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Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context

This brief analyses the current conundrum surrounding the exercise of ministerial discretion in migration matters in historical context. The machinery legislation of the 1901 and 1958 Migration Acts conferred wide discretionary powers upon the Minister. In 1989, reforms to the Migration Act 1958 removed most of these discretionary powers by creating legally binding statutory rules for visa categories, but allowed the Minister a residual public interest power to grant a visa in individual circumstances.

As initially conceived, these discretionary powers were meant to balance what is an otherwise inflexible set of regulations. However in practice ministerial discretion has undergone an evolution, from being an informal mechanism used sparingly, to a systematised administrative process employing more than 50 staff to manage thousands of requests on an annual basis. This brief considers the contemporary policy implications that have arisen in this context and questions whether the current formulation of ministerial discretion is sustainable.

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Contents

Executive Summary	1
Introduction	2
Brief History of Ministerial Discretion and the Migration Act	2
Immigration Legislation and Ministerial Discretion Prior to 1989	2
Migration Legislation Amendment Bill 1989	3
Public Accountability Mechanism: Statement to Parliament	7
Rationale Underpinning Ministerial Discretion	7
Contemporary Issues Regarding Ministerial Discretion in Immigration Matters	8
The Informal Nature of Ministerial Discretion	8
The Delegation of Ministerial Discretion under the Ministerial Guidelines	9
The Increasing Use of Ministerial Discretion	10
Ministerial Discretion as a De Facto On-shore Humanitarian Entry Process	14
New Ministerial Discretion Powers in Migration Matters	15
Conclusion	15
Endnotes	16

Executive Summary

Currently a Select Senate Inquiry is examining ministerial discretion in migration matters.¹ The first witnesses appeared before the inquiry on Friday 5 September 2003 and a number of further hearings are scheduled before the inquiry is due to report early in November.

The current conundrum surrounding the exercise of ministerial discretion in migration matters needs to be understood in historical context. The machinery legislation of the 1901 and 1958 Migration Acts conferred wide discretionary powers upon the Minister. In 1989, reforms to the *Migration Act 1958* removed most of these discretionary powers by creating legally binding statutory rules for visa categories. The original Bill which conferred most of the residual discretionary power on the Secretary (and not the Minister) was blocked in the Senate. After amendments, the Bill that became *Act 59 of 1989* allowed for a degree of ministerial discretion. More recently (and as recent as 28 August 2003) a number of new discretionary powers have been added which broaden the scope of ministerial discretion.

As initially conceived, these discretionary powers were meant to balance what is an otherwise inflexible set of regulations to allow the minister a public interest power to grant a visa in individual circumstances which the legislation had not anticipated and where there were compelling, compassionate and humanitarian considerations for doing so. However in practice ministerial discretion has undergone an evolution, from being an informal mechanism for dealing with unique and exceptional circumstances in a small number of instances, to a systematised administrative process employing more than 50 staff to manage thousands of requests on an annual basis.

The main reasons for the growth of ministerial discretion under the current government include: a growing number of requests for intervention; the introduction of a broader set of ministerial guidelines accompanied by an administrative procedure for reviewing every negative tribunal decision against those guidelines; and the adherence to a policy approach of dealing with humanitarian cases that fall under a number of international treaties and large group claims of a humanitarian nature also on a case by case basis through ministerial discretion.²

The growth in ministerial discretion is not the only contemporary policy issue. Others include: the informal nature of triggering discretion, the delegation of the vetting of requests for ministerial discretion to case officers and officers in the ministerial intervention unit, the reliance on ministerial discretion as a de facto humanitarian entry process and the broadening of the scope of ministerial discretion through the institution of new powers.

In a context where this discretion is neither reviewable nor compellable, is triggered through an informal process, and remains substantially hidden from scrutiny, immigration ministers are left vulnerable to accusations of favouritism. All this begs the question whether the current formulation of ministerial discretion is sustainable.

Introduction

This brief commences with an overview of the history of ministerial discretion in immigration law and policy. This history concentrates mostly on the sweeping changes to migration law and policy brought about by the 1989 reforms introduced by Senator Robert Ray following the report of the Fitzgerald inquiry into Australia's immigration policies. An overview of the parliamentary debate about ministerial discretion in immigration policy follows. This is important because much of what was said in that debate is relevant to the current issues surrounding ministerial discretion in migration matters. The next section sets out how the reforms have fundamentally shaped contemporary immigration policy and legislation in Australia. The final section provides an overview of contemporary issues relating to the use of ministerial discretion and offers explanations for the increasing use of this power under the current government, especially since 1999.

Brief History of Ministerial Discretion and the Migration Act

Immigration Legislation and Ministerial Discretion Prior to 1989

The *Immigration Restriction Act 1901* provided a skeletal framework for making immigration decisions and policies, allowing wide discretionary powers in determining entry, stay and deportation from Australia.³ The *Migration Act 1958* codified some of the discretionary powers of the Minister, but 'gave no indication how discretions would be exercised in individual cases'.⁴ For example, section 18 of the Migration Act simply gave the Minister wide discretion to deport 'a person who is a prohibited non-citizen', leaving considerable scope for the unfettered exercise of that discretion to expel or not expel a person from Australia.⁵ For most of the twentieth century immigration policy was not subject to any systematic scrutiny by the Parliament, or judicial review.⁶ Prior to the establishment of the Federal Court in 1976, appeals against discretionary decisions in immigration matters were rare and generally restricted to highly politicised cases.⁷

The machinery legislation of the 1901 and 1958 Acts conferred wide discretionary powers upon the Minister and the Department to grant entry permits, cancel those permits, deport unlawful non-citizens and others deemed to be undesirable.⁸ According to immigration law expert, Mary Crock:

The policies governing the exercise of these (and other) powers were set out in 14 or so Departmental manuals which were altered whenever the government so directed. There was no obligation to table the manuals in Parliament or otherwise to submit the documents to Parliamentary scrutiny.⁹

The extensive reliance on the exercise of ministerial discretion in immigration matters, created a heavy workload for immigration ministers, leaving them vulnerable to accusations of patronage, favouritism, unfairness and inconsistency.¹⁰ Moreover decisions based on discretion were difficult to defend and easy to overturn in administrative law,

following the establishment of the Federal Court in 1976 and the increased judicial scrutiny of administrative decisions in immigration matters throughout the 1980s.¹¹

Migration Legislation Amendment Bill 1989

In April 1989 the original Migration Legislation Amendment 1989 Bill introduced into the Senate by the then Minister for Immigration, Local Government and Ethnic Affairs, Senator Robert Ray, sought to expunge nearly all avenues for the exercise of ministerial discretion in immigration matters. In this respect, the Bill was modelled substantially on the recommendations of the Fitzgerald inquiry into Australia's immigration policies.¹²

The Bill removed ministerial discretion by creating legally binding statutory rules for visa categories and by shifting any residual exercise of discretionary power to the Secretary of the Department. The Bill sought to radically reform immigration policy, introducing legislation and accompanying regulations governing entry to, and stay within, Australia according to specific criteria. The Bill also created a two-tier system of review of immigration decisions, the first tier being the now defunct Migration Internal Review Office (MIRO) and the second tier being the Immigration Review Tribunal (IRT), now the Migration Review Tribunal (MRT).¹³ At that time, review decisions in refugee matters were undertaken by the Refugee Status Review Committee, whose functions since July 1993 have been taken over by the Refugee Review Tribunal (RRT).¹⁴ In this respect, it could be argued that one of the underlying reasons for the 1989 reforms was to minimise the scope for future judicial review.¹⁵

In his second reading speech of the Bill, Senator Robert Ray explained the underlying rationale of the Bill this way:

The wide discretionary powers conferred by the Migration Act have long been a source of public criticism. Decision-making guidelines are perceived to be obscure, arbitrarily changed and applied, and subject to day-to-day political intervention in individual cases. Accordingly I am proposing in this Bill a decision-making system in which policies governing entry to and stay in Australia will, for the first time, be spelt out in the migration legislative scheme. Parliament, then, through its powers of disallowance will be able to monitor those policies. I am also vesting most of the decision-making powers currently conferred on me in the Secretary of the Department.¹⁶

The original Bill was blocked in the Senate by the then (Coalition) opposition and the Australian Democrats,¹⁷ who argued that the Bill went too far in removing ministerial discretion. Speaking on the ABC PM radio program, Alan Cadman MP explained the reason for blocking the Bill in these terms:

It removes the Minister as the prime decision-maker and that means that for Australians the Government denies that it has a responsibility on immigration, on a day to day basis, and that is wrong. The Government is responsible, and should be responsible.¹⁸

The Minister, Senator Robert Ray, when interviewed on ABC AM radio the following morning retorted:

And it's also wrong for Mr Cadman to say we're not retaining discretion. In the ultimate cases, we are, the compassionate cases, provided I, as Minister, give my reasons in Parliament for exercising that discretion. What we're about is cutting political patronage out of immigration, cutting any sleazy aspect out of it.¹⁹

The original Bill which conferred most of the residual discretionary power to the Secretary (and not the Minister) was blocked in the Senate, for reasons best explained by the then Shadow Minister for Immigration and Ethnic Affairs, Alan Cadman, in the House:

The fact is that the Opposition and the Australian Democrats had blocked this Bill and it was dead in the water in the Senate. The Government had no option but to negotiate or lose the legislation altogether ... The Opposition by blocking this legislation, brought back into the legislation the ministerial discretion that the Caucus committee so dearly wanted.²⁰

The original Bill was withdrawn. Following negotiations, on the 30 May 1989, the Bill was re-introduced into the Senate. After 82 amendments, the Bill that became *Act 59 of 1989* allowed for a degree of ministerial discretion as 26 of these amendments replaced the word 'Secretary' with the word 'Minister'.²¹ These amendments were the result of a compromise as the then Opposition MP Phillip Ruddock explained in the House:

One of the compromises that were reached between the Opposition and the Government was that where the words 'the Secretary' were used in legislation the words 'the Minister' were substituted. The purpose of that was to ensure that ministerial discretion, where discretion was to exist in the migration legislation, would be maintained.²²

Senator Robert Ray again expressed his reservations about the use of ministerial discretion, reminding the chamber how immigration policy had operated 'purely by ministerial directive, subject to no scrutiny in this Parliament and subject to no control by anyone'.²³ Acknowledging differing views on ministerial discretion, he nevertheless insisted:

Under the old system it is open to abuse in terms of political patronage and favouritism, but, more importantly, who has access to a Minister is the critical issue. That has always been the critical issue in considering these migration matters.²⁴

The Bill was referred to the house the following day, 1 June 1989, read a second time and became *Act 59 of 1989*.²⁵ During the parliamentary debate, Phillip Ruddock, MP, then in opposition, had this to say in the House that day:

The outstanding issues related, firstly, to the place of ministerial discretion. As the Government proposed the matter in the first instance, it was seeking to provide for all decisions that would normally be made by the Minister to be placed in the hands of the Secretary to the Department of Immigration, Local Government and Ethnic Affairs. The Opposition was of the view that it was inappropriate for the Minister to divest himself of that discretion, a discretion which was seen by us to be important and, certainly, was seen to be important to ethnic communities in Australia.²⁶

In December 1989 another Bill,²⁷ amending the *Migration Legislation Amendment Act 1989*, was introduced by Senator Robert Ray setting out more comprehensively the limited context under which the minister is able to exercise discretion in immigration matters. The Bill was welcomed by the opposition parties for its recognition of the need to restore a residual power of ministerial discretion in immigration matters, particularly in relation to applicants who do not meet the strictness of the new codified visa categories, but whose individual circumstances warrant humanitarian consideration.²⁸ Senator Jenkins from the Australian Democrats summed up the situation this way:

What we have in this new Bill is a discretionary power of the Minister, which is what we asked for earlier and what I tried to have included in the legislation when it went through the Senate last May. That discretionary power is needed. There will be need at times for a fast track urgent decision to be made for compassionate reasons. We have all heard of cases of a terminal illness and where a person literally has no time to wait for a decision to take a year or even two years. The Australian Democrats have some reservations ... but would not want to jeopardise in any way the facility for a genuine, urgent case to be fast tracked by means of ministerial discretion.²⁹

Reflecting on the difference between the 1989 legislative regime and the earlier regime, immigration law expert, Mary Crock, noted 'the extent to which discretions are confined ... The Act together with the Regulations, set out exhaustively the steps that must be followed and the criteria that must be applied in order to make lawful migration decisions'.³⁰

Current Legislative and Policy Regime

After the 1989 legislative overhaul of the Migration Act, the Minister no longer had a general discretion to grant or to refuse particular visa applications, but must approve those applications which meet the criteria and satisfy legal requirements and refuse those applications which do not (section 65). This strict regime is balanced by the provisions in the Migration Act conferring a discretionary power on the Minister to determine that certain provisions of the Act should not apply or to make a 'more favourable decision'.³¹ These provisions state specifically that the Minister does not have a duty to exercise this power. Mary Crock's view of this discretionary power is that:

In practice the device works as a system of Ministerial noblesse oblige. The Minister cannot be compelled to exercise his or her discretion.³²

Importantly, the Minister's discretionary powers are non-compellable and non-reviewable within domestic law.³³ In *Ex Parte S134* (2003), the High Court said the fact that under the relevant sections the Minister 'does not have a duty to consider whether to exercise this power' means that the Minister's refusal to use his discretionary power under the Migration Act was not reviewable:

... s. 417(7) states in terms that the Minister does not have a duty to consider whether to exercise the power conferred by s. 417(1). That gives rise to a fatal conundrum. In the

express absence of a duty, mandamus [an order to compel a person to do a lawful public duty]³⁴ would not issue without an order that the earlier decision of the Minister be set aside. Further, in that regard, there would be no utility in granting relief to set aside that earlier decision where mandamus could not then issue.³⁵

In practice this means failed visa applicants can appeal, but only against the decision of the relevant tribunal, not that of the Minister. As the High Court said in *Ex Parte SI34*:

Given that there is no duty on the Minister to consider an application that he substitute a more favourable decision under s 417(1) of the Act ... the prosecutors' only right is to have their visa applications determined by the Tribunal in accordance with law, which right is secured by the relief with respect to the Tribunal's decision.³⁶

While the discretionary powers of the Minister are not reviewable in domestic law, they can be subject to scrutiny in international law through complaints mechanisms established by the United Nations. Two committees, the Human Rights Committee and the Torture Committee have heard and in some cases upheld complaints against Australia in relation to its non-refoulement obligations, where ministerial discretion had been unsuccessfully sought.³⁷ However, the views of these international committees are not legally binding or enforceable. Their efficacy is reliant on parties to the convention agreeing to implement the views of the committee.³⁸

The 1989 legislative changes also required extensive administrative changes within the immigration portfolio to implement the new regulatory scheme introduced at that time.³⁹ Policies which implement the regulations and the Act are specified in a lengthy Policy Advice Manual 3 (PAM 3), and a set of Migration Series Instructions (MSI). The PAM 3 is meant to be read in conjunction with the regulations and to provide an interpretive policy framework for making decisions consistent with the Act and the regulations.⁴⁰ MSIs are temporary instructions issued to all offices in Australia and overseas. MSI 225 sets out the Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under the Migration Act 1958 (Ministerial Guidelines). These guidelines operate as a vital policy framework setting out the basis upon which case officers assess whether to refer a particular case to the Minister or not.

Different Uses of Ministerial Discretion under the Act

A number of sections of the Act confer a discretionary power upon the Minister (among them: sections 33, 37A, 46A, 46B, 48B, 72, 91F, 91L, 91Q, 137N, 261K, 351, 391, 417, 454, 495B, 501, 501A, 501J and 503A). These ministerial powers of discretion include substitution powers, powers to vary processes, order release from detention or cancel visas on character grounds. In addition the Minister has a number of discretionary powers available to him or her under the Migration Regulations.

The discretionary power under Section 48B has been the subject of contention in cases already examined at length by the Senate Legal and Constitutional References Committee

Inquiry into Australia's Refugee and Humanitarian Determination Process.⁴¹ This provision gives the Minister the power to allow a non-citizen to apply for a protection visa where under section 48A it would not be otherwise permissible.

The current Ministerial Guidelines refer explicitly to sections 345, 351, 391, 417 and 454. Section 345 was repealed by Act No. 113.⁴² The new guidelines in the process of being implemented add section 501J.⁴³ The Minister's discretionary power under these sections is only available after a decision of one of the relevant tribunals, the AAT (in respect of an RRT or MRT reviewable decisions), the MRT or the RRT.⁴⁴ The Minister can only substitute a more favourable decision than the tribunal decision where he or she considers it in the public interest to do so.⁴⁵

In addition, the Minister's discretionary power has to be exercised personally and is not allowed to be delegated.⁴⁶ However administrative routines governed by a set of Ministerial Guidelines⁴⁷ effectively delegate the vetting of a substantial volume of requests for Ministerial intervention to the ministerial intervention unit, which currently employs more than 50 staff. Officers of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) are delegated the role of deciding which cases to refer to the Minister's intervention unit for consideration, and which ones to cull. This practice of administrative delegation was challenged unsuccessfully in *Ozmanian* (1996) 141 ALR 322.⁴⁸ The informal nature of triggering ministerial discretion through an administrative process of delegation is an important contemporary issue dealt with later.

Public Accountability Mechanism: Statement to Parliament

Where a Minister decides to exercise his or her public interest discretionary power to substitute a more favourable decision than one of the relevant tribunals, he or she must table a statement before both houses of parliament setting out the decision of the relevant tribunal and the reasons for substituting a more favourable decision, in a manner that does not identify or name the individual.⁴⁹ The Act requires these statements to be tabled within fifteen sitting days of the end of the six-month period in which the decision is made.⁵⁰ In practice this could be up to nine months later.

While this provision was designed to act as an accountability mechanism, in reality these tabled statements read like a set of templates, containing three or four paragraphs which convey very little substance about the specific case.⁵¹ The reason for this is that the statements are not allowed to contain any individually identifying information. Most are little more than half a page in length. Statements tabled in relation to MRT matters under s. 351 tend on the whole to be slightly more detailed than statements handed down in relation to RRT matters under s. 417.

Rationale Underpinning Ministerial Discretion

Much of the rationale underpinning the necessity for ministerial discretion in immigration matters can be gleaned from the substance of the 1989 parliamentary debate summarised

above. Fundamentally, the discretionary power balances what is now an otherwise inflexible set of regulations to allow the minister a public interest power to grant a visa in individual circumstances which the legislation had not anticipated and where there are compelling, compassionate and humanitarian considerations for doing so. In other words ministerial discretion acts as a safety net.⁵² According to the current Ministerial Guidelines, signed by the Minister:

The public interest may be served through the Australian Government responding with care and compassion to the plight of certain individuals in particular circumstances. My public interest powers provide me with a means of doing so.⁵³

The rationale underpinning the use of the ministerial discretion is dynamic. It shifts according to policy preferences and changing contexts and pressures. As the ensuing analysis seeks to demonstrate, the rationale for ministerial discretion has broadened considerably in recent years to accommodate Australia's protection obligations under a number of international treaties and conventions, and more recently to address 'urgent' policy matters related to the regulation of temporary protection visas.

Contemporary Issues Regarding Ministerial Discretion in Immigration Matters

The Informal Nature of Ministerial Discretion

The process for triggering ministerial intervention in immigration matters is informal. In the absence of a formal process there are three main avenues for seeking the favourable intervention of the Minister in immigration matters. A member from the Migration Review Tribunal or the Refugee Review Tribunal or other relevant tribunal may informally refer cases for consideration. The current Minister has stipulated that such requests are not to be made as formal recommendations appearing in tribunal judgements, a view supported by the Senate and Legal Constitutional References Committee.⁵⁴

Second, individuals may make a request in writing to the Minister. There is no formal application or formal process set out by which applicants may seek consideration.⁵⁵ They may make the request on their own behalf in writing, or as appears to be more common, through a third party, such as a refugee lobby group, a church group, an ethnic community representative, a supporter or agent, who could be another state or federal MP or party member.

Third, and most routinely, the Minister's discretion may be sought by DIMIA officers who, since the issuing of new guidelines in 1999, have been instructed to assess every negative tribunal decision against the criteria set out in the Ministerial Guidelines, discussed below.⁵⁶ They are to bring to the Minister's attention those cases that fall within the guidelines or make a file note that the case falls outside the guidelines.⁵⁷ The impact of the new guidelines on administrative routines relating to the exercise of ministerial discretion is a matter of some importance considered in the following section.

From September 1999 to June 2000, the Senate Legal and Constitutional References Committee (the Committee) undertook an examination of the adequacy of 'a non-compellable, non-reviewable Ministerial discretion to ensure that no person is forcibly returned to a country where they face torture or death'. The committee considered various submissions in relation to the case of Ms Z, refouled to China to face an abortion at eight months pregnant, and whose repeated verbal requests to be allowed to stay in Australia were not recognised as s. 417 requests.⁵⁸ The Committee found that this case highlighted the 'potential for problems to arise from the informal nature of the process of requesting s. 417 intervention.'⁵⁹ In light of these problems, the Committee recommended that an information sheet be made publicly available explaining the provisions of s. 417 and the accompanying Ministerial Guidelines, as well as information about s. 48B.⁶⁰ The government responded by pointing out that the guidelines were publicly available and that DIMIA Fact Sheet 41 'explains the Minister's discretionary powers and further publication of such information is not considered necessary.'⁶¹ However [Fact Sheet 41](#) makes no mention of Ministerial discretion whereas [Fact Sheet 61](#) does.⁶² This public document provides two sentences of information about Ministerial discretion, but no advice on the process or how to make a request for consideration under the guidelines.⁶³

In the absence of a transparent accountability process, an informal process for triggering ministerial intervention may appear arbitrary, and lacking in transparency, whether it is or not.

The Delegation of Ministerial Discretion under the Ministerial Guidelines

A set of Ministerial Guidelines explain the circumstances where the Minister may want to exercise his discretion.⁶⁴ To ensure that all officers have ready access to this document, the guidelines are registered as a Migration Series Instruction, No. 225.

These guidelines have undergone a series of renovations over the last decade. The current and most comprehensive set of guidelines outline the purpose, the legislative framework, instances where the power is not available, the unique and exceptional circumstances which might warrant the Minister's consideration, other considerations, the applicability of the guidelines and the relationship between requests for the Minister's discretion and removal policy. Paragraph 6.2 of the guidelines directs case officers to assess every rejected application by one of the tribunals (MRT, RRT and AAT in immigration reviewable cases). They are intended to operate as a policy framework for assessing cases where there are 'unique and exceptional circumstances' which may warrant the Minister's favourable intervention.⁶⁵ At the time of the DIMIA submission to the select Senate inquiry an even more comprehensive set of guidelines was in the process of being implemented.⁶⁶

Earlier versions of the guidelines, one dated 28 July 1994 and a subsequent version issued a couple of years later, are more limited in describing the scope for ministerial intervention. The 1994 Guidelines refer to only four of the above dot points and make no mention of Australia's protection obligations under international conventions. Likewise the

1996 Guidelines make no reference to Australia's protection obligations under other treaties, and define the humanitarian grounds for considering discretion under s. 417 and s. 454 much more narrowly as: persons with convention related claims in the past with a continuing subjective fear; persons likely to face treatment closely approximating persecution, and persons facing serious mistreatment, while not Convention related constitutes persecution. The significant difference between these earlier guidelines and those issued in 1999, is that the current ones refer explicitly to Australia's protection obligations under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CROC) and the International Covenant on Civil and Political Rights (ICCPR). Consequently the new guidelines significantly improve the chances of asylum seekers being granted protection for humanitarian reasons, such as having been tortured.⁶⁷

The Minister cannot be compelled to act within the current guidelines. However, it may be that a decision of a case officer not to refer a matter to the Minister could be reviewable by the courts, if for example, the file note showed that the officer failed to consider an issue clearly within the guidelines.

In the case of Ms Z, for example, as discussed earlier, DIMIA did not refer her matter to the Minister despite her repeated (verbal) requests to be allowed to stay in Australia.⁶⁸

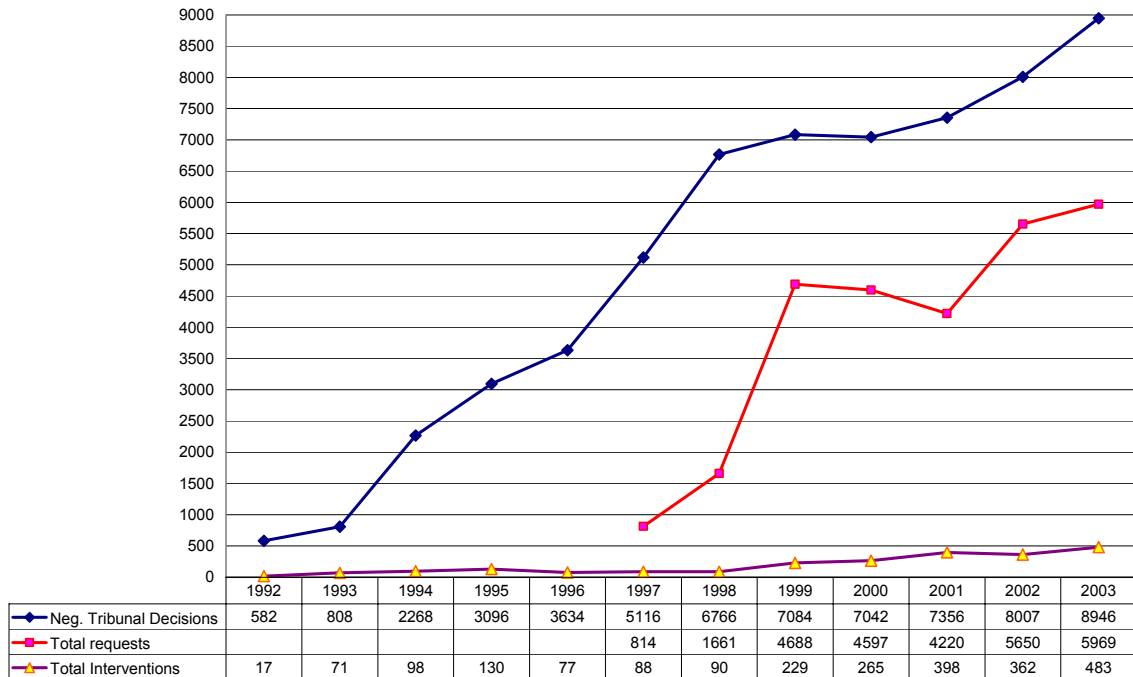
If a non-referral is a 'decision' in an administrative law sense, it would fall under a privative clause [a clause that attempts to restrict judicial review]⁶⁹ decision under section 474 (2) of the Migration Act. Such decisions are not reviewable under the Administrative Decisions (Judicial Review) Act.⁷⁰ However, the high court has indicated that privative clause decisions can still be subject to common law judicial review if there is a 'jurisdictional error'. Even if a review of a DIMIA decision not to refer a case to the Minister is possible, all this would achieve under the current wording of the Migration Act is to place the matter before the Minister. The Minister would still not be compelled to substitute a more favourable decision or to even consider doing so.

The Increasing Use of Ministerial Discretion

From taking office in 1996 to the end of 2002, the current Minister has used his discretionary powers 1916 times.⁷¹ On 1046 occasions he used this power under s. 417 to substitute a more favourable decision than the Refugee Review Tribunal,⁷² and in 516 times he used it under s. 351 to substitute a more favourable decision than the Migration Review Tribunal.⁷³ This number is significantly greater than the number of times this discretionary power was used by former Ministers: 81 times under the Hon. Gerry Hand from 1990 to 1993, and 311 times under the Hon. Senator Nick Bolkus, from 1993 to 1996.⁷⁴

The increasing use of ministerial intervention needs to be seen in the context of the growing number of requests, which is also relative to the growing number of negative decisions affirmed by the tribunals.

Figure 1: Number of Ministerial Interventions, Requests for Ministerial Intervention and Negative Decisions Affirmed by the Tribunals 1992–2003



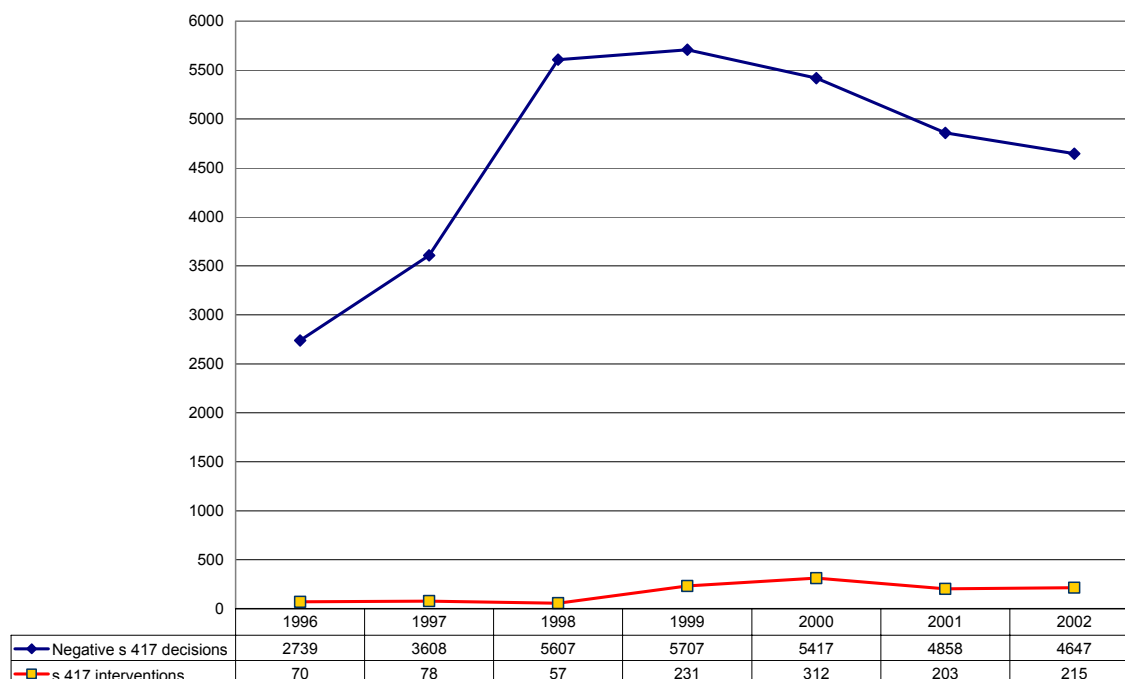
Source: Tables 8T and 9T DIMIA Submission to the Select Senate Inquiry into Ministerial Discretion in Migration Matters. Prior to 1996 statistics were not kept in a format that enables comparisons to be made between Ministers for number of requests.

Figure 1 represents the use of ministerial intervention relative to the number of requests and number of negative decisions affirmed by the tribunals.⁷⁵ Requests for intervention under the current Minister have risen from 814 in 1996–97 to 5969 in 2002–03, an increase of 633 per cent.⁷⁶ Over the same timeframe ministerial interventions have increased by 448 per cent, but as an annual percentage of requests, ministerial interventions have only ranged between five and eleven per cent of annual requests.⁷⁷ For instance, the current Minister granted favourable decisions in 10.8 per cent of requests in 1996–97 compared to 8.1 per cent of requests in the last financial year.⁷⁸

Apart from the increase in requests, there are at least two other reasons for the increasing use of ministerial discretion under the current government. The Ministerial Guidelines issued in 1999, for the first time, put in place a systematic administrative process whereby every negative decision of the relevant tribunal has to be assessed by a departmental case officer against the criteria set out in those guidelines. Prior to this date the Minister had exercised his discretion only 257 times from commencing office in 1996 to the beginning of 1999. After putting in place an administrative process for routinely assessing negative tribunal decisions against the 1999 guidelines, the Minister exercised his discretion 1668 times from 1999 to 2002. Of these, 961 instances were under s. 417, the most likely cases

to fall under one of the international conventions (CAT, CROC, ICCPR) nominated within the guidelines as a reason for seeking ministerial intervention. Figure 2 depicts the rise in ministerial discretion interventions under s. 417 and the rise in negative decisions affirmed by the Refugee Review Tribunal since 1996.⁷⁹

Figure 2: Number of Ministerial Interventions Under s. 417 and Number of Negative Decisions Affirmed by the Refugee Review Tribunal, 1996–2002



Source: Table 6T DIMIA Submission to the Select Senate Inquiry into Ministerial Discretion in Migration Matters, and data extracted from Ministerial Statements Tabled in Parliament as at 30 June 2003.

Another reason for the steep rise in the use of ministerial discretion under the current government arises from the different policy approaches of the major parties to global humanitarian crises. The Labor Party when in government responded to international crises, such as the 1991 Gulf War, civil war in Irian Jaya, Sri Lanka and Yugoslavia,⁸⁰ and the Tiananmen Square massacre of 4 June 1989, by creating special assistance visa categories on humanitarian grounds.⁸¹ Some of the submissions to the current inquiry have suggested the reintroduction of these humanitarian visa classes as a way of reducing the use of ministerial discretion.⁸²

The Coalition government on the other hand has consistently adopted a policy approach opposed to the creation of special category visa classes on humanitarian grounds, preferring to deal with such circumstances on a case by case basis through a reliance on the powers of ministerial discretion. These cases have to first be channelled through one of the tribunals

before ministerial intervention can be requested, accounting in part for the rise in the number of cases coming before the tribunals, and the rise in the number of requests for intervention.

The response of the major parties to the East Timorese asylum seekers who fled Indonesia in the early 1990s seeking Australia's protection, exemplifies the difference in policy approach and the substantial numerical impact on the use of ministerial discretion. The Government has consistently indicated a preference to deal with the exceptional circumstances posed by the complex legal history of the failed East Timorese asylum seekers, on a case by case basis through the exercise of Ministerial discretion.⁸³ On 4 June this year the Minister indicated that he would use his public interest powers of discretion in relation to 379 East Timorese failed asylum seekers subject to health and character checks, and that another 200 of a similar nature were currently being considered.⁸⁴ All these cases had to first be channelled through the RRT before they could be considered by the Minister. These figures are not yet included in the calculation of the current minister's use of discretion. When they are counted, this policy stance will significantly inflate the number of times the minister will have to use his discretionary powers under s. 417 in the latter part of 2003.

The Labor opposition, on the other hand, has indicated a consistent policy preference for amending the Migration Act to create a special visa class of entry on humanitarian grounds in cases like the East Timorese.⁸⁵ When in government Labor created a number of visas on humanitarian grounds, as already discussed (see above). If successfully implemented this policy approach would reduce a Labor government's reliance on ministerial discretion in immigration matters, and reduce the number of cases being channelled through the refuge review tribunal. The costs and benefits of such a policy approach have been considered elsewhere.⁸⁶

A number of difficulties have arisen from the increasing use of ministerial discretion.

First, the sheer volume of requests creates a massive work load for the Minister and his or her staff. The current Minister has for example had to handle an estimated 27 000 requests during his term of office.⁸⁷ The ministerial intervention process currently employs around 51 staff to handle the administration associated with this caseload.⁸⁸

Second, the 2000 Senate Legal and Constitutional Committee inquiry formed the view that 'Ideally, ministerial discretion, and associated resources, should be reserved to deal with a small number of cases which are the exception to the rule',⁸⁹ a view echoed in the parliamentary debate at the time of its introduction in 1989 and a number of submissions to the current inquiry.

Lastly, in the context of ministerial discretion being used more frequently, allegations about favouritism toward particular ethnic groups are, according to Mary Crock and Ben Saul, 'probably inevitable given the way the power is structured and the significance of the decisions to individuals'.⁹⁰

Ministerial Discretion as a De Facto On-shore Humanitarian Entry Process

Ministerial discretion provides the only policy instrument for granting protection on humanitarian grounds for applicants whose on-shore claims fall outside the Refugee Convention.⁹¹ In the absence of any formal on-shore process for humanitarian protection outside the Refugee Convention, Ministerial discretion has increasingly been used to meet Australia's humanitarian obligations, under several international treaties: CAT, CROC and ICCPR. A number of difficulties arise from using ministerial discretion as a de facto on-shore humanitarian entry process.

First, the reliance on the exercise of a non-reviewable, non-compellable and largely informal exercise of ministerial discretion to meet Australia's humanitarian obligations to provide protection under CAT, CROC or ICCPR has raised widespread concerns among legal scholars, the judicial community, international lawyers and a range of refugee advocate groups.⁹² The main issue of concern is that a claim to protection under one of these conventions cannot be guaranteed by a discretionary power that the Minister may choose not to exercise.⁹³ These concerns are reiterated in at least ten submissions to the current inquiry.⁹⁴ In particular, the submissions by Amnesty International and the Human Rights and Equal Opportunity Commission, argue strongly that Australia's protection obligations under these treaties should be explicitly incorporated into domestic law, and reflected in the on-shore refugee determination process, rather than left to the discretion of the minister.

Second, a reliance on ministerial discretion for processing on-shore humanitarian cases outside the Refugee Convention embodies an administrative logic that is both lengthy and costly.⁹⁵ Under the current system, people who have legitimate humanitarian grounds for protection, under one of several international treaties ratified by Australia, are forced to first apply for refugee status and be rejected before being able to invoke the only on-shore process currently available for offering protection on humanitarian grounds under s. 417 through a request to the Minister. This is because the Minister's substitution powers can only apply after a negative decision is handed down. In addition to court, administrative and processing costs, those who arrive unlawfully in Australia and are ultimately channelled into seeking protection through ministerial discretion will have to be detained under the mandatory detention regime at a cost of around \$120 per day.⁹⁶

This raises other problems, as pointed out by various submissions to the inquiry, including:

- the arbitrary detention of legitimate asylum seekers forced to exhaust the appeal system before being able to seek ministerial intervention⁹⁷
- an arbitrary means of protection, with no mechanism to correct the possibility of flawed decisions which may result in the refoulement of legitimate humanitarian cases to countries where they may be seriously harmed or tortured, and⁹⁸

- a non-reviewable decision-making process lacking in transparency and accountability.⁹⁹

Many of these concerns were considered by the Senate Legal and Constitutional References Committee inquiry in 2000. The committee concluded that 'this discretion is a valuable mechanism for a Minister to have,' that 'it should be retained' and it does provide a mechanism for Australia to fulfil its international obligations, but that 'the Guidelines should be more widely disseminated'.¹⁰⁰ Elsewhere in the report, however, the Committee expressed the view that '... this discretion must be exercised through a transparent accountability process',¹⁰¹ a view strongly echoed in many of the submissions to the current inquiry.¹⁰²

New Ministerial Discretion Powers in Migration Matters

Over the last few years, the scope of ministerial discretion has been broadened by changes to the Migration Act and accompanying regulations. Most of these changes have related to the regulation of temporary safe haven and temporary protection visas.¹⁰³ The most recent of these, the Migration Amendment Regulations 2003 No. 6 (No. 224), was gazetted on 28 August 2003.

The new regulation introduces two new avenues for ministerial discretion. First, it allows for visa periods (under classes 447, 451 and 785) to be granted for 'a shorter period specified by the minister in relation to the visa holder'.¹⁰⁴ Second, the new regulations create a discretionary power for the Minister to allow those who arrive lawfully in Australia to apply immediately for permanent protection, if the Minister is satisfied it is in the public interest to do so.¹⁰⁵

The major policy purpose of the new regulation is to effectively broaden the Temporary Protection Visa (TPV) regime to all on-shore applicants seeking protection, regardless of whether they arrived lawfully or unlawfully.¹⁰⁶ Previously the TPV regime discriminated against those who arrived unlawfully and was criticised as a way of punishing them.¹⁰⁷ While the new regime introduces more consistency, only those who arrive lawfully will be able to invoke the Minister's new public interest power to apply for permanent protection, without having first held a TPV.¹⁰⁸

These new provisions, alongside the others introduced in 1999 and 2001, have broadened the scope of the minister's public interest powers of discretion and conceivably may lead to their even greater use.

Conclusion

This brief has provided an overview of the use of ministerial discretion in immigration matters. The scope of that discretion was reduced dramatically following the 1989 reforms to the Migration Act 1958 which established a statutory regime for granting visas. The major impetus underpinning the reforms was a desire to make decision-making in immigration matters accountable, equitable and transparent. The strict regime of

regulations governing visa entry and stay in Australia is balanced by a residual power of ministerial discretion used in 'unique and exceptional' circumstances where the Minister considers it is in the public interest to do. It is reasonable to conclude that the exercise of that discretion was intended to be used sparingly at the time the legislation was introduced in 1989.

However, different policy approaches, particularly between the major political parties to creating visa categories on humanitarian grounds, has impacted significantly on the use of ministerial discretion. The Government's opposition to the creation of special visa classes to respond to periodic humanitarian crises (such as the war in Iraq and Afghanistan and the ten year saga with the East Timorese asylum seekers) has led to extensive reliance on ministerial discretion on a case by case basis. This raises real issues of administrative efficiency and appropriateness where a large number of claimants are involved, and begs the question whether the increasing use of ministerial discretion as currently formulated is sustainable.

The other major factor underpinning the steep rise in the use of discretion arises from the new Ministerial Guidelines issued in 1999 which now explicitly reflect Australia's humanitarian obligations under three international treaties.¹⁰⁹ These guidelines direct case officers to assess every negative decision of the relevant tribunal against the criteria set out in those guidelines in deciding whether or not to recommend a case to the Minister for consideration. This instruction has led to the establishment of a systematic administrative process for identifying cases where the Minister may want to consider exercising his or her discretion, significantly enhancing the chance of many more cases of a humanitarian nature being recommended. A systematic administrative process has evolved for handling what are still informal requests for the minister's favour.

The combined effect of these changes has resulted in an exponential increase in the use of Ministerial discretion in immigration matters. However in a context where this discretion is neither reviewable nor compellable, the exercise of this discretion remains substantially hidden from scrutiny. Public accountability is limited to a short general statement tabled before both houses of Parliament up to nine months later. In this context, suspicions about favouritism are, as Mary Crock and Ben Saul suggest, 'probably inevitable given the way the power is structured'.¹¹⁰

Endnotes

1. The Select Senate Inquiry in Ministerial Discretion in Migration Matters was established on 19 June 2003 and is to report by the 3 November 2003. The inquiry has received 24 written submissions mostly from migration agents, legal academics, refugee advocates and human rights bodies.
2. For example, as with the East Timorese asylum seekers in 2003.

3. John McMillan, 'Controlling Immigration Litigation—A legislative challenge', *People and Place*, vol. 10, no. 2, 2002, p. 16.
4. Mary Crock, *Immigration and Refugee Law in Australia*, Federation Press, Sydney, 1998, p. 34.
5. *ibid.*, p. 218.
6. *ibid.*, pp. 33–41; Katherine Betts, 'Immigration Policy Under the Howard Government', *Australian Journal of Social Issues*, vol. 38(2), 2003, p. 171, John McMillan, *op. cit.*, p. 16; see also Barry York, Australia and Refugees, '1901–2002: An Annotated Chronology Based on Official Sources', *Chronology*, no. 2, Department of Parliamentary Library, Canberra, 2003.
7. John Power, 'The Executive, the Judiciary and Immigration Appeals in Australia', in Neal Tate and Torbjorn Vallinder, (eds.), *The Global Expansion of Judicial Power*, New York University Press, New York, 1995.
8. Mary Crock, *op. cit.*, p. 42.
9. *ibid.*
10. See for example, Senator Robert Ray, Second reading speech Migration Legislation Amendment Act 1989, Senate, *Debates*, 5 April 1989.
11. Catherine Betts, *op. cit.*, p. 172; John McMillan, *op. cit.*, p. 17 and John Power, *op. cit.*, p. 102.
12. On 4 September 1987, a Committee to Advise on Australia's Immigration Policies (chaired by Stephen Fitzgerald) was established with a wide brief to examine immigration policy and legislation. (Stephen Fitzgerald, *Immigration a commitment to Australia: The report of the committee to advise on Australia's Immigration Policies*, Commonwealth of Australia, 1998, vol. 1, p.iii.). After six months of extensive consultation, expert input and commissioned research, the committee produced a three volume report (widely referred to as the Fitzgerald Report). The Fitzgerald report concluded that the major deficiency in the Migration Act 1958 was 'the broad and unstructured nature of the discretionary powers contained in the Act'. (*ibid.*, vol. 2, p. v.).
13. Immigration Review Tribunal, *Annual Report 1990–91*, Commonwealth of Australia, Canberra, 1991, p. 1. On 1 June 1999 this tribunal was renamed the Migration Review Tribunal (MRT).
14. Refugee Review Tribunal, *Annual Report 1993–94*, Commonwealth of Australia, Canberra, 1994, p. 1. This tribunal was established by the *Migration Reform Act 1992*.
15. John Power, *op. cit.*, p. 106.
16. Senator Robert Ray, Second reading speech Migration Legislation Amendment Act 1989, Senate, *Debates*, 5 April 1989.
17. Senator Jenkins, Australian Democrats, Human Rights and Equal Opportunity Commission, Annual Report 1987–88, Senate, *Debates*, 25 May 1989.
18. 'Migration Amendment Bill facing defeat', ABC Radio Program PM, 2 May 1989.
19. Senator Robert Ray interviewed on ABC AM radio, 3 May 1989.

20. Mr Alan Cadman, MP, Migration Legislation Amendment Bill 1989, House of Representatives, *Debates*, 1 June 1989.
21. Migration Legislation Amendment Bill 1989, Senate, *Journals*, no. 161, 30 May 1989.
22. Phillip Ruddock, MP, Migration (and Consequential Amendments) Bills 1989, Speech, House of Representatives, *Debates*, 31 October 1989.
23. Senator Robert Ray, Speech Migration Legislation Amendment Act 1989, Senate, *Debates*, 30 May 1989.
24. *ibid.*
25. Migration Legislation Amendment Act 1989, (Act 59 of 1989), date of assent 19 June 1989.
26. Phillip Ruddock, MP, Speech: Migration Amendment Bill 1989, House of Representatives, *Debates*, 1 June 1989.
27. Migration Legislation Amendment Bill (No. 2) 1989. Date of Assent 28 December 1989; Date of Commencement, 28 December 1989.
28. For example, see the speeches of Senator Jenkins, AD, Senate, *Debates*, 14 December 1989 and Mrs Sullivan, House of Representatives, *Debates*, 21 December 1989.
29. Senator Jenkins, Speech: Migration Legislation Amendment (Consequential Amendments) Bill 1989; Migration Legislation Amendment Bill (no. 2) 1989, Second Readings, Senate, *Debates*, 14 December 1989.
30. Mary Crock, *op. cit.*, p. 42.
31. Sections 37A, 46A, 46B, 48B, 72, 91F, 91L, 91Q, 137N, 261K, 351, 391, 417, 454, 495B, 501A, 501J and 503A.
32. Mary Crock, *op. cit.*, p. 274.
33. Under s. 351 (7), s. 391 (7), s. 417 (7) and s. 454 (7) Migration Act 1958.
34. Ian Ellis-Jones, *Essential Administrative Law*, Second Edition, Cavendish Publishing, Sydney, 2001, p. 96.
35. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 195 ALR 1 at 12 (per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).
36. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 195 ALR 1 at 12–13.
37. Jane Hearn and Kate Eastman, 'Human rights issues for Australia at the United Nations: Australia's non-refoulement obligations under the Torture Convention and the ICCPR', *Australian Journal of Human Rights*, 2000, vol. 6 (1) p. 216–238.
38. Mary Crock, *op. cit.*, p. 30.
39. *ibid.*, p. 39.
40. *Policy Advice Manual 3*, CD Rom, Introduction to Guide, page unspecified.
41. For example, in (Mr SE) Elmi v Australia cited in Senate Legal and Constitutional References Committee Report, *A Sanctuary Under Review: an examination of Australia's*

refugee and humanitarian determination processes, Commonwealth of Australia, Canberra, 2000, p. 261; and also cited in Joanne Kinslor, 'Non-refoulement and torture: the adequacy of Australia's laws and practices in safe-guarding asylum-seekers from torture', *Australian Journal of Human Rights*, vol. 6 (2), 2000, pp. 162–74.

42. Under [s. 351](#) the Minister may substitute a more favourable decision than the one handed down by the MRT, 'if the Minister thinks it is in the public interest to do so.'
Under [s. 391](#) the Minister may substitute a more favourable decision than the one handed down by the Administrative Appeals Tribunal (AAT) in relation to an MRT-reviewable decision, 'if the Minister thinks it is in the public interest to do so.'
Under [s. 417](#) the Minister may substitute a more favourable decision than one handed down by the RRT, 'if the Minister thinks it is in the public interest to do so.'
Under [s. 454](#) the Minister may substitute a more favourable decision than the one handed down by the AAT in relation to an RRT-reviewable decision, 'if the Minister thinks it is in the public interest to do so.'
43. Under [s. 501](#) J The Minister may set aside an AAT protection visa decision and substitute another decision that is more favourable to the applicant in the review, 'if the Minister thinks it is in the public interest to do so'.
44. Under s. 351 (1); s. 391 (1), s. 417 (1) and s. 454 (1) Migration Act 1958.
45. *ibid.*
46. Under s. 351 (3); s. 391 (3), s. 417 (4) and s. 454 (4) Migration Act 1958.
47. MSI 225: Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under sections 345, 351, 391, 417 and 454 of the Migration Act 1958, effective March 1999.
48. Mary Crock, *op. cit.*, p. 275.
49. Not all the sections of the Act require the Minister to table a statement where he has used his or her discretionary power. Those that do include sections: 33, 46A, 46B, 48B, 72, 91D, 91L, 91Q, 137, 345, 351, 391, 417, 454 and 501.
50. Under s. 351 (4), s. 391 (4); s. 417 (4) and s. 454 (4) Migration Act 1958.
51. This judgement is based on reading a random sample of the many statements tabled from the early 1990s to December 2002.
52. See also Phillip Ruddock, 'Refugee Claims: A Ministerial Perspective', *University of New South Wales Law Journal*, vol. 23 (3), 2000, p. 2.
53. Section 4.1, MSI 225: Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under sections 345, 351, 391, 417 and 454 of the *Migration Act* 1958.
54. The Hon. Phillip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs, Speech to open the Migration Review Tribunal, 4 June 1999, quoted in Senate and Legal Constitutional References Committee, *op. cit.*, p. 251.
55. See discussion in Senate and Legal Constitutional References Committee, *op. cit.*, p. 251–57.

56. Section 6.2 Ministerial Guidelines.
57. *ibid.*
58. For an analysis of this case see also, Mary Crock, 'A Sanctuary Under Review: Where to from here for Australia's Refugee and Humanitarian Program?', *University of New South Wales Law Journal*, vol. 23 (3), 2000, p. 246.
59. Senate Legal and Constitutional References Committee, *op. cit.*, p. 253.
60. Senate Legal and Constitutional References Committee, Recommendation 8.3, *op. cit.*, p. 95.
61. Government Response to the Senate Legal and Constitutional References Committee report, *A Sanctuary under review, an examination of Australia's refugee and humanitarian determination processes*, Commonwealth of Australia, Canberra, 2001.
62. It could be that the numbering of the Fact Sheets has changed since the government responded to the Committee's Report, or that it was an inadvertent mistake.
63. DIMIA Fact Sheet 61, 'Seeking Asylum in Australia'.
64. MSI 225: Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s. 345, 351, 391, 417, 454 of the Migration Act 1958.
65. See Section 4, Ministerial Guidelines.
66. See Attachment 9, DIMIA Submission to the Select Senate Inquiry into Ministerial Discretion in Migration Matters, August 2003.
67. Joanne Kinslor, *op. cit.*, 2000, p.174.
68. See Senate and Legal Constitutional References Committee, *op. cit.*, pp. 252–53; see also Mary Crock, 2000, *op. cit.*, p. 246.
69. Ian Ellis-Jones, *op. cit.*, p. 86.
70. *Administrative Decisions (Judicial Review) Act 1997*, Schedule 1.
71. Table 8T, DIMIA Submission to the Select Committee on Ministerial Discretion in Migration Matters, Table 8T, Appendix, August 2003.
72. Tabled Documents, Senate, Ministerial Statements made during 1996–2002 under the Migration Act 1958 tabled in the Parliament as at 30 June 2003.
73. Tabled Documents, Senate, Ministerial Statements made during 1996–2002 under the Migration Act 1958 tabled in the Parliament as at 30 June 2003.
74. Senator Chris Ellison, Answer to Question Without Notice (Speech): Immigration: Ministerial Discretion, Senate, *Debates*, 17 June 2003.
75. There is a strong positive correlation of .82 between the rise in negative decisions affirmed by the Tribunals and the rise in ministerial discretion interventions.
76. DIMIA Submission to the Select Committee on Ministerial Discretion in Migration Matters, Table 8T, Appendix, August 2003.
77. Comparable data for earlier Ministers is not available.

78. Percentages calculated from data contained in Table 9T, DIMIA submission, op. cit.
79. The correlation ($r = .54$) between the rise in ministerial discretion under s. 417 and the rise in the number of negative cases affirmed by the Refugee Review Tribunal, while still positive, is not as strong as the correlation above (see endnote 75.).
80. These special visa categories were announced in 1991. For details see Barry York, op. cit.
81. The Hon. Nick Bolkus, Minister for Immigration and Ethnic Affairs, *Media Release*, 31 January 1994.
82. Submissions from: Human Rights and Equal Opportunity Commission and the Catholic Commission for Justice, Development and Peace.
83. Tabled Document, Letter President of the Senate from The Hon. Phillip Ruddock, MP, 4 February 2003, tabled in Senate, 3 March 2003; see also Kerry Carrington, Stephen Sherlock and Nathan Hancock, 'The East Timorese Asylum Seekers: Legal Issues and Policy Implications Ten Years On', *Current Issues Brief*, no. 17, Department of Parliamentary Library, 2003.
84. The Hon. Minister Phillip Ruddock, Answer to Question Without Notice: Immigration Protection Visas, House of Representatives, *Debates*, 4 June 2003.
85. For example, Julia Gillard MP, *Press Statement*, 25 September 2002; *Joint Statement*, Leader of the Opposition, The Hon. Simon Crean MP and Julia Gillard MP, 5 March 2003; The Hon. Con Sciacca MP, *Media Release*, 12 October 1999; Senator Trish Crossin, Labor Senator for the Northern Territory, Senate, *Debates*, 3 March 2003, Speech East Timor: Asylum Seekers; The Hon. Warren Snowden, House of Representatives, *Debates*, 3 March 2003.
86. See Kerry Carrington, Stephen Sherlock and Nathan Hancock, op. cit.
87. The Hon. Minister Phillip Ruddock, Answer to Question Without Notice: Immigration Visa Approvals, House of Representatives, *Debates*, 25 June 2003.
88. See Table 1T in DIMIA submission, op. cit.
89. Senate Legal and Constitutional References Committee, op. cit., p. 259.
90. Mary Crock and Ben Saul, *Future Seekers: Refugees and the Law in Australia*, Federation Press, 2002, p. 62.
91. Paragraph 8.127, Senate Legal and Constitutional References Committee, op. cit., p. 266.
92. Senate Legal and Constitutional References Committee, op. cit., pp. 237–67; see also Joanne Kinslor, op. cit.
93. Senate Legal and Constitutional References Committee, op. cit., p. 64. See also submissions from Human Rights and Equal Opportunity Commission, Amnesty International Australia and the Catholic Commission for Justice, Development and Peace.
94. Submissions from: Dr Andreas Schloenhardt, University of Adelaide; Christopher Livingston and Associates; Joanna Stratton, ANU Honours dissertation; Refugee Council of Australia; Human Rights and Equal Opportunity Commission; Catholic Commission for Justice, Development and Peace; Legal Aid NSW; The Uniting Church; South Brisbane Immigration and Community Legal Service and Amnesty International Australia.

95. See also Senate Legal and Constitutional References Committee, *op. cit.*, p. 62.
96. In 1998 the Australian National Audit Office estimated the running cost per person per day in detention to be around \$121.71. Source: Australian National Audit Office, 1998, *The Management of Boat People*, Tabled Document, Senate.
97. A point made strongly by the submission from the Human Rights and Equal Opportunity Commission.
98. *ibid.*
99. Most of the submissions to the inquiry stressed this point.
100. Senate Legal and Constitutional References Committee, *op. cit.*, p. 267.
101. *ibid.*, p. 245.
102. For example see submissions from: Refugee Council of Australia; Human Rights and Equal Opportunity Commission; Catholic Commission for Justice, Development and Peace; Legal Aid NSW; South Brisbane Immigration and Community Legal Service and Amnesty International Australia.
103. For example, in 2001 under sections 46A; 46B; 48B; in 1999 under sections 91L; 91Q; in 2001 under regulations 866.215, 866.228 and 866.228A; and in 2003 under regulations 866.212 and 886.214.
104. Under para. 447.511 (c) ii, para. 451.511 (c) ii, and clause 785.511 (c) ii
105. Under section 866.212 clause 5, and section 866.214 (2).
106. See DIMIA, Facts Sheet 64 at: <http://www.dimia.gov.au/facts/64protection.htm>.
107. Mary Crock and Ben Saul, *Future Seekers Refugees and the Law in Australia*, Federation Press, Sydney, 2001, p. 106.
108. Under section 866.212 clause 5, and section 866.214 (2).
109. CROC, CAT and ICCPR.
110. Mary Crock and Ben Saul, *op. cit.*, p. 62.