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SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS COMMITTEE

DETECTING PEOPLE SMUGGLING BILL 2011

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1 | INTRODUCTION

UnitingJustice Australia, the justice and advocacy unit of the Uniting Church in Australia Assembly, welcomes this opportunity to comment on the Inquiry into the Detering People Smuggling Bill 2011. However, we question the very limited period of time that has been allowed for consultation concerning this pertinent piece of legislation. This timeframe not only precludes UnitingJustice from undertaking a detailed consideration of the legislation, but also makes consultation with our wider networks virtually impossible. The Uniting Church has long been troubled by the manner in which successive Australian governments have amended (often in great haste) the Migration Act. The timing of this Inquiry is particularly disconcerting, with a case currently before the Victorian Court of Appeal which challenges the existing people-smuggling laws. We firmly believe that any attempt to amend the Migration Act prior to the handing down of the decision in this case is tantamount to undermining the legitimacy of the legal system in Australia.

The Uniting Church in Australia seeks to bear witness to our Christian faith through our program of worship, service and advocacy. In the Christian tradition of providing hospitality to strangers and expressing in word and deed God's compassion and love for all who are uprooted and dispossessed, the Uniting Church in Australia has been providing services to asylum seekers and refugees in the community and in detention for many years. The Uniting Church provides direct services to refugees and asylum seekers through its network of congregations, employees, lay people and community service agencies. Through our ministers, lay and ordained, who provide ministry to the asylum seekers in detention centres and through our work with asylum seekers and refugees settling into the community, we have first-hand knowledge of the consequences of Government policies.

In July 2002, the Uniting Church released its Policy Paper on Asylum Seekers, Refugees, and Humanitarian Entrants.¹ This paper outlines principles for a just response to the needs of refugees. The Church advocates for a just response to the needs of asylum seekers and refugees that recognises Australia's responsibilities as a wealthy global citizen, upholds the human rights and safety of all people, is culturally sensitive, and is based on just and humane treatment, including non-discriminatory practices and accountable transparent processes.

¹ Uniting Church in Australia National Assembly (2002). "Policy Paper: Asylum seekers, refugees and humanitarian entrants." Available at http://www.unitingjustice.org.au/images/pdfs/issues/refugees/assembly-resolutions/9_asylumseekerandrefugee2002.pdf

In its Statement to the Nation at its inauguration in 1977, the Uniting Church pledged

to hope and work for a nation whose goals are not guided by self interest alone, but by concern for persons everywhere – the family of the One God – the God made known in Jesus of Nazareth (John 10:38) the one who gave his life for others.²

The Uniting Church will continue to work for a compassionate, socially responsible society and government that takes seriously its national and international obligations. It is in line with these beliefs, that we make the following submission to the Senate Legal and Constitutional Affairs Standing Committee.

2 | BACKGROUND

When developing policies designed to bring an end to people smuggling, the Uniting Church believes that the Australian Government must first recognise the motives of those who risk their lives to undertake the often-dangerous journey to seek safety from persecution here in Australia. Introducing punitive legislation designed to 'stop' asylum seeker boats can only be achieved if, as a nation, we address the conflict, persecution, torture and gross human rights violations that drive vulnerable people to seek asylum in the first instance. Consecutive federal governments have been inconsistent in their acknowledgement that these vulnerable men, women and children embark on the hazardous journey to Australia by boat because it is often the only way in which they may be assured of protection.

The office of the United Nations High Commissioner for Refugees has outlined that - at a minimum - for a nation to offer 'effective' protection, it must guarantee that:³

1. there is no likelihood of persecution, or refoulement or of torture or other cruel and degrading treatment;
2. there is no other real risk to the life of the person(s);
3. there is a genuine prospect of an accessible durable solution in or from the asylum country, within a reasonable timeframe;

² <http://www.unitingjustice.org.au/component/content/article/15-uniting-church-statements/190-statementtothenation-1977.html>

³ UNHCR (2004). "International Protection: Effective Protection Newsletter." 2 December. Available at <http://www.unhcr.org.au/pdfs/EFFECT.pdf>

4. pending durable solution, stay is permitted under conditions which protect against arbitrary expulsions and deprivation of liberty and which provide for adequate and dignified means of subsistence;

5. the unity and integrity of the family is ensured; and

6. the specific protection needs of the affected persons, including those deriving from age and gender, are able to be identified and respected.

Overwhelmingly, the evidence suggests that Malaysia and Indonesia - the two nations from which the vast majority of Australian-bound asylum seekers board boats - do not offer the minimum level of protection mandated by the UNHCR.⁴ For those seeking asylum, then, accessing the services of people smugglers is merely an attempt to grapple with the flaws in official migration pathways for people whose lives are at risk. If the current Government is serious about ending people smuggling, then the Uniting Church urges them to pursue the logical solution: increasing their efforts to work in the region to improve protection in countries of first asylum.

3 | THE FACTS ABOUT 'PEOPLE SMUGGLERS'

The proposed amendments to the Migration Act demonstrate a flagrant disregard of the facts surrounding boat arrivals in Australia. Documents released by the Attorney-General's Department under the Freedom of Information Act reveal that 519 crew members have been arrested since September 2008.⁵ Of these, 127 have been convicted, 52 were found to be minors and were repatriated to Indonesia, and 224 are left in legal limbo languishing in Australian prisons. A recent study additionally revealed that the majority of crew members are from low socio-economic backgrounds, are illiterate, have limited access to regular employment in their home country, and are most likely to be 'recruited' from Indonesian fishing communities.⁶

4 See, for instance: Amnesty International (2010). "Abused and Abandoned: Refugees Denied Rights in Malaysia." Available at <http://www.amnesty.org/en/library/asset/ASA28/010/2010/en/2791c659-7e4d-4922-87e0-940faf54b92c/asa280102010en.pdf>; Settlege, R.D. (2009). "Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate For Affirmative Asylum Seekers," Boston University International Law Journal, vol 27, no. 61; United States Senate (2009). "A Report to the Committee on Foreign Relations: Trafficking and Extortion of Burmese Migrants in Malaysia and Southern Thailand," no. 1, April; Foster, M. (2007). "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State," Michigan Journal of Internal Law, Winter; Crock, M. (2003). "In the Wake of Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows," Pacific Rim Law & Policy Journal, vol. 12, no. 1; Taylor, J. (2009). "Behind Australian Doors: Examining the Conditions of Detention of Asylum Seekers in Indonesia."

5 Confidential correspondence between the Minister for Justice and the Attorney-General. File no. 10/6573, min no. MIN-MCII/00549. Available at http://www.ag.gov.au/www/agd/agd.nsf/Page/FreedomofInformation_DocumentsreleasedunderFOI_Documentsregardingtheimprisonmentofpeopleinvolvedinpeople-smugglingwhoclaim-to-bechildren

6 Australian Lawyers for Human Rights. (2010). "People smugglers: Saviours or criminals?" Available at <http://www.alhr.asn.au/getfile.php?id=185>

We are particularly concerned with the treatment of minors under both the current and the proposed legislation. The Indonesian Consulate is currently investigating the incarceration of 16 minors in Western Australian prisons, 2 in Victoria, 14 in New South Wales, 1 in Darwin, and 7 in Queensland. This is in direct contravention of not only Australia's domestic legislation, which recommends all minors charged with people smuggling offences be immediately repatriated to their country of origin, but is a gross violation of our international obligations under Article 37(b) of the United Nations Convention on the Right of the Child, Article 5.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, and Articles 1, 17 and 18 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

Opposition Spokesperson for Immigration, Mr. Scott Morrison, noted in a recent Bills Digest that

The other thing to point out is the people who come on the boats, and I am talking about the crew, are being abused by the people smugglers also. They have very little knowledge of what they are getting into, particularly the younger crew members who effectively have become people smugglers mules. There will be no shortage, sadly, of poor fishers in Indonesia who will be available to be used by the people smuggling trade. They will arrive, as I saw some of them when I was on Christmas Island recently, and the people who looked most worried getting off that boat quite frankly were the young crew who had no idea what they were getting into.⁷

More pertinent, perhaps, are recent comments from the Minister for Home Affairs, the Hon. Brendan O'Connor, who acknowledged that the arrested crew members were not the "key players" in the people smuggling syndicates, and that the focus of the Government should

always be seeking to take out the organisers of the ventures, the organisers that profit the most and I think cause the most harm with the most intention.⁸

To seek to introduce legislation, then, which both sides of politics agree does not and will not target the true criminal element in people smuggling syndicates, makes little sense.

4 | AUSTRALIA'S INTERNATIONAL OBLIGATIONS

In addition to the multiple breaches under the three above-listed UN documents relating to the incarceration of children, the Uniting Church is deeply concerned that the proposed amendments will see Australia

7 Commonwealth of Australia. (2010). "Parliament of Australia, Anti-People Smuggling and Other Measures Bill." Department of Parliamentary Services, Bills Digest 11 March 2010, no. 131, 2009-10. Available at <http://www.aph.gov.au/Library/pubs/bd/2009-10/10bd131.pdf>

8 Interview with the Hon. Brendan O'Connor. Background Briefing, "Casualties in the war on people smuggling." 30 October 2011. Available at <http://www.abc.net.au/rn/backgroundbriefing/stories/2011/3347689.htm>

violate its obligations under Article 31 of the United Nations Convention for the Protection of Refugees (the Refugee Convention) and its Protocol. Under Article 31, a legal right to seek protection in Australian territory is established, with no sanctions to be imposed based on the mode of arrival. There is not currently – and must never be – any Australian law that criminalises the act of arriving in Australia or seeking asylum without a valid visa.⁹

The Uniting Church also notes that the proposed amendments are not in accordance with our legal commitments under the Protocol against the Smuggling of Migrants by Land, Sea and Air (Protocol Against Smuggling), supplementing the United Nations Convention against Transnational Organised Crime, which was ratified by Australia in 2004. Article 19 of this Protocol states

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Under the Protocol Against Smuggling, any measures introduced to curtail people smuggling must be consistent with a Member State's obligations under the Refugee Convention. Intercepting vessels under the suspicion that the crew are involved in a people smuggling syndicate would prevent passengers on those vessels from seeking their legal right to freedom from persecution under the Refugee Convention.

Importantly, any attempt to intercept vessels entering Australian waters must also comply with the guidelines outlined by the United Nations. The UNHCR's Executive Committee on the International Protection of Refugees states that:¹⁰

1. interception measures should not result in asylum seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened, or where the person has other grounds for protection under international law. Intercepted persons found to be in need of international protection should have access to durable solutions;

2. the special needs of women and children and those who are otherwise vulnerable should be considered as a matter of priority; and

3. intercepted asylum seekers and refugees should not become liable to criminal prosecution under the Protocol Against the Smuggling of Migrant by Land, Sea or Air for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met.

Again, the inherent flaws of the proposed amendments are brought to light: any attempt to intercept vessels and prevent them entering Australian waters for the purposes of their passengers asserting their right to protection, is a direct violation of the Refugee Convention and the Protocol against Smuggling.

If the Australian Government is truly committed to the establishment of a regional protection framework, then any legislative amendments must contribute not only to the establishment of a durable resettlement option for refugees, but must also address the social, political and economic forces that drive vulnerable members of our society to both seek the services of people smugglers, and seek employment as crew members on vessels. Indeed, Article 15(3) of the Protocol Against Smuggling explicitly states that

Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

⁹ The fact that there is no current law is reinforced by The Department of Immigration and Citizenship (DIAC). "Seeking asylum without a valid visa." Fact sheet no. 61. Available at <http://www.immi.gov.au/media/fact-sheets/61asylum.htm>

¹⁰ UNHCR (2008). "Protection and Human Trafficking: Selected Reference Materials." First Edition, 1 December. Available at <http://www.unhcr.org/4986fd6b2.pdf>

The Uniting Church fails to see how the proposed amendments make any positive contribution to achieving these ends.

5 | PUNITIVE MEASURES IN PROPOSED AMENDMENTS

The Uniting Church is deeply concerned with the wording of the proposed amendments with regards to section 228B(2) which states

To avoid doubt, a reference in subsection (1) to a non-citizen includes a reference to a non-citizen seeking protection or asylum (however described), whether or not Australia has, or may have, protection obligations in respect of the non-citizen:

(a) under the Refugees Convention as amended by the Refugees Protocol; or

(b) for any other reason.

As it stands, this proposed amendment would render involvement in virtually every attempt to travel to Australia to seek protection an aggravated offence – even the transporting of a single nuclear family. Of particular concern is the high level of ambiguity surrounding this proposed amendment: the current wording may be read as criminalising the actions of an individual assisting others travelling to Australia, even if that person is him or herself seeking asylum. Again, we highlight that this is a brazen disregard of Article 31 of the Refugee Convention, and clearly demonstrates that the Government is concerned only with ‘stopping the boats’.

The retrospective application of the proposed amendments is also of concern to the Uniting Church. The Legislation Handbook of the Australian Parliament,¹¹ which stipulates recommendations for legislative procedures, states that

6.18 Provisions that have a retrospective operation adversely affecting rights or imposing liabilities are to be included only in exceptional circumstances, and on explicit policy authority.

While we are concerned with any attempt to enact retrospective laws on the basis that individuals cannot be expected to adhere to a law that did not exist at the time the action took place, we are particularly concerned when a dispute governed by the legislation is awaiting determination before the courts.¹²

6 | CURRENT FUNDING FOR PREVENTING PEOPLE SMUGGLING

In the 2009-10 Federal Budget, the Government apportioned just over \$300 million to end the practice of people smuggling.¹³ These funds included

\$14.3 million over two years to engage with Indonesia to aid the Indonesian Government in managing detention facilities in Jakarta and Tanjung Pinang;

\$16.4 million over two years to respond to increasing irregular migration through the Asian region;

\$30.5 million over four years to enhance the capabilities of the Australian Secret Intelligence Service;

\$41.6 million over four years to fund additional Australian Federal Police (AFP) officers for the people smuggling strike team, establishing a technical investigation unit in Indonesia, and deploying AFP liaison officers to Sri Lanka, Pakistan, Indonesia, Malaysia and Thailand;

\$62.9 million over four years for aerial surveillance to assist in detecting illegal foreign fishing and people smuggling;

\$54.3 million over two years to extend the lease of the Australian Customs and Border Protection Vessel ACV Triton to aid surveillance and enforcement activities against illegal foreign fishing and maritime people smuggling; and

\$22.0 million over four years to tow and dispose of intercepted vessels that enter Australian waters illegally as part of people smuggling ventures.

Not only does the Uniting Church believe this substantial allocation of funds to be entirely disproportionate to the problem the proposed amendments seek to address, but we note the glaring omission of substantial monies to address the root causes of asylum seekers and refugees undertaking the journey by boat to Australia.

7 | CONCLUSION

The only way to effectively end people smuggling is for the Government to focus its efforts on addressing the causes that drive asylum seekers and refugees risking their lives getting on a boat. Australia must work with transit countries to provide refugees awaiting resettlement with protection by ensuring that fundamental rights to education, housing, health care, employment opportunities and legal representation are assured. The Uniting Church urges the Government to enact legislation that is consistent with its obligations under international laws.

¹¹ http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf

¹² Such as the case currently before the Victorian Court of Appeals.

¹³ http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-18.htm