# SENATE SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

## Submission from
## SCALES Community Legal Centre and Murdoch University

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First and foremost we thank the Committee for the opportunity to present these submissions. SCALES Community Legal Centre and students from Murdoch University have worked on files in the area of refugee law for over 5 years. We believe that our work within an educational framework give us rare opportunity to reflect upon the broader issues underlying the work we do. We hope this reflection can assist you in the task you have before you.

### Preliminary Issues

While we understand the framework of you inquiry, we believe that in order to properly contextualise the comments in this submission we must make some preliminary remarks concerning the way that the refugee determination system operates. It is our view that these observations may assist in fully appreciating the impact of the ministerial discretion.

First, it is very important to express our firm observation that the system is designed to limit the amount of protection visas being issued, rather than to undertake an unbiased determination of each refugee claim. We have anecdotal information that the processes within the Department of Immigration favour refusal of protection visas over approval. Specifically, we understand that when a departmental officer wishes to accept an applicant as a refugee they must seek supervisor approval, whereas when they wish to reject an applicant they need not.

Likewise, the fact that the decisions of departmental officers are reviewed by Tribunal Members who are appointed by the Minister himself and only for limited terms is also in our view problematic. This process coupled with the propensity the Minister has to express decidedly anti-refugee sentiments in the press makes for the impression that the refugee assessment system lacks fairness, balance and ultimately justice.

It is in this context that the issue of the Minister holding an ultimate discretion to decide on the fate of these applicants becomes extremely important.

**Complimentary Protection**

One major issue that the deficiencies of this system points to is the need for a system of complimentary protection. There are many people who have compelling humanitarian or compassionate grounds for staying in Australia, although they do not meet the strict definition of the Refugee Convention. It is our view that there should be a comprehensive humanitarian visa that considers (but is not limited to) the whether the applicants;

- Will be subject to any breach of any international human rights instrument if they had to leave Australia. (eg if they would be subject to discrimination);
- Have particular health, education or social circumstances that require that they remain in Australia. (eg their age or literacy);
- Have particular skills or productive capacity which could benefit Australia, or
- Whether on balance it can be demonstrated that in the long run they would bring more benefit to the Australian community than detriment. (eg their capacity to become active contributing members of the Australian community)

This type of visa should be available to all migrants, not just those entering Australia initially with refugee claims. And it should be incumbent on all departmental officers to consider whether a person would meet the criteria and advise the applicant of the existence of the visa. It should also be an available alternative for Refugee Review Tribunal members to remit matters to the Department with the direction that they meet this visa class.

Assessment of applications under this type of visa should also be reviewable by the Administrative Appeals Tribunal or the Migration Review Tribunal.

Before leaving this issue, it is important to say a few words about the often used argument of opening the floodgates to the millions of refugees around the world unless we are tough on this issue. We submit that it is 'push' pressures in countries of origin that cause large groups of refugees to seek protection, rather than the relative merits of the system in the countries where they go to seek that protection.

But more importantly, the system that we presently have is both legally (at international law) and ethically problematic. Consider this: at the same time as parliamentarian after parliamentarian was getting to their feet to describe the horrors of life in Iraq under Sadam Hussien, in support of joining the coalition, there still remained Iraqi asylum seekers in detention across the country. These Iraqis, when articulating the same horror stories of their country, had been found to be not 'credible' or for other reasons not refugees.

**Access and Fairness in Decision-making**

*Access*

All applications under section 417 or 48B must be sent to the Minister via the ministerial intervention unit in each state. This means that before they even cross the Ministers desk they are 'assessed' by a departmental officer as to whether they fit the criteria set out in the Ministerial Guidelines for the Identification of Unique and Exceptional Circumstances (MSI 225). Due to the demands on his/her time and the number of ministerial applications before him/her, the Minister often appears to simply 'sign off' on the report prepared by the departmental officer.

This can be problematic, for example a letter sent on behalf of or by an applicant to the minister on a matter, may be classified as a section 417 request. This means that if the applicant then tries to send a comprehensive request for exercise of ministerial discretion, it can be blocked by the ministerial intervention unit on the basis that there is no new information being present that what was known to the minister when the first letter was sent.

It is also of concern that the ministerial intervention unit is often staffed by and physically located in the onshore protection unit within the department. This means that the person who decides whether the request under section 417 can go to the Minister maybe a colleague or even the same person as the decision maker who refused the applicant in the first instance.

*Fairness*

Even if the request gets to the Minister, we have serious concerns about the fairness of the determination. It certainly appears that humanitarian grounds take a back seat to community support or skills that can benefit the Australian community. Furthermore, in reference to the preliminary remarks made we question the fairness of the Minister having this discretion given that his political position is so clearly about exclusion rather than fair and balanced assessment of claims.

Furthermore, determination of refugee claims is, by nature, problematic. Cross-cultural and linguistic issues exacerbate the process. Also, lack of evidence due to the applicants need to flee or inability to obtain documents from those persecuting them also adds to the difficulty. Finally, lack of country information along with difficulties of decision-makers in understanding the significance or cultural specificity of that information all contribute to determinations being problematic and uncertain.

It is in this context that we submit that the discretion plays a very important role and should remain, but that it should be administered by a panel. Furthermore, wherever possible, the applicant should be able to appear before the members of the panel. This could be achieved by selecting panel members from across Australia.

Obviously these comments only touch upon a couple of issues, they in no way represent a comprehensive treatment of this issue of ministerial discretion; however we hope that they have assisted you in your work.