

## Chapter 6

### Representations to the minister

6.1 Under the ministerial discretion system anyone can make a request to the minister in support of a person's application for intervention. The main groups that assist applicants in this way are registered migration agents and lawyers, community leaders and representatives of religious bodies and parliamentarians.

6.2 The role of these groups in making representations on behalf of applicants to the minister was one of the central themes of the inquiry. As detailed in Chapter 1, allegations in the parliament that favouritism and political donations had influenced the exercise of the then minister's discretionary powers led to the inquiry being established. During the inquiry the Committee received different views on whether backing from certain types of representative improves the chances of securing ministerial intervention and whether there is a bias toward certain communities. These questions go to deeper concerns about the extent to which the system for ministerial discretion is open to abuse and corruption, not only at the decision making level but also in terms of opportunistic operators exploiting people who are vulnerable and at a disadvantage.

6.3 This chapter examines the role of registered migration agents and lawyers, parliamentarians, community leaders and non-registered migration agents. It addresses the terms of reference relating to (a) the use by the minister of the discretionary powers under sections 351 and 417 and (c) the operation of these powers and the question whether 'other considerations' might have applied in cases where the minister intervened. It also considers the matter of Mr Karim Kisrwni, a central figure in the debate about former Minister Ruddock's exercise of his powers in certain cases. The chapter concludes with some general observations about the role of representatives and what this reveals about the system of ministerial discretion itself.

#### Registered migration agents and lawyers

6.4 Many people rely on registered migration agents, specialist migration lawyers and community based legal centres to help them make their case for intervention. For example, from 1 January 2000 to 31 May 2003 ten major firms made 3275 representations to the minister to intervene.<sup>1</sup>

6.5 The Committee heard in evidence that a well argued case from a professional migration agent, with supporting documentation, can result in ministerial intervention. The migration agents who appeared before the Committee pointed to varying 'success

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1 DIMIA, Submission no. 24A, Attachment D

rates' in their requests to the minister, some enjoying levels of over 50 percent.<sup>2</sup> DIMIA also supplied information to the Committee that illustrated a number of cases where the involvement of an agent appears to have played a role in the minister's decision to intervene. In some cases, a request or repeat request from an agent, among other things, led to the minister reversing a decision not to consider an application and ultimately to the minister intervening and granting a visa.<sup>3</sup> In one case, an agent's request saw the department revise its earlier assessment that a case did not meet the guidelines and it, too, resulted in ministerial intervention.<sup>4</sup>

6.6 While it is clear that migration agents can assist applicants on occasions to secure ministerial intervention, it is harder to pinpoint the factors that lead to successful outcomes or to measure the extent to which agents play a decisive role in such cases. Most of the agents and lawyers appearing before the Committee claimed that they took cases strictly on their merits and attributed their success to the strength of the cases they put forward.<sup>5</sup> Ms Le, although she has had access to ministers, informed the Committee that, 'I only put up cases to the minister where I believe those cases have absolute merit'.<sup>6</sup>

6.7 However, several witnesses appeared to suggest that it was not enough to rely on a case getting up on its merits alone and that they encouraged their clients to seek the support of parliamentarians and other community figures. In explaining the approach of his firm, Mr Lombard said that 'once we have identified somebody as having a genuine case, we ask them to go to a member of federal parliament. ... we rely on members of parliament to assist us in presenting cases. They have access to the parliamentary liaison officers and therefore can get feedback on the merits or otherwise of the case'.<sup>7</sup>

6.8 Some witnesses went further in arguing that to get a case up it was important to make contact with the minister's office or use a 'go-between' with connections to the minister or his or her staff. Mr Manne from the Refugee and Immigration Legal Centre indicated that 'one of the things as an adviser that you are mindful of doing if

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2 For example, Ms Biok, Legal Aid Commission of NSW, *Committee Hansard*, 22 September 2003, p.26; Ms Burgess, Immigration Advice and Rights Centre, *Committee Hansard*, 22 September 2003, p.44; Dr Crock, *Committee Hansard*, 21 October 2003, p.35; Ms Le, *Committee Hansard*, 18 November 2003, pp.48-49

3 DIMIA, Submission no. 24J, see cases 1-3 and 13

4 DIMIA, Submission no. 24J, case 10

5 See, for example, Mr Prince, Christopher Levingston & Associates, *Committee Hansard*, 22 September 2003, p.74 and Mr Fergus, *Committee Hansard*, 22 October 2003, p.79

6 Ms Le, *Committee Hansard*, 18 November 2003, p.46

7 *Committee Hansard*, 22 September 2003, pp.53-54. See also Ms Biok, Legal Aid Commission of NSW, *Committee Hansard*, 22 September 2003, p.26

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you want a matter to get before the minister is to, if you like, find the right person to lobby on behalf of your submission or your client'.<sup>8</sup>

6.9 Dr Mary Crock, who has long standing ties with former Minister Ruddock, also said that 'a lot of the time, unless you have a personal contact, you just do not make it through'.<sup>9</sup> Dr Crock went on to say of Mr Ruddock:

His typical response when you took cases to him would be to ring you at 7.30 in the morning on your mobile and say, 'Mary, I have read all your submissions. I reject them all' – dramatic pause - 'but I have decided to give her [the applicant] a visa anyway'.<sup>10</sup>

6.10 Dr Crock's observation suggests that the minister's decision to intervene rested more on the strength of his ties with Dr Crock than on the strengths of the applicant's claims. Mr Clothier, a lawyer with extensive experience in the migration field, made a similar observation:

My impression is that you can achieve results out of proportion to the merits of the case if you can get intermediaries interested in the case and willing to go into bat for you.<sup>11</sup>

6.11 Not everybody agreed, however, that personal contact with the minister's office is essential. Ms Burgess from the Immigration Advice and Rights Centre, for instance, told the Committee:

I think there is a perception that if you know the minister, or you know someone who knows the minister, you will have a better chance. I do not know that that is necessarily the case, because we do not know the minister personally and we have a very high success rate.<sup>12</sup>

6.12 Some agents and migration lawyers believe that connections with the minister and his or her staff only help to the extent that they can surmount departmental barriers to reaching the minister's office. Referring to the problem of getting cases 'past the gatekeeper, that being the ministerial intervention unit' (MIU), Mr Prince observed:

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8 *Committee Hansard*, 17 November 2003, p.46

9 *Committee Hansard*, 21 October 2003, p.31. See also Mr Manne, Refugee Council of Australia, *Committee Hansard*, 17 November 2003, p.46

10 *Committee Hansard*, 21 October 2003, p.30

11 *Committee Hansard*, 18 November 2003, p.42

12 *Committee Hansard*, 22 September 2003, p.43

I totally agree with the statement that people with contacts can get you through the MIU to the minister's desk. Once you are at the minister's desk, the influence of the third parties, in my experience, is far more limited.<sup>13</sup>

6.13 Another leading migration lawyer, Mr Bitel, told the Committee of the one instance when he had contacted the minister personally in order to get a special case past the 'gatekeeper'. The matter involved an Indian man with kidney failure who, medical evidence suggested, faced certain death if he were to be returned to India. According to Mr Bitel:

In any event he was refused by the RRT, and previous agents had submitted two ministerial appeals. The first was declined because I do not think it had been prepared very well, and the department refused to let the second one get to the minister because they put the usual barrier up: 'There has been no significant change of circumstances, therefore we are not going to let it go to the minister.'<sup>14</sup>

6.14 At this point, the Indian man approached Mr Bitel to intercede on his behalf:

That was the only time I specifically rang Minister Ruddock and said: 'Look, I have this case. It is a matter for you what you decide, but I want you to have a look at the file. Could you please call for the file from the department.' The next day the minister sent him for medicals, and he is now an Australian citizen. But, had I not done that, who knows?<sup>15</sup>

6.15 Even though his approach to the minister resulted in a successful outcome, Mr Bitel was highly critical that the 'system' for securing ministerial intervention should depend, in some circumstances, on a personal contact with the minister. In making this criticism, Mr Bitel also pointed to a general problem that applications do not proceed to the minister because of departmental barriers:

Previous attempts to get it to the minister had been blocked by that intransigent wall in the department. I think it was wrong that I had to ring the minister personally and I might say there should not be a system like that, where it depends on the luck of whom you see to get to the minister to save a person's life.<sup>16</sup>

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13 *Committee Hansard*, 22 September 2003, p.75. See also Ms Le, *Committee Hansard*, 18 November 2003, p.51

14 Mr Bitel, Parish Patience Immigration Lawyers, *Committee Hansard*, 21 October 2003, p.62

15 Mr Bitel, Parish Patience Immigration Lawyers, *Committee Hansard*, 21 October 2003, p.62

16 Mr Bitel, Parish Patience Immigration Lawyers, *Committee Hansard*, 21 October 2003, p.62

6.16 Far from being an exception, Mr Bitel's case exemplified a common view<sup>17</sup> among migration practitioners that a large part of the problem with the current system for ministerial discretion stems from the types of departmental decision making and process concerns discussed in Chapters 4 and 5, that create a need for representatives to intercede with the minister on behalf of applicants.

## Parliamentarians

6.17 Nearly all parliamentarians have made requests to the minister on behalf of applicants. From 1 January 2000 till 31 May 2003, 212 members of parliament wrote 2050 letters to the Minister in relation to requests for intervention.<sup>18</sup> DIMIA tabulated the number of requests, cases, interventions and 'success rate' of the top ten parliamentarians for this period. The tables are reproduced below.

**Table 6.1: Percentage of Positive Outcomes of s417 and s351 Requests**

(Date Range November 1999 - 29 August 2003)

	A	B	C	D	E
Top 10 Parliamentarian	Intervention Correspondence <sup>1</sup>	Number of s417, s351 Requests	Cases	Intervened (Cases)	% Cases Intervened (D/C) <sup>2</sup>
Ferguson, Laurie	100	94	80	19	24%
Price, Roger	70	63	50	12	24%
Mossfield, Frank	58	43	36	9	25%
Bartlett, Andrew	56	50	43	14	33%
Murphy, John	56	54	33	5	15%
Abbott, Tony	53	51	29	6	21%
McLeay, Leo	52	50	44	11	25%
Sciacca, Con	47	42	41	12	29%
Albanese, Anthony	46	44	40	11	28%
Byrne, Anthony	44	42	37	11	30%
<b>Total:</b>	582	533			

17 See, for example, Mr Cosentino, South Brisbane Immigration and Community Legal Service, *Committee Hansard*, 21 October 2003, p.35

18 DIMIA, Submission no. 24A, Attachment C. There are 226 sitting members of parliament. The 212 parliamentarians include former members from the 39<sup>th</sup> Parliament, as well as sitting members of the 40<sup>th</sup> Parliament.

**Table 6.2: Total Caseload Information - Top 10 Parliamentarians<sup>3</sup>**

	A	B	C	D	E
	Intervention Correspondence <sub>1</sub>	Number of s417, s351 Request s	Cases	Intervened (Cases)	% Cases Intervened <sub>2</sub>
Top 10 Parliamentarians	582	533	411	104	25%

These figures are based on the list provided to the Committee on 15 September 2003.

<sup>1</sup> The figures include intervention requests other than s351 and s417, such as those relating to s48b.

<sup>2</sup> Percentage of Intervened Cases = D/C expressed as a percentage.

<sup>3</sup> It is not possible to directly match the case data in Tables 6.1 and 6.2, as in some cases more than one individual or community group has made a request on the same case, and this is reflected in Table 6.1. The information in Table 6.2 is the total number of discrete cases covered by requests made by the Top 10 individuals or community groups.

6.18 The data in the above tables show that the top ten parliamentarians had an average 'success rate' of 25 percent, with the rate for individual members varying from 15 to 33 percent. As with migration professionals, it is difficult to determine the reasons for the different intervention rates of these members, although it would be reasonable to assume that the merits of the cases they represent is important. Similarly, there are a number of factors that might explain the different numbers of representations made by these parliamentarians. One might be the demographic make up of their electorates with some members having significant concentrations of migrants and asylum seekers. In the cases of Mr Laurie Ferguson MP and Senator Andrew Bartlett – who have the highest number of requests and top 'success rate'<sup>19</sup> in percentage terms respectively – these parliamentarians have immigration-related portfolio responsibilities that would lead them into frequent contact with people seeking help with intervention requests.

6.19 As seen already, many migration professionals recommend to their clients that they contact parliamentarians to assist them with their requests. The Committee received, however, different views on the extent to which parliamentarians are useful in securing the minister's intervention. At one end of the spectrum, Ms Marion Le, a migration agent with one of the highest numbers of requests to the minister, stated that

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<sup>19</sup> Senator Bartlett's success rate is 33 percent. Mr Ross Cameron, MP, also has a 33 percent success rate. DIMIA, Submission no. 24H, Attachment 1, Table 1

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'it has not – I repeat, not – been my experience that using politicians has been of any value at all'.<sup>20</sup>

6.20 In marked contrast, Mr Clothier, a migration lawyer who until recently worked for the law firm with the largest number of ministerial requests, claimed:

My experience is that you are more likely to be successful if you can get the right politician or the right ethnic community leader to assist you with your representations to the minister.<sup>21</sup>

6.21 As with other representatives with personal links to the minister, evidence suggests that the intercession of politicians can help applications get past the 'gate keeper', that is the department, and lead to the minister revisiting cases or requesting more information from the department.<sup>22</sup> But it is harder to gauge, however, the *degree* to which requests from parliamentarians influence the minister's decision to intervene or not. No parliamentarian, for whom relevant statistics are available, has a success rate above 50 percent. Senator Bartlett and Mr Ross Cameron MP<sup>23</sup> have the highest success rate among parliamentarians at 33 percent, whereas other types of representatives (community figures and religious bodies) appear to have significantly higher success rates.

6.22 Nevertheless, Mr Clothier expressed the view that the best way to work the system is for applicants to seek the assistance of government parliamentarians. Mr Clothier asserted:

If you are in this area, you are aware that there is this discretion and you are aware of how to push the right buttons. The right buttons are, if possible, to send your client to a Liberal Party member of parliament—at least for the last seven years—and try to get the minister interested in that way. Your experience tells you that that works. You have no direct evidence as to why it works, but human beings are human beings, and perhaps Mr Ruddock, for example, might be more partial to someone who has the same political philosophy as himself.<sup>24</sup>

6.23 The Committee has not been able to either verify or refute Mr Clothier's view. The Committee notes that DIMIA's data show that only one of the parliamentarians

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20 *Committee Hansard*, 18 November 2003, p.46

21 *Committee Hansard*, 18 November 2003, p.39

22 See Mr Lombard, George Lombard Consultancy Pty Ltd, *Committee Hansard*, 22 September 2003, pp.52-53; Mr Cosentino, South Brisbane Immigration and Community Legal Service, *Committee Hansard*, 21 October 2003, p.51. See also the case studies in DIMIA, Submission no. 24J, especially cases 12-13

23 DIMIA, Submission no. 24H, Attachment 1, Table 1

24 *Committee Hansard*, 18 November 2003, p.33

with top ten requests was a member of the Coalition Government. Although the data would seem to suggest that politicians from other political parties have had a reasonable degree of success with Minister Ruddock, the data rank the top ten parliamentarians by number of *requests* as distinct from *success* rates. To adequately probe the issue of political bias it would be, at a minimum, necessary to compare the success rates of individual parliamentarians organised by political party. A more thorough examination would also involve assessing the merits of individual cases taken to the minister by parliamentarians. However, the Committee did not obtain information with the degree of detail required to conduct such analysis.

6.24 On the broader question of the appropriateness of parliamentarians acting as representatives, the South Brisbane Immigration and Community Legal Service (SBICLS) articulated a strong case in support of parliamentarians interceding on the behalf of applicants:

SBICLS does not object to persons of the community seeking the support of Members of Parliament for a 'unique or exceptional case'. There are times when the law cannot protect or account for humanitarian concerns. It is the fundamental right of any human being to be able to seek justice from its lawmakers and this might very well require the lobbying of several parliamentarians to act upon an injustice and support any worthy humanitarian application, which the Minister for Immigration is empowered to decide upon.<sup>25</sup>

6.25 Few witnesses opposed parliamentarians approaching the minister to support applicants. But as noted already in relation to migration agents, many practitioners also made the criticism that systemic deficiencies in the intervention process compel people to enlist the support of parliamentarians and others.

### **Community leaders**

6.26 One migration lawyer stated that, since ministerial intervention can involve political as well as legal decisions, the minister 'will be influenced by evidence of widespread or passionate community support, particularly community opinion leaders'.<sup>26</sup> Referring to his experience in the migration field, Mr Lombard elaborated on his view:

One of the things that we find normally associated with a successful application is getting religious or community group opinion leaders. We have had Catholic bishops, members of obscure religious organisations, leaders of the Tongan and other communities, leaders of the Russian communities, leaders of many different ethnic communities. It does seem to be that the higher up the pecking order, if you like, of those organisations

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25 South Brisbane Immigration and Community Legal Service, Submission no. 21, p.3

26 Mr George Lombard, Submission no. 16, Attachment II, p.2



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you can achieve support, the more likely it is that somebody will be accepted.<sup>27</sup>

6.27 By virtue of their position within their communities prominent figures are sought out as referees who can testify to the bona fides of those making an application. Similarly, where community and religious leaders enjoy close ties with local parliamentary members or indeed the minister, these connections are seen as important for winning, first, the minister's attention and ultimately a favourable outcome.

6.28 Several of the case studies from DIMIA reveal instances where support from community leaders and members of religious bodies, among others, appears to have figured in prompting the minister to reappraise an application or request the department provide more information on a person.<sup>28</sup> As with the cases where parliamentarians made requests to the minister, it is not possible to tell from these cases whether the intercession of these representatives influenced the minister's decision to intervene. Departmental Liaison Officers (DLOs) from DIMIA working in the minister's office also indicated that community leaders, along with parliamentarians and other representatives, contact the minister's office to raise cases, inquire about progress with individual applications and provide information.<sup>29</sup>

6.29 Aside from party political events, the immigration minister's duties involve developing links with different ethnic communities, meeting community leaders and attending functions to explain government policies and receive feedback on particular community concerns. The Committee heard that on occasions community representatives would approach then Mr Ruddock at functions to raise cases with him or to draw his attention to important information about an application. Mr Knobel, a DLO from DIMIA who worked in both Mr Ruddock and Senator Vanstone's offices, said that after such an approach the minister might indicate that a case was expected or required urgent attention in light of new information. When asked if this had occurred before an application in writing had been received, Mr Knobel stated:

The only time I can think of that happening would be if the minister had perhaps been approached at a function by a community leader who raised a case with him as being important or having some factor about it that made it important to look at quickly. In that case, I may anticipate the letter coming through and alert the MIU to the fact that the case would be coming through.<sup>30</sup>

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27 *Committee Hansard*, 22 September 2003, pp.53-54

28 DIMIA, Submission no. 24J, cases 1, 3, 5, 7 and 11

29 *Committee Hansard*, 5 September 2003, pp.72-77

30 Mr Knobel, DIMIA, *Committee Hansard*, 5 September 2003, p.77

6.30 While contacts with community groups are an accepted, normal part of the minister's role, it has engendered a perception that the minister is more likely to look favourably on an application supported by a community leader with whom he or she has built up a relationship than one who does not have personal contact. According to Ms Burgess of the Immigration and Rights Centre:

...the minister, through his [or her] role as minister for immigration, has to have contact with ethnic communities. People take the opportunity to speak to the minister, and so the people who do have those connections think that if they do not know someone who knows the minister they will not get the same treatment.<sup>31</sup>

6.31 This perception of unequal access to the minister has, in turn, led to a related suspicion in some quarters of ministerial bias towards certain communities where the minister has connections or contacts with community leaders. Ms Burgess made the following observation:

All I am talking about is what members of the community see as happening. People certainly feel that if someone knows the minister personally they will have a better chance. It is understandable that people feel that; that is a very human thing. For that reason, if you go to any community event, people are very keen to have their photo taken with the minister. The minister must do that – that is an important part of his role – but to have him also be the sole arbiter of these discretionary powers gives the perception that those encounters at social events may make a difference.<sup>32</sup>

6.32 The Committee also heard claims that 'certain communities are better at lobbying the minister on behalf of certain individuals and are more aware of the political processes which are available in the migration area'. While this is not seen as a problem in of itself, the supposedly 'political nature' of the advocacy process is considered to disadvantage communities that lack political skills or knowledge of the system, or are too small to be in a position to support applications.<sup>33</sup>

6.33 The information available to the Committee on these questions of community bias and privileged access is inconclusive, not least because of the data limitations outlined in Chapter 2. DIMIA provided a range of data on the nationalities of interventions, including a breakdown of nationalities covered by section 351 and section 417 requests by the top ten parliamentarians and community groups and individuals.

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31 *Committee Hansard*, 22 September 2003, p.39

32 *Committee Hansard*, 22 September 2003, p.41

33 Legal Aid Commission of NSW, Submission no. 17, p.6

6.34 As can be seen from the figures in Table 3.5 in Chapter 3,<sup>34</sup> Fiji (213) and Lebanon (200) dominate the top 20 nationalities for interventions, with Indonesia, the People's Republic of China, the Philippines, Tonga and United Kingdom following. The latter five nationalities have roughly similar rates of intervention – clustered between 127 (Indonesia) and the UK (104) – which might discount any suggestion of community bias insofar as it relates to these nationalities.

6.35 Fiji and Lebanon also feature among the 'top five' nationalities covered by requests from both parliamentarians and the top ten community groups and individuals. The table below shows that, for parliamentarians, Fiji and Lebanon rank third and fourth respectively behind the Philippines and Sri Lanka, with the PRC ranking fifth. The table also shows that, for requests by community groups and individuals, Lebanon and Fiji rank first and second respectively, with Iran, Sri Lanka and Algeria following.

**Table 6.3: Nationality of clients covered by s351 and s417 requests by the Top 10 Parliamentarians and Individuals/Community Groups (Date Range November 1999 – 29 August 2003)**

Top 10 Parliamentarians		Top 10 Individuals/Community Groups	
Country	Cases	Country	Cases
Philippines	47	Lebanon	49
Sri Lanka	38	Fiji	41
Fiji	27	Iran	18
Lebanon	19	Sri Lanka	15
China, Peoples Republic of	18	Algeria	9
India	15	China, Peoples Republic of	7
Iran	15	Colombia	7
Burma (Myanmar)	14	Yugoslavia, Fed Republic of	7
Nigeria (Africa)	14	Somalia	6
Indonesia	13	Ethiopia	6
Russian Federation	13	Afghanistan	5
Turkey	13	Albania	5
Tonga	12	Burma (Myanmar)	4

34 See also DIMIA, Submission no. 24E, Answer to Question H1, Attachment H1

Pakistan	11	Cambodia, the Kingdom of	3
South Korea	10	Kenya	3
Colombia	8	Bangladesh	3
Algeria	7	Indonesia	3
Iraq	7	Jordan	3
United Kingdom	6	Vietnam	3
Yugoslavia, Fed Republic of	6	Syria	3
Afghanistan	4		
Others	94	Others	43
<b>Total</b>	<b>411</b>	<b>Total</b>	<b>243</b>

*Source:* DIMIA Submission no. 24B, Attachment D and Submission no. 24C

6.36 On the face of it, it might be adduced that these data suggest that Lebanon and Fiji, along with the Philippines and Sri Lanka, as nationalities are effective at lobbying the minister through representatives. However, the data only provide a nationality breakdown for *requests* by representatives. The data do not measure the key indicator: the *success rate* of nationalities where representatives have made requests.

6.37 Limitations in the information also make it difficult to reach firm conclusions on whether certain nationalities fare better because of personal connections between community bodies and the minister. If there was bias in the system, it might be expected that community groups and leaders connected to Fiji and Lebanon would be prominent on DIMIA's list of top ten representatives. However, only two of the top ten list of community groups/individuals have obvious connections to either nationality. For the period November 1999 to 29 August 2003, the Fiji-Australian Community Council made 41 requests on behalf of Fijian nationals, none of which resulted in intervention. For the same period, Mr Karim Ksirwani made 48 requests on behalf of Lebanese nationals; it is uncertain whether any of these resulted in intervention, although it is possible given that Mr Ksirwani has one of the highest success rates of any individual or community group.<sup>35</sup>

6.38 However, the Committee is cautious about placing too much store on these figures. Again, the data only cover requests by nationality but do not show interventions by nationality for these representatives. The sample of case studies the department provided is also of such limited detail that it provides little more than a snapshot of the intervention process.

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35 DIMIA, Submission no. 24H, Attachment 2

6.39 At a deeper level, though, this information is simply inadequate for exploring whether there is community bias in general terms or in relation to particular representatives. In particular, the refusal of the minister and department to release case files and DLO notebooks has severely hampered the Committee's attempts to explore the links among interventions, *individual* representatives and nationalities. This constraint is highlighted in the case of Mr Kisrwani which is discussed later.

6.40 One possible starting point for examining whether ministerial discretion had been biased towards some communities would be to compare interventions as a percentage of total claims by each nationality. However, the department informed the Committee that it does not collect nationality information in a reportable form that would enable this type of comparison.<sup>36</sup> In any event, such a comparison of 'success rates' across nationalities would in itself not reveal conclusively whether the system is biased, as other factors might lie behind differing intervention rates.

6.41 Among the range of factors that might have led to certain nationalities to be highly represented in ministerial intervention, DIMIA pointed to the following three in particular:

- Some countries can undergo internal disruptions or changes that give rise to a fear of harm which is not Convention related or serious enough to amount to persecution;
- Some nationalities may have low approval rates through the protection visa process, giving rise to a greater likelihood that nationals of those countries will be seeking access to intervention grounds as distinct from normal criteria for visa grant. Conversely, very high visa grant rates for particular countries would limit the number of people with that nationality seeking access to Ministerial intervention;
- Some nationalities may have more people who are more likely to have links with Australians which raise the public interest. This could be because they are likely to be long term residents, or they have age profiles which could mean they are likely to have formed relationships or had Australian born children.<sup>37</sup>

6.42 These factors, particularly the third relating to long standing links with Australians, would go some of the way to explaining the high representation of interventions for Fiji, Lebanon, the Philippines, Tonga and the UK, as these nationalities have a strong presence in Australia through migration and relationship ties.

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36 DIMIA, Submission no. 24E, Questions H5 and H6

37 DIMIA, Submission no. 24E, Question H4

6.43 An interesting view about access to ministers was expressed by the Commonwealth Ombudsman, as follows:

One great strength of our political system is that members of parliament – ministers included – are members of the community and move broadly through the community. They listen to what people have to say and their knowledge of the world – their sagacity and their wisdom – and of deserving cases is triggered by what people have to say. ... It is a strength of the system that a minister, for example, can go to a particular ethnic community function or to some other function and people can speak to him or her and attract his or her attention. But that inevitably leads to the allegation that the minister has favoured the community that he or she has just visited as against a community that did not issue an invitation to the minister. One can see that there is an element of partiality or favouritism but, as I said, on balance I think we regard that as one of the strengths of our system. It is one of the points of access to official and political power that, overall, we would prefer to preserve.<sup>38</sup>

6.44 The Ombudsman was concerned, nevertheless, that people who are disadvantaged, and whose cases would ideally trigger consideration by the minister, should have adequate access to the system. This goes to the flipside of perceptions of ministerial favouritism towards some communities. That is, the perception that those groups *without* a connection to the minister are likely to be at a disadvantage; that, in the words of one witness, 'the people who do not have those connections think that if they do not know someone who knows the minister they will not get the same treatment'.<sup>39</sup>

6.45 The Committee notes that the question of equal access was the main criticism of ministerial discretion that the then immigration minister, Senator Ray, aired at the time of the changes to the Migration Act in 1989. As mentioned in Chapter 2, Senator Ray expressed his concern that parliamentarians and prominent community figures would have access to the minister but those who did not were unlikely to receive equal treatment. The Committee believes that concerns about equal access remain current and need further attention.

### ***Mr Karim Kisrwani***

6.46 As a key figure in the allegations that led to the establishment of this inquiry, the Committee was interested in Mr Karim Kisrwani's role in supporting numerous requests for ministerial intervention. As noted in Chapter 1, the Committee's attempts to investigate in detail the claims made about Mr Kisrwani's activities and influence

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38 Professor McMillan, Office of the Commonwealth Ombudsman, *Committee Hansard*, 18 November 2003, p.11

39 Ms Burgess, Immigration and Rights Advice Centre, *Committee Hansard*, 22 September 2003, p.39

with the former minister have been hampered by the current minister's refusal to allow access to departmental case files and by the operational constraints of the Australian Federal Police (AFP) and Australian Electoral Commission (AEC) which understandably do not wish to divulge information relevant to current investigations. The Committee's efforts to understand why Mr Karim Kisrwan, a travel agent in Harris Park, Sydney who is not a registered migration agent, should be so apparently successful in supporting candidates for ministerial intervention highlights a number of the issues discussed in this chapter.

6.47 Mr Kisrwan is a prominent member of the Lebanese Maronite community at Harris Park. He has connections to Mr Ruddock going back many years, and is known to have supported Mr Ruddock and the Liberal Party both politically and financially.<sup>40</sup>

6.48 Over the years Mr Kisrwan has made numerous representations to the former minister in relation to the exercise of ministerial discretion. Figures submitted by DIMIA show that from November 1999 to 29 August 2003, Mr Kisrwan made 56 requests for ministerial intervention in relation to 55 cases. It is clear that he has actively supported cases through the ministerial intervention process – evidence from a departmental liaison officer working in Mr Ruddock's office was that Mr Kisrwan would call the minister's office 'a couple of times a week about a range of cases'.<sup>41</sup>

6.49 As at 29 August 2003, the minister had intervened in 17, or 31 percent, of these cases, with a further 19 cases either still in process or otherwise finalised.<sup>42</sup> Thus, of the cases where a decision had actually been made by the minister before 29 August 2003, close to half had received ministerial intervention. This contrasts with an organisation such as Amnesty International which, according to DIMIA, had made intervention requests regarding 68 cases, only 11 of which (or 16 percent) received ministerial intervention as of 29 August 2003.<sup>43</sup> Data for the ten individuals or community groups that made the most requests for intervention, including Mr Kisrwan, shows that the average rate of interventions to requests was 20 percent.

6.50 As well as being a community leader among the Lebanese Maronite community, Mr Kisrwan is a donor to the Liberal Party. The most recent return he has lodged with the AEC shows that an amount of \$10,130 was donated to the Liberal Party in Parramatta in 'late 2001'. The AEC return was dated 28 June 2003, which was after allegations were aired prominently in the parliament and the press that the minister had intervened in the case of a Mr Hbeiche after a donation of \$3000 had been made

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40 Mr Kisrwan and his daughter stated as much in an interview on SBS *Insight* program broadcast on August 28 2003.

41 Mr Knobel, DIMIA, *Committee Hansard*, 5 September 2003, p.75

42 DIMIA, Submission no. 24C, Table 1 and Submission no. 24G, Answer to question on notice of 23 September 2003

43 DIMIA, Submission no. 24G, Answer to question on notice of 23 September 2003

to the Member for Parramatta (Mr Ross Cameron MP) in Mr Hbeiche's name. This was said to have occurred at a fund-raising function on 14 October 2001. Mr Hbeiche's name is not listed among the persons whose names appear on Mr Kisrwani's AEC return.

6.51 What, if any, connection there may be between Mr Kisrwani's political donations and the minister's exercise of his discretion in cases supported by Mr Kisrwani is open to speculation. As noted in Chapter 1, Mr Ruddock emphatically denied in Parliament that there was any link between donations and the grant of a visa.<sup>44</sup>

6.52 The Committee's attempts to test this assertion were hampered by lack of access to relevant case files, which may have shed some light on the minister's reasoning in granting ministerial intervention to friends of Mr Kisrwani. Mr Kisrwani was invited to make a submission to the inquiry, but chose not to do so. He did agree to participate by teleconference in a public hearing on 17 November 2003 but pulled out at the last minute due to ill health.

6.53 The Committee's efforts to test the allegations surrounding Mr Kirswani and Mr Ruddock have highlighted a key issue in this inquiry: namely, whether the current structures around the ministerial discretion power provide adequate transparency and accountability to prevent corruption seeping into the system. The Committee has concerns going beyond the possibility that the powers may be used in direct response to political donations. The powers as currently structured appear to invite speculation about political favouritism in their use, which could simply take the form of ministers being more likely to use the powers. The difficulty of testing whether this concern is justified stems from the opaque working of the powers and the inability of parliament to scrutinise the minister's decision making.

### **Non-registered migration agents and other actors**

6.54 Apart from the representatives discussed already, many people including community based groups and members of the public act in support of individuals seeking the minister's discretion. Most act in good faith, although on occasions a weak understanding of the process or the complexity of the system itself can lead to unintended mistakes.<sup>45</sup> However, the Committee also heard repeatedly of disturbing reports of operators in the migration field, including both registered and non-registered 'agents', exploiting people applying for intervention. This issue has been discussed earlier in the report in Chapter 5.

6.55 The extent of this exploitation is not entirely clear, although it appears to be limited to a small segment of the migration advice industry. The Migration Agents

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44 *House Hansard*, 29 May 2003, p.15465

45 Mr Prince, Christopher Levingston & Associates, *Committee Hansard*, 22 September 2003, p.61



Registration Authority (MARA), the industry's regulatory body, reported that it had referred 220 matters to DIMIA relating to persons alleged to have given immigration assistance whilst not registered.<sup>46</sup> MARA had not received any complaints relating to misleading advice on sections 351 or 417 discretion matters but it was investigating a number of cases relating to section 417 matters referred by DIMIA.<sup>47</sup>

6.56 It is possible, nevertheless, that these figures do not reflect the true extent of the problem as many non-citizens are reluctant to make official complaints for fear that it might jeopardize their applications or, where people remain in Australia illegally, lead to deportation.<sup>48</sup> According to one migration lawyer:

In general, applicants are loath to come forward. This is why it is so hard to regulate this industry. Applicants are loath to point the finger at anyone because they believe that their prospects will be hurt.<sup>49</sup>

6.57 DIMIA told the Committee that, while it had limited evidence in 2001, most of the information on the misconduct of migration agents and non-agents emerged in mid-2002 after a review into the migration advice industry was finalised.<sup>50</sup> The review found that the 'low standards of an unscrupulous few' continued to be of 'serious concern'.<sup>51</sup> In view of this finding, the Committee is concerned that it appears to have taken until late 2003 for measures to address this general problem to be introduced.

6.58 The most relevant measure is the *Migration Legislation Amendment (Migration Agent Integrity Measures) Bill 2004*. Passed by parliament in March 2004, the bill includes, among other things, strong provisions against unscrupulous agents that exploit vulnerable clients and closes the existing loop hole that allows non-registered

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46 Mr Mawson, Migration Agents Registration Authority, *Committee Hansard*, 22 October 2003, p.31

47 Mr Mawson, Migration Agents Registration Authority, *Committee Hansard*, 22 October 2003, p.35

48 See Mr Prince, Christopher Levingston & Associates, *Committee Hansard*, 22 September 2003, p.74 and Mr Mitchell, Uniting Justice Australia, *Committee Hansard*, 21 October 2003, p.15

49 *Committee Hansard*, 22 September 2003, p.74. Mr Mawson of the Migration Agents Registration Authority, also observed that 'people may not complain because of cultural issues about complaints', *Committee Hansard*, 22 October 2003, p.40.

50 DIMIA, Submission no. 24H, Answer to Question on Notice, *Committee Hansard*, 23 September 2003, p.66

51 *Review of the Statutory Self-Regulation of the Migration Advice Industry*, DIMIA, July 2002, p.2. This report is often referred to as the 'Spicer review', after Mr Ian Spicer, Chair of the External Reference Group that conducted the review.

agents to charge fees for providing advice on ministerial discretion.<sup>52</sup> Whereas it is illegal for unregistered agents to charge a fee for immigration advice, this did not cover advice on ministerial discretion because it was not deemed to be 'immigration assistance' within the meaning of the Migration Act.<sup>53</sup> The new Act will aim to ensure that only registered agents will be able to charge a fee for assistance with ministerial intervention requests.

6.59 DIMIA indicated that unregistered persons will still be able to assist with intervention requests but not for a fee,<sup>54</sup> a position that is consistent with the views of several witnesses that the ability to assist intervention requests should not be restricted to registered migration agents.<sup>55</sup>

6.60 DIMIA also established in June 2003 the Migration Agents Taskforce, a body involving other agencies including the AFP and Australian Taxation Office, to address the suspected unlawful activity of a small number of agents and companies operating in the migration advice industry. The Taskforce emerged out of research that fed into recent legislative changes related to migration agents such as the Integrity Measures bill. It is not clear if this included investigation of operators exploiting clients or misrepresenting their connections with officials or the minister.<sup>56</sup>

6.61 The Taskforce's operations to date are unlikely to have addressed activities related to intervention, primarily because it has not been illegal to charge for this sort of assistance. Under the Migration Agent Integrity Measures Bill, unregistered agents who charge for ministerial intervention advice will presumably fall within the scope of the Taskforce (although the continuation of the Taskforce beyond June 2004 is in doubt as it will be reviewed at that time).

6.62 The Committee welcomes these measures but is concerned that they do not go far enough in addressing the threat of exploitation of non-citizens. As those most at risk of exploitation are often the least knowledgeable of regulations in the migration field, it is likely that many will remain vulnerable to operators prepared to flout the restrictions on charging fees. Moreover, as noted above, many people at risk are also reluctant to make complaints for fear of the repercussions.

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52 See Senate Standing Committee on Legal and Constitutional Affairs, *Report of the inquiry into the Provisions of the Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003 and the Migration Agents Registration Application Charge Amendment Bill 2003*, 25 November 2003

53 DIMIA, *Committee Hansard*, 23 September 2003, pp.65-67, and 18 November 2003, pp.100-102

54 DIMIA, Submission no. 24G

55 South Brisbane Immigration and Community Legal Service, Submission no. 21, p.2

56 DIMIA, Submission no. 24I

6.63 Without tip-offs and 'intelligence' from those most exposed to exploitation, the new measures prohibiting non-registered agents from charging fees for intervention assistance cannot be expected to capture all illicit operators nor protect those at highest risk. To address exploitation effectively, information and awareness raising campaigns aimed at those communities most disadvantaged are needed to complement other new counter measures. However, as discussed in Chapter 5, there are concerns about the adequacy of the information disseminated about the ministerial intervention process.

6.64 As also discussed in that chapter, the largely shrouded operation of ministerial discretion exacerbates the difficulties people face in understanding and accessing the intervention system. It provides an environment for perceptions about the importance of representatives and 'middlemen' to flourish. Unscrupulous agents are able to feed off such perceptions and perhaps exaggerate their influence, particularly amongst those with a poor knowledge of the system. In the absence of improved accountability for the overall system, including clearcut procedures and reliable information, it will remain difficult for people to check the claims made by agents boasting of personal connections and access to the minister.

## **Observations**

6.65 Despite the information limitations confronting the inquiry, several points can be made about the role of representatives in the system for ministerial discretion. The picture presented by most practitioners in the migration field is that support from representatives, particularly parliamentarians and community leaders, is important for getting applications onto the minister's desk. Whether the support of representatives, in general or certain types of representative in particular, translates into influencing the minister's decision is impossible to say with the limited information that is available publicly. The doubt that still hangs over this issue goes to a major point in the next chapter that once a case reaches the minister's desk, there is no way of checking who or what has influenced a ministerial decision to intervene.

6.66 For the same reasons, it is also hard to determine the extent of any community or political bias in the exercise of the powers. It is because of the lack of information that the high preponderance of interventions for two nationalities – Lebanese and Fijian – deserves further scrutiny. The Committee is not satisfied with the generalised explanations DIMIA provided for the high intervention rates for these and some other nationalities. A clearer account for high intervention rates for certain nationalities is required not only to improve the accountability around ministerial discretion but also to address the perceptions of bias.

6.67 The Committee is particularly concerned at the effect these perceptions have on the system for ministerial discretion. They expose the system to questions about its integrity, a point the Committee discusses in Chapter 9. Furthermore, such perceptions create a climate that unscrupulous operators can exploit.

6.68 To address wider concerns about the transparency of the system, the Committee in Chapter 7 recommends that the ministerial statements tabled in parliament contain sufficient detail to allow the parliament to scrutinise the use of the discretionary powers. The Committee also believes that to enhance transparency around the process of representatives supporting applications for ministerial discretion these statements should identify representatives and organisations that made a request on behalf of an applicant in each case. In the Committee's view, it is fundamental to making the system more open that representations made by parliamentarians, organisations and community leaders are reported by name to parliament.

6.69 The Committee also believes that individuals who make representations should be identified in tabling statements. This may require that, to conform with privacy principles, DIMIA informs people upfront that their names are likely to be disclosed in reports to Parliament.

6.70 With section 417 interventions, the Committee recognises that there will be cases where concerns about personal safety may mean that the identities of applicants and any associated persons or organisations are not disclosed. The Committee considers this is appropriate. Its recommendation in Chapter 7 would, by indicating how a case was brought to the minister's attention, still provide a reasonable level of transparency for the purposes of parliamentary scrutiny if this information were not included in tabling statements.

## **Recommendation 12**

**6.71 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.**

6.72 The Committee also considers that current efforts to address the problem of unscrupulous operators exploiting people need to be reinforced in two ways. First, DIMIA in concert with MARA should produce and disseminate information sheets aimed at more vulnerable communities. The information sheets should explain the regulations about charging fees for migration advice and in particular highlight the assistance for which non-registered agents cannot charge fees. This information should also provide links to the complaints process. It should make it clear that filing a complaint does not expose the complainant to risk.

6.73 Second, the Migration Agents Taskforce should, if it is not already so doing, target operators that are exploiting clients through charging exorbitant fees and/or by giving misleading advice. While the Committee believes that increased availability of information and improved accountability are vital for reducing the scope for exploitation, it also considers that stronger enforcement measures are required to address the misconduct of unscrupulous operators and provide protection to vulnerable clients.

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### Recommendation 13

**6.74 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.**

### Recommendation 14

**6.75 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.**

6.76 The Committee is also concerned about two other aspects related to the role of representatives. The first is the widely held view that well-placed representatives are required to overcome problems in the system – to 'get past the gatekeeper'. In this sense, the reliance on representatives is a symptom of problems that appear to lie mainly at the departmental level and which raise doubts over the administration of applications before they reach the minister. These problems were discussed in Chapters 4 and 5.

6.77 The second concern is the side-effect that representatives have on equality of access for applicants. Applicants for intervention that do not have well organised community support or the assistance of a parliamentarian would appear to be at a disadvantage in getting their cases before the minister. One migration practitioner drew a connection between the barriers at the departmental level and the inequalities that result when representatives with personal links to the minister are brought into play in the process. Speaking of his own experience, cited above, in getting the minister to attend to an application, Mr Bitel remarked:

I think it is an improper practice. The barrier should be the same for everybody. It should not be a case of how you can get to the minister or who you know who can get to the minister. Everybody should start equally. They should be assessed by open and public criteria. There should be an independent assessment.<sup>57</sup>

6.78 The Committee returns to the recurring concern about transparency and openness in Chapter 7.

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57 *Committee Hansard*, 21 October 2003, p.62

