

SUBMISSION ON AUSTRALIA'S HUMANITARIAN PROGRAM FOR 2007-08

From the Australian Catholic Migrant and Refugee Office

The Australian Catholic Migrant and Refugee Office (ACMRO) would like to commend and acknowledge the significant contribution made by the Australian Government in the area of resettlement and protection of refugees. However, we offer the following comments in relation to the Discussion Paper on the Humanitarian Program 2007-08.

While the first part of the submission is dedicated to questions on the composition of the Humanitarian program, the second part address various elements of the onshore component.

In the latter part we advocate for a new complementary protection visa class to be created.

The Composition of the Refugee and Humanitarian Program

Program Size

Despite the apparent and continuing need for resettlement, the humanitarian component of the overall migration program has actually decreased as a percentage over the last couple of years. While the general (non-humanitarian) migration program has grown to accommodate migrations based on family ties, skilled migration and business imperatives the humanitarian component has been halved from a figure of 17% of the total intake in the 2000/01 yearⁱ to just 8% in 2006/07.ⁱⁱ

With a booming economy and a population growth in decline, Australia has the capacity to provide for an increase in its annual humanitarian intake. In its submission on the 2006/07 humanitarian program, Refugee Council of Australia (RCOA) argued that, in a world where there is an increasing need for resettlement of vulnerable groups escaping persecution, there is no reason why the humanitarian component of the program should not be allowed to grow incrementally, as have occurred with both the skilled and family streams.

ACMRO supports RCOA's recommendation that the humanitarian intake of the migration programme should continue to grow incrementally in line with continued increases in both the skilled and the family migration streams.

Contingency Reserve

The world is becoming an increasingly volatile place, subject to sudden crises and emergencies. It's the view of ACMRO that a contingency reserve should be available to provide a substantial number of resettlement places in the event of emergencies. These places should be allocated independently of the main annual intake quota. This means that these designated emergency resettlement places should be added to the current programme, rather than being taken, or borrowed, from existing or future humanitarian intakes.

Providing a continuous Contingency reserve would enable the Government to respond quickly and appropriately should an emergency arise. Current examples of people with international protection needs which may apply for contingency places include Sri Lankans, Burmese and Iraqis (this is just to mention a few and should by no means be seen as a complete list of people deserving our protection). In the case of Iraq, one could argue, that since Australia has a strong

military and political presence in Iraq and the country once again is the producer of major refugee flows, (for whom there are, according to the Office of the United Nations High Commissioner for Refugees (UNHCR), only a very limited prospect for a return in safety and dignity,ⁱⁱⁱ it is Australia's moral responsibility to share the burden of the situation by accommodating these people's arisen protection needs.

ACMRO recommends that there be a provision in the humanitarian program for a Contingency Reserve.

De-linking the Humanitarian Programs

The linkage between the onshore and the off shore component was only introduced in 1996. As a result, any increase in the allocation of on shore places through successful asylum claims has effectively meant a decrease in places available for off shore applicants.

The annual voluntary quota set by Australia for the protection and settlement of refugees and humanitarian entrants is not appropriately scaled to cover the arrival of on-shore refugee claimants. ACMRO believes that the accommodation of a large numbers of refugees and humanitarian entrants is to be strongly commended. However we also believe that the quota should not be used to discriminate against people accepted to be refugees in Australia by i) pointing out that they are taking places in the refugee resettlement program from "genuine" off-shore refugee claimants, or ii) denying them resettlement in Australia by sending them off-shore for processing and then seeking a third resettlement country.

The measure of the way we treat refugees is not only in numbers but also in generosity of spirit. The uncertainty and extra anguish our current refugee regime imposes on onshore arrivals undermines the spirit of the Refugee Convention, contributes to the pain of claimants and leaves our own spirit as a country diminished.

ACMRO believes that resettlement should be viewed as an activity that complements asylum systems in a larger refugee protection system. It should not challenge the right to seek asylum onshore.

ACMRO recommends that the offshore humanitarian program numbers be determined independently of the number of onshore protection visas granted.

On shore protection

Mandatory detention

Our nation has attracted much criticism for its treatment of asylum seekers seeking our protection. Critics have included various UN agencies, Amnesty International, the Human Rights and Equal Opportunity Commission (HREOC), RCOA and many others.

In its report which was released last month,^{iv} HREOC renewed its request for the repeal of the mandatory detention policy. HREOC states that "Despite efforts to improve the environment inside detention facilities, the fundamental problem with immigration detention has not changed – namely the length of detention and the uncertainty about how much longer that detention will last." HREOC also referred to discussions with several mental health teams which confirmed what is already well-known: that uncertainty and length of detention inevitably leads to mental health problems.



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ACMRO would like to see a new culture evolve within the current migration regime, where the new legislation is based on a general presumption against detention. Asylum seekers who arrive in Australia without adequate documentation should only be detained when their detention is consistent with international human rights standards. This means that detention should only be resorted to if it is necessary to verify their identity and/or to determine the basis of the claim for refugee status or asylum and/or to protect national security and public order and/or where the asylum-seeker has deliberately sought to mislead the authorities.

There are alternatives to our current regime of mandatory detention; ways that can both accommodate and meet border security concerns, and at the same time ensure that respect for human life and dignity is not compromised. In other western democracies most asylum seekers live in the community. In Sweden for example, where an overwhelming majority of the people seeking asylum are residing in the community while their claim is being assessed, very few people have absconded and there has been little violence. This is a model that we in Australia used to have.

It is always morally reprehensible to mistreat innocent people in order to deter people from behaving in particular ways. In the case of mandatory detention, government policy is being used to mistreat people with the aim of deterring more people from coming to Australia.

Besides being a serious moral concern, one can also raise questions on the effectiveness of mandatory detention as a government policy. Evidence suggests that factors other than mandatory detention are likely to have been the biggest influence on the decline of boat arrivals to Australia over the past five years. Professor William Maley for example disputes the claim that mandatory detention is a deterrent. The numbers of people arriving by boat increased greatly in the years following the introduction of the current system of mandatory detention by the Australian Government (the present Opposition) in 1992. Professor Maley maintains that it is the so called push factors, ie the situation in refugees' countries of origin, and the *transit factors*, ie the situation en route to Australia, which determines the flow of asylum seekers to Australia.^v

It is also interesting to consider the fall in recent years of asylum claims made in Australia is consistent with global and regional trends. Figures in the latest report released by UNHCR shows a downward trend in asylum applications in most industrialized countries.^{vi} This indicates that the perception, commonly held by many in these countries, of a growing asylum problem, is not supported by data.

ACMRO views detention as inherently undesirable. We are therefore reiterating our call for an end to Australia's mandatory immigration detention laws.

Children in detention

ACMRO welcomed the legislative principle that children should only be detained in detention centres as a measure of last resort. Therefore we are very concerned about the findings made in the HREOC report (mentioned above) about the continuing detention of children. HREOC reports that:

[“It was disappointing to find 13 unaccompanied children in the Northern centre when HREOC visited on 1 November. All of these children were Indonesian boys found on illegal fishing

boats. As at 1 November, those 13 children had been detained for between 8 and 15 days. [”]

Detention is not a place for a child. It has been well established that exposure to a detention environment can be harmful for children.

ACMRO strongly urges DIAC to adopt the recommendations made by HREOC regarding finding alternative places of detention in the community for any future children.

Temporary Protection visas (TPVs)

ACMRO shares UNHCR’s concern over last years High Court decision of *MIMVIA v QAAH* and *NBGM v MIMA*, which asserted the primacy of Australia’s domestic legislation. This will mean that refugees in Australia will continue to need to prove afresh their refugee status after three years. UNHCR expressed concern that the affirmation of provisions in the Australian Migration Act overrides the international framework.^{vii}

Maintaining the temporary protection regime means the continuation of undue suffering on behalf of the refugees and their loved ones, inflicting uncertainty as well as postponing unnecessary solutions to their displacement and their integration into society. Evidence also shows that the majority of TPV holders eventually are afforded permanent protection.^{viii}

ACMRO recommends that the Government to abolish TPV’s. If an applicant is determined to be a refugee that person should be given permanent protection immediately.

Complementary Protection

Introduction

The term ‘complementary protection’ refers to a widening of the categories of persons who may be granted protection beyond those who meet the definition of refugee such as outlined in the Refugee Convention. Examples of people in need of protection who do not meet the definition of a refugee under the Convention include persons fleeing from generalized violence in a country where the rule of law and order no longer applies.

While the Refugee Convention only provides protection to people who satisfy the Convention’s definition of a ‘refugee’, there are a range of other international instruments which impose obligations not to return (or *refoul*) persons who face a risk of a violation of their fundamental human rights. Examples include a range of United Nations instruments such as the Convention Against Torture; the Statelessness Conventions, the Convention on the Rights of the Child; and the International Covenant on Civil and Political Rights.^{ix}

In response to the need to provide appropriate protection for people not otherwise recognized as refugees under the Refugee Convention, some countries, such as Canada, have expanded the definition of a refugee. The majority of asylum countries, however, have chosen not to alter the definition of a refugee but have instead adopted another instrument to complement the protection provided by the Refugee Convention.^x

The importance of avoiding protection gaps is stressed by UNHCR’s Executive Committee of the High Commissioner’s Programme (EXCOM 2005) which “encourages the use of

complementary protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol".^{xi} EXCOM also stresses that complementary protection should be implemented to ensure the strengthening, rather than the undermining of the existing international refugee protection regimes.

The need for complementary protection in Australia

Australia is one of the few western states that have not introduced a system of codified complementary protection for asylum seekers. In Australia there is no administrative process in place to assess protection applications made by people with valid non-Convention reasons. In order for complementary protection claims to be considered, the person first has to fail each stage of the refugee determination process.^{xii} Only after all avenues of appeal have been exhausted can the applicant seek the personal intervention of the Minister for Immigration. The Minister has non-compellable, non-reviewable powers to grant a visa to rejected visa applicants.

This effectively means that persons requiring protection outside of the limited definition of a refugee under the Refugee Convention must go through the whole administrative determination process before a primary decision can be made for complementary protection by the Minister. The Refugee Council of Australia sums up the present situation in Australia as follows:

"By leaving any consideration of non-Convention [that is, Refugee Convention] related protection claims to the very end of the process and by consigning the decision to the Ministerial discretion, it can be argued that Australia's current practice is inefficient, unnecessarily expensive, places an unrealistic burden on the Minister for Immigration, lacks transparency and accountability, does not contain sufficient safeguards and is detrimental to both Convention Refugees (by clogging up the system) and to those with non-Convention needs."^{xiii}

ACMRO shares RCOA's concerns and argues that the current system for assessing the claims of people seeking protection, regardless of whether they meet the Refugee Convention's definition of a refugee, needs immediate change. Australia has an obligation to comply with all the international agreements to which it is a party and which provide for additional and more inclusive criteria for granting international protection.

ACMRO supports the model of complementary protection detailed in the paper entitled "Complementary Protection: The Way Ahead" prepared by the Refugee Council of Australia, Amnesty International and the National Council of Churches in Australia and endorsed by most Australian Churches, the ICJ other legal organizations and refugee organizations. The paper proposes a model for a single administrative procedure that would allow an applicant's eligibility for complementary protection to be determined at each stage of the process rather than unnecessarily consigned to the very end of the process.

Such a reform would have numerous advantages including

- i. ensuring that Australia honors its obligations under international treaties
- ii. reducing the burden on the Minister, DIAC and review bodies;
- iii. introducing transparency, accountability and consistency in decision making;
- iv. ensuring no undue delays for those entitled to Australia's protection; and
- v. providing a safety net of reviewable decisions.

The reliance on a non reviewable and non-compellable discretion is an unacceptable means in determining applicants' protection needs under Australia's international obligations.

ACMRO recommends that:

- 1. The Migration Act be amended to introduce a fair system for 'complementary protection'.**
- 2. A single administrative procedure be used to assess complementary protection needs at each stage of the determination process.**

ⁱ Refugee Council of Australia, *Australian Refugee and Special Humanitarian Programme: Current Issues and Future directions. Views from The Community sector* (2006).

ⁱⁱ DIAC, Fact Sheet 20. Migration Program Planning Levels (2007).

ⁱⁱⁱ UNHCR, *Return Advisory and Position on International Protection Needs of Iraqis outside Iraq* (2006).

^{iv} HREOC, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities* (2007).

^v The Senate Legal and Constitutional References Committee, *Administration and operation of the Migration Act 1958* (March 2006).

^{vi} UNHCR, *Asylum Levels and Trends in Industrialized Countries Second Quarter. Overview of Asylum Applications Lodged in 31 European and 5 Non-European Countries* (2006).

^{vii} UNHCR, Press Release: *UNHCR concerned about confirmation of TPV system by High Court* (2006).

^{viii} FPLP Social Policy Caucus Committee Sub Committee to review aspects of Immigration Policy, *Summary and Recommendations Temporary Protection Visas (TPV)* (2006).

^{ix} The Senate Legal and Constitutional References Committee, *Administration and operation of the Migration Act 1958* (March 2006).

^x RCOA, *Complementary Protection-A new Model for Australia* in UNHCR Discussion paper *Complementary Protection* (2005).

^{xi} UNHCR, *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees* (2005).

^{xii} RCOA, *Complementary Protection- A new Model for Australia* in UNHCR Discussion paper *Complementary Protection* (2005).

^{xiii} Ibid

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