Report of Government Members

March 2004

Summary of Government Members' Position

The Government members of the Committee are pleased to present their report on Ministerial Discretion in Migration Matters.

The Government members of the Committee note that despite the defamatory, scurrilous, unfounded and unsubstantiated allegations aired by the ALP in the Parliament and repeated in their report, they were unable to gather or produce a single shred of evidence to indicate that the former Minister for Immigration and Multicultural and Indigenous Affairs acted inappropriately or unlawfully in the exercise of his discretion on any occasion.

The Government members of the Committee therefore dismiss unconditionally all allegations of impropriety against the former Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Philip Ruddock MP.

These continued attacks by the ALP members are nothing more than a desperate attempt to besmirch and impugn the character of Australia's most respected, successful and longest serving immigration Minister for their perceived political gain. This approach strongly influenced the attitude of ALP members to the Inquiry and the pursuit of witnesses. As a result they failed to take advantage of the opportunity presented to make an intelligent and dispassionate assessment of the exercise of ministerial discretion.

The Government members of the Committee note that despite the ALP's assertion that ministerial intervention powers are "open to real or perceived distortion, political influence and corruption at the highest levels of public office" because "the Minister's discretionary powers are non-compellable, non-reviewable and non-delegable"; **the report of the ALP members of this committee make no recommendations that address these perceived problems. However, if the full raft of recommendations is implemented, the ALP will have introduced a further 3 or 4 levels of review, ensuring that the decision-making process will be extended by several years and deny the government of the day a capacity to manage the number of people entering and remaining in Australia.**

Government members also note that the ministerial powers were incorporated in legislation in their current form by a Labor Government in 1989. ALP members of the Committee have failed to observe that these powers were just as "open to real or perceived distortion, political influence and corruption at the highest levels of public office" under Labor immigration ministers as might be the case today.

The Government members on the Committee were concerned to ensure that if shortcomings exist in the current processes, these were identified and recommendations made to limit unintended consequences. The Government members examined dispassionately the large number of submissions and have made sensible

recommendations to increase the efficiency of the use of ministerial discretion under the Migration Act.

Structure of the report

Chapter 1

Reviews the political issues and controversy which preceded the Inquiry and examines several independent aspects of the conduct of the Inquiry.

Chapter 2

Sets out the policy context of the ministerial discretion powers and deals with the unsubstantiated allegations aired in Parliament.

Chapter 3

Gives the statistical overview of the patterns of use of the powers. This demonstrates clearly that there is no correlation whatsoever with the number of positive decisions made and the relationship of the sponsor to the visa applicant or the Minister.

Chapter 4

Looks at the operation of the powers over recent years with a focus on the transparency of current procedures.

Chapter 1

Background to the inquiry

This Inquiry had its origins in unsubstantiated and scurrilous allegations aired in parliament by the ALP about the use of the ministerial discretion under the *Migration Act 1958*. In the course of the parliamentary debate the ALP also aired concerns about the transparency and accountability surrounding the use of such powers. The Senate established this Select Committee to investigate these and broader issues concerning the exercise of discretionary powers.

Conduct of the inquiry

The Committee advertised the Inquiry on 2 July 2003 in *The Australian* newspaper and on the Senate website and wrote directly to a range of relevant organisations and experts.

The Shadow Minister for Population and Immigration, Ms Nicola Roxon MP, also wrote directly to relevant organisations and experts exhorting them to contact her directly for "confidential" discussions.

Furthermore, the Shadow Minister for Citizenship and Multicultural Affairs, Mr Laurie Ferguson MP, placed an advertisement in the Arabic Newspaper, *An-Nahar* on 22 July 2003, also exhorting individuals to contact him directly to pass on "confidential" information.

The Government members of the Committee condemn this direct intervention as contemptuous of the Committee process. If Ms Roxon or Mr Ferguson received any representations or response to their extraordinary interventions, none were passed on to the Committee. A copy of Ms Roxon's correspondence is attached (Attachment 1), as is a translation of the advertisement placed by Mr Ferguson (Attachment 2).

Despite this direct appeal to interested parties and widespread media reporting of the parliamentary debate, the Committee **received no submissions or representations from individuals that provided a shred of evidence to substantiate the scurrilous allegations** made by the Labor Party under Parliamentary Privilege.

Provision of personal documents

The ALP members of the Committee were dismissive of concerns expressed by the current Minister for Immigration and Multicultural and Indigenous Affairs, Senator Vanstone, of privacy considerations in the provision of certain information requested by the Committee, accusing her of "hampering" the conduct of the Inquiry, being uncooperative, and of "executive obstruction". These are serious charges.

However, it is the view of the Government members that the explanation provided by Senator Vanstone and her department regarding the limits of what could be provided were entirely reasonable in the circumstances.

Senator Vanstone and her Department devoted considerable resources to appearing at three public hearings of the Committee and providing a very significant amount of statistical information and explanatory material, including responses to more than 140 questions put to the Department.

In relation to both DLO notebooks and the files requested, Senator Vanstone invited the Committee to indicate any specific matters that could be clarified by reference to the information contained within them. She made clear that if there were such specific matters she would facilitate the checking of the files or notebooks for that purpose. No specific matters were identified by the Committee.

The fact is that the Committee received no information that indicated any issue that could be clarified by accessing the files of dozens of individuals. The claim by ALP members of the Committee that lack of access to information meant that the Committee was "unable to resolve the suspicion and doubt" aroused by allegations is not supported by any indication of specific facts that the Committee might have expected to check on the files.

The claim by ALP Committee members that Senator Vanstone was reluctant "to expose the decision making process to close scrutiny" is an unwarranted slur, made in contradiction of the Minister's clear offer to assist the Committee by facilitating the checking of notebooks or any information held by DIMIA in relation to any specific matters.

The ALP members' report notes that the Committee sought specific information in relation to two individuals and records that DIMIA, following legal advice on privacy issues, wrote to the individuals concerned seeking their permission to accede to this request. There is no further explanation of the significance of the information sought or why the ALP members of the Committee did not consider it necessary to wait for a response from the individuals before finalising their report.

The Government members of the Committee note, however, that the ALP members conclude that "the evidence before the Committee was sufficient to enable it to formulate conclusions on the exercise and administration of the discretionary power. The conclusions are reflected in the recommendations".

Chapter 2

Answering the allegations

This Inquiry was established following unsubstantiated and scurrilous allegations aired in parliament concerning the exercise of ministerial discretion powers by the then Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Philip Ruddock MP.

One of the major motivating reasons for the establishment of the Committee was the anticipation of evidence being presented to the Committee to substantiate four specific allegations. The four specific allegations raised were:

(a) The ALP alleged that a Mr Bedweny Hbeiche was granted permanent residence as a result of the Minister's intervention after a $3,000 donation was made to the Liberal Party at a fund-raising dinner by Mr Karim Kisrwani acting on Mr Hbeieche's behalf.

The Committee received no evidence whatsoever directly or inferentially to substantiate this allegation.

(b) The ALP raised a number of allegations about Mr Kisrwani, including that he received money for migration advice although he was not a registered migration agent; that he received $220,000 from Mr Dante Tan to use his influence with the Minister to have his visa restored; that he received $1,500 from Mr Roumanos Boutros Al Draibi to represent him in a migration matter and that he received $2,000 a month from Mr Jim Foo for an "immigration consultancy"

The Committee received no evidence whatsoever to substantiate these allegations, but notes that investigations into some of these matters are continuing.

(c) The ALP alleged that a donation of $100,000 made to the Liberal Party resulted in the Minister approving visas for a large number of religious workers to the donor.

The Committee notes that Mr Ruddock was not involved in the decision making process of the visas granted, nor did he use his ministerial discretion to grant visas. The Government members of the Committee totally reject the unsubstantiated inference by the ALP that the donation somehow influenced the decision by departmental officers (who knew nothing of the donation) to grant the visas, or that somehow the Minister (who knew nothing of the donation at the time) influenced the outcome of the visa applications.

(d) The ALP alleged in Parliament (under the cover of parliamentary privilege) that Mr Tan had his visa reinstated after he made a $10,000 donation to the Minister's re-election campaign at a fund-raising dinner organised by Mr Kisrwani.

The Committee notes that Mr Ruddock had no occasion whatsoever to exercise ministerial discretion in the re-instatement of Mr Tan's visa. The Committee was given no evidence to substantiate the ALP's claim that the donation had any bearing whatsoever on the outcome of his visa application.

The Government members of the Committee also note that no submission or comment from persons before the Inquiry implied, suggested or proved that the Minister acted in any way improperly in the use of his discretion.

In fact many witnesses testified to the probity, honesty, hard work and integrity of the former Minister. For example, Mr George Lombard, a migration lawyer said:

> In my personal view I have the highest regard for the Minister. I believe he is a man of probity. I believe that he tries very hard to reach the correct decision….people take advantage of his probity by holding themselves out. You could imagine that a future Minister may not have the same degree of probity as the current Minister.[1]

Ms Jennifer Burn, a senior lecturer at the University of Technology in Sydney, said to the Committee:

> I worked as a solicitor in the Immigration Advice and Rights Centre for about seven years and I made submissions to the Minister in that capacity. I did not have any experience of corruption associated with that process.[2]

Dr Mary Crock had this to say about the former Minister, Mr Ruddock:

> He had an extraordinary capacity for work…I took up a submission – it was 60 pages long – and went to see the Minister. He spoke to me for 45 minutes and took me to page 58 in the attachments to the submission. He had an extraordinary capacity for attention to detail. I would never accuse him of being slack in his ministry. He was extraordinary; just amazing.[3]
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> I would have to say that, over the years, Minister Ruddock has struck me as a very upright man, a very principled man.[4]

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1 *Committee Hansard*, 22 September 2003, p.51

2 *Committee Hansard*, 23 September 2003, p.21

3 *Committee Hansard*, 23 September 2003, p.44

4 *Committee Hansard*, 23 September 2003, p.35

Mr Grant Mitchell from the Hotham Mission of Uniting Justice, Australia, had this to say:

> I do not have any examples of misuse of the Minister's discretion. We have raised cases where we believe the Minister should have intervened. We do not have any cases where we feel that the Minister has misused his powers.[5]

Mr Michael Clothier, a persistent critic of the Minister, said:

> In 20 years I have not been aware of anyone paying money to a Minister, or even any rumour that someone has paid money to a Minister.[6]

Ms Marion Le, a well-known refugee advocate and registered migration agent who is also a consistent critic of government policy in this area, said to the Committee:

> I do not know whether it was cash for visas, but I found it extraordinary that Philip Ruddock would face that kind of accusation. I have never seen any evidence of that in all the years I have known Philip.[7]

Mr David Manne, Board Member of the Refugee Council of Australia and coordinator of the Refugee and Immigration Legal Centre, emphasised:

> I have no evidence whatsoever of the fact that that power has been used corruptly or that it has been abused in any way.[8]

Dr Graham Thom, the Refugee Coordinator of Amnesty International, Australia, replying to a question by the Chair asking his opinion on whether there is a perception of bias or favouritism in the use of the discretionary powers said:

> We certainly have not experienced that.[9]

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5 *Committee Hansard*, 21 October 2003, p.8

6 *Committee Hansard*, 18 November 2003, p.34

7 *Committee Hansard*, 18 November 2003, p.52

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

9 *Committee Hansard*, 23 September 2003, p.15

Chapter 3

Statistical overview of the use of discretionary powers

The ALP has also made much of the fact that the former Minister Ruddock intervened more frequently that his predecessor ministers. However, when the statistical evidence is examined, this assertion is not borne out.

Over his seven years as Minister, Mr Ruddock intervened at an average of 3.61% of the total cases presented to him each year. By comparison, Minister Hand intervened in 5.8% of cases and Minister Bolkus in 3.53% of cases.

However, this analysis ignores the actions of Ministers Hand and Bolkus who decided to "intervene" in the creation of specific visa classes to grant visas to large numbers of people, rather than exercise their public interest powers.

The use of special onshore visa categories by previous governments significantly reduced the numbers of requests for the exercise of the Minister's public interest powers. In 1990 Minister Hand introduced a special visa category which allowed 6,900 people to remain in Australia. In 1993 Minister Bolkus announced the creation of three special visa categories to accommodate over 42,700 people from the People's Republic of China, the former Yugoslavia, Sri Lanka and other places.

(In 1997 Minister Ruddock resolved the status of some 7,200 people who were led to believe they would receive permanent residence by the previous Labor government. This group of people could not access ministerial discretion, and without the creation of a specific visa, would have remained in limbo.)

Apart from the 1997 initiative, the current Government has chosen to operate within the framework of the migration legislation and to utilise discretionary powers on a case by case basis. In this context, the government is resolving the current East Timorese caseload, involving some 990 persons whose protection visa refusals have been affirmed by the RRT through the use of the Minister's public interest intervention powers.

Rate of intervention by nationality

The ALP has also suggested that the Minister intervened more frequently in the case of Lebanese people than any other applicant group and this was further evidence of improper conduct. Again, this is not borne out by the evidence. The Minister intervened more often for persons from Fiji than any other nationality. People from Lebanon were the second highest. Even so, the Minister intervened on average around 400 times each year of the six years where figures are available. Fijians and Lebanese accounted for around 15% of the total.

Several witnesses testified to the fact that they saw no evidence of certain ethnic groups being treated preferentially by the Minister in the exercise of his discretion.

When asked by Senator Wong whether some ethnic groups were treated more favourably by the Minister, Mr Cosentino, a caseworker from the South Brisbane Immigration and Community Legal Service said:

> No…we do not have any experience of some being treated more favourably than others.[10]

Rate of intervention by political parties

The ALP has also suggested that membership of the Liberal Party is a route to a successful application for intervention. Again, however, the data does not support that allegation.

For example, between November 1999 and August 2003, nine of the top ten parliamentarians who approached the Minister to intervene on behalf of their constituents and others, were members of the ALP and the Australian Democrats. The average success rate of these Opposition parliamentarians was 25%, ranging from 15% to 33%.

Rate of intervention by relationship with Minister

The Committee could not find any evidence of a correlation between the rate of success and whether or not the sponsor of a visa applicant, or the visa applicant themselves, had access to the Minister, his office, other parliamentarians, or community leaders. In fact, the data suggest very strongly that it is the merit of the case that determines the outcome, not the relationship between the sponsor or agent, or applicant, and the Minister.

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. Many enjoy levels of success of over 50 percent.

Mr David Mawson, Executive Officer of the Migration Agents Registration Authority, made this observation:

> Through the complaints process, we see a range of approaches, which would be from a minimalist approach to a very thorough and full approach. The more thorough the approaches and understanding of what clients' needs are, the more successful they tend to be.[11]

When asked by Senator Santoro if he was aware of any evidence that substantiated allegations that some people enjoyed high rates of success because of ministerial preference, Mr Mawson said:

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10 *Committee Hansard*, 21 October 2003, p.49

11 *Committee Hansard*, 22 October 2003, p.42

> No, not at all.[12]

Ms Biok, a legal officer from the NSW Legal Aid Commission has at various times enjoyed success rates of 100%, but generally around 40%. When asked by Senator Wong if she was one of those people who rang the Minister's office a couple of times a week, she replied:

> We are certainly not.[13]

Ms Judith Burgess of the Immigration Advice and Rights Centre has said, in relation to a question of favouritism to known communities and bias towards some communities:

> 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 (around 90%).[14]
>
> We do not have any experience of bias. In terms of the applications we make, they proceed through the ministerial intervention unit, with only a small amount of contact on occasion with the Minister's office.[15]
>
> In our experience in general the Minister acts fairly and predictably…[16]

Mr David Prince, an immigration law specialist with the law firm Christopher Levingston and Associates, was asked if he thought that certain persons' relationship with the Minister and/or the department gave them privileged access. He replied:

> Once you are at the Minister's desk, the influence of the third parties, in my experience, is far more limited.[17]

Senator Santoro asked Mr Paul Fergus, an immigration lawyer with a high success rate with the Minister, if he had ever met the former Minister and received a reply in the negative. The following exchange ensued:

> **Senator Santoro:** Therefore your high success rate could in no way be claimed to have been influenced by a familiarity or personal contact, or any other liaison, with the former Minister.

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

13 *Committee Hansard*, 22 September 2003, p.27

14 *Committee Hansard*, 22 September 2003, p.42

15 *Committee Hansard*, 22 September 2003, p.40

16 *Committee Hansard*, 22 September 2003, p.38

17 *Committee Hansard*, 22 September 2003, p.74

Mr Fergus: I do not believe so. It is fairly obvious.[18]

Conclusion

As noted earlier in this report, the ALP failed to make any recommendations that will substantially altered the exercise of ministerial discretion. The only conclusion from this is that the power is operating as Parliament intended it should and that the allegations against former Minister Ruddock are completely unfounded and scurrilous.

Much of the ALP's allegations rest on the assumption that Mr Kisrwani had a disproportionately high rate of success in his requests for the Minister to intervene. However, the evidence shows this is not the case. Mr Kisrwani's success rate is equivalent to that of Senator Bartlett - 31% to Mr Kisrwani and 33% to Senator Bartlett. Indeed, evidence was given where some community leaders and agents consistently had success rates of well over 50%, with one claiming 90% and in another case a 100% success rate was claimed.

The Committee noted that high success rates did not correlate with the closeness of the relationship with the Minister, with those claiming particularly high rates not having access to the Minister or his office.

18 *Committee Hansard*, 22 October 2003, p.79

Chapter 4

Operation of discretionary powers and accountability

The Commonwealth Ombudsman expressed the following view about access to parliamentarians and the use of ministerial discretionary powers.

> One great strength of our political system is that members of parliament – Minister 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.[19]

Most of the submissions to the Inquiry recognised the importance of maintaining the capacity for the Minister to exercise discretion as an instrument of last resort.

Mr Cosentino from the South Brisbane Immigration Service:

> We certainly do not want to remove the discretion…. we are very strong about not having the ministerial discretion removed.[20]

Mr Paul Fergus had this to say:

> …the discretion should be kept as free as possible. Provisions in the Act or the Regulations constraining the Minister would run the risk of creating another source of rigidity and hardship for individuals.[21]

Mr Michel Gabaudan, Regional Representative, United Nations High Commissioner for Refugees, said:

> We note that the use of ministerial discretion can act, and has in the past acted, as a safeguard for added levels of review to ensure that Australia

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

20 *Committee Hansard*, 21 October 2003, p.50

21 *Committee Hansard*, 22 October 2003, p.83

> meets its non-refoulement obligations under the 1951 convention and, in that light, ministerial discretion should be preserved and commended.[22]

Finally, Mr David Prince of the law firm, Christopher Levingston and Associates, stated:

> It is our staunch view that there is an incredible necessity to maintain these types of discretions. In the absence of these types of discretions, what you have is a system without any sort of compassion, decency or integrity to deal with anything other than very simple cases. That is just a historical consequence of our fairly rigid immigration system. The more inflexible the system, the greater the import of these discretions.[23]

Some submissions expressed concerns about the operation of ministerial discretion. The following three were the most common:

(a) The discretionary power may only be exercised by the Minister after merits review. Many witnesses believe that the Minister should be able to intervene after a negative primary decision;

(b) The powers are non-compellable, non-reviewable and non-delegable. Some expressed the view that the power ought to be subject to an external review mechanism; and

(c) The tabling statement setting out the decision and the decision substituted by the Minister does not set out sufficient detail about why the Minister decided to intervene.

Many of the criticisms arise out of a failure to understand the nature of ministerial discretion and the fact that ministerial discretion is not part of the visa application process.

The discretionary powers that are available to the minister for immigration have their genesis in the desire of successive governments to be able to manage the humanitarian and migration programs. The discretionary powers are an important tool in effectively managing these programs.

The key elements of the migration framework were put in place in 1989 and arose, in part, from concern that external influences, such as court decisions, were causing the government to lose control of its migration programs. The Labor government of the day was concerned that uncontrolled migration would lead to a loss of community support for migration and cause tensions within the Australian community.

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22 *Committee Hansard*, 18 November 2003, p.19

23 *Committee Hansard*, 22 September 2003, p.74

The view at the time, and one that is still held today, is that it is the sovereign right of the elected government to decide who meets the criteria to come to the country and remain.

The clear and comprehensive statutory criteria that are set out in the Migration Regulations in relation to each visa class allow a structured and transparent assessment process to be undertaken. Where an applicant meets the criteria and comes within the visa cap, a visa is granted. Where an applicant fails to meet the criteria, they are provided with reasons for the decision. This enables the person to determine whether they may not have provided sufficient evidence to support their application, and to assess the prospects of being successful in the merits review process.

Merits review includes a primary review by the Department. If a negative finding is made, an applicant may seek review at the Migration Review Tribunal or the Refugee Review Tribunal. If the applicant is still unsuccessful, there is the possibility of further review by the Magistrates Court, the Federal Court, the full bench of the Federal Court, the High Court and the full bench of the High Court.

The process as described above constitutes the extent of the formal visa application process.

However, in recognition of the rigidity of the regulations and criteria, successive governments have supported the inclusion of a capacity for the Minister for immigration to exercise his or her personal discretion to make a more favourable decision, but only after the application has been through a review process.

The point is, of course, that as the discretion is supposed to account for unforseen circumstances, there is no point in the Minister reviewing the merits of the original application against rigid and published criteria. As Mr Prince, of the law firm Christopher Levingston and Associates, has argued, that when a request for intervention comes before the Minister:

> The Minister forms the view, perhaps not unreasonably, that these issues have been ventilated before the appropriate authorities and why should he waste his time on it.[24]

The decision to intervene, or not, is a matter for the Minister and his judgement against what he considers to be the public interest. As such, not only can the decision not be reviewable, but it is not intended to be. The non-compellable nature of the power was carefully framed to ensure that, in addition, an unsuccessful applicant cannot use requests for intervention merely to prolong their stay or disrupt their removal from Australia; nor can a court order that the Minister embark on a consideration of the applicant's case under these discretionary powers.

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24 *Committee Hansard*, 22 September 2003, p.67

Calls for the Minister to table fuller reasons for his decision and for that decision to be reviewable, fail to recognise the essential quality of the discretionary power. This power is not a continuation of the application process; it is not the so-called "end of the line". The end of the line was at the final review process – either the tribunal or the court. All applicants have had ample opportunity to put their case in at least three administrative and judicial review authorities.

If critics are so concerned about these aspects of ministerial discretion, they must logically call for the total abolition of the Minister's discretionary powers. However, most critics that hold these views are also those who believe ministerial discretion should not be abolished, but indeed, in some cases, should be expanded.

Other critics infer that there is something out of the ordinary if the Minister exercises his discretion to grant particular types of visas, for example, family class visas. Again, this criticism fails to recognise that the schema enables the Minister (and the government) to provide responsive visa solutions in exceptional circumstances. The discretionary powers do not stipulate that the Minister must provide a particular type of visa.

Conclusion

Australia's rigorous approach to the selection of migrants harnesses the positive effects of human mobility while undercutting the illegal trade in people. The continuing success of our immigration programs depends on the support of the Australian public. This support in turn depends on the fairness, integrity and rigour of our migration programs. If the distinction between a well-managed and generous Migration Program and informal and unregulated movements breaks down, public confidence in the Migration Program, as well as our very successful policy of multiculturalism, would be undermined.

The Minister's discretionary powers must be seen in this context. They allow the Minister to exercise his or her judgement as to whether to overturn an outcome flowing from the Migration Act which may have lead to an unintended harsh result.

Without ministerial discretionary powers, considerable pressure would be placed on the rigorous migration selection criteria we have in place and we could be forced to take a less rigorous approach by lowering Australia's standards in the selection of migrants.

Chapter 5

The Committee's Recommendations

The Position of Government Members

Recommendation 1

The Committee recommends that the Minister require DIMIA to establish procedures for collecting and publishing statistical data on the use and operation of the ministerial discretion powers.

The Government members support recommendation one in the above formulation. The Government members do not support prescribing to the Department what data is collected. The collection of specific data must be balanced against demands on resources and the capacity of data systems and the usefulness of that data.

Recommendation 2

The Committee recommends that DIMIA establish a procedure of routine auditing of its internal submission process.

The Government members support recommendation two in the above formulation.

Recommendation 3

The Committee recommends that the Commonwealth Ombudsman carry out periodic audits of the consistency of DIMIA's application of the ministerial and administrative guidelines on the operation of discretionary powers.

The Government members support recommendation three in the above formulation.

Recommendation 4

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

The Government members support recommendation four.

Recommendation 5

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

The Government members do not support recommendation five. This requirement would expand the statutory role of the MRT and RRT to examine the merits of failed applications against published criteria. It is not the role of the MRT or the RRT to

examine applications against any other criteria and make recommendations to the Minister on the basis of that examination. Additionally, this would duplicate other recommendations and involves significant resources to implement for no particular outcome.

Recommendation 6

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

The Government members do not support this recommendation. This recommendation would effectively end the capacity of the Minister to intervene at all. Ministerial intervention is not part of the visa application process, however by codifying and formalising what is a "request" to intervene, the ALP would bring the powers into the application process and hence into the ambit of the courts, rendering it inoperable as intended.

Recommendation 7

The Committee recommends that coverage of the Immigration Application Advice and Assistance Scheme (IAAAS) be extended to enable applicants for ministerial intervention to obtain an appropriate level of professional legal assistance. Extending the coverage of IAAAS should assist in reducing the level of risk of exploitation of applicants by unscrupulous migration agents.

The Government members do not support this recommendation. Providing legal assistance to failed applicants has been limited to assistance with their first appeal only. This ensures that failed applicants are not encouraged to abuse the process by accessing all appeal avenues with the intention of delaying their removal from Australia.

Recommendation 8

The Committee recommends:

- That DIMIA inform persons when a representation for the exercise of ministerial discretion is made on their behalf by a third party;

- That each applicant for ministerial intervention be shown a draft of any submission to be placed before the Minister to enable the applicant to comment on the information contained in the submission. This consultative process should be carried out within a tight but reasonable time frame to avoid any unnecessary delay; and

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

The Government members do not support this recommendation as it again brings ministerial discretion into the formal visa application process where all applicants already have an opportunity to ventilate their arguments. It would also bring the process into an appellable process further delaying removal from Australia. It would also require the introduction of statutory timeframes, again extending the entire process and introducing a further level of judicial or administrative (or both) review.

Recommendation 9

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

- Processing times that can take up to several weeks;
- Applicants not knowing when they should apply for a bridging visa; and
- Applicants being ineligible for a bridging visa because an unsolicited letter or inadequate case was presented to the Minister, often without the applicant's knowledge.

The Government members do not support this recommendation.

Recommendation 10

The Committee recommends that all applicants for the exercise of ministerial discretion should be eligible for visas that attract work rights, up to the time of the outcome of their first application. Children who are seeking asylum should have access to social security and health care throughout the processing period of any applications for ministerial discretion and all asylum seekers should have access to health care at least until the outcome of a first application for ministerial discretion.

The Government members of the committee do not support this recommendation as it would provide an incentive for failed asylum seekers to further access the system in order to delay their removal from Australia.

Recommendation 11

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

The Government members do not support this recommendation.

Recommendation 12

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

The Government members do not support this recommendation.

Recommendation 13

The Committee recommends that DIMIA and MARA disseminate information sheets aimed at vulnerable communities that explain the regulations on charging fees for migration advice, the restrictions that apply to non-registered agents and the complaints process. The information should also explain that the complaints process does not expose the complainant to the risk that their applications will be adversely considered as a result of that complaint.

The Government members support this recommendation.

Recommendation 14

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

The Government members support this recommendation.

Recommendation 15

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

The Government members do not support this recommendation. The current process is adequate for parliamentary scrutiny. It is not always clear if a particular reason or approach by an individual is in itself a reason for intervention. Providing such a detailed reasoning lends itself to being abused by subsequent applicants.

Recommendation 16

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

The Government members do not support this recommendation for privacy considerations. It establishes an unsustainable precedent which would require all Ministers to publish the names of all people and organisations who have approached or lobbied them for a particular outcome.

Recommendation 17

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

The Government members do not support this recommendation. Ministerial intervention powers as currently formulated are designed to do just as the recommendation proposes. To amend the regulations to accommodate the cases that are currently dealt with would lead to a blow out in the migration numbers.

Recommendation 18

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

Government members do not support this recommendation. The existing mechanisms are sufficient for the purposes for which ministerial intervention was originally designed. Again, such a formalising of the process renders it appellable and places an onerous administrative function on the department.

Recommendation 19

The Committee recommends that the Government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the Minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPAR.

Government members do not support this recommendation. Australia already makes a substantial contribution to providing resettlement to 12,000 people annually through its refugee and humanitarian program. Australia does not, nor has it ever, refouled a refugee. The current process meets Australia's international obligations and establishing a form of complementary protection would again blow-out Australia's migration program and give less discretion to help genuine refugees languishing in camps around the world.

Recommendation 20

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

The Government members support the first clause of this recommendation but do not accept that the existing transparency and accountability of the system are inadequate.

Recommendation 21

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

The Government members do not support this recommendation. Any decision of the proposed committee would introduce another level of appeal into an already lengthy appeals process and would add another cumbersome bureaucratic layer with all the perceived concerns about accountability and transparency identified by the committee in the existing intervention process.

Senator Santo Santoro (Deputy Chair) _____

Senator David Johnston _____

Senator Gary Humphries _____

Attachment 1

Nicola Roxon MP

Federal Labor
Member for Gellibrand

21 July 2003

Dear Migration Agent,

Re: The Use of Ministerial Discretion to Grant Visas

I write to alert you to an inquiry that a Parliamentary Committee is conducting regarding the use of Ministerial Discretion in Migration Matters.

As someone who handles migration matters every day I am sure you would have information about the workings of the system that would be of interest to the Committee. If you do have such information I would encourage you to consider making a submission to the inquiry. Submissions are due by Friday 1 August. If you need longer than this, you can contact the Committee to arrange an extension of time.

I am particularly concerned by suggestions that people outside the industry may have preferred access or receive favourable treatment from the Minister. As a professional working in the migration field I know you would be equally worried by any action that threatens the integrity or fairness of our migration system.

If you have any information or examples of seeking or obtaining Ministerial intervention that you would like to discuss confidentially please contact Ann Clark on 02 6277 2054 or by email on ann.clark@aph.gov.au

Further, if you have information about people who are not authorised migration agents ~~acting on behalf of~~ or receiving money to make representations to the Minister I would like to hear from you. If you would like to make a formal submission to the Committee, contact details and the terms of reference appear on the back of this letter.

Clearly my interest is in ensuring that our migration system and process for granting visas works fairly, in accordance with the law and without favouritism.

I urge you to take an interest in this matter.

Yours sincerely,

Nicola Roxon MP
Shadow Minister for Population and Immigration

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Footscray, Victoria 3011

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ATTACHMENT 2

AN-NAHAR 22 JULY 2003.

Notice of a Parliamentary Investigation Committee by Laurie Ferguson MP.

The Australian parliament set up an Investigative Committee to look into the Immigration Minister discretionary powers to issue visas. The investigation came about as a result of reports alleging that unregistered community Migration Agents offer to use their personal influence (for a fee or donation) in order to assist visa applicants.

Only Registered Migration Agents can legally charge a fee for visa services. If any one had dealings with such people, regarding visa applications or you know of anyone who has, I am interested in hearing from you.

For confidentiality purposes, please call my office on (02) 96823096

I have a strong relationship with the Arabic community in Sydney and I would like to make sure that Australian immigration programs are impartial and that people are not exploited.

Signed: Laurie Ferguson MP
Shadow Minister for Citizenship and Multicultural Affairs

Translation by
Raja El Tabar
Parramatta Team 7

Note: The same notice appeared in the El Telegraph Arabic paper on 23 July 2003.