Additional Comments

Senator Andrew Bartlett

I support the recommendations of the Senate Select Committee on Ministerial Discretion in Migration Matters and agree with the thrust of the report. I share the concerns raised in the report regarding the lack of transparency around the ministerial discretion system. The reluctance of DIMIA and the Minister for Immigration to assist with providing records and other material pertinent to the Committee's investigation illustrates that the system is a major accountability problem that all parliamentarians should be concerned about.

The political genesis of this Inquiry related to specific allegations against the then Immigration Minister, Philip Ruddock. Whilst any allegations of serious impropriety should be examined, the Inquiry demonstrated that the real problems are with the way the power of ministerial discretion has evolved and expanded into so many aspects of migration law.

Whilst the current Minister's refusal to allow proper access to records was frustrating and unacceptable, I believe it must be said that no solid evidence at all was presented to suggest that the so-called 'cash for visas' allegations had any real substance. I have been and remain very critical of many of Minister Ruddock's policies towards migration and refugee issues and the way those are implemented, but I have seen nothing that leads me to think that there is likely to be direct corruption of the sort that had been alleged or implied. Similarly, I have seen nothing which gives weight to any of the claims against Mr Kirswani, the member of the public most frequently mentioned in regard to these allegations.

I believe the 'cash for visas' allegations are a distraction from the main issue of concern, which is the decline in transparency, independence, consistency and fairness in the migration area, particularly (but by no means only) in regard to asylum claims.

I support retaining ministerial discretion, but it needs to be in a far more limited capacity. I believe the use of the discretionary powers has grown much larger and wider than is desirable. The Committee's report details the expansion in the minister's use of these powers in recent years. I would like to see ministerial discretion restored to it's original intention of being for unusual and extraordinary circumstances. This would mean reducing some of the areas where discretion is now available and introducing codified criteria for visas in areas where discretion has now become commonplace.

I am pleased that the Committee has made recommendations to this effect, particularly in relation to adopting a system of complementary protection. However, I would have liked to have seen the Committee present a stronger, more detailed case for such a measure. I wish here to highlight a number of options that merit examination in any consideration of implementing a complementary protection regime in Australia.

The need for Australia to adopt a complementary protection system

I remain concerned that Australia is one of the few countries in the developed world that does not have a system of complementary protection. I believe that the Government is turning a blind eye to the merits of complementary protection, which are well documented in evidence to this inquiry. I am left in no doubt that the current Australian practice of relying solely on ministerial discretion places it at odds with emerging international trends and that the risks involved in relying solely on this mechanism are not acceptable.

The Committee has been made aware that most European countries and Canada have adopted a visa category which addresses the issue of complementary protection. The UNHCR advised the Committee that a number of countries have in place administrative or legislative mechanisms for regularising the stay of persons who are not formally recognised as refugees, but who are in need of protection or for whom return is not possible or advisable.[1] Amnesty International also told the Committee that the international community is in the process of moving towards developing systems which have a complementary protection component.[2] UNHCR explained recent international developments regarding complementary protection in the following terms:

> Every country has cases which fall in the difficult grey area between those of people who have experienced high levels of discrimination or come from countries with recognised human rights concerns, and those of people who cross the threshold of persecution on convention grounds and are recognised as refugees. The committee can think of that as a spectrum with people at one end with no international protection concerns and people at the other end who are recognised as refugees.[3]

The UNHCR also points out that there are significant differences in the way countries interpret inclusion criteria set out in Article 1 of the 1951 Convention.[4] This means that some persons who are recognised as refugees in one country may be denied such status in another country. At least three categories of persons are currently the subject of varying State interpretations of the refugee definition criteria: those who fear persecution by non-state agents for 1951 Convention reasons; those who flee persecution in areas of on-going conflict; and those who fear or suffer gender-related persecution.[5]

---

1 UNHCR, Submission no. 36, p.2

2 Mr Gee, Amnesty International, *Committee Hansard*, 23 September 2003, p.3

3 UNHCR, *Committee Hansard*, 18 November 2003, p.18

4 UNHCR, Submission no. 36, p.5

5 ibid

The reliance of ministerial discretion to meet the protection needs of those who fall outside of the Refugee Convention's definition of a refugee ignores the real dangers facing thousands of people who seek protection from Australia.

I believe that relying on ministerial discretion in this way leaves no safeguards to ensure that those whom Australia has protection obligations under international treaties receive this protection.[6]

The Refugee Council of Australia has presented the Committee with a proposal for a model of complementary protection. This model allows decision makers to grant protection at all stages of the process. As Figure 1 shows, the model uses a single administrative procedure to determine whether a person is eligible for complementary protection and is therefore efficient and cost effective.

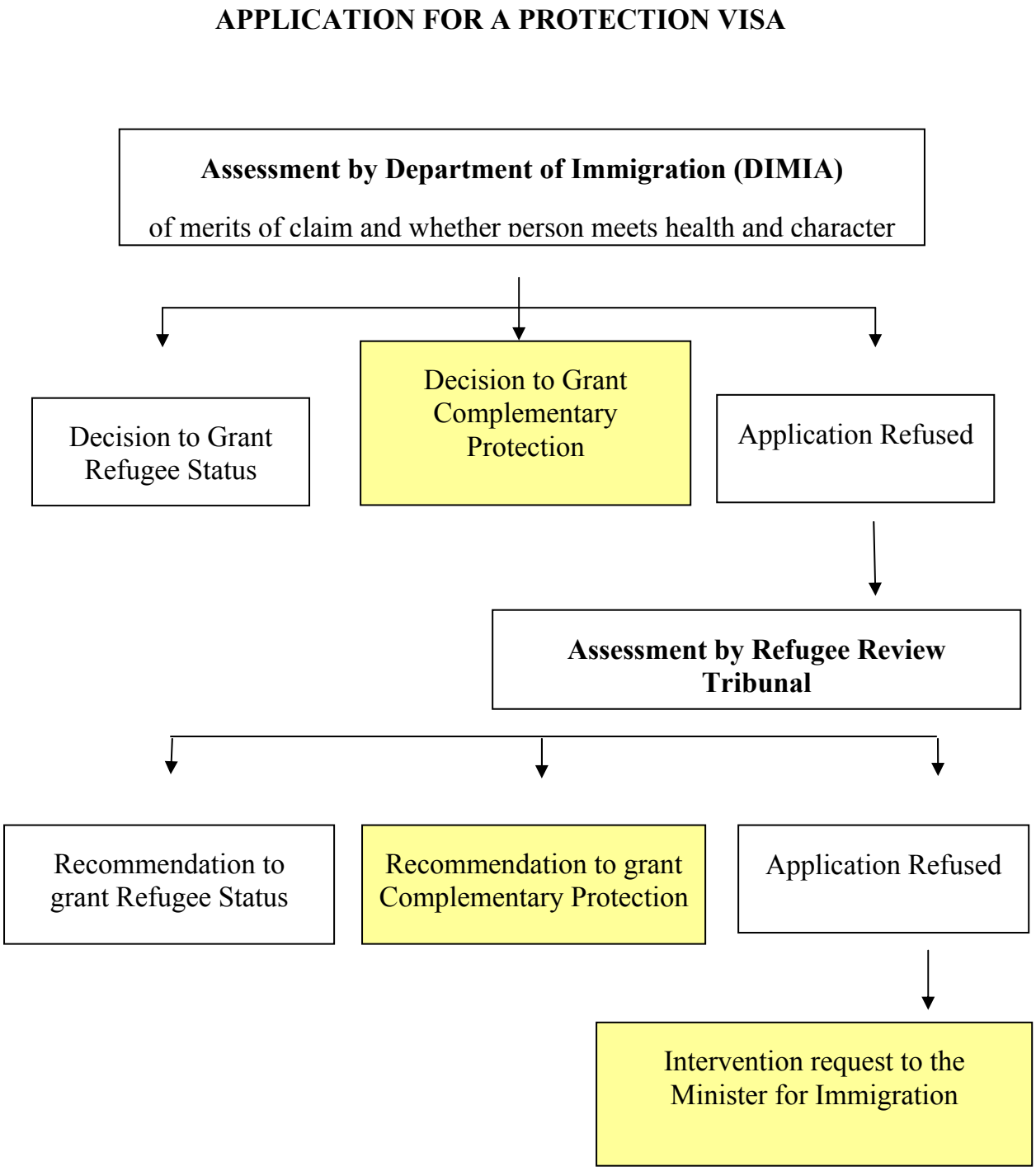
I believe this model deserves serious consideration on the part of the government. Adopting such a model will ensure that Australian policy is consistent with not only internationally recognised best practice but also an Australian Government commitment to the framework document *Agenda for Protection*[7] which was adopted by the Executive Committee of the UNHCR in September 2001.

6 Additional information, Refugee Council of Australia, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004, pp.2–3

7 *Agenda for Protection.* from http://www.unhcr.ch

Figure 1: Proposed Model of Complementary Protection

(Refugee Council of Australia)



The UNHCR also presented a compelling case for the adoption of a system of complementary protection, one that would overcome some of the problems that beset the government's current policy towards people who fall outside the Refugee Convention. The UNHCR told the Committee:

> This approach would ensure that key concerns—such as the threat of torture, the rights of children, or the non-returnability of a stateless person—are dealt with … certainty and clarity from the outset, rather than relying on a non-compellable, non-reviewable executive power at the very end of the process. UNHCR believes that this is a better risk management and more humanitarian approach which would avoid prolonged detention and prevent any chance of people being refouled without these issues being raised and considered properly.[8]

The UNHCR advised the Committee that in 2002 it had requested the Government to provide complementary forms of protection to all Afghans and, more recently, to all Iraqis seeking refugee status 'because we know that even rejected Iraqis cannot be returned at present—certainly not in large numbers'. The UNHCR clarified its position by stating that complementary protection should only be temporary: 'We review the situation in principle in the countries of origin every six months and we brief the government on what our view is of the situation'.[9] In addition: 'For a complementary form of protection, we certainly would not suggest that the traditional rights that we would request be granted to convention refugees be applied'.[10] In other words, the UNHCR is proposing a flexible solution that would be able to respond to changing circumstances in countries of origin as required.

In addition to the above proposals, there are a number of other options that should be noted. HREOC advised the Committee that all models of complementary protection should at the very least incorporate the following three features:

- clear criteria setting out when a person should be protected from non-refoulement under the ICCPR, CROC and CAT;
- procedures that protect against errors in applying that criteria (due process); and
- mechanisms to implement Australia's protection obligations for those who meet the criteria (visas).

The CCJDP and the Uniting Church also advocate the introduction of a complementary protection scheme into Australian law based on the various refugee

---

8 UNHCR, *Committee Hansard*, 18 November 2003, p.19

9 UNHCR, *Committee Hansard*, 18 November 2003, p.24

10 UNHCR, *Committee Hansard*, 18 November 2003, p.23

determination systems currently in operation in countries such as Canada, the Netherlands, Sweden, Denmark, the UK and the US.[11] The Refugee Council of Australia points out that Denmark and Sweden have comprehensive legislation which recognises fully the protection need of certain groups of people who fall outside the terms of the Refugee Convention, but who have compelling humanitarian reasons to stay.[12]

The CCJDP argues that the government should seriously consider two options as a potential solution to the 'unaccountable', 'vague' and 'unwieldy' mechanism embodied in section 417.[13] The first involves the introduction of a new humanitarian visa class which would have at least two distinct advantages over the current sole reliance on the section 417 discretionary powers:

- it would remove the administrative burden, inconsistency and arbitrary decision making inherent in the section 417 powers by de-linking the compassionate and humanitarian program from the onshore refugee program; and

- it would preclude the continuation and use of section 417 in certain circumstances, and increase the discretion available to case managers and the RRT to deal with more humanitarian claims at a much earlier stage of the refugee determination process.

The second option would involve amending section 36 of the Migration Act to give DIMIA case officers and the RRT jurisdiction to grant protection visas to persons who meet the requirement for protection under the CAT, CROC and ICCPR. According to the CCJDP, this would enable decision makers at both the primary and merits review stages to consider relevant human rights conventions as well as the Refugee Convention, thus 'improving the criteria for their discretion, [saving] time, and [reducing] the number of cases currently made under s417'.[14]

The change would empower decision makers in much the same way as currently exists for temporary protection visas introduced in 2001. These visas which apply to those who fall under the umbrella of the Pacific Solution include criteria that are outside of the Refugee Convention.

I want to also note that DIMIA was unable to substantiate its claim that introducing special categories of visas will place considerable pressures on Australia's ability to protect its borders, and result in the Minister for Immigration losing his or her control

---

11 CCJDP, Submission no. 15, pp.19–21; Uniting Church of Australia, Submission no. 19, p.5

12 Refugee Council of Australia, Submission no. 12, Appendix A, p.2

13 CCJDP, Submission no. 15, p.22

14 CCJDP, Submission no. 15, p.19

of the migration determination process. This claim is simply alarmist and exaggerated. In fact, other witnesses rejected these arguments outright. Dr Mary Crock, for example, told the Committee that:

> The criteria for the exercise of such powers can be articulated without opening the floodgates and [government] losing precious control of the migration process. The criteria are to be found in the human rights enshrined in international law…[15]

Whilst I remain supportive of the concept of ministerial discretion, various changes in circumstances and wide-ranging changes to Australia's Migration Act have left many thousands of people in a vulnerable position. Currently we face the prospect of those who were granted temporary protection remaining in an unprocessed state for months or maybe years to come. The situation is so dire that those who have argued ministerial discretion adequately meets these needs can no longer logically do so. The expense, inefficiency and the human costs of the current system make it absolutely necessary for steps to be taken to alleviate the problem.

I believe it is time that Australia accepted and acted upon its international obligations and joined the global community in offering protection to refugees for non-convention reasons. The concerns about the flaws and limitations of ministerial discretion have been raised before Senate Committees many times and outlined in previous reports, but have not been addressed by government. I therefore strongly urge the government to accept recommendation 17 of the Committee report and give priority to implementing a system of complementary protection in Australia.

Andrew Bartlett

Australian Democrats

15 Dr Mary Crock, Submission no. 34, p.4