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UnitingJustice AUSTRALIA

SUBMISSION TO THE SENATE STANDING COMMITTEES ON LEGAL AND CONSTITUTIONAL AFFAIRS

MIGRATION AMENDMENT (REGAINING CONTROL OVER AUSTRALIA'S PROTECTION OBLIGATIONS) BILL 2013

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1 | Executive Summary

UnitingJustice Australia welcomes the opportunity to provide a submission to the Senate Standing Committees on Legal and Constitutional Affairs in their inquiry into the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013* (hereafter the *Protection Obligations Bill*).

Reverting to a system that is dependent upon Ministerial intervention powers will result in a lack of transparency, accountability and efficiency. It will also increase the hardship faced by vulnerable asylum seekers and will place Australia in grave danger of violating its *non-refoulement* obligations. UnitingJustice Australia believes that a legislative system of complementary protection is a crucial aspect of upholding and respecting the human rights owed to asylum seekers.

2 | Introduction

UnitingJustice Australia is the justice policy and advocacy unit of the Assembly of the Uniting Church in Australia (the national Council of the Uniting Church), pursuing matters of social and economic justice, human rights, peace and those concerning the environment. It works in collaboration with other Assembly agencies, Uniting Church synod justice staff around the country, and with other community and faith-based organisations and groups. It engages in advocacy and education and works collaboratively to communicate the Church's vision for a reconciled world.

This commitment arises from the Christian belief that liberation from oppression and injustice is central to the outcome of the work that God has undertaken through Jesus Christ. The Uniting Church in Australia is committed to involvement in the making of just public policy that prioritises the needs of the most vulnerable and disadvantaged in our society.

In 1977, the Inaugural Assembly of the Uniting Church issued a Statement to the Nation. In this statement, the Church declared "our response to the Christian gospel will continue to involve us in social and national affairs."[1]

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 direct services to refugees and asylum seekers for many years 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.

1 http://www.unitingjustice.org.au/uniting-church-statements/key-assembly-statements/item/511-statement-to-the-nation

In July 2002, the Uniting Church released its Policy Paper on Asylum Seekers, Refugees, and Humanitarian Entrants.[2]

In this paper, 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.

The Uniting Church is committed to working for a compassionate, socially responsible society and government that takes seriously its national and international obligations. We have recently had cause to express our disappointment in the policy decisions of the current Government with regards to asylum seekers and refugees.[3]

We believe that the current political discourse has served only to harden the hearts of many Australians towards those who are seeking a life free from persecution, suffering and hardship. Even the title of the Bill currently before the Committee employs a discourse that demonises asylum seekers and leads people to believe that our borders are somehow under 'threat' from those seeking asylum, or that those asylum seekers whose case for protection cannot be easily assessed under the Refugee Convention alone are not worthy of protection. UnitingJustice is deeply troubled by these insinuations.

UnitingJustice is seriously concerned by the Statement of Compatability with Human Rights accompanying the *Protection Obligations Bill*, and disconcerted by the conclusions drawn; specifically, that the proposed legislation "is compatible with human rights and freedoms."[4] Indeed, we firmly believe that the *Protection Obligations Bill* places Australia at grave risk of breaching our obligations under the following treaties:

- The Convention Relating to the Status of Refugees (Refugee Convention);
- The Convention Relating to the Status of Stateless Persons;
- The Convention on the Reduction of Statelessness;
- The International Covenant on Civil and Political Rights (ICCPR);
- The United Nations Declaration on Human Rights (UDHR);
- The International Covenant on Economic, Cultural and Social Rights;
- The Convention on the Rights of the Child (CRoC); and
- The Convention Against Torture and the Optional Protocol to the Convention Against Torture (CAT).

Additionally, we believe this risk may extend to:

- The UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention; and
- The Australian Government's Identification and Support of People in Immigration Detention Who are Survivors of Torture and Trauma.

2 http://www.unitingjustice.org.au/refugees-and-asylum-seekers/uca-statements/item/477-asylum-seeker-and-refugee-policy

3 http://www.unitingjustice.org.au/refugees-and-asylum-seekers/news

4 Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, Explanatory Memorandum, Attachment A, p. 1.

It is in line with the past work and future commitment of the Uniting Church, and in light of the aforelisted international human rights treaties, that we make the following submission to the Inquiry into the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*.

3 | Background

In December 2013, the Minister for Immigration and Border Protection articulated the Government's position on the issuing of protection visas:

> The previous minister for immigration, now Manager of Opposition Business, handed out 539 permanent protection visas during the few short months he sat in the chair. He also had the highest month of arrivals of any month under their deplorable record in government of 4,239...
>
> For six years those opposite ran a visa shop for people smugglers. That shop is now shut under this government.
>
> We are ending the tick-and-flick process that led to more than 90 per cent of claims just being rushed through the system because the visa shop owners over there could not be too quick or too hasty to hand out those visas to them. [5]

This statement - devoid as it is of an acknowledgement of the rights of asylum seekers or our obligations under international law - serves only to support our conclusion that the *Protection Obligations Bill* is simply another tool in the Government's arsenal for reducing the number of protection visas it is prepared to provide to those seeking asylum. Other than capitulating to the wishes of those constituents who neither understand nor respect the international protection framework, UnitingJustice sees no reason for a government to frame its 'success' or 'failure' in terms of the number of protection visas issued.

To date, 57 protection visas have been granted on the grounds of complementary protection - a small proportion of the total protection visas granted. Despite this small number, UnitingJustice believes that the legislative enshrinement of a system of complemetary protection is a vital lifeline for those who do not meet the refugee definition under the Refugee Convention but trigger our protection obligations under other treaties.

With the Government committed to the offshore processing of asylum seekers, it is important to note our concerns relating to complementary protection on both Nauru and Manus Island.

While Nauru is a party to the CAT, they are yet to ratify the ICCPR, and complementary protection obligations are not enshrined in law. Instead, there is provision for complementary protection on a discretionary basis; however, there is no process outlined for determining whether a person is in need of complementary protection. Papua New Guinea is a party to the ICCPR, but not the CAT. Like Nauru, complementary protection obligations are not enshrined in law, and there is no process for determining whether a person is in need of complementary protection. Given the lack of protections offered by the two countries charged with detaining the vast number of asylum seekers seeking protection in Australia, it is vitally important that Australia maintain its current system of complementary protection.

5 http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/70599486-f0f8-459f-87b4-af23cfca767f/0082/hansard_frag.pdf;fileType=application%2Fpdf

The *Protection Obligations Bill* is designed to:

> Give effect to the government's position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that *non-refoulement* obligations are a matter for the government to attend to in other ways.
>
> Instead, Australia's *non-refoulement* obligations under the CAT and the ICCPR will be considered through an administrative process, as was the case prior to March 2012. Where the Minister is satisfied that the person engages Australia's *non-refoulement* obligations under the CAT and the ICCPR, it is then available to the Minister to exercise his or her personal and non-compellable intervention powers in the Act to grants that person a visa.[6]

Complementary protection, which this amendment seeks to remove from the Migration Act, refers to a situation in which a person enters another country, cannot be protected under the Refugee Convention, but is owed protection under another international treaty.

In 2002, the UNHCR requested that States adopt a programme of action as outlined in The Agenda of Protection, which asks Member States to:

> consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary grounds of protection.[7]

This single system was successfully adopted in Australia in March 2012. Prior to the introduction of complementary protection in Australia, responsibility for assessing claims for refugee status that fell outside the definition of the Refugee Convention fell to the Minister.

The discretionary mechanism employed in Australia prior to 2012 was criticised in governmental reviews, UNHCR assessments and in commentary by academics, practitioners and advocates, for its lack of consistency and transparency.[8] UnitingJustice is deeply concerned that the amendments proposed by the *Protection Obligations Bill* will see us return to the flawed pre-2012 system.

4 | The principle of *non-refoulement*

Non-refoulement is a central principle upon which refugee law rests. Until 2012, Australia relied upon ministerial intervention in an attempt to satisfy its *non-refoulement* obligations - a process that received widespread criticism from "several parliamentary inquiries, United Nations treaty monitoring bodies, refugee and human rights advocacy groups" and from the then-Minister for Immigration and Citizenship.[9]

6 Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, Explanatory Memorandum, p.1.

7 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F7144%2F0005%22

8 Senate Select Committee on Ministerial Discretion in Migration Matters (2004), Inquiry into Ministerial Discretion in Migration Matters; Australian Senate, Legal and Constitutional References Committee (2000), A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes; McAdam, J. (2006), "Seeking Asylum under the Convention on the Rights of the Child," 14 International Journal of Children's Rights, 251; UNHCR (2009), Draft Complementary Protection Visa Model: Australia, UNHCR Comments.

9 Parliament of Australia, Department of Parliamentary Services (2009), "Complementary protection for asylum seekers: overview of the international and Australian legal frameworks," 30 September.

Australia's *non-refoulement* obligations are outlined most clearly in the Convention Against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR), and the Convention Relating to the Status of Refugees (Refugee Convention).

Article 3 of the CAT provides:

> No State Party shall expel, return ("refoule") or extradite a person to another State where there are substantial grounds for believing that he (sic) would be in danger of being subjected to torture.

Article 7 of the ICCPR provides:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 33(1) of the Refugee Convention recognises *non-refoulement* as a fundamental aspect of refugee protection, where the expulsion of a refugee would lead to his or her life being threatened on account of their race, religion, nationality or membership of a political or social group.

In 2008, the UN Committee Against Torture recommended that:

> [Australia] should explicitly incorporate into domestic legislation, both at Federal and State/Territories level, the prohibition whereby no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture (*non-refoulement*), and implement it in practice. The State party should also implement the Committee's previous recommendations formulated during the consideration of the State party's second periodic report to adopt a system of complementary protection ensuring that the State party no longer relies on the Minister's discretionary powers to meet its *non-refoulement* obligations under the Convention.[10]

In light of the recommendations that were made prior to 2012 by various UN bodies, and the clear obligations outlined in various human rights treaties, UnitingJustice does not believe that the amendments proposed in the *Protection Obligations Bill* are adequate to ensure the principle of *non-refoulement* is upheld and respected within our refugee protection system.

5 | The rights of children

The *Protection Obligations Bill* will further erode the rights of child asylum seekers. Under the CRoC, a broad range of protection rights are afforded to this most vulnerable group. The Committee on the Rights of the Child has interpreted Articles 6 and 37 of the CRoC as entailing an obligation of *non-refoulement*:

> States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.
>
> In the case that the requirements for granting refugee status under the 1951 Refugee Convention are not met, unacoompanied and separated children shall benefit from available forms of complementary protection.[11]

10 Committee Against Torture (2008), "Concluding Observations: Australia," UN Doc CAT/C/AUS/CO/3

11 Committee on the Rights of the Child (2006), "General Comment No 6: Treatment of unaccompanied and separated children outside of their country of origin," UN Doc CRC/GC/2006/6

Article 3(1) of the CRoC prioritises the needs of the child when considering legislation that will impact them:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[12]

The CRoC also clearly articulates the importance of the family unit to the health, wellbeing and development of children:

> The family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.
>
> Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.[13]

Given these clear obligations to the fundamental rights of children and the protection of the family unit, UnitingJustice is deeply concerned then that the *Protection Obligations Bill*:

> will mean that membership of the family unit of a person in respect of whom Australia has *non-refoulement* obligations will no longer expressly provide an avenue to visa grant for a family member to also remain in Australia.[14]

This amendment seems punitive in the extreme, and as the legislation will be retrospectively applied to cases not yet finalised, there is the potential that many children who have been awaiting family reunion will now be denied that opportunity.

6 | Impact of prolonged detention

It is well established that our immigration detention network directly contributes to significant mental and physical health problems for asylum seekers. This is particularly true for those detained for lengthy periods of time.

In 2011, UN Human Rights Commissioner Navi Pillay criticised the Australian Government's system of mandatory immigration detention. Noting the "grim despondency" of detainees, she said, "thousands of men, women and – most disturbingly of all children – have been held in Australian detention centres for prolonged periods, even though they have committed no crime. Mandatory detention is a practice that can lead – and has led – to suicides, self-harming and deep trauma."[15]

A recent survey of several international studies on the mental ill health of asylum seekers in detention noted:

> All studies found high levels of emotional distress among individuals who were in detention or who had previously been detained. Among children, mental health difficulties in combination with developmental and behavioural problems were observed. Although in its infancy, research into the effects of detention has used increasingly

12 http://www.ohchr.org/en/professionalinterest/pages/crc.aspx

13 Preamble, http://www.ohchr.org/en/professionalinterest/pages/crc.aspx

14 Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, Explanatory Memorandum, Attachment A

15 http://www.abc.net.au/news/stories/2011/05/25/3226610.htm

> sophisticated methods in order to attempt to identify and isolate the independent effects of numerous adverse circumstances on the mental health of these individuals. This has produced evidence that the findings relate in part to pre-detention trauma, in addition to detention itself having an independent and significant adverse effect on mental health… [Additionally] time in detention was directly related to the severity of symptoms of depression, anxiety and PTSD.[16]

The previous administrative system utilised for determining complementary protection claims was grossly ineffecient, leading to extended periods of detention for asylum seekers.

UnitingJustice is deeply concerned that the *Protection Obligations Bill* will see a return to an arbitrary system of administrative decisions that will serve only to increase the length of time vulnerable asylum seekers spend in detention, and increase the rates of mental and physical ill health among these individuals.

7 | Conclusion

Former Immigration Minister, Chris Evans, regarded the administrative burden of non-legislatively enshrined complementary protection as being excessively high. He also expressed concern about the investment of decision-making power in a single individual:

> I have formed the view that I have too much power … in terms of the power given to the minister to make decisions about individual cases. I'm uncomfortable with that, not just because of concern about playing God, but also because of the lack of transparency and accountability for those decisions.[17]

UnitingJustice does not believe that the *Protection Obligations Bill* will enable Australia to meet even the minumum of requirements for the protection of refugee rights under international law. The implementation of administrative procedures such as the one proposed by the *Protection Obligations Bill* is yet another attempt to use punitive measures as a deterrent to future arrivals.

The non-compellable, non-delegable, and non-reviewable powers that will be conferred upon the Minister should this legislation be adopted will lead - once again - to a system of protection that lacks transparency, is grossly inefficient, and fails to protect the rights owed to refugees and asylum seekers.

16 Robjant, K., Hassan, R. & Katona, C. (2009). "Mental health implications of detaining asylum seekers: A systematic review," British Journal of Psychiatry, 194, 306 – 312.

17 http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/72de5436-cc84-439a-b82f-89066b3333e9/0041/hansard_frag.pdf;fileType=application%2Fpdf