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31 July 2020

Public Accounts and Estimates Committee  
Parliament of Victoria  
Parliament House, Spring Street  
EAST MELBOURNE VIC 3002  
AUSTRALIA

Dear Committee members,

***Inquiry into the Victorian Government's Response to the COVID-19 Pandemic***

**About Liberty Victoria**

1. Liberty Victoria is a peak civil liberties organisation in Australia that has worked to defend and extend human rights and freedoms in Victoria since 1936. For more than eighty years we have advocated for civil liberties and human rights. These are spelled out in the United Nations international human rights treaties, agreed to by Australia. We speak out when such rights and freedoms are threatened by governments or other organisations.
2. We welcome the opportunity to provide a submission to the Inquiry into the Victorian Government's Response to the COVID-19 Pandemic. The focus of our submissions and recommendations reflect our experience and expertise as outlined above

## General comments

3. Liberty Victoria recognises that the COVID-19 pandemic has resulted in an extraordinary public health crisis. The scale and severity of this crisis has required a response that necessarily limits the human rights and liberties of all Victorians. Sensibly, the focus of the response has been focused on saving lives. Many of these measures have been implemented through Directions under the *Public Health and Wellbeing Act 2008* (Vic) (**PHW Act**). Other changes have been introduced under the *COVID-19 (Emergency Measures) Act 2020* (**Omnibus Act**).
4. However, in times of such crises, the respect for and protection of human rights becomes more important than ever. Human rights abuses can occur when uncertainty and fear in the community are heightened, and when decisions are made in haste which may have unintended consequences. There have already been reports of increased discrimination towards people of certain ethnic backgrounds, an exacerbation of existing inequalities (for example, between landlords and renters), and harsh impacts on people in contact with the criminal justice system or in closed/locked environments (such as prisons, some care facilities and immigration detention).
5. Human rights must remain at the forefront to ensure each person's inherent dignity is respected and that responses to the pandemic are equitable and non-discriminatory.
6. In Victoria, human rights are principally protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**), including the rights to liberty, freedom of movement, peaceful assembly, and the right to privacy, family and home.<sup>1</sup> Of course these rights can be limited, but only to the extent necessary.<sup>2</sup>
7. Section 32 (1) of the Charter provides that statutory provisions must, in so far as is possible consistently with their purpose, be interpreted in a way that is compatible with human rights. Thus, where a legislative provision engages a human right referred to in the Charter, s 32(1) must be considered in conjunction with other ordinary principles of statutory interpretation.<sup>3</sup> It is arguable that the Stay at Home Directions issued under the PHW Act are subordinate

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<sup>1</sup> *Charter of Human Rights and Responsibilities Act 2006*, ss 21, 12, 16, 13 respectively.

<sup>2</sup> *Charter of Human Rights and Responsibilities Act 2006*, s 7(2).

<sup>3</sup> *R v Momcilovic* (2010) 25 VR 436; *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors* (2012) 38 VR 569.

instruments<sup>4</sup> and s 32(1) of the Charter applies so that the Stay at Home Directions (and other Directions) should be interpreted in a manner that is compatible with those rights.

8. Section 38(1) of the Charter makes it unlawful for a public authority to act in a way that is incompatible with a human right or fail to give proper consideration to a relevant human right. Once a human right is identified as limited by the action of a public authority (which includes the Chief Health Officer and Deputy Chief Health Officers, Authorised Officers and Victoria Police), the onus of ‘demonstrably justifying’ the limitation in accordance with s 7(2) of the Charter resides with the party seeking to uphold the limitation.<sup>5</sup> In light of what must be justified, the standard of proof is high.<sup>6</sup>
9. Section 28 of the Charter requires a Statement of Compatibility to be prepared in respect of any Bill introduced to Parliament. This process is intended to promote human rights throughout the process of developing legislation well before it becomes law. While Directions made under the PHW Act may not require a Statement of Compatibility to be prepared, a similar process should nevertheless take place when such Directions are being drafted or revised given the wide-ranging impacts they can have on various human rights.
10. Australia is also signatory to significant international human rights treaties. This includes the *International Covenant on Civil and Political Rights (ICCPR)* (on which the rights in the Charter are largely framed) and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* which recognises the rights to the highest attainable standard of physical and mental health and to adequate housing, and obliges state parties to take effective steps to realise those rights. International human rights law recognises that in states of emergency, rights under the ICCPR can be limited in order to protect the population so long as the restrictions

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<sup>4</sup> See the definition of ‘statutory provision’ pursuant to s 3(1) of the Charter. Arguably the Stay at Home Directions are instruments made under an Act and have a ‘legislative character’ pursuant to the definition of ‘subordinate instrument’ under s 38 of the *Interpretation of Legislation Act 1984* (Vic).

<sup>5</sup> *Re an application under the Major Crime (Investigative Powers) Act 2004; DAS v Victorian Human Rights & Equal Opportunity Commission* (2009) 24 VR 415; [2009] VSC 381 (**DAS**), (2009) 24 VR 415, 448 [147] (Warren CJ). Approved by the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, 475 [144]; *Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 498 [175] (John Dixon J).

<sup>6</sup> *Ibid.* In *DAS* at 449 [148], Warren CJ cited with approval the observations of Dickson CJ in the celebrated judgment of *R v Oakes* [1986] 1 SCR 10 at 43 [70]:

There are... three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.” [citations omitted]

are: lawful, for a legitimate purpose; necessary; proportionate (the least restrictive option); evidence-based; and temporary.<sup>7</sup> Similarly, rights guaranteed by the ICESCR can only be limited in narrow circumstances.<sup>8</sup> Insofar as measures taken or supported by Victoria might infringe on these treaties, Australia may become responsible internationally for the non-performance of its obligations.

11. Notwithstanding our acceptance that human rights must be limited in the present circumstances, Liberty Victoria is concerned that there are examples of where the COVID-19 response — either through the design of regulation or through the actions of public authorities — has been disproportionate.
12. Before outlining our specific concerns (below), we make some general observations.
13. Firstly, it is Liberty Victoria’s view that there was inadequate consultation when measures were introduced by the Victorian Government. Understandably, in the midst of a pandemic, important decisions need to be made quickly, and often on a daily basis. A State of Emergency was declared on 16 March 2020.<sup>9</sup> The COVID-19 (Emergency Measures) Bill 2020 was not introduced to Parliament until 23 April 2020. As far as Liberty Victoria is aware, there was no public consultation on the draft version of the Bill (even for urgent submissions) despite it being clear that the emergency measures would significantly impact the Victorian community.
14. Other major decisions similarly involved little public consultation and resulted in confusion and worry. For example, Liberty Victoria is unaware of any consultation before implementing the “hard lockdown” of public housing towers. Indeed, many residents were not provided with

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<sup>7</sup> The Siracusa Principles specifically provide that restrictions on human rights must be: provided for and carried out in accordance with the law (lawful); directed toward a legitimate objective of general interest (legitimate purpose); strictly necessary in a democratic society to achieve the objective (necessary); the least intrusive and restrictive available to reach the objective (least restrictive option); based on scientific evidence and neither arbitrary nor discriminatory in application (evidence-based); and of limited duration, respectful of human dignity, and subject to review (temporary).

<sup>8</sup> Art 4 of the *International Covenant on Economic, Social and Cultural Rights* provides the enjoyment of the rights guaranteed by the Covenant “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

<sup>9</sup> Victoria Government Gazette, ‘Declaration of a State of Emergency’ (16 March 2020).

notice and were left uncertain about their ability to access to food, medicine or other support services<sup>10</sup> — and, in one case, access to their premature newborn baby.<sup>11</sup>

15. We acknowledge that responding to the COVID-19 pandemic is challenging and that some of the issues created by Government actions or decisions have since been addressed. However, some issues could have been avoided if there had been wider community input.
16. Secondly, and relatedly, Liberty Victoria believes that the temporary suspension of Parliament removed important scrutiny at a time when it was needed most.
17. The exercise of extraordinary powers during an emergency comes at the expense of human rights and often with significant expenditure of public funds. It is therefore essential in a properly functioning democracy that Parliament continues to operate uninterrupted as far as is possible to ensure that the exercise of those powers — which affect all Victorians — is subject to appropriate levels of oversight, and that decision-makers act transparently and are held to account.
18. The Victorian community, as with the rest of Australia, has adapted to the practical impediments posed by the responses to COVID 19. Many workplaces now pride themselves on being ‘COVID-safe’. The courts have also gone to great lengths to ensure access to justice continues by introducing or expanding ways in which hearings can be conducted remotely.
19. In the absence of elimination of the virus, it is possible that Victoria may experience another ‘spike’ in infections. Indeed, the recent increase in numbers of people who have tested positive to the virus demonstrates how easily it can spread. The response in future should not be to suspend an entire branch of government again. The Victorian Parliament should likewise adapt.

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<sup>10</sup> Rachel Clayton, ‘Melbourne residents in coronavirus hard lockdown fear for health impacts in public housing towers’ *ABC News* (7 July 2020) <<https://www.abc.net.au/news/2020-07-07/health-concerns-rise-in-coronavirus-melbourne-tower-lockdown/12427940>>

<sup>11</sup> Margaret Paul, ‘Parents caught in Melbourne public housing coronavirus lockdown stopped from visiting baby’ *ABC News* (9 July 2020) <<https://www.abc.net.au/news/2020-07-09/coronavirus-public-housing-lockdown-stops-parents-visit-baby/12439778>>

## **Policing the Public Health Directions**

### ***Issues in policing Stay at Home Directions***

20. Liberty Victoria is a partner of COVIDPolicing (<https://covidpolicing.org.au/>). Through this partnership, Liberty Victoria has been alerted to, and is concerned about, many reports of Victoria Police exercising its powers and issuing infringements in an arbitrary and inconsistent manner, particularly in relation to the Stay at Home Directions. Liberty Victoria refers to and adopts these accounts at the COVIDPolicing website.<sup>12</sup>
21. We are particularly concerned that police members may have been exercising their powers in a manner that disproportionately affects people from diverse cultural and linguistic backgrounds, what may be seen as lower social-economic backgrounds, and Aboriginal and Torres Strait Islander people. We understand that, despite calls from stakeholders, Victoria Police has not released the demographic data with regard to fines that have so far been issued.
22. In April 2020, it was reported that then Deputy Commissioner Shane Patton stated that the inconsistency and a lack of discretion in the enforcement of lockdown laws is eroding public confidence in Victoria Police.<sup>13</sup> While the announcement that all infringements would be reviewed is to be commended, Liberty Victoria remains concerned that many people may have received fines in circumstances where they either may not have breached the Directions, or they may have a defence of reasonable excuse for refusing or failing to comply with the direction or requirement pursuant to s 203(2) of the PHW Act.
23. Liberty Victoria is also concerned about the reported use of move-on powers against homeless persons, in circumstances where the Stay at Home Directions themselves contain an exception for homelessness (for persons without an “ordinary place of residence”), and accordingly would not properly inform the execution of move-on powers.
24. Liberty Victoria is also very concerned about the issuing of over \$43,000 of fines to those involved in the Good Friday protest at the Mantra Hotel in Preston as well as one of the persons being charged with “incitement” for allegedly organising the protest. We have made a detailed comment noting that the protesters, who engaged in a socially distant form of

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<sup>12</sup> See in particular COVIDPolicing, ‘Weekly Roundups’ (20 July 2020) <<https://covidpolicing.org.au/summary/>>.

<sup>13</sup> See Tammy Mills, ‘COVID-19 lockdown fines ‘eroding public confidence, top cop warns’, *The Age* (20 July 2020) <<https://www.theage.com.au/national/victoria/covid-19-lockdown-fines-eroding-public-confidence-top-cop-warns-20200413-p54jfk.html>>.

protest, may well have defences under the Stay at Home Directions.<sup>14</sup> Liberty Victoria remains very concerned about the conditions of detention of those refugees and asylum seekers that were the subject of the protest, and notes the open letter of more than 1,000 doctors and other health professionals who have called for people seeking asylum and refugees being held in detention, including hotels, to be released into the community during the coronavirus pandemic. The letter, authored by Sydney paediatrician and refugee advocate David Isaacs, said that hotels being used as detention sites "constitute a very high-risk environment for detainees' mental and physical health".

25. Liberty Victoria also notes the recent Detention Orders made in relation to the nine public housing towers in Flemington and North Melbourne in July 2020. Liberty Victoria notes that in two of those towers, no cases of COVID-19 were found. We are concerned, amongst other things:

- a. That there was a disproportionate police response to what is a public health issue, and in particular, this was imposed without consultation upon vulnerable communities. Many of the people living in the towers have experienced racial profiling by police in the past and many are refugees who in some cases have experienced trauma and fled from authoritarian State authorities. We are also concerned that there has been a continued police presence even after the towers have returned to stage 3 restrictions;
- b. That there was not an adequate interpretation of the terms and purported justifications for the Detention Orders, resulting in residents who did not speak or read English to the requisite level not being properly informed of the reasons for, and conditions of, the Detention Orders;
- c. That the limitations themselves were disproportionate in circumstances where residents of the towers were not free to leave to exercise or work (even in a socially distant manner), and required permission to leave for medical reasons; and
- d. That there was a delay in the provision of culturally acceptable food.

26. In short, Liberty Victoria does not accept that these measures would have been imposed, without warning or consultation, on other more privileged communities in Victoria. Liberty Victoria is concerned that the serious limitations to the human rights of those residents would

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<sup>14</sup> See Liberty Victoria, 'Media Release – Refugee Protest Arrest and Fines' (20 July 2020) <<https://libertyvictoria.org.au/content/media-release-%E2%80%93-refugee-protest-arrest-and-fines>>.

fail to meet the proportionality test under the Charter. Liberty Victoria notes that this response is now subject to investigation by the Victorian Ombudsman.<sup>15</sup>

***Concern with recent changes to Stay at Home Directions***

27. In relation to the recent Stay at Home Directions (Restricted Areas) (No 2), Liberty Victoria is concerned that the new clause 5(1A) (which was not contained in the earlier Directions) is a disproportionate limitation to the human rights of Victorians. Clause 5(1A) provides:

A person may only leave their premises under subclause (1) where it does not involve unreasonable travel or travelling to a place for an unreasonable period of time.

Note 1: unreasonable travel would include travel within or outside the Restricted Area to obtain goods or services that can be obtained closer to home.

Note 2: unreasonable travel would include travel within the Restricted Area to exercise or outdoor recreation where that type of exercise can be done closer to home. Travelling to an area outside the Restricted Area for exercise or outdoor recreation is prohibited under these directions.

28. Liberty Victoria is concerned that such a provision – turning on “reasonableness” – leaves too much discretion in the hands of police, and further unreasonably impacts upon those isolated Victorians who, for example, were meeting a friend for exercise (often outside of their suburb but within the restricted area). Liberty Victoria notes that such exercise is vital for physical and mental health. We submit that Victorians should be able to travel within the restricted area for the purpose of (socially distant) exercise with another person.
29. Further, in relation to the recent Stay at Home Directions (Restricted Areas) (No 4), which make the wearing of face coverings mandatory, Liberty Victoria does not take issue with the requirement to wear such coverings when Victorians leave their homes. However, Liberty Victoria opposes the \$200 fine, which will invariably disproportionately impact upon those from perceived lower socio-economic backgrounds, including minorities. Police would be better placed to provide face masks rather than infringement notices, at least at the first instance of purported non-compliance. Liberty Victoria is also concerned about the possible impact on Victorians’ right to privacy in having to reveal to Victoria Police any physical or mental illness, including disability, in order to avoid a fine for not wearing a mask.

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<sup>15</sup> Victorian Ombudsman, ‘Ombudsman announces investigation into treatment of public housing tenants in lockdown’ (17 July 2020) <<https://www.ombudsman.vic.gov.au/our-impact/news/ombudsman-announces-investigation-into-treatment-of-public-housing-tenants-in-lockdown/>>.

## Prisons and Bail

30. The impact of COVID-19 on the criminal justice system has perhaps most acutely impacted those being held in custody, including youth detention centres and adult prisons. While those in the community are able to stay at home and follow health directions (including by social distancing and mask-wearing), those in custody are unable to protect themselves in the same way, and live in an environment of over-crowding, poorer hygiene, and vastly increased risk.<sup>16</sup>
31. In the initial stages of the pandemic in this country, hundreds of academics, experts, justice and health advocates, and legal practitioners called for urgent action to reduce the risk of transmission of COVID-19 in the criminal justice system.<sup>17</sup> Liberty Victoria supported this call.<sup>18</sup>
32. Corrections Victoria implemented an array of severe restrictions to address the risks associated with COVID-19. The efficacy of these measures is unknown, but they have made conditions in custody more onerous for all. Since 28 March 2020, all prisoners on entry to prison custody are required to undergo a period of quarantine for 14 days where they experience significantly limited time out of their cell. The quarantine and isolation of prisoners has serious impacts on prisoners' mental health and well-being. More recently, a number of adult and child prisoners and those working at adult and youth prison facilities have been diagnosed with COVID-19. This has led to an increase in the "lockdown" of prisoners, including children, who during lockdowns no longer get to leave their cells and have access to fresh air and sunlight. Liberty Victoria is very concerned about the physical and mental impact this will have on child and adult prisoners, in particularly those already vulnerable due to their existing health and mental health issues.
33. At the completion of their quarantine, prisoners are subject to further restrictions on their movement and their ability to receive visitors (including lawyers and family) has been barred.
34. Programs aimed at rehabilitation have ceased or been dramatically reduced — prisoners are unable to access mental health programs, anger management counselling, alcohol and drug

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<sup>16</sup> Adj Prof Lesley Russell, 'Why prisons in Victoria are locked up and locked down' *The Conversation* (23 July 2020) <<https://theconversation.com/why-prisons-in-victoria-are-locked-up-and-locked-down-143178>>.

<sup>17</sup> Liberty Victoria, 'Support for calls for Humane Decarceration during the COVID-19 Pandemic.' (29 March 2020) <<https://libertyvictoria.org.au/content/liberty-victoria-supports-calls-humane-decarceration-during-covid-19-pandemic-you-cannot>>.

<sup>18</sup> *Ibid.*

counselling, and other courses. As recently observed by the Victorian Court of Appeal in *Freeburn v The Queen [No 2]*:<sup>19</sup>

[I]t is relevant to take into account the impact of the lockdown restrictions that have been imposed as a result of the COVID-19 pandemic, and that have been applicable to the appellant and indeed to other prisoners in Victoria. As a result of those restrictions, the appellant has not had the opportunity to have contact visits, and the COVID-19 restrictions have been an additional factor (apart from his placement in a management unit) limiting the time that he might be able to spend out of his cell each day. The appellant's placement, and the COVID-19 restrictions, have also meant that the appellant has had very limited opportunity to participate in courses directed to his rehabilitation, and to engage in meaningful work. Those circumstances, together with the appellant's psychological condition, have meant that his time in custody has been, and will, we apprehend, continue to be, more onerous than otherwise would be the case for a prisoner in normal health.

35. Liberty Victoria is concerned about the impact of these restrictions on the safety and welfare of those in custody as well as the impact on their right to humane treatment while in custody.
36. Further, many people in custody have chronic conditions such as asthma, diabetes and heart-disease. In addition, there are many vulnerable groups that suffer from poorer health outcomes and are at greater risk of serious infection from the COVID-19 virus – these include Aboriginal and Torres Strait Islander people, homeless people, people living with disabilities, and those from lower socio-economic backgrounds. There have been no specific measures introduced to address the added risks faced by these people.
37. Unfortunately, it now appears that there are cases of COVID-19 in Victoria's prison system.<sup>20</sup> Liberty Victoria repeats its call that there should be controlled decarceration to protect the rights of prisoners, including those on remand (who are presumed innocent), those who are particularly vulnerable (the elderly and those with underlying health conditions) and those serving short sentences.

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<sup>19</sup> [2020] VSCA 176, [61] (Kyrrou, Kaye and Emerton JJA).

<sup>20</sup> Corrections Victoria reports that, either due to positive cases of COVID-19 (at two locations at least) or out of precaution, strict lockdown measures – including forced isolation for up to 14 days – have been implemented at some point in time at the Metropolitan Remand Centre, Melbourne Assessment Prison, Ravenhall Correctional Centre, Loddon Prison, Tarrengower Prison, Fulham Correctional Centre, Barwon Prison and Langi Kal Kal Prison: Corrections Victoria, 'Our response to coronavirus (COVID-19)' (31 July 2020) <<https://www.corrections.vic.gov.au/covid19>>.

### **Isolation of children**

38. Children are a particularly vulnerable group in the criminal justice system. The responses to COVID-19 within youth detention centres have involved an increase in isolation of children for health purposes. Liberty Victoria understands that under the present conditions children and young offenders in detention are regularly in lockdown, and have been denied access to rehabilitation programs. The Victorian Ombudsman has unambiguously recognised the long-term harm that results from practices of isolation, separation, seclusion and lockdown of young people and children.<sup>21</sup> Liberty Victoria is concerned about the deleterious impact on children of these measures.
39. Liberty Victoria submits that, where reasonably possible, there should be decarceration with regard to child and young offender prisoners.

### **Protective Services Officers**

40. For many people in the community, their first encounter with the justice system is their encounters with police in the community. Since 2011, Protective Services Officers (“PSOs”) have been employed by Victoria Police primarily to maintain a visible presence on and around metropolitan and regional trains and train stations, to engage with the community and foster a sense of safety. They receive less training than police officers but carry firearms and are given some of the powers of a police constable, including to arrest, to obtain personal information, to search and seize and to issue infringement notices. They wear similar clothing as police officers, and it is not always readily apparent to members of the community that they are not dealing with a police officer.
41. The Government has announced expanded deployment of PSOs to shopping centres, sporting precincts and other “highly populated” places across the state, as well as their deployment in other emergencies. In fact, the expansion is much larger than what might be considered ‘highly populated’ places and covers the entire “Melbourne metropolitan area” and nine major regional cities and surrounding areas.<sup>22</sup> The increased reliance on, and deployment of,

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<sup>21</sup> Victorian Ombudsman, ‘OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people’ (September 2019) <<https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/OPCAT-in-Victoria-A-thematic-investigation-of-practices-related-to-solitary--September-2019.pdf?mtime=20191216123911>>

<sup>22</sup> *Victoria Police Regulations 2014*, rr 27(k)–(l), Sch 2 inserted by the *Victoria Police Amendment Regulations 2020*, rr 6(a)–(b), 8.

PSOs increases the risks of harmful interactions with members of the community as identified in the Independent Broad-based Anti-Corruption Commission report, *Transit Protective Services Officers – An exploration of corruption and misconduct risks*.<sup>23</sup> If PSOs are used as de-facto police, they should receive the same level of training. Further, the expansion of the definition of “designated place” under the *Victoria Police Regulations 2014* should be rolled back.

42. One of the top reasons PSOs arrested members of the community during the initial months of the pandemic was for public drunkenness, an offence the government has committed to abolishing due to its disproportionate impact on the vulnerable. The system of accountability and complaint management in response to issues relating to PSOs in Victoria is lacking. Liberty Victoria is concerned that with increased use of PSOs, there may be an increased risk in over-policing of vulnerable and marginalised neighbourhoods and communities.

## **Other criminal justice system issues**

### ***Judge-alone trials***

43. The cessation of trials in courts around Victoria has had an immense impact on the administration of justice in the state. The right to a trial before a jury is a fundamental tenet of the criminal justice system and an important safeguard to ensure a fair trial. The Government’s introduction of the option for certain matters to be heard by a judge alone represents a significant change to the operation of the criminal justice system.
44. Liberty Victoria believes the right to a trial by jury should in all circumstances be preserved and protected. In these extraordinary circumstances, the introduction of judge-alone trials with the consent of the accused person may be an acceptable measure to alleviate delays, but it demands careful review and scrutiny, as well as a thorough investigation of all other available alternative options. Liberty Victoria notes that recently the Government of the

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<sup>23</sup> Independent Broad-based Anti-corruption Commission, ‘Transit Protective Services Officers: an exploration of corruption and misconduct risks’ (December 2016) <[https://www.ibac.vic.gov.au/docs/default-source/research-documents/transit-protective-services-officers---an-exploration-of-corruption-and-misconduct-risks.pdf?sfvrsn=38616c75\\_4](https://www.ibac.vic.gov.au/docs/default-source/research-documents/transit-protective-services-officers---an-exploration-of-corruption-and-misconduct-risks.pdf?sfvrsn=38616c75_4)> at 20 July 2020.

Australian Capital Territory, in the face of a High Court challenge, has abandoned its introduction of judge-alone trials without the consent of the accused.<sup>24</sup>

45. It is fundamental that any judge-alone trial only occur with the consent of the accused and that once jury trials resume significant resources be allocated to jury trials to ensure that there is not pressure placed on accused persons to elect to proceed with judge-alone trials because their cases can be heard at an earlier stage. Otherwise any 'choice' to proceed with a judge-alone trial would be illusory, particularly for those accused persons remanded in custody.

#### ***Crimes (Mental Impairment and Unfitness to be Tried) Act changes***

46. Changes were introduced that would permit special hearings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* to be conducted by judge-alone. In determining whether this takes place a court is to have regard to submissions by the prosecution, but not defence. Liberty Victoria is concerned this precludes consideration of submissions made on behalf of an accused person, an unnecessary abrogation of the rights of an accused.

#### ***Henry VIII clauses***

47. Parliament's decision to delegate the power to legislate to the Executive branch of Government is a concerning shift away from proper oversight and accountability. This is particularly dangerous in relation to regulations that impact the rights and liberties of individuals, such as the process of bail applications and regulations that amend conditions in prisons and youth detention centres.
48. Liberty Victoria submits that the delegation of such law-making powers should be restrained, regularly reviewed and limited in scope and duration. The increased use of Henry VIII clauses undermines the role of the legislature and prevents scrutiny of government decisions, both of which are central tenets of a healthy liberal democracy.

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<sup>24</sup> Daniella White, 'Coronavirus: Emergency laws that removed defendants' rights to a trial by jury ditched' (19 June 2020) <<https://www.canberratimes.com.au/story/6798543/laws-that-took-away-rights-to-jury-trials-ditched/>>.

## Right to adequate housing

49. Adequate housing plays a particularly important role in the front-line defence against the COVID-19 pandemic. Those without adequate housing are at greatest risk of contracting the virus. In his recent announcements extending funding to house the homeless, Premier Daniel Andrews acknowledged: “This pandemic has laid bare many inequalities — you can’t stay home if you don’t have one.”<sup>25</sup> Liberty Victoria welcomes these measures and encourages the Victorian Government to maintain its commitment to properly investing in housing to address homelessness beyond the pandemic.
50. Liberty Victoria also welcomes the Victorian Government’s efforts to give effect to the National Cabinet’s decision to declare a temporary moratorium on evictions of renters in residential tenancy agreements.
51. Evicting people from their homes is not only a public health risk, it is a severe infringement of that person’s human rights. Adequate housing is a fundamental human right and is enshrined as a human right under section 13(a) of the *Charter*, as well as at international law.<sup>26</sup> As was stated in *Director of Housing v Sudi*:<sup>27</sup>
- Theses rights ... in section 13(a) are of fundamental importance ... Their purpose is to protect and enhance the liberty of the person – the existence, autonomy, security and wellbeing of every individual in their own private sphere. ...
52. We acknowledge and are grateful for having been given the opportunity previously to provide feedback in relation to the *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020 (RT Regulations)*. We note that the RT Regulations resolved several issues including:
- a. Reinstating a tenant’s ability to issue a notice of intention to vacate that existed under the *Residential Tenancies Act 1997 (RT Act)* prior to commencement of the *Omnibus Act*, as well as retaining the new bases for issuing such a notice under s 545(1).<sup>28</sup>
  - b. Establishing minimum earliest termination dates when the Victorian Civil and Administrative Tribunal (**VCAT**) determines to terminate a tenancy agreement to at

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<sup>25</sup> Premier of Victoria, ‘Media Release: Homes for Homeless Victorians during Pandemic and beyond’ (28 July 2020) <<https://www.premier.vic.gov.au/homes-homeless-victorians-during-pandemic-and-beyond>>.

<sup>26</sup> *International Covenant on Economic, Social and Cultural Rights*, art 11.

<sup>27</sup> (2010) 3 VAR 139; [2010] VCAT 328.

<sup>28</sup> *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020*, rr 39 (tenancy agreements) and 49 (Pt 4A site agreements).

least match the earliest termination date that would have been specified had a notice to vacate been issued.

- c. Changing the word “endangered” (past tense) to “endangers” (present tense) so that the language under the emergency provisions remained consistent with other provisions of the *RT Act* and the *Residential Tenancies Amendment Act 2018 (RT Amendment Act)*.<sup>29</sup>
- d. Prohibiting compensation orders, including for rent, being made following an early termination under the *RT Act* due to concerns that the termination of tenancy agreements may result in tenants being unfairly required to pay compensation, lease break fees or charges in circumstances where the fixed term tenancy agreement was reduced due to severe hardship caused by the COVID-19 crisis.

53. However, Liberty Victoria believes that the Omnibus Act and RT Regulations can be further improved to greater protect the right to adequate housing.

#### ***Issues that may arise following the repeal of the Pt 16 of the RT Act***

##### *Gap between repeal of Omnibus Act and commencement of RT Amendment Act*

54. The Omnibus Act postponed the commencement of changes to the *RT Act* which were designed to make renting safer, better and fairer for all Victorians.
55. The *RT Amendment Act* is due to bring into effect several important changes including:
- a. abolishing ‘no reason’ eviction notices; and
  - b. requiring VCAT to take into account the mandatory consideration of whether making a possession order would be “reasonable and proportionate”.<sup>30</sup>
56. Those amendments resulted from a lengthy review of existing tenancy laws, and were due to commence in July 2020.

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<sup>29</sup> This removed any confusion about whether this ground required the ‘danger’ to be continuing – recognised as important protection against “unfair and harsh results” caused by the blunt and speedy procedure to evict a renter: *Pavletic v Director of Housing* [2002] VSC 438 [15]-[20].

<sup>30</sup> *Residential Tenancies Act 1997*, s 330A as to be inserted by *Residential Tenancies Amendment Act 2018*, s 245.

57. The Omnibus Act has postponed the commencement date of the RT Amendment Act from 1 July 2020 to 1 January 2021.<sup>31</sup> Notwithstanding this postponement, the effect of the COVID-19 temporary measures will be to bring forward the two abovementioned reforms. This is sensible and welcome.
58. However, upon the repeal of the COVID-19 temporary measures on 24 October 2020,<sup>32</sup> the RT Act will revert to its earlier form. This will create a gap of three months when tenants will lose the benefits of greater legal protections against unfair evictions. This means that, during this interim period, VCAT must issue a possession order in a range of situations which might otherwise be unreasonable and/or disproportionate. Further, landlords can resume issuing notices to evict without a specified reason.
59. In a context where many tenants have lost their employment and accrued arrears, this poses the risk that if landlords apply for possession orders, VCAT may have no real option but to evict them.
60. Liberty Victoria recommends bringing forward the commencement date of the RT Amendment Act to coincide with the repeal of the COVID-19 temporary measures. Alternatively, bring forward the operation of the ‘reasonable and proportionate test’ and the abolition of the ‘no reason’ basis for giving a notice to vacate.

*Loss of protections from adverse action due to a ‘COVID-19 reason’*

61. The Omnibus Act also introduced measures to protect tenants from being evicted if they are unable to comply with their obligations under a tenancy agreement or the RT Act, including the payment of rent, because of a “COVID-19 reason”.<sup>33</sup>
62. As Victoria enters a period of higher infection rates, the financial impacts of the broader COVID-19 restrictions will almost certainly continue for many several months into the future. Despite there being no evidence of easing infection rates or government-imposed restrictions, there is uncertainty in the job market and around how long social security benefits introduced by the Federal Government will continue. Further, when restrictions do ease, some renters may also be unable to return to work immediately due to family or carer responsibilities or other personal issues.

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<sup>31</sup> *COVID-19 (Emergency Measures) Act 2020*, s 50.

<sup>32</sup> *Residential Tenancies Act 1997*, s 615.

<sup>33</sup> *Residential Tenancies Act 1997*, s 537.

63. Accordingly, difficulties paying rent because of a 'COVID-19 reason' is not likely to end with the repeal of the COVID-19 temporary measures. If protections for a COVID-19 reason are to end along with the repeals of Pt 16, many tenants who have not yet recovered from the impacts of restrictions may face the prospect of homelessness shortly thereafter.
64. Liberty Victoria recommends continuing the protections from adverse action where the failure to comply with an obligation under a tenancy agreement of the RT Act is due to a 'COVID-19 reason'.

*RT Regulations set to expire before COVID-19 temporary measures*

65. Currently, Pt 16 of the RT Act will expire on 24 October 2020. The RT Regulations are set to expire on 26 September 2020. There will be a gap of one month between the pair. It is axiomatic that the corrections to the COVID-19 temporary measures made by the RT Regulations would be lost.
66. Liberty Victoria recommends amending the RT Regulations so that its expiration coincides with the repeal of Pt 16 of the RT Act.

*Uncertainty in the eviction process*

67. As noted above, the RT Regulations have gone some way to address concerns relating to evictions by introducing minimum earliest termination dates into the COVID-19 temporary measures under Pt 12A. However, there remains uncertainty around how the eviction process works in practice.
68. Under the previous RT Act, landlords who issue tenants with a notice to vacate must wait until a specified minimum timeframe has elapsed before applying to VCAT for a possession order. This time allows tenants to make alternative living arrangements. It also allows tenants time to prepare to challenge a notice including seeking advice or collecting evidence which might support their case. This time is important to ensure a fair hearing.
69. If a tenant fails to leave, the landlord can apply to VCAT for a possession order. If a possession order is made, VCAT can postpone the date on which the tenant must vacate the premises by up to 30 days. This discretion is available in all cases, including those where there is notice period is contemporaneous with the giving of the notice. The benefit of this discretion provides tenants with further time to make alternative living arrangements before they must leave the premises.

70. Under the COVID-19 temporary measures, there appears to be a two-step process in place before an eviction can occur. Firstly, landlords can bypass the notice requirement and apply to VCAT for the termination of a tenancy.<sup>34</sup> As noted above, if VCAT makes an order terminating the tenancy, the tenant will have the same amount of time to vacate the premises that would have been available had an equivalent a notice to vacate that would have been given in ordinary circumstances.
71. However, the time is only provided after VCAT has made an order terminating the tenancy agreement. In other words, the tenant is not provided with an equivalent period of time to prepare to challenge the basis relied upon to justify the termination before the VCAT hearing.
72. Secondly, VCAT is required to consider whether making a possession order is ‘reasonable and proportionate’ in the circumstances. To decide this, it would seem that VCAT must conduct a second hearing. This second hearing may provide an opportunity for a tenant to challenge the basis justifying the eviction. Alternatively, a tenant could show that they have remedied matters, thereby demonstrating that an eviction is no longer justified. For example, if a tenant caused a nuisance and subsequently addressed the nuisance causing behaviour or conduct, there may no longer be a good reason to evict the tenant. VCAT may decide that a possession order should not be granted in those circumstances.
73. However, the termination order would still appear to be effective. It is unclear what effect, if any, such an order would have where VCAT declines to make a possession order.
74. Further, the RT Regulations do not express a similar discretion for VCAT to postpone the issuing of a possession order for up to 30 days in any circumstance as is contained in s 330. An additional period of time to make alternative arrangements may be appropriate, especially where a person faces the prospect of homelessness during a public health emergency.
75. Liberty Victoria recommends clarifying that VCAT must conduct a second hearing before making a possession order at which time a tenant has an opportunity to show that the possession order would not be ‘reasonable or proportionate’. Further, provide that if a possession order is not made, the termination order is no longer of effect. Finally, make

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<sup>34</sup> While the *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020* provide that the landlord must first apply to the Consumer Affairs Victoria, r 11 makes clear that applications for termination under *Residential Tenancies Act 1997*, ss 548, 558, 569, 581 or 592 are not eligible disputes. Accordingly, the matter would be referred to VCAT immediately.

express that VCAT has the discretion to postpone the issuing of a possession order for up to 30 days.

### ***Landlord's grounds to apply for termination and possession***

#### *Lowering the bar for landlords to evict tenants over minor breaches*

76. The bar for evicting tenants over breaches of a tenancy agreement or duty provision – even minor breaches – has been significantly lowered.
77. Under the previous RT Act and the RT Amendment Act, a landlord could issue a notice to vacate if the tenant fails to comply with a compliance order issued under s 212, or the tenant has breached the same duty provision of the RT Act on multiple occasions.
78. By contrast, under the COVID-19 temporary measures, a landlord can apply to VCAT for termination where there has been a single breach of a tenancy agreement or a duty provision of the RT Act. For example, a landlord can allow a landlord to threaten eviction and take a tenant to VCAT for not pruning the garden if that is required in the tenancy agreement, or a single instance of playing loud music which causes a nuisance to neighbours.
79. This represents a significant expansion of grounds to terminate available to landlords. Drawing on the examples above, a tenant may be able to argue that the termination would not be 'reasonable and proportionate'. However, a tenant would still need to make that argument in circumstances where they would never have had to do so before.
80. Liberty Victoria recommends clarifying the relevant provisions so that the ground applies only to successive breaches of a renter's obligations under the rental agreement or duty provisions under the RT Act.

#### *Pre-preparatory steps to sale of property as a reason to vacate*

81. Another departure from the RT Act and RT Amendment Act concerns the basis of selling a property. Under the RT Act and RT Amendment Act, a landlord can issue a notice to vacate if the premises have been sold or are offered for sale with vacant possession. This ground contemplates the all but certain sale of the premises and the requirement that they be vacant.
82. The COVID-19 temporary measures introduced an entirely new basis for termination and possession. The landlord could seek termination and possession simply by engaging an agent to sell the premises or preparing a contract of sale. Unlike the 'sale of the premises' basis,

evidence that the property is to be sold subject to vacant possession immediately after the termination date is not required.

83. The bona fides of this ground will be extremely difficult to police. There is nothing preventing a landlord, for example, seeking possession after engaging a real estate agent with no genuine intention to sell the premises. All that would be needed is the preparation of a draft contract of sale. Other preparatory steps to sell a property — such as advertising to sell or valuing the property — do not appear necessary. The previous justification for termination — the completed (or near complete) sale of the property — is lacking.
84. There is no apparent good reason as to why this new ground was introduced when it did not exist in the previous RT Act and will not exist in upon commencement of the RT Amendment Act.
85. Liberty Victoria recommends removing this ground from the RT Act altogether.

#### ***Residential Tenancies Dispute Resolution Scheme***

86. The effect of the RT Regulations requires all disputes arising under a tenancy agreement or the RT Act must first go through the Residential Tenancies Dispute Resolution Scheme (**RTDRS**) before they can proceed to VCAT. This is due to the very broad – if not completely encompassing – definition of an “eligible dispute”; indeed, it is difficult to conceive of a dispute which would not fall within the definition.
87. The Director of CAV can either accept the dispute for alternative dispute resolution under the RTDRS or refer the dispute to VCAT for determination. While some disputes cannot be subject to the RTDRS, it is still mandatory to apply to the RTDRS for a referral to VCAT – a direct application to VCAT is effectively not possible.
88. The mandatory requirement to apply firstly to the RTDRS has created uncertainty and risks delays for tenants with urgent matters. For example, a tenant may need an urgent restraining order to prevent an unlawful eviction. While such a case is invariably never going to fall within the remit of the RTDRS, the tenant must be triaged through the Scheme regardless.
89. The CAV website contains a page dedicated to emergencies and urgent issues. This specifically identifies illegal evictions as an urgent issue. However, CAV appears to acknowledge its limited capacity, noting that it has “limited phone services and [tenants] *may experience long wait*

*times*".<sup>35</sup> In circumstances where time is of the essence, waiting for long periods for an inevitable referral seems unnecessary and inefficient.

90. Liberty Victoria recommends amended the RTDRS so that urgent applications can be made directly to VCAT. Where a dispute should be dealt with under the RTDRS, VCAT should have the power to refer the dispute to the Scheme. This approach seems preferable and better facilitates urgent cases.

### **Aged care facilities**

91. The elderly, particularly those aged over 70 years, have been identified as one of the most at-risk cohorts of the population to the severe effects of COVID-19. It is plainly sensible that additional efforts are made to protect them from contracting the coronavirus. However, the response by some aged care facilities has been to go beyond the public health guidance issued by the Federal and Victorian Governments. In doing so, it is arguable that they have disproportionately limited the human rights of its aged care facility residents.
92. Aged care providers are required to comply with the quality and safety rules provided for under federal legislation, regulations and supportive legislative instruments,<sup>36</sup> including the Charter of Aged Care Rights. In addition, aged care providers are required to comply with Care Facilities Directions issued by the Deputy Chief Health Officer under the PHW Act during states of emergency.<sup>37</sup> The Directions include restrictions on the number of visitors as well as the conditions in which those visits can take place.
93. There have been reports that some private aged care providers have denied all visits to elderly residents, even in cases where there have been no reported cases of COVID-19 and without implementing ways for relatives to visit their loved ones in a safe and suitably distant way — euphemistically called “voluntary lockdowns”.<sup>38</sup> Reporting on this issue, Human Rights Watch

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<sup>35</sup> Consumer Affairs Victoria, ‘Contact us: Emergencies and urgent issues’ (30 July 2020) <<https://www.consumer.vic.gov.au/contact-us/emergencies-and-urgent-issues>>.

<sup>36</sup> See also *Aged Care Act 1997* (Cth), *Aged Care Quality and Safety Commission Act 2018* (Cth) and User Rights Principles 2014.

<sup>37</sup> See, eg, Care Facilities Direction (No 7) (22 July 2020).

<sup>38</sup> Bethany Brown, ‘Blanket Visitor Ban under COVID-19 Will do More Harm Than Good’ *Human Rights Watch* (8 April 2020) <<https://www.hrw.org/news/2020/04/08/blanket-visitor-ban-under-covid-19-will-do-more-harm-good>>. Robyn Grace, ‘It’s really hard: Couples split as nursing homes lock out families’ *Sydney Morning Herald* (19 March 2020) <<https://www.smh.com.au/national/it-s-really-hard-couples-split-as-nursing-homes-lock-out-families-20200319-p54bo3.html>>

summarised the adverse impacts that excessive restrictions can have on aged care facility residents.<sup>39</sup>

Visitor restrictions by aged care providers can do more harm than good by cutting off older people from vitally important family and social connections. Older people who find themselves unexpectedly alone without control over their circumstances are at particular risk for a variety of severe, even life-threatening physical and mental health conditions, including cognitive decline. Such underlying health conditions are harmful enough on their own, but with a disease that is particularly dangerous for people with them, voluntary lockdowns might not be the answer.

94. Visits from family members, friends, carers, support workers, guardians or advocates not only provides an opportunity to socialise (which benefits their physical and mental health), but also provides an important oversight mechanism. This is especially important for those who are particularly vulnerable to forms of elder abuse such as those with dementia or cognitive impairments. Making reasonable adjustments to facilitate visits should be preferred over outright denial of visits. By restricting visits to aged care facility residents altogether, aged care providers are arguably imposing an unreasonable limitation on residents' human rights (their freedom of movement, freedom of association, right to family and, given the harmful effects of such policies, right to health).<sup>40</sup> Affected residents have limited options in seeking to address this issue. While a complaint can be made to the Aged Care Quality and Safety Commission, the Commission has no power to mandate that people be allowed to receive visitors.
95. Liberty Victoria acknowledges the Victorian Government is limited in how it can respond to potential breaches of quality and safety standards by aged care providers. However, we recommend that the Victorian Government advocate through the National Cabinet to ensure aged care providers' policies appropriately balance protecting older and at-risk residents with the residents' needs for family and connection. The Government should also advocate to ensure there is consistent and effective oversight of aged care facilities and appropriate complaint mechanisms and legal remedies in instances of breaches.

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<sup>39</sup> Human Rights Watch, 'Protecting Human Rights in the COVID-19 Pandemic' (13 July 2020) <<https://www.hrw.org/news/2020/07/13/protecting-human-rights-covid-19-pandemic>> citing National Institute on Aging, 'Social isolation, loneliness in older people pose health risks' (23 April 2019) <<https://www.nia.nih.gov/news/social-isolation-loneliness-older-people-pose-health-risks>>

<sup>40</sup> See *International Covenant on Civil and Political Rights*, arts 6, 7, 11 and 12.

### **Issues affecting refugees, asylum seekers and visa-holders**

96. Despite the unique and unprecedented challenges that COVID-19 presents, the Government must ensure that members of the community who are not Australian citizens are afforded the dignity and support extended to all Victorians.
97. Unfortunately, to date, many vulnerable Victorians have fallen through the gaps. People in immigration detention, those seeking asylum, temporary visa holders including bridging visa holders, people facing visa cancellation or refusal, and other vulnerable groups engaging with Australia's migration system have been excluded from the relief afforded to other Australians. These cohorts are often particularly vulnerable, facing barriers including language, health, means, and backgrounds of torture and trauma.
98. The impact on these groups has been severe, from psychological harm, financial distress including loss of livelihood and homelessness, loss of access to crucial support services, and the loss of ability to exercise legal rights (with consequences including detention and forcible removal from Australia). This is not an individual problem: it has a ripple effect on families, communities, and businesses. It is in no-one's interests to leave behind a group of people whose contribution to this State is extremely valuable, and whose suffering threatens not only their own health but the State's long-term recovery.
99. Liberty Victoria recognises that the Victorian Government's jurisdiction is limited with respect to migration. Liberty Victoria also recognises the Victorian Government's generous assistance to these groups to date. However, both in respect to its role in National Cabinet and in terms of its powers to extend State-based support to members of the Victorian community, there are further steps that can and should be taken to protect the people currently left behind. In particular, Liberty Victoria submits that the Victorian Government ought to:
  - a. Ensure financial support is available to all members of the community, regardless of visa status.
  - b. Increase funding to legal and social services providing support to asylum seekers, refugees, and people in immigration detention.
  - c. Advocate in the National Cabinet to:
    - i. Ensure transparent, appropriate and expert-led management of immigration detention, including controlled release of detainees.

- ii. Suspend adverse discretionary visa cancellation decision-making, except where it is a matter of public safety or at the request of the person affected, to ensure no loss of rights occurs due to severe access barriers.

***Ensure financial support is available to all members of the community, regardless of visa status.***

100. Temporary visa holders contribute enormous amounts to Australia in myriad ways. Our economy relies on students and skilled workers. Abandonment of these cohorts not only hurts those communities and the people directly affected, but affects Australia's international reputation as a preferred destination for education and employment. It will also affect the State's longer-term economic recovery, relying heavily as we do on tourism and hospitality workers, many of whom are non-citizens.
101. Liberty Victoria welcomes the Victorian Government's steps to address the gap left by Commonwealth funding, including the Extreme Hardship Support Program, implemented through the Red Cross, and the Victorian Government's International Student Emergency Relief Fund. However, we remain concerned that the supports do not go far enough: for example, a \$400 is unlikely to go far towards a vulnerable person's essential needs. Further, the \$1,500 hardship payment for those required to self-isolate should be available to all members of the Victorian community, regardless of visa status.
102. Liberty Victoria recommends that the Victorian Government, as part of the National Cabinet, advocate for JobSeeker and JobKeeper payments to be available to all members of the Australian community, regardless of visa status.
103. Liberty Victoria recommends that financial assistance be available to all members of the community who require it, regardless of visa status, and that any information collected in the provision of this relief be confidential so that undocumented people or people with insecure status are not prevented from access.
104. There are between 60,000 and 100,000 people without visas currently in Australia.<sup>41,42</sup> Research suggests that undocumented people constitute a significant percentage of the workforce in sectors such as horticulture, cleaning and food production.<sup>43</sup> Because of their

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<sup>41</sup> Minister for Home Affairs, 'Matters Requiring Immediate Attention and Consideration,' p8 <<https://www.homeaffairs.gov.au/foi/files/2019/fa180801356-document-released.PDF>>.

<sup>42</sup> Marie Segrave, 'Exploited and Illegal: Unlawful Migrant Workers in Australia', p7 <[https://arts.monash.edu/\\_data/assets/pdf\\_file/0020/1532063/exploited-and-illegal\\_unlawful-migrant-workers-in-australia.pdf](https://arts.monash.edu/_data/assets/pdf_file/0020/1532063/exploited-and-illegal_unlawful-migrant-workers-in-australia.pdf)>

<sup>43</sup> Ibid.

legal status, undocumented people are often underpaid and exploited at work. Earning subsistence wages, and without access to basic forms of income and social support, undocumented people will be unable to observe social distancing, stay-at-home orders, or quarantine measures, and there may be significant barriers to receiving appropriate medical care.

105. Similarly, people facing severe financial hardship who do have visas are likely to face inordinate pressures to continue to attend work despite illness, and against government direction. They too may have insecure work or have precarious financial status. The provision of financial assistance will not only prevent harm to them, but mitigate the spread of COVID-19 by enabling compliance.
106. Premier Daniel Andrews has made clear that attending a workplace with symptoms “is the biggest driver of transmission”, noting “we have to work together to keep anyone who’s got symptoms away from work”:<sup>44</sup> a key part of this fight is ensuring those with insecure financial situations are protected.

***Increase funding to legal and social services providing support to refugees and people seeking asylum, and people in immigration detention.***

107. There is a long-standing shortage of legal and social assistance available for asylum seekers, refugees, and other non-citizens in Australia. The COVID-19 crisis has intensified the strain on service providers, with demand soaring and numerous barriers to provision of services. These essential services have also been a critical pathway for the provision of multilingual COVID-19 related information to culturally and linguistically diverse communities.
108. New research conducted by the Refugee Council of Australia investigated the social and financial costs of not extending COVID-19 lifelines to people seeking asylum and refugees. The RCOA found:
  - a. Almost 19,000 people in this cohort are estimated to lose their jobs during the present economic downturn. The unemployment rate is expected to double from 19.3 per cent to 41.8 per cent.

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<sup>44</sup> Nicole Mills ‘Victorians must not go to work with coronavirus symptoms or lockdown ‘will not end’, Dan Andrews says’, *ABC News* (27 July 2020) <<https://www.abc.net.au/news/2020-07-27/coronavirus-cases-rise-again-as-victorians-go-to-work-while-sick/12495898>>

- b. Of those who remain employed, 92 per cent are expected to earn less than the minimum wage.
  - c. Thousands are expected to be pushed into poor health and homelessness. The homeless rate among refugees and asylum seekers on temporary visas is projected to rise to around 12 per cent.
  - d. The added burden on health, justice, social and other services is expected to cost hundreds of millions of dollars.<sup>45</sup>
109. Liberty Victoria recommends that increased funding be urgently made available to ensure that vulnerable persons receive legal advice and, where necessary, representation. In particular, funding should be provided for people facing visa cancellation. This cohort are often detained and face particular barriers to understanding, responding to or engaging with the processes they are subjected to. Liberty Victoria also recommends further funding be made available to essential non-legal assistance for refugees and people seeking asylum in the community facing destitution, including housing.

***Advocate in the National Cabinet to ensure transparent, appropriate and expert-led management of immigration detention, including controlled release of detainees.***

110. The Federal Government has acknowledged that those most at risk of serious infection include people in detention facilities.<sup>46</sup> Victoria is home to the Melbourne Immigration Transit Accommodation in Broadmeadows, as well as Alternative Places of Detention. Many people previously living freely in Victorian communities, and members of Victoria families, are detained in these places.
111. People in detention have very little agency or control over their circumstances or proximity to others.
112. Those in detention face insurmountable difficulties in attempting to self-isolate or comply with those Government-issued guidelines. Many have underlying health conditions that put that at a higher risk of serious illness or death should they contract the virus. People most

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<sup>45</sup> Refugee Council of Australia, 'COVID-19 and humanitarian migrants on temporary visas: assessing the public costs' (Research Briefing Note 2, July 2020) <<https://www.refugeecouncil.org.au/wp-content/uploads/2020/07/COVID-19-van-Kooy-.pdf>>

<sup>46</sup> Department of Health, Australian Government, 'What you need to know about coronavirus (COVID-19)' (24 March 2020) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19>>

vulnerable in detention include elderly people, people with ongoing health conditions including psychological conditions, minors and Aboriginal and Torres Strait Islander people.

113. Detainees are also facing immense psychological pressure: they are understandably terrified.
114. At declaring the biosecurity emergency, the Commonwealth Government should have had a clear and implementable plan for controlled release to community detention of low risk, highly vulnerable immigration detainees due to the increased risk of transmission and mortality in places of detention.<sup>47</sup>
115. Liberty Victoria condemns the reported use of solitary confinement practices for quarantine.
116. Liberty Victoria recommends that the Victorian Government advocate for a systematic review of numbers in immigration detention and consideration of alternative placement options, including controlled release. Appropriate oversight from bodies including the Commonwealth Ombudsman should also be ensured.

***Advocate in the National Cabinet to suspend adverse discretionary visa cancellation decision-making.***

117. People facing visa cancellation are very often particularly vulnerable, as are their families in the community. They usually have some history of criminal offending, and may have trauma or refugee backgrounds.
118. The law is complex and the timeframes labyrinthine and strict.
119. The consequences of cancellation are severe, and include prolonged detention, forcible removal from Australia, and permanent separation of families. Many of those affected are held in correctional facilities under COVID-19 lockdown and cannot access appropriate assistance to ensure a fair hearing of their case.

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<sup>47</sup> World Health Organisation, 'Preparedness, prevention and control of coronavirus disease (COVID-19) for COVID-19 in prisons and other places of detention' (15 March 2020) <[https://www.euro.who.int/\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf](https://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf)>. See also Prof Richard Coker, 'Report on Coronavirus and Immigration Detention', p15 (<[https://www.publicdefenders.nsw.gov.au/Pages/covid19/Report%20on%20Detention%20and%20COVID%20\(Final\).pdf](https://www.publicdefenders.nsw.gov.au/Pages/covid19/Report%20on%20Detention%20and%20COVID%20(Final).pdf)>; Diane Taylor, 'Home Office releases 300 from detention centres amid Covid-19 pandemic' *The Guardian* (22 March 2020) <<https://www.theguardian.com/uk-news/2020/mar/21/home-office-releases-300-from-detention-centres-amid-covid-19-pandemic>>.

120. Liberty Victoria understands that many people are unable to understand correspondence they receive regarding visa cancellation, or are without the means to sufficiently respond, and consequently, do not take action and miss strict immovable deadlines to access review. This means that they are denied the opportunity for a considered and appropriate review of their circumstances, with a decision made on the basis of the facts.
121. Given travel restrictions, they may be detained for prolonged periods, where their communication may be further restricted, and in circumstances of great hardship. No visits are presently permitted.
122. As a result of COVID-19, obtaining advice is more difficult. Many law and support services are more difficult to contact due to closures and demand. Interpreting services are overburdened and often impractical to use. People in detention may be quarantined or even in hospital. Services that used to monitor detention in person are no longer able to carry out that role.
123. Providing a full and meaningful response to in a visa cancellation process requires an affected person to gather a large volume of supporting documents, including letters or statements from family, employers and friends; medical records and letters health providers; documents from previous legal representatives, and documents that can only be obtained through freedom of information. COVID-19 has severely restricted people's ability to obtain such documents in a timely manner.
124. The Administrative Appeals Tribunal has issued new Practice Directions in the Migration and Refugee and General Divisions indicating hearings will be held by telephone, on the papers, or by video, rather than in person, representing a significant disadvantage to review applicants who *do* manage to lodge review applications.
125. This is all occurring in the context of significantly increased stress and lack of support. It will impact the integrity of decision-making and lead to disproportionate outcomes.
126. As visas are cancelled and detention becomes mandatory, the health risk in detention increases. Each new detainee is a significant risk to others.

127. There is no justification for proceeding with negative visa cancellation decisions during a pandemic, unless they are patently necessary in the public interest (for example on national security grounds), or at the request of the relevant person (for example, because they wish to be removed from Australia).

**Julian Burnside**

**President, Liberty Victoria**