Executive Summary

This inquiry into ministerial discretion in migration matters was established on 19 June 2003 following allegations raised in parliament in May and June 2003 about the use of the discretionary powers by the then Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Philip Ruddock MP, stretching back to 1998.

Four separate cases of alleged impropriety by Mr Ruddock were raised by the Opposition and debated in the House of Representatives between 29 May and 26 June 2003. The allegations involved, amongst others, Mr Karim Kisrwani, a prominent member of the Lebanese Maronite community, and a central figure in the so-called 'cash-for-visas' scandal. The allegations and parliamentary debates are described briefly in Chapter 1.

During parliamentary debates on the allegations, the Opposition reiterated long-standing criticisms of the discretionary powers. It argued that the powers are open to real or perceived distortion, political influence and corruption at the highest levels of public office because they are too broad in scope and far removed from the established avenues of accountability that exist across all levels of executive decision-making.

The ministerial discretion powers at the centre of this inquiry were inserted in to the Migration Act during the 1989 codification reforms to provide an outlet to deal with difficult cases that did not fit statutory visa criteria. Under sections 351 and 417 of the Act, the minister may substitute a more favourable decision than the one handed down by a tribunal 'if the Minister thinks it is in the public interest to do so'. Significantly, the discretionary powers are non-compellable, non-reviewable and non-delegable within domestic law, the minister does not have a duty to exercise the discretionary powers, and the powers must be exercised personally by the minister and cannot be delegated.

Section 351 powers may be exercised following a decision of the Migration Review Tribunal which considers all cases except protection visa cases, whereas section 417 powers may be exercised following a decision of the Refugee Review Tribunal which considers only protection visa cases.

Accountability issues surrounding the conduct of the inquiry

Although the allegations raised in parliament in 2003 were the starting point of the inquiry, the Committee was empowered under its terms of reference to examine broader issues, such as the appropriateness of the ministerial discretion powers under sections 351 and 417 within the current migration system. The Committee was also empowered to consider the operation of the discretion powers by immigration ministers, including the criteria that applied (and should apply) to the exercise of the powers.

The Committee decided during the inquiry process that it would seek access to case files, information and documents held by the immigration department and documents kept by a departmental liaison officer in the immigration minister's Parliament House office. The Committee formed the view that having access to the case files and documents was necessary to enable it to properly examine allegations involving Mr Ruddock's use of the discretionary powers, and to address in full the inquiry's terms of reference.

All of the Committee's requests for detailed case file information were met with resistance, initially from DIMIA and ultimately from the current minister, Senator Vanstone. The Committee is left in no doubt that it was obstructed in carrying out the task requested of it by the Senate, as provided in the inquiry's terms of reference. The minister's disregard for the Committee's power to obtain the departmental case files and ministerial notebooks necessary to fully explore the minister's discretionary powers is a dominant theme that runs through this inquiry.

The Committee concludes that Senator Vanstone's unwillingness to provide the detailed information necessary to conduct a full and thorough investigation of relevant cases suggests a reluctance to expose the decision making process to close scrutiny. In particular, the refusal by the minister and the department to provide certain key documents and case files has resulted in the Committee being unable to form a view as to the number of matters which were properly the subject of its inquiry. These include:

- The allegations relating to the visa or visas that were issued to Mr Bedweny Hbeiche, as outlined in Chapter 1;
- The basis for the high success rate of intervention requests made by Mr Kisrwani;
- The process by which intervention requests by Mr Kisrwani were dealt with by Mr Ruddock and by the department; and
- The factual basis on, and the process, by which Mr Ruddock exercised his discretion in relation to applicants whose matters the department had determined fell outside the ministerial guidelines.

The Committee expresses its disappointment that the department and minister have refused to provide certain key documents and information. It notes with concern that many aspects of the information requested were patently within the ability of the department to provide. For example, the Committee requested information regarding the process by which the successful intervention requests were made by Mr Kisrwani in its letter of 29 October 2003. Much of the information requested by the Committee must necessarily have been in the department's hands in order for Mr Ruddock to have responded in the terms set out in his correspondence to Ms Gillard MP on 16 June 2003.

Despite the obstruction by the minister, the Committee decided that the best course of action was to report its findings and recommendations to the Senate and place on the

public record information about the operation of the minister's discretionary power that is otherwise not available.

Ministerial discretion in practice: patterns of use, availability of data and accountability to parliament

There has been a gradual increase over time in the use of the discretionary powers. The Committee is concerned by evidence from DIMIA which shows that the discretionary powers are being used on average several hundred times each year instead of for the few exceptional cases they were designed to deal with. In 2002-03, Mr Ruddock used his power to intervene in some 483 cases, having presumably considered many more. As discussed in Chapter 3, Mr Ruddock exercised his power to intervene on 2513 occasions from 1996 to October 2003, compared with Senator Bolkus's 311 in three years and Mr Hand's 81 in two years. Although Mr Ruddock has obviously used the power much more than the other ministers, there were many more cases in which he could have intervened.

DIMIA suggested 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 processes of the exercise of discretion. DIMIA also suggested that judicial review has influenced the number and timing of requests.

The Committee finds that the data provided by DIMIA on the use made of the ministerial discretion powers under sections 351 and 417 are limited in respect of their reliability and explanatory detail. The Committee is unable to draw firm conclusions about the use of ministerial discretion from the available data. In some cases the data seem to raise more questions than they answer, creating room for speculation about the former minister's use of his powers. The Committee recommends 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.

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. While the statements made under section 351 go some way to providing case specific reasons for ministerial intervention, those made under section 417 since 1998 provide no case specific reasons beyond reference to the 'public interest'. The majority of witnesses to this inquiry argued that the ministerial statements under section 417 contain insufficient information to judge how the power is being used.

The Committee finds that the lack of transparency and accountability of the minister's decision making process is a serious deficiency in need of urgent attention. Section 417 tabling statements no longer provide reasons for the minister's decisions and the

pro-forma words used are not sufficient for parliamentary accountability. Under the Howard Government, the statements have outlined only in the broadest terms cases where the minister has intervened. The Committee finds that the tabling statements fail to provide, as required by legislation, the minister's *reasons for* considering his or her actions to be in the public interest. Meaningful transparency and accountability in the ministerial intervention process stops at the door to the minister's office.

The Committee makes several recommendations that address the current 'black hole' in the accountability of the minister's discretionary powers. It recommends that the minister's tabling statements under sections 351 and 417 meet the legislative requirement that the minister provide reasons why a decision to intervene is in the public interest. It also recommends that tabling statements give 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. The Committee believes that these practical measures go some distance in enabling parliament to scrutinise the use of the discretionary powers.

Ministerial guidelines and decision making within DIMIA

A key concern for the Committee during the inquiry has been whether the systems currently in place are adequate to ensure that the operation of this unusual power is transparent and open to scrutiny. One area of interest is the department's processes for supporting the operation of the ministerial intervention powers. The Committee notes with some concern that DIMIA officials did not view the department's role as including any 'decision making', despite clear evidence that ministerial intervention requests are vetted by departmental officials in the first instance to determine whether the minister will be briefed in any detail on that case.

The Committee finds it difficult to accept the department's assessment that it is not involved in any decision making during the intervention process. The Committee is particularly concerned that as the inquiry proceeded, the department played down its own decision making role and stressed the importance of the final non-reviewable 'public interest' decision taken by the minister. In fact, the department almost went as far as to suggest that only the minister's final decision constitutes decision making while the department's role amounts to overseeing an administrative process.

Furthermore, the Committee finds that departmental decision making during the ministerial intervention process does not generate adequate records or statistical data to enable effective external scrutiny of the way the powers are operating. The Committee also heard of aspects of the administration of the powers that appear to create hardship for individual visa applicants.

The Committee recommends in Chapter 4 that DIMIA take steps to ensure that its processes are rigorous and fair to all applicants. It recommends that a system of internal and external audit be established to scrutinise the department's decision making processes in this area.

Ministerial discretion and the experience of applicants

An issue which is central to the inquiry is the operation of ministerial discretion from the perspective of those who request that the minister exercise the discretionary power in their favour. In Chapter 5, the Committee examines how the migration system in general and ministerial discretion in particular is administered in ways that may result in applicants being exploited and suffering hardship. Many of these difficulties stem from a lack of readily available information for applicants about ministerial discretion and its processes.

The Committee makes a series of recommendations to address these deficiencies, namely that DIMIA create an information sheet and application form in appropriate languages that explains the ministerial guidelines and application process, and that 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, and reasons for an unfavourable decision on a first request for ministerial intervention.

The Committee also considers in Chapter 5 other areas of difficulty experienced by applicants. These difficulties include the unavailability of legal aid and inadequate coverage of the Immigration Application Advice and Assistance Scheme (IAAAS), the risk of exploitation that non-citizens face, problems surrounding the current process for granting bridging visas, the financial hardship experienced by many applicants, and cases in which applicants through no fault of their own are not able to appeal to a tribunal. The Committee makes recommendations to strengthen the current processes involved in the exercise of the ministerial intervention powers, which have resulted in hardship for the people they are supposed to assist.

Representations to the minister

The Committee examines factors that may influence a minister in the exercise of the discretionary powers in Chapter 6. Representations to the minister made by parliamentarians, lawyers, migration agents and community leaders can be influential. Notwithstanding the air of suspicion and doubt which surrounds the allegations raised in parliament last year, and the effect that the perception of bias has on the system of ministerial discretion, the Committee finds that support from representatives, particularly community leaders, is important for getting applications onto the minister's desk. Beyond that, the Committee is unable to determine the extent to which such representations influence the minister's decision because of the limited amount of information that is publicly available.

While the Committee recognises the importance in a democracy of people being able to make representations to a minister, it is concerned about the perception of bias and favouritism that can be created when access to the minister is seen as necessary to gain a favourable outcome. In this regard, the Committee tried to explore any connection between Mr Karim Kisrwani's political donations and the minister's

exercise of his discretion. However, the Committee was unable to determine the extent of community or political bias in the exercise of the powers because there was no way it could check who or what influenced the minister's decision to intervene.

The Committee recommends improvements to the accountability and transparency of this aspect of the system to address the perception of bias and favouritism. Specifically, it recommends that the Migration Act be amended so that statements tabled in parliament under sections 351 and 417 identify any representatives and organisations that make a request on behalf of an applicant. The Committee also recommends that DIMIA and the Migration Agents Registration Authority (MARA) disseminate information sheets that explain the regulations on charging fees for migration advice, the restrictions that apply to non-registered agents and the complaints process.

Ministerial discretion under minister Ruddock

A key area of concern which is explored by the Committee in Chapter 7 is the use of the ministerial discretion powers by the former immigration minister, Mr Ruddock. A number of issues came to light during the inquiry. The Committee heard evidence from DIMIA that Mr Ruddock used the intervention powers in ways not suggested by departmental staff. From mid 2000 to mid 2003, Mr Ruddock requested full submissions on 105 cases that the department had placed on a schedule, presumably as they were assessed as not falling within the ministerial guidelines. Likewise, Mr Ruddock would on occasion choose to grant a visa class outside the range presented by the departmental submission.

The Committee is concerned that when Mr Ruddock chose to act outside the scope of departmental advice, and when he appeared to act contrary to his own published guidelines, he was not required to provide any explanation for doing so. The Committee's frustration at the lack of reasons provided by the minister is compounded by the present minister's refusal to provide it with case files that might cast light on individual cases where Mr Ruddock may have acted contrary to his own published guidelines. The Committee is therefore unable to form a conclusive view on exactly what may have prompted the minister to seek further information about cases placed on a schedule.

The Committee also heard evidence from a number of stakeholders which suggests that Mr Ruddock's open door policy appears to have added to the perception that direct access to him could assist a case gain ministerial intervention. Mr Ruddock does not seem to have taken steps to contain this perception by, for example, insisting that all cases should be processed on equal terms by the department before being brought to his attention. Mr Ruddock's willingness to discuss individual cases at community events and other functions may also have encouraged a climate in which community leaders could assert that their links with the minister could help individuals known to them get visas through the ministerial intervention process. Again, without access to individual case files, the Committee has been unable to examine the extent to which

the media allegations of undue influence of certain community leaders on Mr Ruddock's decision making are justified.

Another feature of the operation of the ministerial discretion powers during Mr Ruddock's tenure that is of concern to the Committee is the comparatively large number of cases in which intervention was both sought and granted. As observed in Chapter 3, use of the minister's discretionary powers has gradually become more frequent since they were inserted in the legislation, going from 17 cases in 1992-92 to 483 cases in 2002-03, to 597 cases in three months from July to October 2003. The sheer volume of cases reaching the minister's desk for consideration raises two related issues: can a minister possibly give equal consideration to so many cases, and is it appropriate that a minister's time should be spent considering the details of thousands of individual cases rather than on overall policy development?

Many witnesses from both inside and outside the department gave evidence that Mr Ruddock was attentive to the ministerial discretion workload and had extensive knowledge of the Migration Act and regulations gained through his experience and long term commitment to this policy area. They suggested that Mr Ruddock often had greater knowledge of the Act than departmental officers, and could think of options that departmental officers simply had not thought about.

The Committee, however, considers that notwithstanding Mr Ruddock's knowledge and experience in this policy area, the high volume of cases that he dealt with in person indicates serious problems with the operation of the ministerial discretion system. If ministerial intervention is necessary to ensure a fair or desirable outcome in so many cases then this suggests that the system as it exists is becoming unmanageable as the workload being generated is too great for one minister to handle.

The evidence suggests that Mr Ruddock himself had doubts that it was feasible for an individual minister to cope with the caseload. The Committee finds it surprising, then, that Mr Ruddock did not take steps to investigate the factors causing the high number of applications or find other ways to address a situation that he recognised as problematic.

The Committee considers that ministerial discretion should be a last resort to deal with cases that are truly exceptional or unforeseeable. No immigration minister should be left in the position of micro-managing the immigration system. Where a series of interventions in similar cases suggests a recurring problem, a preferable approach would be to amend the regulations or institute a group visa class so that such cases can be dealt with under normal administrative processes.

International humanitarian obligations

In the absence of an onshore humanitarian visa class, ministerial discretion is the only mechanism by which Australia can discharge its obligations under certain international conventions not to return people to the countries from which they have fled (non-refoulement). These conventions include the Convention Against Torture

(CAT), the International Convenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CROC).

The Committee heard from a number of refugee advocacy groups that protection from refoulement should not be left solely to the minister's discretionary powers under sections 351 and 417 of the Migration Act, given that the powers are non-compellable, non-reviewable and non-delegable. The Committee also heard from witnesses that 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.

The Committee does not accept assurances from DIMIA that the minister's discretionary powers always enable Australia to meet its international obligations in respect of individual applicants. Assurances by DIMIA could not be supported by any data on the number of occasions the discretionary powers are used specifically for humanitarian reasons under various international treaties. The Committee recommends in Chapter 8 that in the future DIMIA record the reasons for the immigration minister's use of the section 417 intervention powers to 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.

The Committee heard from a number of witnesses that complementary protection has the potential to enable Australia's migration and humanitarian programs to be delivered with certainty and transparency, and to assist non-Convention asylum seekers who are in genuine need of humanitarian protection. However, the Committee finds that complementary protection is a relatively undeveloped concept in the Australian context. Further examination of the application of complementary protection to Australia's circumstances is therefore required.

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.

The future of ministerial discretion in migration matters

The Committee finds almost unanimous support for having some capacity for discretion in the migration legislation. This seems entirely logical given the difficulty of framing regulations capable of producing fair outcomes in the myriad of individual circumstances to which they may be applied. Agreeing that there needs to be capacity for the exercise of discretion, however, does not necessarily entail agreeing that that discretion should rest solely with the minister.

The evidence before the Committee highlights a pressing need for reform of the ministerial discretion system. While the Committee is not opposed to maintaining the powers in some form, it believes immediate steps must be taken to improve the

transparency and accountability of their operation. The Committee's recommendations are therefore aimed at generating more information about the use of the powers and improving the transparency of the decision making process.

The Committee concludes that the ministerial intervention powers should be 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 recommendations of this report.

The Committee recommends that the government consider establishing 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 should receive ministerial intervention.

In assessing the appropriateness of the ministerial discretion powers, the Committee is concerned 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.