



# AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

## Australian Catholic Migrant and Refugee Office



### Reflection on Memorandum of Understanding

The Australian Catholic Migrant and Refugee Office (ACMRO) commends the Australian government for investing in the long term promotion of peace and prosperity in Afghanistan. It is very positive that the two governments, in their proposed Memorandum of Understanding (MoU), along with UNHCR, acknowledge the need to work together in order to successfully manage the related problems of conflict and forced migration.

It is to be hoped that the MoU represents a shift away from ineffective and cruel policies of deterrence to control forced migration; towards a more proactive approach which addresses the underlying issue of war and instability in Afghanistan.

The focus on getting tough or stopping the boats adds nothing to the debate. These people are coming to Australia for protection that Australia agrees to provide as a signatory to the Refugee Convention.

The current system for processing excised offshore asylum claims is not sufficient to accurately justify the return of unsuccessful applicants. The system must incorporate fair review of both cases that fail on the basis of merit and cases that fail on the basis of procedure.

In November last year, the High Court ruled that the current non-statutory Refugee Status Assessment (RSA) which applies to excised offshore applicants was procedurally unfair.<sup>1</sup> In their 2010 report on Christmas Island, the Australian Human Rights Commission opposed the excision system because it treats asylum seekers differently based on their mode of arrival. It is an unfair process operating within an unfair system.<sup>2</sup> The RSA process is only granted to asylum seekers at the discretion and intervention of the Minister. The Minister decides if it is in the public's interest to lift the bar and allow the person to apply for a protection visa. This process of ministerial intervention is non-compellable and non-reviewable. Recent changes to the RSA process announced on the 7<sup>th</sup> of January 2011 are an improvement; however the system remains fundamentally unfair.

The Government should end the excision policy and process all asylum claims under the Refugee Status Determination (RSD) process which currently applies to applicants arriving on the mainland. Under the RSD process, unsuccessful applicants have access to the Refugee Review Tribunal (RRT) to review the merits of their case.

It is vitally important due to the uncertain and dangerous situation still present in Afghanistan, that Afghans claiming asylum be given the opportunity to have the merits of

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<sup>1</sup> *Plaintiff M61/2010E v Commonwealth and Plaintiff M69 of 2010 v Commonwealth* [2010] HCA 41 (11 November 2010).

<sup>2</sup> *Australian Human Rights Commission, 2010 Immigration Detention on Christmas Island (2010 Christmas Island report) p13.*



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their case reviewed. All claims for asylum undergo a fairer and more robust process under the current RSD process operating on the mainland.

We must remember the protection and welfare of all humans is paramount. If there are concerns about unfair procedures and of the environment these persons will be returned to; we should give them the benefit of the doubt and the opportunity to remain.

The Australian Government should establish subsidiary protection of asylum seekers who fail to meet the legal requirements to be granted refugee status but who nonetheless still need our protection.

Claims for protection should be addressed on an individual basis. The situation in Afghanistan is complex and certain areas may be safe for some but not others, largely depending on gender, age, race and religion. Those of the Afghan Hazara minority who have suffered horrendous persecution should not be forced to return even if they do not fit into the legally termed category of a “refugee”. The UNHCR reports that Afghanistan's capacity to absorb returnees is stretched to its limits. Australia should be extremely cautious before sending a persecuted minority back to a country which does not have the capacity to guarantee their safety.

Pakistan currently has over 1.7 million refugees from Afghanistan. The majority of displaced Afghans eventually want to return to their homes and way of life, however, only when it is safe to do so. Australia must be patient and only proceed with repatriation when we can establish a certain level of safety.

Australia is paving the way for the rest of the international community to start sending refugees back to Afghanistan. To do so would likely escalate the situation.

People smuggling activities cannot be controlled by returning unsuccessful asylum seekers to Afghanistan. The message is lost on people who are desperate and have no other choice. The Minister should guarantee beyond doubt that those who are returned to Afghan over the coming months will be protected from violence and persecution.

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