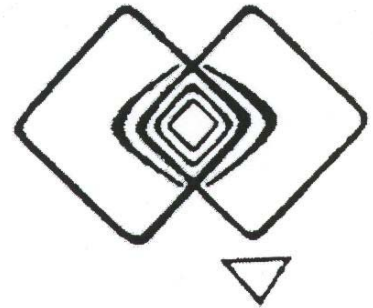


# **POLMIN**

Australian Political Ministry Network Ltd  
*Influencing public policy for the common good*



## **Senate Legal and Constitutional Committee**

### **Inquiry into the administration and operation of the Migration Act 1958**

**July 2005**

## A. Introduction

1. The Australian Political Ministry Network (PolMin) welcomes the Senate Legal and Constitutional Committee Inquiry into the administration and operation of the *Migration Act 1958*. PolMin's submission will address the terms of reference 'a':

*“the administration and operation of the Migration Act 1958, its regulations and guidelines by the Minister for Immigration and Multicultural Affairs and the Department of Immigration and Multicultural and Indigenous Affairs, with particular attention to migration detention”.*

2. PolMin is an independent membership organisation which is committed to affecting change in public policy in accordance with Catholic Social Teaching. This body of teaching has been expressed in the authoritative declarations of consecutive Pope leaders in response to social concerns of the time. Central to Catholic Social Teaching is the dignity of the human person.
3. PolMin is committed to upholding the dignity of asylum seekers and refugees in Australia by responding to and acting on unjust policy. It is our firm belief that the current policy of mandatory detention as expressed in the *Migration Act* is not in the interests of the common good, that is, our society as a whole.
4. PolMin has consistently called for a complete review of the *Migration Act 1958*, which was developed in the spirit of the 1951 UN Convention on Refugees to provide protection for refugees. PolMin believes the policy of mandatory detention introduced in 1992 and outlined under the *Act* has failed to best provide this protection and has thus breached our international obligations<sup>1</sup>.
5. Despite a recent softening to the policy of mandatory detention, PolMin remains concerned that a damaging, inhumane and ineffective detention system still awaits future arrivals. PolMin believes that the Parliament should act urgently to review the *Migration Act* and develop regulations and guidelines that best allows asylum seekers a fair and reasonable opportunity to claim protection in Australia. Our submission therefore will deal with key aspects which we believe inhibit this:
  - The Failure of Mandatory Detention
  - The Pacific Solution
  - Prolonged Detention
  - Ministerial Discretion
  - Lack of Review
  - The need for Complementary Protection
  - Rights for Asylum Seekers in the Community
  - The Temporary Protection Visa

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<sup>1</sup>Including but not limited to: *The Universal Declaration of Human Rights (Article 14)*, *The International Covenant on Civil and Political Rights (ICCPR) (Article 9, 9(4), 7)*, *The Refugee Convention (Article 26, 31 (1))*, *The Convention on the Rights of the Child (Article 22, 37)*

## B. Seeking Asylum in Australia

6. The Church has clear positions on the rights of asylum seekers. Pope John Paul II points out that refugees, however they might arrive in a country, illegally or not, still have their human rights:

*His irregular legal status cannot allow the migrant to lose his dignity, since he is endowed with inalienable rights, which cannot be violated nor ignored.*<sup>2</sup>

7. However, the system for receiving asylum seekers in Australia differs markedly depending on their method of arrival. Those who arrive in Australia without a valid visa are mandatorily detained under the *Migration Act* until their claims are determined. Numerous United Nations and Human Rights groups have consistently condemned Australia's detention centres. The United Nations Human Rights Commission has described conditions in Australia's detention centres as "offensive to human dignity".
8. Locked in remote desert locations or offshore islands, asylum seekers are isolated from the community and the appropriate services and support they need. The administration of detention centres by private contractor, GSL has most recently been bought into question by the Palmer Report. The denial of access to the media shows a system lacking transparency.

### The failure of mandatory detention

9. Mandatory detention has been defended by our government as being an effective deterrent, discouraging potential asylum seekers coming to our country. PolMin believes that a policy to punish an innocent person to deter others is a policy founded on morally bankrupt principles. PolMin welcomes recent comments by Bishop Joseph Grech, chair of the Bishops' Committee for Migrants and Refugees who said that:

*"It is always unjustifiable to detain asylum seekers in order to deter future asylum seekers from coming to Australia. Prolonged detention is gravely injurious to those on whom it is inflicted: and the Catholic moral tradition has always insisted that it morally wrong to use unacceptable means even for an arguably good end."*<sup>3</sup>

10. Little evidence exists to show that government policy actually worked to deter asylum seekers. Indeed, the steady flow of boat arrivals between 1999 and 2001 strongly discounts this view. As more than 9500 people, mainly from Afghanistan and Iraq, arrived in Australia by boat between July 1999 and December 2001<sup>4</sup>, fears were raised about Australia's security and the possibility of terrorists

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<sup>2</sup> John Paul II, Message for World Migration Day 1995-6, *Undocumented Migrants*, 25 July 1995 p.2

<sup>3</sup> Bishop Joseph Grech, chair, Bishops' Committee for Migrants and Refugees, *Cathnews*, 18<sup>th</sup> July 2005

<sup>4</sup> Department of Immigration and Multicultural Affairs, Fact Sheet 75, "Processing Unlawful Boat Arrivals"

infiltrating Australia. However, given the ‘push’ factors of war and terror in their own countries, 90% of the people who arrived by boat during that period were found to be refugees<sup>5</sup>. Further, ASIO reported to Parliament that up until 2002, not one authorized arrival had proven to be a security threat among almost 6000 unlawful arrivals screened by ASIO<sup>6</sup>.

11. For the government to suggest such misleading and defamatory ideas, in the climate of fear that followed the September 11 attacks, is a shameless attack on vulnerable people. The fact that boat people never proved to be a threat to Australians cannot be simply put aside - in this hostile environment, the capacity of vulnerable, traumatized people to feel welcomed and settle has been severely damaged. Further, the capacity of our society to reach our full potential has been diminished by the suspicious, fearful and sometimes hostile attitudes that have found space to flourish under this policy.
12. That these asylum seekers were recognized with genuine needs for protection shows that maximum security detention is disproportionate to the objective to be achieved<sup>7</sup>. The government must begin implementing proven humane and compassionate alternatives to the current needless and failed system.

### **The ‘Pacific Solution’**

*“It is an inalienable right of a person to enter a country to seek asylum.”*  
John XXII, *Pacem in Terris*, 11 April 1963<sup>8</sup>

13. PolMin condemns recent moves to further excise a large number of islands from the Australian Migration Zone, including the Melville and Tiwi Islands<sup>9</sup>. PolMin believes that the Government should restore all excised islands back into Australia’s migration zone so that further arrivals can apply for protection under Australia’s *Migration Act* as an onshore claimant and be afforded the full range of rights this entails. If Australia is to properly conform with the international protection regime, then it must give asylum seekers a reasonable opportunity to make a claim from their point of arrival. Using the navy to turn boats around is an offense against the dignity of vulnerable people.
14. PolMin believes it is time to end the Pacific Solution, and that detention facilities on Nauru and Manus Island should be closed down. The government should stop sending further arrivals offshore and foreign aid funds should not be diverted to their detention and processing costs.

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<sup>5</sup> Phillip Ruddock, speech to parliament, November 1, 2000

<sup>6</sup> Director General of ASIO, Parliament House, August 2002

<sup>7</sup> *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, advise that detention must be ‘proportionate to the objectives to be achieved’, Guideline 3, paragraph 3, 1999

<sup>8</sup> John XXII, Encyclical Letter on Establishing Universal Peace in Truth, Justice, Charity and Liberty, *Pacem in Terris*, 11 April 1963

<sup>9</sup> ABC Online, “*Government excises islands from the migration zone*”, 29/7/05

## **Prolonged Detention**

15. The policy of mandatory detention leads to prolonged or indefinite detention in some cases. As at 29 May, 2005 Amnesty International estimates that at least 150 people have been detained for more than three years. The total number of persons detained by Australia rises to at least 200 when those detained for longer than 18 months are included<sup>10</sup>.
16. The United Nations Working Group on Arbitrary Detention advises that maximum periods be set for detention<sup>11</sup>. Against this international standard, in Australia there is no maximum limit on the amount of time a person can actually be detained in the *Migration Act*. The High Court has found that this means those asylum seekers who have not been found to be refugees under the Refugee Convention, and for whatever reason can not be returned to their home country, could be detained indefinitely under the *Act*.
17. PolMin suggests that asylum seekers should only be detained for identity, health and security (IHS) clearance. This should not exceed 30 days. Asylum seekers should then be released into the community on bridging visas with work rights and social security benefits whilst their claims for protection are processed. There should be clear direction in the regulations and guidelines<sup>12</sup> to compel the department to lodge an application with an independent authority to explain the need for continued detention for IHS checks. The asylum seeker shall have the right to appeal the decision to detain beyond this time before the courts.
18. A maximum duration for detention (6 months) should be specified in the *Migration Act* and be in accordance with international human rights law. Directions should be included in the regulations and guidelines to compel the department to lodge an application with an independent authority to continue to detain beyond this period. The asylum seeker shall have the right to appeal the decision to detain beyond this time before the courts.

## **The need for Complementary Protection**

19. The introduction of the Removal Pending Bridging Visa has provided an avenue for people whose claims for asylum have been rejected to be released into the community until arrangements can be made for their deportation. However, this visa is at the invitation of the Minister for Immigration, on the basis of a non-enforceable, non-compellable, non-reviewable discretion. PolMin remains

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<sup>10</sup> Amnesty International, “*The Impact of Indefinite Detention, the case to change Australia’s mandatory detention regime*”, June 2005, p. 4

<sup>11</sup> The United Nations Commission on Human Rights Working Group on Arbitrary Detention which advises “a maximum period being set, as appropriate, by the regulations”. UN Doc no. E/CN.4/1999/63

<sup>12</sup> i.e the Department’s *Procedures Advice Manual (PAM 3)* and *Migration Series Instructions (MSI’s)*

- concerned that a person who has had their claim for asylum rejected, could still be detained indefinitely.
20. The *Migration Act* is limited to providing protection towards those persons who fall within the definition provided in the Refugee Convention, namely those who have “a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion”<sup>13</sup>.
  21. However under international law, Australia’s has ‘non refoulement’ obligations not only to persons who fit within the Refugee Convention but also to any person who faces a “real risk” of a violation of their fundamental human rights if they are returned to their country of origin. Australia must seek humane solutions to persons recognised as stateless and offer them appropriate protection<sup>14</sup>.
  22. Some states have dealt with the need to provide protection to people not covered by the Refugee Convention by either expanding the definition of refugee, or through the use of ‘complementary protection’ – this second option is an objective of the *Agenda for Protection*, adopted by the UNHCR<sup>15</sup>. It has been adopted in many developed nations.<sup>16</sup>
  23. The Australian Government must develop a Complementary Protection visa to provide protection for those asylum seekers whose claims for protection does not fit within the strict definition of the Refugee Convention, but still hold valid claims for protection.

### **Ministerial Discretion**

24. The Australian Government does acknowledge that people do have protection needs, though they fall outside the Refugee Convention's specific criteria. To deal with this, the Minister for Immigration has discretionary powers to consider claims under Section 417 of the *Migration Act*. This power is non-enforceable and non-reviewable.
25. This approach is inconsistent with international standards because to be eligible for ministerial intervention they must first go through all the stages of the refugee determination process. PolMin believes that this is an inefficient use of resources, lacks in transparency and accountability, without the appropriate safeguards, and places unnecessary hardship on the person in need of complementary protection.

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<sup>13</sup> Refugee Convention, 1951, Article 1

<sup>14</sup> UNHCR Guidelines, Guideline 9, *Detention of Stateless Persons*, 1999

<sup>15</sup> Executive Committee, UNHCR, *Agenda for Protection*, 2002

<sup>16</sup> Refugee Council of Australia, *Position on Complementary Protection*, May 2002

26. PolMin believes that to be consistent with international best practice, a complementary protection visa should be legislated into the *Migration Act*.
27. PolMin is concerned by the recent changes which give increased discretionary powers to the Minister to seek community alternatives for families and children and for releasing long term and stateless detainees. PolMin believes that rather than being at the Ministers discretion, these changes to improve the situation of claimants should be well defined under the regulations and operate with natural justice protections to ensure a fair and transparent system.

### **Lack of Review**

28. The Catholic Church does not endorse sweeping State powers to detain all asylum seekers. The ‘Pontifical Council for Pastoral Care of Migrants and Itinerant People’ warned that:

*A person applying for asylum should not be interned unless it can be demonstrated that he or she represents a real danger, or there are compelling reasons to think that he or she will not report to the competent authorities for due examination of his or her case. Moreover such people should be helped with access to work and to a just and rapid legal procedure.*<sup>17</sup>

29. However, in contravention of the right to challenge detention before the courts as outlined in the ICCPR<sup>18</sup>, Australia only allows for limited judicial review to decide whether detention is justified and appropriate in individual cases. This represents a serious departure from our own system of governance, where the judiciary plays an important role in providing checks and balances. Palmer expressed concern about this failure to ensure an automatic process of review, to ensure detention is “being exercised lawfully, justifiably and with integrity”<sup>19</sup>.
30. PolMin believes that the Parliament should reinstate full judicial powers to oversee merits review decisions so that asylum seekers are offered rights equal to Australian citizens, as prescribed by international law<sup>20</sup>.
31. Recent changes have introduced the Ombudsmen as a means to review the cases of people who have been detained for longer than two years. However, the Ombudsmen’s recommendations are non enforceable and non binding.

### **Rights for Asylum Seekers in the Community**

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<sup>17</sup> Pontifical Council for Pastoral Care of Migrants and Itinerant People’ ‘*Cor Unum*’: *Refugees: A Challenge to Solidarity*, 1992, 11.

<sup>18</sup> International Covenant On Civil and Political Rights, Article 9(4)

<sup>19</sup> Palmer Report, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, p. 194

<sup>20</sup> Convention on Refugees, 1951, Article 16

32. In contrast to unauthorized arrivals, people who enter Australia on a valid visa and then claim protection as refugees are generally allowed to live in the community whilst their claims for asylum are processed under a bridging visa. Depending on the grade of visa, some asylum seekers are allowed to work and receive Medicare, whilst some receive government support via the Red Cross Asylum Seeker Assistance Scheme. The majority however, do not have these rights and have to rely on charity from community groups for medical care, food, housing and clothing.
33. Asylum seekers should be free to live in the community on a bridging visa whilst their claims for asylum are processed. The bridging visa should provide right to work and to the full range of social security benefits, as well as ongoing support from a case worker. Those found ineligible to remain in Australia shall be provided with the appropriate support and counselling to prepare for departure.
34. The only thing that distinguishes these two groups of asylum seekers discussed (unauthorized and authorized), is their method of transport to Australia and the possession of a visa, but they are treated very differently once they arrive here. This distinction breaches Article 31 of the Refugee Convention which prohibits imposing penalties on account of illegal entry. It also puts Australia at odds with the UNHCR which states that ‘detention is inherently undesirable’ and “detention should only take place after consideration of all possible alternatives”<sup>21</sup>. Clearly, alternative community arrangements exist for asylum seekers. By applying them for one group of asylum seekers and not another is blatant discrimination.

### **The Temporary Protection Visa**

35. The Temporary Protection Visa was also introduced as a means to deter other potential asylum seekers arriving in Australia<sup>22</sup>. By introducing penalties for people found to be refugees on the basis of their having arrived without a visa (something inherent in the nature of being a refugee and recognised by the UNHCR) the current Government is breaching Convention Article 31. Secondly, by denying one group of refugee’s access to the same assistance as other refugees and nationals, the Government is breaching human rights, by acting in a discriminatory fashion.
36. A recent announcement that outstanding TPV cases will be finalized by October 31 is welcome however PolMin believes that the TPV regime must be abolished. On a successful determination, refugees should be offered permanent protection and the full range of rights and entitlements available to people on permanent protection visa’s, including settlement services, travel rights and family reunion.

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<sup>21</sup> UNHCR Guidelines, Guideline 3, paragraph 1

<sup>22</sup> Then Minister for Immigration, Phillip Ruddock was quoted as believing that the initiatives “would go a long way to solving the problem of forum shopping and removing the incentives for authorised arrivals.” Press release, 13/10/99



## **Conclusion**

PolMin welcomes recent changes which have begun to recognize the rights and dignity of asylum seekers and refugees. Releasing families, long term and stateless detainees, finalizing TPV cases and employing use of the Ombudsmen to review detention over two years, will undoubtedly improve the situation of many asylum seekers and refugees. However, this success relies heavily on how the changes are implemented, and as such, PolMin recommends serious legislative change to the *Migration Act*. Australia has an obligation to provide protection for people fleeing persecution. A raft of evidence ranging from the United Nations, to our own human rights commission has proved our failure to provide protection and care. Australians too have seen the irreparable damage caused to innocent individuals who were victim to this punitive, arbitrary regime. PolMin recommends that the Australian Government rework the *Migration Act 1958* to bring it into line with our international human rights obligations. PolMin commits its recommendations for a fair, humane and compassionate policy for refugees.

## **C. Recommendations**

### **1. Equal Treatment for Asylum Seekers and Refugees in one unified system**

This requires equal treatment for all asylum seekers without discrimination based on method of arrival.

### **2. Restore the right to seek asylum in Australia**

End the Pacific Solution, close offshore camps and restore excised islands into the Migration Zone.

### **3. Time limited detention**

Asylum seekers should only be detained for a time limited period for health, identity and security checks and then released into the community on bridging visas.

### **4. Judicial review**

Courts must be given full powers to examine the decision to detain people.

### **5. Complementary Protection**

Asylum seekers whose claims for protection are valid, but fall outside the Refugee Convention definition, must be entitled to complementary protection.

### **6. Rights for Asylum Seekers in the Community**

Asylum seekers in the community on bridging visas should be entitled to work and to the full range of social security benefits, as well as support from a case worker.

### **7. Permanent protection**

The TPV should be abolished. On successful determination, refugees should receive permanent protection with the full range of rights and entitlements.