

APPENDIX 7

RECOMMENDATIONS OF THE SENATE SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

[This report was tabled in March 2004.¹ No Government response to date.]

Recommendation 1

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

- the number of cases referred to the minister for consideration in schedule and submission format respectively;
- reasons for the exercise of the discretion, as required by the legislation;
- numbers of cases on humanitarian grounds (for example, those meeting Australia's international obligations) and on non-humanitarian grounds (for example, close ties);
- the nationality of those granted intervention;
- numbers of requests received; and
- the number of cases referred by the merits review tribunals and the outcome of these referrals. (para 3.54)

Recommendation 2

The Committee recommends that DIMIA establish a procedure of routine auditing of its internal submission process. The audits should address areas previously identified by the Commonwealth Ombudsman, namely identifying ways to improve departmental processes for handling cases, and ensuring that claims are processed in a timely way and case officers consider all of the available material relevant to each case. (para 4.67)

1 The report can be found at http://www.aph.gov.au/senate/committee/minmig_ctte/report/b01.htm

Recommendation 3

The Committee recommends that the Commonwealth Ombudsman carry out an annual audit of the consistency of DIMIA's application of the ministerial and administrative guidelines on the operation of the minister's discretionary powers. The audit should include a sample of cases to determine whether the criteria set out in the guidelines are being applied, and to identify any inconsistency in the approach of different case officers. (para 4.70)

Recommendation 4

The Committee recommends that the MRT and the RRT standardise their procedures for identifying and notifying DIMIA of cases raising humanitarian and compassionate considerations. (para 4.84)

Recommendation 5

The Committee recommends that the MRT and the RRT keep statistical records of cases referred to DIMIA, the grounds for referral and the outcome of such referrals. (para 4.85)

Recommendation 6

The Committee recommends that DIMIA create an information sheet in appropriate languages that clearly explains the ministerial guidelines and the application process for ministerial intervention. The Committee recommends that the new information sheet be accompanied by an application form, also to be created by the department. Both the information sheet and application form are to be readily and publicly accessible on the department's website and in hard copy. (para 5.9)

Recommendation 7

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. Extending the coverage of IAAAS should assist in reducing the level of risk of exploitation of applicants by unscrupulous migration agents. (para. 5.12)

Recommendation 8

The Committee recommends:

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

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- That each applicant be given a copy of reasons for an unfavourable decision on a first request for ministerial intervention. (para. 5.18)

Recommendation 9

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

- processing times that can take up to several weeks;
- applicants not knowing when they should apply for a bridging visa; and
- applicants being ineligible for a bridging visa because an unsolicited letter or inadequate case was presented to the minister, often without the applicant's knowledge (para 5.35)

Recommendation 10

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. (para 5.44)

Recommendation 11

The Committee recommends that DIMIA consider legislative changes that would enable ministerial intervention to be available in certain circumstances where there is a compelling reason why a merits review tribunal decision was not obtained. (para 5.53)

Recommendation 12

The Committee recommends that the Migration Act be amended so that, except in cases under section 417 that raise concerns about personal safety of applicants and their families, all statements tabled in Parliament under sections 351 and 417 identify any representatives and organisations that made a request on behalf of an applicant in a given case. (para 6.71)

Recommendation 13

The Committee recommends that DIMIA and MARA disseminate information sheets aimed at vulnerable communities that explain the regulations on charging fees for migration advice, the restrictions that apply to non-registered agents and the complaints process. The information should also explain that the complaints process does not expose the complainant to risk. (para 6.74)

Recommendation 14

The Committee recommends that the Migration Agents Taskforce should expand its operations to target unscrupulous operators that are exploiting clients through charging exorbitant fees, giving misleading advice and other forms of misconduct. (para 6.75)

Recommendation 15

The Committee recommends that the minister ensure all statements tabled in parliament under sections 351 and 417 provide sufficient information to allow parliament to scrutinise the use of the powers. This should include the minister's reasons for believing intervention in a given case to be in the public interest as required by the legislation. Statements should also include an indication of how the case was brought to the minister's attention – by an approach from the visa applicant, by a representative on behalf of the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department or in some other way. (para 7.53)

Recommendation 16

The Committee recommends that the Migration Act be amended so that the minister is required to include the name of persons granted ministerial intervention under section 351 in the statement tabled in parliament unless there is a compelling reason to protect the identity of that person. (para 7.54)

Recommendation 17

The Committee recommends that the minister should make changes to the migration regulations where possible to enable circumstances commonly dealt with using the ministerial intervention power to be dealt with using the normal migration application and decision making process. This would ensure that ministerial intervention is used (mainly) as a last resort for exceptional or unforeseen cases. (para 7.71)

Recommendation 18

The Committee recommends that DIMIA establish a process for recording the reasons for the immigration minister's use of the section 417 intervention powers. This process should be consistent with Recommendation 15 about the level of information to be provided in the minister's tabling statements to parliament. This new method of recording should enable the department to identify cases where Australia's international obligations under the CAT, CROC and ICCPR were the grounds for the minister exercising the discretionary power. (para 8.29)

Recommendation 19

The Committee recommends that the government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR. (para 8.82)

Recommendation 20

The Committee recommends that the ministerial intervention powers are retained as the ultimate safety net in the migration system, provided that steps are taken to improve the transparency and accountability of their operation in line with the findings and other recommendations of this report. (para 9.73)

Recommendation 21

The Committee recommends that the government consider establishing an independent committee to make recommendations to the minister on all cases where ministerial intervention is considered. This recommendation should be non-binding, but a minister should indicate in the statement tabled in parliament whether a decision by the committee is in line with the committee's recommendation. (para 9.77)

