29 July 2005 H16
AW;rp

Mr Owen Walsh
The Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Walsh

Inquiry into the administration and operation of the Migration Act 1958 (Cth), submission to the Senate Legal and Constitutional References Committee

Introduction

The Law Society (SA) has previously submitted comments in respect of Australia's immigration laws, including, most recently, a submission to the Legal and Constitutional References Committee in respect to the *Migration Litigation Reform Bill* (Cth). The Australian Government has recently announced a number of legal and administrative changes for migration matters[1]. We now make the following further comments about the administration and operation of the Migration Act 1958, its Regulations and Guidelines by the MIMIA and DIMIA. Noting the breadth of this term of reference, we address only those aspects which we believe to be in most urgent need of reform.

A PROCESSING AND ASSESSMENT OF VISA APPLICATIONS

Temporary Protection Visa regime

The Temporary Protection Visa (TPV) regime is harsh and costly in both human and economic terms. Australia is the only country to grant temporary status to refugees who have been through a fully adjudicated process and have been found to be refugees according to the 1951 Refugees Convention definition[2]. Australia's

[1] Prime Minister's Media Release, *Immigration Detention*, 17 June 2005, http://www.pm.gov.au/news/media_releases/media_Release1427.html, accessed on 17 July 2005.
[2] See *Human Rights Watch Commentary on Australia's Temporary Protection Visas for Refugees*, May 2003, http://www.hrw.org/backgrounder/refugees/australia051303.pdf, accessed on 17 July 2005.

approach is at odds with the United Nations High Commissioner for Refugees (UNHCR) Handbook, which emphasises the importance of providing refugees with the assurance that their status will not be subject to constant review in the light of temporary changes in their country of origin[3].

The impact of the TPV regime and extended processing periods on applicants is enormous. Holders of TPVs have fewer rights than permanent visa holders, including in respect to family reunion. Lawyers/migration agents and mental health professionals who work with TPV holders report a high incidence of mental health problems in this client base, with the distress being caused or compounded, in many cases, by the prolonged decision making process and attendant uncertainty. Research carried out by the University of New South Wales supports this, with preliminary findings showing that refugees placed on TPVs have a 700% increase in risk for developing depression and post-traumatic stress disorder compared to refugees with Permanent Protection Visas (PPVs) [4].

In addition to the obvious human cost, the economic cost of TPV system and prolonged decision making process are also significant. Each individual claim must be evaluated at least twice, possibly more if the decision is appealed, necessitating the inefficient allocation of resources[5].

Our primary submission is that the TPV regime should be abolished. If it is not to be abolished, DIMIA's policies with regard to the circumstances in which refugee status ceases should be amended as outlined below.

Article 1C of the Refugees Convention[6] sets out the circumstances in which the Convention ceases to apply to a person granted refugee status, and includes the provision that refugee status ceases where 'the circumstances in connexion with which [s/]he has been recognized as a refugee have ceased to exist'[7]. DIMIA's policy is that the existing statutory framework requires decision makers to form a fresh view on a protection visa application by a TPV holder as to whether Australia has protection obligations to the applicant[8].

In our submission this policy approach is flawed. The appropriate approach is to continue the prior recognition of refugee status unless there have been fundamental, stable and durable changes in the country of origin. Decision makers should be required to determine in the first instance whether such fundamental and durable changes have occurred, rather than requiring applicants to again prove themselves to be in need of protection[9].

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[3] *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Geneva, January 1992.

[4] 'Temporary Protection Visas compromise refugees' health: new research', 30 January 2004, http://www.unsw.edu.au/news/pad/articles/2004/jan/TPV_HealthMNE.html, accessed on 17 July 2005.

[5] See *Human Rights Watch Commentary on Australia's Temporary Protection Visas for Refugees*, as above.

[6] *Convention Relating to the Status of Refugee 1951 and Protocol Relating to the Status of Refugees 1967.*

[7] *Convention Relating to the Status of Refugees 1951*, Article 1C(5).

[8] DIMIA, *Procedures Advice Manual 3*, 'The Protection Visa Procedures Manual', accessed via LegendCom.

[9] *NAGV and NAGW of 2002 v MIMIA* [2005] HCA 6 (2 March 2005), per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ at [47].

Assessing whether fundamental and durable changes have occurred should be approached with caution, as recommended by UNHCR[10]. The DIMIA position that a durable solution can exist for returning refugees from war-torn countries such as Afghanistan or Iraq after 3 years (the duration of a TPV) lacks justification.

Assessment of evidence in protection visa applications

The circumstances of most protection visa applicants dictate that evidence (other than their own verbal or written evidence) in support of the protection claims is rarely available. Assessment of credibility issues is therefore intrinsic to refugee status determinations. The UNHCR Handbook, which has been accepted by the High Court as a guide to decision making, suggests that the decision maker should ensure that the applicant presents her or his case as fully as possible and with all available evidence, and in assessing the evidence, should give the applicant the benefit of the doubt where necessary[11].

Credibility issues such as inconsistencies in information supplied by the applicant, "late claims" and the results of linguistic analyses often form the basis of visa rejections by DIMIA. There is a tendency for the applicant's whole account to be disbelieved because of a relatively minor fact or inconsistency in the evidence.

This approach to the assessment of an applicant's credibility fails to take sufficient account of the myriad reasons that may exist for minor inconsistencies in the information supplied. These include limited opportunities to present claims, particularly at the early stages while the applicant is in immigration detention. Many applicants have suffered trauma which they are then forced to repeatedly revisit in telling their story, affecting their ability to present the information. Some have a fear of authority and/or a fear that information supplied may be disclosed to the government of the country of origin, particularly where the applicant has family members who remain in that country. Applicants also tend to place tremendous importance on interviews conducted by DIMIA, as a result of which the pressure associated with such interviews is immense. In many cases, applicants are asked to recall exact details of events which occurred many years ago, such as the precise date of a political demonstration or the precise length of time spent in a transit country.

There must, of course, be a mechanism for assessing the credibility of applicants' claims. However, expectations of internal consistency in these circumstances are unrealistic and expect too much of refugee claimants[12]. DIMIA purports to, and in many cases, does apply the 'benefit of the doubt' approach, but it appears that there

QAAH v MIMIA [2005] FCAFC 136 (27 July 2005) per Wilcox and Madgwish JJ (Lander J dissenting)

[10] *UNHCR Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6),* 10 February 2003.

[11] *UNHCR Handbook*, as above, p.34. The Handbook was recognised as a non-binding guide by the High Court in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs 1989)* 169 CLR 379.

[12] Susan Kneebone has made similar comments in respect to RRT members, many of which are also broadly applicable to the DIMIA decision-making process, in 'The Refugee Review Tribunal and the Assessment of Credibility: an Inquisitorial Role', *Australian Journal of Administrative Law*, Vol 5., pp 78-96.

is often a lack of consistency in its application, leading to significant disadvantage for some confused or traumatised applicants.

Likewise, linguistic analysis is often relied upon by DIMIA in visa rejections. This evidence has been controversial and subjected to sustained criticism by expert linguists[13]. Excessive weight has been attached to linguistic analysis evidence, resulting in a significant number of applicants spending lengthy periods in immigration detention until finally being forced to apply for passports from their country of origin, only then being granted refugee status[14].

Lengthy visa processing times

Protection Visa Applications

Processing times for protection visa applications are subject to excessive delay. This is in part the result of primary refusals by DIMIA at the TPV and PPV application stage. For TPV applicants and holders, a majority of whom originate from Iraq and Afghanistan, around 90% of these primary refusals have been overturned by the Refugee Review Tribunal (RRT)[15]. In part, this is the result of DIMIA policy in respect to Article 1C (cessation clause) issues, discussed above.

Further delays have been caused by the processing of security (or 'character') checks. DIMIA itself admits that this can cause delays of up to a year in the processing of protection visa applications, adding to the uncertainty and distress for applicants.

The effect of the combined delays is that protection visa applicants may remain in limbo for lengthy periods before becoming eligible for permanent protection. This can take anywhere from the minimum 30 months envisaged by legislation[16] to as long as 7-8 years in some cases.

While the recently announced policy and legislative changes in respect to faster visa processing times are welcomed, the way in which they are implemented in practice will be crucial[17]. Importantly, they do not address the policy differences which contribute to the high percentage of cases overturned on appeal, and therefore do

[13] Eg Diana Eades, Helen Fraser, Jeff Siegel, Tim McNamara and Brett Baker, 'Linguistic identification in the determination of nationality: a preliminary report', February 2003 (available on request).
[14] It is arguable that some Federal Court decisions imply criticism of the weight decision makers attach to linguistic evidence: see for example the decision of French J in *WAAB v MIMIA [2002] FCA 782* (19 June 2002), in which he is at pains to point out that while the validity of inferences drawn by fact finders concerning credibility is not a ground for judicial review, 'it is no endorsement of the weight given to the language analysis which seems to have played a significant role in the … conclusion' (at [26]).
[15] 89.2% set aside for Afghan applicants, 91.5% set aside for Iraqi applicants. See 'Cases Finalised by Country in 2004-2005' (statistics for all cases finalised between 1 July 2004 and 30 June 2005), http://www.rrt.gov.au/statistics.htm, accessed on 17 July 2005.
[16] Absent the exercise of Ministerial discretion to shorten the time period, see Reg 866.228 of the *Migration Regulations 1994*.
[17] For a summary of the recent changes see the Prime Minister's Media Release, *Immigration Detention*, 17 June 2005, http://www.pm.gov.au/news/media_releases/media_Release1427.html, accessed on 17 July 2005; *Migration Amendment (Detention Arrangements) Act 2005* (Cth).

not address some of the most significant reasons for delays.

Freedom of Information Applications

The *Freedom of Information Act 1982* (Cth) requires that DIMIA or the Minister must take all reasonable steps to enable the applicant to be notified of a decision on a request within 30 days[18]. However, applications for access to documents held by DIMIA typically take many months to process. Current applications commonly take from 6 months to a year before a decision is made.

This in turn impedes the application for and processing of visa applications. It prevents lawyers and migration agents from giving speedy advice, and in some cases, from assisting with an application at all, until the documents are made available. DIMIA should direct appropriate resources to ensuring that such unreasonable delays do not occur.

Inflexible provisions for notice and time limitations

Applicants who are refused at the primary (DIMIA) level have a fixed time in which to appeal to the Migration Review Tribunal (MRT) or the Refugee Review Tribunal (RRT)[19]. Most applications for judicial review must also be lodged within strict time limits[20].

The time limits begin to run from the date of notification of the decision. Under the *Migration Act*, applicants are taken to have received notice if the decision was sent to the person's last supplied address, or if the person has appointed an agent, to the address provided by that agent[21].

Under the existing legislative scheme, these timelines are inflexible. If the person has not received notice of the decision and/or lodged an appeal within the allowed time frame, the right to seek merits review and judicial review is lost. This is the case *regardless of the reasons* for failing to lodge the appeal within time.

This impact flows on to affect applications made directly to the Minister. Under the *Migration Act*, the Minister only has the power to exercise her discretion to substitute a more favourable decision after the RRT or MRT has made a decision[22]. If applicants fail to lodge an application for merits review within time, they also lose the right to appeal to the Minister.

While it is reasonable to require applicants to supply a current address for correspondence, there are many reasons an applicant may not receive notice and/or lodge an appeal within time. These include lack of access to legal advice, failure to understand the requirement to provide a current address (particularly for applicants

[18] *Freedom of Information Act 1982* (Cth), s.15(5)(b).
[19] *Migration Act 1958* (Cth), ss. 347 and 412. Appeal rights do not apply to all refusals of all visa types.
[20] Section 477 of the *Migration Act 1958* (Cth).
[21] Reg. 2.16, *Migration Regulations 1994* (Cth) s.494B, *Migration Act 1958* (Cth).
[22] *Migration Act 1958*, ss. 351 and 417.

with limited English language skills, education and/or understanding of the Australian legal system), or error on the part of the appointed agent. If DIMIA is in error, the onus is on the applicant to prove the error in order for the notification to be re-issued, which can be very difficult.

Precluding such applicants from applying for an extension of time for appeal is unreasonably harsh. The MRT, RRT and federal courts should be granted the discretion to allow extensions of time in appropriate circumstances.

Harsh legislative provisions

7 Day Rule

The '7 day rule' operates to exclude onshore and offshore refugee and humanitarian visa applicants from eligibility for permanent visas on the basis that they have spent 7 days or longer in a country where it was possible to seek effective protection[23]. Applicants who fail to satisfy the 7 day rule, but have shown themselves to be in need of protection, will only be eligible for ongoing temporary protection visas[24]. This requires the person to make applications for ongoing protection every few years in perpetuity. Offshore applicants who are found to be 'secondary movers' will likewise only be granted a five year temporary visa[25].

This rule operates harshly, by continuing uncertainty and failing to offer a durable solution for people who have repeatedly proven themselves to be refugees. The policy basis for the rule appears to be the prevention of 'forum shopping', but in some instances it has been interpreted to apply to applicants who have merely passed fleetingly through another country during a passage organised by a people smuggler[26].

These applicants have no less need for ongoing protection, and the application of this rule constitutes a penalty imposed on people who may have had good reason to move from the first country[27]. The relevant time frame should be extended to capture only those applicants who have resided for a lengthy period of time in a country in which they genuinely had an opportunity to seek effective protection.

45 Day Rule

The '45 day rule' operates to prevent the grant of work rights to protection visa applicants who have been in Australia for 45 days or more before the date of their application[28]. The policy motivation appears to be that a genuine refugee would have made the protection application immediately after arrival in Australia. This is despite

[23] See Regs. 866.215, 200.212, 202.212 of the *Migration Regulations 1994* (Cth).
[24] Absent the exercise of ministerial waiver.
[25] Secondary Movement Relocation (Temporary) Visa Subclass 451.
[26] See, for example, RRT Reference N04/48768 (15 September 2004).
[27] See 'The 7 Day Rule – Inappropriate Use of Temporary Protection as a Penalty Against Secondary Movers', *Human Rights Watch Commentary on Australia's Temporary Protection Visas for Refugees,* as above.
[28] See Reg. 050.613A of the *Migration Regulations 1994* (Cth).

most refugees having limited, if any, English and no experience of Australian bureaucracy.

The consequence of this rule is that until a decision is made on the protection visa application, applicants are eligible only for a bridging visa which carries neither the right to work, nor the right to social security, nor the right to Medicare[29]. Applicants in this situation, who may later be found to be refugees, are forced to survive for very lengthy periods with no means to meet basic needs other than community support. The rule causes extreme hardship and should be abolished.

Restrictive visas for "offshore entry persons"

Refugee and humanitarian visa applicants who entered Australia at a place that has been excised from the migration zone[30], who have proved themselves to be in need of protection, are granted an extremely restrictive temporary visa[31]. These visas only allow the holder to remain in Australia for three years. Most significantly, *holders of these visas are excluded from eligibility for permanent protection*, unless the MIMIA grants a waiver based on public interest considerations[32]. Significant numbers of Nauru detainees have been granted these visas.

Legislative changes in 2004, which made some holders of these visas eligible to apply for mainstream visas, were a positive step[33]. However, many applicants will not satisfy the criteria for mainstream visas such as spousal or work visas. Rights associated with mainstream visas may also be more limited. There is no justification for continuing to exclude holders of these visas from permanent protection other than through Ministerial waiver and the provision should be abolished.

Impact of certain criminal convictions

Criteria for eligibility for permanent protection include the requirement that the applicant has not, in the last four years, been convicted of an offence that carries a maximum penalty of imprisonment for 12 months or longer[34]. The actual penalty imposed is irrelevant, and in this respect it is arguable that the provision goes well beyond the type of behaviour contemplated in other provisions of the *Migration Act 1958* as justifying the refusal or cancellation of a visa[35].

Applicants convicted of traffic offences may be captured by this provision, making it a particularly significant issue for refugees, many of whom lack knowledge or understanding of Australia's traffic laws. For example, in South Australia a second

[29] Unless the applicant falls within a class of persons specified by Gazette Notice: Reg. 050.613A(c).
[30] Eg Christmas Island or Ashmore Reef.
[31] Secondary Movement Offshore Entry (Temporary) Visa Subclass 447.
[32] Reg. 866.214 of the *Migration Regulations 1994* (Cth).
[33] Division 2.2AA *Migration Regulations 1994* (Cth).
[34] Reg. 866.222A of the *Migration Regulations 1994* (Cth).
[35] See section 501 of the *Migration Act 1958* (Cth). The issue of the provision being *ultra vires* for inconsistency with the *Migration Act 1958* (Cth) was considered and rejected by a single judge of the Federal Court in *VWOK v MIMIA [2005] FCA 336* (1 April 2005), but is arguably a point for appeal.

offence of driving without a licence carries a maximum penalty of a year's imprisonment[36]. A person convicted of this offence would be ineligible for permanent protection for at least a further four years[37].

This is unreasonably harsh and a wholly disproportionate penalty, the consequences of which are devastating for applicants. The provision should be removed and reliance placed instead on the existing provisions for visa refusal and cancellation on character grounds under the *Migration Act 1958*[38].

RECOMMENDATIONS

Greater flexibility and fairness have been specifically cited by the Prime Minister as goals in the reform of the Australian immigration system[39]. Further reforms are needed before these goals can be met.

We make the following recommendations:

1. **That the TPV regime be abolished, or if it is to continue, that DIMIA apply Article 1C of the Refugees Convention in a way that ensures that the onus is on decision makers to decide whether the country circumstances that gave rise to the initial finding of refugee status have ceased.**

2. **That a consistent method for the assessment of credibility issues be developed, adopting a 'benefit of doubt' approach.**

3. **That DIMIA build on the recent changes providing for 90-day processing of protection visa applications, by addressing the policy positions that also contribute to lengthy delays caused by appeals.**

4. **That DIMIA ensure that adequate resources be directed to the assessment of Freedom of Information applications, to meet the legislative requirement that reasonable efforts be made to notify the applicant of a decision within 30 days.**

5. **That greater flexibility be introduced in respect to time limitation periods for appeal, by bestowing the MRT, RRT and federal courts with the discretion to extend the time frame in which to lodge appeals.**

6. **That the '7 day rule' be amended to capture only those applicants who have resided for a lengthy period of time in a country which genuinely offered an opportunity to seek effective protection.**

7. **That the '45 day rule' be abolished.**

[36] Where the person has never held a licence and has had a prior (prescribed) driving offence in the last three years: section 74 of the *Motor Vehicles Act 1959* (SA).
[37] Absent the exercise of Ministerial waiver.
[38] Section 501.
[39] Minister's Media Release, *Immigration Detention,* as above.

8. That the restriction on eligibility for permanent protection for "offshore entry persons" be removed.

9. That Regulation 866.222A be revoked.

B DETENTION

Whilst the major part of the Law Society's submission (and it can be expected from other organisations) concerns issues such as,

- whether the procedures adopted by DIMIA are likely to lead to fair hearings and just outcomes for those in detention;
- the management and fairness of the TPV system;
- the procedures of the RRT; and the appropriateness of a mandatory system of detention,

the final stage, namely the deportation of those in detention also warrants consideration, as the execution of procedures and methods of DIMIA are currently of significant concern.

By section 198 of the Act, "Removal from Australia of Unlawful Non-Citizens" a mandatory removal process for a number of classes of unlawful non-citizens is established. These classes include:-

- those who have requested the Minister in writing to be so removed;
- those who have been brought to Australia for a temporary purpose;
- those who have not made a valid application for a substantive visa when in the migration zone;
- those who have had an application for a substantive visa finally determined against them; and
- those who may be eligible to apply for a substantive visa but have not done so.

Lack of Notice

Reports from legal practitioners who have acted for many detainees is that the Department gives at best brief notice that a deportation will be likely to occur, and at worst often gives notice to legal practitioners or migration agents which only becomes known in circumstances after the deportation has occurred. It is believed by many that this is part of the "culture" of the Department which views both the detainees and those who may wish to be involved in their dealings with the Department with scant regard.

The Act should be amended to give reasonable notice in order that any issue which may be relevant can be considered.

Where Deportation Is Not Achievable

Where it is not possible to "remove as soon as practicable an unlawful non-citizen" the harshness of the detention system is seen.

This issue after being explored at length by seven Justices of the High Court in Al-Kateb v Goodwin. By a 4:3 majority the appeal by the appellant Al-Kateb to be released from detention in circumstances where there was no real prospect of removal from Australia in the reasonably foreseeable future was dismissed.

The situation faced by those such as Mr Al-Kateb should be re-examined and the legislation amended to ensure that such an inhumane situation for a person who poses no threat by reason of criminal activity or otherwise is able to take a place in Australian life.

This situation, of course, is also that of the asylum seeker Peter Qasim. By any measure of reasonableness, the detention of this man for seven years is unconscionable

The Baktiyari Case

The circumstances of the events surrounding the Baktiyari family are too well known to be repeated.

The circumstances of their deportation is the clearest example of the actions of the Department acting in ways which would be unacceptable in other areas where human rights are affected. In particular there was no notice to those who had sought to ensure that the Baktiyari family would find a place in the community.

The Alvarez Case

The arbitrary use of the deportation power by Department officers is likely to be the subject of severe adverse criticism in the Palmer Inquiry. The failure of the system in this case highlights how the unchecked actions by the Department can have the most severe consequences for the individual and ultimately must undermine public regard for the manner in which the Act is administered.

Danger of Torture or Death on Deportation to Country of Origin

There are now a number of reports in which the danger of torture or death of an individual or family members on return to a country of origin has now been well identified by the Edmund Rice Centre (and see also David Corlette's recent book).

It is submitted that the Senate Inquiry should carefully consider this most recent information with the view to ensuring that significant injustice is not done in the deportation process.

C PROBLEMS WITH THE EXERCISE OF MINISTERIAL DISCRETION
D NEED FOR PROTECTION ON 'COMPLEMENTARY' HUMANITARIAN GROUNDS

We note that this aspect of our submission deals with issues already examined in detail in 2003 by the Senate Select Committee on Ministerial Discretion in Migration Matters. The shortcomings of the framework established by the Migration Act in this area have been evident for several years. We are of the opinion that urgent reform is necessary to address the problems associated with the current manner in which Ministerial discretion is exercised and relied upon and the lack of an adequate system for processing applications for protection by persons who are at risk of a violation of their fundamental human rights, but who do not fall into the narrow category of persons afforded protection under the Refugee Convention[40].

Inadequacy of, and problems relating to, the current system under the Migration Act

The Migration Act as it currently stands in relation to the protection of refugees recognises only that Australia has protection obligations towards those persons who fall within the definition provided in the Refugee Convention, namely those who have "a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion".

However under international law, Australia's protection obligations, (specifically the obligation of non-refoulement), apply not only to persons who fear persecution on the grounds set out in the Refugee Convention but also to any person who faces a "real risk" of a violation of their fundamental human rights if they are returned to their country of origin or to a third country, for example a violation of any right protected by the ICCPR[41], the CROC[42] or CAT[43]. Australia must also have regard to those persons recognised as stateless and offer them appropriate protection.[44] Protection on humanitarian grounds outside of the scope of the Refugee Convention ("complementary" protection) is offered by most developed nations.[45] In investigating the most appropriate way in which Australia can meet its obligations in this respect we would urge the Government to have regard to the UNHCR Agenda for Protection, which includes in its objectives the "provision of complementary forms of protection to

[40] *Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees*
[41] *International Covenant on Civil and Political Rights*
[42] *Convention on the Rights of the Child*
[43] *Convention Against Torture, Inhuman or Degrading Treatment or Punishment*
[44] *Convention on the Reduction of Statelessness*
[45] For example see the systems used by the UK, Italy, Germany, Denmark and Sweden. Note also the adoption on 4 November 2004 by EU countries of a 5-year plan for the implementation of the *Hague Program* (harmonisation of immigration and asylum policy) which includes provision of complementary protection.

those who might not fall within the scope of the 1951 Convention but require international protection".

Due to the inadequacy of the current system in dealing with this category of persons seeking protection for 'non-convention' reasons, the exercise of Ministerial discretion, particularly that provided for by s417 of the Migration Act, has been relied upon as a 'safety net' mechanism. This reliance has resulted in a far greater number of applications for Ministerial intervention and a much wider scope for the exercise of the discretion than was likely intended when the legislation was drafted. We submit that, although there remains a place for Ministerial intervention in exceptional cases, the current heavy reliance on Ministerial discretion in order to meet Australia's non-refoulement obligations is inappropriate for numerous reasons.

The mechanism is inherently unsuitable

Australia's obligation of non-refoulement is not discretionary. It requires an analysis of the risk of violation of a person's rights if they are removed from Australia. Where a real risk is found to exist there are few, if any, exceptions to the duty to provide protection. We are obliged under international law to provide "effective remedies" for breaches of international human rights obligations.[46] This includes the provision of an adequate determination process for assessing claims for protection.

There is an inherent conflict in attempting to meet the non-refoulement obligation through reliance on a non-compellable, non-reviewable, non-delegable decision made on the sole basis of intervention where it is "in the public interest". There should be a clear legislative structure to guide the decision-making process to ensure factors relevant to Australia's obligations under the ICCPR, CROC and CAT are considered and that outcomes are fair and consistent. The current system does not provide an "effective remedy" sufficient to satisfy the requirements of international law.

Administrative error may have dire consequences

Whenever administrative decisions are made there is a risk of errors occurring. This is not a criticism of specific Ministerial decisions made to date but an acknowledgement that the decision making process can be flawed in a number of ways. This may be because a decision is made on the basis of incorrect information, a lack of relevant information, or a misinterpretation of the facts or the law. This risk is heightened where applications are made to the Minister without legal advice as to what information is in fact relevant, where there is no opportunity to respond to adverse material which may be before the Minister, where applications are made on the basis of documentary evidence alone and/or where the Minister is burdened by such a large volume of applications that insufficient time is available to consider each individual application thoroughly.

[46] See for example article 2(3) of the ICCPR.

Due to a lack of information, it is difficult to judge how failed asylum seekers who have been deported from Australia have fared following their removal. We are deeply concerned however by the findings of the Edmund Rice study "Deported to Danger" which reported on a significant number of persons who were placed into unacceptably dangerous situations as a result of their removal from Australia. The circumstances of the persons included in the study together with the fact that some were subsequently granted protection by other developed countries constitutes an embarrassment and a serious blight on Australia's human rights record. The study shows that the current system is clearly failing and Australia is not meeting its obligation of non-refoulement in some cases. Our view is that the removal of even just one person who is placed into a situation where they are at risk of a serious human rights violation is unacceptable. The consequences of administrative error in this area are potentially tragic.

There is absolutely no reason why an application for complementary protection should be considered any less rigorously than an application for protection under the Refugee Convention. A decision made in error could result in a person's death, 'disappearance', torture, wrongful imprisonment or other human rights violation and therefore must be subject to the safeguards afforded by the RRT and judicial review. The current system is flawed as although applicants must have exhausted the review and appeal channels before seeking the Minister's intervention, neither the primary decision maker within DIMIA nor any of the review bodies are entitled to consider factors relevant to complementary protection due to the legislative constraints of the Migration Act. Under the current system the decision as to whether or not to exercise Ministerial discretion is therefore in effect a primary decision where an applicant is seeking complementary protection, yet is not subject to any form of review and provides no safeguard against potential harm flowing from an error in the decision.

Inefficient use of resources

The burden of the large number of applications to the Minister in recent years is unacceptable and unsustainable, yet the discretionary power will continue to be relied upon whilst there remains no effective structure provided for in the Migration Act for the consideration of applications for complementary protection. As applicants must have exhausted all avenues of appeal before seeking the Minister's intervention, frivolous applications for review by the RRT and Federal Court are implicitly encouraged. This is a ridiculous and costly waste of time and resources.

May result in arbitrary detention

In addition to wasting time and resources, persons who do not meet the requirements for recognition under the Refugee Convention but who cannot be removed from Australia due to a serious risk of a violation of their human rights are detained, in some cases for extended periods, through no fault of their own whilst waiting for the exhaustion of the appeal process and finally for a decision by the Minister as to whether he or she will exercise their discretion. Where a person who is ultimately found to be in genuine need of protection has been required to go through an appeal

process which has no application in their particular circumstances, it is difficult to argue that their detention is not arbitrary and therefore prohibited under international law.[47] If the primary decision maker was able to make a decision based on all humanitarian grounds in the first instance, there would be no need for such lengthy periods of detention resulting in the eventual release of a person on a protection visa.

Lacks transparency and accountability

Decisions made by the Minister in the exercise of his or her discretion should be more transparent in order to reduce the risk of actual or apprehended bias, inconsistency and unfairness. If reasons for decisions were tabled in Parliament (as they were previously) there would be greater accountability and less scope for criticism. This need not compromise the confidentiality of the persons involved. If the number of cases involving Ministerial intervention were to be reduced by the introduction of a more efficient system of processing applications for complementary protection, then it is not unreasonable to require that where decisions are made to intervene, justification in the form of reasons tabled in Parliament be provided. Likewise, where the Minister declines to exercise his or her discretion, written reasons should be provided to the applicant. A person who fears for his or her future should they be removed from Australia (for whatever reason, well-founded or otherwise) deserves more than a one-line response in answer to their final plea for protection. For that person, the Minister's decision will be a life-altering one and should therefore offer some form of explanation.

Suggested Reforms

Our submission is that the Migration Act should be amended to incorporate a single system, as recommended by the UNHCR in the Agenda for Protection, "in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary forms of protection". Such reform would have numerous benefits including ensuring Australia meets the full extent of its human rights obligations, reducing the burden on the Minister, DIMIA and review bodies through the use of a more efficient determination process, reducing the length of time asylum seekers spend in detention, and affording applicants a more acceptable level of due process and the safety net of a reviewable decision.

We also encourage the retention of Ministerial intervention as a 'catch-all' provision for dealing with exceptional cases, however we submit that a number of changes to the current operation of s417 and s351 would be advisable. First, the requirement that a decision of a review authority be made before an application to the Minister is made should be removed. Genuinely unusual and exceptional circumstances will often be evident from the outset of a case and there is little point in forcing a person to go through the motions of an appeal to a tribunal which is doomed to failure merely so that they can become eligible to apply for the exercise of Ministerial discretion.

[47] See article 9(1) ICCPR, article 37(b) CROC.

Secondly, equity and fairness demand that access to Ministerial discretion should be available to applicants of all visa categories. Thirdly, transparency and accountability should be improved by the tabling in Parliament of case-specific reasons for the exercise of Ministerial discretion. Finally, written reasons for the refusal to exercise the discretion should be provided to failed applicants to encourage confidence in the integrity of the system amongst both applicants and the broader community and to demonstrate that thorough, fair and proper consideration has been given to each individual application.

RECOMMENDATIONS

1. **That the Migration Act be amended to introduce a system whereby the needs of asylum seekers for protection on the basis of complementary humanitarian reasons, in addition to existing Refugee Convention reasons, are:**

   (a) Recognised; and

   (b) Assessed from the outset of the claim.

2. **That the Migration Act be amended to enable the grant of a protection visa to a person who would be at risk of an infringement of their fundamental human rights if returned to their country of origin or to a third country, despite the fact that this may be for a non-convention reason.**

3. **That intervention by the exercise of Ministerial discretion be retained as a mechanism for use in exceptional cases, but that amendments be made to enable the discretion to be exercised at any time during the assessment and determination process rather than only after a decision of a review authority has been made.**

4. **That the option of seeking Ministerial intervention be open to applicants of all categories of visa.**

5. **That case-specific reasons for the exercise of Ministerial discretion be tabled in Parliament, but with the names and identifying details of the persons involved to remain confidential.**

6. **That where the Minister declines to exercise his or her discretion, written reasons for the refusal be provided to the applicant.**

Yours sincerely

Alexander Ward
PRESIDENT