularly where technology is deficient or unreliable. This can affect justice outcomes. Research indicates that online criminal proceedings can be dehumanising for the accused.⁸² The outcomes of civil applications by asylum seekers can also be adversely affected, according to one US study.⁸³
113. The Law Council recognises that face-to-face delivery of justice has inherent community-wide advantages which can be lost in a wholesale move to online proceedings. For courts and tribunals, a face-to-face local presence can help to combat mistrust of the justice system, to provide a tangible reminder of the law in operation, to engage local communities, and to foster local respect for the law. Face-to-face relationships between legal advisors and marginalised and vulnerable communities are often crucial in building trust and respect, both of which are important in securing positive justice outcomes. This is particularly true for clients who have experienced significant trauma, including trauma related to their experience of authorities (for example, Aboriginal and Torres Strait Islander peoples and asylum seekers).

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Law Council of Australia, *Justice Project – Final Report* (2018), 'Courts and Tribunals chapter', 77-79; Carolyn McKay, 'Human Rights in Closed Environments' (2015) 37(4) *Sydney Law Review* 617.

⁸³ Ibid, 79, citing Susan Banki and Ilan Katz, University of New South Wales Social Policy Research Centre, *Resolving Immigration Status, Part 1: Review of the International Literature* (2009) 3.

114. Accordingly, the Law Council considers that legal and justice services must remain human-centred, triage people effectively according to their capabilities, and be provided face-to-face or by telephone where needed. Regard should be had to issues regarding the use of artificial intelligence in service delivery, including the possibility of algorithms being inherently discriminatory.
115. At the same time, the Law Council recognises that many people within vulnerable cohorts are active and competent users of technology, and that digital engagement amongst such groups has rapidly increased over recent years. COVID-19 has presented opportunities to embrace the advantages of technological innovation.
116. Research indicates that moves towards online courts and tribunals can have particular benefits in certain circumstances and with respect to specific groups. That is, they can reduce litigation costs, eliminate unnecessary and expensive formal correspondence, simplify procedures, avoid transportation from prisons to courts, and improve safety (for example, for family violence victims).
117. Overall, the Law Council supports a cautious, evidence-based approach to the delivery of legal and justice services online which takes into account the effects of online proceedings on all participants and takes into account the digital exclusion of many members of marginalised and vulnerable groups.

Access to online education

118. The digital divide and the risks of negative education implications has been accentuated with the rapid shift to online learning in response to COVID-19 containment measures. A recent report by the Mitchell Institute has stated the problem well: ‘...if digital exclusion disrupts the education of students in low socio-economic households during the COVID-19 crisis they are less likely to return to a successful educational pathway’.⁸⁴
119. Education is widely recognised as one of the most important protective factors that will help keep young people out of the youth and adult criminal justice systems. Bridging the digital divide, both in physical access to technology and the resources and skills needed to accrue benefits from use, has the potential to support far-reaching change in communities, including in education, youth justice, social inclusion, economic participation and access to information.
120. The Law Council submits that the Australian Government should invest in adequate technology and increased resourcing for internet reliability to ensure these communities have equal access to and opportunities for education and participation, particularly if the current flexible arrangements are maintained into the future post COVID-19.

⁸⁴ Kate Noble, ‘COVID-19 school closures will increase inequality unless urgent action closes the digital divide’ *Mitchell Institute, Victoria University* (online, 3 April 2020) <<http://www.mitchellinstitute.org.au/opinion/covid19-digital-divide/>>.

Recommendations

- **The Australian Government should develop and fund an evidence-based approach to the delivery of legal and justice services online which takes into account:**
 - **the effects of online proceedings on all participants and the digital exclusion of many members of marginalised and vulnerable groups; and**
 - **the continued need within the justice system to provide for face-to-face interactions, or by telephone where needed.**
- **The Australian Government should invest in adequate technology and increased resourcing for internet reliability to ensure RRR communities have equal access to and opportunities for education and participation, particularly if the current flexible arrangements are maintained into the future post COVID-19.**

Racial vilification

121. The Law Council is concerned about reports of complaints from persons of Chinese-descent who have experienced vilification as well as discriminatory treatment when trying to obtain goods and services. The Law Council supports measures taken by the Queensland Human Rights Commission to address this issue, including its dedicated complaints system and information resources.⁸⁵
122. The Law Council notes that a variety of federal, state and territory laws are in place to protect individuals against such incidents. Anti-vilification laws now exist at the federal, state and territory level. These are both civil laws, and in some states, criminal laws also prohibit serious vilification (such as New South Wales and Queensland). At the federal level, such laws include Part IIA of the *Racial Discrimination Act 1975* (Cth), which prohibits offensive behaviour based on racial hatred. Other racist attacks may fall within the auspices of other criminal offences, such as for assault and property damage.
123. The Law Council considers that it may be less important to consider law reform in this area, compared to whether people can effectively access such laws in practice. Increasing education and awareness about these laws is fundamental. At the federal level, attention should also be given to whether the Australian Human Rights Commission is appropriately resourced and empowered to carry out its investigation, complaint and conciliation functions. It must also be asked whether the current remedies available are sufficient to act as a deterrent.
124. It is suggested that the Committee seek to quantify the extent to which the pandemic has given rise to circumstances of racial vilification and to consider measures to address the risk of this occurring again.

Recommendation

- **The Australian Government should seek to quantify the extent to which the pandemic has given rise to circumstances of racial vilification and to consider measures to address the risk of this occurring again, including through education and awareness campaigns, and the adequate resourcing of the Australian Human Rights Commission.**

⁸⁵ Queensland Human Rights Commission, 'COVID-19 and human rights' (online, undated) <<http://www.qhrc.qld.gov.au/your-rights/covid-19-and-human-rights>>.

Broader human rights concerns

OPCAT implementation

125. While the above discussion on immigration detention facilities forms one important example of concern, acute concerns have also been raised regarding a lack of transparency or independent oversight of many other places in which people are deprived of their liberty in Australia throughout the pandemic. For example, these include concerns:

- that prisoners and children in juvenile detention are at particular risk of contracting COVID-19, given overcrowding and their underlying health risks, and should be released where it is safe to do so – for example, prisoners with relatively minor sentences who do not pose a community risk.⁸⁶ While some jurisdictions have adopted legislation to enable prisoners to be released due to the pandemic,⁸⁷ there has been no subsequent systemic release of prisoners;
- regarding the lack of transparency in the management of prisoners and juvenile detainees during the pandemic. While a joint decision was made by the National Cabinet to suspend all personal visits to adult correctional facilities across Australia on 20 March 2020, it did not agree upon guidelines for how to manage COVID-19 in Australia's jails until early May.⁸⁸ This decision followed findings made by the Supreme Court of Victoria in *Rowson v Department of Justice and Community Safety*.⁸⁹ The Court granted interlocutory relief to ensure that the health of the plaintiff, a prisoner, was preserved. It held that the plaintiff's evidence provided a sufficient basis, when taken with the absence of a risk assessment, to establish a prima facie case that the defendant had breached its duty of care to him, which exposed him to risk of significant injury;⁹⁰
- that some aged care facilities imposed visitor rules well beyond the national COVID-19 advice, such as by banning all visitors. The Law Council welcomed the Prime Minister's late April intervention on this issue and the 6 May 2020 release of a visitor code of conduct.⁹¹ However, it notes that the level of oversight of aged care during the pandemic has been reduced, with media reports that Aged Care Quality and Safety Commission (**ACQSC**) has no longer been doing unannounced inspections of nursing homes and that facilities due for a scheduled visit would have their accreditation continued without an onsite visit.⁹² The ACQSC indicates that it is conducting a 'proportionate risk-based regulatory response to COVID-19', based on self-assessment by providers in the first instance, and site visits based on assessed risk and circumstances of the provider;⁹³ and

⁸⁶Alexandra Beech, 'Prison advocates call on Government to take more action to prevent COVID-19 outbreak in jails', *ABC News* (online, 6 May 2020) <<https://www.abc.net.au/news/2020-05-06/government-urged-to-protect-inmates-from-covid19/12217928>>.

⁸⁷ See, for example, *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW).

⁸⁸ *Ibid.*

⁸⁹ [2020] VSC 236.

⁹⁰ *Ibid* [98].

⁹¹ See <www.cota.org.au/wp-content/uploads/2020/05/Industry-Code-RACH-Visits-during-COVID-10-FINAL-as-at-11-May-2020.pdf>, also Older Persons Advocacy Network, 'Update on the Industry Code for Visiting Residential Aged Care Homes', (webinar, 27 May 2020) <<https://opan.com.au/update-industry-code-for-visiting-residential-aged-care-homes-27-may-2020/>>.

⁹² Anne Connolly and John Stewart, 'With no visitors or unannounced inspections, who knows what is happening in nursing homes during the coronavirus lockdown?' (online, 2 April 2020) *ABC News* <<https://www.abc.net.au/news/2020-04-02/families-fear-for-aged-care-residents-during-coronavirus-lockdown/12111256?nw=0>>.

⁹³ Aged Care Quality and Safety Commission, 'Proportionate risk-based regulatory response to COVID-19' (online, undated) <<https://agedcarequality.govcms.gov.au/sites/default/files/media/ACQSC%20Schematic.pdf>>.

- regarding the wellbeing of people with disability living within closed residential settings, including group homes, prisons and mental health facilities. On 26 March 2020, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability issued a statement that it was ‘very concerned’⁹⁴ about this issue. It underlined that measures to ‘lockdown’ facilities or restrict visiting, while for legitimate health objectives, may have the unintended consequence of reduction of formal oversight mechanisms and informal oversight by family and friends.⁹⁵ The Law Council understands that some measures adopted have been overly restrictive, although efforts are being taken to overcome this issue including under a comprehensive national management and operational plan.⁹⁶

126. With respect to the above examples, it is well-documented that there has been systemic neglect, abuse or exploitation of vulnerable persons who have been either formally or effectively deprived of their liberty in recent years, leading to the establishment of several Royal Commissions on the subject.⁹⁷ It is also established that neglect, abuse and exploitation is more likely to occur in closed conditions with little transparency or oversight.⁹⁸

127. On 21 December 2017, Australia took a positive step in the campaign to end torture, through the ratification of OPCAT. OPCAT is designed to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. It requires the Australian Government to establish a system of regular visits, to be undertaken by independent international and national bodies, to all places of detention in Australia, including prisons, youth and immigration detention and mental health facilities. When ratifying, the Australian Government postponed its obligations to implement an NPM for three years.

128. The Law Council envisages that OPCAT will assist in preventing torture from occurring in any place of detention in Australia, as well as encouraging a culture of transparency and accountability. The State’s obligation not to impose such treatment or punishment or to expose anyone to the real risk of such treatment or punishment is an obligation which cannot be derogated from in any circumstances.⁹⁹ However, as discussed below, there are concerns about Australia’s progress in implementing OPCAT.

129. The Law Council considers that the COVID-19 pandemic reinforces the need for comprehensive, transparent and independent oversight of places in which people are deprived of their liberty. While the pandemic poses real challenges, including that visitors may carry the virus into such places, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**) has issued COVID-19 advice to State parties and NPMs emphasising that:

While the manner in which preventative visiting is conducted will almost certainly be affected by necessary measures taken in the interests of public health, this does not mean that preventative visiting should cease. On the contrary, the

⁹⁴ Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability, ‘Statement of concern: The response to the COVID-19 pandemic for people with disability’, 26 March 2020.

⁹⁵ Ibid.

⁹⁶ Australian Government Department of Health, *Management and Operational Plan for People with Disability: Australian Health Sector emergency response plan for Novel Coronavirus (COVID-19)*, April 2020.

⁹⁷ Royal Commission into Aged Care Quality and Safety; Royal Commission into the Detention and Protection of Children in the Northern Territory.

⁹⁸ See, for example, Senate Community Affairs References Committee, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (25 November 2015).

⁹⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 2.

*potential exposure to the risk of ill-treatment faced by those in places of detention may be heightened as a consequence of such public health measures taken. The Subcommittee considers that national preventative mechanisms should continue to undertake visits of a preventative nature, respecting necessary limitations on the manner in which their visits are undertaken. It is particularly important at this time that national preventative mechanisms ensure that effective measures are taken to reduce the possibility of detainees suffering forms of inhuman and degrading treatment as a result of the very real pressures that detention systems and those responsible for them face.*¹⁰⁰

130. The SPT also provides advice regarding the safeguards which States should apply to places of detention during the pandemic. These include: reducing prison and other detention populations where possible; ensuring that existing complaints mechanisms remain functional; providing detainees with sufficient alternative means of external communication where visiting regimes are restricted; and preventing the use of medical isolation taking the form of disciplinary solitary confinement.¹⁰¹
131. New Zealand ratified OPCAT and it entered into force in New Zealand in 2007. Its designated NPMs include the Office of the Ombudsman.¹⁰² In contrast to Australia, the Secretary of Justice has designated the Chief Ombudsman's role under the OPCAT as an 'essential service' during COVID-19.¹⁰³ This means that the Chief Ombudsman will continue his program of onsite inspections and visits to New Zealand places of detention during the lockdown, where appropriate. His mandate includes prisons, health and disability facilities (including secure mental health units and aged care facilities), immigration facilities, and court cells. He also issued a statement of principles to guide facilities and their staff to manage the crisis, while meeting New Zealand's international human rights obligations.
132. The Law Council considers that by contrast, Australia's approach to oversight of such places during the pandemic has been at times patchy, inconsistent, lacked transparency and subject to delay. It recognises that work is currently underway to implement OPCAT. However, the pandemic underlines the importance of doing so effectively. In this regard, the Law Council has previously recommended that:
- OPCAT should be implemented under compliance frameworks with clear accountability and transparency mechanisms. These frameworks should be developed by each state and territory, in consultation with the Commonwealth;
 - core elements of OPCAT implementation in Australia should be documented in legislation or, at minimum, in a formal agreement;
 - the central coordinating NPM (the Commonwealth Ombudsman) should establish formal arrangements with civil society representatives;
 - there should be an expansive interpretation of the definition of 'places of detention', noting that ratification presents a unique opportunity to develop a systematic and cohesive oversight system across both private and public institutions where people are subjected to the care or authority of others; and

¹⁰⁰ SPT, *Advice of the Subcommittee to States parties and national preventative mechanisms relating to the coronavirus disease (COVID-19) pandemic*, UN Doc CAT/OP/10 (7 April 2020).

¹⁰¹ Ibid.

¹⁰² In addition to the Independent Police Conduct Authority, the Children's Commissioner and the Inspector of Service Penal Establishments. The Human Rights Commission has been appointed to a coordination role as the designated Central National Preventative Mechanism: New Zealand Government Ministry of Justice, 'Constitutional Issues & Human Rights: Optional Protocol to the Convention Against Torture' (online, undated).

¹⁰³ Ombudsman, 'OPCAT inspections and visits during COVID-19 pandemic – update and Statement of Principles', 9 April 2020.

- the NPM should prioritise issues such as current practices on seclusion and restraint, conditions in immigration and youth detention, and the treatment of Aboriginal and Torres Strait Islander peoples in detention.¹⁰⁴

133. Despite the above recommendations having already been made, concerns remain about the implementation of OPCAT to date.¹⁰⁵ As identified by the Australia OPCAT Network,¹⁰⁶ these include that:

- the Australian Government does not intend to enshrine the NPM model in legislation, nor does it consider it necessary to legislate to enable inspections by the SPT. Instead, it proposes to have an intergovernmental agreement between federal and state governments;
- regulatory amendments to establish the Commonwealth Ombudsman as NPM Coordinator and the NPM for federal places of detention do not comprehensively outline the NPM role or powers and not all states intend to introduce SPT legislation;¹⁰⁷
- the Australian Government intends to initially limit the scope of the NPM's work to 'primary places of detention'.¹⁰⁸ For example, residential aged care facilities are not included, or facilities where people are held for less than 24 hours, despite the risks of torture and ill-treatment being at their highest during this initial period of detention.¹⁰⁹ Immigration detention centres in Australia are included, but not all places where non-citizens are deprived of their liberty in an immigration context;¹¹⁰
- stronger links with civil society are needed for NPM designation; and
- the resources provided to implement the NPM are insufficient and may not permit it to perform its functions effectively.¹¹¹

134. The Law Council encourages the Committee to make recommendations addressing the above issues.

Recommendations

- **The Committee should seek detailed information regarding the transparency, independence and adequacy of oversight measures adopted for places of deprivation of liberty throughout the pandemic, including for immigration detention facilities, aged care, and with respect**

¹⁰⁴ Law Council of Australia, *Response to Consultation Paper OPCAT in Australia: Stage 2 Australian Human Rights Commission*, 24 September 2018.

¹⁰⁵ See, Yoni Bashan, 'States fight Malcolm Turnbull's UN torture deal' *The Australian* (3 June 2020) <www.theaustralian.com.au/nation/politics/states-fight-malcolm-turnbulls-un-torture-deal/news-story/9592ce939accbb6fcca80bf7e0dc0842>.

¹⁰⁶ Australia OPCAT Network, *Submission on the Implementation of OPCAT in Australia to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD)* (January 2020).

¹⁰⁷ See, *Ombudsman Amendment (National Preventative Mechanism) Regulations 2019* (Cth).

¹⁰⁸ These include adult prisons, juvenile detention facilities (excluding residential secure facilities), police lock-up or police station cells (where people are held for equal to, or greater than, 24 hours), closed facilities where people are involuntarily detained by law for mental health assessment or treatment (where people are held for equal to, or greater than, 24 hours), closed forensic disability facilities or units where people may be involuntarily detained by law for care (where people are held for equal to, or greater than, 24 hours), immigration detention centres (but this does not include all places where non-citizens are deprived of their liberty in immigration contexts), and military detention facilities.

¹⁰⁹ Australia OPCAT Network, *Submission on the Implementation of OPCAT in Australia to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD)* (January 2020), 21, citing Richard Carver and Lisa Handley, 'Does Torture Prevention Work?' (July 2016) *Liverpool University Press*, 2.

¹¹⁰ *Ibid* 19.

¹¹¹ *Ibid* 27.

to National Disability Insurance Scheme participants, having regard to international human rights standards.

- The Australian Government, working with state and territory governments, should act quickly to implement OPCAT, and including through:
 - developing compliance frameworks with clear accountability and transparency mechanisms;
 - documenting core elements of OPCAT implementation in legislation or, at minimum, in a formal agreement;
 - adopting an expansive interpretation of the definition of ‘places of detention’, given the unique opportunity to develop a systematic and cohesive oversight system across both private and public institutions where people are subjected to the care or authority of others;
 - ensuring adequate resourcing, including for the Commonwealth Ombudsman as central NPM and federal NPM; and
 - improving links and communication with civil society representatives as part of this process.

Data privacy and the COVIDSafe app

135. The Law Council supports measures to introduce effective digital contact tracing to control outbreaks of COVID-19, as long as robust legislative privacy and transparency measures are in place. To this end, the Law Council in April 2020 developed a series of core principles that in its view should guide governing laws and administrative frameworks underpinning tracing measures such as the COVIDSafe app.¹¹²
136. The Law Council therefore welcomed the passage of the *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth) (**COVIDSafe Act**) on 14 May 2020, which has put the regulatory framework governing the operation of the COVIDSafe app on a statutory footing, replacing the prior Determination made under the Biosecurity Act.
137. This legislative framework amends the *Privacy Act 1988* (Cth) to include a number of measures that are designed to provide privacy protections relating to COVIDSafe app data and the COVIDSafe app. A key protection is that it is an offence to collect, use or disclose COVIDSafe app data, other than for specified permitted purposes, which are limited principally to contact tracing.¹¹³ Importantly, the COVIDSafe Act excludes the ability of intelligence or law enforcement agencies to access the data, including under warrant, by overriding any other law that would otherwise authorise access.¹¹⁴

Beneficial legislative privacy protections

138. The Law Council was pleased that the Government adopted the Law Council’s recommendation to release an Exposure Draft Bill for public consideration,¹¹⁵ and that the final legislation incorporated a number of the Law Council’s comments on the

¹¹² Law Council of Australia, *Principles for the design of a COVID-19 contact tracing app* (April 2020), <www.lawcouncil.asn.au/files/web-pdf/Principles%20for%20the%20design%20of%20a%20COVID-19%20contact%20tracing%20app%20April%202020.pdf?4f1173e4-df85-ea11-9404-005056be13b5>.

¹¹³ *Privacy Act 1988* (Cth), Part VIIIA, Division 2.

¹¹⁴ *Ibid* s 97ZD.

¹¹⁵ Law Council of Australia, *Law Council calls on government to adopt core design principles when developing tracing app*, (online, 24 April 2020) <<https://www.lawcouncil.asn.au/media/media-releases/law-council-calls-on-government-to-adopt-core-design-principles-when-developing-tracing-app>>.

Exposure Draft Bill.¹¹⁶ This included amendments to ensure that the Information Commissioner (performing the functions of the Privacy Commissioner) has comprehensive oversight over the operation of the app and data store, and mechanisms to ensure that the Commissioner's investigations are not obliged to cease where there is overlap with a law enforcement investigation.¹¹⁷ This is particularly important given that the key prohibitions and limitations in the legislation are implemented through offences, which means that there is likely to be significant overlap in the event of a suspected or alleged breach, and this would otherwise have required the Commissioner to discontinue investigations of privacy complaints.

139. While a stronger degree of protection for privacy investigations could have been achieved through the adoption of civil penalty provisions in addition to offences, the Law Council nonetheless welcomed the efforts made to address this problem.

140. The Law Council also welcomed the adoption of its recommendations for public and parliamentary reporting on the operation of the app and data store, which will help to inform further public and Parliamentary scrutiny, including by the Committee.¹¹⁸

Outstanding concerns raised by the Parliamentary Joint Committee on Human Rights

141. However, the Law Council notes that there remains a degree of concern with the scope and safeguards within the COVIDSafe Act, illustrated by the privacy assessment undertaken by the Parliamentary Joint Committee on Human Rights (**PJCHR**), including:

- uncertainty as to what information falls under the definition of 'COVIDSafe app data';
- the extent to which COVIDSafe app data uploaded to the National COVIDSafe data store will include all 'digital handshakes' between two users;
- whether the de-identification process will sufficiently protect the privacy of personal information;
- why it is necessary to retain data uploaded to the National COVIDSafe data store for the duration of the COVIDSafe data period, rather than requiring data to be deleted once it has been transferred to state and territory health authorities for the purposes of contact tracing; and
- how long state and territory health authorities will be empowered to retain the data transferred to them by the data store administrator.¹¹⁹

Use of derivative data and reverse engineering de-identified data

142. In addition to the above, the Law Council is also concerned about an absence of protections for derivative data obtained from COVIDSafe app data, and prohibitions on reverse engineering of de-identified data. In particular, while the COVIDSafe Act contains prohibitions on the use or disclosure of COVIDSafe data other than for permitted purposes (including the act of creating derivative or de-identified data),¹²⁰ it contains no clear prohibition on the secondary use of derivative or de-identified data that has been created lawfully or unlawfully. That is, there is no prohibition on the act

¹¹⁶ Law Council of Australia, *Law Council President's statement on the COVIDSafe exposure draft* (online, 5 May 2020) <<https://www.lawcouncil.asn.au/media/media-releases/law-council-presidents-statement-on-the-covidsafe-exposure-draft>>.

¹¹⁷ *Privacy Act 1988* (Cth), Part VIII A, Division 4.

¹¹⁸ *Ibid* ss 94ZA and 94ZB.

¹¹⁹ Parliamentary Joint Committee on Human Rights, *Report 6 of 2020* (20 May 2020) [1.38].

¹²⁰ *Privacy Act 1988* (Cth), Part VIII A, Division 2.

of re-identifying de-identified data by applying a process of reverse engineering. Nor is there a clear prohibition on a person making further use of derivative data.¹²¹

143. Accordingly, the Law Council continues to recommend specific regulation of these activities, which need not necessarily be implemented via the enactment of criminal offences. As such, Law Council regrets that it is unable to agree with the suggestion that the legislation 'effectively addresses the concern underlying this recommendation'.¹²²

Legislative prescription of high-level, core design parameters

144. The Law Council would also prefer to see core, high-level parameters for the COVIDSafe app prescribed in legislation – such as an obligation on the Government to ensure that the app is strictly voluntary at all times, and cannot be 'pushed out' to users devices – to remove any risk that the present policy to utilise an 'opt in' model could be unilaterally changed by the executive government from time-to-time. That is, while the Act currently contains offences which prohibit third parties from coercing individuals to install and operate the app – for example, as a condition of entering places – it does not limit the executive power of the Commonwealth to design and release an app whose operation is involuntary.¹²³
145. The Law Council notes that the Attorney-General's Department (**AGD**) has informed the Committee of its view that, 'to the extent that the Law Council is proposing that detailed technical design specifications be legislated and enforced through criminal or civil penalties, this would not be appropriate'.¹²⁴ The Law Council confirms that its recommendation is limited to a legislative limitation on executive power, which prescribes a high-level functional outcome. (For example, a provision that is an exhortation that the COVIDSafe app must, at all times, operate in a voluntary manner, which is premised on obtaining users' informed consent to its installation, operation and use.) The Law Council has not proposed the granular, statutory prescription of the full technical design specifications for the app, and nor has it advocated in favour of any attempt to impose criminal or civil penalties against the executive government.
146. The Law Council welcomes the advice of the AGD to the Committee that 'the Government is committed to ensuring that the COVIDSafe app is developed and operates in a way that is voluntary'.¹²⁵ The Law Council's recommendation for a legislative exhortation about the voluntary nature of the design of the app (in addition to existing protections in the Act for the voluntary nature of its use by community members) would simply be declaratory of that objective, and could further enhance community confidence by enshrining it in legislation.

Sunsetting of offence provisions

147. The Law Council is also concerned that the new offences in relation to accessing and making secondary use and disclosure of COVIDSafe data will cease when the legislation sunsets (90 days after the date the Health Minister determines the app should cease operation). The override provision, which helps to ensure that the offences prevail over other provisions that would authorise access, will also sunset.¹²⁶

¹²¹ This arises from the definition of 'COVID app data' in subsection 94D(5)(d) of the *Privacy Act 1988* (Cth).

¹²² Attorney-General's Department, *Answers to written questions on notice by the Attorney-General's Department, asked by Senator Gallagher on 8 May 2020* (12 May 2020) 2.

¹²³ *Privacy Act 1988* (Cth) s 94H.

¹²⁴ Attorney-General's Department, *Answers to written questions on notice by the Attorney-General's Department, asked by Senator Gallagher on 8 May 2020* (12 May 2020) 1.

¹²⁵ *Ibid* 2.

¹²⁶ *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth), Schedule 2, items 2 and 3.

148. This means that if any data is not deleted as required when the app ceases to operate, the protections created by the offences will no longer be available in relation to the remaining data. This may also facilitate access by intelligence and law enforcement agencies to the remnant data after the legislation sunsets. Accordingly, the Law Council would prefer to see the prohibitions continue in effect for a longer period of time, to ensure that subsequent use cannot be made of data that is not deleted for any reason. For example, the offence and override provisions could be manually repealed via the enactment of separate repealing legislation after a period of years, rather than subject to automatic repeal as the COVIDSafe Act presently provides.

Certification of deletion

149. Further, while the Law Council welcomes the conferral of an explicit function on the Information Commissioner to conduct an inspection (known as an ‘assessment’) of agencies’ compliance with their obligations under the Act,¹²⁷ it is concerned that there is no specific statutory requirement for the Privacy Commissioner to conduct an assessment as to whether the national data store operator has complied with the obligation to delete data at the conclusion of the period of operation. This means that the legislation does not give effect to the Government’s assurance that there will be ‘full third-party assurance’ of deletion.¹²⁸

150. The Law Council notes the statement by the AGD to this Committee that ‘as an independent regulator, the Information Commissioner has the discretion to determine whether, and in what way, it is appropriate to assess the data store administrator’s compliance with the Bill after notification that COVIDSafe app data has been deleted from the National COVIDSafe Data Store’.¹²⁹ However, the Law Council notes that there is extensive precedent across the legislation governing Commonwealth integrity agencies mandating the performance of discrete oversight functions, where guaranteed oversight of an activity is identified as a matter of particular importance to the Government, the Parliament and the public. For example:

- The Information Commissioner has specific obligations to monitor the compliance of telecommunications carriers and carriage service providers with regulatory requirements concerning authorised disclosure and record-keeping in relation to telecommunications data (and these functions are identified as being among the ‘privacy functions’ of the Commissioner, which apply in addition to their functions under the Privacy Act).¹³⁰
- The Commonwealth Ombudsman has specific, mandatory inspection functions in relation to law enforcement agencies’ access to and use of telecommunications intercept information and telecommunications data.¹³¹
- The Prime Minister may direct the Inspector-General of Intelligence and Security to inquire into a particular intelligence or security matter.¹³²

151. The Law Council considers that there should be an equivalent statutory guarantee in relation to the certification of the deletion of COVIDSafe data. Given the ‘one-off’ nature of this function and the existing precedents noted above, the Law Council suggests that this would not be an undue incursion into the general independence of the Information

¹²⁷ *Privacy Act 1988* (Cth) s 94T.

¹²⁸ The Hon Stuart Robert MP, Minister for Government Services, *Transcript of Interview with Fran Kelly, RN Breakfast, ABC Radio National*, 20 April 2020, <<https://minister.servicessaustralia.gov.au/transcripts>>.

¹²⁹ Attorney-General’s Department, *Answers to written questions on notice by the Attorney-General’s Department, asked by Senator Gallagher on 8 May 2020* (12 May 2020) 3.

¹³⁰ *Telecommunications Act 1997* (Cth) s 309.

¹³¹ *Telecommunications (Interception and Access Act) 1979* (Cth) Chapter 4A.

¹³² *Inspector-General of Intelligence and Security Act 1986* (Cth) s 9.

Commissioner to determine their oversight priorities. It would provide valuable assurance to the Parliament and the community in relation to compliance.

Resourcing for independent oversight and accessibility issues

152. Finally, the Law Council also notes that the success of the COVIDSafe app and its oversight and transparency arrangements will depend on the adequacy of resourcing for the Office of the Australian Information Commissioner, and on considering carefully the views of experts on the security and technical settings of the COVIDSafe app itself following consideration and analysis of the source code. The Law Council also supports calls for the app to be made available in languages other than English, to ensure its accessibility to all people in the Australian community.

Recommendation

- **The Committee should continue to monitor the privacy and safeguard concerns inherent in the rollout of the COVIDSafe app, including with respect to areas of concern highlighted by the Parliamentary Joint Committee on Human Rights. This should include consideration of legislative amendments to address outstanding concerns.**

Human rights scrutiny of decision-making

153. Given that Parliamentary sittings have been heavily limited throughout the COVID-19 pandemic, the scrutiny role of its committees has been paramount. In addition to the specific establishment of this Committee, the Law Council has welcomed the commitments by both the PJCHR and the Senate Standing Committee for the Scrutiny of Delegated Legislation (**the Scrutiny Committee**) to meet regularly throughout the pandemic to ensure appropriate parliamentary oversight, having regard to their respective remits.
154. However, it also notes that much relevant activity occurs under instruments made under the Biosecurity Act, which inherently limit the role the PJCHR and Scrutiny Committee can play. For example, during a human biosecurity emergency period,¹³³ the Minister for Health may, under sections 477 and 478 of the Biosecurity Act, determine emergency requirements, or give directions, deemed necessary to prevent or control the entry, emergence, establishment or spread of the relevant disease in Australian territory. Subsection 477(2) states that emergency determinations made under subsection 477(1) are legislative instruments, but they are not subject to disallowance by the Parliament.¹³⁴ As such, they are not considered by the Scrutiny Committee.
155. Under the *Human Rights (Parliamentary Scrutiny Act) 2011* (Cth) (**the HR Scrutiny Act**), the PJCHR is empowered to scrutinise all legislation, including delegated legislation, for compatibility with human rights. However, statements of compatibility with human rights (**statements of compatibility**) are essential to this process. The HR Scrutiny Act only requires statements of compatibility to be provided for legislative instruments that are subject to disallowance.¹³⁵ Consequently, determinations under the Biosecurity Act have not been accompanied by statements of compatibility, despite the PJCHR's advice that:

¹³³ On 18 March 2020, the Governor-General declared that a human biosecurity emergency exists regarding COVID-19 for a period of three months until 17 June 2020. On 14 May 2020, the Governor-General extended the human biosecurity emergency period for a further three months until 17 September 2020.

¹³⁴ Under subsection 477(2), a determination made under subsection (1) is a legislative instrument, but section 42 (disallowance) of the Legislation Act 2003 does not apply to the determination.

¹³⁵ HR Scrutiny Act, s 9.

... given the potential impact on human rights of legislative instruments dealing with the COVID-19 pandemic, the committee considers it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.¹³⁶

156. The Law Council is concerned that the lack of statements of compatibility for such determinations has undermined the PJCHR's ability to perform its scrutiny role, such as for measures made under the Biosecurity Act. This raises concerns that the explicit consideration of human rights obligations may not have been part of the policymaking and drafting process of the non-disallowable instrument. Given the significant intrusion on the enjoyment of rights some of these instruments impose, this is an unsatisfactory situation. For example:

- certain declarations have designated a number of geographical areas in Western Australia, Queensland, South Australia and the Northern Territory for the purposes of the Biosecurity Act and established that persons cannot enter these areas except in specified circumstances.¹³⁷ These are made under subsection 477(1) of the Biosecurity Act, and failure to comply is punishable by five years imprisonment or a penalty of up to \$63,000. The PJCHR has noted that the measures are intended to prevent the spread of COVID-19 and would appear to promote the rights to life and health. However, it has also stated that the measures would appear to limit freedom of movement, and to disproportionately impact upon Indigenous persons, although this has not been specifically addressed in the explanatory materials.¹³⁸ Consequently, they may also engage the right to equality and non-discrimination. The PJCHR notes that the rights engaged may be subject to permissible limitations if they are reasonable, necessary and proportionate, but that no statement of compatibility has been provided. Therefore, it requires further information as to their compatibility;¹³⁹ and
- the PJCHR has noted that statements of compatibility have not been provided for the specification of certain zones as human health response zones, the setting of requirements for entry into or leaving the zones, both of which engage the rights to liberty and freedom of movement¹⁴⁰ and in some cases, to equality and non-discrimination.¹⁴¹ Similarly, statements of compatibility were absent in relation to prohibitions on Australian citizens or permanent residents from travel outside Australia unless an exemption is granted to them, a matter which engages the rights to freedom of movement, equality and non-discrimination and the right to a private life.¹⁴²

157. As noted by Evans and Petrie, who raised the lack of a statement of compatibility provided in relation to the initial COVIDSafe determination,¹⁴³ 'it is worth pausing to

¹³⁶ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report of COVID-19 legislation, Report 5 of 2020* (29 April 2020) 4.

¹³⁷ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020; Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020.*

¹³⁸ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report of COVID-19 legislation, Report 5 of 2020* (29 April 2020), 7-9.

¹³⁹ *Ibid.*

¹⁴⁰ See, for example, *Biosecurity (Human Health Response Zone) (Swissotel Sydney) Determination 2020; Biosecurity (Human Health Response Zone) (Howard Springs Accommodation Village) Determination 2020.*

¹⁴¹ See, *Biosecurity (Human Health Response Zone) (North West Point Immigration Detention Centre) Determination 2020* and *Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020.*

¹⁴² See, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020.*

¹⁴³ Note, however, that the later *Privacy Amendment (Public Health Contact Information) Bill 2020* has included a statement.

consider what difference a human rights compatibility statement might have made.¹⁴⁴ The statement requires the Minister to explicitly consider the human rights and freedoms contained in the seven core international human rights treaties under which Australia has obligations. He or she must explain how the legislation interferes with rights and consider whether restrictions on rights are proportionate, having regard to established international human rights law principles. These principles affirm that measures that limit rights¹⁴⁵ must be prescribed by law, be in pursuit of a legitimate objective, be rationally connected to their stated objective, and be proportionate to achieve that objective (having regard to less restrictive means of achieving it, whether effective safeguards are in place and whether it provides flexibility to consider individual circumstances).¹⁴⁶

158. The Law Council accepts that before a Minister makes a decision under subsection 477(1) of the Biosecurity Act, they must be satisfied of certain criteria, including that a measure is appropriate and adapted to achieve its purpose and that it is to be no more restrictive or intrusive than required in the circumstances, that it must not extend longer than necessary.¹⁴⁷ It also accepts that statements of compatibility require additional time to prepare, imposing additional burdens during an emergency period. However, in a reduced period of scrutiny and transparency, when much depends on delegated legislation and individuals' rights are heavily curtailed, it is also important to identify and explain to the public how their rights are being weighed up in the decision-making process, and to enable Committee scrutiny. The Law Council recommends that statements of compatibility be provided to accompany all legislative measures, including non-disallowable instruments, which significantly impinge on human rights during the pandemic and recovery process.

Recommendation

- **During the COVID-19 pandemic and recovery period, statements of compatibility should accompany all legislative measures, including non-disallowable instruments, which significantly impact upon human rights.**

Emergency powers

159. The Law Council acknowledges the Federal Government has acted quickly on a great number of issues in response to the COVID-19 pandemic. As noted above, there are, however, risks when enacting laws in an emergency situation. Fundamental legislative principles and the usual mechanisms of consultation and oversight are not necessarily followed to the same degree as they would be in the usual legislative process.
160. In light of the risks associated with emergency legislation, the Law Council commends the establishment of the further inquiry by the Scrutiny Committee into the exemption of delegated legislation from parliamentary oversight, and encourages the Committee to consider that inquiry's report, once published.
161. The present Inquiry may also assist in determining whether Australia needs further legislative guidance with respect to the exercise of emergency powers by the executive

¹⁴⁴ Kylie Evans and Nicholas Petrie, 'COVID-19 and the Australian Human Rights Acts' (online, 6 May 2020) *AUSPUBLAW* <<https://auspublaw.org/2020/05/covid-19-and-the-australian-human-rights-acts/>>.

¹⁴⁵ Most rights can be limited, with the exception of absolute rights.

¹⁴⁶Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report of COVID-19 legislation, Report 5 of 2020* (29 April 2020), vii.

¹⁴⁷ Biosecurity Act s 477(3).

and the review mechanisms in place to ensure those powers have been exercised appropriately.¹⁴⁸

162. In this regard, the Law Council notes that the Royal Commission into National Natural Disaster Arrangements was established on 20 February 2020 in response to the extreme bushfire season of 2019-20 (which resulted in loss of life, property and wildlife and environmental destruction). The Royal Commission is due to report by 31 August 2020. This Committee should have regard to the findings of the Commission in respect of legal frameworks and other issues involving coordination between the Commonwealth and the states and territories, risk management, preparedness, resilience and recovery.

Recommendations

- **The Committee should consider whether Australia needs further legislative guidance with respect to the exercise of emergency powers by the executive and the review mechanisms in place to ensure those powers have been exercised appropriately.**
- **The Committee should have regard to the findings of the Royal Commission into National Natural Disaster Arrangements Commission in respect of legal frameworks and other issues involving coordination between the Commonwealth and the states and territories, risk management, preparedness, resilience and recovery.**

Human Rights Charter

163. The Law Council takes the opportunity to strongly encourage Parliament to consider the role that a Human Rights Charter (**a Charter**) could play in national crises, including the pandemic. While Committee scrutiny is largely retrospective, a Charter could provide an important tool by setting out a framework under which human rights must be protected, respected and fulfilled as a crisis is approached. It would ensure that these obligations are embedded into legislative and government decision-making processes from the outset. It would also provide an established framework for resolving tensions when different rights conflict in circumstances in which difficult policy decisions must be taken.
164. The Law Council acknowledges that the Australian Government, working closely with state and territory governments, has taken substantial steps to protect human rights throughout the COVID-19 pandemic. These not only include direct steps to respect, protect and fulfil the rights to life and health in light of the virus, but also protecting and fulfilling other rights through measures such as ensuring adequate safety nets for many individuals impacted by job losses, supporting family violence victims and older persons at risk, providing free child care, and preserving Australians' privacy with respect to the COVID-Safe app (as discussed above).
165. However, there have been gaps in this response. As flagged, these include the rights of temporary migrants and asylum seekers, and persons in immigration detention during COVID-19. Some measures, while welcome, have been delayed and the issues may have been more effectively addressed if driven by a stronger understanding of the relevant rights engaged. For example, as discussed, many aged care facilities implemented stronger restrictions than those recommended by National Cabinet, including bans on all visitors. This prompted the vocalisation by the community of serious concerns for the welfare of residents, as well as a direction by Prime Minister

¹⁴⁸ For a more detailed discussion on this, see: Michael Eburn, 'Responding to Catastrophic Natural Disasters and the Need for Commonwealth Legislation' (2011) 10(3) *Canberra Law Review* 81.

Scott Morrison to aged care facilities to allow visitors.¹⁴⁹ In mid-May, following public consultation, an Industry Code for Visiting Residential Aged Care Homes during COVID-19 was released by aged care peak bodies and consumer advocacy organisations which ‘cements a human rights approach to care that both protects and respects aged care residents and their visitors’.¹⁵⁰

166. The Law Council also refers to the ‘Charter of Aged Care Rights’ (in effect from 1 July 2019). While this document contains several welcome features, the Law Council identified during its development that it is overly consumer focused and lacks a comprehensive human rights perspective.¹⁵¹ For example, it does not refer to the right to enjoy the highest attainable standard of physical and mental health, the right to respect for the family and freedom from interference with the family, the right to equality and non-discrimination, or several freedoms such as those of movement, association and speech.¹⁵² The Law Council is also unaware of the extent to which aged care providers receive education and training on these issues. It suggests that having a stronger human rights framework, backed by a federal Charter, may have helped to guide providers’ interpretation of public health orders throughout the crisis in a manner which better upheld the wellbeing of older persons, while managing health risks in a less restrictive manner.
167. The pandemic has also exposed core underlying gaps in addressing human rights effectively. For example, Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar AO has highlighted that Indigenous-led responses have successfully supported many Indigenous persons to return to country during the pandemic. However, she has also stated that the COVID-19 return to country has highlighted that ‘we may be safer from the virus, but our human rights are still at risk’¹⁵³, due to systemic underinvestment in the critical infrastructure of Indigenous communities:

*...In some instances, people have moved back to communities where water and electricity has been cut off. Additional people have put pressure on scarce resources in some communities, leading to even greater stress for already vulnerable communities where food security, inadequate housing, poor mental health, high levels of alcohol and drug consumption and domestic and family violence are already at crisis point.*¹⁵⁴

168. The Law Council considers that a Charter is needed to ensure that human rights objectives are embedded into federal legislative and government decision-making processes.
169. Reviews of the Australian Capital Territory Act and Victorian Charter indicate that, contrary to the prior expectations of some commentators, they have not caused the courts to be flooded with litigation.¹⁵⁵ Instead, key benefits are often experienced in an improved parliamentary and bureaucratic culture of respect for human rights – in a

¹⁴⁹ Georgia Hitch, ‘Scott Morrison issues warning to aged care facilities to allow visitors or Commonwealth will get involved’ (24 April 2020) *ABC News* <<https://www.abc.net.au/news/2020-04-24/coronavirus-aged-care-facilities-urged-to-follow-visitor-rules/12181408>>.

¹⁵⁰ COTA, ‘Industry Code for Visiting Residential Aged Care Homes during COVID-19’ (online, undated), <<http://www.cota.org.au/policy/aged-care-reform/agedcarevisitors/>>.

¹⁵¹ Law Council, *Draft Charter of Aged Care Rights*, Submission to the Department of Health, 12 October 2018.

¹⁵² *Ibid* 10-12.

¹⁵³ June Oscar, ‘Coronavirus means traditional homelands may be safest for Indigenous people but it comes with unexpected lessons’, *ABC News* (online, 17 May 2020) <<https://www.abc.net.au/news/2020-05-17/coronavirus-indigenous-health-safe-homeland-june-oscar/12245728>>.

¹⁵⁴ *Ibid*.

¹⁵⁵ Michael Brett Young, ‘From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006’ (2015) *Victorian Government* 158; ACT Human Rights ACT Research Project, ‘The Human Rights Act 2004 (ACT): The First Five Years of Operation, A Report to the ACT Department of Justice and Community Safety’ (May 2009) *Australian National University* 6.

preventative sense. Human rights concerns are given due consideration in the framing of new legislation and policy, and departments and public authorities have embedded these principles into their work.¹⁵⁶ An important feature in the existing human rights statutes in Australian jurisdictions¹⁵⁷ is an explicit obligation on public authorities to act compatibly with human rights. There is also a procedural duty to 'give proper consideration' to human rights in the making of decisions.¹⁵⁸ These features should be included in a federal Charter.

170. A federal Charter would also help to guide responses both during emergencies and the subsequent recovery process. For example, United Nations briefings on the COVID-19 pandemic have reinforced the need to include targeted economic recovery measures to address the longer-term risks faced by older people and people with disability. These include job rehabilitation programs, adequate social security benefits, and anti-discrimination measures, as people in these groups face greater risks of joblessness, poverty, homelessness and discrimination which may be exacerbated throughout the pandemic.¹⁵⁹
171. In addition to a Charter, the Law Council also considers that greater education and awareness of human rights is needed. In one recent survey on attitudes to human rights in Australia, 47 per cent of respondents stated that they knew 'not very much' or 'nothing' about human rights.¹⁶⁰ It is concerning that the lack of awareness amongst many Australians – including service providers – of human rights, leaves a vacuum in which these rights are not respected and upheld. This may facilitate frequent breaches of the rights of the most vulnerable members of the community, including children, older Australians, people with disability and people in correction or detention facilities.

Recommendations

- **The Australian Government should adopt a Federal Charter of Human Rights, as well as measures to increase public awareness of human rights, including targeted measures aimed at service providers.**
- **Australia's human rights obligations should explicitly inform the ongoing COVID-19 law and policy response, including during the recovery period.**

Issues specific to charities and the not-for-profit sector

Not-for-profits given lower priority in establishment of NCCC

172. The Prime Minister's announcement of the creation of a new National COVID-19 Coordination Commission (**NCCC**) stressed the need to put the economic and social wellbeing of all Australians front and centre of the government response.
173. In this context, it is interesting to note that this business-led support initiative from Government initially included no-one from charities or key peak bodies, despite making the following statement:

The National COVID-19 Coordination Commission is about mobilising a whole-of-society and whole-of-economy effort so we come through this unprecedented

¹⁵⁶ Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation* (March 2012).

¹⁵⁷ *Human Rights Act 2004* (ACT) s 40B(1)(a); *Charter of Human Rights and Responsibilities Act* (Vic) s 38(1); *Human Rights Act 2019* (Qld) s 58(1)(a).

¹⁵⁸ *Human Rights Act 2004* (ACT) s 40B(1)(b); *Charter of Human Rights and Responsibilities Act* (Vic) s 38(1); *Human Rights Act 2019* (Qld) s 58(1)(b).

¹⁵⁹ United Nations, *Policy Brief: The Impact of COVID-19 on older persons* (May 2020); United Nations, *Policy Brief: A Disability-Inclusive Response to COVID-19* (May 2020).

¹⁶⁰ Ipsos Public Affairs, *Human Rights in 2018: A Global Advisor Survey* (2018).

*health crisis. The Commission will assist the Government to ensure all resources are marshalled to this vital task in a coordinated and effective manner.*¹⁶¹

174. At the time of appointing members to the NCCC, the Prime Minister indicated that further appointments would be made, particularly in the not-for-profit sector.¹⁶² It is understood that subsequently, a not-for-profit committee of the NCCC may have been appointed.

175. For such a Commission to understand the role that the not-for-profit sector can play, it is appropriate to engage with not-for-profit sector leaders. The not-for-profit sector represents about 10 percent of the Australian economy and employs one in eight people in the Australian workforce. It is called upon in times of social crisis to meet community needs from limited resources and ought not be considered as an afterthought.

Focus on not-for-profits and the JobKeeper scheme

176. Building upon comments made above in relation to the JobKeeper scheme, it is also understood that significant parts of the not-for-profit sector are struggling to determine whether they are included as a qualifying entity for the JobKeeper program. For example:

- many Public Benevolent Institutions (**PBIs**) delivering aid and relief overseas through Australian residents may not 'pursue their objectives principally in Australia';
- non-PBIs, such as religious missions delivering religious teaching, education, health, welfare, etc. through Australian residents, may face the same hurdle;
- environmental organisations seeking to protect wildlife habitats or other environmental concerns outside Australia face uncertainty as to where they pursue their objectives principally and whether they 'carry on a business';
- cultural organisations which may have been on a world tour or exhibition on 1 March 2020 need to consider whether the test of being a qualifying entity is a point-in-time test, such as to render them ineligible; and
- research institutions conducting research overseas or in collaboration with overseas research organisations are also faced with the question of how they might fit into the qualification criteria.

177. If it is the view of the ATO that not-for-profit entities do not carry on business and that only not-for-profits whose beneficiaries are in Australia are eligible, then those listed above will not qualify. This excludes many not-for-profits delivering crucial services from the JobKeeper scheme. Clear guidance ought to be issued on these matters.

178. Excellent consultation with the sector took place after the JobKeeper Rules were first published. There were significant and beneficial amendments made which considered the way in which religious practitioners are remunerated and included some overseas aid organisations. However, the qualification criteria that remain are not fit-for-purpose. This could have been avoided with early consultation with the sector and its inclusion from the outset.

179. Although the JobKeeper Rules were amended to assist the not-for-profit sector, many charities delivering overseas aid and relief through Australian residents may still not qualify.

¹⁶¹ Prime Minister of Australia, *Media Release* (25 Mar 2020) <<http://www.pm.gov.au/media/national-covid-19-coordination-commission>>.

¹⁶² Prime Minister of Australia, *Transcript* (25 March 2020) <<http://www.pm.gov.au/media/press-conference-australian-parliament-house-act-250320>>.

180. It is further noted that most Australian universities are also not-for-profit and have in most cases been excluded from JobKeeper or indeed any type of support. This approach has led to a significant decline in the university sector, including job losses, salary cuts, and the inability to renew contracts for casuals. The Law Council is particularly concerned with the impact on legal education and legal research in Australia that will arise should the tertiary sector remain excluded from the JobKeeper program.

Recommendation

- **There should be greater clarity as to how the JobKeeper scheme (and future workplace subsidies) will apply to the not-for-profit sector, including universities.**

Fundraising

181. Charities were particularly damaged by the inability to conduct face-to-face fundraising because of COVID-19 related restrictions, including in the form of events such as street collections and fundraising dinners. This left only online fundraising options. The regulation of online fundraising is complex and onerous, with each state and territory having its own regime, and little consistency between them. Several proposals were put to government to address this issue, including:

- an urgent call to action for Federal, state and territory Governments to agree to allow charities to fundraise online and through other forms of digital and telecommunications pursuant to nationally consistent rules which override the various fundraising regimes for the next 18 months, or for at least the period during which the JobKeeper scheme remains operational;
- 150 per cent tax deduction for donations to Deductible Gift Recipient (**DGR**) entities; and/or
- expanding the DGR categories to cover more charities registered with the Australian Charities and Not-for-profits Commission (**ACNC**).

182. None of these initiatives have yet been accepted, despite the urgency of the need to resource charities for the increased demand they face. If these initiatives are introduced, it would be appropriate for them to remain in place during the whole of the recovery period of approximately 18 months.

Recommendation

- **The Australian Government should consult with the not-for-profit sector on urgent measures to improve fundraising regulation, particularly in the context of the COVID-19 pandemic.**

The place of not-for-profits in civil society

183. Not-for-profits are a significant part of the Australian economy. During the pandemic it is imperative that their viability be maintained and protected. It will be just as difficult to re-build their capacity after the pandemic as it will be for business.

184. The COVID-19 pandemic will mean that charities are called on to provide more services with fewer resources. Governmental assistance based on loss of turnover will not necessarily support capacity. Even if income is maintained, the additional cost of doing business will threaten viability.

185. The Law Council's Not-for-profit Legal Practice and Charities Committee of its Legal Practice Section acknowledges the remarkable work of Treasury and the ATO in

consulting with the not-for-profit sector in this area, to date. However, it urges the whole of government to recognise the important role of the sector in dealing with the COVID-19 crisis and its aftermath. This sector ought not be regarded as an afterthought or a low priority in government considerations.

Additional matters

Impact of COVID-19 on paid parental leave eligibility

186. The Law Council has been made aware that due to the employment ramifications for many people, COVID-19 will likely impact the eligibility for benefits such as those available under the Commonwealth Paid Parental Leave scheme. To qualify for parental leave pay, a person must satisfy the 'work test', which requires them to have worked for both:

- ten of the 13 months before the birth or adoption of their child; and
- a minimum of 330 hours, around one day per week, in that 10 month period.¹⁶³

187. It is submitted that the Committee should consider what measures should be taken to offset this impact.

Recommendation

- **The Committee should consider measures to offset the impact on people whose eligibility for benefits under the Paid Parental Leave scheme has been affected by the pandemic.**

Early Access to Superannuation

188. The Law Council acknowledges the reasoning behind the ATO's announcement of measures which have enabled eligible persons financially affected by the pandemic to gain early access to a certain amount of their superannuation.¹⁶⁴ However, this may have a disproportionate effect on women who already, on average, have much lower superannuation balances than men.

189. Notably, older women are already the highest-growing age group for homelessness.¹⁶⁵ As such, there is a need to develop strategies to counteract the effect that this measure will have upon vulnerable groups in the community.

190. The Law Council recommends that the Committee specifically consider this as an issue and work with stakeholders to offer support (such as financial literacy education) to those who have needed to access their superannuation.

Recommendation

- **The Committee should consider how best to address issues caused by the early access by persons of their superannuation, including by**

¹⁶³ *Paid Parental Leave Act 2010* (Cth), ss30-36B.

¹⁶⁴ Australian Taxation Office, *COVID-19 early release of super* (last updated 25 May 2020) <<https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/COVID-19-early-release-of-super/>>.

¹⁶⁵ National Older Women's Housing and Homelessness Working Group, 'Retiring into Poverty: a national plan for change: Increasing housing security for older women' (August 2018) <<https://www.mercyfoundation.com.au/wp-content/uploads/2018/08/Retiring-into-Poverty-National-Plan-for-Change-Increasing-Housing-Security-for-Older-Women-23-August-2018.pdf>>.

working with stakeholders to offer support such as financial literacy education.

Workplace health and safety

191. The changing nature of work because of the pandemic, social distancing restrictions, and health advice, has led to workplace health and safety issues, as well as issues surrounding workplace policies and procedures, and employee supervision and discipline. These issues particularly relate to those workers working from home.
192. The Law Council is of the view that the Committee should take the opportunity afforded by the present inquiry to consider the emerging workplace health and safety issues in more depth and assess whether future guidelines can be produced and whether other measures from Government are needed.

Recommendation

- **The Committee should consider workplace health and safety issues arising from the COVID-19 pandemic and assess whether future guidelines can be produced and/or whether other measures from Government are needed.**