

EDITORIAL

Extending Our Protection:
October 2009

OUR CRITIQUE

Catholic teaching has long been critical of asylum laws that leave many people in need without adequate protection.

We believe that anyone who is forced to move to preserve their lives or human dignity has a moral claim on our hospitality. The more vulnerable and needy the person, the less able they are to access effective protection from their own country or the country where they usually live, the greater the moral claim on our care.

Measures that complement the *Refugee Convention*, extending protection beyond those who meet its narrow definition of a refugee, are needed. The *Migration Amendment (Complementary Protection) Bill 2009* is a step in the right direction.

The way in which Australian law currently defines who is a refugee is much narrower than the everyday use of the word. For example, the following categories of people are not included:

- victims of armed conflicts;
- people displaced by natural disasters;
- victims of poverty, hunger and failed economic policies;
- people who cannot prove that they personally were specifically persecuted;
- people displaced by climate change; and
- internally displaced people.

Catholic teaching regards all of these people to be refugees to whom we owe care and protection¹.

¹ Pontifical Council *Cor Unum* & Pontifical Council for the Pastoral Care of Migrants & Itinerant People, *Refugees: A Challenge to Solidarity*, Liberia Editrice Vaticana, Vatican City, 1992, n 4 – 6; see also

The amendments currently being proposed to the *Migration Act* will not address all of these situations.

HUMAN RIGHTS OBLIGATIONS

The amendments will however help our country to be fairer and more consistent in meeting our obligations not to return people to situations of danger (our non-refoulement obligations) as set out in international human rights instruments to which we are a signatory.

These instruments include the:

- International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty
- Convention on the Rights of the Child
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

MINISTERIAL DISCRETION

At present, people who do not meet the refugee definition may be granted a protection visa on humanitarian grounds through the exercise of the Minister's discretion.

A Minister cannot be forced to exercise their discretion and make a decision, nor can any discretionary decision be appealed.

<http://www.faitdoingjustice.com.au/docs/PeopleOnTheMoveAndCST.pdf>

The amendments, if passed, will allow people to apply for a protection visa on an increased range of grounds, and decisions will be reviewable.

Because such decisions would be an application of law and open to judicial review, rather than an exercise of discretion, we would expect to see greater consistency, and that all applications would be determined.

Greater certainty and transparency in the process of applying for protection would go some way to relieving some of the stress experienced by asylum seekers whose circumstances don't meet the strict refugee definition, and who find themselves in limbo waiting and hoping for an exercise of ministerial discretion.

NEW CRITERIA

The threshold for meeting the criteria to be granted a protection visa under the expanded criteria will still be high.

The Minister would need to have "substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will be irreparably harmed because the non-citizen will:

- (i) Be arbitrarily deprived of his or her life; or
- (ii) Have the death penalty imposed on him or her and it will be carried out; or
- (iii) Be subjected to torture; or
- (iv) Be subjected to cruel or inhuman treatment or punishment; or
- (v) Be subjected to degrading treatment or punishment.²

In addition to being a necessary and foreseeable consequence of removal, the potential harm would need to meet the test of being highly probable. The danger of harm must also be personal and present.

It is heartening to note that once such strenuous tests are met, protection visas will also be able to be granted on the basis of being a member of the same family unit as the person to whom a *non-refoulement* obligation is owed.

COMPLEMENTARY PROTECTION

Church and community groups have been advocating a formal system of complementary protection for many years.

Often it is the Church and community based groups who accompany and support asylum seekers through the process of applying for protection. They have seen who misses out on protection under our current laws, and the consequences for their lives.

We know from the research of groups like the Edmund Rice Centre, and the work of religious and others with trafficked women, that people have in the past been returned by the Australian Government to circumstances in which they suffered grave harm.

We have seen how inefficient and inappropriate it is for people like the young Kenyan women who came to Australia for World Youth Day and fear genital mutilation if they are returned, to be forced to rely on one person's exercise of discretion.

These changes to our migration law will provide an institutional framework for the solidarity with people forced to flee from danger expressed by so many ordinary Australians.

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Editor

² The Parliament of the Commonwealth of Australia, House of Representatives, *Migration Amendment (Complementary Protection) Bill 2009 Explanatory Memorandum*, http://www.austlii.edu.au/au/legis/cth/bill_em/mapb2009480/memo_0.html Accessed 25 September 2009.