

8 June 2012

Submission
to the
Transport and Industrial Relations Select Committee
on the
Immigration Amendment Bill 2012

Asylum seekers who flee persecution are often forced to enter other countries when they are not in a position to meet legal formalities and to secure proper documentation. Accordingly, the 1951 United Nations Convention on Refugees (Article 31) exempts from punishment for illegal entry those who flee their own lands because of persecution, provided that they contact the authorities with good reasons for their request for asylum. To deprive them of their liberty for long periods amounts to a severe punishment.

Australian Catholic Bishops Conference, *Statement on asylum seekers*, 2004

Summary of key points

- **Caritas opposes this Bill and strongly recommends it not proceed.** Refugees are not criminals and should not be arbitrarily detained. The experience of our neighbours in Australia is that mandatory detention further traumatises refugees, and has very high financial and social costs.
- Aspects of the Bill relating to ‘mass arrival’ groups are based in fear of the unlikely scenario of boat people reaching New Zealand shores, and will generate still more fear and hostility towards refugees and asylum seekers.
- However, under the cover of this emotive debate, significant changes affecting a much wider group of people are being introduced. The Bill provides for suspension of determination of refugee claims. It also contains restrictions on judicial review. These changes will affect a wider group than the ‘mass arrivals’ in the theoretical situation discussed in the Explanatory Note.
- We are deeply concerned that the Bill and associated policy changes are based on flawed assumptions and understandings of New Zealand’s obligations under the Refugee Convention.
- **If the Bill does proceed, we strongly recommend:**
 - the provisions around suspension of determination of refugee claims, and restrictions on judicial review should not proceed;
 - there should a time limit of a maximum of 6 weeks in secure accommodation for asylum seekers focused on establishing identity and any security issues;
 - no child should be detained, whether or not accompanied by parents;
 - families should always be kept together;
 - successful refugee claimants must have the same access to family reunification and permanent residence as all other categories of immigrants.
- **Caritas wishes to appear before the Select Committee to speak to our submission.**

Introduction

1. Caritas Aotearoa New Zealand is the Catholic agency for justice, peace and development. We are mandated by the New Zealand Catholic Bishops Conference to undertake development and aid projects in the Pacific, Asia, Africa, Latin America and the Middle East, and advocacy and education for social justice at home in New Zealand.
2. Internationally our work includes responses to complex emergencies, such as the situations of the refugees on the Thai-Burma border, and internally displaced people in Sudan. We believe it is essential to address the reasons that people feel impelled to leave their homes because of violence, persecution, conflict, extreme poverty and environmental factors, such as the approaching food crisis in the Sahel region of West Africa.
3. The New Zealand Catholic Bishops Conference has designated an annual Day of Prayer for Refugees and Migrants, which this year falls on 17 June. This is an opportunity to celebrate the refugee and migrant background of many of our parishioners, to acknowledge and recognise the service played by many Church based volunteers in assisting with resettling and welcoming refugees, and to consider Catholic social teaching on migration.
4. In preparing our response to this Bill we are guided by:
 - International agreed human rights norms, in particular the Refugee Convention and the Declaration of Human Rights
 - Catholic social teaching, including the annual Papal message for the World Day of Migrants and Refugees.
 - The application of Catholic social teaching, particularly by the Australian Catholic Bishops Conference on the detention of asylum seekers.
 - The experience of Catholic parishioners and groups in welcoming new refugees and migrants who have become part of our communities.
 - Our international and local experience working with refugees.
5. Aspects of Catholic Social Teaching that are relevant to consideration of this legislation include:
 - **Natural justice:** Natural justice is about ensuring procedural fairness. It includes ensuring that people know all charges being made against them; that they have equal access to the law; that they receive fair and prompt hearings; and that they have the opportunity for review of decisions. Natural justice arises out of the work of Catholic theologians such as St Thomas Aquinas who said an unjust law 'ceases to be a law and becomes instead an act of violence'.
 - **Preferential protection for the poor and vulnerable:** We consider all public policy decisions from the perspective of how they affect the most vulnerable. In the context of teaching on migration, Catholic social teaching recognises the rights and responsibilities of asylum seekers and refugees, specifically including those of migrants in 'irregular' situations. Granting asylum is not simply a favour to be granted at the whim of the more

fortunate members of the international community. Catholic social teaching recognises that people have the right to flee and the international community has the duty to provide assistance.

- **Human dignity:** We recognise the human dignity of the human person as paramount. Matters of national security, such as the protection of borders, are not absolute rights, but are tempered by our rights and responsibilities as human beings.
- **Families are the fundamental unit of society:** Keeping families together and reuniting families must be a priority of public policy on refugees and asylum seekers.
- **The protection of the Refugee Convention is a minimum standard, not an aspirational goal:** While the Refugee Convention provides an agreed international minimum standard, Catholic social teaching recognises there are also situations not covered by the tight definition of the Convention which also deserve a compassionate and humanitarian response.
- **We must address the causes as well as the symptoms:** We do not only 'bind the wounds' of asylum seekers: the causes of the conflict, persecution and human rights abuses that cause people to flee their homes must also be addressed. Our international aid and development programmes should be focused on enabling people to live in safety and dignity in their home countries, so they do not have to seek asylum.

Caritas opposition to Bill

6. Caritas Aotearoa New Zealand strongly opposes this Bill. The primary reasons given for the legislation are based on unrealistic scenarios about the mass arrival of asylum seekers, for example, by boat. We believe that government decision makers and advisors think this is only a theoretical possibility. For that reason, this legislation is unnecessary.
7. However, even if asylum seekers were to reach our shores in groups on boats, or other forms of craft, either now or in the future, detention is not an appropriate response. Over 90 percent of arrivals in Australia are found to have a valid refugee claim, which means that the vast majority of those arriving have genuine fears and experience of persecution and violence. Many will already have faced imprisonment and torture. How can it not further traumatise frightened and desperate people if the first thing that happens to them in a place of apparent safety is that they are locked up?
8. In assessing the claims to protection of these potential arrivals, New Zealand immigration authorities will consider whether their human rights have been breached under internationally recognised standards such as the International Covenant on Civil and Political Rights (ICCPR). This will consider, for example, whether they experienced detention without charge or were unable to seek appropriate remedies in the court. However, at the same time that New Zealand would be considering whether such rights were breached in their country of origin, under this proposed legislation those fundamental rights to natural justice and liberty would be breached here.

9. However, in addition to these mostly theoretical situations, the Bill includes significant changes which will affect people already in New Zealand. The proposed changes to suspend determination of claims, and to restrict access to judicial review, would affect people whose immigration cases are currently being considered. For a Bill supposedly focusing on 'irregular entry', this is a very back-door way of introducing significant changes to our Immigration laws which will affect a much wider group of people.
10. We oppose any reduction in natural justice in our Immigration procedures, and believe the existing rights to judicial review should be maintained. Judicial review is primarily about process questions, rather than the content of claims. Delaying the ability to take judicial review until the conclusion of all other proceedings would mean that potentially significant flaws in process which may prejudice the consideration of immigration cases may not be considered until immediately before the point of deportation.
11. We also oppose the provision to suspend determination of refugee claims. This is a very significant step, which will leave people living in limbo for reasons that are not explained in the Bill. The Explanatory Note to the Bill leaves the impression that this is primarily a measure introduced for groups deemed 'mass arrivals', but once again it would affect a much wider group of people.

Refugees, asylum seekers and New Zealand's obligations under the Refugee Convention

12. We are deeply concerned that the First Reading debate on this Bill showed that Members of Parliament on both sides of the House had an incomplete understanding of the Refugee Convention, the definitions of refugee and asylum seeker, and the internationally recognised processes by which refugees seek asylum. We were equally concerned that formally released public service advice, including the Bill of Rights assessment by the Ministry of Justice, did not clarify or correct these assumptions.
13. It is imperative that all those making decisions about this Bill and associated refugee policy are well informed about these matters. Caritas has provided a leaflet 'Refugee Myths and Realities' to assist our communities to better understand these issues, and alongside this submission, we provide copies for the benefit of the Committee members and advisors.
14. The Refugee Convention provides primarily for the seeking of asylum by people fleeing violence and persecution. **Asylum seekers, wherever they are from and wherever they are seeking refuge, are Convention refugees.** This is broader than the way the term 'refugee' is often used in New Zealand political discourse only to refer to those whose cases have already been accepted by an international body such as the United Nations High Commissioner for Refugees (UNHCR) and recommended to New Zealand for resettlement under our annual resettlement quota.

15. **New Zealand's obligations under the Refugee Convention are not limited to the acceptance of resettled refugees.** The Refugee Convention specifically covers the crossing of borders by people seeking asylum. Section 31 of the Refugee Convention recognises that people fleeing persecution may be required to enter a country irregularly. 'Cherry picking' our preferred candidates from the refugee camps of the world is not the main purpose of the Convention.
16. **Both resettled 'quota refugees' and asylum seekers are Convention refugees.** They are not 'illegal migrants', 'people smugglers' or 'queue jumpers'.
17. New Zealand is fully entitled to test and examine the claims of any person seeking asylum in New Zealand, and our Immigration and legal systems currently have robust processes for doing so. Australian experience is that over 90 percent of those who arrive irregularly eventually have their refugee status confirmed. It is inappropriate to refer to these people as 'illegal migrants'.
18. Similarly, while refugees and asylum seekers may be desperate enough to seek and use the services of 'people smugglers', there needs to be a clear distinction between the victims of people smuggling and those who may be running such operations. New Zealand currently has provision under the Crimes Act for dealing with people smuggling and people trafficking, and if necessary, these penalties could be strengthened for those who are profiting from the movement of desperate people. But it is inappropriate to refer to all refugees and asylum seekers arriving irregularly as 'people smugglers'.
19. The use of the term 'queue jumpers' appears to be based on ignorance of the process by which the very small numbers of refugees are resettled to New Zealand under the resettlement quota. Opinions heard in the First Reading debate on this Bill, that asylum seekers ought to follow the correct 'process' may give the impression that somewhere in the world exists an orderly 'queue' of 10.5 million acknowledged refugees, or an orderly process of applying for and receiving resettlement to New Zealand. No such systems are in place. **There is no queue.** Even the process of asking the New Zealand Immigration Service or UNHCR for inclusion of family members of resettled refugees in subsequent quotas lacks any transparency or clarity.
20. **New Zealand has the right to regulate our borders, but alongside the rest of the international community we also have obligations to ensure that people who are fleeing persecution are able to cross borders and ask for asylum.** Our geographic isolation has allowed us, even perhaps encouraged us, to believe that we do not have the same responsibilities to asylum seekers as countries such as Pakistan, Kenya or Thailand living immediately next to situations of conflict or human rights abuses. That does not mean our obligations under the Convention have become limited only to the acceptance of hand-picked refugees for resettlement.

Specific Issues with the Bill

21. This is a significant piece of legislation, and we cannot comment in detail on every section. We will focus our specific comments on four areas of the Bill:

- Warrants of commitment for mass arrivals
- Detention of children
- Suspension of determination of claims
- Restrictions on judicial review

We also wish to comment on two accompanying policy changes, about which there has been insufficient public consultation:

- Restrictions on family reunification
- Delay in grant of permanent residence

22. **Clause 12/New section 317A (1): Warrant of commitment for mass arrivals**

We have serious concerns about the proposal to allow the detention of asylum seekers for an initial period of up to 6 months, followed by renewable periods of 28 days. Seeking asylum is not a crime, and therefore asylum seekers should not be subject to mandatory detention.

23. Use of the State's coercive powers to deprive people of liberty is one of the most serious of responsibilities and duties. It should not be used as an administrative procedure for people who are not accused of committing any crime. Three of the four grounds given for detaining people under this clause are primarily about administrative efficiency. We do not accept 'Effective management of mass arrivals', 'efficiency of the immigration system' or 'efficient functioning of the District Court' as valid grounds for detention of people based only on their method of arrival to New Zealand and the number of people they arrived with.

24. We recognise that it is reasonable for Immigration authorities to adequately hold irregular arrivals to New Zealand about whom there may be questions of security and identity. We do not accept that this can be determined solely from the manner of arrival in New Zealand.

25. We accept 'management of any threat or risk to security' as a valid ground for detention, but only for the shortest possible time required to establish identity and confirm any ongoing issues. There are many valid and acceptable alternatives to detention which can establish adequate health and security checks. The Australian Catholic Bishops recommended in January that detention of no longer than 3 months is justified on these grounds. We believe six weeks in secure accommodation – as is currently provided for resettled 'quota refugees' at the Mangere Centre – is suitable and appropriate.

26. In the criminal justice sector, it is clear that detention has many negative outcomes and is extremely costly. We should not be contemplating locking up a group of people who have fled violence, imprisonment and even torture, and would be further traumatised by detention.

27. Clause 12/New section 317A (5): Detention of children

Only unaccompanied minors appear to be excluded from this legislation. This sub-clause clearly provides for the detention of children under the age of 18 if they are accompanied by a parent, guardian or relative.

28. Caritas is strongly opposed to the detention of children, particularly in circumstances where they are accused of no crime other than irregular entry as provided for by the Refugee Convention. As acknowledged in Section 37 of the Convention on the Rights of the Child: 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'

29. The Australian Catholic Office Migrant and Refugee Office advises that detention of children damages their personal development. The Australian government is making considerable efforts to get children out of detention.

30. We understand it is intended that men will be detained in Waiouru and women in Auckland. The indication that families will be separated raises many issues, not least of which is care for a young daughter arriving with a father, or a mother with teenage sons.

31. Clause 7/New section 135A: Suspension of determination of claim

We oppose the measure which would allow regulations to suspend consideration of a refugee claim. Combined with the ongoing ability to detain people, and the removal of access to judicial review, a person in this situation could potentially be detained indefinitely.

32. We do not accept that suspension of processing of refugee claims is an appropriate way to proceed with asylum claims. New Zealand has a robust process for considering refugee status, which is able to take into account matters such as fluctuating security circumstances in home countries. It is inappropriate that the response would be to suspend consideration of applications, rather than to consider such issues in the context of determining refugee status. People would be left in limbo, causing ongoing distress and uncertainty.

33. Clause 10/Amendment of Section 249: Restriction on review

The right to seek review of administrative processes or lower court decisions is a fundamental human right. Removal of this right is a serious breach of natural justice.

34. Restricting access to judicial review to the final determination by Immigration Tribunals means significant process issues which may affect the outcome of decisions cannot be reviewed. For example, a person may face bias if a decision is made to jointly consider refugee claims from people coming from similar circumstances. Poor credibility of one claimant may prejudice decision makers against other claimants being considered at the same time. At present,

claimants wishing to separate themselves from joint consideration can apply for judicial review; however, this Bill would restrict even consideration of this and similar process issues until after the final Appeal. At that point, deportation is usually being considered, and refugees may have very few remaining resources to be able to undertake legal action of this kind.

Further issues with policy

35. Accompanying the legislative changes proposed in this Bill are policy changes, which would increase the impact on asylum seekers.

36. Restrictions on family reunification

We are deeply concerned to hear that policy changes accompanying this legislation include a permanent restriction on aspects of family reunification, even after acceptance of refugee status. A person arriving as part of a group covered by this Bill would never be able to seek residency for a parent, adult sibling or other extended family member – reunification would be restricted only to spouses and children.

37. This is particularly harsh and unnecessary when dealing with refugee populations, in which people may have lost husband and wives to conflict. People in these circumstances may face a situation where they can never bring a related adult to live with them in New Zealand, even after their refugee status is accepted. The threshold for extended family members is already set so high in terms of income and employment requirements, that few can achieve the requirements. That is not a reason to completely close the door.

38. Delay in grant of permanent residence for 3 years

We also oppose policy changes accompanying the legislation which would delay grant of permanent residence by 3 years to ‘mass arrival’ group members who subsequently have their refugee claims accepted. This appears a local version of the Australian ‘temporary protection visas’ which were granted to refugees for up to 3 years until 2008, but have now been abandoned by the Australian government. In Australia, they created huge anxiety for refugees, and delayed family reunification for immediate family members, further encouraging women and children to make the same journey by boat.

Conclusion

39. Caritas is opposed to this legislation. We regard it as unnecessary. We question why government time and money are being poured into finding solutions for a problem New Zealand does not have. Under the cover of the fear generated by discussion of ‘mass arrival’ groups, other significant changes to Immigration law and policy are sneaking through.

40. Rushed legislation and policies based on fear, flawed analysis and poor understanding of the Refugee Convention are the ‘irregular arrivals’ we should fear; not the frightened people who deserve our compassion and support.