

**A Joint Submission**

from the

***Melbourne Catholic Commission for  
Justice, Development & Peace***

and the

***Melbourne Catholic  
Migrant & Refugee Office***

into the

**Senate Inquiry**

into the

**Administration and Operation of the Migration Act 1958**

**July 2005**

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## i. Executive Summary

1. The Melbourne Catholic Commission for Justice, Development & Peace (MCCJD), and the Melbourne Catholic Migrant & Refugee Office (MCMRO) recommends:
  - A provision be made in the Migration Act to give the courts the power in the appropriate circumstances to release people held in administrative custody under the legislation. This power should be available to the courts from the time such people are first detained under the Act.
  - The abolition of mandatory detention of all asylum seekers – whether men, women or children.
  - The abolition of the ‘7-day’ rule that may prevent some asylum seekers from ever receiving permanent protection.
  - The abolition of the ‘45-day’ rule as it places asylum seekers in the community without any means of financial support either through paid work or welfare payments.
  - Permanent protection should be provided to all asylum seekers who have been found to be refugees, irrespective of how they arrived in Australia.
  - The hierarchy of refugee protection visas should be dismantled so that particular asylum seekers are not discriminated against due to their mode of arrival.
  - A humanitarian solution should be developed for long-term detainees in Australian detention facilities both here and offshore on Nauru and Christmas Island.
  - Though the *Migration Amendment (Detention Arrangements) Bill 2005* endeavours to get all children with their families out of immigration detention, the changes only apply to children of asylum seekers. Rather than detaining children as the first option, the detention of children must only be accepted as an action of last resort.
  - Minimum standards of care and entitlements for people released on Class E Bridging Visas (BVEs) should include work rights, financial support (through Centrelink payments) and access to health care (through the Medicare system).
2. As members of the Justice for Asylum Seekers (JAS) Alliance, the MCCJDP and MCMRO recommend *The Better Way* as a viable alternative to mandatory detention that is cheaper and more humane. Though there are fewer people in immigration detention, the Australian Government should be encouraged to implement this program for managing the needs of asylum seekers while they undergo the refugee determination process. A revised strategy is required before the next wave of asylum seekers reach our shores.

## **ii. The Melbourne Catholic Commission for Justice, Development & Peace**

3. The Melbourne Catholic Commission for Justice, Development & Peace (MCCJDP) aims to help educate and give leadership to the Catholic and wider community in the gospel message of justice and in the social teachings of the Church. The MCCJDP's Charter requires it to work for justice in public, local and national structures. It seeks to achieve these ends through research, analysis, working with parish networks, public forums, schools and in the media. It actively seeks to explore ways that social justice can be improved in society and in the performance of mechanisms that have a role in public life. In addition to the promotion of and respect for universal human rights and standards, the MCCJDP uses the principles of Catholic social teaching to test the *justness* of public policy.

## **iii. The Melbourne Catholic Migrant & Refugee Office**

4. The Melbourne Catholic Migrant & Refugee Office (MCMRO) is an agency of the Catholic Archdiocese of Melbourne and is primarily concerned with the pastoral care of migrants and refugees in parishes. However, due to the changing nature of immigration and border protection, the issues go beyond the traditional Catholic immigrant. The MCMRO endeavours to provide advice and guidance from a Catholic perspective in response to policy and program issues relating to migrants, immigrants, refugees, asylum seekers, population and multiculturalism. Through other organisations, such as the National Council of Churches in Australia (NCCA) and Justice for Asylum Seekers (JAS), the MCMRO supports programs that raise social awareness and provide education and advocacy around the many issues pertaining to immigration and the treatment of asylum seekers in Australia today.
5. As Catholics, we are guided by the philosophies of the Gospel – to not mistreat the foreigner (Exodus 22:21 and Leviticus 19:33), to show love and compassion towards others especially those who have less than us (John 13: 34-35 and 1 John 3:17), and to welcome the stranger into our midst (Matthew 25:31-46).

## **iv. The Catholic Church and Migration**

6. Concern for migrants and refugees runs deep in the history of the Church. The story of the Holy Family fleeing to Egypt is an account of refugees fleeing persecution; and, like the Holy Family, contemporary refugees have been forced to leave their homes in fear of their lives.
7. Over the past 100 years, the Roman Catholic Church has spoken out strongly on a number of issues related to Migration. For example:

8. The Church on the mass movements of peoples:

*“In many regions of the world today people live in tragic situations of instability and uncertainty. It does not come as a surprise that in such contexts the poor and the destitute make plans to escape, to seek a new land that can offer them bread, dignity and peace. This is the migration of the desperate: men and women, often the young, who have no alternative than to leave their own country and venture into the unknown. Every day thousands of people even take critical risks in their attempts to escape from a life with no future”.*<sup>1</sup>

*“...it is very important that public opinion be properly informed about the true situation of the migrant’s country of origin, about the tragedies involving them and the possible risks of returning”.*<sup>2</sup>

9. The Church on the role of the State:

*“[Their] irregular legal status cannot allow the migrant to lose [their] dignity, since [they are] endowed with inalienable human rights, which cannot be violated nor ignored”.*<sup>3</sup>

*“Solidarity means taking responsibility for those in trouble. For Christians, the migrant is not merely an individual to be respected in accordance with the norms established by law, but a person whose presence challenges them and whose needs become a responsibility. “What have you done to your brother?” (Gn 4:9) The answer should not be limited to what is imposed by law, but should be made in the manner of solidarity”.*<sup>4</sup>

10. The Church on mandatory detention:

*“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>5</sup>

11. The Church in Australia on the detention of minors:

*“Mandatory detention is itself a matter of concern: alone among the nations, Australia excludes any discretion being exercised as to whether, in particular cases, detention may be inappropriate or should be abbreviated...The Church’s pastoral care of asylum seekers convinces us that detention, beyond the minimum time necessary for carrying out security and health checks, identity checks and the lodgement for Protection Visas, is deeply destructive of human dignity. This is particularly true of children”.*<sup>6</sup>

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<sup>1</sup> John Paul II, Message for Migration day, November 1999

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

<sup>3</sup> John Paul II, Message for World Migration Day 1995-6, *Undocumented Migrants*, July 1995

<sup>4</sup> John Paul II, Message for World Migration Day 1995-6, *Undocumented Migrants*, July 1995

<sup>5</sup> ‘Cor Unun’: *Refugees: A Challenge to Solidarity*, 1992

<sup>6</sup> Australian Catholic Bishops Conference, *Refugees and Asylum Seekers*, March 2002

12. With the weight of the Church's long established history of lending its moral voice and practical support to the cause of refugees and asylum seekers behind them, the MCCJDP and MCMRO are compelled to continue this tradition by contributing to this Senate Inquiry into the administration and operation of the Migration Act 1958.
13. Within the parameters of the present Inquiry, the MCCJDP and MCMRO seek to address, in particular, the following matters:
  - Australia's obligations under international law
  - The Rights of Refugees
  - The Rights of Children
  - Mandatory Detention
  - Judicial Powers
  - Temporary Protection Visas (TPVs)
  - Class E Bridging Visas (BVEs)
  - The 'Pacific solution'
  - Return Pending Bridging Visas (RPBVs)
  - Community Detention
  - Policy Recommendations

## v. Australia's obligations under international law

14. While members of the Legal and Constitutional References Committee will undoubtedly be well versed in Australia's general obligations under international law and, in particular, those related to migration matters, the MCCJDP and MCMRO believe there is value to be had at this particular juncture in the submission to document these obligations.
15. *Their inclusion provides a timely reminder that there are characteristics of Australian migration policy that are contrary to internationally accepted human rights standards.*

### a. General obligations

16. Australia has obligations under international human rights law as a result of its ratification of the United Nations Charter (UN Charter) and various human rights treaties, as well as the operation of customary international law. The nature of these obligations is such that Australia must respect, protect and ensure the enjoyment of human rights by all persons within its jurisdiction.<sup>7</sup> Failure to perform any one of these three obligations constitutes a human rights violation. Where a violation does occur, Australia has an international legal obligation to provide remedies to victims of the violation.<sup>8</sup>
17. The obligation to *respect* requires Australia to refrain from interfering with the enjoyment of rights. For example, the right to housing is violated if the State engages in arbitrary forced evictions.
18. The obligation to *protect* requires Australia to prevent violations of such rights by third parties. For example, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work.
19. The obligation to *fulfil* requires Australia to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights. For example, a failure to provide essential primary health care to those in need may amount to a violation.

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<sup>7</sup> In addition to the derivation of these duties from interpretation of international treaties, the non-binding 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 (3) *Human Rights Quarterly* 691, par 6, and Committee on Economic Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations*, Fifth Sess, E/19991/23, annex III (1990) confirm that these three duties exist with respect to all human rights.

<sup>8</sup> The right to an effective remedy is provided for in several international conventions. See eg *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, art 2(3)(a) (entered into force 23 March 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195, art 6 (entered into force 4 January 1969). See also comments of the Committee on Economic, Social and Cultural Rights regarding the same right under the International Covenant on Economic, Social and Cultural Rights: Committee on Economic Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, [pars 2-4, 9], E/C.12/1998/24, CESCR (3 Dec 1998); Committee on Economic Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations*, Fifth Sess, [par 5], E/19991/23, annex III (1990).

*b. Specific Obligations — Treaties*

20. Australia is a State Party to several human rights treaties. Consequently, Australia must act in accordance with the terms of these conventions and not engage in activity that might defeat their objectives and principles. Amongst others, Australia is a party to the following key human rights treaties:

<b>Treaty</b>	<b>Theme</b>	<b>Ratification by Australia (year)</b>
Charter of the United Nations (UN Charter)	General Human Rights	1945
International Covenant of Economic, Social and Cultural Rights (ICESCR)	Economic, Social and Cultural Rights	1975
International Covenant on Civil and Political Rights (ICCPR)	Civil and Political Rights	1980
Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	Torture	1989
Conventions on the Rights of the Child (CROC)	Children	1990
Convention relating to the Status of Refugees (Refugee Convention)	Refugees	1954
Protocol relating to the Status of Refugees (1967 Protocol)	Refugees	1967

*c. Customary International Law*

21. In addition to the human rights obligations derived from treaties, Australia must also abide by customary international law. Customary international law is derived from consistent State practice and the belief that States are bound by the rules that they observe. As such, it is not necessary for a State to publicly declare its commitment to standards of customary international law in order to be bound by them.<sup>9</sup>

22. The Universal Declaration of Human Rights (UDHR), which was proclaimed on 10 December 1948, represents a solemn and authoritative declaration of the duties of all States. While not all aspects of the UDHR may have attained the status of customary international law, it is widely accepted that at least some of the rights and obligations outlined in the UDHR have become part of customary international law. These include the obligations prohibiting:

- arbitrary deprivation of liberty (as reflected in article 3);<sup>10</sup>
- torture (as reflected in article 5);<sup>11</sup>
- racial discrimination (as reflected in article 2);<sup>12</sup> and
- slavery (as reflected in article 4).<sup>13</sup>

<sup>9</sup> Note, however, that customary international law does not bind a State in some circumstances where the State has consistently indicated its refusal to be so bound.

<sup>10</sup> *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 3, 42.

<sup>11</sup> *Ibid*

<sup>12</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 57.

<sup>13</sup> *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 3, 42.



23. It is also widely accepted that genocide and patterns of gross violations of internationally recognised rights are contrary to the norms of international law binding on all States.<sup>14</sup>

#### vi. The Rights of Refugees

24. There are a number of human rights directly applicable to the situation of refugees in detention and asylum seekers living in the community. These rights have been recognised in International Conventions and signed by the Australian Government as part of its commitment to respecting and promoting universal human rights. These rights are recognised in all states and territories.

25. Under the 1951 Refugee Convention as amended by the 1967 Protocol, Australia has protection obligations to any person who:

“...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of their nationality and is unable, or owing to such fear, is unwilling to avail themselves of the protection of that country ...”<sup>15</sup>

26. All asylum seekers are entitled to the full range of human rights set out in the various treaties to which Australia is a party and under customary international law. Where asylum seekers and refugees are within Australia’s territory and subject to its jurisdiction, Australia is legally obliged to ensure that these people are able to enjoy their human rights.<sup>16</sup>

27. When carrying out its international obligations to asylum seekers, Australia should:

- not impose penalties on refugees, on account of their illegal entry (article 31, Refugee Convention);
- not subject any person to arbitrary detention (article 9(1), ICCPR);
- treat detainees with humanity and with respect for the inherent dignity of the human person (article 10(1), ICCPR);
- provide the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children (article 16(3), UDHR, article 23(1), ICCPR and article 10(1), ICESCR);
- facilitate the assimilation and naturalisation of refugees (article 34, Refugee Convention);

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<sup>14</sup> Reservations to the Genocide Convention [1951] ICJ Rep, 23; s 702 of the Restatement (Third) of the Foreign Relations Law of the United States (1987).

<sup>15</sup> Article 1 Refugee Convention

<sup>16</sup> See, for example, art 2(1) ICCPR. See also various comments by the CESCR Committee and Human Rights Committee, eg: Human Rights Committee, *General comment No. 15: The position of aliens under the Covenant*, Twenty Seventh session(1986); CESCR, *General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)*, Sixth session, [par 13], E/1992/23 (1991).

- not expel or return a refugee to a country where his or her life or freedom would be threatened (on account of his race, religion, nationality, membership of a particular social group or political opinion) (article 33(1), Refugee Convention) or if there are substantial grounds for believing that he or she would be in danger of being subjected to torture (article 3(1), CAT);
- ensure that children seeking refugee status receive appropriate protection (article 22, CROC);
- ensure that in all actions concerning children, the best interests of the child is the primary consideration (article 3, CROC);
- not separate a child from his or her parents except where it is necessary for the best interests of the child (article 9, CROC);
- not deprive children of their liberty arbitrarily and ensure that detention of a child is only a measure of last resort and is for the shortest appropriate period of time (article 37(b), CROC);
- protect children from all forms of physical or mental violence, injury, abuse, or maltreatment (article 19(1), CROC);
- ensure that asylum seekers receive the protection of the law against attacks on their honour and reputation (article 17, ICCPR);
- ensure that any person whose human rights are violated has an effective judicial remedy, whether or not that violation is committed by an official of the State (articles 2(3)(a)&(b), ICCPR).

## **vii. The Rights of the Child**

28. The Convention on the Rights of the Child (CROC) provides for specific State obligations in respect of protecting the rights of children. As a party to the CROC, Australia's international human rights obligations include, among others, the duties to:
- ensure that the best interests of the child shall be a primary consideration in all actions concerning children (article 3(1));
  - ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision (article 3(3));
  - ensure that no child shall be deprived of his or her liberty arbitrarily, and ensure that the detention of a child shall be used only as a measure of last resort and for the shortest appropriate period of time (article 37(b)).
  - take all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (article 19(1));
  - provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing so as to ensure a standard of living adequate for the child's physical, mental, spiritual, moral and social development. In addition, States Parties shall secure the recovery of maintenance for the child from persons having financial responsibility for the child (article 27);

### viii. The Denial of Rights of Children in Detention

29. The Denial of Rights of Children in Detention is an issue of particular concern to the MCCJDP and MCMRO.
30. The Human Rights and Equal Opportunity Commission's *National Inquiry into Children in Immigration Detention Report*, 'A Last Resort', tabled in Federal Parliament on 13 May 2004, is most telling for the present discussion. The Commission found that Australia's immigration detention policy failed to protect the mental health of children, failed to provide adequate health care and education and failed to protect unaccompanied children and those with disabilities.<sup>17</sup>
31. The two-year comprehensive inquiry found that the mandatory detention system breached the CROC and failed, as required by the Convention, to make detention a measure of last resort, for the shortest appropriate period of time, and subject to independent review. The system failed to make the 'best interests of the child' a primary consideration in detaining them and failed to treat them with humanity and respect. The Report also noted that the Government ignored repeated recommendations from mental health professionals to remove children and their parents from detention.
32. A decision of the Full Court of the Family Court in August 2003, which ruled that the release of five children from detention was in the best interests of those children,<sup>18</sup> was appealed to the High Court in 2004. During April 2004, the High Court overruled the decision by the Family Court and found unanimously that the Family Court did not have any jurisdiction to make orders concerning the general welfare of children held in detention. The High Court ruled that, under the Constitution, the Family Court only has the jurisdiction that Parliament confers. This did not extend to a general power to make orders against third parties relating to the welfare of children.
33. This ruling confirmed that children could be maintained in an environment that is known to be detrimental to their physical and mental health. In commenting on the ruling Justice Kirby stated that he found it 'strongly arguable'<sup>19</sup> that Australia had breached its obligations under the UN Convention on the Rights of the Child, but said the Court could not invoke international law to override Australian law.

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<sup>17</sup> Media Release, HREOC, 13 May 2004

<sup>18</sup> *B&B v Minister for Immigration and Multicultural and Indigenous Affairs*, Full Ct of Fam Ct unrep, 25 Aug, 2003

<sup>19</sup> News Report, The Australian, 30 April, 2004

## ix. Mandatory Detention

34. Detention that is arbitrary in character, that is indefinite or disproportionate and where its legitimacy is not subject to review by an independent and impartial judicial body, is prohibited under the UDHR and ICCPR. The United Nations High Commission for Refugees (UNHCR), in its *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, states that asylum seekers should not be detained and that any detention is viewed as inherently undesirable.
35. *The MCCJDP and MCMRO share a firm view that the detention of asylum seekers should only be employed for the limited purposes of identity, health and security (IHS) checks.*
36. There have been several reports on standards of care in immigration detention facilities and, though they often concluded that standards were adequate for people's physical needs, the denial of liberty had detrimental psychological effects. When incarceration was indefinite, with no foreseeable end, the psychological effects often exacerbated existing torture and trauma issues for some asylum seekers.
37. In a series of landmark decisions handed down in August 2004, the High Court of Australia declared that the Federal Government can detain rejected asylum seekers indefinitely – even for life – regardless of their inability to be deported to any other country and irrespective of the intolerable conditions inside the government's immigration detention centres. In the cases of *Al-Kateb* and *Al Khafaji*, by a four-to-three majority, the Court ruled that the government could use the 'aliens' power of the Australian Constitution to impose detention for as long as the government deemed it necessary. The judges held that, even if deportation were not possible, indefinite detention did not unconstitutionally impose punishment without trial.
38. While the High Court has found that the Australian Government is not acting inconsistently with powers granted to it under the Constitution, it is widely held that the regime of immigration detention is in breach of Australia's obligations under international law. The decision also goes against the Australian sense of 'a fair go' and the Australian government needs to acknowledge that the current humanitarian program does not cater for the unique situations some asylum seekers may find themselves in.
39. Not all asylum seekers are automatically detained – only those who arrive by boat. Thus, certain nationalities, such as Iraqis and Afghanis, are more likely to be detained. It has been suggested that mandatory detention and the TPV system are discriminatory by race
40. Asylum seekers who arrive by air, depending on the validity of their entry visas, are not automatically detained. Thus, *it is possible* for asylum seekers to live in the community with work rights, or access to Centrelink payments, while their applications are being processed.

## **x. Judicial Powers**

41. The MCCJDP and MCMRO recommend that the Judiciary should have the power to release people held in custody by the Executive, both on the ground that such detention is unlawful and on the ground that, though lawful, it is appropriate that in all the circumstances that the person detained be released on reasonable terms.
42. It is right and proper for the Executive to have the power to release those that it detains. However, an authority which holds people in custody should not have the exclusive power to decide whether they should be released or in what circumstances or under what conditions. *Detention of any sort or for any length of time is a grave matter and a captor should not be the only person deciding the fate of the captive.*
43. Most people held in custody under the Migration Act have not been charged with any crime and never will be. They must have the opportunity to test the reasonableness of their detention before the courts and not be confined to applying for a remedy to the Government which has taken them into custody.
44. The Constitution, in giving the Judiciary power to examine the validity of the Executive's detention of any person and to order one unlawfully in custody to be released, demonstrates high trust in the ability of judges to examine the circumstances in which people are detained. The MCCJDP and the MCMRO make three points about trust in the Judiciary
  - i. Australia has excellent judges. They are worthy of trust and should be given it.
  - ii. Were Parliament and the Executive, because they lacked trust in the Judiciary, to move successfully to reduce its proper role, unwarranted strain would be thrown on the constitutional balance of this country.
  - iii. Because the Judiciary is trustworthy, it should have jurisdiction to release people held in detention under the Migration Act.

## **xi. Temporary protection visas (TPVs)**

45. TPVs do not provide a durable solution for people who have been found to be refugees. They are not of long enough duration to allow for a significant improvement in the countries from where refugees have fled.
46. Temporary Protection Visas (TPVs) have been described as 'detention without the razor wire' as they prevent people the necessary freedom of movement to find missing family members overseas. Though they can leave the country, TPV holders will be denied entry upon return. When 'the family' is recognised as 'the natural and fundamental group unit of society and is entitled to protection by society and the State'<sup>20</sup> (i.e. Australia as a signatory to this international covenant), the denial of family reunification is unjust.

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<sup>20</sup> ICCPR, Article 23.1

## **xii. The 'Pacific solution'**

47. Australia has an international obligation to assess the claims of asylum seekers who reach our shores. However, in the wake of the TAMPA incident in August 2001, many of Australia's outlying territories, such as Christmas Island and Ashmore Reef, were excised from Australia's migration zone.
48. While asylum seekers continue to be processed in off-shore detention facilities, such as Nauru and Christmas Island, Australia is not honouring its obligations under the Refugee Convention. Australia should not expel or return asylum seekers before their claim has been processed. At present, Australia effectively repels asylum seekers before they reach the migration zone thereby giving them no opportunity to call on Australia's international obligation to process their claim for asylum.
49. Declared refugees on Nauru and Manus Island have been issued with rolling 5-year TPVs. Asylum seekers not classified as refugees have been brought to Australia on Temporary Humanitarian Visas (THVs). It is understood that people on these visas have no right to seek any other protection visa while in Australia. Both these visas deny family re-unification.

## **xiii. The '45-day rule' and '7-day rule'**

50. The '45-day' rule denies asylum seekers living in the community the right to work or financial support (and consequently health care) as a consequence of not seeking asylum within their first 45 days in Australia. There are other reasons why an asylum seeker may not present to authorities within the first 45 days: the risk of detention, personal trauma, ignorance to proper procedures.
51. Under the '7-day' rule (secondary movement), asylum seekers who remain for more than 7 days in a country where they could have sought asylum while in transit to Australia could be prevented from receiving permanent residency. Though DIMIA has advised that it is fairly lenient with this rule, the '7-day' rule still exists and can be enforced at the Department's discretion.
52. The MCCJDP and MCMRO consider that these policies require urgent revision.

## **xiv. Migration Amendment (Detention Arrangements) Bill 2005**

### *a. Finalisation of TPV applications for further protection visas*

53. The new legislation sets 31 October 2005 as the deadline for DIMIA to finalise all current TPV applications (approx. 4,000) seeking permanent protection. This will hopefully bring permanent protection for up to 90% of the current applicants. The changes will only affect those who have applied for a further protection visa, not all of the current caseload of TPV holders, including refugees released from Christmas Island.

*b. Release of families with children*

54. Most importantly, the principle that children shall only be detained as a measure of last resort has been enshrined in the legislation. However, in practice, children will still be detained in the first instance. Children of over-stayers whose detention is part of the removal process are also still likely to be detained.

*c. Time limits*

55. The MCCJDP and MCMRO consider the proposed three-month time limit on primary Immigration department decisions and secondary Refugee Review Tribunal (RRT) decisions highly desirable. A defined period may make detention more tolerable. However, the legislation does not indicate whether families with children will be released earlier if they pass their IHS checks in less than 3 months.

*d. Community detention*

56. Community detention aims to release families with children into the community without supervision but with reporting obligations. The MCCJDP and MCMRO consider this to be more favourable than closed detention. However, community detention raises issues related to duty of care and visa provisions that have yet to be adequately addressed.

57. The MCCJDP and MCMRO recommend that the social welfare sector should be consulted so that a process of best practice is implemented.

*e. Ministerial discretion*

58. The increase in Ministerial discretionary powers is of considerable concern. Many of the more recent changes to the Migration Act have given the Immigration Minister increased discretionary powers. Despite an inquiry into these discretionary powers, decisions are still seen to be made without transparency or consistency.

*f. Review by Ombudsman*

59. To counter Ministerial discretionary power, Migration Amendment (Detention Arrangements) Bill 2005 includes a review by the Ombudsman of all asylum seekers who have been in detention two years. However, under the proposed legislation, new arrivals could be detained for two years before the required review by the Ombudsman is available to them.

## **xv Conclusion**

60. Despite recent changes to the Migration Act and the spirit in which these amendments were made, the MCCJDP and the MCMRO are still concerned that Australia is not meeting its international obligations to asylum seekers and refugees.
61. While some migration decisions are automatic, such as mandatory detention, others are increasingly at the discretion of the Immigration Minister. While the Ombudsman can make recommendations about the release of certain detainees, the Minister is not compelled to follow these recommendations.
62. Without an independent judicial review system, asylum seekers are often excluded from due process.
63. As Catholic organisations, our concerns are primarily directed towards ensuring the dignity of the human person. There is a better way of dealing with the needs of refugees in Australia – whether with or without a visa, by boat or by plane.
64. The MCJDP and MCMRO are conscious that asylum seekers are for the most part not seeking a better life, simply life itself.

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