A Submission to

Senate Legal and Constitutional Committee

Inquiry into the Administration and Operation of the Migration Act 1958

From

The Bishops Committee for Migrants and Refugees

On Behalf of
The Australian Catholic Bishops Conference

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The Bishops Committee for Migrants and Refugees welcomes the opportunity to make a submission to the Inquiry into the Administration and Operation of the Migration Act 1958. The Inquiry is both timely and important.

The Inquiry is timely because some of the difficulties in the administration and operation of the Migration Act have been starkly highlighted in recent times by the unfortunate treatment of Cornelia Rau and Vivian Alvarez. A number of these issues have been discussed in the recent Palmer Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau. However, the terms of reference of the Palmer Inquiry necessitated that report focusing upon only a few of the difficulties with the current administration and operation.

The Inquiry is important because migration has made Australia what it is today. With the exception of Indigenous Australians, all of us in Australia are either migrants or descendants of migrants. How the Migration Act is administered does and will play an important part in shaping the future of Australia.

Who we are

The Bishops Committee for Migrants and Refugees is a committee of the Australian Catholic Bishops Conference. The Committee supervises and coordinates services for migrants and refugees on behalf of the Catholic Church in Australia (The Church).

What we do

The Australian Catholic Migrants and Refugees Office, the delivery arm of the Bishops Committee, coordinates much of the work for migrants and refugees. However, many individuals and organisations within the Church are involved in delivering day to day services to migrants and refugees. For example, the Church has Chaplains and Pastoral Workers in every immigration detention facility, just as we have in other detention facilities, such as jails. Chaplains and Pastoral workers in immigration detention facilities provide assistance to detainees regardless of faith. They are often the only contact that detainees have with the outside world. The Church's welfare services provide substantial ongoing assistance to people released from detention. They see, at first hand, the consequences of long-term immigration detention. If members of the Inquiry wish, we can arrange for members to meet with those with first hand experience of such matters.

Prior to commenting upon specific facets of the Migration Act, it is important to make two important points:

I. The Migration Act and its administration and operation is complex. It has become significantly more complex in recent years as various changes have been made to legislation and procedures. Migration administration is also in a time of great change following very recent events. Accordingly, given the short time frame for this Inquiry, this submission neither seeks nor claims to address every matter of concern with the administration and operation of the Migration Act. We offer a number of issues for consideration by the Committee and advise that, if the Committee wishes to follow up on these or other issues, appropriate personnel will be available to assist.

II. The Church has been critical of the administration and operation of the Migration Act in recent times. Some of this criticism is contained in this submission. However, we wish to emphasise that there are many competent and dedicated people working in the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). Palmer noted this fact a number of times in his recent report, eg "There is considerable evidence of highly committed DIMIA staff….having heavy workloads and trying to operate effectively despite instructions and requirements that inhibit or prevent effective performance rather than facilitate it" (Palmer page ix). The Church shares that view.

The following comments relate to specific Terms of Reference of the Inquiry:

A. The administration and operation of the *Migration Act 1958*, its regulations and guidelines by the Minister for Immigration and Multicultural and Indigenous Affairs and the Department of Immigration and Multicultural and Indigenous Affairs, with particular reference to the processing and assessment of visa applications, migration detention and the deportation of people from Australia.

As noted, the administration and operation of the Migration Act (the Act) is complex and has become more so in recent years. The increasing complexity of the Act and its administration, arguably, is a consequence of an increasingly complex world. While there is some merit in this view, it is suggested that many of the problems with the Act and its administration are the result of changes to meet needs at the time (one hesitates to use the word "ad hoc"). The result has been a larger and more complex Act which has lost much of the internal cohesion of earlier versions. The consequent evolution has been more complex administration and, as has been starkly demonstrated in recent times, particular treatment of individuals that clearly was not the intention of the legislature. A more strategic, long term view is required when planning changes to the Migration Act and its subsequent administration.

There are numerous examples of the way in which the Act and administration have evolved into a more complex arrangement with consequent difficulties.

One such example is the immigration detention facilities. These facilities were originally established to enable the safe custody of individuals "with visa problems" prior to their expeditious removal from Australia. Such facilities were in capital cities near international ports (originally sea ports but more recently airports). There was always the expectation that detention in such facilities would be short term. As such, the facilities did not have many of the resources, facilities or trained staff that one finds in more long term detention facilities such as jails.

In recent years, with changes in the world political situation and in the flow of people around the world, it was decided by the Australian Government to have an overtly rigorous system to deter those seeking to enter Australia "illegally". Part of this system was an expansion of the immigration detention system and the detention of inmates for much longer periods than previously. This expansion also included the establishment of immigration detention facilities in remote areas such as Port Hedland, Woomera and, more recently, Baxter.

Some of the problems resulting from the current immigration detention system have been demonstrated in recent times. However, while we might be outraged at the treatment of particular individuals, in considering a solution it is important to concentrate upon the causes of the problem, not just the symptoms. Some of the causes of these problems have been identified by others. They include:

I. The role of the immigration detention facilities was changed substantially but the model of a short term facility in a capital city was not changed when detention facilities for long term detainees were established in cities and, especially, in remote areas. The model was simply transported from the city to the desert with resulting difficulties. If detention facilities are to be operated either in remote areas or for long term detainees (and both of those issues are a matter for considerable discussion) then clearly the short term capital city model was, and is, inappropriate. Later in this submission, some of the inadequacies of the current model are considered.

II. The Migration Act gives considerable powers to the Minister and to Immigration Officers. These powers include the right to detain a person whom the officer suspects is an unlawful non-citizen. Parliament may consider that such powers are justified. But, as has been demonstrated by recent events, without appropriate checks and balances, such considerable powers can lead to very unfortunate consequences. Other jurisdictions that include the power to detain people have substantial checks and balances on such powers that are not currently imposed upon the administration and operation of the Migration Act. The checks and balances in other jurisdictions include the rights, based in legislation, of detainees to seek review of the

length and conditions of their detention. Such rights are not available to immigration detainees. The recent extension of the Ombudsman's role to enable a limited review of certain detentions is a welcome first step towards resolving this problem.

Any serious consideration of the administration and operation of the Migration Act must ask the threshold question: is it necessary for such large numbers of people to be detained for such long periods, especially in remote areas, or are there viable alternatives?

Why is it not possible to devise a system in which applicants for asylum or permanent residence live in the community, perhaps under strict reporting conditions, while their cases are decided quickly? The Church is willing to work with the Government in devising such an arrangement.

Further comments regarding immigration detention facilities are provided in discussions of other terms of reference below.

As noted, administration and operation of the Migration Act has become increasingly complex in recent times. Such complexity has not only affected detention centres. Overall migration processing has become increasingly complex for staff, for agencies involved in assisting migrants such as the Church and, most importantly, for individuals seeking to migrate to Australia. A matter of strategic importance to Australia is whether the complexity of migration processing is having an adverse impact on the long term future of Australia. There is substantial anecdotal evidence that people, who could make a positive contribution to Australia, are often deterred by the complexity of the process and thus seek to migrate to other countries who also covet their skills.

The underlying cause of many of the problems of complexity in the processing and assessment of visa applications appears to be similar to the cause of the problems in detention facilities. That is, ad hoc solutions to immediate problems or processes that accord with a particular political or philosophical approach, have been implemented without consideration of the long term or down stream consequences of such changes. The results have been increasing complexity of administration and adverse operational impacts on other parties.

An example may illustrate the problem. This example is one in which the Church can speak from first hand experience but it is not presented as the most important adverse impact of such changes. There are many others.

Given the international nature of the Church, there is a desire to bring religious students to Australia. Some time ago, DIMIA noted that some individuals/organisations were abusing the system for the entry of students by facilitating the entry of individuals who were not bone fide students. DIMIA reacted by changing the system for processing applications of all students without, it would appear, considering the impact that such changes would have on genuine applicants and their organizations, such

as applications for religious students. A number of quite reasonable applicants have been rejected. Again this is evidence of the increasing complexity of administration of the Act. The Church has communicated with the Minister and with DIMIA seeking to resolve these complexities but, so far, without result. We have been promised a new agreement for religious personnel, to which the Church has agreed, and which will apparently go a long way to solving this problem with the processing of nominations and visas for religious students. But after three years, the Minister/DIMIA have yet to implement this agreement despite frequent reminders.

Similarly, priests and members of religious congregations have been refused short-term visas to come to Australia to observe the work of the Church here, or simply to have a holiday. The overseas DIMIA officer often gives the reasons that there is insufficient evidence of support in Australia and of the nominee's preparedness to leave Australia at the expiry of their visa. This is despite the assurances that have been given by the Church authorities here and overseas.

There is no argument with the need to prevent abuse of migration procedures. But consultation with stakeholders could have devised a system that would have prevented abuse without the negative impacts of current arrangements. As noted, these example are provided to illustrate a widespread problem in the administration and operation of the Migration Act. More details are available if required by the Committee.

B. The activities and involvement of the Department of Foreign Affairs and Trade and any other government agencies in processes surrounding the deportation of people from Australia.

The deportation of Vivian Alvarez and the attempts to deport Cornelia Rau are illustrative of many of the difficulties in the administration and operation of the Act and the involvement of the Department of Foreign Affairs and Trade and other government agencies in deportation processes.

The details of Ms Alvarez's and Ms Rau's situations have been canvassed by others and are well known. But both cases illustrate what Palmer (page x) calls a policy that is "'process rich' and 'outcomes poor' with the predominant, and often sole, emphasis being on the achievement of quantitative yardsticks rather than qualitative performances".

In Ms Alvarez's case, the breakdown in communication between numerous agencies and the policy described by Palmer resulted in Ms Alvarez being left in a Catholic refuge in the Philippines for a number of years. In Ms Rau's case, if it had not been for the diligence of the German Consulate, she also would have been deported. If it had not been for the persistence of chaplains, pastoral workers and other visitors to Baxter, she would have continued to languish in detention. Both cases illustrate the

urgent need for improvements in the exchange of information between government agencies, as well as the need for improvement in the administration and operation of the Migration Act.

It is unfortunate that the terms of reference are limited to the activities and involvement of "….other government agencies in processes surrounding the deportation of people from Australia". Numerous non-government agencies are involved in deportations, in particular out-sourced private providers that perform functions previously performed by government agencies. No consideration of the processes surrounding the deportation of people can be complete without consideration of the role of non-government agencies.

C. The adequacy of healthcare, including mental healthcare, and other services and assistance provided to people in immigration detention.

The inadequacy of mental health care in immigration detention facilities was illustrated by the treatment of Ms Rau. But the inadequacy of health and mental health care is only one of a range of such inadequacies. There is a need for systemic change in the legislative basis and the administration and operation of immigration detention facilities.

As noted elsewhere, current immigration detention facilities evolved from an earlier model which was established to perform different functions to those now expected of the facilities. But changes to accommodate the new demands on the facilities were not made and thus the immigration detention facilities have failed to deliver a service that reasonable Australians would expect.

When immigration detention facilities changed, from providing short term detention to more long term and numerous detention, their structure should have changed accordingly. The new role was one more akin to other detention facilities such as jails. Over many centuries, jails have evolved an organisational structure appropriate to long term detention in such facilities. Health, recreation and pastoral support services for detainees are an integral part of all other detention facilities but not of immigration detention facilities.

It has been argued that immigration detention facilities are different to other detention facilities because detainees have not been convicted of a crime. While noting that detainees in remand centres have not been convicted of a crime, it is suggested that such a distinction is irrelevant. Immigration detention facilities should, of course, lack some of the punitive arrangements found in other detention facilities. But resources such as adequate appeal arrangements and health, recreational and pastoral services are fundamental to the effective and humane operation of any detention facility.

As an illustration of the difference in services available to detainees in immigration detention facilities and other facilities, the attention of the

Committee is drawn to the Victorian Corrections Act 1986. Section 47 of that Act outlines prisoners' rights. There is similar legislation in other states and territories. But a detainee in an immigration detention facility has no such rights.

On its web site, DIMIA provides a fact sheet that says in part: "Detainees are able to access timely and effective primary health care, including psychological / psychiatric services (including counselling):

- in a culturally responsive framework
- where a condition cannot be managed within the facility, by referral to external advice and/or treatment".

But this information about health and other services is a quote from the services standards included in the contract between DIMIA and Global Solutions, the out-sourced provider that manages immigration detention facilities. Only DIMIA can legally demand that such services are provided. Unlike detainees in other detention facilities, a detainee in an immigration detention facility has no legal rights to such services.

An example may illustrate the problem. Again, this example is one in which the Church can speak from first hand experience but it is not presented as the most important adverse impact of current arrangements. There are many others.

As noted, the Church provides chaplaincy and other pastoral services in all detention facilities in Australia. Arrangements for such services have evolved over time and are recognition of the legal rights of detainees to such assistance and the important contribution that such services make to the welfare of detainees. Other Churches provide similar services in detention facilities. However, DIMIA does not have agreed arrangements for chaplains or other pastoral workers in immigration detention facilities. Some immigration detention facilities allow chaplains and pastoral workers to visit at visiting time and, in some cases, at other times. But there are severe limitations on the work of chaplains and pastoral workers in immigration detention facilities that are not experienced in even the most punitive of jails. This difficulty is particularly apparent at the Baxter detention facility, where, unfortunately, some of the most tragic events have also occurred.

The Church and the National Council of Churches have approached DIMIA on numerous occasions to resolve the difficulties confronting chaplains and other pastoral workers in immigration detention facilities. After numerous approaches, in December 2004 DIMIA agreed to discuss the issue with a committee comprising representatives of the Church and the National Council of Churches. However, to date (July 2005), despite numerous promises, DIMIA has continually declined to meet the committee.

In summary, the Church and the National Council of Churches seek only to have similar arrangements for chaplains and other pastoral workers in immigration detention facilities as exist in other detention facilities.

This example is cited as illustration of systemic difficulties with the services and assistance provided to people in immigration detention. Further examples can be provided if required.

A further example of the inadequacy of services for people in immigration detention is the inadequacy of services for people released from detention. Many asylum seekers are traumatised by experiences prior to arriving in Australia. Many others are traumatised by the duration and conditions of immigration detention. Most require ongoing assistance after release from detention. DIMIA appears to have taken the attitude that people released from detention are no longer their responsibility. But one can reasonably ask: if not DIMIA's, then whose responsibility is care of such people?

Welfare agencies, such as St Vincent de Paul and Centrecare, are often the primary source of assistance for people released from immigration detention. Some former detainees have visa conditions that forbid work and limit access to health and other welfare services. Such former detainees must either go into the black economy or depend upon welfare agencies. It is unreasonable for responsibility for the care of such people to be simply transferred to the welfare sector. The government has a responsibility to provide adequate assistance to assist with the transition of such people.

D. The outsourcing of management and service provision at immigration detention centres.

There is no doubt that some services are better provided by outsourced providers than by government agencies. Such services usually are ones in which the primary measures of performance are quantative. However, for services in which the primary measures of performance are qualitative, the merits of outsourcing are not as clear-cut. Performance management of immigration detention facilities should be mainly qualitative and thus the merits of outsourcing such a service can be difficult to justify.

There are many dedicated people working for outsourced providers who seek to provide a quality and humane service in, often, very difficult circumstances. However, recent publicised cases have illustrated some of the inadequacies of such an outsourced service.

In recent years, there have been three different contracts for the management of immigration detention facilities. With changes in providers every few years, it obviously has been difficult to establish a continuity of skilled personnel in such facilities. Attracting skilled personnel to work in difficult situations or in remote locations is a problem for all organisations. These problems are compounded if long term employment cannot be guaranteed.

Recent events have illustrated that the quality of service provided in immigration detention facilities has been inadequate. Either the performance of the outsourced provider has not been in accordance with the contract or the

contract provisions have been inadequate. In either case the provision of the outsourced management of immigration detention facilities has been unsatisfactory. Either the activity should be brought back "in-house" or substantial changes should be made to improve outsourced arrangements.

Summary

As people who have worked closely with migrants and refugees over many years, we know that there are many difficulties in the administering and operating the Migration Act. We have worked successfully with DIMIA staff in achieving many satisfactory outcomes. But we have also seen the difficulties, especially in recent years, that can occur. We have worked with detainees in immigration detention centres and with those still suffering trauma after their release. We do not pretend that solutions are simple. But surely there must be a better way than the current arrangements. Our work with migrants and refugees is for the long term. We are willing to work with all other parties, especially with the Government, to improve the current situation.

Our comments in this submission are provided in the hope of contributing to an improvement in current arrangements. If the Committee wishes to discuss any issue in regard to this matter, we will be happy to assist.

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