NATIONAL COUNCIL OF CHURCHES IN AUSTRALIA ('NCCA')

SUBMISSION TO THE INQUIRY INTO THE PROVISIONS OF THE MIGRATION AMENDMENT (DESIGNATED UNAUTHORISED ARRIVALS) BILL 2006

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1. Summary of key recommendations

The National Council of Churches in Australia (NCCA) recommends that:

1. the Government withdraw the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*.

2. Australia adopt an approach of international co-operation and mutual obligation, working with the UNHCR, to protect people, to fulfil the best refugee processing responsibilities and seek peaceful resolution of those causes that compel people to flee persecution.

3 the Ministers for Defence and Justice and Customs quickly release to the public the guidelines for “rules of engagement” of the Australian navy and coastguard with boats, especially those carrying asylum seekers, entering Australian waters and the guidelines in sharing intelligence information with other countries on such boats.

2. Background

The NCCA welcomes the opportunity to submit its views to the Senate Legal and Constitutional References Committee, as it enables the NCCA to contribute the knowledge it has gained from its involvement in refugee and asylum issues since 1948.

The NCCA is comprised of 15 major Christian churches working together to strengthen relationships and understanding of each other and to fulfill common witness, mission and service. Through the NCCA, member churches come together to break down the structures that create and perpetuate poverty, oppression, injustice and division.

The National Program on Refugees and Displaced People operates under the Christian World Service Commission (CWS) of the NCCA. It is concerned with policy relating to refugees, asylum, settlement, access and equity. It is also involved in awareness raising, education, community development and

advocacy. This work is done in partnership with the State Councils of Churches, which each have a refugee program that maintains close links to the community and involves member churches in providing services to refugees and asylum seekers.

The NCCA also works in partnership with national councils of churches around the world, regional councils, such as the Christian Conference of Asia, and the World Council of Churches' Global Ecumenical Network on Uprooted People, which brings together regional working groups on uprooted people.

3. Opposition to the "Pacific Solution" policy –past and proposed

The NCCA is strongly opposed to the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006***.** If passed this Bill would see an extended and even more troubling "Pacific Solution" because it is likely to now include the diversion of refugees fleeing directly to Australia. The NCCA, like the UNHCR, is concerned that this approach will violate Australia's obligations under Article 31 of the 1951 Refugee Convention. In short, Article 31 states that contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who come directly from a territory where their life or freedom was threatened. Previously, the "Pacific Solution" was justified by the Government as preventing "secondary movement" of asylum seekers.

Under this Bill even the Australian mainland would be excised from our migration zone. The Australian navy again would be used to intercept and remove asylum seekers attempting to reach Australia to the Pacific island of Nauru for refugee determination processing. Those asylum seekers would be held on Nauru- effectively a form of indefinite detention even though there may be "day release"- until those determined to be refugees are resettled in a "third country" or unsuccessful applicants are returned to their home countries.

The NCCA has opposed the "Pacific Solution" concept of off-shore processing centres since its introduction in 2001. This opposition also reflected the deep disquiet of our partner Pacific churches and the World Council of Churches. Our arguments against Australia's "Pacific Solution" were provided in detail on pages 20 to 22 of the NCCA's submission to this Committee's recent *Inquiry into the administration and operation of the Migration Act 1958***.** This submission, numbered 179, can be found at: http://www.aph.gov.au/Senate/committee/legcon_ctte/migration/submissions/sub179.pdf.

In summary, the NCCA expressed concern that the Pacific Solution:

- went against the spirit of the United Nations' 1951 Refugee Convention;
- set a poor precedent for other countries;
- harmed Australia's international reputation;
- caused distortions in the domestic politics of Pacific island neighbours in the large offers of conditional development aid;
- had serious practical drawbacks in the use of inferior processing due to lack of appeal provisions and inadequate legal assistance and Nauru not being a signatory to the Refugee Convention;
- distorted Pacific approaches to refugees;
- created strong Pacific opposition;
- lacked transparency and disproportionately allocated resources.

4. Explanation of objections to this Bill

The NCCA's concerns with the proposed *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* are explained below.

4.1. Undermining a co-operative approach to international burden sharing

Australia has an international legal obligation to provide protection to refugees who arrive on our shores seeking protection. It undermines a co-operative approach to responsible burden-sharing for Australia to divert our responsibilities to a smaller, financially vulnerable neighbour and to insist that anyone found to be a refugee should first be resettled in "third countries" and only in Australia as a last resort.

4.2. Danger of return to indefinite detention on Nauru with inadequate facilities

The proposed legislation is likely to result in an unacceptable return to indefinite detention of refugees on Nauru. It is likely this will include families and children. This violates the spirit of the *Migration Amendment (Detention Arrangements) Act 2005*, promoted by Petro Georgiou and his colleagues, with cross-party parliamentary and overwhelming community support, that " as a principle…a minor shall only be detained as a measure of last resort".

Past experience shows that asylum seekers left on Nauru for many years suffered severe psychological damage. In October 2005 the Minister for Immigration agreed to bring to Australia 25 of 27 asylum seekers detained for years on Nauru due to their serious mental health problems. Thirteen of the 27 finally had been found to be refugees, after status processing reviews. There were also concerns about water quality and access to appropriate medical care and legal and other advice.

There is no commitment from Australia to set an acceptable processing time limit, which, if exceeded, would see those asylum seekers brought from Nauru to Australia to access our full on-shore processing system. Even if the actual processing is done more quickly than in the past refugees could still face years on Nauru if countries refuse them speedy or any resettlement. There is no commitment from Australia to resettle those found to be refugees within a reasonable and short timeframe. On the contrary, the Australian Government seeks to avoid any resettlement commitment, on the unlikely scenario that other governments will agree to take over what they will rightly regard as Australia's responsibilities. This is despite that in the previous use of the "Pacific Solution" about 95% of recognised refugees eventually were accepted into Australia or New Zealand, despite external processing.

4.3. Inferior refugee processing system on Nauru

Asylum seekers on Nauru will not be entitled to the full range of appeal options eligible to asylum seekers processed in Australia. Off shore detainees will not automatically have access to the Refugee Review Tribunal, the courts (if needed) or the exercise of Ministerial discretion to be accepted on humanitarian grounds broader than the strict refugee definition.

On April 18 the UNHCR expressed concern about Australia's off-shore processing proposal, stating "it would be an unfortunate precedent, being for the first time, to our knowledge, that a country with a fully functioning and credible asylum system, in the absence of anything approximating a mass influx, decides to transfer elsewhere the responsibility to handle claims made actually on the territory of the state".

Clearly the UNHCR will be extremely unhappy with any Australian Government pressure for UNHCR to do the refugee status determination processing on Nauru. The Australian Government's other proposed option of having status determination done by "trained Australian officers using a process modelled clearly on that used by UNHCR" is inferior in that it lacks the important independent appeals safeguards available to asylum seekers being processed in Australia.

This is demonstrated by statistics provided by David Manne of the Refugee and Immigration Legal Centre (RILC) in Melbourne in his May 5, 2006 address "*Boatloads of Extinguishment*? " at the forum on the proposed offshore processing of "Boat People" at the Castan Centre for Human Rights Law. To quote:

> *"…consider that in the last three years, the Refugee Review Tribunal ("RRT") (the independent review body which will not be available to applicants at all) has overturned 92% of refusals by the Department of Immigration officials of Iraqi and Afghan Protection Visa applications. In all, 3,200 people have been granted protection from returning to post-regime change catastrophes of Afghanistan and Iraq, only after a decision by the RRT to overturn the Department of Immigration's rejection. In other words, in the last three years, the safety mechanism of independent administrative review has resulted in 3,200 people who were found to face a real chance of being persecuted if returned to their homeland ultimately being granted protection."*

These inadequacies are not overcome by provision in the legislation to bring asylum seekers to Australia for a temporary purpose, such as to receive medical treatment, and to gain access to the Refugee Review Tribunal if they remain in Australia for over six months or the announcement that the Minister can exercise her discretion to process an asylum seeker in Australia. There is no clarity as to which factors will trigger the use of the Minister's discretion to grant asylum seekers access to Australia's on-shore refugee processing system.

4.4. Inability to achieve Palmer Inquiry standards of detention reform on Nauru

The positive reforms and strict accountability measures proposed for the Australian detention system by the 2005 Palmer Inquiry and accepted by the Australian Government will not be achievable on Nauru. The Palmer Inquiry expressed concern about the exercise of exceptional power, without adequate training and oversight, and with no genuine quality assurance or constraints on those powers.

The Palmer Inquiry highlighted: the need for adequate mental and other health care for asylum seekers; the benefits of a case management model; the need for quick processing of asylum applications and support for adequate external oversight and professional review of standards and arrangements, including one focusing specifically on health matters to strengthen the existing roles of the Immigration Detention Advisory Group (IDAG) and the Commonwealth Ombudsman. The delivery of such proposed standards for Australian detention centres are most unlikely to be achieved on Nauru.

4.5. The need for genuinely independent oversight on Nauru

Very importantly, based on past experience, independent media, church, welfare and human rights agency access to, and monitoring of, asylum seeker detention facilities is vital. Unfortunately, it has proved very difficult on Nauru. Frankly, such access and scrutiny was deliberately discouraged and blocked by relevant Nauruan and Australian authorities for a long time. What will be the arrangement if asylum seekers are again detained on Nauru?

For those detained in Australian mainland detention centres efforts at further independent oversight, though unfortunately always reliant on unenforceable Ministerial discretion, were attempted in the *Migration Amendment (Detention Arrangements) Act 2005*. This is through the roles of the Commonwealth Ombudsman and the Immigration Departmental Committee, which is headed by the Secretary of the Department of Prime Minister and Cabinet.

The proposed Bill's requirement that the Immigration Department report annually on the off-shore processing arrangements and refugee assessment outcomes, and for those reports to be tabled in both houses of parliament is a weaker protection than Ombudsman and other oversight, investigation and recommendations.

4.6. Danger of refoulement as Nauru is not a signatory to the 1951 Refugee Convention

The Federal Government argues the Bill meets Australia's obligations under the Refugee Convention and facilities on Nauru will provide adequate status assessment procedures, protection and relevant human rights standards in meeting that protection. However, the earlier concerns listed and Nauru not being a signatory to the 1951 Refugee Convention, and so under no legal obligation not to return or expel refugees, cast strong doubt on these assumptions.

4.7. Concerns on the use of Australian navy and coastguard vessels and information-sharing

Whether this legislation is passed or not, the NCCA seeks urgent clarification of the "rules of engagement" for the Australian navy and coastguard and the protocols for the use and sharing with other governments of intelligence and other information of our military or customs officers. Such rules and protocols must avoid any possibility of the forcible return (refoulement) of refugees to places of feared persecution. It is vital that the Ministers for Defence and Justice and Customs quickly and publicly reveal such "rules of engagement" and information sharing protocols. While this concern is not dependent on the passage of this Bill, if the Bill becomes law the political climate will be heightened on these issues. Australian navy and coastguard personnel will face difficult moral and legal responsibilities. It is important that those personnel and the Australian public are clear as to the policy and practice of the Australian Government on these matters which risk potential violation of Article 33 of the Refugee Convention. Article 33 prohibits the expulsion or return ("refoulement") of a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened.

5. Conclusion

The NCCA reiterates our strong concern and calls for the withdrawal of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. We thank you for the opportunity to comment on this very important matter. We are happy to provide further information on request.

Yours sincerely,

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