Submission to the Inquiry into the provisions of the

MIGRATION AMENDMENT (DESIGNATED UNAUTHORISED ARRIVALS) BILL 2006

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INTRODUCTION

The Uniting Church in Australia, through UnitingJustice Australia, welcomes the opportunity to present a submission to the Inquiry into the provisions of the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.*

The Uniting Church in Australia seeks to bear witness to God's call for the continuing renewal and reconciliation of all creation through its 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.

In July 2002, the Uniting Church released its *Policy Paper on Asylum Seekers, Refugees, and Humanitarian Entrants*, which outlines key principles that we believe should underpin Australia's policies, legislation, and practices. These principles reflect the Church's belief in the inherent dignity of all people and our commitment to work for justice.

The Uniting Church advocates for a just response to the needs of refugees that recognises Australia's responsibilities as a wealthy global citizen, upholds the human rights and safety of all people, and is based on just and humane treatment, including non-discriminatory practices and accountable transparent processes.

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."

In this spirit, the Uniting Church offers its submission to the Inquiry into the provisions of the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*.

RECOMMENDATIONS

That the Senate reject this Bill in its entirety.

That future parliamentary inquiries should be conducted over a more reasonable and appropriate timeframe, in order to allow the Committee to consult widely on the implications of the Bill and to facilitate better community involvement in the process of governance.

1. AN ACT OF MORAL ABANDONMENT

The Uniting Church believes that were these amendments to the *Migration Act* to be passed, it would constitute an abrogation of Australia's international human rights obligations, and of our ethical and moral responsibilities and commitments to human rights and the welfare of other human beings.

Uniting Church President, Rev. Dr Dean Drayton, has condemned the Government's proposals as "an act of moral abandonment", stating:

> This decision shows the Government's commitment to human rights will now run, at best, a poor second to foreign policy considerations.[1]

As a general principle, we are concerned that this legislation represents a disproportionate and immoral attempt to exclude refugees who have suffered significant human rights abuses in West Papua and other countries from seeking asylum under current Australian law. The proposed extension of the 'Pacific solution' appears to have been conceived in response to high level diplomatic pressure from the Indonesian Government, following the recent grant of Australian protection visas to 42 West Papuan asylum seekers whose claims of persecution were verified under Australian law. It would seem that the Australian Government's response to this pressure is to withdraw the due process of Australian law from any asylum seeker who in future arrives, as did the West Papuans, by boat.

However, article 31 of the *1951 Convention Relating to the Status of Refugees* provides that states shall not impose penalties:

> on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

As such, the application of the provisions of this law to any refugee who reached Australia as their first country of asylum, including refugees from West Papua or other neighbouring nations, would seem to contravene our *Convention* obligations in this area. Treating such arrivals differentially and less favourably may constitute the imposition of a penalty; certainly, practically speaking, these vulnerable people will be worse off than if the Bill had not been enacted, without Ministerial intervention.

More particularly, without Ministerial intervention, the Bill would certainly contravene our obligations under S37 (b) of the *Convention on the Rights of the Child* to ensure that children are detained only as a measure of last resort.

In addition to the potential for the Bill to lead us into contravention of our international legal obligations, we are deeply concerned by its aim to deliberately avoid rather than accept our obligations under the *1951 Convention Relating to the Status of Refugees*. For example, while the enactment of the Bill would not apparently contravene article 32, which states that States "shall not expel a refugee lawfully in their territory save on grounds of national security or public order", the Bill would achieve this adherence to the letter of the law through first making certain refugees'

[1] "Moral Courage Absent in Government Response to Asylum Seekers" Media Release, National Assembly of the Uniting Church in Australia, 13th April 2006.

presence unlawful, and then enabling the state to expel them. This attempted 'sidestepping' of our international obligations is unacceptable. So great is the concern over this aspect of the legislation that UNHCR has announced its intention to seek changes to the Government's proposal.[2]

Australia's proposed use of Nauru as a base for processing boat arrivals is another such side-stepping of our moral responsibility for the welfare of asylum seekers. While our Government is apparently not willing to undertake the blatant contravention of the *Convention* to its letter by returning asylum seekers directly to their country of origin, this legislation shows that we are willing to remove them to our impoverished neighbours who are not bound by the same international laws.

The legislation shows an unacceptable overlap between the contemporary demands of Australia's international diplomatic agenda, and our commitment to meeting the genuine needs of human beings in distress. It is clear that this Bill, if passed, will engender a situation wherein our international humanitarian obligations to refugee men, women and children could be over-ridden by the demands of transient political concerns. A policy of withdrawing the protection of Australian law on the suggestion that some asylum seekers are less worthy of Australian support, dependent upon the state of our relationship with their country of origin rather than on the legitimacy of their experience of oppression and abuse, is immoral and contrary to the interests of the nation's heart.

2. ADMINISTRATIVE CONCERNS

Retrospective Legislation

As a more particular criticism of the proposals, we believe that specific administrative provisions of the legislation are inappropriate. One area of concern is the retrospective nature of the legislation, dating as its provisions will from the Government's announcement of its intention rather than the Parliament's assent to its plan. As such, it captures people who would otherwise be entitled to the superior protections of Australian law as it was in place at the time of their landing within the Australian migration zone. In particular, asylum seekers who have lodged a protection visa application between the 13th April 2006 and the time of the legislation's taking effect, and whose application has not been progressed, will be subject to the new laws.

This is an entirely inappropriate arrangement, dependent as progression of visa applications is upon the Department of Immigration and not merely upon the asylum seeker involved. Refugees who arrived and lodged applications according to the law as it existed, will be denied access to Australian visas on the basis of the Department's actions in processing or not processing their application, and not their own; they will be deported to offshore detention and denied Australian visas despite having acted in good faith and with due attention to Australian laws at the time of their application.

In addition, asylum seekers arriving after this date whose visa application has been rejected at the first instance, and whose appeal has not progressed before the

[2] UNHCR briefing notes, 12th May 2006

implementation of the legislation, will apparently be denied their current right to appeal the rejection of their claim. This is of particular concern in the case of people who have a need for protection which is not captured by our obligations under the *Refugee Convention* but by our other treaty obligations, for example, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, or the *Convention Relating to the Status of Stateless Persons*. While Australia is without a system of complementary protection, these claims are forced through an inappropriate system and not heard on their merits until a Section 417s application is made for Ministerial intervention. This process can take many years, and it is certain that humanitarian applicants who enter Australia between the 13th of April 2006 and the date of the Bill's taking effect, would not have sufficient time to progress through the current system to a satisfactory conclusion.

We are generally concerned about retrospective enactment of legislation of any kind, as it almost certainly involves penalising people for actions that were undertaken in good faith and within the confines of the existing law. Asylum seekers in need of protection, who have applied in good faith through the Australian legal system as it existed contemporaneously, should not be punished by the withdrawal of their rights. It seems particularly cruel that people should be denied protection due to the nature of their claim (humanitarian rather than *Convention*-based) and the current inadequacies of the visa system.

Henry VIII Clause

Another key problem with this amendment stems from the inclusion of what is sometimes known as a Henry VIII clause, allowing the delegation of legislative power to a non-legislative body. Clause 44(2) delegates extraordinary legislative powers to the Department, by providing for the consequential and transitional requirements of the Act, "including the modification of any Act", to be dealt with through regulatory processes.

We believe that such a provision is unacceptable, especially considering the fraught and contentious nature of this legislation, and this Bill's far-reaching effects on Australia's international human rights obligations. In effect, this Bill has been created with the express understanding that it would supercede any current legislative requirements that would otherwise infringe on its operation, and that the Department, in writing the regulations to the Bill, would be able to remove or alter any previous legislation of the Parliament that would hinder the Bill's practical intent.

Parliamentary sovereignty must remain a fundamental precept of Australian law, as a system providing transparency and accountability. Delegating the primary function of Parliament to a Department would allow the Department to alter legislation without public input or scrutiny, and without the obligation to undertake inquiries and solicit submissions such as this one. It is not in the public interest to allow any Government Department the freedom to regulate the legislative environment, rather than being itself regulated by Parliamentary legislation.

3. REFUGEE WAREHOUSING

The Uniting Church is especially concerned about the potential of this Bill to effect the indefinite detention of refugees in offshore centres. Specifically, the legislation enacts a situation wherein asylum seekers, once deported from Australia, will have their refugee claim processed at offshore facilities and not according to Australian law. Once determined to be 'genuine refugees', they will not be automatically entitled to protection from Australia, as is currently the case; rather, refugees' only option will be to apply for resettlement to other countries as offshore applicants.

As such, refugees will have no choice but to remain in places such as Nauru, while their applications for resettlement are processed. It is notable that this Bill fails to address any issue of timeframe for resettlement in these third nations. The Uniting Church is extremely concerned for the welfare of refugees in this situation, who would be 'warehoused' without adequate provision for resettlement.

'Refugee warehousing' is well recognised as the de facto outcome in the case of refugees who cannot return home, and who will not be accepted by another nation. The term describes the practice and politics of isolating large populations of displaced persons in camps or segregated settlements, such as would be the situation in our offshore detention centres on Nauru, Manus Island and Christmas Island. Warehousing keeps refugees in protracted situations of poverty, immobility and economic dependence, with neither freedom of movement nor access to basic state services. People in these situations are deprived of their basic rights under the *1951 Refugee Convention* and the *1967 Protocol Relating to the Status of Refugees*, which set out the entitlements of refugees to gainful employment, freedom of movement, and free and equal access to basic state supports including education and welfare assistance. In addition, there is substantial evidence to suggest that warehousing situations produce and encourage corruption, political and ethnic violence, and violence against women.[3]

The Uniting Church opposes the practice of 'refugee warehousing', and is particularly concerned that the Australian Government is involved in maintaining such a situation in its processing facilities on Nauru. In 2005, the Assembly Standing Committee of the Uniting Church in Australia committed the Church to condemn refugee warehousing practices as "an infraction of international refugee rights and a waste of human potential"[4]. Australia's prior experiment with the 'Pacific Solution' has shown that detention on Nauru is an extremely harmful experience for those refugees involved[5]. It is unacceptable that we should devolve our obligation to people in need by allowing them to remain indefinitely on Nauru.

[3] M. Smith (ed) "Warehousing Refugees: a denial of rights, a waste of humanity" *World Refugee Survey*, 2004

[4] *Refugee Warehousing*, resolution of the Assembly Standing Committee, Uniting Church in Australia 05.48, July 2005

[5] see A Just Australia, "Two Years and still counting: the Nauru detainees", AJA December 2003

4. ACCESS AND TRANSPARENCY

The Tyranny of Distance

Currently, the Uniting Church is heavily involved in care of and advocacy for the rights of asylum seekers and refugees. Uniting Church members, groups, congregations, and agencies work to provide support to asylum seekers and refugees in the community and in detention. In many cases, non-government organisations (NGOs) and churches provide services and support that would otherwise not be available. These include financial and legal support and advocacy, casework, linguistic support, and emotional and spiritual support. This pastoral care is extremely important for refugees and asylum seekers, many of whom have been subject to torture and trauma and who are destitute.

Additionally, non-government organisations play an important role in monitoring the welfare of detainees in immigration detention centres. The involvement of Church and other community organisations is essential to maintaining transparency of operations and providing feedback about the suitability and adequacy of particular aspects of the detention process.

Deporting and warehousing asylum seekers in remote offshore centres will reduce the ability of NGOs and churches to monitor and assist in maintaining the welfare of detainees. The expense and difficulty involved in gaining visas, accommodation and airfares, and entry to externally-administered offshore centres for support workers is extreme. Our key concern is that without NGOs involved the welfare of asylum seekers will suffer.

Parliamentary and Departmental Reporting Arrangements

We note that new part 8D of the *Act* would require the Minister to receive, and to table in Parliament, a report as to the status of the program over the past financial year. We welcome the measure of transparency that this would bring to the offshore detention process. However, this section of the Bill is inadequate in that it does not require the reporting process to provide an assessment of the ongoing suitability of arrangements for detainees, other than through an initial assessment that the country of detention fulfils the criteria laid out in S198A (3) of the *Act*. While S486R (4) allows this information to be included at the Secretary's discretion, there is no compulsion for this to occur. In addition, there is no compulsion for the Minister to take this report into account when determining alterations or improvements to the system in place.

5. MINISTERIAL POWER

We note with concern the further concentration of power in the hands of the Minister without setting in place stringent and transparent measures of public accountability. The Minister would now be given the power to declare 'a specified class of person' to be exempt from deportation. In contrast to previous Ministerial powers to grant visas, this particular power does not appear to be specifically non-compellable, or subject to a 'national interest' test. The explanatory memorandum states that this power "will

provide flexibility to avoid the regime being extended to those not intended to be covered by the changes", without further explanation.

The intention of this power is unclear. It could be used to fulfil the stated principle of the *Migration Act* as expressed in S4AA, "that a minor shall only be detained as a measure of last resort", by exempting all minors from deportation and offshore detention. On the other hand, it could be utilised in the service of foreign policy initiatives; it could be used to exempt asylum seekers from a particular nation or background, and thus discriminate against those who are not 'exempted' from the deportation regime.

RECOMMENDATION: That the Senate reject this Bill in its entirety.

TIME CONSTRAINTS

UnitingJustice Australia would like to express its concern at the short space of time allowed for this investigation into a set of sweeping changes to Australia's migration program. We believe that the far-reaching implications of this Bill merit an in-depth process of inquiry and the canvassing of community and expert opinion. We note that brevity has been a recent trend in Parliamentary inquiries, and are concerned that it is not conducive to receiving well-considered and high quality submissions.

As its stands, time constraints have meant that we have been unable to address the provisions of the Bill in as much detail as we believe such a Bill requires.

RECOMMENDATION: Future parliamentary inquiries should be conducted over a more reasonable and appropriate timeframe, in order to allow the Committee to consult widely on the implications of the Bill and to facilitate better community involvement in the process of governance.

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