CHAPTER 4

MINISTERIAL DISCRETION

4.1 This chapter explores the concept of ministerial discretion and its implementation, the nature of a non-compellable and non-reviewable decision and forced *refoulement*, when an applicant is unable to gain refugee status under the Refugee Convention. It outlines the statutory framework and application processes and canvasses the concerns raised in respect of that process to date.

Statutory framework

4.2 The Migration Act provides the Minister with various discretionary powers, including substitution powers and powers to vary processes, order release from detention and cancel visas on character grounds.

4.3 Key provisions include sections 351, 417 and 501J of the Migration Act which generally authorise the Minister to substitute a decision of the Migration Review Tribunal (MRT) the Refugee Review Tribunal (RRT) or the Administrative Appeals Tribunal (AAT) respectively with a decision that is more favourable to the applicant, where the Minister believes it is in the public interest to do so. Although the Act does not specify that the 'more favourable decision' must result in the grant of a visa to the applicant, it is understood that the discretionary power is most commonly used in that way.[1]

4.4 Another key provision is section 48B of the Migration Act which confers a personal non-compellable power on the Minister to allow a person refused a protection visa to lodge a valid fresh protection visa application.[2]

4.5 In June 2005, as part of a reform package to secure 'greater flexibility, fairness and timeliness' in immigration matters, the Government moved to amend the Migration Act to confer the following discretionary 'public interest' powers on the Minister:

- Section 195A empowers the Minister to grant a visa to a person in immigration detention (whether or not the person has applied for the visa) if the Minister thinks that it is in the public interest to do so. In exercising the power, the Minister is not bound by the usual requirements that apply to the grant of visas. The Minister may grant any visa that the Minister considers is appropriate to that individual’s circumstances.

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1 The following summary of the Minister's discretionary powers under the Migration Act is drawn from DIMIA, Submission 205, pp. 13-15. See also the report of the Select Committee on Ministerial Discretion, Chapter 2.

2 *The Migration Act 1958* prevents a person refused a protection visa from lodging a valid fresh protection visa application unless the Minister uses a personal non-compellable power to allow this in the public interest under section 48B of the Act.

- Section 197AB empowers the Minister to make 'a residence determination' if the Minister considers this is in the public interest. A residence determination provides that a person in immigration detention may reside other than in an immigration detention centre or secured arrangements (that is, the detainees would be free to move about in the community without being accompanied or restrained by an officer), subject to any conditions specified in that determination. The stated purpose of the power is to enable the detention of families with children to take place in the community under conditions that can meet their individual circumstances.
- Section 197A provides that the Minister may at any time revoke or vary a residence determination in any respect if the Minister thinks that it is in the public interest to do so.[3]

4.6 Much of the evidence to this (and earlier) parliamentary inquiries has concerned the discretionary powers under sections 351 and 417 of the Act, which are therefore the focus for this chapter. Section 351 powers may be exercised following a decision of the MRT which considers all cases except protection visa cases, whereas section 417 powers may be exercised following a decision of the RRT which considers only protection visa cases.

4.7 The discretionary powers under sections 351 and 417 have the following features:

- They may only be used to intervene in a matter where the Minister believes it is in the public interest to do so.
- They may only be exercised in circumstances where a visa application has been assessed both at primary and merits review stages as failing to meet the criteria for grant of a visa – for example, at the MRT under section 351 and at the RRT under section 417.
- They are non-compellable and non-reviewable. That is, the Minister does not have a duty to exercise the discretionary power, and a court cannot order the Minister to use the discretionary power to consider an applicant's case.
- They may only be exercised personally by the Minister and cannot be delegated.
- When exercising them to grant a visa, the Minister is generally not restricted by the type of substantive visa that can be granted, and does not have to be satisfied that criteria specified in the Migration Regulations have been met.
- Having exercised these powers, the Minister must table a statement in both Houses of Parliament setting out the decision of the relevant tribunal, the

3 See Parliamentary Library, Bills Digest no. 190, 2004-05, *Migration Amendment (Detention Arrangements) Bill 2005*, (Australian Parliament 2005); See also The Hon John Howard MP, Prime Minister, Media Release, *Immigration Detention*, (17 June 2005).

decision substituted by the Minister, and the reasons for substituting a more favourable decision.

How the powers are exercised

4.8 Matters that may require the exercise of the above powers are brought to the Minister's attention in one of two ways:

- Requests for Ministerial intervention, whereby an applicant or their representative may write to the Minister seeking her intervention through the exercise of her discretionary powers. The Committee understands that such requests are treated as Ministerial correspondence.
- Assessment of cases returned from review authorities. An automatic assessment is undertaken where a review authority – such as the RRT or the AAT – rejects an application for review and affirms DIMIA's decision on a protection visa application. This occurs irrespective of whether or not a request for ministerial intervention has been made. A review authority or the court may also identify circumstances that may warrant the Minister's intervention and refer the case back to DIMIA.[4]

Reliance on Ministerial Guidelines

4.9 Processing of requests and returned cases is undertaken by DIMIA officials in accordance with Ministerial Guidelines. The Minister has issued a set of Guidelines on the identification of 'unique or exceptional' circumstances where the Minister may consider it appropriate to use the discretionary powers. The Guidelines provide that unique or exceptional circumstances may be shown by:

- Circumstances that evidence a significant threat to a person's safety, human rights or human dignity on return to their country of origin;
- Circumstances that may bring Australia's obligations under the Convention Against Torture (CAT) into consideration; namely where there are substantial grounds for believing that the person would be in danger of being subjected to torture in the State to which they would be returned;
- Circumstances that may bring Australia's obligations under the Convention on the Rights of the Child (CROC) into consideration, particularly the obligation that the best interests of the child be given primary consideration;
- Circumstances that in which Australia has obligations under the International Covenant on Civil and Political Rights (ICCPR). For example, where a person would face a real risk that their human rights would be violated through torture, cruel, inhuman or degrading treatment of punishment if they were removed from Australia;

4 See Migration Series Instruction 387, paragraph 5.2.1

- Circumstances that the legislation could not have anticipated or where the application of the legislation leads to unfair or unreasonable results;
- Strong compassionate grounds relating to harm or hardship to an Australian family;
- Circumstances where exceptional economic, scientific cultural or other benefit to Australia would result if the person was permitted to retain in Australia;
- The length of time the person has been present in Australia;
- Compassionate circumstances such as the age, health, psychological state of the person.[5]

4.10 The Guidelines and associated instructions also specifically list cases which would be 'inappropriate for the Minister to consider'. These include cases in which:

- migration related litigation has not yet been finalised;
- the applicant has made another visa application that has yet to be determined;
- where there is an ongoing request to the Minister to exercise another power; or
- where the case has been remitted or set aside by a review body.[6]

4.11 The Guidelines are intended to provide guidance to DIMIA officials involved in processing requests and returned cases. They are not criteria for intervention nor intended to be exhaustive. Nor are they binding on the Minister. Each case is to be considered in isolation and on its merits. Previous decisions of the Minister have no impact on the assessment of each case against the Guidelines.[7]

Processing and assessment by DIMIA

4.12 Requests for Ministerial intervention are allocated to one of four Ministerial Intervention Units (MIU) located in Sydney, Melbourne, Perth and Canberra for processing. Requests concerning persons in immigration detention are referred to DIMIA's national offices.

4.13 Requests for Ministerial intervention are not passed to the original departmental decision maker or case officer for review and comment. However, it is understood that the referred or return review authority decisions are usually sent back to the original DIMIA decision maker for analysis. This is to provide feedback to the decision-maker. The officers are tasked to automatically refer any case which they assess meets the Minister's guidelines for referral to the relevant MIU.[8]

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5 Migration Series Instruction 387, paragraph 5.2.1; Burns, *The Immigration Kit*, pp 782 -3; DIMIA Submission 205, pp 13-14.

6 Burns, *The Immigration Kit*, pp 782-3. Migration Series Instruction 387, paragraph 5.5.6.

7 Migration Series Instruction 387, paragraphs 3.3.4 and 3.3.5

8 DIMIA, Answer to Questions on Notice, 11 November 2005, p. 1; DIMIA, Answer to Question on Notice, 5 December 2005, p. 71.

4.14 The role of the MIU includes conducting a check on whether the Minister is able to exercise his public interest powers. As mentioned above, the Minister's public interest power is not available unless a review authority decision has been made. It is also not available if there is no longer a review authority decision in existence for which the Minister can substitute a more favourable decision.[9] That is, where:

- the review authority has made a decision to remit the matter to DIMIA and a departmental decision-maker has made a subsequent decision on the case; or
- the decision set aside by a court and the case is remitted to the review authority. [10]

4.15 If the request is within power and that does not fall within the 'inappropriate to consider' category, the MIU is then required to make an assessment against the Guidelines.[11]

4.16 In the event that a request or case is assessed as falling within the Guidelines, DIMIA will prepare a submission to the Minister to enable her to decide whether she wishes to consider the case. The submission will outline the reasons why DIMIA considers the matter falls within the Guidelines and provide a statement of the matter, its background and any relevant issues. It is understood that DIMIA refrains from making a recommendation in the submission to the Minister on whether or not the discretionary powers should be exercised. However, submissions may also set out a range of visa options available in the event that the Minister decides to use his or her discretionary power to grant a visa.

4.17 Requests for Ministerial intervention assessed by DIMIA as not falling within the Guidelines are sent to the Minister in the form of a schedule summarising each matter.[12] It remains for the Minister to decide whether or not to consider each matter.

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9 The prerequisite of a review authority decision means that the Minister also does not have the power to substitute a more favourable decision in respect of a 'no jurisdiction' decision (such as a finding that the Department's decision is not 'MRT-reviewable') or an 'invalid application' decision (for example, where an application is not made to the review authority within the required timeframe).

10 Migration Series Instruction 387, paragraphs 3.1.1 and 3.1.2. The Minister's power to substitute a more favourable decision for that of a review authority is also only available if the relevant review authority's decision was made under the appropriate section of the Act. For example, a decision under section 349 (which provides the MRT the power to make decisions) is necessary to trigger the power in section 351 of the Migration Act.

11 Migration Series Instruction 387, paragraphs 5.5.9, 5.5.1.

12 The schedule must contain the following types of information: a summary of the request and the reasons for the request being made; the relevant history the subject of the request has with the Department; details on who made the representation; views of review authority members or the courts; and an assessment against the Guidelines (including international obligations). Migration Series Instruction 387, paragraphs, 5.6.1.

4.18 The Committee understands that cases returned or referred from review authorities or the courts and assessed by DIMIA as not falling within the Guidelines are not referred to the Minister. Rather, a file note to that effect signed and dated by the assessing officer, is placed on file and no further action is taken.

4.19 There is no limit on the number of times a person may request intervention by the Minister. However, once a request has been considered by the Minister, subsequent requests by the same applicant are not usually brought to the Minister's attention unless they are assessed by DIMIA as meeting the Guidelines for referral. This could occur, for example, where a subsequent request provides significant new information on the case, or where the department becomes aware of such significant new information through its own research or other avenues.[13]

4.20 It is understood that no automatic assessment of *non-protection* visa decisions by review bodies is undertaken by DIMIA. That is, the relevant instructions only provide that an assessment under the Guidelines *may* be undertaken by DIMIA if a review authority – such as the MRT – affirms a non-protection visa decision.[14]

Impact on removal of unlawful non-citizens

4.21 A request for Ministerial intervention of itself will have no effect on the removal provisions of the Migration Act. Section 198 of that Act requires the removal of unlawful non-citizens (whether or not they are also detainees) who are not either holding or applying for a visa. A request for the Minister to exercise one of the public interest powers such as section 351 or 417 is not regarded as an application for a visa and unless the request leads to the grant of a visa, such a request has no effect on the removal provisions.[15]

4.22 The Migration Regulations provide that the making of a request for the Minister to exercise his public interest powers under sections 351 and 417, among others, is a ground for the grant of a bridging visa. An applicant must meet the specified criteria for the grant of such a visa.[16]

Time taken to assess cases and requests

4.23 DIMIA advised that the automatic assessment by DIMIA of returned or referred review authority decisions is generally completed within 28 days of the case files being returned to the department.[17] However, the time taken to resolve requests for intervention made by individuals:

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13 Migration Series Instruction 387, paragraph 6.5.

14 Migration Series Instruction 387, paragraph 5.1.1.

15 Migration Series Instruction 387, paragraph 9.3.

16 Migration Series Instruction 387, paragraph 81.

17 DIMIA, Answer to Question on Notice, 11 November 2005, p. 2.

> … can vary significantly depending on the complexity of the issues raised, the completeness of the information and argument provided in support of the intervention, and the number and spacing of submissions and correspondence being provided in support of the case. Where a case has been referred to the Minister, the issue of possible Ministerial intervention remains open until such time as the Minister considers whether or not to use her power in a particular case.[18]

4.24 The Committee notes that, during 2004-05, DIMIA acted to streamline the Ministerial intervention support arrangements and establish stronger management and coordination arrangements for community and detention caseloads. Management of the detention caseload was centralised in Canberra to strengthen liaison with detention management areas and the Minister's office.[19]

Caseload

4.25 The following tables provide an indication of the case load for the requests for Ministerial intervention.

Table 4.1: Use of Ministerial Discretion 1999 to 2005

Year	**1999-00**	**2000-01**	**2001-02**	**2002-03**	**2003-04**	**2004-05**
Humanitarian*						
Requests	3709	3370	4472	4489	4138	2802
Interventions	179	289	203	213	655	142
Percent	4.8	8.6	4.5	4.7	15.8	5.1
Non-humanitarian**						
Requests	888	850	1178	1471	1297	995
Interventions	86	109	159	270	277	97
Percent	9.7	12.8	13.5	18.4	21.3	9.7
Totals						
Requests	4597	4220	5650	5969	5435	3797
Interventions	265	398	362	483	932	239
Percent	5.8	9.4	6.4	8.1	17.2	6.3

*Interventions under s417, s454 and s501J, described as ‘Humanitarian’ by DIMIA
**Interventions under s345, s351 and s391, Described as 'Non-humanitarian’ by DIMIA

18 DIMIA, Answer to Question on Notice, 11 November 2005, p. 6.

19 DIMIA, *Annual Report 2004-2005*, p. 95.

Table 4.2: Ministerial Interventions on RRT and MRT Decisions

Year	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05
Humanitarian						
RRT	5417	4858	4647	5391	5810	3033
Interventions	179	289	203	213	655	142
Percentage	3.3	6.0	4.4	4.0	11.3	4.7
Non-humanitarian						
IRT/MRT	1625	2498	3360	4087	3925	3284
Interventions	86	109	159	270	277	97
Percentage	5.3	4.4	4.7	6.6	7.0	2.9
Totals						
All Tribunals	7042	7356	8007	8946	9735	6317
Interventions	265	398	362	483	932	239
Percentage	3.8	5.4	4.5	5.4	9.6	3.8

*Decisions affirmed by IRT

**Decisions affirmed by IRT and MRT

Source: Tables provided to the Committee by the Department of Immigration and Multicultural and Indigenous Affairs on 12 January 2006.

Concerns raised in earlier inquiries

4.26 The Minister's discretionary powers in migration matters were considered in two inquiries in recent years—in 2000 by a predecessor of this committee (see *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000), and in 2004 by the *Select Committee on Ministerial Discretion in Migration Matters,* a specially-constituted Senate Select Committee which tabled its report in March 2004.[20]

The Senate Legal and Constitutional References Committee 2000 inquiry

4.27 This committee's report of 2000, *A Sanctuary under Review*, examined, among other things, the concept of Ministerial discretion, its implementation and administrative procedures, and the nature of a non-compellable and non-reviewable decision and forced *refoulement* when an applicant is unable to gain refugee status under the Refugee Convention.

4.28 The committee's report concluded that the Ministerial discretions, such as that provided under section 417 of the Migration Act, were valuable and should be

20 *Select Committee on Ministerial Discretion in Migration Matters* (March 2004).

retained.[21] However, in light of the evidence received during its inquiry, the committee recommended a number of procedural and administrative improvements to the way the discretionary powers are exercised. Issues covered by these recommendations included that:

- the Minister should consult with stakeholders to ensure the Ministerial guidelines are contemporary and address the specific purposes of Australia's obligations under the CAT, CROC and ICCPR;
- the RRT should continue its current practice whereby members informally advise the Minister of cases where there may be humanitarian grounds for protection under international conventions;
- an information sheet should be made available in appropriate languages to explain the provisions of section 417 and the Ministerial guidelines, as well as information about section 48B;
- section 417 processes should be completed quickly and the outcome advised to the relevant person;
- the subject of the request should not be removed from Australia before the initial or first section 417 process is finalised; and
- appropriately trained DIMA staff should consider all section 417 requests and referrals against CAT, CROC, and ICCPR.[22]

4.29 The Government's response to the above was to maintain that existing administrative procedures and arrangements were adequate.[23]

The Select Committee's 2004 inquiry

4.30 As mentioned above, a Select Committee was established in June 2003 to inquire into the use and appropriateness of the Minister's discretionary powers under sections 351 and 417 of the Migration Act. It tabled its report in March 2004.[24]

4.31 The Select Committee found almost unanimous support for having some capacity for Ministerial discretion in the migration legislation. However, while the committee concluded that the Ministerial intervention powers should be retained as the ultimate safety net in the migration system, evidence to that inquiry highlighted a pressing need for reform of their operation.

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21 Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (June 2000), p. 267.

22 Senate Legal and Constitutional Committee, *A Sanctuary under Review*, Recommendations 8.1 to 8.4 and 8.6.

23 Government response, 8 February 2001, pp 12-13.

24 The report can be found at http://www.aph.gov.au/Senate/committee/minmig_ctte/report/index.htm

4.32 The Select Committee's findings are summarised below. The full listing of its 21 recommendations is shown at Appendix 7.

Lack of transparency and accountability

4.33 The Select Committee found that a lack of transparency and accountability of the Minister's decision making process was a serious deficiency in need of urgent attention. The sole accountability mechanism in cases where the discretionary power is used to grant a visa is a requirement that the Minister table statements in parliament on a six-monthly basis. According to the legislation, these statements must set out the Minister's reasons for thinking intervention is in the public interest. However, in recent years, tabling statements had outlined only in the broadest terms cases where the Minister has intervened. The Select Committee noted its concern that:

> … vesting a non-delegable, non-reviewable and non-compellable discretion with the immigration minister without an adequate accountability mechanism creates both the possibility and perception of corruption. At a minimum, the Committee wants to see external scrutiny of decision making made an integral part of the ministerial discretion system. This should bring a greater degree of transparency into the decision making process and reduce the scope for corruption of the system.[25]

4.34 The Select Committee made several recommendations to address the perceived shortcomings in the accountability of the Minister's discretionary powers. To ensure parliamentary scrutiny of the use of discretionary powers, the Select Committee recommended that the Minister's tabling statements provide reasons why a decision to intervene is in the public interest and indicate 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. [26]

4.35 It was also recommended that the Government establish an independent committee as part of the Ministerial intervention process to improve the equity and transparency of the process and restore public confidence in the system. The purpose of the committee would be to review DIMIA's submissions and schedules and recommend to the Minister cases which it believes warranted Ministerial intervention.[27]

4.36 The Select Committee was concerned by evidence that the Minister's discretionary powers were being used on average several hundred times each year instead of for the few exceptional cases they were originally designed to deal with.[28]

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25 *Report of the Senate Select Committee on Migration Matters*, March 2004, p.xix

26 *Report of the Senate Select Committee on Migration Matters,* p.xiv

27 *Report of the Senate Select Committee on Migration Matters,* p.xix

28 *Report of the Senate Select Committee on Migration Matters,* p.119

4.37 DIMIA had advised that there were three main reasons for the increase in the use of Ministerial discretion since 1996-97. First, the Government has chosen to deal with onshore applications for visas on a case-by-case basis rather than by establishing special visa categories. Second, there have been more requests as the workload and decisions made by the tribunals have increased significantly. Third, there is greater public awareness of the existence and the processes of the exercise of discretion. DIMIA also suggested that judicial review has influenced the number and timing of requests.

4.38 The Select Committee was unable to test these claims, as it could not draw firm conclusions about the use of Ministerial discretion from the available data, which it described as being limited in respect of its reliability and detail. It therefore recommended that DIMIA establish procedures for collecting and publishing statistical data on the operation and use of the Ministerial discretion powers to improve the accountability of the system.[29]

DIMIA involvement in vetting applications

4.39 The Select Committee noted that the Minister's capacity to formulate an independent view on a particular case depended almost entirely on the information provided by DIMIA. The processing and decision making process within DIMIA, especially whether to prepare for the Minister a submission or a schedule, was critical to the success or otherwise of individual cases. However, evidence to that inquiry – including evidence from the Commonwealth Ombudsman – revealed 'serious and fundamental administrative' weaknesses in DIMIA's decision making processes.

4.40 The Select Committee therefore recommended that:

- DIMIA establish a procedure of routine auditing of its internal submission process;
- 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.[30]

4.41 The Select Committee also recommended that the role of the RRT and MRT in the Ministerial discretion process be reconsidered.[31] The Committee accepted that the Tribunals' core task is the review of DIMIA decisions to refuse or cancel protection

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29 *Report of the Senate Select Committee on Migration Matters,* p.xii

30 *Report of the Senate Select Committee on Migration Matters,* p.62

31 As noted above, cases may be brought to DIMIA's attention by a referral from the RRT and the MRT. Members of the review tribunals may indicate in their decisions that a particular case raises humanitarian issues.

and other visas. However, the Tribunals were seen as being well placed to assess the entirety of an applicant's circumstances, especially when new information is presented that was not previously available to the department. The Select Committee recommended that the MRT and the RRT:

- standardise their procedures for identifying and notifying DIMIA of cases raising humanitarian and compassionate considerations; and
- keep statistical records of cases referred to DIMIA, the grounds for referral and the outcome of such referrals.[32]

Limited advice, assistance and information for applicants

4.42 The Select Committee found a lack of available information for applicants about Ministerial discretion and its processes. To address these deficiencies, the Select Committee recommended that:

- DIMIA create an information sheet and application form in appropriate languages that explains the Ministerial guidelines and application process; [33]
- a consultative process be established between DIMIA and applicants for Ministerial intervention where applicants are shown and can comment upon information that is central to the outcome of their case – for example, the draft submission to be placed before the Minister;[34] and
- the Minister provide a statement of reasons for an unfavourable decision on a first request for Ministerial intervention.[35]

4.43 The Select Committee considered that provision of a statement of reasons would ensure fairness and allow applicants to identify in any subsequent request matters that may have been overlooked. It would also enable Parliament and the community to ascertain how the powers were being used.[36]

4.44 The Committee also recommended that 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.[37]

The need for a tribunal decision as a prerequisite for intervention

4.45 The Select Committee recommended that DIMIA consider legislative changes to enable Ministerial intervention to be available in certain circumstances where there

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32 *Report of the Senate Select Committee on Migration Matters,* p.67

33 *Report of the Senate Select Committee on Migration Matters,* p.71

34 This was originally recommended by the Commonwealth Ombudsman.

35 *Report of the Senate Select Committee on Migration Matters,* pp 73-74

36 *Report of the Senate Select Committee on Migration Matters,* p.73

37 *Report of the Senate Select Committee on Migration Matters,* p.185

is a compelling reason why a merits review tribunal decision was not obtained. Witnesses and submitters to that inquiry – including the Commonwealth Ombudsman – pointed to the problems of denying access to Ministerial intervention in cases in which applicants, through no fault of their own, were not able to appeal to a tribunal (ie, because an invalid application for review had been lodged). The need to appeal to a tribunal in cases where there is no chance of success before the tribunal, but where there is a reasonable chance that the Minister might intervene, was also queried.[38]

Financial hardship and delays in obtaining bridging visas

4.46 The Select Committee identified a range of difficulties being experienced by applicants. A particular concern was the evidence that many applicants for Ministerial intervention faced considerable financial hardship due to the constraints of bridging visas, particularly restrictions on work rights (and therefore access to Medicare).

4.47 The committee recommended 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.[39]

4.48 The committee noted that applicants for Ministerial intervention become eligible for a bridging visa while their request is being considered. It therefore recommended that DIMIA formalise the application process for Ministerial intervention to overcome delays and other problems in the 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.[40]

4.49 This committee understands that the Government has yet to respond to the Select Committee's report and recommendations.

The need for 'complementary protection'

4.50 An issue that arose in both of the above inquiries was whether the Migration Act should be amended to provide expressly for complementary protection.

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38 *Report of the Senate Select Committee on Migration Matters,* p.186

39 *Report of the Senate Select Committee on Migration Matters,* p.80

40 *Report of the Senate Select Committee on Migration Matters,* p.186

4.51 The term 'complementary protection' refers to a widening of the categories of persons who may be granted temporary or permanent residence beyond only those who are owed refugee protection. The Refugees Convention does not provide for protection of people who do not meet the Convention definition of a refugee. However, a range of other international instruments impose obligations not to return (or *refoul*) persons who do not satisfy the Refugee Convention's definition of a 'refugee', but who face a risk of a violation of their fundamental human rights. Examples include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the International Covenant on Civil and Political Rights.

4.52 It is understood that there is no consistent international approach on this issue, with the nature and application of complementary protection provided under domestic law differing between countries. The protection offered by countries can include permanent or temporary residence on various grounds based on humanitarian concerns, obligations under international human rights treaties, or judgement by a State as to whether it is unsafe, inappropriate or not practicable to return to the country of origin. International practice also varies markedly on the rights to be afforded under complementary protections, ranging from nothing more than protection against *refoulement* to enjoyment of all rights normally afforded to persons found to be a 'refugee'. Differences also exist in the procedures followed to accord complementary protection.[41]

4.53 The committee notes that there are moves to harmonise the various approaches to complementary protection, particularly within the European Union.[42]

4.54 Australia's practice has been to rely on the Ministerial discretionary powers to grant a visa to meet the needs of those people in Australia whose circumstances do not fit the criteria of the Refugees Convention. Another mechanism has been the occasional creation of special categories of visas to provide temporary haven for

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41 DIMIA answers to Questions on Notice, 11 November 2005, pp. 53-54. See also Erka Fellor Director of International Protection, UNHCR, *The responsibility to protect – closing the gaps in the international protection regime and the new EXCOM Conclusion on Complementary Forms of Protection*, Statement to the 'Moving On: Forced Migration and Human Rights Conference, Sydney, 22 November 2005.

42 A European Commission Directive adopted in 2004 established a framework for an international protection regime based on existing international refugee and human rights instruments obligations, which emphasises the primacy of refugee status. It set minimum standards, with some flexibility for States to give lesser benefits to holders of complementary or subsidiary protection. Member States must implement national legislation by October 2006. Discussion is also underway within UNHCR on the general principles on which complementary protection should be based. UNCHR's Executive Committee, which is comprised of over 50 member states including Australia, recently adopted the *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, which, among other things, calls on States to implement procedures to care for those in need of protection, but who fall outside the Refugee Convention. See Refugee Council of Australia, Answer to Question on Notice, 27 October 2005.

certain prescribed groups or to allow people in Australia illegally to regularise their status.[43]

4.55 This practice was examined in both the above-mentioned inquiries.

Concerns raised with the Committee in 2000

4.56 A key issue in the committee's 2000 inquiry was the fact that Australia's treaty commitments – such as those under the CAT and the ICCPR – had not been incorporated into Australian domestic law. Rather, as noted above these obligations were met through the provision of the non-reviewable and non-compellable Ministerial discretion in section 417 of the Migration Act**.** This led to committee consideration of whether Australia was complying with its obligation of non-refoulement under the CAT and the ICCPR, and whether it was appropriate to rely on Ministerial discretion to give effect to international obligations.

4.57 The report identified four specific areas of concern regarding the use of Ministerial discretion powers to fulfil non-refoulement obligations:

- The absence of a formal mechanism for the referral of cases to the Minister;
- Reliance on a non reviewable and non-compellable discretion is an unacceptable means for determining the fate of persons claiming protection under Australia's international obligation;
- The circumstances in which the Minister is able to exercise the discretionary power is too narrow;[44] and
- It takes too long to access the Ministerial discretion.

4.58 A person seeking protection on humanitarian grounds must make an application to the department for 'refugee status' based on the criteria of the Refugee Convention, have that rejected and then seek to have that negative decision reviewed

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43 Examples include the Temporary Safe Haven visas used in 1999 to provide temporary residence to some 4000 Kosovars brought to Australia for temporary protection. An equivalent 'Safe Haven Visa' was used to provide temporary protection to some 1 900 East Timorese evacuated by Australia from Dili in 1999. Similarly, the offshore humanitarian visa classes provide protection to persons on grounds broader than those set out under the Refugees Convention. There have also been occasions where persons unlawfully in Australia and in humanitarian need were granted visas under new visa categories. See UNHCR, *Complementary Protection*, Discussion Paper No. 2, 2005. See also DIMIA, Answer to Question on Notice, 11 November 2005, Attachment.

44 The Minister is only able to substitute a more favourable decision of the RRT once the RRT has reviewed a claim for consideration of refugee status under the Refugee Convention. That means that the Minister is unable to use the power until the relevant review authority has made a decision in a particular case. Similarly, where a decision is quashed or set aside by a Court and the matter is remitted to the decision maker to be decided again, the Minister is unable to use the public interest power as there is no longer a review decision in respect of which he can substitute a decision.

by the RRT. This is required even though the applicant and their advisor may consider such a claim for refugee status on Convention grounds to be without merit. It is only after the Tribunal had affirmed the department's decision that the applicant may apply to the Minister.[45]

4.59 The above, it was argued, had a number of unintended adverse consequences:

- it had added significantly to the number of apparently 'unsuccessful' applications;
- it fostered professional disrepute by forcing practitioners to utilise the refugee determination process for the purpose of seeking Ministerial discretion;
- it wasted public monies by requiring the assessment of humanitarian cases in the first instance against refugee criteria – which will, by their very definition, fail;
- it causes delays for alleged refugees who may be emotionally vulnerable; and
- applicants in immigration detention may be detained for lengthy periods while waiting to access the Ministerial discretion.[46]

4.60 Notwithstanding the above, the committee's report concluded that discretionary Ministerial powers – such as those provided by section 417 of the Act – were an appropriate means through which Australia can meet its international obligations under the CAT, CROC and the ICCPR.[47]

4.61 However, it is clear that the Select Committee also considered that discretionary Ministerial powers alone were an insufficient safety net to ensure compliance with the above international obligations.[48] Further, the 2000 report noted that:

> A revision of the process whereby a person seeking asylum on humanitarian grounds is required to be processed through an administrative decision-making system focussing on refugee related grounds would remove the sometimes lengthy delays incurred in a number of genuine cases. It should also lead to what would be considerable saving in time and resources associated with unsuccessful RRT processing.[49]

4.62 Concerns that reliance on Ministerial discretions and guidelines meant that applicants lacked enforceable rights and obligations led the committee to recommend

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45 *A Sanctuary Under Review*, pp. 61-64.

46 *A Sanctuary Under Review*, p 63.

47 *A Sanctuary Under Review*, p. 64.

48 Select Committee on Ministerial Discretion, p. 137.

49 *A Sanctuary Under Review*, p. 257.

that the Government examine incorporation of the non-refoulement obligations of the CAT and ICCPR into domestic law.[50]

4.63 This recommendation was generally rejected by the Government.[51]

Concerns raised with the Select Committee

4.64 The same arguments and concerns arose during the Select Committee's 2004 inquiry. The Select Committee received evidence expressing the view that protection from refoulement should not be left solely to Ministerial discretion powers which are non-compellable, non-reviewable and non-delegable because:

- Australia's non-refoulement obligations under the CAT, CROC and ICCPR are not discretionary and subject to few, if any, exceptions;[52]
- CAT, CROC and ICCPR asylum seekers have no such right of review and little protection in the way administrative decisions are scrutinised; [53]and
- reliance on the discretionary powers places considerable burden on Australia's migration system and results in non-Convention asylum seekers being detained for extended periods in order to request the Minister's intervention at the end of a determination process which is not relevant to them. [54]

4.65 In light of the above, it was put to the Select Committee that providing alternative administrative arrangements to enable Australia to fulfil its non-refoulement would ease the burden on the current (over) use of Ministerial discretion. Introduction of complementary protection under the Migration Act, it was suggested, had the potential to enable Australia's migration and humanitarian programs to be delivered with certainty and transparency, and to assist non-Refugee Convention asylum seekers who are in genuine need of humanitarian protection.[55]

4.66 The Select Committee – in its majority report – accepted these arguments. It was concerned that Australia is one of the few countries in the developed world that does not have a system of complementary protection. The Select Committee was in no doubt that the current Australian practice of relying solely on Ministerial discretion places it at odds with emerging international trends. In its view, the concept has not received the attention from Government it now clearly deserves.[56]

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50 *A Sanctuary Under Review*, Recommendation 2.2.

51 See Appendix 3.

52 *Select Committee on Ministerial Discretion*, p.134

53 *Select Committee on Ministerial Discretion,* p.135

54 *Select Committee on Ministerial Discretion*, p.147

55 *Select Committee on Ministerial Discretion,* p.148

56 *Select Committee on Ministerial Discretion*, p.145

4.67 However, as complementary protection was at that time a relatively undeveloped concept in Australian domestic law, the Committee considered that further examination of how complementary protection might work in the Australia context was warranted. It therefore recommended that the Government consider adoption of 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.[57]

4.68 In making this recommendation, the Select Committee dismissed concerns raised by DIMIA that introduction of complementary protection would encourage litigation and create the potential for misuse of the process by those wishing to prolong their stay and frustrate their removal from Australia.

4.69 The Government has yet to respond formally to the Select Committee's report. However, it is apparent from the evidence given to this inquiry that it does not accept the Select Committee's findings and maintains that the existing arrangements are appropriate.

Concerns raised during this inquiry

4.70 The same concerns and criticisms that were levelled at the operation of the discretionary Ministerial powers and at the lack of a system of complementary protection were put to the Committee during this inquiry.

4.71 Most submissions and witnesses agreed that there is a need for Ministerial discretion in relation to migration matters, as a 'catch-all' or a final 'safety net'. However, several expressed concern in the manner it which it operates. These concerns included:

- the non-compellable, non-delegable and non-reviewable nature of the power;
- the lack of accountability and transparency in decision making;
- the delay in obtaining a decision can prolong a person's detention; and
- reliance on such a power is at odds with Australia's international commitments under international treaties.

4.72 Submissions and witnesses also argued that, rather than relying on Ministerial discretion to cover cases where an asylum seeker does not fall within the definition of refugee in the Refugee Convention, but may be eligible for protection under other conventions such as CAT, ICCPR and CROC, a fairer and more efficient process

57 *Select Committee on Ministerial Discretion*, p.148

would be to consider such claims under some form of complementary protection, such as a humanitarian visa.[58]

4.73 These concerns and criticisms are examined below.

The non-compellable, non-delegable and non-reviewable nature of the power

4.74 Most submissions and witnesses did not agree with the Committee's finding in 2000 that the continued reliance on the current system of Ministerial discretion was appropriate.[59]

4.75 The Law Society of South Australia (LSSA), for example, considered the present reliance on Ministerial discretion is 'inherently unsuitable' in dealing with Australia's obligation on non-refoulement, which 'is not discretionary'. It pointed to:

> … an inherent conflict in attempting to meet the non-refoulement obligation through reliance on a non-compellable, non-reviewable, non-delegable decision made on the sole basis of intervention where it is "in the public interest". There should be a clear legislative structure to guide the decision-making process to ensure factors relevant to Australia's obligations under the ICCPR, CROC and CAT are considered and that outcomes are fair and consistent. The current system does not provide an 'effective remedy' sufficient to satisfy the requirements of international law.[60]

4.76 The LSSA also argued that with any administrative decision there is a risk of errors occurring**,** whether it is as a result of 'incorrect information, a lack of relevant information, or a misinterpretation of the facts or the law.'[61] It stressed that:

> This risk is heightened where applications are made to the Minister without legal advice as to what information is in fact relevant, where there is no opportunity to respond to adverse material which may be before the Minister, where applications are made on the basis of documentary evidence alone and/or where the Minister is burdened by such a large volume of applications that insufficient time is available to consider each individual application thoroughly.[62]

4.77 Yet, notwithstanding these risks, the LSSA noted that:

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58 LSSA, *Submission 110*, pp. 11-15; NCCA, *Submission 179*, pp. 4-15; Franciscan Missionaries of Mary, *Submission 180*, p. 3; UJA and ASPHM, *Submission 190*, pp. 10-11; LIV, *Submission 206*, p. 20. Witnesses and submitters advised that it is too early to assess whether the additional intervention powers granted to the Minister by the June 2005 changes to the Migration Act were capable of being used to remedy this situation. See, for example, Refugee Council of Australia, *Submission 148*, p. 3.

59 *A Sanctuary under Review,* p. 267

60 LSSA, *Submission 110*, p. 12.

61 LSSA, *Submission 110*, p. 11.

62 LSSA, *Submission 110*, pp. 12-13.

> … the decision as to whether or not to exercise Ministerial discretion …[which is] in effect a primary decision where an applicant is seeking complementary protection … is not subject to any form of review and provides no safeguard against potential harm flowing from an error in the decision.[63]

4.78 The National Council of Churches Australia (NCCA) shared this concern. It argued that:

> There is no reason in principle why a person applying under ICCPR/CRC/CAT grounds should be entitled to a lesser form of support (income support, work rights and Medicare coverage) than an asylum seeker applying under the Refugee Convention. Each invokes Australia's obligations under the various treaties and Australia's non-refoulement obligations under the ICCPR, CRC and CAT are no less important than those under the Refugees' Convention. The potential harm resulting from a flawed decision is equally severe, if not fatal.[64]

Lack of transparency and accountability in decision making

4.79 Witnesses and submitters pointed to a lack of accountability and transparency in how the Ministerial discretion was being exercised.

4.80 Representatives of the LSSA commented that:

> By its very nature, the exercise of Ministerial discretion lacks transparency and accountability. It may result in inconsistent outcomes because of the vagueness of the criteria which must be established in order for the Minister to intervene. It is open to allegations of actual or apprehended bias and corruption.[65]

4.81 Amnesty International echoed the Law Society's concerns. Its representative, Dr Graham Thom, advised the Committee that:

> There are issues regarding transparency and guidelines. For those people who have to try to navigate the guidelines in terms of getting 417 applications or 48B applications to the Minister, at times it just does not seem to make sense. You may tick off every box on those guidelines and you get a letter back saying that you have not met the guidelines. You do not understand. The inability to challenge the decision is increasingly frustrating for practitioners, let alone for asylum seekers.[66]

4.82 The LSSA suggested that such shortcomings could be overcome if reasons for decisions were tabled in Parliament (as they were previously) and if written reasons

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63 LSSA, *Submission 110*, pp. 12-13.

64 NCCA, *Submission 179*, p. 9.

65 *Committee Hansard*, 26 September 2005, p. 4.

66 *Committee Hansard*, 29 September 2005, p. 27.

were provided to the applicant where the Minister declines to exercise his or her discretion.[67] As noted above, earlier Senate inquiries have made a similar recommendation.

4.83 Uniting Justice Australia (UJA) and Asylum Seeker Project Hotham Mission (ASPHM) also stressed the importance of ensuring that asylum seekers understand why their application has been refused :

> … It is important that asylum seekers have all the information as to why they have been refused. Allowing asylum seekers to feel that their entire case has been heard and that a definitive decision looking at all our obligations has been made will assist and facilitate a more humane process of return. All persons requesting or referred for Ministerial intervention on their visa application should receive notice, in writing, of the decision made by the Minister and the reason for the decision.[68]

4.84 Reverend Poulos of Uniting Justice Australia advised the Committee that 'we never know why people are accepted or refused'. She also highlighted the problems facing those trying to advise applicants:

> Without any understanding of how 417 decisions are made, it leaves people with absolutely no grounds to assess things and think: 'Of the conditions surrounding this particular case, what is the most relevant? What is the Minister going to consider in particular? What would be helpful for the Minister in this case? What is irrelevant?' It is a bit of lottery for people.[69]

4.85 Ms Lucy Bowring of the ASPHM expressed the same concern over the lack of transparency:

> We cannot say why decisions are being made or not being made. It is very hard to determine if a certain issue is being picked up on. I know there have been a few occasions when we have had two very similar cases before the Minister and one family received the visa and the other did not. It is very difficult to determine why that might be when you do not know what has actually been looked at and considered.[70]

4.86 When asked how they dealt with such a situation and what avenues are open to them to resolve such a situation, Ms Bowring responded:

> We do not have an avenue, apart from trying to talk to the department about putting up the case again, stressing our original concerns and perhaps our concerns around other cases that received a positive decision in a similar situation. With that level of advocacy, sometimes the case will get up again and the Minister will decide to consider it. Whether the Minister ends up

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67 LSSA, *Submission 110*, p. 14.

68 UJA and ASPHM, *Submission 190*, p. 12.

69 *Committee Hansard*, 29 September 2005, p. 32.

70 *Committee Hansard*, 29 September 2005, p. 33.

> making a decision or not is unclear, but that is pretty much the role that we take. It is very arbitrary and it is very unclear.[71]

4.87 The Migration Institute of Australia (MIA) advised the Committee that, despite the 'recent and comprehensive Senate inquiry in 2004', the use of the Minister's discretionary powers 'remained a process shrouded in mystery and controversy':

> Recent decisions relating to Ministerial Discretion (in particular decisions which have separated parents from their natural children), have left MIA perplexed, given the public interest foundations behind these powers. It appears to MIA members that they can no longer rely on MSI guidelines written under the provisions of these sections of the Act as reliable for properly and professionally advising and acting for applicants in these circumstances.[72]

4.88 The MIA agreed that Ministerial discretion in migration matters should be retained as a necessary and basic Ministerial power. However, it also considered that:

> … the very seriousness of the situation facing the majority of people seeking the Minister's intervention to grant visas in the public interest …, requires absolute trust in the government of the day that such a power is at the very least not politicised or even suggested as so.[73]

4.89 In light of the above, the MIA queried why the above-mentioned recommendations made by the Select Committee had not been decided on or acted upon by the Government. The MIA also recommended that the Migration Act be amended to allow the power to be delegated by the Minister to decision makers at State Director level, as is the case with other powers under the Act. In its view, this would go some way in de-politicising the intervention powers and providing more consistency overall.[74]

Delays prolong detention and hardship

4.90 A major concern raised in evidence to the Committee was the length of time involved in seeking the exercise of Ministerial discretion. Submissions pointed out that applications for Ministerial intervention are lodged late in the assessment process, after an applicant has already gone through and had to await the outcome of the initial assessment by DIMIA and then review by the RRT. The Asylum Seekers Centre advised that, while the Centre had been given the opportunity through the Ministerial unit in DIMIA to request that a particular case be expedited on the basis of mental health concerns, they had:

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71 *Committee Hansard*, 29 September 2005, p. 33

72 Migration Institute of Australia, *Submission 144*, p. 6.

73 Migration Institute of Australia, *Submission 144*, p. 6.

74 Migration Institute of Australia, *Submission 144*, p. 6.

> … several clients at the moment who have lodged a section 417 (application) and been waiting for over two years – in some cases, close to three years – without word. During that time, they are living in complete limbo. They have absolutely no way of knowing whether their claims are even going to be considered.[75]

4.91 Criticism was directed at the Migration Act's failure to provide for requests for protection on humanitarian grounds to be undertaken at the primary stage of application. As NCCA representatives noted:

> … protection visa applicants with grounds for complementary protection must apply as a refugee to DIMIA and appeal to the RRT and receive negative decisions from both before they can appeal to the Minister on complementary protection grounds. In the case of protection visa applicants in detention, this effectively prolongs the detention as they must first be considered under irrelevant criteria by DIMIA and the RRT before being able appeal under relevant criteria to the Minister.[76]

4.92 Witnesses also pointed to the impact on applicants living in the community. Applicants for protection on humanitarian grounds living in the community may face financial and other hardships pending Ministerial consideration of their application. Different levels of support are available apply depending on the basis of their release (such as release into the community under a temporary protection visa, a bridging visa E, removal pending bridging visa, or under community detention arrangements). This has prompted church representatives to describe the plight of some applicants in the following terms:

> The absence of complementary protection also affects asylum seekers living in the community. These are people who entered Australia with a visa and then claimed asylum so they are not detained. Some have work rights and income support and others have neither and are totally dependent on charities. Again, they have to wait and get knocked back by both the Department of Immigration and the Refugee Review Tribunal before they can apply to the Minister under the appropriate grounds. For those who are not permitted to work or receive income support, this obviously greatly extends the period in which they are impoverished, idle and forced to depend on charity. For those with income support who are forced to apply as a refugee to the Department of Immigration, get knocked back, and appeal to the Refugee Review Tribunal, and get knocked back, it is a waste of government-funded income support and processing costs, as they're not being assessed under the right criteria until they apply to the Minister. And when they do apply to the Minister under the right criteria, their income support is cut off and often their work rights, leaving them without income, work or Medicare. [77]

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75 *Committee Hansard*, 28 September 2005, p. 28.

76 NCCA, *Submission 179*, p. 9.

77 James Thompson, National Council of Churches In Australia, *Why Australia needs a complementary protection visa*, Perspective, ABC Radio National, 3 September 2004.

4.93 The committee also notes evidence cited in Chapter 8 of this report of the adverse impacts that prolonged uncertainty can have on the mental and emotional well being of some applicants.

4.94 The Regugee Advocacy Service of South Australia (RASSA) provided the Committee with an example of the delay and hardship caused by the Minister's policy of not considering section 417 requests while court proceedings are current. As mentioned above, the Guidelines provide that such cases are 'inappropriate for consideration'. The example concerned a group of Sabean Mandeans who had claimed protection from persecution in Iran and Iraq:

> On 20 June 2004, all Sabean Mandeans that we know of were granted protection visas except for those who had court proceedings on foot. … The remaining Sabean Mandeans were required to put their lives on hold while they waited for years for the court process to be completed, despite the logical outcome being a guaranteed visa. These asylum seekers were faced with the cruel choice of giving up their only available legal fight for asylum to rely on a non-compellable, discretionary decision from a Ministry that is known for being inconsistent or waiting out a lengthy court process in order to obtain the asylum that we all knew they deserved. It is now two years since the RRT clearly acknowledged that Sabean Mandeans are persecuted in Iran and Iraq and we know of one Sabean Mandean who still has not received a protection visa due to court proceedings continuing well into 2005. This is not only an appalling way to treat genuine asylum seekers but also an extraordinary waste of administrative and judicial resources. DIMIA cannot dismiss this criticism merely by pretending to defer to the authority of the courts because the Minister has intervened with the granting of a section 417 visa or a section 48B opportunity while court proceedings were on foot; just not at RASSA's request.[78]

4.95 RASSA argued that, rather than delaying matters, the Minister and her Department should take action to grant a visa as soon as they are satisfied that an asylum seeker is deserving of protection.

International humanitarian obligations – Complementary Protection

4.96 Most submissions and witnesses did not agree with the committee's finding in 2000 that Australia is able to meet its international obligations under CAT, ICCPR and CROC by relying on discretionary Ministerial powers. They considered that these obligations could only be met appropriately by the creation of a complementary protection visa to cover the particular circumstances of asylum seekers whose claim for protection is based on these conventions.

4.97 Some highlighted the lack of accountability and transparency in the current system to argue that it was an unacceptable mechanism for determining the fate of

78 RASSA answer to Questions on Notice received 28 October 2005, p. 2.

persons claiming protection under international obligations. The UJA and ASPHM, for example, advised:

> For those seeking Ministerial intervention for humanitarian reasons, there is no formal decision made on a person's humanitarian status. The question of whether claims with humanitarian merit are adequately assessed is crucial. The current process does not give any assurance that this occurs, in part due to the non-compellable nature of the power, combined with a lack of binding criteria in relation to international obligations against which Ministerial decisions can be measured and held accountable. If Ministerial intervention continues to be used to assess cases that may invoke our obligations under international treaties, there is a need for mechanisms to ensure a consistent application of the guidelines, and the guidelines themselves must be expanded to clearly and adequately detail Australia's humanitarian, protection, and non-refoulement obligations under these treaties. Applicants also need to be enabled to explicitly outline their case for humanitarian protection against these guidelines as the claim made against criteria for refugee protection may not be adequate and can not be assumed to contain sufficient relevant information to assess a non-refugee convention claim.[79]

4.98 Others pointed to the inefficiencies inherent in the current system, which requires asylum seekers to first seek protection under the Refugee Convention and then exhaust all avenues of appeal.[80] The LSSA, for example, considered the existing procedures involved in requesting the exercise of Ministerial discretion to be an illogical and inefficient use of resources. It said:

> The burden of the large number of applications to the Minister in recent years is unacceptable and unsustainable, yet the discretionary power will continue to be relied upon whilst there remains no effective structure provided for in the Migration Act for the consideration of applications for complementary protection. As applicants must have exhausted all avenues of appeal before seeking the Minister's intervention, frivolous applications for review by the RRT and Federal Court are implicitly encouraged. This is a ridiculous and costly waste of time and resources.[81]

4.99 The LSSA stressed that:

> [t]he current system is flawed as … neither the primary decision maker within DIMIA nor any of the review bodies are entitled to consider factors relevant to complementary protection due to the legislative constraints of the Migration Act. [82]

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79 UJA and ASPHM*, Submission 190*, p. 12.

80 LSSA, *Submission 110*, pp 11-13; NCCA, *Submission 179*, pp 4-15; UJA and ASPHM, *Submission 190*, p. 13; LIV, *Submission 206*, p. 20.

81 LSSA, *Submission 110*, p. 13.

82 LSSA, *Submission 110*, pp 12-13.

4.100 Others emphasised the impact on those who seek Australia's protection on humanitarian grounds. Amnesty International's representatives, for example, advised the Committee that:

> … we have seen a number of cases where we believe individuals should have been picked up much earlier in the system. In some cases those individuals have had to go through years of very traumatic circumstances in trying to prove who they are and that they would suffer persecution. …. where there are issues of human rights, there needs to be a system that operates before it gets to the Minister. Again, this is where we raise the issue of complementary protection, because if assessments are able to be made before they get to the Minister then you will cut back on a great deal of suffering.[83]

4.101 The Refugee Council of Australia recently summed up the situation as follows:

> By leaving any consideration of non-Convention [that is, Refugee Convention] related protection claims to the very end of the process and by consigning the decision to Ministerial discretion, it can be argued that Australia's current practice is inefficient, unnecessarily expensive, places an unrealistic burden on the Minister for Immigration, lacks transparency and accountability, does not contain sufficient safeguards and is detrimental to both Convention refugees (by clogging up the system) and to those with non-Convention needs.[84]

Calls for reform

4.102 In order to address the deficiencies identified above and to ensure that Australian practice is consistent with both Australia's international obligations and with international best practice, witness and submitters argued that changes had to be made to the manner in which Australia considers protection applications.

4.103 Most argued for a system of complementary protection based on a single administrative procedure in which consideration of both Refugee Convention and non-Convention related protection claims was undertaken by primary decision-makers.

4.104 The committee notes in particular the model of complementary protection detailed in the paper prepared by the Refugee Council, Amnesty International and the National Council of Churches in Australia entitled *Complementary Protection: The Way Ahead*. The aim of the model – which has also been endorsed by most Australian churches, the ICJ and other legal organisations as well as refugee organisations – is to ensure that Australian practice is 'fair, transparent, timely, efficient and legally defensible'.[85]

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83 *Committee Hansard*, 29 September 2005, p. 27.

84 Refugee Council of Australia, *Complementary Protection – A New Model for Australia*, in UNHCR, *Complementary Protection*, Discussion Paper No. 2, 2005, p. 9.

85 Refugee Council of Australia, *Submission 148*, Attachment A, p. 12.

4.105 The proposed model would allow 'an applicant's eligibility for complementary protection to be assessed at each stage of the determination process, thereby ensuring that those entitled to protection receive it at the earliest possible time. Complementary protection would be offered to people who would face 'a substantial violation of their human rights if returned to their country of origin'. This could include people who:

- have no nationality or right of residence elsewhere;
- would face torture if returned to their country of origin;
- come from countries where their lives, safety or freedom is likely to be threatened by the indiscriminate effects of generalised violence, foreign aggression or internal conflict;
- come from countries where there is significant and systemic violation of human rights and/or a breakdown in the rule of law; and
- would face serious human rights violations if compelled to return.[86]

4.106 The introduction of this model would require an amendment to paragraph 36(2)(b) of the Migration Act to include a new section which would set out the criteria for the grant of a visa, introduce a new visa subclass, set out any necessary limitations, and stipulate that nothing in this section removes or otherwise affects the exercise of the Minister's discretion. It would also require a new regulation to set out the framework for the grant of a visa on the grounds of the need for complementary protection and the rights and entitlements afforded to successful applicants.[87]

4.107 It was argued that adoption of this model would have the following benefits:

- bring Australia into line with international best practice;[88]
- ensure compliance with Australia's international obligations and commitments;
- result in consistency between Australian policy with respect to onshore and offshore refugees;[89]
- result in significant cost savings for determination bodies and also reduce welfare payments to asylum seekers as well as detention costs;[90]

86 Refugee Council of Australia, *Submission 148*, Attachment A, p. 17.

87 Refugee Council of Australia, *Submission 148*, Attachment A, pp 19-20.

88 It is understood that, for example, Canada, the United States and all the countries in the European Union have introduced complementary protection measures whereby claims may be brought on non-Refugee Convention grounds.

89 Australia's Offshore Humanitarian Program provides for the grant of 'refugee' visas and special 'humanitarian' visas.

- enhance the efficiency and productivity of DIMIA and the RRT;
- make it easier for applicants to present their claims by reducing the perceived need for tenuous links between their fear of return and Refugee Convention grounds;
- ensure necessary transparency, accountability and consistency in decision-making;
- reduce the burden on the Minister for Immigration and enable the Minister's discretionary powers to used for the exceptional cases for which they were intended;
- ensure that those entitled to Australia's protection receive it in a timely fashion and thereby enhance their ability to become productive members of the Australian community;
- enable detained asylum seekers to have all relevant claims considered simultaneously and thereby reduce the duration and trauma of detention;
- benefit Convention refugees by feeing up the determination processes;
- benefit TPV holders by enabling a more thorough examination of the implications of changed country circumstances when applications for a further TPV are being considered; and
- reduce the incentive for people to abuse the protection application process to extend their stay in the country as decisions will be made faster.[91]

4.108 This view was shared by other witness and submitters, such as the LSSA. It considered that such:

> … reform would have numerous benefits including ensuring Australia meets the full extent of its human rights obligations, reducing the burden on the Minister, DIMIA and review bodies through the use of a more efficient determination process, reducing the length of time asylum seekers spend in

90 The Refugee Council of Australia referred to a case study of a family with six members granted a protection visa after Ministerial intervention. They had been in detention for four years. The cost of detention for the family for four years would have been in the order of $1.2million (based on $140 per person per day). Had it been possible to make a decision on their need for protection at the primary determination stage, they may have been released within six months of arriving. Detention for 6 months would have cost about $150,000, a saving to the taxpayer of over $1million. This does not include additional savings in determination and health costs. Refugee Council of Australia, *Submission 148*, Attachment A, p. 13.

91 Refugee Council of Australia, *Submission 148*, Attachment A, pp 18-19. See also Refugee Council for Australia, *Complementary Protection – A New Model for Australia*, pp 11-12.

> detention, and affording applicants a more acceptable level of due process and the safety net of a reviewable decision.[92]

3.1 The committee was advised that the Uniting Church also supported the move to a system of complementary protection:

> … which would cover the assessment of cases which might trigger our obligations to protect under international treaties other than the refugee convention. These are predictable claims, not obscure and exceptional claims as would be appropriate for consideration under the powers of Ministerial discretion.[93]

4.109 The LSSA recommended the retention of Ministerial discretion 'as a mechanism for use in exceptional cases'. However, the LSSA considered that, unlike the present process which requires all avenues of appeal be completed before a request can be made, a request for Ministerial discretion should be permitted at any time during the assessment and determination process.[94]

4.110 It was put to the Committee that adoption of the above-mentioned complementary protection model would not prompt a flood of applications as it is merely a transfer of existing decision making power from the Minister to officials. Moreover, vexatious or frivolous applications can be prevented by codification of the relevant criteria and by incorporating appropriate safeguards.[95]

4.111 The committee notes that successive Governments have not supported the introduction of a system of complementary protection. DIMIA, maintains that current Australian arrangements are adequate. It said:

> … provide a range of mechanisms to provide continued lawful stay in Australia on general humanitarian grounds with considerable flexibility to respond appropriately to individual circumstances. It is not possible to anticipate and codify all human circumstances. Accordingly, the Ministerial intervention power plays a significant additional role in providing the capacity to flexibly and compassionately respond to other exceptional individual circumstances where there are public interest grounds in providing some form of continued stay in Australia. At the same time the migration framework allows the Government to develop regulations as

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92 LSSA, *Submission 110*, p. 14. See also comments of Ms Eszenyi of the LSSA, *Committee Hansard,* 26 September 2005, p. 4. Ms Thea Birss of the RASSA advised the Committee that they supported the recommendation of the LSSA for the creation of a complementary protection visa: *Committee Hansard,* 26 September 2005, p. 14.

93 Reverend Poulos, *Committee Hansard,* 29 September 2005, p. 31.

94 LSSA, *Submission 110*, p.15.

95 Refugee Council of Australia, *Submission 148*, Attachment A, p. 13.

> necessary tailored to the particular circumstances of new groups as the need arises.[96]

4.112 DIMIA also highlighted the potential cost of moving towards a complementary protection regime:

> It is not clear why it is expected that the introduction of some form of complementary protection in Australia would deliver cost savings. A parallel visa system for complementary protection with full merits and judicial review available and with broad eligibility criteria, is likely to attract a wider class of applicant and therefore larger numbers of applicants, most of whom may not be eligible, with corresponding increased costs.[97]

4.113 DIMIA advised that it has not conducted any studies into the feasibility of introducing a system of complementary protection. Nor has it done any assessment of whether the introduction of a complementary protection process would reduce the amount of immigration litigation that DIMIA was involved in.[98]

4.114 The lack of evidence that there are significant numbers of persons entitled to CAT, ICCPR or CROC protection who do not also meet the Refugee Convention definition of a refugee has also been cited as reason for maintaining the status quo.[99]

4.115 DIMIA's response to concerns over the nature of the Ministerial powers and the lack of accountability and transparency was to note the exceptional nature of the powers:

> The section 417 intervention power enables the Minister to act in exceptional circumstances to grant a visa, in the public interest, to a person who does not meet the normal legislative requirements for a visa grant, including after testing the initial decision at review. Migration legislation sets out the requirements for the Minister to report to Parliament on the use of her power.[100]

4.116 In response to concerns over the delays and uncertainties experienced by applicants, DIMIA maintained that, given the exceptional nature of the power, it was unreasonable for applicants to expect that the Minister will necessarily use her intervention power in their case.[101]

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96 DIMIA, 'Complementary Protection and Australian Practice', in UNHCR, *Complementary Protection*, Discussion Paper No. 2, 2005, p. 8.

97 DIMIA answer to Questions on Notice, 11 November 2005, p. 54.

98 DIMIA answer to Questions on Notice, 11 November 2005, p. 54.

99 DIMIA, 'Complementary Protection and Australian Practice', in UNHCR, *Complementary Protection*, Discussion Paper No. 2, 2005, p. 8.

100 DIMIA answer to Questions on Notice, 5 December 2005, p. 72.

101 DIMIA answer to Questions on Notice, 5 December 2005, p. 72.

Committee view

4.117 The committee notes that the issues in relation to the Minister's discretion have been identified in a number of inquiries as deserving of serious review. The most comprehensive of these inquiries was conducted by the Senate Select Committee on Ministerial Discretion in Migration Matters, which tabled its report in March 2004. The committee generally supports the recommendations made in that report.[102]

4.118 However, to date the Government has chosen to ignore the recommendations made by these inquiries.

4.119 If at the end of the day the Government intends to honour Australia's obligations under international treaties and conventions such as CAT, CROC, and ICCPR, then it would make sense to provide for it upfront, rather than giving that responsibility to the Minister involved. Having said that, the committee understands that a minimum level of ministerial discretion is necessary to give the system a required degree of flexibility.

4.120 The committee considers that in a system based on the rule of law, in general, it is inappropriate that rights are discretionary, although it acknowledges that a sensible balance is required. In recent years that balance has swung too far towards Ministerial discretion. It believes that the recommendations made below will go a long way to achieving that better balance.

4.121 The Committee makes the following five specific recommendations:[103]

Recommendation 29

4.122 The committee recommends that coverage of the Immigration Application Advice and Assistance (IAAAS) scheme be extended to enable applicants for Ministerial intervention to obtain an appropriate level of professional legal assistance.

Recommendation 30

4.123 The committee recommends 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.

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102 The recommendations are listed in Appendix 4, while the full report can be found at http://www.aph.gov.au/Senate/committee/minmig_ctte/report/index.htm

103 These recommendations are the same as those made on these issues by the Senate Select Committee on Ministerial Discretion in Migration Matters report of March 2004, pp. xxi - xxv.

Recommendation 31

4.124 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.

Recommendation 32

4.125 The committee recommends that the Minister ensure all statements tabled in Parliament under sections 351 and 417 (which grant the Minister the discretionary power to substitute more favourable decisions from that of the Tribunals) 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.

Recommendation 33

4.126 The committee recommends that the Migration Act be amended to introduce a system of 'complementary protection' for future asylum seekers who do not meet the definition of refugee under the Refugee Convention but otherwise need protection for humanitarian reasons and cannot be returned. Consideration of claims under the Refugee Convention and Australia's other international human rights obligations should take place at the same time. A separate humanitarian stream should be established to process applicants whose claims are in this category, including a review process.