

Introduction

Terms of reference

On 19 June 2003 the Senate agreed that a Select Committee, to be known as the Select Committee on Ministerial Discretion in Migration Matters, be appointed to inquire into and report on the following matters:

- a) the use made by the Minister for Immigration of the discretionary powers available under sections 351 and 417 of the Migration Act 1958 since the provisions were inserted in the legislation;
- b) the appropriateness of these discretionary ministerial powers within the broader migration application, decision-making, and review and appeal processes;
- c) the operation of these discretionary provisions by ministers, in particular what criteria and other considerations applied where ministers substituted a more favourable decision; and
- d) the appropriateness of the ministerial discretionary powers continuing to exist in their current form, and what conditions or criteria should attach to those powers.

Background to the inquiry

This inquiry had its origins in concerns aired in parliament about the use of the ministerial discretion powers under the *Migration Act 1958* by the then Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Philip Ruddock MP. Between 26 May and 12 June 2003, Mr Ruddock was asked several questions in parliament about cases where ministerial discretion appears to have been granted to people who had made donations to the Liberal party or their associates. In the course of parliamentary debate on the so-called 'cash-for-visa' allegations, the opposition parties aired long-standing concerns about the nature of the discretionary powers under the Migration Act, including that they are insufficiently accountable and open to the possibility of corruption and influence peddling. Finding that Mr Ruddock did not satisfactorily address either the individual allegations or the broader concerns raised in the House, the Senate established this Select Committee to investigate these and broader issues concerning the discretionary powers.

Conduct of the inquiry

The Committee advertised the inquiry on 2 July 2004 in the *Australian* and on the Senate website and wrote directly to a range of relevant organisations and experts. Interested persons and organisations were invited to lodge submissions by 1 August 2003, although the Committee agreed to accept submissions after that date. A total of 43 submissions and 30 supplementary submissions were received from

Commonwealth agencies, lawyers and migration agents, academics, community groups and individuals. The majority of submissions were published, although a number were received *in camera* at the request of the submitter. A list of submissions is at Appendix 1.

Between 5 September 2003 and 18 November 2003 the Committee conducted seven public hearings in Canberra and Sydney, at which evidence was taken from 51 witnesses. A list of the public hearings and witnesses is at Appendix 2.

In addition to the public hearings, the Committee held two *in camera* hearings in Sydney. Taking evidence *in camera* enabled Committee members to discuss a number of issues in detail without jeopardising the privacy or security of individuals. With the agreement of the witness concerned, the transcript of part of one *in camera* hearing was later published.

The Committee takes this opportunity to thank all those who made submissions and gave evidence at public and *in camera* hearings.

Structure of the report

The structure of this report reflects the Committee's terms of reference, which were to examine the use, operation and appropriateness of the ministerial discretion powers under sections 351 and 417 of the *Migration Act 1958*.¹

Background – Chapters 1 and 2

Chapter 1 sets out the issues that led to the establishment of the inquiry including the allegations aired in parliament and outcome of the parliamentary debates. It also details how the Committee's efforts to investigate specific allegations were hampered by the new immigration minister, Senator Vanstone's, refusal to provide information on individual cases as requested by the Committee.

Chapter 2 sets out the policy context of the ministerial discretion powers, including the background to their insertion in the Migration Act in 1989, and the way they are framed. It briefly notes the outcome of previous parliamentary reports dealing with these powers.

Use of the powers – Chapter 3

Chapter 3 gives a statistical overview of the patterns of use of the powers under previous ministers, noting the limitations of the available data to gaining a full understanding of the ways in which the powers have been used.

1 The text of sections 351 and 417 of the *Migration Act 1958* is at Appendix 3

Operation of the powers – Chapters 4 to 7

Chapters 4 to 7 consider aspects of the operation of the powers over recent years, with a focus on whether current procedures are sufficiently transparent and accountable to prevent abuse of the system and whether there is equity for visa applicants.

Chapter 4 examines the development of the ministerial guidelines on the discretionary powers and current administrative and decision-making processes within the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). It briefly considers the role of the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT) in the operation of the powers.

Chapter 5 discusses problems encountered by visa applicants trying to access ministerial intervention as related to the Committee. It considers the adequacy of publicly available information, assistance to visa applicants seeking ministerial intervention and a number of procedural issues that can adversely affect an applicant's status in Australia.

Chapter 6 looks at the role played by representatives of visa applicants, including migration agents, lawyers, community leaders and parliamentarians, in bringing cases to the minister's attention and considers claims that certain advocates or communities have had an undue influence on the minister's exercise of the discretionary powers.

Chapter 7 is about the central place of the minister for immigration in exercising the non-delegable discretionary powers in the public interest. In examining a number of features of the operation of the powers under former Minister Ruddock, it questions whether there is sufficient transparency and accountability for decision making and whether the volume of cases decided by the minister in person in recent years is problematic.

Ministerial discretion and Australia's international obligations – Chapter 8

Chapter 8 examines an issue raised by many witnesses to the inquiry, namely the adequacy of the ministerial discretion powers to implement Australia's non-refoulement obligations under several international human rights treaties.

Appropriateness of the current form of the powers – Chapter 9

Chapter 9 looks at the appropriateness of the current form of the ministerial discretion powers in light of the increased number of cases decided in this way in recent years and the widely-held concern about the corruptibility of the present system. It proposes maintaining the ministerial discretion power but with increased transparency in its operation.

