Chapter 3

Patterns of use of ministerial discretion

3.1 In this chapter, the Committee provides an overview of the use made of the ministerial discretionary powers under sections 351 and 417 since the major changes made to the Migration Act. This overview addresses the first of the inquiry's terms of reference, namely:

- 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.

3.2 The Committee examines some of the factors that are said to have influenced trends in the recent use of the discretionary powers. However, it is important to note at the outset that the overview is constrained by limitations in the data, as explained below.

Data limitations

3.3 The data provided by DIMIA are limited in two respects: reliability and explanatory detail. Some of the information submitted by DIMIA that relates to the exercise of ministerial discretion may be considered reliable, for example, the number of interventions and the visas granted as a result of the interventions. This information is obtained from the statements tabled in parliament. Other data may not be as reliable, for example, the number of requests made for ministerial intervention.

3.4 In the past DIMIA has not collected statistics specifically on the exercise of ministerial discretion. Most of the data provided to the Committee therefore have been derived from databases that are designed for other purposes, such as for tracking correspondence addressed to the minister. DIMIA informed the Committee that it had attempted to derive information from these sources that would be helpful or indicative, but that the information is not perfect.[1]

3.5 More recent data, on requests, nationalities and so on, especially since 1999, appear to be reasonably reliable, but data that relate to earlier periods are more problematic. Comparisons made of the use of ministerial discretion over time must therefore be treated with caution. In some cases, even for the most recent data, questions have been raised about their accuracy. The questions concern requests made by individuals or community groups and the outcomes of those requests. Ms Marion

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1 Ms Godwin, DIMIA, *Committee Hansard*, 23 September, 2003, p.40

Le, a migration agent, and Amnesty International queried the figures provided by DIMIA that purported to relate to their activities.[2]

3.6 Because the information is so limited the Committee was unable to answer some of the questions that are central to the inquiry. While DIMIA was able to discuss the data on trends at a general level, neither the statistics nor the explanations DIMIA provided on intervention go far enough to enable the Committee to explore issues thoroughly. For example, DIMIA provided data on interventions categorised by nationality but was not able to explain in any meaningful way the reasons why certain nationalities feature more prominently than others (nationality data are discussed again later in this chapter and in Chapter 6). Similarly, while it is asserted that the discretionary powers are a primary means by which Australia meets some of its international treaty obligations,[3] the department could not provide data to indicate the number of times the powers have been used to recognise such obligations. This issue is discussed in Chapter 8.

3.7 Another issue limiting the Committee's ability to understand the way the powers are used is that statistical data on the reasons for intervention do not appear to be kept. It is even difficult to understand whether intervention has been on humanitarian or other grounds. While the department has described interventions under section 417 as 'humanitarian' and those under section 351 as 'non-humanitarian', this has been done presumably because section 417 relates to matters that are dealt with by the RRT and section 351 covers matters that have been reviewed by the MRT. There is some question whether these are appropriate descriptions, given the (putative) reasons for the exercise of ministerial discretion. The data show that many family and close ties visas are granted under both sections of the Act.

3.8 With these caveats, the Committee has reproduced in this chapter the available, relevant, data.

Use of discretion by ministers

3.9 As indicated above, DIMIA was able to provide data giving a reasonable overview of the use made of ministerial discretion from 1996 till late 2003 when Mr Ruddock was Minister for Immigration and Multicultural Affairs. The figures are shown in the following tables:

Table 3.1: Use of Ministerial Discretion 1996-97 to 2002-03

Year	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03
Humanitarian*							

2 Dr Thom, Amnesty International, *Committee Hansard*, 23 September 2003, pp.4-5 and Ms Le, *Committee Hansard*, 18 November 2003, pp.48, 49

3 Mr Hughes, DIMIA, *Committee Hansard*, 5 September 2003, p.16

Requests	309	1182	4236	3709	3370	4472	4489
Interventions	79	55	154	179	289	203	213
Percent	25.6	4.7	3.6	4.8	8.6	4.5	4.7
Non-humanitarian**							
Requests	505	479	452	888	850	1178	1471
Interventions	9	35	75	86	109	159	270
Percent	1.8	7.3	16.6	9.7	12.8	13.5	18.4
Totals							
Requests	814	1661	4688	4597	4220	5650	5969
Interventions	88	90	229	265	398	362	483
Percent	10.8	5.4	4.9	5.8	9.4	6.4	8.1

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

Note: Although only ss351 and 417 fall within the terms of reference, the figures submitted by DIMIA also relate to four additional sections of the Act under which the Minister may exercise discretion. There are apparently relatively few requests and interventions under ss454, 501J, 345 and 391.

Source: DIMIA Submission 24, Attachments 16-18.

3.10 On the above figures, the former minister intervened in response to almost 11 percent of the requests he received in 1996-97, but to only 5 percent in 1998-99. He exercised his power to intervene in 8 percent of requests in the most recent financial year for which data are available, 2002-2003.[4]

3.11 More recent figures for the numbers of interventions under sections 417 and 351 were submitted to the Legal and Constitutional Legislation Committee during its Budget Estimates supplementary hearings in November 2003. For the period 1 July to 6 October when Mr Ruddock ceased as minister for immigration he intervened in 395 cases under section 417, including 138 cases from 1 to 6 October, and 202 cases under section 351.[5] Figures for the numbers of requests for that period are not available.

4 There is usually a significant time lag between the receipt of a request and any exercise of the Minister's power to intervene in relation to that request, so that some of the interventions in any one year would be in response to requests made in the previous year, or years.

5 DIMIA, Legal and Constitutional Legislation Committee, supplementary hearings on the Budget Estimates for 2003-2004, *Committee Hansard,* 4 November 2003, pp.57, 61

3.12 The figures in Table 3.1 appear to suggest that the minister intervened more often in response to 'non-humanitarian' requests than to 'humanitarian' requests. DIMIA informed the Committee that it would be wrong, however, to use percentages based on the number of intervention responses to requests to support that contention, because many requests may be made in relation to only a few well-publicised cases. In the department's view, a more reliable indicator of intervention rates is given by comparing the number of interventions with the number of cases in which the minister may legally exercise his discretion, that is, with the number of cases on which the MRT or RRT affirmed the department's initial findings to refuse visas.[6] These comparisons are shown in Table 3.2 below.

Table 3.2: Ministerial Interventions on RRT and MRT Decisions

Year	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03
Humanitarian							
RRT	3608	5607	5707	5417	4858	4647	5391
Interventions	79	55	154	179	289	203	213
Percentage	2.2	1.0	2.7	3.3	6.0	4.4	4.0
Non-humanitarian							
IRT/MRT	1508*	1159*	1377**	1625	2498	3360	4087
Interventions	9	35	75	86	109	159	270
Percentage	0.6	3.0	5.4	5.3	4.4	4.7	6.6
Totals							
All Tribunals	5116	6766	7048	7042	7356	8007	8946
Interventions	88	90	229	265	398	362	483
Percentage	1.7	1.3	3.2	3.8	5.4	4.5	5.4

*Decisions affirmed by IRT

**Decisions affirmed by IRT and MRT

Source: DIMIA

3.13 When the data are shown in this way, it seems that there has not been a great discrepancy between the rates of intervention in 'humanitarian' (section 417) and 'non-humanitarian' (section 351) cases.

3.14 DIMIA submitted that the relationship between the numbers of interventions and the numbers of available cases is also the appropriate measure to assess the use made

6 DIMIA, Submission no. 24E, Answer to question on notice K2, pp.1-2

of the discretionary powers by different ministers. This measure is used in Table 3.3 below.

Table 3.3: Exercise of Powers of Discretion by Various Ministers

Year	Decisions Affirmed by Tribunal *	Interventions	Percentage	Minister
1991-92	582	17	2.9	Hand
1992-93	808	71	8.8	64-Hand; 7-Bolkus
1993-94	2268	98	4.3	Bolkus
1994-95	3096	130	4.2	Bolkus
1995-96	3634	77	2.1	76-Bolkus; 1-Ruddock
1996-97	5116	88	1.7	Ruddock
1997-98	6766	90	1.3	Ruddock
1998-99	7084	229	3.2	Ruddock
1999-00	7042	265	3.8	Ruddock
2000-01	7356	398	5.4	Ruddock
2001-02	8007	362	4.5	Ruddock
2002-03	8946	483	5.4	Ruddock
Total	60705	2308		**81-Hand** **311-Bolkus** **1916-Ruddock**

The figures for 1991-92 and 1992-93 reflect applications made under sections 115 and 166B of the Act prior to the establishment of the RRT in July 1993.

Source: DIMIA, Submission 24, Appendix 15.

3.15 As may be observed from Table 3.3, Mr Ruddock exercised his power to intervene on 1916 occasions from 1996 to 30 June 2003 (with another 597 interventions between 1 July and 6 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 also many more cases in which he could intervene.

3.16 DIMIA has 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.

Special concession visa categories

3.17 DIMIA informed the Committee that in the past the use of special onshore visa categories had reduced the numbers of requests for intervention because many people were able to qualify for a visa under those categories.[7]

3.18 In the years following the 1989 changes to the migration legislation, ministers made use of special concession categories of visa for special groups of people, as follows:

- On 15 October 1990, under Mr Hand, the status of certain people who were in Australia illegally prior to 19 December 1989 was regularised. Some 6,900 persons were granted visas.
- On 1 November 1993, under Senator Bolkus, three special visa categories were created to accommodate more than 42,700 people from various countries, principally the People's Republic of China, the former Yugoslavia and Sri Lanka.
- On 13 June 1997, under Mr Ruddock, another special visa category was established for 7,200 people whose expectations for a visa had been raised by the grant of visas on 1 November 1993, but who did not meet the criteria.[8]

3.19 Mr Ruddock himself used a special visa category, but subsequently changed his policy apparently without giving a reason for the change. There has been no further use of special visa categories since June 1997, although it would have been open to the Government, for example, to create a group visa for the approximately 1,700 East Timorese who had been on protection visas for a number of years. DIMIA informed the Committee that group resolution approaches:

> … tend to grant permanent residence without regard to the strength of the individual's claims for residence in Australia and more importantly without weeding out those group members who clearly would have little personal claim for special treatment.[9]

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7 DIMIA, Submission no. 24, p.45

8 DIMIA, Submission no. 24, pp.43-44

9 DIMIA, Submission no. 24, p.44

3.20 The Committee notes that the Minister can select cases from the schedule of cases prepared by DIMIA. Although these cases have been assessed by DIMIA as having little claim for special treatment, Mr Ruddock asked for a full submission on a scheduled case on 105 occasions in the three financial years ended 30 June 2003.[10]

Greater numbers of decisions by tribunals

3.21 The second reason advanced by DIMIA for increased use of the minister's discretionary powers is that the numbers of review applications and review tribunal decisions have increased.[11]

3.22 The Minister may exercise the discretionary power only to substitute a decision that is more favourable to an applicant than the decision of an appeals tribunal. The number of cases that may potentially come before the minister is therefore determined by the number of decisions handed down by the tribunals. DIMIA submitted data that show the numbers and outcomes of decisions taken by the relevant tribunals (RRT, MRT and IRT) since 1991-92. The data are reproduced below.

Table 3.4: All Tribunal Finalised and Affirmed Decisions 1991-2003

	RRT		MRT		IRT	
Financial Year	Total Decisions	Affirmed Decisions	Total Decisions	Affirmed Decisions	Total Decisions	Affirmed Decisions
1991-92					794	582
1992-93					1166	808
1993-94	1679	1436			1655	832
1994-95	2949	2432			1616	664
1995-96	3335	2739			1868	895
1996-97	4104	3608			2431	1508
1997-98	6245	5607			2256	1159
1998-99	6267	5707	34	22	2461	1355
1999-00	5982	5714	3047	1625		
2000-01	5478	4858	5346	2498		
2001-02	5357	4647	7147	3360		

10 DIMIA, Submission no. 24F, Answer to question on notice, *Committee Hansard*, 5 September 2003, p.81

11 DIMIA, Submission no. 24, p.46

2002-03	5182	4859	8220	4087		
Total	**46 578**	**41 310**	**23 794**	**11 592**	**14 247**	**7803**

Source: DIMIA, Submission No. 24, Attachment 13

3.23 DIMIA has observed that the numbers of decisions made by the tribunals that have been unfavourable to the applicants increased by 1100 percent from 1991-92 to 2002-03.[12] As may be observed from Table 3.4, the greatest year-on-year increase was from 1992-93 to 1993-94, when the tribunals' affirmation of unfavourable departmental decisions increased by 181 percent. Other significant increases occurred in 1992-93, 1994-95 1996-97 and 1997-98.

3.24 It is interesting to note from Table 3.1 that the numbers of requests for ministerial intervention only began to increase significantly after 1997-98. DIMIA suggested that part of the reason for this may be that the government has not used special concessional visa categories since then, and part may be due to increased community awareness of the existence of the powers and the processes for initiating them. The Committee notes that the minister may also have encouraged the trend by his personal decision making.[13]

Increased public awareness of the discretionary powers

3.25 DIMIA suggested that unsuccessful visa applicants may have been encouraged to request ministerial intervention because they had become more aware of the existence of the powers. The department suggested that five factors had contributed to increased awareness. First, the government had disseminated official information about the relevant policies and procedures. Second, the media had become more interested in migration matters. Third, unsuccessful applicants are now routinely advised of their rights of appeal. Fourth, more applicants are using the services of registered migration agents for initial applications and appeals and, fifth, applicants for protection visas may have been encouraged to appeal to the minister because the post-review fee is waived if the minister intervenes on their behalf. [14]

3.26 The Committee accepts that some of these factors may have led more people to be more aware of the minister's discretionary powers. However, witnesses were not convinced that the government had done enough to disseminate official information. They were concerned that the guidelines on the minister's public interest powers (MSI 386) are not widely disseminated and are not easy to understand. (See Chapter 4 for an explanation and history of the guidelines.) Ms Burgess of the Immigration Advice and Rights Centre commented as follows:

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12 DIMIA, Submission no. 24, p.46

13 *Committee Hansard*, 5 September 2003, pp.36-37

14 DIMIA, Submission no. 24, pp.48, 49

> In the wider area of transparency, the ministerial guidelines, although they are available to people who practise in immigration law and to migration agents, are not easy to obtain outside that area and are probably not that easy for the layperson to understand.[15]

3.27 DIMIA, however, appears to consider that the current arrangements are adequate, as indicated by the following statement:

> The Parliamentary reporting requirements and the Ministerial guidelines provide transparency, while balancing the affected person's right to privacy.[16]

3.28 DIMIA informed the Committee that the guidelines are disseminated to subscribers through the Lawbook Company and may be obtained in hard copy from the department on request. Specifically, they may be inspected and purchased at DIMIA Freedom of Information Units.[17]

3.29 These arrangements may well be adequate to inform migration agents and lawyers, but they will not assist members of the public or those applicants who do not engage the services of a competent migration agent or lawyer. Certainly, persons in detention are unlikely to be well enough informed to lodge a request, much less a request that would have any chance of being brought to the minister's attention. The Committee further discusses access to public information from the applicant's perspective in Chapter 5.

Other factors that encourage greater use of ministerial discretion

3.30 DIMIA suggested that other factors that had caused the increase in demand for ministerial intervention include changes in the applicants' countries of origin that may encourage them to stay in Australia, and the lengthy time taken to process and review visa applications during which people may develop close ties with the Australian community.[18]

3.31 Also, as mentioned earlier, DIMIA considers that judicial review may be a factor in the level of demand for ministerial intervention. The department stated, for example, that there was a dramatic increase in the number of requests for interventions

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15 Ms Burgess, Immigration Advice Centre, *Committee Hansard*, 22 September, 2003, p.37

16 DIMIA, Submission no. 24. p.52

17 Mr Walker, DIMIA, *Committee Hansard*, 5 September, 2003, pp.9-10 and Submission no. 24 B, p.35

18 DIMIA, Submission no. 24, p.49

in 1998-99 following the *Ozmanian* decision.[19] The figures shown in Table 3.1 demonstrate that the increase was approximately 360 percent for s417 requests.

3.32 Some witnesses suggested that increased use of the ministerial discretion powers had occurred in the context of increasing complexity and change in migration law.[20] Another suggested that poor primary decision making is responsible for cases coming before the minister that should have been resolved earlier in the process.[21] The Committee addresses these matters in detail in Chapter 4.

Cases before the courts

3.33 The current guidelines on the ministerial discretion powers (MSI 386) state that the minister considers it inappropriate to consider cases where there is migration-related litigation that has not been finalised.[22] The department explained the rationale for this as follows:

> The general requirement that a case not be considered under the Ministerial discretion where there is litigation in progress ensures that one consideration does not complicate or frustrate the other. For example, if a court sets aside the Tribunal decision, then sections 351 or 417 cannot operate to allow the Minister to intervene and grant a visa.[23]

3.34 Although it was the former minister's practice not to exercise his discretion when cases were before the courts, he did so on 21 occasions in the three years ended 30 June 2003.[24] He was able to do so because the discretionary power may be exercised at any point after a decision is made by an appeals tribunal, including when such a decision is appealed to the courts. If an appeal to the court is upheld, and a tribunal's decision is set aside, the case is again referred to the relevant tribunal and is not available for ministerial intervention.

3.35 The Legal Aid Commission of NSW also stated that the exercise of ministerial discretion during court proceedings is more advantageous for the applicant than a successful outcome in the courts. It noted, however, that:

> In cases where important questions of law are raised, settlement of the Federal Court proceedings through the Minister exercising his discretion

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19 DIMIA, Submission no. 24, p.47

20 See, for example, Commonwealth Ombudsman, *Committee Hansard*, 18 November 2003, p.4 and Migration Institute of Australia, Submission no. 32, p.6

21 Ms Le, *Committee Hansard*, 18 November 2003, p.49

22 DIMIA, Submission no. 24, Attachment 9, p.4

23 DIMIA, Submission no. 24D, Answer to question on notice G1

24 DIMIA, Submission no. 24D, Answer to question on notice G3

> under the Act, limits the development of case law. The use of the Minister's power will only benefit the applicant, whereas a favourable Federal Court decision has the capacity to benefit a wider range of applicants.[25]

3.36 DIMIA informed the Committee that the guidelines refer to some circumstances such as a significant health issue where the minister might choose to exercise his or her discretion when a case is before the courts.[26] The Committee accepts that this may be so, but notes that the use of the powers in these circumstances can result in cases not being decided by the courts which might have left an 'unacceptable' precedent.

3.37 Nine of the cases in which the minister intervened while they were before the courts involved East Timorese and four involved Afghanis. The other nationalities in the cases were Indian, Chinese, Iranian and Somali.[27]

Use by nationality

3.38 Because the Committee was aware of allegations that some national groups had been especially favoured by the exercise of ministerial intervention, it sought information about the nationalities of persons who had received visas as a result of the process. [28] A selection of the data provided by DIMIA is tabulated below. The table covers the financial years 1997-98 to 2002-2003, because comparable data for earlier periods are not available.

Table 3.5: Nationalities of Persons Granted Visas following Ministerial Intervention, 1997-98 to 2002-03

Country	section 417	section 351	Total
Fiji	91	122	213
Lebanon	148	52	200
Indonesia	97	30	127
PRC	72	50	122
Philippines	47	71	118
Tonga	23	94	117
UK	1	103	104

25 Legal Aid Commission of NSW, Submission no. 17A, p.5

26 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, p.36

27 DIMIA, Submission no. 24D, Answer to question on notice G3, p.2

28 See, for example, Andrew Clennell, 'Ruddock's mercy more plentiful for Lebanese', *Sydney Morning Herald*, 6 April 2001

Sri Lanka	74	20	94
Russian Federation	60	23	83
India	48	28	76
Other	734	458	1192
Total	1395	1051	2446

Note: The totals in the Table are greater than those in the earlier tables because data in those tables refer to numbers of interventions, rather than to the numbers of persons affected by the interventions.

Source: DIMIA, Submission no. 24E, Answer to Question H, Attachment H1.

3.39 A number of features are apparent from the data in Table 3.5. First, people from Fiji and Lebanon benefited most from the minister's intervention – Fiji ranked highest for interventions under section 351 ('non-humanitarian') and Lebanon ranked highest for section 417 ('humanitarian') interventions. Another obvious feature is that while the UK is ranked seventh, all but one of the interventions was under section 351. It should be remembered that the data in the table cover a period of six years, so that the numbers granted a visa following ministerial intervention under sections 417 and 351 of the Act in any one year are relatively small. The figures suggest that on average 408 persons a year benefited from ministerial intervention, 36 of whom were Fijian and 33 Lebanese nationals.

3.40 Some observers have found significance in the fact that the two main source countries of persons granted protection visas, Afghanistan and Iraq, do not feature in the top group of nationalities who have been granted visas following ministerial intervention.[29] DIMIA has speculated that it is precisely because people from these countries are determined to be refugees at the primary processing stage that there are few cases available for ministerial intervention. Ms Philippa Godwin, a DIMIA deputy secretary, stated that the outcomes reflect entirely the individual minister's assessment, but she suggested that:

> … if people already have a visa they do not remain, in effect, in the available pool for the minister to intervene. Whereas, for people from countries that … are less likely to be able to sustain a successful refugee claim, there is a larger pool of people … who may … seek the minister's intervention.[30]

3.41 Ms Godwin also stated that different nationalities are highly represented at different times. In this regard, the Committee notes the evidence that many East Timorese have requested the exercise of ministerial discretion in 2003-04 and 129

29 See, for example, Ms Johanna Stratton, Submission no. 10, p.26

30 Ms Godwin, DIMIA, *Committee Hansard*, 18 November 2003, p.73

have already been granted visas.[31] These figures will show up in the statistics for the current financial year. As temporary protection visas granted to Afghanis and Iraqis expire in the next few years and as conditions change in those countries this may again affect the data as these people make requests of the minister.

3.42 The Committee examines the issue of alleged bias for certain nationalities in Chapter 6.

Categories of visas granted

3.43 As the Committee reported earlier information that relates to the numbers and categories of visas granted as a result of ministerial intervention is among the most reliable information available on the use of ministerial discretion.

3.44 Although the ministerial statements presented to parliament under section 417 do not give reasons for the exercise of ministerial discretion, they may be of some value to prospective applicants because the category of visa is almost invariably specified. DIMIA reported that the most significant categories of visas that are granted are spouse, close ties and family, and that these connections are raised in a number of cases.[32] Many migration agents are aware of this, and advise their clients to emphasise family connections and close ties to the Australian community in their requests for ministerial discretion.[33] However, it is impossible to determine the reasons for the grant of visas under section 417 in the absence of detail in the ministerial statements and given that the minister may grant any category of visa. DIMIA's Migration Series Instruction (MSI 387) intended to assist departmental staff in the application of the Guidelines contains the following statement:

> 7.0.4 … the Minister may grant a visa irrespective of whether the circumstances of the individual bear some relation to the usual criteria for that class of visa.[34]

3.45 DIMIA provided data on the types of visas granted by way of ministerial intervention in the three years, 2000-01 to 2002-03. The data have been provided under two categories, visas granted on humanitarian grounds (sections 417, 454, and 501J) and visas granted on non-humanitarian grounds (sections 345, 351 and 391). The figures are tabulated below.

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31 Ms Godwin, DIMIA, *Committee Hansard*, 18 November 2003, p.69

32 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, p.69

33 See, for example, Ms Biok, Legal Aid Commission of New South Wales, *Committee Hansard*, 22 September 2003, p.26

34 DIMIA, Submission no. 24, Attachment 2, p.26

Table 3.6: Non-humanitarian Visas Granted under ss 345, 351, and 391

Visa Category	2000-01	2000-01	2001-02	2001-02	2002-03	2002-03
	Number	Percent	Number	Percent	Number	Percent
820 (Spouse)	39	22	47	18	103	25
832 (Close Ties)	43	24	21	8	62	15
806 (Family)	8	5	75	28	67	16
856 (Employer Nomination Scheme)	5	3	19	7	31	8
Other	81	46	103	39	153	37
Total	176	100	265	100	416	100

Note: Owing to rounding, percentages may not total 100 in all cases.

Source: DIMIA, Submission 24d, Answer to Question 12, Attachment A.

Table 3.7: Humanitarian Visas Granted under ss 417, 454 and 501J

Visa Category	2000-01	2000-01	2001-02	2001-02	2002-03	2002-03
	Number	Percent	Number	Percent	Number	Percent
820 (Spouse)	143	34	131	43	131	47
832 (Close ties)	66	16	61	20	25	9
835 (Remaining relative)	47	11	15	5	11	4
866 (Protection)	93	21	21	7	17	6
856 (Employer nomination scheme)	4	1	14	5	30	11
Other	67	16	61	20	68	24
Total	420	100	303	100	282	100

Note: Owing to rounding, percentages may not total 100 in all cases.

Source: DIMIA, Submission 24d, Answer to Question 12, Attachment A.

3.46 As may be observed from the tables above, the number of visas granted under section 417 (for 'humanitarian' reasons) decreased over the three year period, while those granted under section 351 (for 'non-humanitarian' reasons) increased. A notable feature of the data is that in both categories 'spouse' and 'close ties' visas accounted

for a high percentage of all visas that were granted. This is not surprising in relation to the section 351 power, where cases involve persons applying to migrate to Australia, but some witnesses expressed concern in relation to the high percentages under the section 417 power which involve persons applying for protection visas. This appears to suggest that compassionate considerations such as family ties in Australia are more likely to result in the grant of a visa than humanitarian need.

Humanitarian and compassionate grounds

3.47 'Humanitarian' in the past had a rather narrower definition than that used in Table 3.7. Several witnesses informed the Committee that, prior to the changes made to the migration legislation in 1989, there were two classes of onshore visas that catered for some of the section 417 cases that now come before the minister, 'humanitarian' visas and 'compassionate' visas. Ms Biok, a legal officer employed by the Legal Aid Commission of NSW, informed the Committee that:

> At that time there was a humanitarian visa which was for people who did not fall within the refugee convention but who could not be returned to their home country for a wide variety of humanitarian reasons, including things such as natural disasters occurring in their home country. There was also a compassionate visa, which dealt with things such as links to the Australian community, the medical health, the age etcetera of the person.[35]

3.48 As may be seen from Table 3.7, only 17 percent of visas granted under section 417 in 2002-2003 were protection visas. Assuming that protection visas are issued for humanitarian reasons, as described above, 83 percent of the 'humanitarian' visas granted in 2002-2003 were granted on compassionate grounds

3.49 Anecdotal evidence submitted by migration agents indicates that they are in no doubt that compassionate reasons and in particular family ties were important in influencing the former minister to exercise his discretion under section 417.[36] The Refugee Council of Australia, for instance, submitted that criteria that are unrelated to risks to which an applicant might be exposed if not granted protection can become the principal determinant of access to complementary (humanitarian) protection, for example, the presence of relatives in Australia.[37]

3.50 However, because the minister is not constrained as to the category of visa that is granted under the discretionary powers, and the reasons for the grant of any particular category of visa under section 417 are not published, the Committee cannot be certain

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35 Ms Biok, Legal Aid Commission of New South Wales, *Committee Hansard*, 22 September 2003, p.33

36 See, for example, Mr Mitchell, Uniting Justice Australia and Mr Bitel, Parish Patience Immigration, *Committee Hansard*, 21 October 2003 pp.11, 55

37 Refugee Council of Australia, Submission no. 12, p.5

that this is in fact the case. Again, this highlights one of the information gaps the Committee has encountered in trying to understand patterns of use of the intervention powers.

3.51 One possible explanation for the relative decline in the number of protection visas granted under section 417 since 1998 was provided by DIMIA. The department informed the Committee that:

> …the department became aware as the 1990s progressed of the proliferation of a view that intervention was a form of merits review of the decision – a view contributed in part by the grant of a protection visa following Ministerial intervention. Given the wide range of circumstances which might enliven the public interest, the Department has in recent years, usually provided a number of visa options to the Minister.[38]

Use of discretion to meet international obligations

3.52 A number of witnesses stated that, in the absence of an onshore humanitarian visa class, ministerial discretion is the only mechanism by which Australia can discharge its non-refoulement (ie the non-return of people to the countries they have fled) obligations under certain international conventions. These conventions include the Convention against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR) and, perhaps, the Convention on the Rights of the Child (CROC). As may be observed from Table 3.7, ministerial discretion is not used much to grant protection visas, which suggests that its use for that purpose may be limited, but the lack of any detail in the ministerial statements tabled under section 417 makes it impossible to determine why a protection visa was granted. Questions remain as to whether an applicant's case triggered Australia's non-refoulement obligations under one of the international conventions. The parliament and the public have no way of knowing. The efficacy of ministerial discretion to fulfil international obligations is a matter of some controversy, with conflicting evidence submitted by witnesses. That evidence is reviewed in Chapter 8.

Conclusion

3.53 The Committee has found it impossible to draw firm conclusions about the use of ministerial discretion from the available data. The Committee considers it essential for improving the accountability of the system that DIMIA routinely collect and publish statistical data on the operation and use of the ministerial discretion powers.

Recommendation 1

3.54 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):

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38 DIMIA, Submission no. 24D, Answer to question on notice I3, p.2

- **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.**