

**GOVERNMENT RESPONSE TO**

**SENATE COMMITTEE REPORT**

**SENATE SELECT COMMITTEE  
ON MINISTERIAL DISCRETION IN  
MIGRATION MATTERS**

**MARCH 2004**

**Department of Immigration and Citizenship  
April 2011**

The Government welcomes the Senate Select Committee's Report on Ministerial Discretion on Migration Matters (the Report).

The Migration Act 1958 (the Act) provides the Minister for Immigration and Citizenship (the Minister) with discretionary, non-compellable, and non-delegable powers to resolve cases, if it is considered in the public interest to do so. Therefore, Ministerial Intervention (MI) processes differ from those in the codified visa framework.

The Report identified a number of issues for reform of MI under the Act, including the need for greater accountability, transparency and procedural fairness. It also recommended regulation changes allowing greater access to the migration visa framework, thereby providing access to review and reducing the number of MI cases.

In 2008, the government commissioned Ms Elizabeth Proust to provide advice to the Minister on arrangements for the exercise of the Minister's public interest powers. The Proust Report, released in July 2008, reiterated a number of issues outlined in the Senate Select Committee's Report. It recommended that, to the extent MI was retained, it should be very limited and subject to strict guidelines.

Both Reports supported the retention of MI to deal with cases which are unable to be resolved within the codified visa framework in the Act but which, nevertheless, require a migration outcome.

Taking into account the views of the Committee and the Proust Report, the government and the Department of Immigration and Citizenship (DIAC) are engaged in ongoing reform of MI, with a number of significant changes already implemented.

Following are DIAC's responses to the Committee's 21 recommendations.

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## Chapter 3 – Patterns of use of ministerial discretion

### Recommendation 1 (3.54)

*The Committee recommends that the Minister require DIMIA to establish procedures for collecting and publishing statistical data on the use and operation of the ministerial discretion powers, including (but not limited to):*

- *the number of cases referred to the Minister for consideration in schedule and submission format respectively;*
- *reasons for the exercise of the discretion, as required by the legislation;*
- *numbers of cases on humanitarian grounds (for example, those meeting Australia's international obligations) and on non-humanitarian grounds (for example, close ties);*
- *the nationality of those granted intervention;*
- *numbers of requests received; and*
- *the number of cases referred by the merits review tribunals and the outcome of these referrals.*

### **Government Response**

DIAC collects and reports on most of the information covered by the recommendation and is working to increase its capacity to record and report on a broader range of MI issues<sup>1</sup>. Key statistics on MI under section 417 is published in the DIAC annual report and will henceforth be available quarterly on the DIAC website.

A significant proportion of MI requests exhibit circumstances which may meet more than one of the grounds for referral, making identification and recording of any one specific ground problematic.

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<sup>1</sup> Refer to Government Response to Recommendation 5 regarding review tribunal referrals.

## **Chapter 4 – Development of ministerial guidelines and the exercise of the Minister’s discretionary powers**

### **Recommendation 2 (4.67)**

*The Committee recommends that DIMIA establish a procedure of routine auditing of its internal submission process. The audits should address areas previously identified by the Commonwealth Ombudsman, namely identifying ways to improve departmental processes for handling cases, and ensuring that claims are processed in a timely way and case officers consider all of the available material relevant to each case.*

#### **Government Response**

Since the tabling of the Ombudsman’s report, DIAC has strengthened arrangements for supporting the Minister in the use of his powers.

To ensure consistency in assessments, decision-making and referral of MI requests to the Minister, changes have been made to DIAC’s guidelines on the administration of ministerial powers. DIAC has implemented an analysis-based approach for all information provided by clients seeking the exercise of the Minister’s public interest powers. New templates for submissions and schedules have been developed which support a comprehensive analysis of the case and provide a preferred option in all cases that are referred to the Minister for consideration.

In line with evidence-based decision making principles and to ensure timely case processing, DIAC has conducted extensive training for staff involved in assessing MI requests.

A quality assurance process has been developed and implemented to review MI processes under section 417 of the Act, in line with DIAC’s National Quality Assurance Framework. The process monitors whether quality controls such as templates, guidelines and training are effective.

### **Recommendation 3 (4.70)**

*The Committee recommends that the Commonwealth Ombudsman carry out an annual audit of the consistency of DIMIA’s application of the ministerial and administrative guidelines on the operation of the Minister’s discretionary powers. The audit should include a sample of cases to determine whether the criteria set out in the guidelines are being applied, and to identify any inconsistency in the approach of different case officers.*

#### **Government Response**

The Government notes that it is a matter for the Office of the Commonwealth Ombudsman to determine whether to carry out such an audit and, if so, the timetable, priority and focus of such an audit. DIAC would cooperate fully and provide support in any such audit.

#### **Recommendation 4 (4.84)**

*The Committee recommends that the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) standardise their procedures for identifying and notifying DIMIA of cases raising humanitarian and compassionate considerations.*

#### **Government Response**

The Migration Review Tribunal (MRT)'s and Refugee Review Tribunal (RRT)'s standard procedures for identifying and notifying DIAC of cases raising humanitarian and compassionate considerations are set out in "*Tribunals' Policy and Procedures Guideline 1/2010 – Referrals for Ministerial Intervention*" (issued on 4 February 2010).

The guideline contains standardised procedures for identifying and notifying DIAC of those cases considered by Tribunal members to exhibit unique or exceptional circumstances, including compassionate and humanitarian grounds, which the Minister may wish to consider in accordance with sections 351 or 417 of the Act.

#### **Recommendation 5 (4.85)**

*The Committee recommends that the MRT and the RRT keep statistical records of cases referred to DIMIA, the grounds for referral and the outcome of such referrals.*

#### **Government Response**

The MRT and RRT keep statistical records of cases referred to DIAC and records of the grounds for referral.

DIAC provides monthly advice to the Tribunals of cases in which the Minister has intervened under sections 351 or 417 in a format which enables the matching of outcome of referrals with the relevant Tribunal's records.

## **Chapter 5 – Operation of the powers – problems encountered by applicants**

### **Recommendation 6 (5.9)**

*The Committee recommends that DIMIA create an information sheet in appropriate languages that clearly explains the ministerial guidelines and the application process for ministerial intervention. The Committee recommends that the new information sheet be accompanied by an application form, also to be created by the department. Both the information sheet and application form are to be readily and publicly accessible on the department's website and in hard copy.*

### **Government Response**

DIAC provides written information about the MI process for public distribution on its website.

A general fact sheet about MI is available on DIAC's website in English and 11 other languages including Arabic, Bengali, traditional and simplified Chinese, Hindi, Indonesian, Korean, Malaysian, Tongan, Urdu and Vietnamese. This is provided in hard copy through DIAC counters to clients interested in submitting a first MI request and refers to the more detailed information online.

Unlike a visa application process, a MI request does not require a client to comply with statutory criteria. Introduction of a prescribed application format has the potential to misrepresent MI as an application or review process, rather than as a safeguard for resolving unique and exceptional cases. It would therefore be inappropriate to create a binding format for making MI requests

In addition to the aforementioned general fact sheet, all clients making their first MI request are provided with a detailed fact sheet outlining the process and the expectations of the Minister and DIAC.

## **Recommendation 7 (5.12)**

*The Committee recommends that coverage of the Immigration Application Advice and Assistance Scheme (IAAAS) be extended to enable applicants for ministerial intervention to obtain an appropriate level of professional legal assistance. Extending the coverage of IAAAS should assist in reducing the level of risk of exploitation of applicants by unscrupulous migration agents.*

### **Government Response**

The Immigration Advice and Application Assistance Scheme (IAAAS) is a carefully directed response to Australia's international obligations not to *refoule* persons who might engage Australia's protection by meeting the Refugee Convention definition of a refugee. It provides publicly funded application assistance and independent and professional immigration advice to vulnerable clients seeking protection in immigration detention, and to the most disadvantaged, vulnerable Protection Visa (PV) applicants and other visa applicants in the community. The focus of IAAAS is on achieving an immigration outcome at the primary and merits review stages of the protection process.

A MI request is not a visa application process, nor does it require applicants to comply with statutory criteria. MI is intended as a safeguard to resolve unique or exceptional circumstances and not as a standard part of the visa application process. As clients request MI at their own discretion after receiving an immigration outcome, it is not appropriate for IAAAS services to be available to this group.

It should be noted, however, that the Migration Amendment (Complementary Protection) Bill 2011 is before the Parliament. This Bill may pass into law, matters that are currently considerations in cases for MI such as other international conventions that have a *non-refoulement* (non-return) obligation. Where IAAAS assistance is available, these complementary protection considerations may be brought within the operation of the IAAAS.

The responses to recommendations 13 and 14 detail measures put in place to address the problem of unscrupulous migration agents.

## **Recommendation 8 (5.18)**

*The Committee recommends:*

- *That DIMIA inform persons when a representation for the exercise of ministerial discretion is made on their behalf by a third party;*
- *That each applicant for ministerial intervention be shown a draft of any submission to be placed before the Minister to enable the applicant to comment on the information contained in the submission. This consultative process should be carried out within a tight but reasonable time frame to avoid any unnecessary delay; and*
- *That each applicant be given a copy of reasons for an unfavourable decision on a first request for ministerial intervention.*

## **Government Response**

The revised Minister's Guidelines which came into effect on 5 December 2008 provide that a request for the exercise of the Minister's public interest powers can only be accepted from the person who is the subject of the request or their authorised representative, unless initiated by DIAC. Letters of support provided by the person's supporters can still be forwarded to DIAC and may be taken into account when a request for MI has been made.

In keeping with the principles of client service delivery and the best interests of the client, DIAC consults with clients to obtain any additional documentation which might assist to present their case holistically to the Minister. DIAC is currently considering the potential impact on MI of the High Court decision of November 2010 in *Plaintiff M61/2010E v Commonwealth* regarding procedural fairness.

However, providing individuals with draft submissions would cause significant delays to finalising MI requests. Due to the non-compellable nature of the MI powers, providing individuals with a draft submission for their comment would be an unnecessary measure. For this reason, it would also be inappropriate for the Minister to provide reasons for not considering or declining to intervene in a request.



## **Recommendation 9 (5.35)**

*The Committee recommends that DIMIA take steps to formalise the application process for ministerial intervention to overcome problems surrounding the current process for granting bridging visas, namely:*

- *processing times that can take up to several weeks;*
- *applicants not knowing when they should apply for a bridging visa; and*
- *applicants being ineligible for a bridging visa because an unsolicited letter or inadequate case was presented to the Minister, often without the applicant's knowledge.*

## **Government Response**

Unlike a visa application process, a MI request does not require a client to comply with statutory criteria. Introduction of a prescribed application format has the potential to misrepresent MI as an application or review process, rather than as a safeguard for resolving unique and exceptional cases. It would therefore be inappropriate to create a binding format for making MI requests

The guidelines published by the Minister on 5 December 2008 provide that a request will only be considered when made by the person for whom intervention is requested or their authorised representative<sup>2</sup>. This ensures that clients are not disadvantaged if supporters request MI without their knowledge.

These changes also included the direction that, unless a client is in immigration detention, the Minister will not generally consider their request unless they hold a current bridging visa or other visa, or have applied for a bridging visa. Details regarding bridging visa conditions for MI clients are outlined on the DIAC website, including permission to work arrangements, access to Medicare and eligibility for Centrelink benefits<sup>3</sup>.

Departmental ministerial powers instructions state that "requests or information provided by any third party who is not the person's authorised representative may be taken into account if a request by the person or their representative has been made."

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<sup>2</sup> Refer to Government response to Recommendation 8.

<sup>3</sup> Refer to Government response to Recommendation 10.

## **Recommendation 10 (5.44)**

*The Committee recommends that all applicants for the exercise of ministerial discretion should be eligible for visas that attract work rights, up to the time of the outcome of their first application. Children who are seeking asylum should have access to social security and health care throughout the processing period of any applications for ministerial discretion and all asylum seekers should have access to health care at least until the outcome of a first application for ministerial discretion.*

### **Government Response**

As part of the 2009-10 Budget, the Government announced changes to permission to work and Medicare access for PV and MI applicants.

New arrangements introduced on 1 July 2009 support the principle that PV applicants and people making an initial MI request, who have remained lawful and actively engaged with DIAC to resolve their immigration status, should be eligible for permission to work (and therefore access to Medicare) while they await the outcome of their application.

In addition, DIAC's Community Assistance Support (CAS) program specifically targets clients who are assessed as being highly vulnerable, on temporary visas (including Bridging visas) while their immigration outcome is being actively managed.

## **Recommendation 11 (5.53)**

*The Committee recommends that DIMIA consider legislative changes that would enable ministerial intervention to be available in certain circumstances where there is a compelling reason why a merits review tribunal decision was not obtained.*

### **Government Response**

Existing provisions in migration legislation may offer further options in certain circumstances to applicants who fail to seek merits review. Section 48 of the Act enables a person whose visa application has been refused, whether or not they have sought merits review, to apply for a range of specified visas, including a PV if they have not already applied for such a visa.

The Minister also has the personal power under section 48B of the Act to allow a person who did not seek review of a PV refusal to lodge a further PV application. If that application is unsuccessful at the primary stage and at review, the MI power becomes available. Additionally, section 195A of the Act provides the Minister with a personal non-compellable power to grant a visa to a person who is in immigration detention, if the Minister considers it to be in the public interest to do so, whether or not the person has applied for a visa.

Making MI available only after both the primary decision and merits review was intended to preserve the statutory basis and consistency of visa decision making generally, while also providing a safety net for unique and exceptional cases after all of the formal processes have concluded. The comprehensive criteria in the Migration Regulations for each visa class which are considered at both the primary and review stage, allow for a structured and transparent assessment process to be undertaken.

In 2009, the Migration Regulations were changed to allow certain partners of Australian citizens, permanent residents and eligible New Zealand citizens, who were previously barred from making an application for a Partner visa in Australia, to do so where they meet certain criteria<sup>4</sup>.

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<sup>4</sup> Refer to Government Response to Recommendation 17 for more information.

## Chapter 6 – Representations to the Minister

### Recommendation 12 (6.71)

*The Committee recommends that the Migration Act be amended so that, except in cases under section 417 that raise concerns about personal safety of applicants and their families, all statements tabled in Parliament under sections 351 and 417 identify any representatives and organisations that made a request on behalf of an applicant in a given case.*

### Government Response

Publication of the identity of representatives or organisations could identify the client, raising complex privacy considerations and the potential for delay while agreement to publish such information is sought.

### **Recommendation 13 (6.74)**

*The Committee recommends that DIMIA and MARA disseminate information sheets aimed at vulnerable communities that explain the regulations on charging fees for migration advice, the restrictions that apply to non-registered agents and the complaints process. The information should also explain that the complaints process does not expose the complainant to risk.*

### **Government Response**

To protect communities from exploitation by unscrupulous and unregistered migration agents, DIAC has implemented a number of initiatives including:

- issuing warning letters to unregistered persons who may not be aware that they need to be registered in order to provide immigration assistance;
- improving provision of information to client contact officers in Australia so that they can consistently and appropriately respond to suspected cases of unregistered practice;
- publishing new brochures to improve consumer information and protection;
- developing a videoclip on the dangers of using unregistered migration agents;
- writing to the editors of ethnic press publications (in which unregistered persons purportedly advertise) advising them not to accept advertisements from unregistered agents;
- distributing community notices warning against unregistered practice.
- working with the Office of the Migration Agents Registration Authority (OMARA) on developing a client information sheet which agents must give to every client and is available on OMARA website.

In consultation with key stakeholders, the OMARA is publishing a *Consumer Guide* to provide information on what to expect from a registered migration agent and the complaints process. OMARA also publishes agent average fee information on its website.

## **Recommendation 14 (6.75)**

*The Committee recommends that the Migration Agents Taskforce should expand its operations to target unscrupulous operators that are exploiting clients through charging exorbitant fees, giving misleading advice and other forms of misconduct.*

### **Government Response**

The Migration Agents Taskforce (MATF) was set-up in June 2003 to deal specifically with particularly unscrupulous operators (who may be registered migration agents or unregistered persons acting unlawfully as agents) and to target any related criminal behaviour. It was originally intended that the taskforce would exist for a limited time and was dissolved in March 2007.

The *2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession (the Review)* found that there is a strong view in the broader stakeholder community that the architecture of the arrangements for regulating the migration advice profession was not ideal.

On 9 February 2009, the then Minister announced the establishment of the new OMARA. On 1 July 2009, the new OMARA was established to regulate migration agents to ensure visibility and transparency of the operations of the Office and to enhance consumer confidence. The new Office, attached to DIAC, is supported by a representative and independent advisory board.

Persons who may have been exploited by unscrupulous operators may make a complaint to:

- OMARA. If a registered migration agent is alleged to have breached the migration agents Code of Conduct, the OMARA is responsible for investigating and if appropriate sanctioning the agent; and
- state consumer protection bodies; and
- police.

## **Chapter 7 – Role of the Minister**

### **Recommendation 15 (7.53)**

*The Committee recommends that the Minister ensure all statements tabled in Parliament under sections 351 and 417 provide sufficient information to allow Parliament to scrutinise the use of the powers. This should include the Minister's reasons for believing intervention in a given case to be in the public interest as required by the legislation. Statements should also include an indication of how the case was brought to the Minister's attention – by an approach from the visa applicant, by a representative on behalf of the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department or in some other way.*

#### **Government Response**

Statements tabled in Parliament under sections 351 or 417 of the Act are prepared in a manner consistent with legislative requirements and include broad reasons why the Minister considers it in the public interest to intervene in a case. Any circumstances by which the case was brought to the Minister's attention that would identify the person cannot be included in the tabling statement.

### **Recommendation 16 (7.54)**

*The Committee recommends that the Migration Act be amended so that the Minister is required to include the name of persons granted ministerial intervention under section 351 in the statement tabled in Parliament unless there is a compelling reason to protect the identity of that person.*

#### **Government Response**

Publishing the names of people whose case the Minister has intervened on under section 351 of the Act in statements tabled in Parliament could give rise to genuine concerns about the person's personal safety, such as in cases involving domestic violence or children.

Interventions under section 351 of the Act may relate to a person owed protection under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CROC) or the International Covenant on Civil and Political Rights (ICCPR) and disclosure of the name of the person involved may place them at risk, as well as family members or associates in their home country.

## **Recommendation 17 (7.71)**

The Committee recommends that the Minister should make changes to the migration regulations where possible to enable circumstances commonly dealt with using the ministerial intervention power to be dealt with using the normal migration application and decision making process. This would ensure that ministerial intervention is used (mainly) as a last resort for exceptional or unforeseen cases.

### **Government Response**

Since the release of the Proust Report on 9 July 2008, a substantial amount of work has been done to reform MI through administrative improvements, changes to the Minister's guidelines, the development of alternative visa pathways and a possible legislation change.

DIAC has explored options for consideration by the Minister so that, where possible, circumstances commonly dealt with using the MI powers can be resolved using normal application and decision-making process.

On 14 September 2009, the Migration Regulations were changed to allow certain partners of Australian citizens, permanent residents and eligible New Zealand citizens, who were previously barred from making an application for a Partner visa in Australia, to do so where they meet certain criteria. On that date, the Minister's guidelines were amended so that MI requests made by clients who may be eligible to lodge a Partner visa under these changes are generally finalised without further assessment.

The *Migration Amendment (Complementary Protection) Bill 2011* (Complementary Protection Bill) was re-introduced in Parliament on 24 February 2011. If Complementary Protection is implemented, the legislation would allow Australia's *non-refoulement* obligations under CAT, CROC and ICCPR to be considered as part of an integrated Protection visa framework.<sup>5</sup>

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<sup>5</sup> Refer to Government Response to Recommendation 19.



## Chapter 8 – International humanitarian obligations

### Recommendation 18 (8.29)

*The Committee recommends that DIMIA establish a process for recording the reasons for the immigration Minister's use of the section 417 intervention powers. This process should be consistent with Recommendation 15 about the level of information to be provided in the Minister's tabling statements to Parliament. This new method of recording should enable the department to identify cases where Australia's international obligations under the CAT, CROC and ICCPR were the grounds for the Minister exercising the discretionary power.*

#### Government Response

As the Minister's public interest powers are discretionary and non-compellable, the Minister is only required to table in Parliament statements that comply with section 417 of the Act. For privacy and security reasons, the tabling statements do not hold specific information on the reasons for the Minister's decision to intervene in specific cases.

### Recommendation 19 (8.82)

*The Committee recommends that the government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the Minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR.*

#### Government Response

*The Migration Amendment (Complementary Protection) Bill* was re-introduced in Parliament on 24 February 2011.

If this Bill is passed and Complementary Protection implemented, the legislation will allow Australia's *non-refoulement* obligations under CAT, CROC and ICCPR to be considered as part of an integrated Protection visa framework. This would improve the efficiency of decision-making by more rapid and accountable assessments of asylum seekers' protection claims in a single process with access to merits review.

If a system of complementary protection is adopted, it is anticipated that the Minister's public interest powers would continue to allow the Minister to consider cases involving unique or exceptional circumstances where it may be in the public interest to substitute a more favourable decision.

## **Chapter 9 – Appropriateness of the Minister’s discretionary powers**

### **Recommendation 20 (9.73)**

*The Committee recommends that the ministerial intervention powers are retained as the ultimate safety net in the migration system, provided that steps are taken to improve the transparency and accountability of their operation in line with the findings and other recommendations of this report.*

#### **Government Response**

The Government response to the Committee’s recommendations outlines a number of areas where steps have been or are being taken to enhance the transparency and accountability of the MI process.

These steps include the amendments to the Minister’s Guidelines and the associated Administrative Guidelines implemented on 5 December 2008, which clarified the process of referring MI requests to the Minister.

Work continues in DIAC to identify areas of reform and further efficiencies and to provide greater clarity, transparency and fairness to clients. These include:

- considering other options for broad-ranging reform to limit the scope of MI to a true safety-net provision;
- further strengthening the Minister’s Guidelines; and
- providing better information about MI to clients.

### **Recommendation 21 (9.77)**

*The Committee recommends that the government consider establishing an independent committee to make recommendations to the minister on all cases where ministerial intervention is considered. This recommendation should be non-binding, but a minister should indicate in the statement tabled in parliament whether a decision by the committee is in line with the committee’s recommendation.*

#### **Government Response**

As the Minister’s personal public interest powers are discretionary and non-compellable, it would not be appropriate for an independent committee to make recommendations on cases.