

# LET THE ASYLUM SEEKERS STAY: STRENGTHS AND WEAKNESSES OF CHURCH SANCTUARY AS A STRATEGY FOR LAW REFORM

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*In response to the decision of the High Court of Australia in Plaintiff M68/2015 v Minister for Immigration and Border Protection (2016) 257 CLR 42, over 120 churches from nine denominations around Australia began offering refugees and asylum seekers, at risk of being transferred to Nauru, physical protection from removal by Australian authorities and sanctuary in church buildings. This paper provides an analysis of the offer of church sanctuary in 2016 by Australian churches as a strategy for law reform. The offer of church sanctuary in 2016 should be seen as a partial success because it contributed to a number of asylum seekers and refugees being spared return to extraterritorial processing facilities. The success enjoyed by churches was due to the legitimacy derived from the theological and historical roots of the concept of sanctuary and the standing of churches in Australian society. Although churches were not successful in ending Australia's extraterritorial processing regime, they continue to be engaged in resistance to Australian refugee law and policy. It is thus too early to determine if they can contribute to more substantive law reform in the long term.*

In February 2016, over 120 churches from nine denominations around Australia began offering refugees and asylum seekers, at risk of being transferred to Nauru, physical protection from removal by Australian authorities and sanctuary in church buildings. The offer of sanctuary from church groups included the sheltering of refugees and asylum seekers on church property, the provision of food and other necessities and the refusal to hand refugees and asylum seekers to the authorities.<sup>1</sup>

Despite this offer of sanctuary, no refugees or asylum seekers are known to have sought haven in an Australian religious institution in 2016. Nevertheless, the highly publicised actions of the churches in offering sanctuary was politically effective and contributed to the success of the campaign to prevent the transfer of many refugees and asylum seekers to extraterritorial processing centres. Church sanctuary is an act of non-violent civil disobedience because it does not include coercion but encompasses activities that are in defiance of Australian municipal

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1 Australian Churches Refugee Taskforce, *Sanctuary for Asylum Seekers* (2018) <<http://www.acrt.com.au/sanctuary-for-asylum-seekers/>>.

law.<sup>2</sup> Stephan and Chenoweth have found that civil disobedience tactics are successful when they have a claim to legitimacy and provide broad appeal.<sup>3</sup> This was the case in the offer of sanctuary by church groups in Australia.

Churches in Australia were able to derive legitimacy from the theological and historical roots of the concept of sanctuary and their standing in Australian society. In the words of Giugni, effective social movements communicate ‘their message simultaneously to two distinct targets: the power holders and the general public’.<sup>4</sup> Church groups were successful in influencing the executive branch as well as gaining the support of the Australian public in halting removals in 2016. Ultimately however, church groups and the broader refugee rights movement, were not successful in achieving long-term law reform and amendments to Australian domestic legislation which would prevent the transfer of asylum seekers and refugees to Nauru and Papua New Guinea (‘PNG’).

This paper provides an analysis of the offer of church sanctuary as a strategy for law reform. Part I of the paper begins with an examination of the demands of those offering sanctuary and the strategies adopted by churches. This includes an exploration of the criminal sanctions associated with the act of civil disobedience. In Part II, the paper will assess the reasons for the success of churches in their offer of sanctuary. It will explore the theological and historical roots of the concept of sanctuary and the standing of church groups in Australia. This paper concludes by acknowledging the failure of the movement in achieving substantive law reform and the continuing political engagement of church groups in the area of refugee rights.

The offer of church sanctuary in 2016 should be seen as a partial success because it contributed to a number of asylum seekers and refugees being spared return to extraterritorial processing facilities. Despite failing in the ultimate aim of dismantling Australia’s extraterritorial processing regime, the wins by church groups and the broader refugee rights movement should not be viewed as merely symbolic concessions.<sup>5</sup> The activism of church groups has created greater sympathy for the cause of refugees amongst a wider range of Australians and has contributed to a growing refugee rights movement. The struggle for law reform is not over and it is thus too early to assess if churches and the broader refugee rights movement can be successful in achieving the larger aims of substantive law reform.

2 For a comprehensive discussion of non-violent action and examples of differing methods of nonviolent protest see Gene Sharp, *The Politics of Nonviolent Action* (Extending Horizons Books, 1973). See also Sharon Erickson Nepstad, *Nonviolent Struggle: Theories, Strategies, and Dynamics* (Oxford University Press, 2015).

3 Maria J Stephan and Erica Chenoweth, ‘Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict’ (2008) 33(1) *International Security* 7, 8–9.

4 Marco Giugni, *Social Protest and Policy Change: Ecology, Antinuclear, and Peace Movements in Comparative Perspective* (Rowman & Littlefield Publishers, 2004) 26.

5 On cooption through symbolic concessions, see David Beetham, ‘Political Legitimacy’ in Kate Nash and Alan Scott (eds), *The Blackwell Companion to Political Sociology* (Blackwell Publishing, 2001) 107.

## I DEMANDS AND TACTICS

In 2001, Australia instituted an extraterritorial processing and detention regime.<sup>6</sup> Under this regime, Australia transfers certain refugees and asylum seekers who have reached Australian territory (including its territorial waters) by boat, or have been intercepted at sea, to the neighbouring countries of Nauru and PNG for status determination and detention.

This policy of extraterritorial processing and detention temporarily ceased in 2007.<sup>7</sup> However, Australia resumed the transfer of asylum seekers to Nauru and PNG in August 2012.<sup>8</sup> In July 2013, it was announced that no refugees processed in Australia's extraterritorial processing and detention centres would ever be resettled in Australia.<sup>9</sup> Instead, asylum seekers would be sent to Nauru or Manus Island for processing and then following a positive assessment of their claims, refugees would either be expected to resettle in Nauru, PNG or a third country.

Australia ceased sending women and children to PNG in June 2013 but continued to hold men in and transfer men to the Pacific nation.<sup>10</sup> Women, children and family groups, as well as some single men, continue to be transferred to and accommodated in Nauru.<sup>11</sup>

Extraterritorial processing and detention now constitute an important element in what Australia has branded as 'Operation Sovereign Borders', a 'military

6 *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); *Migration Legislation Amendment Act (No 1) 2001* (Cth); *Migration Legislation Amendment Act (No 5) 2001* (Cth); *Migration Legislation Amendment Act (No 6) 2001* (Cth).

7 Chris Evans, 'Last Refugees Leave Nauru' (Media Release, 8 February 2008).

8 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, signed 29 August 2012; *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues*, signed 8 September 2012.

9 Kevin Rudd, 'Transcript of Joint Press Conference with PNG Prime Minister Peter O'Neill: Regional Resettlement Arrangement' (Media Release, 19 July 2013). For details of the agreements between Australia and its Pacific partners, see: *Regional Resettlement Arrangement between Australia and Papua New Guinea*, signed 19 July 2013; *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, signed 6 August 2013.

10 See James Robertson, 'Children Taken off Manus Island', *The Sydney Morning Herald* (online), 20 June 2013 <<https://www.smh.com.au/politics/federal/children-taken-off-manus-island-20130620-2olze.html>>.

11 For a historical account of extraterritorial processing by Australia and the legal framework for the detention of refugees and asylum seekers today in Australia's extraterritorial processing facilities, see Azadeh Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful?' (2015) 38 *University of New South Wales Law Journal* 669. See also Azadeh Dastyari and Maria O'Sullivan, 'Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in *Namah* (2016)' (2016) 42 *Monash University Law Review* 308.

operation<sup>12</sup> enforced by the Australian Border Force. Refugees and asylum seekers transferred to PNG and Nauru are ordinarily not permitted to enter or return to Australian territory. However, an exception is made in the case of medical evacuations or emergencies. After receiving treatment in Australia, refugees and asylum seekers are expected to return to Nauru or PNG.

In 2016, the High Court considered the case of *Plaintiff M68/2015 v Minister for Immigration and Border Protection* ('*Plaintiff M68*').<sup>13</sup> M68 was the name given to the plaintiff by the Court. The young woman had been intercepted at sea after fleeing Bangladesh for Australia in October 2013. She was initially transferred to the Australian territory of Christmas Island by the Commonwealth before being taken against her will to the Republic of Nauru where she was detained as she sought asylum.<sup>14</sup> M68 became pregnant and was then medically evacuated to Australia and gave birth to her baby in Australian territory. The Commonwealth sought to return her to Nauru once her baby was born and her treatment was concluded.<sup>15</sup>

M68 brought an action in the High Court to prevent the Commonwealth from transferring her and her baby to Nauru. She argued that her detention in Nauru was 'funded, authorised, caused, procured and effectively controlled by, and was at the will of, the Commonwealth'<sup>16</sup> and that this detention was not authorised by a valid law of the Commonwealth. Her case, therefore, challenged the validity of Australia's extraterritorial processing and detention regime.

The High Court did not agree with the plaintiff's arguments. In a joint judgment handed down on 3 February 2016, French CJ, Kiefel and Nettle JJ found that the Commonwealth did not detain the plaintiff or authorise or control her detention; it merely participated in that detention.<sup>17</sup> Keane J also agreed, finding that

the plaintiff was detained in custody in Nauru by the Republic of Nauru. And to the extent that the Commonwealth Executive procured, funded or participated in the restraint upon the plaintiff's liberty which occurred in Nauru, that restraint was authorised by s 198AHA [of the *Migration Act 1958* (Cth) ('*Migration Act*')] ...<sup>18</sup>

Bell and Gageler JJ found that the Commonwealth bore some responsibility for the plaintiff's detention on Nauru, with Bell J finding that the Commonwealth caused and effectively controlled the plaintiff's detention,<sup>19</sup> and Gageler J finding that the plaintiff's detention was procured by the Commonwealth.<sup>20</sup> However,

12 Liberal Party of Australia and National Party of Australia, 'The Coalition's *Operation Sovereign Borders* Policy' (Policy Document, July 2013) 2 <[http://past.electionwatch.edu.au/sites/default/files/docs/Operation%20Sovereign%20Borders\\_1.pdf](http://past.electionwatch.edu.au/sites/default/files/docs/Operation%20Sovereign%20Borders_1.pdf)>.

13 (2016) 257 CLR 42 ('*Plaintiff M68*').

14 Her transfer was pursuant to ss 198AD(2), (3) of the *Migration Act 1958* (Cth) ('*Migration Act*').

15 *Plaintiff M68* (2016) 257 CLR 42, 45.

16 *Ibid* 69 [38].

17 *Ibid* 67–9 [29]–[37].

18 *Ibid* 115 [199].

19 *Ibid* 80–5 [78]–[93].

20 *Ibid* 108–9 [167]–[175].

both Justices also found that the detention was authorised by s 198AHA of the *Migration Act*.<sup>21</sup>

The lone dissent in the case was by Gordon J, who found that s 198AHA of the *Migration Act* was invalid, and that the Commonwealth's participation in the plaintiff's detention was not authorised by the executive power of the Commonwealth.<sup>22</sup>

The High Court, therefore, did not find an obstacle to the removal and return of women and children temporarily in Australia for medical evacuations to Nauru. In addition to Plaintiff M68 and her baby, the group most directly affected by the court's decision were 267 refugees and asylum seekers who had been transferred from Nauru because of serious medical conditions, including 54 children, many of whom were attending school in Australia, and 33 babies, who had never been to Nauru but were born to refugees and asylum seekers that had once been transferred to the island.<sup>23</sup>

## **A The Offer of Sanctuary**

It was in this political and legal climate that church groups in Australia publicised their willingness to offer sanctuary. The Australian Churches Refugee Task Force, an umbrella group for churches concerned about the plight of refugees and asylum seekers, issued a press release on 4 February 2016, only one day after the High Court handed down its decision. The press release announced that Brisbane's St John's Anglican Cathedral, among others, had been declared a place of sanctuary for asylum seekers.<sup>24</sup>

The Anglican Dean of Brisbane and the president of the Task Force argued that 'there is irrefutable evidence from health and legal experts that the circumstances asylum seekers, especially children, would face if sent back to Nauru are tantamount to state-sanctioned abuse'.<sup>25</sup> On 17 February, the Baptist Association of NSW & ACT released a briefing document to Baptist churches in New South Wales and the Australian Capital Territory in support of church sanctuary.<sup>26</sup>

The churches offering sanctuary saw themselves as part of a much larger network of change makers. They worked closely with other civil society groups,

21 Ibid 87–8 [99]–[103] (Bell J), 109–12 [176]–[187] (Gageler J).

22 Ibid 155–69 [358]–[414].

23 'Asylum Seeker Families Face Deportation to Nauru after High Court Ruling', *SBS News* (online), 3 February 2016 <<https://www.sbs.com.au/news/asylum-seeker-families-face-deportation-to-nauru-after-high-court-ruling>>.

24 Australian Churches Refugee Taskforce, 'Cathedrals and Churches around Australia Offer Sanctuary to Asylum Seekers Facing Deportation to Nauru' (Press Release, 4 February 2016) <<http://www.acrt.com.au/cathedrals-and-churches-offer-sanctuary-from-nauru/>>.

25 Paul Farrell, 'Churches Offer Sanctuary to Asylum Seekers Facing Deportation to Nauru', *The Guardian* (online), 4 February 2016 <<https://www.theguardian.com/australia-news/2016/feb/04/churches-offer-sanctuary-to-asylum-seekers-facing-deportation-to-nauru>>.

26 Baptist Churches of NSW & ACT, *Sanctuary, Nauru and Jesus* (17 February 2016) <<https://nswactbaptists.org.au/public-engagement/sanctuary-nauru-and-jesus/>>.

in particular the advocacy organisation GetUp!, which had a leading role in the campaign.<sup>27</sup> The movement, born as a reaction to the High Court decision in *Plaintiff M68*, adopted the slogan ‘Let Them Stay’. This branding exercise clarified the movement’s message and made clear its demand that the Australian government not transfer refugees and asylum seekers to extraterritorial processing and detention facilities.<sup>28</sup>

Many church groups who publicly offered sanctuary engaged in training in nonviolent direct action and workshopped ways of protecting refugees and asylum seekers on church grounds should they become at risk of removal from Border Force officials.<sup>29</sup> The training included legal information about the rights and responsibilities of volunteers, instructions on organising food and medical care and discussions about what to do in the event of Border Force agents forcibly attempting to remove refugees and asylum seekers from church grounds.<sup>30</sup> Church groups and individuals attending sanctuary training also received advice about their public presence and their use of social media.<sup>31</sup>

## **B Sanctuary as Civil Disobedience**

Providing sanctuary in church buildings is an act of civil disobedience because it is in defiance of Australian law. The offer of sanctuary in 2016 was not made in a clandestine fashion but rather it was proclaimed in open defiance of Commonwealth legislation. This is because the offer of sanctuary was not seen as an end in itself but a means of gaining public support and seeking law reform.

Those who made the offer of sanctuary knew that it would lead to contravention of Commonwealth legislation. Any potential arrest was viewed as a strategic win as it would draw attention to the plight of those facing inhumane conditions in extraterritorial processing centres and place pressure on politicians for law reform.<sup>32</sup> As Terry Fitzpatrick, a member of the St Mary’s in Exile community, wrote: ‘The Sanctuary Movement is about people saying that this government

27 See GetUp!, *Let Them Stay* <<https://www.getup.org.au/campaigns/refugees/refugee-x/let-them-stay>>.

28 Meghan Fitzgerald, Tamar Hopkins and Shen Narayanasamy, “Justice, Social Action and Structural Change” (2016) 42 *Australian Feminist Law Journal* 351, 357–61.

29 Melissa Davey, “‘The Whole Nation Is on Board’: Inside the Sanctuary Movement to Protect Asylum Seekers”, *The Guardian* (online), 13 March 2016 <<https://www.theguardian.com/australia-news/2016/mar/13/the-whole-nation-is-on-board-inside-the-sanctuary-movement-to-protect-asylum-seekers>>.

30 Amy Mitchell-Whittington, ‘#Letthemstay Sanctuary Training Set up at Brisbane Cathedral’, *Brisbane Times* (online), 13 March 2016 <<https://www.brisbanetimes.com.au/national/queensland/letthemstay-sanctuary-training-set-up-at-brisbane-cathedral-20160313-gnhrx1.html>>.

31 Ibid. See also Davey, above n 29.

32 Campbell highlights this strategy in the Sanctuary Movement of the 1980s in the United States. As she writes, churches were ‘essentially daring the United States government to stop them from providing safe harbor’: Kristina M Campbell, ‘Operation Sojourner: The Government Infiltration of the Sanctuary Movement in the 1980s and Its Legacy on the Modern Central American Refugee Crisis’ (2017) 13 *University of St Thomas Law Journal* 474, 480.

does not speak for me, and I am prepared to break an unjust law to offer protection to some of the most vulnerable people in the world today.<sup>33</sup>

The offences risked by those offering sanctuary in church buildings will be discussed in turn below:

## 1 Offences under the Criminal Code and Crimes Act

Section 149.1 of the *Criminal Code Act 1995* (Cth) sch 1 (*'Criminal Code'*) provides that a person commits an offence if they obstruct, hinder, intimidate or resist a known Commonwealth public official in their functions as a Commonwealth public official. '[F]unction' is defined in the *Criminal Code* as 'any authority, duty, function or power that is conferred on the person as a Commonwealth public official'.<sup>34</sup>

Section 149.1 of the *Criminal Code* also provides that in prosecuting an offence of obstruction of Commonwealth public officials, it is not necessary to prove that the defendant knew that the official was a Commonwealth public official or was performing the functions of a Commonwealth public official. Violation of s 149.1 of the *Criminal Code* carries a maximum penalty of two years' imprisonment.

The removal of non-citizens from Australian territory is a function of Border Force agents, who are Commonwealth officials. As churches were open about their willingness to shield refugees and asylum seekers from officials and sanctuary training in Australia included exercises to protect refugees and asylum seekers from physical removal, it is conceivable that the offer of church sanctuary would have involved obstructing, hindering, intimidating or resisting the work of Border Force officials in removing refugees and asylum seekers. Providing sanctuary would therefore have placed individuals in violation of s 149.1 of the *Criminal Code* and at risk of a maximum penalty of two years' jail.

Provision of sanctuary could also have placed church members in violation of s 6 of the *Crimes Act 1914* (Cth) (*'Crimes Act'*) which carries a sentence of two years' imprisonment and provides:

Any person who receives or assists another person, who has, to his or her knowledge, committed any offence against a law of the Commonwealth, in order to enable him or her to escape punishment or to dispose of the proceeds of the offence commits an offence.

Section 197A of the *Migration Act* makes it a crime for anyone to escape from immigration detention (including community detention). The sentence for asylum seekers convicted under the provision is five years' imprisonment. A person facing deportation is likely to be in some form of 'detention', most likely community detention. An asylum seeker or refugee in detention (including community detention) would be committing an illegal act by seeking sanctuary

33 Terry Fitzpatrick, 'Sanctuary: A Compassionate Illegal Response' on St Mary's in Exile, *Homilies* (1 June 2016) <<http://stmaryssouthbrisbane.com/multimedia-archive/sanctuary-a-compassionate-illegal-response/>>.

34 *Criminal Code* s 149.1(6)(b).

and individuals assisting refugees and asylum seekers in their 'escape' from immigration detention would also be in violation of s 6 of the *Crimes Act*.

## 2 Offences under the Migration Act

Section 233E(3) of the *Migration Act* creates an offence if a person harbours a person without valid authority to remain in Australia (an unlawful non-citizen),<sup>35</sup> a removee<sup>36</sup> or a deportee.<sup>37</sup> It is also an offence under s 233E(2) to engage in conduct with the intention of preventing discovery by an officer of a non-citizen without authority to remain in Australia or due to be removed or deported. The provisions were introduced in 2010 as a standalone provision under the *Anti-People Smuggling and Other Measures Act 2010* (Cth). The sections carry a maximum sentence of 10 years jail, 1000 penalty units, or both.

Refugees and asylum seekers offered sanctuary would fall in the category of non-citizens that should not be harboured or assisted under the provisions. Whether or not church groups could be found in violation of the provision would depend on whether or not they are considered to be 'harbouring' or engaging in conduct with the intention of preventing discovery of refugees and asylum seekers to be removed from Australia.

'Harbouring' is not defined under the *Migration Act* and has not been the subject of judicial consideration. The act of sheltering refugees and asylum seekers from removal would, however, fall under the ordinary meaning of the verb and is likely to be seen as a violation of the section.

## 3 A Legal Defence of Sanctuary?

No right to church sanctuary exists under Australian legislation. As will be discussed below, in the UK, James I abolished the right to sanctuary under *Continuance of Acts, etc Act 1623*, 21 Jac 1, c 28, s 7 in 1623.<sup>38</sup> There is a very strong argument, therefore, that the concept of church sanctuary was not received into Australian law in the process of colonisation.

Gray contends that 'there is a reasonable argument that James I's [1623] Act abolishing sanctuary was not applicable to the Australian colonies, and so was not inherited through the colonial legislation of the early 19<sup>th</sup> century'.<sup>39</sup> As such,

35 Section 14 of the *Migration Act* defines an 'unlawful non-citizen' as '[a] non-citizen in the migration zone who is not a lawful non-citizen'.

36 A 'removee' is defined in s 5 of the *Migration Act* as 'an unlawful non-citizen removed, or to be removed, under Division 8 of Part 2' of the Act, which deals with the removal of non-citizens. 'Unlike the power to order deportation, which is discretionary, removal is an automatic consequence for every unlawful non-citizen.': Joint Standing Committee on Migration, Parliament of Australia, *Deportation of Non-Citizen Criminals* (1998) 71 [7.1].

37 A 'deportee' is defined in s 5 of the *Migration Act* as 'a person in respect of whom a deportation order is in force'.

38 J H Baker, 'The English Law of Sanctuary' (1990) 2 *Ecclesiastical Law Journal* 8, 12–13.

39 Anthony Gray, 'The Status of Sanctuary in Australian Law' (2016) 42 *Monash University Law Review* 685, 699.



it is possible that the concept of sanctuary has been imported into the common law but the legislation abolishing it has not. Gray also holds that this position may be particularly strong in jurisdictions that have not passed imperial repeal legislation. However, as he also goes on to argue, the High Court is unlikely to find sanctuary to apply in some jurisdictions and not others.<sup>40</sup> It is also highly unlikely that the High Court of Australia would recognise the right to sanctuary as a part of modern Australian law.

It has been further argued that that the provision of sanctuary is an expression of Christian faith and therefore protected under s 116 of the *Australian Constitution*. Foster, relying on *Adelaide Company of Jehovah's Witness Inc v Commonwealth*,<sup>41</sup> argues that Australian law protects both belief and action involved in living out one's faith.<sup>42</sup> As Gray points out, however, in the same case the High Court also found that freedom of religion is not absolute and the Commonwealth is permitted to criminalise acts that are 'inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community'.<sup>43</sup> The High Court has interpreted s 116 narrowly in the past. For example, religious pacifists have not been found to be protected by the freedom of religion under the *Australian Constitution*.<sup>44</sup> Constitutional challenges to the relevant sections of the *Migration Act*, *Crimes Act* and *Criminal Code* are therefore unlikely to succeed.

Had church groups acted on their offer of providing sanctuary they would therefore have been acting in violation of Australian municipal law without legal defence.

## II SUCCESS AND ITS REASONS

As no asylum seekers or refugees sought sanctuary in 2016 and no church groups broke the law by providing sanctuary, no prosecutions were made. However, the threat of civil disobedience by church groups received considerable media attention and contributed to public sympathy for the asylum seekers and refugees concerned.<sup>45</sup>

Church groups and the wider refugee rights movement were successful in halting the transfer of the majority of affected asylum seekers and refugees. More than half of the refugees and asylum seekers at the centre of the protests were released

40 Ibid.

41 (1943) 67 CLR 116.

42 Neil Foster, 'Places of Refuge: What Legal Basis for the Churches' Offer of "Sanctuary"?', *ABC News* (online), 9 February 2016 <<http://www.abc.net.au/religion/places-of-refuge-what-legal-basis-for-the-churches-offer-of-sanc/10097342>>.

43 Ibid 131, quoted in Gray, above n 39, 706.

44 *Krygger v Williams* (1912) 15 CLR 366.

45 A compilation of some of the media the churches attracted can be found at: Australian Churches Refugee Taskforce, *Media* (2018) <<http://www.acrt.com.au/media/>>.

into community detention in Australia, including all families.<sup>46</sup> The offer of church sanctuary was an important factor in the success of the campaign. As the coordinator of the #letthemstay campaign for GetUp!, Shen Narayanasamy, notes: ‘when you have people like the churches ... standing up ... the Government really does have no choice but to listen to that overwhelming sentiment’.<sup>47</sup>

The campaign galvanised the Australian public with thousands of Australians participating in protests across the country in support of the refugees and asylum seekers refusing to return to Nauru.<sup>48</sup> Daniel Andrews, the Victorian Premier, offered to provide a haven to refugees and asylum seekers at risk of transfer to Nauru in Victoria.<sup>49</sup> He was followed by the premiers of Queensland,<sup>50</sup> South Australia,<sup>51</sup> and the Chief Minister of the Australian Capital Territory,<sup>52</sup> with qualified support from the Premiers of New South Wales,<sup>53</sup> and Tasmania.<sup>54</sup>

## A Claims to Legitimacy Based on Theology

Part of the success of church groups in invoking the idea of sanctuary was the legitimacy derived from the historical and theological foundations of the

46 Thomas Oriti, ‘Let Them Stay Labelled a Success, More Than Half of 267 Asylum Seekers in Community Detention’, *ABC News* (online), 2 April 2016 <<http://www.abc.net.au/news/2016-04-02/let-them-stay-labelled-success-asylum-seeker-community-detention/7294456>>. The Australian government has not released information about what happened to the people who were not permitted to remain.

47 Ibid.

48 ‘#LetThemStay: Thousands Gather in Australia-Wide Protests against Return of Asylum Seekers to Nauru’, *ABC News* (online), 8 February 2016 <<http://www.abc.net.au/news/2016-02-08/let-them-stay-protests-against-return-of-asylum-seekers-to-nauru/7150462>>.

49 Farrah Tomazin and Heath Aston, ‘Premier Daniel Andrews Tells Malcolm Turnbull That Victoria Will Take Asylum Seekers’, *The Age* (online), 6 February 2016 <<https://www.theage.com.au/national/victoria/premier-daniel-andrews-tells-malcolm-turnbull-that-victoria-will-take-asylum-seekers-20160206-gmnbo.html>>.

50 ‘Qld Ready, Able to Help Asylum Seekers’, *The Daily Telegraph* (online), 7 February 2016 <[https://www.dailytelegraph.com.au/news/breaking-news/qld-ready-able-to-help-asylum-seekers/news-story/70a0b1c3edb344fb536d7511468e746d?utm\\_source=twitterfeed&utm\\_medium=twitter&utm\\_campaign=Feed%3A+dailytelegraphbreakingnewsndm+%28Daily+Telegraph+%7C+Breaking+News%29](https://www.dailytelegraph.com.au/news/breaking-news/qld-ready-able-to-help-asylum-seekers/news-story/70a0b1c3edb344fb536d7511468e746d?utm_source=twitterfeed&utm_medium=twitter&utm_campaign=Feed%3A+dailytelegraphbreakingnewsndm+%28Daily+Telegraph+%7C+Breaking+News%29)>.

51 ‘South Australian Premier Jay Weatherill Joins Call for Asylum Seekers to Remain in Australia’, *ABC News* (online), 8 February 2016 <<https://www.abc.net.au/news/2016-02-08/sa-premier-calls-for-a-group-of-asylum-seekers-to-remain-here/7147528>>.

52 Michael Safi, ‘“Yes and Yes”: Australian Capital Territory Signals It Will Accept Asylum Seekers Awaiting Removal to Nauru’, *The Guardian* (online), 7 February 2016 <<https://www.theguardian.com/australia-news/2016/feb/07/act-signals-it-will-follow-daniel-andrews-lead-and-accept-asylum-seekers>>.

53 Kirsty Needham, Farrah Tomazin and Heath Aston, ‘Premier Mike Baird Supports Daniel Andrews’ Calls for Malcolm Turnbull to Let Asylum Seeker Children Stay’, *The Sydney Morning Herald* (online), 7 February 2016 <<https://www.smh.com.au/national/nsw/premier-mike-baird-and-victorian-premier-daniel-andrews-tell-malcolm-turnbull-they-will-take-asylum-seekers-20160206-gmnhxt.html>>.

54 @WillHodgman (Twitter, 6 February 2016, 8:19pm) <<https://twitter.com/willhodgman/status/696186534874054657>>; but see also Lucy Shannon, ‘Tasmanian Premier Will Hodgman Forced to Clarify Asylum Seeker Position after Tweet Prompts Confusion’, *ABC News* (online), 8 February 2016 <<https://www.abc.net.au/news/2016-02-08/tasmanian-premier-will-hodgman-forced-to-clarify-refugee-tweet/7147814>>.

practice. In calling for sanctuary, church groups in Australia adopted a strategy of resistance with ‘international, institutionally-flexible, and perhaps above all, theoretically-rich set of practices’.<sup>55</sup>

Political theologians Myers and Colwell argue that the religious idea of sanctuary is found in many cultures and religious traditions.<sup>56</sup> Theologians have highlighted the recorded references to asylum and sanctuary within the Old Testament.<sup>57</sup> Myers and Colwell argue that the Christian concept of sanctuary, which is the subject of this paper, derives from the Biblical concept of hospitality, and as such ‘welcoming the stranger’ is a tenet of Christian faith and tradition.<sup>58</sup> Sobrino argues that the sanctuary movement ‘expresses faith that there are places in which God himself defends the life of those who are threatened and before which every other consideration yields’.<sup>59</sup>

Underpinning belief in sanctuary is the understanding that God’s law precedes the secular, municipal law of the state.<sup>60</sup> The theological roots of the offer of sanctuary were clear in the messaging adopted by church groups in Australia. The press release in support of church sanctuary by the Lutheran Church of Australia stated that ‘[c]hurches have the right to object or resist if they understand that the government is subverting its God-ordained functions’.<sup>61</sup> The Baptist Association of NSW & ACT also justified their actions by stating that

while governments are called to be servants of God and the good (Romans 13), they can overreach and become oppressive (eg Daniel 2 & 7; 1 Samuel 8–10; Revelation 13). By offering refugees sanctuary your church is declaring that the State has overreached in its treatment of refugees.<sup>62</sup>

The invocation of God’s laws in opposition to the secular laws of the state necessarily results in tension. The two cannot be reconciled under Australian law, for, as discussed above, it is unlikely that Australian courts would countenance a religious defence to the act of providing sanctuary. In announcing the intention of his church to offer sanctuary, Anglican Dean of Brisbane, Peter Catt, has referred

- 55 Randy K Lippert and Sean Rehaag, ‘Sanctuary Across Countries, Institutions and Disciplines’ in Randy K Lippert and Sean Rehaag (eds), *Sanctuary Practices in International Perspectives: Migration, Citizenship and Social Movements* (Routledge, 2013) 1, 2.
- 56 Ched Myers and Matthew Colwell, *Our God Is Undocumented: Biblical Faith and Immigrant Justice* (Orbis Books, 2012) 54–71.
- 57 Pamela Begaj, ‘An Analysis of Historical and Legal Sanctuary and a Cohesive Approach to the Current Movement’ (2008) 42 *John Marshall Law Review* 135. See also Jorge L Carro, ‘Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?’ (1986) 54 *University of Cincinnati Law Review* 747.
- 58 Myers and Colwell, above n 56, 55–61.
- 59 Jon Sobrino, ‘Sanctuary: A Theological Analysis’, tr Walter Petry Jr (1988) 38 *CrossCurrents* 164, 167.
- 60 Pierrette Hondagneu-Sotelo, *God’s Heart Has No Borders: How Religious Activists Are Working for Immigrant Rights* (University of California Press, 2008).
- 61 John Henderson, *Sanctuary to Asylum Seekers* (16 February 2015) Lutheran Church of Australia <<http://www.lca.org.au/sanctuary-to-asylum-seekers/>>.
- 62 Baptist Churches of NSW & ACT, above n 26.

to sanctuary as ‘entering into God’s territory, away from the civic authorities’.<sup>63</sup> He also conceded, however, that ‘if the authorities chose to enter the church and take people away, it would probably be a legal action’.<sup>64</sup>

Despite this opposition between God’s law and the secular laws of the state, a number of individuals and church groups remained undeterred in their invocation of sanctuary. Czajka argues that ‘sanctuary’s promise lies in its potential to disrupt the state’s attempt to monopolize territorial sovereignty and ways of being political’.<sup>65</sup> The theological basis of the practice of sanctuary leads to the activation and political engagement of people who may not necessarily have contemplated engagement in civil disobedience or participation in political protest. It may also have offered some people a more accessible form of expressing political discontent. The legitimacy derived from the theological roots of the concept of sanctuary was thus as important for the activation of the participants as it was for the broader messaging of the church regarding the unjust nature of the treatment of refugees and asylum seekers in Australia and the incompatibility of Australia’s laws and policies with Christian values.

## **B Claims to Legitimacy Based on Historical Roots**

The offers of sanctuary also derived legitimacy from the historical roots of sanctuary. The concept of church sanctuary is loosely understood to be the offer of refuge on religious property such as a church or cathedral. Under the medieval concept of church sanctuary, criminals who were able to reach a church could anticipate protection from punishment which often meant protection from execution.<sup>66</sup> However, the concept of sanctuary predates medieval times.

In ancient Greek society, temples offered sanctuary in the form of divine protection for fugitives escaping punishment for crimes.<sup>67</sup> Ancient Roman society limited this right to asylum for fugitives until a formal inquisition could be made and a judgment could be rendered in a case.<sup>68</sup> The adoption of Christianity expanded the Roman concept of sanctuary and Christian churches were permitted to provide sanctuary to fugitives in 313 AD under Constantine’s Edict of Toleration.<sup>69</sup> The

63 Michael Edwards, ‘Sanctuary Offered to Asylum Seekers Facing Removal to Offshore Detention by Churches across Australia’, *ABC News* (online), 4 February 2016 <<http://www.abc.net.au/news/2016-02-04/churches-offer-sanctuary-to-asylum-seekers/7138484>>.

64 *Ibid.*

65 Agnes Czajka, ‘The Potential of Sanctuary: Acts of Sanctuary through the Lens of Camp’ in Randy K Lippert and Sean Rehaag (eds), *Sanctuary Practices in International Perspectives: Migration, Citizenship and Social Movements* (Routledge, 2013) 43, 44.

66 See Begaj, above n 57, 140.

67 Carro, above n 57, 751.

68 *Ibid* 751, citing Norman Maclaren Trenholme, ‘The Right of Sanctuary in England: A Study in Institutional History’ (1903) 1 *University of Missouri Studies* 299, 303.

69 Carro, above n 57, 752, citing Norman Maclaren Trenholme, ‘The Right of Sanctuary in England: A Study in Institutional History’ (1903) 1 *University of Missouri Studies* 299, 304.

concept of Christian sanctuary was codified under Theodosian Code promulgated by Theodosius the Great in 392.<sup>70</sup>

It is believed that the concept of church sanctuary was brought to England in 597 AD by Augustine.<sup>71</sup> The right of churches to provide sanctuary derived from early canon law but was adopted as part of the secular common law of England.<sup>72</sup> The common law permitted a person to take sanctuary in any church by either entering the grounds or making contact with the knocker or door handle.<sup>73</sup> This right of churches to provide sanctuary was accepted without question by secular courts.<sup>74</sup> The concept of sanctuary was widely abused, however, with some criminals taking shelter within church buildings and continuing their criminal activities from within the sanctified spaces.<sup>75</sup> The abuse of the concept of sanctuary led to discontent and growing opposition over time. In 1623 the institution of sanctuary was abolished in England by James I who declared that ‘no sanctuary or privilege of sanctuary be hereafter admitted or allowed in any case’.<sup>76</sup>

In modern times, sanctuary has been used less for harbouring fugitives and more for the protection of refugees and asylum seekers. The utilisation of church sanctuary for refugees and asylum seekers gained traction and media attention in the early 1980s in the United States. At that time, a handful of churches in the south-western United States began assisting the passage of South American refugees through underground networks into US territory. The churches then provided the refugees with protection, with some refugees taking shelter in church buildings.<sup>77</sup>

The concept of church sanctuary is also not new in Australia.<sup>78</sup> In 1995, some church groups attempted to prevent the deportation of Timorese refugees by offering them sanctuary on church grounds.<sup>79</sup> The more than 1350 Timorese refugees were set for deportation because they were considered to be Portuguese citizens and thus the Commonwealth argued that they could seek the protection of Portugal.<sup>80</sup> The visible support of church members was part of a successful

70 Ibid.

71 Ibid 753.

72 Baker, above n 38, 8.

73 Ibid 9.

74 Ibid 10.

75 Ibid.

76 Ibid 12–13, quoting *Continuance of Acts, etc Act 1623*, 21 Jac 1, c 28, s 7. See also Gray, above n 39, 690.

77 On the US Sanctuary Movement, see Susan Bibler Coutin, *The Culture of Protest: Religious Activism and the US Sanctuary Movement* (Westview Press, 1993). See also Grace Yukich, *One Family under God: Immigration Politics and Progressive Religion in America* (Oxford University Press, 2013).

78 Maria O’Sullivan, ‘The Sanctity of Asylum: The Legality of Church Sanctuary in Australia’ (2016) 41 *Alternative Law Journal* 254, 254.

79 Patrick A Smythe, ‘*The Heaviest Blow*’: *The Catholic Church and the East Timor Issue* (LIT Verlag, 2004) 116–17.

80 Suganthi Singarayar, ‘East Timor-Refugees: Australia Irked by Church’s Sanctuary Offer’, *Inter Press Service News Agency* (online), 9 November 1995 <<http://www.ipsnews.net/1995/11/east-timor-refugees-australia-irked-by-churchs-sanctuary-offer/>>.

movement that resulted in the East Timorese being permitted to remain in Australia.

The New Sanctuary Movement also re-emerged in the United States in the mid 2000s following increasing restrictions on undocumented non-citizens in the United States. In contrast with the sanctuary movements of the 1980s, the New Sanctuary Movement primarily serves undocumented migrants who have established lives in the United States rather than refugees attempting to enter the United States.<sup>81</sup>

In more recent years, churches have offered refugees and asylum seekers sanctuary across Western Europe as well, including in France, Belgium, the Netherlands, Norway, Switzerland and Finland.<sup>82</sup> In Germany, an Ecumenical Committee on Church Asylum was founded in 1994 to assist church groups with their sanctuary activities.<sup>83</sup> It is estimated that more than 600 refugees were residing in Protestant and Catholic Church buildings in Germany in December 2017.<sup>84</sup>

A further incarnation of the idea of sanctuary has been adopted in the United States under the more secular setting of ‘sanctuary cities’.<sup>85</sup> The United States Department of Homeland Security Immigration and Customs Enforcement (‘ICE’) requires the cooperation of local law enforcement to effectively identify and remove undocumented non-citizens.<sup>86</sup> For example, local authorities are often asked to jail individuals who are due for deportation for minor infringements to allow ICE officials time to locate and remove the person. The approach of these ‘sanctuary cities’ has not been uniform but they have all frustrated attempts by federal agencies to remove non-citizens.

These ‘sanctuary cities’ have come under increasing attack from the Trump Presidency and conservative commentators in the US media.<sup>87</sup> An attempt to cut federal funding to ‘sanctuary cities’ through an executive order<sup>88</sup> was defeated by a preliminary injunction issued by the United States District Court Northern District of California.<sup>89</sup> On 20 November 2017, § 9(a) of the executive

81 Grace Yukich, “‘I Didn’t Know if This Was Sanctuary’”: Strategic Adaptation in the US New Sanctuary Movement’ in Randy K Lippert and Sean Rehaag (eds), *Sanctuary Practices in International Perspectives: Migration, Citizenship, and Social Movements* (Routledge, 2013) 106–7.

82 Randy K Lippert, ‘Wither Sanctuary?’ (2009) 26(1) *Refuge* 58.

83 Verena Mittermaier, ‘Refuge in Europe? Church Asylum as Human Rights Work in Fortress Europe’ (2009) 26(1) *Refuge* 68.

84 Dale Gavlak, ‘German Churches Act as Buffer for Refugees with Sanctuary Program’, *Crux* (online), 19 December 2017 <<https://cruxnow.com/global-church/2017/12/19/german-churches-act-buffer-refugees-sanctuary-program/>>.

85 See, eg. Rose Cuison Villazor, “‘Sanctuary Cities’ and Local Citizenship’ (2010) 37 *Fordham Urban Law Journal* 573.

86 *Ibid* 578.

87 Christopher N Lasch, ‘Sanctuary Cities and Dog-Whistle Politics’ (2016) 42 *New England Journal on Criminal and Civil Confinement* 159.

88 Executive Order No 13768, 3 CFR 268 (2017). § 9(a) of the order provides: ‘jurisdictions that willfully refuse to comply with 8 USC 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary [of Homeland Security]’.

89 *County of Santa Clara v Trump*, 250 F Supp 3d 497 (ND Cal, 2017).

order, which provided that sanctuary cities ‘are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes’, was declared unconstitutional by Orrick J, who issued a nationwide permanent injunction against its implementation.<sup>90</sup> The adoption of the term ‘sanctuary cities’ in the United States shows the growing understanding of ‘sanctuary’ as a legitimate form of resistance to unjust immigration policies.

The historical and global nature of the concept of sanctuary provided moral weight and legitimacy to the use of the idea in Australia in 2016. This was evident in the language used by church leaders. For example, the Anglican Dean of Brisbane, Peter Catt, referred to the offer of sanctuary as reinventing the ‘ancient concept of sanctuary’.<sup>91</sup> He made references to sanctuary as ‘a concept that was certainly alive in the Middle Ages’.<sup>92</sup> The references to this ancient tradition were not made in order to deny the applicability of Australian common law and legislation to church groups. The invocations were made to frame the act of civil disobedience by church groups as accepted behaviour rooted in an established tradition. Thus, churches were able to gain greater support for their actions by showing the legitimacy and historically recognised validity of their chosen tactic.

### **C Success Due to the Standing of the Church in Australian Society**

In addition to its theological and historical claims to legitimacy, the success of the offer of sanctuary in Australia can also be traced to the social capital enjoyed by church groups in Australia.

Grace Yukich argues that ‘[t]he traditional sanctuary offer of aid, shelter, and protection in the form of temporarily living in a church is ... less appealing and less useful for today’s undocumented population’ because they do not need humanitarian aid and a place to hide but rather legal status.<sup>93</sup> This is as true in the Australian context as it is the sanctuary movement in the United States about which Yukich is writing. Modern sanctuary movements are thus most effective as a political strategy aimed at gaining public sympathy and drawing attention to an issue with the aim of law reform. The fact that no refugees or asylum seekers took shelter in church buildings in 2016, but churches were nevertheless celebrated for their contribution to the refugee movement, attests to the function of churches in this context as effective political agitators. The lack of utilisation of church property as places of shelter was largely immaterial to the role of churches in the resistance to government laws and policies.

90 *County of Santa Clara v Trump*, 275 F Supp 3d 1196 (ND Cal, 2017).

91 Edwards, above n 63.

92 Ibid.

93 Yukich, ‘I Didn’t Know if This Was Sanctuary’, above n 81, 107.

Despite the decline in the religious engagement of the Australian population, there has been an increase in the prominence of religion in Australian politics.<sup>94</sup> Much of the literature on the role of church groups in Australian politics has focused on the growing power of the ‘Christian right’ in Australia.<sup>95</sup> Church-going Australians are statistically more likely to vote for conservative political parties.<sup>96</sup> Since 1996, and the election of the Howard Coalition Government, there has been an increase in Christian mobilisation and much of this political activity and lobbying has been in support of ‘neo-liberal economic positions and the patriarchal, heterosexual family’.<sup>97</sup>

However, the influence and power of the religious right should not be overstated.<sup>98</sup> The failure of conservative interest groups to achieve success on issues such as abortion and marriage equality in Australia demonstrate that the conservative Christian voice is not as powerful as it is sometimes thought to be by its members or indeed its opponents.<sup>99</sup> As Smith argues, Christian activism in the Australian context has been marked by its pluralism.<sup>100</sup> A diverse range of churches have engaged with Australian politics and have been active in lobbying politicians across the political spectrum.<sup>101</sup> Whilst churches have indeed been active on issues of personal morality, they have also been critical of neoliberal policies relating to economics and industrial affairs.<sup>102</sup>

As ostensibly conservative organisations, churches enjoy a degree of legitimacy that is not afforded to many advocacy groups calling for law reform. Thus, church

94 Todd Donovan, ‘The Irrelevance and (New) Relevance of Religion in Australian Elections’ (2014) 49 *Australian Journal of Political Science* 626.

95 See, eg, John Warhurst, ‘Religion and Politics in the Howard Decade’ (2007) 42 *Australian Journal of Political Science* 19; Peter Browne and Julian Thomas (eds), *A Win and a Prayer: Scenes from the 2004 Australian Election* (University of New South Wales Press, 2005). As Lohrey has argued, ‘the influence of right-wing Christian lobbyists is growing, and is disproportionate to their representation in the wider community’: Amanda Lohrey, ‘Voting for Jesus: Christianity and Politics in Australia’ (2006) 22 *Quarterly Essay* 1, 42–3, citing Marion Maddox, *God under Howard: The Rise of the Religious Right in Australian Politics* (Allen & Unwin, 2005).

96 Donovan, above n 94, 641. See also Warhurst, above n 95, 21.

97 Marion Maddox, ‘Right-Wing Christian Intervention in a Naïve Polity: The Australian Christian Lobby’ (2014) 15 *Political Theology* 132, 132–3.

98 Kate Gleeson, ‘Tony Abbott and Abortion: Miscalculating the Strength of the Religious Right’ (2011) 46 *Australian Journal of Political Science* 473. On the support for marriage equality among Christian Australians, see Gareth Hutchens, ‘Most Christians in Australia Support Marriage Equality and Want a Free Vote’, *The Guardian* (online), 21 July 2017 <<http://www.theguardian.com/australia-news/2017/jul/21/most-christians-in-australia-support-marriage-equality-and-want-a-free-vote>>; James MacSmith, ‘Australian Christians Support Same Sex Marriage According to New Poll’, *News.com.au* (online), 24 July 2017 <<http://www.news.com.au/lifestyle/relationships/marriage/australian-christians-support-same-sex-marriage-according-to-new-poll/news-story/8dc3f1808beada4a62a6e571748a6364>>.

99 Gleeson, above n 98.

100 Rodney Smith, ‘How Would Jesus Vote? The Churches and the Election of the Rudd Government’ (2009) 44 *Australian Journal of Political Science* 613.

101 Anna Crabb, ‘Invoking Religion in Australian Politics’ (2009) 44 *Australian Journal of Political Science* 259, 259.

102 ABC Radio National, ‘Abbott Attacks Church over WorkChoices Criticism’, *PM*, 11 October 2007 <<http://www.abc.net.au/pm/content/2007/s2057260.htm>>.



advocacy can give a cause such as refugee rights mainstream appeal for it can be harder for politicians to dismiss churches and undermine their claims.

The adoption of a progressive cause by a traditionally conservative organisation can, however, have unexpected consequences. Yukich observes that the New Sanctuary Movement in the United States

is an explicitly religious group, focused not only on challenging US immigration policy but also on struggling to define what it means to be religious today. Through their religious support of immigrant rights, the mostly liberal New Sanctuary activists seek to counter prevailing public images of the religious person as necessarily politically conservative ...<sup>103</sup>

That is, according to Yukich's empirical study of the New Sanctuary Movements in the United States, Christian activists she observed were motivated as much by the task of reclaiming Christian identity from the Christian right as they were about the plight of refugees and migrants they served.

No equivalent empirical study has been done of the sanctuary movement in Australia. As religion has a very different place in Australian society,<sup>104</sup> any attempt to apply such conclusions about US faith-based groups to the Australian context can be problematic.

The division in political identity among Christians in Australia has been noted by a number of scholars.<sup>105</sup> Some Christian writing in Australia about the concept of sanctuary has also suggested an understanding of church sanctuary as a progressive position by its supporters and opponents.<sup>106</sup> To date, however, there has not been any indication that the sanctuary movement in Australia has become a battleground for the assertion of Christian identity, in the same way that it has been observed to be in the United States. Churches and participants in the sanctuary movement in Australia have invoked universal theological and human rights grounds for the call to sanctuary.<sup>107</sup> This position is understandable as it has greater appeal to mainstream Australians and avoids the alienation of individuals who may be ideologically opposed to progressive causes.

103 Grace Yukich, *Praying with Our Feet: Religion and Immigration Politics in the New Sanctuary Movement* (PhD Thesis, New York University, 2010) 2 (emphasis altered) (citations omitted).

104 Alan W Black, 'The Sociology of Religion in Australia' (1990) 51 *Sociological Analysis* S27.

105 See, eg, Donovan, above n 94. See also Gerald A Arbuckle, *Crafting Catholic Identity in Postmodern Australia* (Catholic Health Australia, 2007); Smith, above n 100.

106 For example, the website Open Discussion on Progressive Christianity explicitly links the offer of church sanctuary with progressive values, stating that '[t]he Churches, all with strong progressive values, are invoking the historical concept of sanctuary, opening their doors to asylum seekers facing removal back to offshore detention centres': *Progressive Christians Offering Sanctuary to Refugees* (4 February 2016) Open Discussion on Progressive Christianity <<https://ucforum.unitingchurch.org.au/?p=1348>>. See also Stephen McAlpine, *No Sanctuary from the Secular State* (4 February 2016) <<https://stephenmcalpine.com/no-sanctuary-from-the-secular-state/>>.

107 Baptist Churches of NSW & ACT, above n 26.

## IV CONCLUSION

By joining a global sanctuary movement with historical and theological roots and risking criminal sanctions, churches contributed to many refugees and asylum seekers remaining in Australia rather than being returned to Nauru in 2016. This win, however, was a partial success because the struggle for refugee rights in Australia is far from over. What church groups and others advocating for the rights of refugees and asylum seekers have not succeeded in achieving yet is the abolition of extraterritorial detention and processing altogether. Australia continues to fund and effectively control the containment of refugees and asylum seekers in PNG and Nauru.

The temporary nature of the win by church groups and the broader refugee rights movement was evident in August 2017 when the Commonwealth government announced the cutting of welfare payments to asylum seekers and refugees transferred to Australia for medical reasons and threatened the return of the people affected to Nauru and PNG.<sup>108</sup> Through this action, the Commonwealth specifically targeted refugees and asylum seekers who were permitted to remain in Australia after the success of the ‘Let Them Stay’ campaign and others in a similar situation.

Church groups responded to the announcement by yet again offering sanctuary. Support for the refugees and asylum seekers concerned was also offered by a number of civil society organisations. The Premier of Victoria, Daniel Andrews, offered a package of \$600 000 for the group affected which included housing, basic food, medical, clothing and transport expenses.<sup>109</sup> Many of the asylum seekers and refugees in Australia following medical treatment were again permitted to remain in Australia and averted destitution. However, the event highlights the failure to achieve legislative changes which would have averted the situation.

One constraint of sanctuary as a strategy is that interception at sea and transportation of refugees and asylum seekers to neighbouring Pacific islands necessarily places great limits on the church’s ability to offer shelter and protection to the men, women and children affected by Australia’s policy of extraterritorial processing and detention. The tactic is limited to providing assistance to the few refugees and asylum seekers who have been sent to Australia to receive medical treatment.<sup>110</sup>

This limitation has not stopped many churches and individual Christians from calling for law reform. A number of Christians and church leaders have

108 Richard Baker and Nick McKenzie, ‘Federal Government to Launch Crackdown on Asylum Seekers’, *The Sydney Morning Herald* (online), 27 August 2017 <<https://www.smh.com.au/national/federal-government-to-launch-crackdown-on-asylum-seekers-20170826-gy4vnh.html>>.

109 Benjamin Preiss, ‘Andrews Government to Give Housing, Food to Asylum Seekers Facing Homelessness’, *The Age* (online), 8 September 2017 <<https://www.theage.com.au/national/victoria/andrews-government-to-give-housing-food-to-asylum-seekers-facing-homelessness-20170908-gydu8n.html>>.

110 Mittermaier also highlights this issue in relation to the European context: Mittermaier, above n 83, 69.

engaged in other forms of civil disobedience actions in support of refugees and asylum seekers in PNG and Nauru.<sup>111</sup> Such actions have included Christian leaders chaining themselves to the Australian Prime Minister's Kirribilli House residence,<sup>112</sup> and refusing to leave the offices of numerous politicians across Australia.<sup>113</sup> Father Chris Bedding, rector of the Anglican Parish of Darlington-Bellevue, describes the acts of civil disobedience by Christians in Australia in the following way:

We're going to come and sit in [politicians' offices] and pray. And awkwardly sing. And we'll be super polite and thank the staff as the police take us away. ... God told us to "let my people go" from Immigration Detention Centres. So that's what we're going to do. ... and we are not giving up.<sup>114</sup>

Through these continuing acts of civil disobedience, Christian leaders continue to draw attention to the ongoing suffering of refugees and asylum seekers that have resulted from Australian laws and policies. The resistance of churches to Australia's refugee regime is unlikely to end with the offer of sanctuary. What form any future resistance may take and the overall effectiveness of church advocacy on this issue remains to be seen.

111 Stephanie Anderson, 'Love Makes a Way: What Drives These Christians to Risk Arrest?', *SBS News* (online), 22 May 2015 <<https://www.sbs.com.au/news/love-makes-a-way-what-drives-these-christians-to-risk-arrest>>.

112 Ben Doherty, 'Manus Protest: Christian Leaders Chain Themselves to Kirribilli House Gate', *The Guardian* (online), 27 November 2017 <<http://www.theguardian.com/australia-news/2017/nov/27/manus-protest-christian-leaders-chain-themselves-to-kirribilli-house-gate>>.

113 Anderson, above n 111.

114 Chris Bedding, 'Cranky Christians against Asylum Seeker Cruelty', *ABC News* (online), 20 May 2014 <<http://www.abc.net.au/news/2014-05-20/bedding-love-makes-a-way/5465300>>.