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# AUSTRALIAN GOVERNMENT RESPONSE TO THE COVID-19 PANDEMIC

*Submission to the Select Senate  
Committee Inquiry*

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VISA  
CANCELLATIONS  
WORKING GROUP

# ABOUT THE VISA CANCELLATIONS WORKING GROUP

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The Visa Cancellations Working Group is a national group with significant expertise in the area of visa cancellations and migration more generally. The Working Group has twice been invited to give evidence before Senate Committee Inquiries since its establishment in 2018.

Its membership includes multiple LIV Accredited Specialists in Immigration Law, and is comprised of individuals from private law firms, not-for-profit organisations, community legal centres, and tertiary institutions, including :

- Abode Migration;
- Amnesty International;
- Asylum Seeker Resource Centre;
- Australian Human Rights Commission;
- AUM Lawyers;
- Brigidine Asylum Seekers Project;
- Carina Ford Immigration Lawyers;
- Clothier Anderson Immigration Lawyers;
- Darebin Community Legal Centre;
- Erskine Rodan & Associates;
- Estrin Saul Lawyers and Migration Specialists;
- FCG Legal;
- Fitzroy Legal Service;
- Federation of Ethnic Communities Councils of Australia Inc;
- Flemington Kensington Community Legal Centre;
- Foundation House;
- Immigration Advice and Rights Centre;
- Jesuit Refugee Service (JRS) Australia;
- Justice Connect;
- Kah Lawyers;
- Monash University;
- Multicultural Development Australia;
- MYAN Australia;
- NSW Council for Civil Liberties;
- Peter McMullin Centre on Statelessness;
- Refugee Legal;
- Refugee Advice & Casework Service;
- Russell Kennedy;
- Salvos Legal;
- Slater & Gordon;
- Tasmanian Refugee Legal Service;
- The Australian Human Rights Commission;
- The Kaldor Centre;
- The Law Institute of Victoria;
- The Refugee Council of Australia;
- The Settlement Council of Australia;
- The University of Melbourne;
- Victoria Legal Aid, and
- Welcome Lawyers.

## INTRODUCTION

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1. The Visa Cancellations Working Group (**the Working Group**) welcomes the opportunity to provide a submission to the Senate Select Committee inquiry into the Australian Government's response to COVID-19.
2. In addition to the recommendations made herein, the Working Group endorses:
  - a. the joint submissions made by Andreea Lachs and Monique Hurley on behalf of the COVID-19 Working Group, 'OPCAT, places of detention and COVID-19', and
  - b. the Human Rights Law Centre submission, 'Urgent action needed to protect people held in immigration detention'.
3. Novel coronavirus COVID-19 is a respiratory illness that can spread from person to person. Thus far, there have been over 6 million cases of COVID-19 globally, and over 380,000 deaths.<sup>1</sup> Pre-symptomatic transmission appears to be possible.
4. The Australian Government has said that those most at risk of serious infection include people in detention facilities.<sup>2</sup>
5. The Working Group recognises the unique and unprecedented challenges that COVID-19 presents on social, financial and humanitarian fronts. It is critical, however, that the Australian Government's response to such crises be measured and equitable. The Australian Government must ensure the most vulnerable in our community are protected rather than exposed to disproportionate harm.
6. Such an approach is not only critical to the vulnerable and to their families and communities, but to Australia's international reputation, including as a destination for education, tourism and work, and to the proper functioning of our legal system.
7. To leave the vulnerable exposed to health and legal complications is inimical to a democratic society which values respect for the freedom and dignity of the individual, commitment to the rule of law, equality of opportunity, and a spirit of egalitarianism that embraces mutual respect, tolerance, fair play and compassion for those in need and pursuit of the public good.<sup>3</sup>
8. Whilst we appreciate the challenges that inhere in responding to this crisis, the Australian Government's response has had significant and disproportionate negative impacts on people facing visa cancellation or refusal, people in detention, temporary visa holders including bridging visa holders, and other vulnerable groups engaging with Australia's

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<sup>1</sup> Berlinger and Renton, 'Coronavirus pandemic: Updates from around the world', CNN, 3 June 2020, available at <https://edition.cnn.com/world/live-news/coronavirus-pandemic-06-03-20-intl/index.html>.

<sup>2</sup> 'What you need to know about coronavirus (COVID-19)', Department of Health, Australian Government, 24 March 2020, available at <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19>.

<sup>3</sup> The Australian Values Statement, Department of Home Affairs, available at <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/australian-values>.

migration system. Such impacts include psychological harm, financial distress including homelessness, and loss of ability to exercise legal rights.

9. The Working Group submits that further measures should have been and ought now be taken to protect these cohorts.

## RECOMMENDATIONS

The Working Group recommends that the following steps be taken as a matter of urgency during the current health crisis, and immediately as a matter of course in the case of any future crises:

- **Suspension of all adverse discretionary visa cancellation decision-making** (cancellation and non-revocation) for the duration of emergency, except where it is a matter of public safety or at the request of the person affected.
- **Issue of bridging visas** as an alternative to detention for those who are or become unlawful.
- **Controlled release of immigration detainees.** Where those in immigration detention are a low risk to the community and/or vulnerable to COVID-19 transmission, detainees should be released on bridging visas as a matter of priority.
- **Commonwealth financial support be made available to all members of the Australian community**, regardless of visa status.
- For people in detention:
  - **Transparent and appropriate risk-management structures** should be implemented to protect detainees from infection.
  - *De facto* solitary confinement should not be used in any case.
  - Psychological support should be provided.
  - Alternative Places of Detention (APODs) use should be reduced. Administration of APODs must be accountable and transparent. Prison should never be used to house detainees.
- **Increased amount and availability of Commonwealth funding** for representation, expert reports and other necessary measures in legal processes.
- **Provision of appropriate opportunity for civil and expert scrutiny of legislation introduced** at this time profoundly affecting the lives of those detained.

## SUSPENSION OF CANCELLATION DECISION-MAKING FOR DURATION OF EMERGENCY

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10. Australia's legislative framework for regulation of visa cancellation and refusal is contained in the *Migration Act 1958* (Cth) (**the Act**) and the *Migration Regulations 1994* (Cth) (**the Regulations**). There are numerous and very broad grounds on which a visa can be cancelled or refused, including under ss 109, 116, and 501. Since changes to the law in 2014, over 6,600 visas have been cancelled or refused under s 501 of the Act alone.<sup>4</sup>
11. The Working Group has made submissions regarding the cancellation framework in the past, in particular emphasising the need for consistent, informed, apolitical, and proportionate decision-making in this area, and the need for support for people who cannot afford legal representation. Our concerns about the current framework remain.
12. In the present context, however, at or before the point at which the Governor-General declared a "human biosecurity emergency" existed,<sup>5</sup> all discretionary decisions regarding cancellation or non-revocation should have been postponed for the duration of the emergency, except where there is a clear case for public safety or at the request of the affected individual. This is not only appropriate and fair but does not prejudice the Australian Government or the community in any way.
13. Even under normal circumstances, visa cancellation is extremely serious for the people and families affected. Cancellations can have "potentially life-destroying" effects:<sup>6</sup> protracted loss of liberty (including indefinite detention), separation from family (sometimes permanent), loss of refugee protection, and potential forcible return to serious harm or other harms in breach of international obligations, and serious psychological consequences.<sup>7</sup>
14. The law is also complex to navigate. There are numerous opportunities during a refusal or cancellation process for an individual to lose access to their rights, for example by failing to respond to a letter within tight timeframes, or by failing to lodge an application for merits review within the strict timeframes of the legislation, including due to lack of access to legal assistance. This can occur due to a change of address, an inability to comprehend what can be obscure wording,<sup>8</sup> or a lack of access to legal or other assistance. Individuals may also struggle to respond in ways that properly make their cases, owing to numerous factors including linguistic barriers and entrenched disadvantage.

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<sup>4</sup> Department of Home Affairs, 'Key visa cancellation statistics', October 2019, available at <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.

<sup>5</sup> *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020*, 18 March 2020, made under *Biosecurity Act 2015* (Cth) s 475.

<sup>6</sup> Per Allsop CJ in *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 (17 December 2018) at [45].

<sup>7</sup> A leading recent review of studies regarding immigration detention and health, for example, found that there "is a significant relationship between detention duration and mental health deterioration" and that "detention should be viewed as a traumatic experience in and of itself": see M von Wethem et al, 'The impact of immigration detention on mental health: a systematic review', *BMC Psychiatry* (2018) 18:382.

<sup>8</sup> In *DFQ17 v Minister for Immigration and Border Protection* [2019] FCAFC 64 (18 April 2019), per Perram J at [62], the Full Court of the Federal Court described the description of timeframes for merits review in a Protection (subclass 866) visa refusal as "piecemeal, entirely obscure and essentially incomprehensible". Cancellation or refusal notifications are not unlike these refusals.

15. A person subject to cancellation will generally receive an overwhelming amount of documentation to process and respond to. Direction no. 79, governing the application of s 501, is 33 pages long, and provided to those affected with a direction to respond to it.
16. Timeframes and methods of review are labyrinthine: time for response can vary between 10 minutes and 35 days, but failure to comply often means the response will not be considered; if a delegate makes a decision, review can generally be sought in the Administrative Appeals Tribunal, but if the Minister decides personally, then the visa applicant or holder is limited to seeking judicial review of the decision in the Federal Court of Australia. In each eventuality, a separate set of rules applies.
17. In other words, individuals and their families affected by visa cancellation already face an immense challenge in exercising their rights.
18. During this pandemic, the challenge has become exponentially greater for the following reasons:
  - a. Where a person may otherwise have been able to depart Australia, they now cannot leave due to lack of flights and travel restrictions.
  - b. A person may have their visa cancelled but not be detained, and may remain in the community (sometimes without a bridging visa and therefore without lawful status) without access to any financial support.
  - c. A person may have their visa cancelled and be taken into immigration detention, where they are at greater risk of COVID-19 transmission and may be subject to serious restrictions on their basic freedoms including communication.
  - d. 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.
  - e. Providing a full and meaningful response to a notice of intention to consider cancellation of a visa, or requesting revocation of a mandatory visa cancellation, requires an affected person to gather a large volume of supporting documents. This generally includes 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. As outlined herein, the current restrictions arising from COVID-19 have severely restricted people's ability to obtain such documents in a timely manner.
  - f. Attendance at the Department of Home Affairs is by appointment only. Telephone calls to the Department routinely take hours to connect, with no information provided by the end of the call. The Department has suspended application services like biometrics and medical checks.
  - g. There are no visits permitted to immigration detention during the pandemic.

- h. 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.
  - i. The Administrative Appeals Tribunal and Federal Court each have new and different practice directions outlining new procedures in response to COVID-19 including in relation to the provision of documents. The new processes require a level of technical and computer literacy that many, and perhaps most, applicants do not have. The Federal Court, for example, requires filing and provision of documents now via two different portals, with different requirements for compliance with rules under each electronic platform.
  - j. In addition to the barriers outlined above, applicants who are already profoundly disadvantaged in engaging with this complex legal process are now dealing with increased stress and diminished mental health, as they are aware of the heightened risk they face as a detainee of contracting COVID-19. Further details in relation to mental health concerns are detailed below. Our experience recently is that mental health concerns are increasingly obstructive to applicants' ability engage with new and complicated processes.
  - k. The strict timeframes and other requirements set out in the legislative framework are extraordinarily difficult to comply with in these circumstances.
19. When the COVID-19 crisis first occurred, there were indications from the Department of Home Affairs that negative cancellation decisions would be suspended wherever possible. However, these decisions continue to be made, including personal decisions by the Minister for Home Affairs. This will have the consequence of fewer people being able to exercise their rights to respond properly, to seek review, and to receive a fair hearing. It will also increase the risk to people already in detention and entering anew.
20. We also note that people other than the cancellee may be adversely affected by visa cancellation. For example, a family member's visa may be consequentially cancelled, or their Partner visa relying on the cancellee's sponsorship may be refused. These people will face the same extraordinary hurdles set out above.
21. 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).
22. Proceeding with negative visa cancellation decisions unless necessary or as requested, especially where the person is then detained after having spent time in the community, arguably increases health risks for detained populations as new members are introduced. Based on available public health advice, this practice should be avoided where possible, and where new members are introduced to detained populations, our position, based on expert public health advice, is that this practice increases health risks faced by the detained population. Our position is that this derogates from the duty of care owed to people in immigration detention. To be clear, consistent with the duty owed to detained populations,

our position is also that, where possible, those who pose a low risk to the community and/or are particularly vulnerable to COVID-19 ought to be released into the community with appropriate financial support.

## GRANT BRIDGING VISAS AND REGULARISE IMMIGRATION STATUS

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23. The Working Group is aware that, in some cases, the Department of Home Affairs has cancelled individual visas but chosen not to detain the former visa holder. As a result, the person must remain in the community as an unlawful non-citizen, without access to social support or medical treatment, and under constant threat of detention and removal from Australia.
24. We note that the policies adopted by the current government have already led to the creation of a sizeable pool of undocumented migrants, leading to serious social and public health consequences. For instance, we note that the Minister for Home Affairs has declined to intervene to grant Bridging 'E' visas to thousands of asylum seekers in the 'legacy caseload' cohort (i.e. who arrived in Australia by boat after 2012) and currently have pending matters before the Courts. By operation of s 46A of the *Migration Act*, these asylum seekers are barred from validly applying for Bridging visas in their own right and are therefore forced to remain in the community without lawful status. Significant caseloads in the Federal Circuit and Federal Courts means that asylum seekers with pending cases may remain unlawful in the community for up to five years awaiting the resolution of their proceedings.
25. There are serious public health consequences that are associated with prolonged undocumented status. The Working Group is aware of people in the community have chronic health conditions and have been unable to access the medical support they require to treat these conditions due to not being able to access Medicare. Undocumented migrants do not have lawful permission to work and thus are restricted to reliance on charity, or irregular work under dangerous conditions, in order to survive. Economic stresses mean that undocumented migrants are restricted to crowded and sub-standard accommodation, thus unable to observe 'social distancing' protocol. The health implications of these compound circumstances should be obvious.<sup>9</sup>
26. In order to minimise the number of people becoming undocumented during the crisis, the Minister and/or his officers must:
  - a. Act to regularise the status of people already in the community and without valid visas, following an earlier cancellation decision; and
  - b. Ensure that, where visa cancellation is considered necessary (on the restricted grounds expressed above) then the former holder be issued with a Bridging visa immediately, with permission to work, in order to prevent them from remaining in the community while undocumented.

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<sup>9</sup> Steven Clibborn and Chris F Wright, 'Protection of Temporary Migrants is now a 'public health issue'' 7 April 2020 *Sydney Morning Herald* available at <https://www.smh.com.au/business/workplace/protection-of-temporary-migrants-is-now-a-public-health-issue-20200406-p54hk6.html>.

27. It is psychologically distressing and damaging to deny a person in the community legal status, where they are attempting to engage with the Department. It is also contrary to the public interest and the rule of law. Section 189 of the Act requires officers to detail unlawful non-citizens. To create a liminal, extra-legal category is harmful and unnecessary.

## CONTROLLED RELEASE FROM IMMIGRATION DETENTION

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28. 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.
29. As at 31 March 2020, after it was announced that all visits to detention would be prohibited, there were 1,373 people detained in onshore facilities excluding APODs and community detention. Of those people, 750 were not people whose visas had been cancelled under s 501, indicating at a minimum that they are not considered a high risk to the community. 41.5% had been in detention over a year; 24.8% for over two years.<sup>10</sup>
30. People in detention have very little agency or control over their circumstances or proximity to others.
31. 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 vulnerable in detention include elderly people, people with ongoing health conditions including psychological conditions, minors and Aboriginal and Torres Strait Islander people.
32. Detainees are also facing immense psychological pressure: they are understandably terrified and feel like sitting ducks. Detainee assisted by members of the Working Group report panic, despair, hopelessness, and sadness. This does not need to be the case: controlled release and appropriate implementation of protection methods would significantly assuage this distress. We note that controlled release from detention settings has occurred in many other jurisdictions, including the United States, United Kingdom and Belgium.
33. The methods employed to control infection in immigration detention are presently unacceptable. Reports indicate 14-day isolation with no ability to leave the room is employed for people entering or returning to immigration detention, including those who were visiting hospital with severe health conditions. This is tantamount to solitary confinement, and particularly unacceptable for people with mental health conditions. We refer to the joint submission made by Andreea Lachs and Monique Hurley, who observe:

*The World Health Organization has discouraged the use of “routine intake quarantine” because of its unnecessary negative impacts on mental health and the fact that it is more cost-effective to screen people for the virus. While measures need to be put in place to mitigate the risk of COVID-19 in places of detention, any*

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<sup>10</sup> Department of Home Affairs, 'Immigration Detention and Community Statistics Summary', 31 March 2020, available at <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf>.

*such measures must respect human rights and any isolation or quarantine measures must be legal, proportionate, necessary, time-bound, subject to review and should not result in de facto solitary confinement. The prohibition of torture, cruel, inhuman or degrading treatment or punishment must not be derogated from, even during exceptional circumstances like the COVID-19 pandemic.*

34. Controlled release is in line with expert international public health advice and action. On 15 March 2020, the World Health Organisation (WHO) published interim guidance on preparedness, prevention and control of COVID-19 in places of detention:<sup>11</sup>

*People deprived of their liberty... are likely to be more vulnerable to the coronavirus disease (COVID-19) outbreak than the general population because of the confined conditions in which they live together for prolonged periods of time.*

35. The WHO guidance warned that these confined conditions are “likely to result in a heightened risk of person-to-person and droplet transmission of pathogens like COVID-19.”<sup>12</sup> Furthermore:

*...[People deprived of their liberty] typically have a greater underlying burden of disease and worse health conditions than the general population, and frequently face greater exposure to risks such as smoking, poor hygiene and weak immune defence due to stress, poor nutrition, or prevalence of coexisting diseases, such as bloodborne viruses, tuberculosis and drug use disorders.*<sup>13</sup>

36. Specifically, on the risk of COVID-19 in United Kingdom immigration detention, Professor Richard Coker stated that:

*If detention is unnecessary it should be relaxed. This should be done before the virus has a chance to enter a detention centre. Preventing an outbreak is much easier than controlling an outbreak. The risk to any individual is likely to be much lower in the wider community, where social distancing is feasible, than in a place that is, by definition, a congregate setting.*<sup>14</sup>

37. Notably, after legal action using Professor Coker’s advice was launched, the United Kingdom Home Office chose to release nearly 300 detainees from its immigration detention centres.<sup>15</sup>

38. The Australasian Society for Infectious Diseases (Asid), the Australian College of Infection Prevention and Control (ACIPC) and Doctors for Refugees have all said detainees need to

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<sup>11</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, available at [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons-and-youth-detention-centres.pdf?ua=1](http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons-and-youth-detention-centres.pdf?ua=1).

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Professor Richard Coker, Report on Coronavirus and Immigration Detention, available at [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), 15.

<sup>15</sup> Taylor, D., Home Office releases 300 from detention centres amid Covid-19 pandemic’, 22 March 2020, available at <https://www.theguardian.com/uk-news/2020/mar/21/home-office-releases-300-from-detention-centres-amid-covid-19-pandemic>.

be released from held detention urgently to prevent rapid transmission.<sup>16</sup> Over 50,000 people have signed a petition calling for immediate release of detainees.<sup>17</sup> A public health expert has said that detention centres provide ideal incubation conditions for the rapid spread of the virus.<sup>18</sup>

39. The Working Group calls particular attention to individuals in detention who are older, who have pre-existing health conditions including intellectual impairment or mental health conditions, and who are survivors of torture and trauma.
40. The Working Group acknowledges that there are anecdotal reports of release of some detainees but the reasons and policy for such release remains unclear. It asserts that a transparent, systematic review of detained individual's vulnerability and low-to-no risk to the community should be taking place to ensure an efficient, controlled reduction of numbers at risk of transmission in detention.
41. The Working Group also calls for appropriate oversight of the Australian Government's response to the COVID-19 pandemic in relation to detainees and staff in immigration detention. Accurate and complete information must be provided to the public and to the Commonwealth Ombudsman regarding prevention and control measures and infection rates.
42. The situation is grim for all detainees, and the severe public health risk is obvious. Release of those most vulnerable is essential, not only in their interests but in the interests of protecting the community from the spread of this deadly virus.

## **INCLUDE ALL TEMPORARY VISA HOLDERS IN EMERGENCY FUNDING**

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43. The Working Group submits that all individuals, regardless of their migration status, should have been included in the Commonwealth's financial support program.
44. Temporary visa holders contribute enormous amounts to Australia in myriad ways. Our economy relies on students and skilled workers. People holding these visas are often heavily involved in their communities and have worked hard and sacrificed for those communities. 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.
45. Because the Commonwealth Government has provided some support for temporary visa holders, it important to differentiate between different visa statuses:
  - A **permanent visa** allows a person to remain in Australia indefinitely.

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<sup>16</sup> Holt, R., and Vasefi, S., 'We are sitting ducks for Covid 19': asylum seekers write to PM after detainee tested in immigration detention', The Guardian, 24 March 2020

<sup>17</sup> Change.org, 'Stop the spread of COVID-19 in immigration detention centres #SaferAtHome', available at [https://www.change.org/p/stop-the-spread-of-covid-19-in-immigration-detention-centres-saferathome?recruiter=332513203&recruited\\_by\\_id=4339d920-1f1f-11e5-8554-837bfb6f3267&use\\_react=false](https://www.change.org/p/stop-the-spread-of-covid-19-in-immigration-detention-centres-saferathome?recruiter=332513203&recruited_by_id=4339d920-1f1f-11e5-8554-837bfb6f3267&use_react=false).

<sup>18</sup> Taylor, D., Home Office releases 300 from detention centres amid Covid-19 pandemic', 22 March 2020, available at <https://www.theguardian.com/uk-news/2020/mar/21/home-office-releases-300-from-detention-centres-amid-covid-19-pandemic>.

- A **temporary visa** is qualified by time or purpose, such as work or study: it is substantive, and allows holders rights and access to support.
  - A **bridging visa** essentially places people in a holding pattern: it provides lawful status to people including those who are awaiting the outcome of a visa process or review process, who have no process ongoing but who are unable to leave Australia, who are making arrangements to leave Australia, or who are suspected victims of human trafficking.
  - An **undocumented person**<sup>19</sup> might be so for various reasons: their visa may have expired or been cancelled; they might have been trafficked, or the Minister for Home Affairs might have simply declined to grant a bridging visa, but allowed the person to remain in the community. The latter is a commonplace situation for asylum seekers. Often, undocumented people are subject to serious labour exploitation.
46. The Working Group acknowledges that JobKeeper assistance has been extended to New Zealander holders of special category (subclass 444) visas, visas that are ‘temporary’ in nature. In doing so, Prime Minister Morrison stated, “they are part of an ongoing economy in Australia.”<sup>20</sup> Regarding excluding all other visa holders with work rights, Commonwealth Treasurer Frydenberg stated “they can go back to their home country, that is an option for them”. Even if borders were open, this is absolutely not an option for many: they may be face harm on return; they may not be legally or medically able to travel, and they may have rights to be exercised in Australia.
47. The Working Group notes that the Tasmanian Government has recognised the need to assist bridging visa holders by providing “Pandemic Isolation Assistance Grants” and increasing funding to non-government organisations to provide additional emergency relief. The Coronavirus Tasmania website states that individuals “on Bridging Visas (Subclasses 010, 020, 030, 050 and 051)” and “who can demonstrate hardship caused by the COVID-19 pandemic” will be eligible for such support.<sup>21</sup> Notably there is no requirement to be in quarantine to be eligible for the assistance grants.
48. The Australian Government should:
- a. Urgently consult with the community health and refugee assistance sectors to develop and implement the provision of this assistance—recognising that many of the internet-based processes may not be accessible to those most vulnerable;
  - b. Prioritise assistance to members of our community who are undocumented, seeking asylum, have experienced of torture and trauma, or are homeless;
  - c. Make emergency payments, one-off and temporarily on-going, available regardless of an individual’s visa status;

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<sup>19</sup> A person without a valid visa in effect is deemed an ‘unlawful non-citizen,’ within the meaning of s 14 of the *Migration Act 1958* (Cth). We use the term ‘undocumented’ in preference to ‘unlawful non-citizen,’ to avoid the stigma associated with the latter term.

<sup>20</sup> Karp, P., ‘Jobkeeper payment: check your eligibility. Here’s everything you need to know to register’, *The Guardian*, 30 April 2020, available at <https://www.theguardian.com/australia-news/2020/apr/30/jobkeeper-payment-eligibility-ato-tax-for-sole-traders-start-date-faq-application-jobseeker-payments>

<sup>21</sup> Tasmanian Government, ‘Coronavirus disease (COVID-19)’, 26 March 2020, available at <https://coronavirus.tas.gov.au/travellers-and-visitors>.

- d. Ensure that any information collected in the provision any COVID-19 relief assistance is not shared with law enforcement bodies, and
  - e. Increase community support funding, including to assist in greater access to food and mental health support, as well as legal assistance.
49. The Working Group submits that this assistance is necessary for the duration of the emergency and is directly related to our recommendation for the cessation of discretionary cancellations and controlled release from detention.

## **REDUCE RELIANCE ON ALTERNATIVE PLACES OF DETENTION**

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50. For the remaining individuals deemed high-risk to the community and not vulnerable, the Working Group asserts the Commonwealth Government should be transparent about their policies and use of Alternative Places of Detention (APODs).
51. The Department of Home Affairs defines Alternative Places of Detention (APODs) as distinct from ‘immigration residential housing’ and ‘community detention’—the latter of which could constitute private housing. As such, APODs are not private houses, but rather public buildings or private commercial properties. The same duty of care to prevent COVID-19 transmission is owed to a detainee in an APOD as in a detention facility.
52. The Working Group recognises the need for space to permit social distancing and quarantine, however reasserts that this need would be lessened if controlled release was exercised.
53. Furthermore, the Department itself is cited as submitting to the Joint Select Committee on Australia’s Immigration Detention Network that “APODs generally accommodate people who present a minimal risk to the Australian community.”<sup>22</sup> Following this logic, those held in APODs are of ‘minimal risk’ and therefore could be eligible for controlled release as above—thus negating the need for use of APODs in this crisis.
54. The Working Group notes with concerns individuals with visa cancellations being transferred back to prison, having served their time and then in immigration detention at the time of the COVID-19 outbreak. Returning an individual to a punitive form of containment is unacceptable.

## **INCREASE LEGAL FUNDING AVAILABLE FOR ASSISTANCE**

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55. The Working Group notes an ongoing critical shortage of legal assistance for people affected by visa cancellation. Given the vulnerabilities those affected often face, and the severity of consequences, the Working Group considers that urgent consideration be given to providing funding for legal representation to visa cancellées.

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<sup>22</sup> See Report of the Joint Committee into Australia’s Immigration Detention Network, Chapter 2, 2.42, 2012, available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/immigrationdetention/report/footnotes#c02f39](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/immigrationdetention/report/footnotes#c02f39) , citing DIAC, *Submission 32, Supplementary*, p. 194.

56. The COVID-19 crisis has caused immense strain on providers of legal assistance, with demand soaring and numerous barriers to provision of services. Prior to the crisis, these services were overburdened; during COVID-19, the situation has worsened significantly.
57. The Working Group urges implementation of funding for legal representation for people facing visa cancellation on an ongoing basis. However, such funding is **essential** during this crisis.
58. The Working Group notes the availability of Commonwealth legal financial assistance, including the Disbursement support scheme and under s 69 of the *Administrative Appeals Tribunal Act 1975*, administered by the Attorney-General's Department.
59. The Working Group submits that the Commonwealth Government should increase availability and accessibility of this financial assistance as a stopgap until ongoing funding can be considered.

## PROVIDE OPPORTUNITY FOR SCRUTINY OF LEGISLATION AFFECTING THOSE DETAINED

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60. The Working Group asserts that the introduction of the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* at a time of limited Parliamentary sitting is inappropriate and concerning. Legislation that is likely to be extremely detrimental to the mental health and wellbeing of individuals is unnecessary at any time, and untimely during a public health emergency. Reduced communication capacity for detainees and reduced oversight cannot be condoned, particularly in the current circumstances.
61. The Working Group welcomes the Legal and Constitutional Affairs Legislation Committee's inquiry and will be providing submissions in due course.

## CONCLUSION

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62. The Working Group considers that implementation of the above measures during this and any future health crisis will protect Australia's standing as a just and equitable country, is in the interests of our long-term economic stability, and protects individual rights and freedoms. It is a pragmatic and inclusive approach. Where lives and health are at risk, no one should be left behind.
63. The Working Group welcomes the opportunity to consult further on a confidential basis. Its areas of expertise are broad. If you would like to discuss matters regarding cancellation further, please contact Hannah Dickinson, Chair of the Working Group, at [workinggroup@visacancellations.org](mailto:workinggroup@visacancellations.org).